Nos. 08-50531, 08-50570, 09-50115, 09-50125,
09-50128, 09-50159, 10-50434, 10-50462

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANTHONY PELLICANO,

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of California
Honorable Dale S. Fischer, District Judge Presiding

APPELLANT'S OPENING BRIEF

LAW OFFICES OF STEVEN F. GRUEL

STEVEN F. GRUEL
315 Montgomery Street, 9th Floor
San Francisco, California 94104
Telephone: (415) 989-1253
attystevengruel@sbcglobal.net

Attorney for Anthony Pellicano

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	) U.S.C.A. No. 08-50570
	) U.S.D.C. No. 05-CR-1046-DSF
Plaintiff-Appellee,	)
	)
v.	)
	)
ANTHONY PELLICANO,	)
	)
Defendant-Appellant.	)
_____	)

INTRODUCTION

This entire case involves serious government misconduct. Starting from the investigation stage and continuing to post trial revelations, the prosecution engaged in a pattern of misrepresentations and constitutional violations. On the false strength of an FBI agent's intentional misrepresentations, evidence was illegally gathered with an infected search warrant. On the wave of irrelevant and extremely inflammatory testimony, the prosecution methodically highlighted unsubstantiated "bad acts" to skillfully stoke the jury's passion and fear. Meanwhile, the prosecution compounded its concerted attack on due process by failing to disclose *Brady* material, ignoring its obligation to provide reasonable notice of Rule 404(b) evidence, depriving Pellicano of meaningful jury *voir dire* and improperly vouching for the merits of its case.

As a consequence of the government's misconduct, the trial was reduced to baseless attacks on its main target, Anthony Pellicano, instead of a guarantee that the jury would perform its constitutional protection to ensure that the prosecution was held to its burden of proof on relevant admissible evidence, not innuendo.

Thus, appellant, Anthony Pellicano ("Pellicano") respectfully submits his individual brief to raise claims that are specific to his appeal.[1] As supported by the record, all of Pellicano's convictions must be reversed because the case was predicated on unlawfully obtained evidence beginning with the November 21, 2002 search of his office, Pellicano Investigative Agency (PIA). Pellicano also seeks reversal of all counts of conviction because of outrageous government conduct. The lack of fundamental fairness at trial serves as yet another justification to reverse the convictions.

Significantly, recent decisions by the United States Supreme Court and this Court mandate reversal because the government's evidence was wholly insufficient to support Pellicano's convictions. Specifically, the decision in *United States v. Skilling*, 561 U.S. __, 130 S.Ct. 2896 (2010) (defining what actions constitute "a deprivation of honest services") and this Court's guidance in *LVRC Holdings LLC*

[1] The Statement of Jurisdiction, Statement of the Case and Certification of Related Cases are contained in the Appellants' Joint Brief and therefore are not repeated here. Furthermore, "ER" refers to the Joint Excerpts of Record. "SJER" refers to the Sealed Joint Excerpts of Record. "CR" refers to the Clerk's Record. "SER" refers Pellicano's Sealed Excerpt of Record filed in conjunction with this brief and "PSER" refers to Pellicano's Supplemental Except of Record filed herewith.

v. Brekka, 581 F.3d 1127 (9th Cir. 2009) (limiting the contours of the Computer Fraud and Abuse Act) have profound impact on the RICO and accompanying charges in this case.

Finally, at a minimum, the district court's imposition of its harsh sentence of 180 months for illegally gathering information should be found unreasonable, vacated and remanded with instructions to sentence in accordance with the law and justice. Given the district court's predisposition, as expressed at sentencing, remand should be to a different judge.

BAIL STATUS OF THE DEFENDANT

Mr. Pellicano is 66 years of age and in the custody of the Bureau of Prisons (BOP). He has been in BOP custody since November 17, 2003 and his projected release date is February 28, 2019.

STATEMENT OF THE ISSUES

1. Whether the evidence illegally seized from PIA on November 21, 2002 should be suppressed because the warrant lacked probable cause and the "good faith" exception to the exclusionary rule is inapplicable.

2. Whether the district court erroneously denied Pellicano's motion for an evidentiary hearing in accordance with *Franks v. Delaware, 438 U.S. 154 (1978)* with respect to the November 19, 2002 search warrant given the substantial showing that Ornellas's declaration was replete with intentional and material

misrepresentations and omissions intended to misled the reviewing Magistrate Judge.

3. Whether the July 23, 2003, search of PIA computers was overly broad and impermissibly general.

4. Whether the district court erroneously denied Pellicano's motion to dismiss given the government's outrageous misconduct.

5. Whether Pellicano was denied a fair trial when, among other serious due process defects, the prosecution without proper notice repeatedly introduced highly prejudicial, inflammatory and irrelevant "evidence" claiming Pellicano engaged in murder, threats and other unsubstantiated bad acts.

6. Whether the alleged RICO racketeering acts, as well as the similar substantive counts, must be reversed due to insufficient evidence of wire fraud in the deprivation of honest services and identity theft through the unauthorized use of work computers in light of the United States Supreme Court decision in *United States v. Skilling*, 561 U.S. __, 130 S.Ct. 2896 (2010) and this Court's decision in *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127 (9th Cir. 2009).

7. Whether the bribery racketeering acts must be reversed for lack of sufficient evidence in that Pellicano's payments to Arneson for work computer runs were not for "acts" or "matters" within the meaning of California Penal Code §§ 67 and 68.

8. Whether Pellicano's conviction for RICO conspiracy must be reversed for

lack of sufficient evidence in that there was no enterprise which agreed to engage in any racketeering activity.

9. Whether the district court incorrectly calculated Pellicano's sentencing guideline range so as to impose an unreasonable sentence of 180 months for the RICO convictions.

10. Whether Pellicano should receive credit for time served since November 17, 2003 when he began his sentence for possession of explosives and firearms which were related to the RICO prosecution.

STATEMENT OF FACTS

Anthony Pellicano was a high profile Los Angeles private investigator and a nationally recognized expert in audio forensics. His notoriety was well earned. For example, he enhanced 40 year old audio recordings for the Justice Department in an investigation of the 1963 Birmingham, Alabama church bombing which killed four young African-American children. CR 2038.

On November 21, 2002, FBI agents raided Pellicano's office with a search warrant. The basis for the warrant originated six months earlier when, on June 20, 2002, a reporter named Anita Busch ("Busch") had her car vandalized outside her apartment. It was purported that this incident was a result of Busch's recent articles concerning actor Steven Seagal ("Seagal") and his alleged connections to the Mafia. ER 14-37. The government mistakenly asserted that this vandalism was a

violation of 18 U.S.C. § 1951 (Hobbs Act).

On the morning of June 21, 2002, Busch received six calls from an active federal cooperating witness (CW) who claimed he wanted to warn her about possible threats because of her Seagal articles. The CW gave Busch his name and FBI special agent Stanley Ornellas ("Ornellas") interviewed the CW that evening. ER 29-30. The CW told Ornellas that a man he knew as "Alex" claimed he was hired by an investigative agency to burn Busch's car and that this was for "some guys back east."

Ornellas claimed ten days went by before the CW told him that Alex's last name was Proctor. ER 30. For the next six months Ornellas did nothing, or very little, to independently investigate Proctor, but instead instructed the CW to learn more, and possibly audio record, Proctor talking about the investigative agency and the Busch incident. As detailed below, the true results of that six month "investigation" were intentionally omitted and misstated by Ornellas in his November 19, 2002 search warrant declaration that he submitted to Chief Magistrate Judge Robert Block.

On November 21, 2002, the FBI searched PIA and found explosives in Pellicano's safe.[2] The FBI seized the explosives as well as PIA computers and all

[2] Later, Pellicano conditionally admitted his illegal possession of the explosives and firearms in order to preserve appealing the search warrant's lack of probable cause in that he correctly maintained that no federal offense (i.e. the Hobbs Act) had been violated. This Court, by a 2-1

the evidence the prosecution would later use in this case. Subsequent searches of PIA on January 14, 2003 and of PIA computers on July 25, 2003 were directly upon warrants grounded on the Ornellas November19, 2002 declaration.

With the illegally seized PIA material, the FBI soon began to interview Pellicano's former and current employees. The illegally seized evidence from PIA, and the fruits, culminated in the RICO and other federal charges against Pellicano.[3]

With the evidence seized from the PIA illegal search the government claimed that Pellicano along with two police officers (Los Angeles Police Officer Mark Arneson and Beverly Hills Police Officer Craig Stevens) and SBC phone company employee (Ray Turner) were part of a RICO enterprise which engaged in the illegal gathering of information from their work computers. Turner, it was believed, would get information from fellow SBC employees Teresa Wright ("Wright") and Michelle Malken ("Malken"). The government claimed that Pellicano would pay Arneson, Stevens or Turner to acquire information from the police or SBC databases for use in wiretapping (which is not a RICO predicate) or investigative purposes. The government incorrectly considered these actions to be

---

split decision, only upheld the warrant because of *Leon* "good faith." PSER 1-9. However, this Court, as with Magistrate Judge Block and Judge Tevrizian, was completely unaware that Ornellas intentionally omitted and misrepresented material facts to manufacture probable cause to search PIA.

[3] There is no dispute that this complete prosecution was initiated by the materials seized from the first search warrant. The prosecution admitted this and government FBI CART witnesses Manser, Ellis and Rios testified to this. RT 3/6/08; 3/7/08; 3/14/08 AM 15.

RICO predicates because it believed that the defendants engaged in unauthorized access to work computers, wire fraud through the deprivation of honest services, identity theft and state bribery. [4] The government filed substantive charges which were identical to the RICO racketeering acts and also included numerous counts of wiretapping.

On October 22, 2007, Pellicano filed pretrial motions with several supporting declarations contesting the legality of the search warrant and requesting an evidentiary hearing in accordance with *Franks v. Delaware*, 438 U.S. 154 (1978). CR 841; PSER 10-114; JSER 448-539. On December 17, 2007, the court heard Pellicano's motions and denied them the next day. ER 987-1089; 165-176. Years later, and important to this appeal, on June 18, 2010, Pellicano renewed his request for a *Franks* hearing after *first learning* that the government withheld *Brady* material directly pertinent to the Ornellas declaration. Specifically, Pellicano was provided the CW's federal grand jury transcripts from the Los Angeles District Attorney as discovery in a belated state prosecution stemming from the June 2002 Busch incident.[5] Equally revealing, on August 4, 2009, in a

[4]The specific charges filed against Pellicano are outlined in the Joint Brief.

[5] No one disputes that there was no federal crime committed when Busch's car was vandalized. On June 16, 2005, a few days before the state statute of limitation expired, Ornellas took the unusual step of drafting a declaration for a state complaint against Pellicano. The state case did not commence until Pellicano's federal case was completed. Ornellas was the only witness at the preliminary hearing. ER 5044.

state preliminary hearing, Ornellas admitted to critical misrepresentations in his fashioning of the facts for the PIA search warrant. ER 5044. These new facts, spurred a renewed motion for a *Franks* hearing and new trial. On July 16, 2010, the court denied these motions. ER 527-528.

Pellicano engaged in extensive pretrial litigation. On February 10, 2006, he expressly requested notice from the government of all Rule 404(b) evidence. ER552. The defense also developed that the prosecution directed Sandra Carradine (Pellicano's girlfriend) to visit Pellicano in federal prison to gather defense information and try to convince him to cooperate with the prosecution. ER 572; 771. Carradine served as the prosecution's operative while Pellicano was represented by counsel and federal charges were secretly filed.

Ornellas's blatant misrepresentations, Carradine's invasion of the defense camp and numerous *Brady* violations were grounds for a motion to dismiss for outrageous government conduct. The court denied this motion. ER 162-164.

Pellicano represented himself in two trials which are summarized in the Joint Brief. For the reasons outlined below, and in addition to the arguments in the Joint Brief, Pellicano submits that the trials were fundamentally unfair and constitutionally unsound. Pellicano submits that both RICO convictions, and the corresponding substantive counts, must be reversed.

A Presentence Report (PSR) was prepared on September 12, 2008. SER 1-43.

On September 24, 2008, the United States Probation Office recommended a downward departure to a sentence of imprisonment of 70 months. SER 1-4. On December 15, 2008, the court disregarded the PSR and nearly tripled the sound recommendation and unreasonably sentenced Pellicano to 180 months. ER4702-4779.

SUMMARY OF ARGUMENT

Pellicano's convictions must be reversed for several reasons. First, the November 21, 2002 search of PIA was illegal and all the evidence seized, and the fruits thereof, must be suppressed. Ornellas' declaration not only failed to establish probable cause, but it was intentionally crafted so as to mislead the court to falsely conclude that Pellicano committed a violation of the Hobbs Act and that evidence would be found in PIA. Not only was there no probable cause, but there can be no *Leon* "good faith" exception to this "bad faith" warrant.

Alternatively, the district court should have granted Pellicano's motion for a *Franks* hearing in light of the Pellicano's substantial showing that Ornellas's declaration included intentional material misrepresentations and omissions.

Pellicano asserts that the cumulative effect of the government's misconduct in this case mandated dismissing the indictment. Flagrant *Brady* violations, misrepresentations to the courts, ignoring notice requirements, bolstering trial witnesses and inflaming the jury with unsubstantiated claims of Pellicano's

involvement in bad acts collectively, if not individually, deprived Pellicano of due process and a fair trial.

Discovery of the government's pattern of outrageous conduct continued while this case has been pending on appeal. Specifically, Pellicano uncovered concealed *Brady* material pertaining to the motions challenging the search warrants. Also, as discussed in the Joint Brief, the government recently admitted that it failed to produce critical *Brady* material regarding its cooperating witness Teresa Wright.

Further, Pellicano's RICO counts must be reversed because the evidence was insufficient to support these convictions. The government's alleged RICO racketeering acts as well as the expressed objects of the RICO conspiracy centered on unauthorized access to law enforcement computers or SBC computers together with the government's mistaken theory that "running" names by police officers constituted a violation of the honest services act. However, the Supreme Court's decision in *United States v. Skilling*, 561 U.S. ___, 130 S.Ct. 2896 (2010) and Court's holding in *LVRC Holdings v. Brekka*, 581 F.3d 1127 (9th Cir. 2009) establish that the prosecution is wrong. Honest services as used in 18 U.S.C. § 1346 is limited to bribery and kickbacks – not a police officer's providing names and information from work computer databases. Likewise, unauthorized access to computers as alleged in 18 U.S.C. § 1030 is restricted to computer "hacking," not the occurrence when the employee (police officer or SBC employee) improperly

uses their work computers of which they have authorization to access. The state bribery racketeering predicates likewise fall not only because no official "act" was influenced, but also because there was no evidence to support the court's belief of what constituted the influenced act.

Finally, Pellicano's sentence must be reversed. The court miscalculated the final offense level and criminal history category. The court's error was compounded when it unreasonably imposed a sentence of 180 months imprisonment, nearly three times the sentence recommended sentence of the probation officer. Given that Pellicano has been in custody for the same case since November 17, 2003, his credit for time served should be reduced using that date.

ARGUMENT

I. ALL EVIDENCE MUST BE SUPPRESSED BECAUSE THE NOVEMBER 19, 2002 SEARCH WARRANT LACKED PROBABLE CAUSE, WAS BASED ON AN INTENTIONALLY MISLEADING DECLARATION AND THE *LEON* "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE IS NOT APPLICABLE

A. Introduction and Standard of Review.

The central elements of Ornellas's affidavit were taped discussions in which Proctor, a drug-dealing felon, bragged to the CW that Pellicano hired him to threaten a journalist to stop her reporting a story by vandalizing her car and that this was done on behalf of actor Seagal. ER 14-37. Even though Proctor said these things on the recording, his words did not constitute probable cause because

virtually everything he described about the incident was wrong. Pellicano made a substantial showing that Ornellas knew Proctor was lying. PSER 10-114; JSER 448-539. Instead of being forthright, Ornellas intentionally concealed information from the court which revealed that Proctor was untrustworthy.

Knowing that Proctor's claims were dubious, Ornellas bolstered the flawed affidavit with false accusations that Seagal was behind another alleged threat to another reporter, Ned Zeman ("Zeman"). In fact, there was no connection whatsoever between Pellicano and the Zeman incident. Ornellas knew this.

Ornellas's affidavit was a recitation of false statements by Proctor and false accusations by people with an agenda against Seagal. While the government may claim that Ornellas was merely repeating what he had heard, the fact remains that Ornellas knew that the statements were false, or illogical, or irrational, and he failed in every instance to correct the false impressions left by the statements. For instance, Proctor's description of the vandalism was inaccurate in nearly every respect, but the affidavit did not say so and the magistrate was left to assume that these false details were corroborative of Proctor's account when the opposite was true.

Ornellas manipulated the narrative to mislead the magistrate by failing to include the numerous facts that would have negated probable cause. The sum of

the evidence available to him did not amount to probable cause, but after excising the relevant inconvenient facts, he was able to knowingly concoct a false scenario.

Private Investigator Lynda Larsen submitted a detailed declaration which established the substantial showing for a *Franks* hearing. PSER 10-114. Paragraph- by-paragraph, Larsen methodically exposed the omissions, misrepresentations and half-truths submitted by Ornellas.

Pellicano moved to traverse and quash the search warrants relating to this case thereby suppressing the evidence seized in all the searches of Pellicano's offices and computers in 2002 and 2003. Pellicano further moved to suppress all the evidence seized during the searches as well as a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978).

Whether the good faith exception to the exclusionary rule applies in any given case is subject to *de novo* review. *United States v. Thai Tung Luong*, 470 F.3d 898, 902 (9th Cir. 2006). A district court's refusal to conduct a *Franks* hearing is reviewed *de novo*. *United States v. Napier*, 436 F.3d 1133, 1136 (9th Cir. 2006).

B. The June 20, 2002 Busch Incident and Proctor Investigation.

Busch was a reporter working on articles about Seagal and his alleged association with the Mafia. On June 20, 2002, her parked car was vandalized on the street across her apartment. The windshield had a puncture hole and a dead

fish with a rose in a tin pan on the hood. A paper sign saying "Stop" was taped to the windshield. Busch telephoned the LA Police Department. She claimed that the vandalism was connected to the Seagal-Mafia articles.

On June 21, 2002, the CW telephoned Busch and claimed that he knew she was to be threatened. That night, Ornellas met the CW who said he knew a man named "Alex" who claimed he had been hired to threaten Busch. The CW later reported that Alex's last name was Proctor. Using only the CW for the next four months, Ornellas did nothing to independently corroborate the tip regarding "Proctor."

C. Ornellas's First Search Warrant Was Denied.

On October 16, 2002, a month before he searched PIA, Ornellas attempted and failed to obtain a warrant to search Proctor's residence. PSER 75-100. With no corroborating evidence, Ornellas based his "Proctor warrant" on the mistaken conclusion that Proctor violated the Hobbs Act. Ornellas also stated that Proctor was involved in drug trafficking. In paragraphs 9–25, Ornellas outlined his *probable cause* to search Proctor's residence. PSER 89-96. This included a description of Busch's vandalized car with the punctured windshield and a tin foil baking pan with a dead fish and rose. Ornellas included that Proctor boasted that he was a big drug dealer who received $10,000 for each "drug run," that he traveled to Atlanta with "ten pounds of blow" and "returned with $200,000 in cash

and that he had a couple of pounds of "black tar." PSER 91. Proctor's bragging of high level drug dealing included that he could distribute up to three hundred kilos of cocaine a month and that he could sell up to ten thousand ecstasy pills. Proctor told the CW that he had orders for over 100,000 ecstasy pills and was to earn $600,000. Proctor claimed to have drug contacts in San Diego, Los Angeles and Mexico. PSER 93-94. Ornellas conducted no independent investigation to verify Proctor's boasting.

Ornellas relied upon the same lack of corroboration with respect to the Busch incident. Proctor told the CW that he had been hired to set Busch's car on fire, but that he was uncomfortable with the idea so he placed the fish and rose on the reporter's car. PSER 91. Proctor bragged that he "put a bullet hole in the windshield." PSER 91-92. Proctor said Seagal hired a famous private investigator who he identified as "Anthony." PSER 92. Proctor boasted that he worked for this big time private investigator.[6] He claimed that he owed Pellicano $14,000 and that Pellicano wiped out his debt because "they" were pleased with Proctor's work.

Significantly, among the items Ornellas requested to be seized from Proctor's residence were "hammers, tools, golf clubs, and any other blunt instruments that could reasonably be used to place a hole in a vehicles windshield." PSER 79.

[6] Ornellas never mentioned in his declaration that ***he knew*** Proctor's license plates for his car showed it was registered to a private investigation company which was ***not*** PIA.

Magistrate Judge Block "declined" the warrant. ER75. On October 16, 2002, Proctor was arrested. His residence was searched because of alleged "consent" provided by Proctor's landlady. Notwithstanding his loud talk about trafficking large amounts of drugs and making huge amounts of cash, nothing was found on Proctor or in his residence. Even though he talked about shooting a bullet hole into Busch's car, no gun was found.

A month later, Ornellas submitted his search warrant for PIA. Although the PIA search warrant relied exclusively on Proctor's uncorroborated words that Pellicano was involved in the Busch incident, Ornellas never told the court that Proctor clearly lacked credibility in that his recent claims of high scale drug trafficking and large quantities of money turned out to be completely untrue. Ornellas *understandably* never told the judge that the gun Proctor claimed to shoot Busch's windshield remained unaccounted for because Ornellas knew *it never existed*.

D. Ornellas Deliberatively Concealed Material Facts And Misled Magistrate Judge Block In His November 19, 2002 Declaration For a Search Warrant for Pellicano's Office.

As it related to the Busch incident, Ornellas's declaration to search PIA was nearly identical to the warrant which had been declined to search Proctor's residence. Given that he knew that merely stating Proctor's statements of *his involvement* in the Busch incident resulted in a declined search warrant, Ornellas

augmented the legally insufficient Proctor "facts" with another alleged incident involving another reporter, articles about Seagal, a threat to the reporter and the use of a gun – this time it was reporter Ned Zeman ("Zeman").

On August 26, 2002, Zeman claimed that he was doing a similar story about Seagal and his alleged Mafia connections. ER 33-35. That evening, as he was driving home, a car with two male passengers pulled up next to him. Zeman claimed that the passenger pointed a handgun at him and the driver said "bang" or "bam." ER34. Coincidentally, the man with the gun purportedly told Zeman, "stop" or "stop it." ER 34.

On September 20, 2002, after probing by the CW, Proctor said that he had nothing to do with the Zeman incident. ER 34. Although he could be wrong, Proctor said he thought Pellicano had nothing to do with Zeman incident either. ER34.

With nothing connecting Pellicano to the Zeman incident, Ornellas spoke with a private investigator in New York named Bill McMullin. ER 35. McMullin said he had a client who told him that the man who confronted Zeman with the gun was a former Navy seal who was a "very good friend" of Seagal's who appeared in a few of his movies, named John Rottger,

On October 28, 2002, Ornellas showed a photo-spread of six individuals to Zeman. Included in the photo display, for no apparent reason other than to misled,

was a DMV photograph of ***John Rottger, Jr***. (Rottger's son). ER 35. Zeman thought the photograph of ***John Rottger, Jr***. looked like the man who pointed the gun at him, but he was not sure.

Next, in what was nothing less than a blatant lie, Ornellas swore that he had been a licensed private investigator for approximately three years and that he knew from his "***own*** personal experience that records of retainers, work done for clients and payment information are likely to be found at a private investigator's office." (emphasis added). ER 36-37. Ornellas's fabrication about P.I. experience was no innocent mistake, but deliberately made to concoct a nexus to PIA.[7]

Thus, along with Proctor's unsubstantiated boasting, Ornellas added a second reporter "incident" suspiciously similar to the Busch vandalism, all with no connection to Pellicano. This warrant was approved – but the true facts had yet to unfold until 2006.

E. The Search Warrant Was Challenged Once Before In This Court Without The Knowledge Of Ornellas's Concealed Facts.

This is not the first that time this *same* warrant to search PIA has been challenged in this Court. Pellicano entered a conditional guilty plea to charges of

[7] Ornellas's lie about three years of private investigator's experience served three purposes. First, it misled the magistrate judge into accepting that records of a PIA's alleged relationship with Seagal would be maintained and *inside* PIA. Second, his lie solved the obvious staleness issue given that the Busch incident was six months old. Finally, it served as the fabricated reason to seize and rifle through all of PIA's computers for Pellicano's records.

illegally possessing explosives which were found in PIA's safe during the November 21, 2002 search. In this first appeal, it was undisputed that the search warrant lacked probable cause because no Hobbs Act crime occurred with the alleged threat to a reporter. Nonetheless, the Court, by split decision, upheld the deficient warrant relying upon the *Leon* good faith exception to the exclusionary rule. *See United States v. Pellicano,* 135 Fed. Appx. 44 (9th Cir. 2005) PSER 1-9.

The November 21, 2002 search was initially upheld because this Court determined that even if no federal crime was alleged, the *Leon* "good faith exception" applied because Ornellas could not be expected to know this and because there were no facts showing that Ornellas was dishonest or reckless in his declaration. Ornellas's material representations were not unearthed until the defense of the RICO prosecution.

F. Pellicano Satisfied The Showing Needed For A *Franks* Hearing.

In *Franks v. Delaware,* 438 U.S. 154 (1978), the Supreme Court held that in the following circumstances, a defendant may challenge the facial sufficiency of a search warrant affidavit and challenge the truth of the affidavit:

> "…where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request."
> *Id.* at 155-56.

The *Franks* opinion expressed the importance of the defendant's right to challenge a warrant as follows:

> "…because it is the magistrate who must determine independently whether there is probable cause, … it would be an unthinkable imposition upon his authority if a warrant affidavit, revealed after the fact to contain a deliberately or recklessly false statement, were to stand beyond impeachment." *Id.* at 165.

1. The Two-Prong Test of *Franks*.

a. A Substantial Preliminary Showing.

Under *Franks,* a defendant is required to satisfy a two-prong test in order to gain an evidentiary hearing. First, the defendant must "make a 'substantial preliminary showing' that the affidavit contained actual falsity, and that the actual falsity either was deliberate or resulted from reckless disregard for the truth." *United States v. Chesher,* 678 F. 2d 1353, 1360 (9th Cir. 1982). In *Chesher*, this Court found that in determining whether there has been a substantial preliminary showing, "Clear proof is not required—for it is at the evidentiary hearing itself that the defendant, aided by live testimony and cross-examination, must prove actual recklessness or deliberate falsity." *Id.* at 1362. While a defendant's allegations cannot be merely conclusory, they need only be support by "offer of proof." *Franks, supra*, 438 U.S. at 171.

b. Materiality to the Finding of Probable Cause.

The second prong is materiality. In *Franks*, the Supreme Court synthesized the question as follows: If the "material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled under the Fourth and Fourteenth Amendments, to his hearing." *Franks, supra*, 438 U.S. at 171-72.

Furthermore, the examination of a warrant affidavit is not restricted to the issue of false statements. The defendant is also entitled to challenge the search warrant for deliberate omissions of material facts. In *United States v. Stanert*, 762 F. 3d 775 (9th Cir.), *amended by* 769 F. 2d 1410 (9th Cir. 1985), this Court ruled:

> "Today, we expressly hold that the Fourth Amendment mandates that a defendant be permitted to challenge a warrant affidavit valid on its face when it contains deliberate or reckless omissions of facts that tend to mislead." *Id.* 780-81.

In *Stanert*, the Court found that, "The effect of the misrepresentations and omissions on the existence of probable cause is considered cumulatively. We must determine, therefore, whether the affidavit, once corrected and supplemented, would provide a magistrate with a substantial basis for concluding that probable cause existed." *Id.* at 782.

Here, it is undisputed that the affidavit never established probable cause. Pellicano not only proved that there was a substantial showing justifying a *Franks* hearing, but that *Leon* "good faith" could not save this intentionally "bad faith" warrant."

On the strength of defense private investigator Lynda Larsen's declaration, Pellicano established Ornellas's "bad faith" to manufacture probable cause which included the following misrepresentations, among many others (PSER 10-114): (1) virtually all of Proctor's statements about the vandalism to journalist Busch's car were materially inaccurate. Proctor claimed to shoot a bullet into the car—but there was no bullet. He said the container on the car was plastic—but it was aluminum. He said he pasted a cardboard sign on the car's windshield—but it was paper and taped on. He said the location was not easily accessible—but it was bounded by two large streets; (2) Proctor's contention that Pellicano had hired him on behalf of Seagal was knowingly wrong; (3) Proctor's contention that Seagal would threaten Busch made no sense because her previous articles favored him. Ornellas knew that Seagal was adverse to the Gambino crime family and a man name Julius Nasso ("Nasso") because Seagal was a government witness against them; (4) Ornellas was aware of a concern that the Gambinos may have been behind the threats but hid that fact from the magistrate; (5) the CW was attempting to sell information to Nasso's lawyers about Proctor, which suggested that the

informant had a motive to manipulate Proctor's statements and manipulate the information passed on to the government; (6) information about the purported threat to Zeman was manipulated to suggest that Seagal was involved when he was not; (7) Ornellas knew that the accusation from McMullin against Seagal was from someone who worked on Nasso's defense team; (8) Ornellas knowingly presented a misleading narrative about John Rottger, a former Navy SEAL, whom Nasso's people accused of participating in the threat to Zeman. Ornellas knowingly concealed the fact that Rottger did not match the description provided by Zeman. Ornellas falsely implied that Zeman tentatively identified Rottger, when it was instead Rottger's son.

After analyzing the affidavit pursuant to *Franks*, all that remains is an uncorroborated claims of a drug-dealing felon telling a devious informant inaccurate stories about the vandalism of Busch's car. More troubling is that Ornellas's knowing manipulation of statements resulted in a false picture that was pieced together to mislead the magistrate judge. No warrant should stand under these circumstances. Had the true facts been presented, the warrant would have been denied (as was the earlier Proctor warrant).

G. The Prosecution Knowingly Conspired To Conceal Ornellas's Deliberate Misrepresentations.

On December 17, 2007, the court began the motion hearing regarding the

request for a *Franks* hearing with a question: "Out of curiosity, does ***anybody*** actually know what caused the hole in the windshield?" (emphasis added). ER 987- 1085. After Pellicano's counsel responded that ". . . it wasn't a bullet . . ." because there were "no reports as to a bullet," the court criticized, "Is that all you have?" Defense counsel pointed to the lack of reports, no shell casings and the fact that the windshield had a puncture hole as more evidence in response to the Court's question. Meanwhile, the government never answered the court's question. Instead, the prosecution side-stepped the inquiry and noted that the picture of the car's windshield "certainly looks like a bullet hole. Whether the bullet richocheted, whether the bullet wasn't found, whether there was no bullet and it was made by a golf club or a hammer, in the totality of the circumstances, Your Honor, it doesn't matter."

However, in that Proctor's uncorroborated inconsistent statements were the *only* connection between the June 2002 Busch incident and the November 21, 2002 search of PIA, this intentionally omitted clarification and truth of the cause of the windshield hole was significant.[8]

[8] The need for Ornellas to maintain the appearance of a bullet hole in his affidavit was simple. First, a gun blast into Busch's windshield elevated the mere vandalism to a seriously potential threat of violence. The Busch incident without a bullet hole is not even a California offense for threats. California Penal Code 422 requires a clear, specific and immediate threat of harm to another person. A phantom bullet hole accomplishes and clears this legal hurdle – otherwise the incident is only vandalism to property (not a person). Second, the alleged Zeman incident in involved the assailant's brandishing of a handgun which was, Ornellas crafted, likely the

Indeed, in its ruling the court found one of the most significant issues to be the cause of the hole Busch's windshield. As the court noted, this discrepancy was more significant than the others and arguably should have been mentioned in the affidavit." ER 165-176.

The court went on to say, that there is no evidence that Ornellas recklessly or intentionally withheld this information. This is false. The government deliberately advanced the fabrication that the hole was caused by a gunshot just as Proctor said. The court believed that the hole was caused by a bullet and found the "defendants' suggestion that the hole was definitively not caused by a bullet as completely unsupportive."

The truth is that Ornellas and Saunders concealed that there was no gunshot into Busch's windshield as Proctor falsely claimed. This blatant omission surfaced in 2009 in the discovery from the LA District Attorney's Office. The fact that Ornellas disregarded the truth about the "bullet hole" is evident in the CW's 2003 grand jury testimony – which was never given to Pellicano in the federal case.

On February 27, 2003 and March 13, 2003, the CW testified before the grand jury. Saunders asked the CW whether in June 2002 he became aware of a threat that had been made to a reporter named Busch. The CW answered that he had and when asked how he first heard about what happened, the CW replied:

---

handgun given to Rottger by Seagal.

> "And he [Proctor] was laughing. He said what I did. I went down and bought a fish and put a rose in its mouth, and put a bullet hole in the front window and then I ***spray painted*** "stop" on either a car or on a sign or something and put it in the window. But he did say he had ***painted*** "stop" on it, along with the fish, the rose and supposedly a gunshot." ER 5044-5305.

Significantly, the CW explained: "***The FBI agent that contacted me said it wasn't a gunshot. It was a rock or something like that. That, I don't know. I have no way of knowing. That I assume that they know there business***."

The CW identified Ornellas as the FBI agent who contacted him. Contrary to Ornellas's declaration that he did not learn Proctor's name until July 1, 2002, the CW testified that when he first met Ornellas, he was reluctant to talk about Busch and told Ornellas to contact agent Brenda Dillard who he was already working with.

The CW also revealed that Proctor said he worked for several "different private detective offices," and that the license plates on his car where registered to an investigative company where he worked, not PIA. The CW testified that in getting as "much information," he asked Proctor "what detective agent hired him" and got the "opinion that it was an agency known as Chameleon." Although Proctor on occasion would also say he was working for Pellicano, that story was never verified. In fact, the CW testified that he and Ornellas planned a "good

story" to manufacture a reason for the "detective" to do some work for the CW as a way to positively identify Proctor's employer, but that plan failed.

The CW's grand jury testimony, viewed in the context of Pellicano's request for a *Franks* hearing makes abundantly clear that the prosecution should have disclosed these transcripts as *Brady* material.

Ornellas intentionally omitted Proctor's inconsistencies knowing that, apart from Proctor, there was absolutely nothing implicating Pellicano. Thus, Ornellas had to make Proctor sound consistent, believable and dangerous.

Ornellas subsequently admitted to this complete lack of supporting and objective evidence establishing probable cause to search Pellicano's office when he was finally required to testify under oath about his declaration.[9] ER5044-5305.

On August 4, 2009, Superior Court Judge William Pounders conducted a preliminary hearing on the state charges filed against Pellicano with respect to the Busch incident. The prosecution's lone witness was Ornellas. Although the purpose of the hearing was obviously different than a *Franks* evidentiary hearing

[9] The federal prosecutors harbored grave concerns about Ornellas's lack of credibility and filed an *in limine* motion to limit the scope of Pellicano's cross-examination of Ornellas in the RICO trial. CR 1119. The prosecutors needed to shield Ornellas from cross-examination about his glaring misrepresentations like the Rottger photo spread and bullying a "consent" search from Proctor's landlady. The prosecutors were also deeply concerned about excluding cross examination of Ornellas about another prosecution wherein a prosecutor questioned Ornellas's veracity. *Id.* The federal prosecutors eventually elected to completely protect Ornellas, the lead case agent in the six year old case, from cross-examination by never calling him in the government's case.

and notwithstanding that the state court sustained numerous prosecution objections to questions focusing on Ornellas's search warrant affidavit, there was testimony which established that a *Franks* hearing was indeed appropriate.

For example, Ornellas, under cross-examination, *now minimized* his description of Proctor's "statement" (as he earlier described in his affidavit) about the bullet hole in the windshield and now called it a mere "claim." Ornellas added that he knew Proctor said he was employed by a private investigation *group*.[10] When pressed, Ornellas admitted that at the Busch scene on June 20, 2002 he saw only a "shatter mark" on the windshield. He did not recall seeing a bullet hole and he knew that the LAPD never recovered a bullet or bullet casing.

Ornellas admitted that, on June 16, 2005 when he was the affiant for the state felony complaint in the case, he now changed his description from his search warrant affidavit 3 years earlier and declared that Proctor "made a hole in the windshield with the intent *to make it appear like a bullet hole*." Ornellas admitted that he knew Proctor did this because his investigating partner, Mike Howard, told him this *on June 20, 2002*. Although he knew it was not a bullet hole and

[10] This comported with information seen in a July 1, 2002 FBI report wherein the CW told Ornellas that Proctor drives a bronze Honda and the license plates are registered to a "P.I. Firm." The CW added ". . . that Proctor was contacting a "Jewish guy" at the detective agency." JSER 448-540. Proctor's obvious association with a "Jewish" guy at a different detective agency were facts conveniently left out in steering a search into PIA.

notwithstanding Proctor's repeated representations to the CW that he shot up the windshield, Ornellas hid Proctor's lie from Judge Block.[11]

Ornellas admitted that he did nothing to investigate the "relationship" between Pellicano and Proctor and excluded that Busch told him she was afraid of others connected to organized crime.[12] He admitted that he knew McMullin, who worked for Nasso, had a reason to fabricate a story against Seagal. Ornellas revealed that he knew the CW had incorrectly described many of the "details" of the Busch incident including the wrong description of the car and the inaccurate description of the so called "narrow dead end street" where Proctor claimed Busch lived. Ornellas admitted that he was aware that the CW, while working for the FBI, was untrustworthy in that he was attempting to sell evidence [tapes with Proctor] to Nasso.

According to Ornellas, the "probable cause" to search Pellicano's office was: (1) the vandalism occurred; (2) Proctor was recorded saying Pellicano was involved; and (3) some phone tolls (2 calls on June 17 and 18, 2002). Ornellas admitted that from June 20, 2002 to November 21, 2002, he did nothing to independently establish the alleged relationship between Pellicano and Proctor.

[11] Later at the preliminary hearing, Ornellas admitted that he looked into Busch's car on June 20, 2002 and did not see a bullet hole in the seat on the driver's side.

[12] Ornellas's knowledge of and participation in the ongoing FBI interviews of Seagal in April, May and November 2002 were never included in his search warrant affidavit.

In summary, Ornellas knew his "bad faith" warrant was not an accurate or complete story of the true events as he knew them at that time. The power of the "exclusionary rule" or the scrutiny of a *Franks* hearing are the Court's remedies summoned to address the agent's actions in this case.

H. The Warrants To Seize and Search PIA Computers Were Overbroad.

On December 18, 2007, the court denied the defense motions challenging a subsequent July 25, 2003 search into PIA's computers as overbroad and lacking of particularity.[13] ER 155-161. Pursuant to Federal Rule of Appellate Procedure 28(i), Pellicano adopts and joins in all arguments and challenges by Appellant Christensen in his individual brief pertaining to the impermissibly broad search warrants.

I. Appellant Pellicano Adopts and Joins Appellant Christensen

Pursuant to Federal Rule of Appellate Procedure 28(i), Pellicano adopts and joins in all search warrant related arguments and challenges by Christensen in his individual brief to the extent applicable to him.

[13] The Pellicano defense maintained, and the evidence supported, that the real objective in this case centered on the FBI's desire to seize and search PIA's computers. The undisputed evidence showed that in May 2002 FBI agent Dale Waller served a grand jury subpoena on Pellicano for records, including audio recordings of individuals including members of law enforcement. What became clear eight months later in Ornellas's January 14, 2003 search warrant used to return to PIA for more computers was that the FBI was looking for audio recordings of agent Dale Walker! ER 101,112. Ornellas concealed from Magistrate Judge Segal that the FBI previously tried to get the same information about the FBI agent with the May 2002 subpoena.

II. OUTRAGEOUS GOVERNMENT MISCONDUCT MANDATES DISMISSAL OF THE FIFTH SUPERSEDING INDICTMENT

A. Introduction and Standard Of Review.

On October 22, 2007, Pellicano filed his motion to dismiss the indictment because of outrageous government conduct. CR 839. The motion was predicated on the culmination of Ornellas's toxic search warrant declaration as well as the development of a claim under *Massiah v. United States*, 377 U.S. 201 (1964).[14] The court denied the motion. ER 162-164.

A district court's decision whether to dismiss an indictment based on improper or outrageous government conduct is reviewed *de novo*. *United States v. Bridge*s, 344 F.3d 1010, 1014 (9th Cir. 2003). The evidence is viewed in the light most favorable to the government, and the district court's findings are accepted unless clearly erroneous. *United States v. Gurolla*, 333 F.3d 944, 950 (9th Cir. 2003). A criminal defendant may raise a due process challenge to an indictment based on a claim that the government employed outrageous investigative techniques. *United States v. Russell*, 411 U.S. 423 (1972). To constitute a Fifth Amendment violation under *Russell* the government conduct must be fundamentally unfair and "shocking to the universal sense of justice" mandated by the Due Process Clause. *Russell*, at 432. The court may exercise its supervisory

[14] The Court granted Pellicano's motion for a *Massiah* hearing, but he subsequently withdrew that request. The motion for dismissal due to outrageous government conduct was brought independent of that *Massiah* motion.

powers to remedy a constitutional or statutory violation to protect judicial integrity by ensuring that a conviction rests on appropriate considerations . . . or to deter future illegal conduct. *United States v. Doe*, 125 F.3d 1249, 1253 (9th Cir. 1997).

B. Flagrant Misrepresentations And Conscious Avoidance of the Truth.

"[A]lthough the State is obliged to 'prosecute with earnestness and vigor,' it is as much [its] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. *Valdovinos v. McGrath*, 598 F.3d 568 (9th Cir. 2010). This case is replete with prosecution misconduct in its representations to the court(s) and to Pellicano. Whether piecing together the story for "probable cause" to search PIA, or later representing that all *Brady* material had been provided, the prosecution engaged in a pattern of deceit. The very conduct it pointed an accusing finger, the prosecution engaged in by steering Carradine into Pellicano to gather defense information to gain an unfair advantage. An even darker example of hypocrisy surfaced at trial when it was revealed that Ornellas, on at least one occasion, had Arneson "run" his [Ornellas's] neighbor's license plate in the LAPD database for personal information.

C. The Government Proactively Used An Informant To Obtain Information From Pellicano After He was Charged and Represented By Counsel.

On October 5, 2007, Pellicano filed a *Massiah* motion upon the

prosecution's use of Carradine as an operative into the Pellicano defense camp from July 29, 2005 to February 6, 2006. CR 807; 812. With Carradine, the prosecution learned of Pellicano's thoughts and strategies regarding the case and learned that Pellicano was concerned about the government's threats to file RICO charges.[15] Pellicano submitted defense counsel's detailed declaration outlining the use of Carradine to garner sensitive defense information. Although two sealed indictments were pending, the government repeatedly instructed Carradine to visit and accept calls from Pellicano to monitor events in his defense camp. The prosecution readily played upon the information provided by Carradine and, not until its third sealed indictment, first filed the RICO charges at the conclusion of Carradine's undercover work.

It is of no matter that Pellicano, upon deciding to go *pro se,* later withdrew his motion for a *Massiah* hearing. The government's cumulative misconduct, including the improper use of Carradine, required dismissing the indictment.

D. Ornellas Had Arneson "Run" The LAPD Computer Database For Personal Information About His Neighbor.

[15] This is just another example where the prosecutor abandoned the special role he plays in the search for truth in criminal cases. *Strickler v. Greene,* 527 U.S. 263, 280 (1999). The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. *Berger v. United States,* 295 U.S. 78 (1935). This Court has noted that the enhanced sanctions under RICO are subject to abuse by prosecutors. *United States v. Robinson,* 15 F.3d 862 (9th Cir. 1994)(reversed on other grounds).

Ornellas knew Arneson well before this case. At trial it was uncontested that Ornellas once asked Arneson to "run" his neighbor for information from the LAPD database. (RT 4/11/08 AM 103-107). Ornellas did not contest that he made this request, but instead attempted to excuse his conduct by claiming that the information was law enforcement related but beneath the FBI's interest. (RT 4/18/08 AM 84-86). Given Ornellas's unlimited access to the FBI database, his self-serving "explanation" for Arneson's "run" was simply implausible.

E. *Brady* Violations: Pretrial and Trial.

Challenges to convictions based on alleged *Brady* violations are reviewed *de novo*. *United States v. Ross*, 372 F.3d 1097, 1107 (9th Cir. 2004). A district court's denial of a motion for mistrial or new trial based on an alleged *Brady* violation is also reviewed *de novo*. *United States v. Antonakeas*, 255 F.3d 714, 725 (9th Cir. 2001).

There are three components of a *Brady* violation: "The evidence at issue 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." *United States v. Price*, 566 F.3d 900, 907 (9th Cir. 2009). Evidence that impeaches a central prosecution witness is indisputably favorable to the accused. *Giglio v. United States*, 405 U.S. 150 (1972). Failure to disclose Brady material is prejudicial if there is a sufficient

probability to undermine confidence in the outcome of the trial. *United States v. Bagley*, 473 U.S. 667 (1985). In *Price*, this Court reversed defendant's conviction for being a felon in possession of a firearm because his due process rights were violated when the prosecution failed to produce impeachment evidence against its main witness. Similar, violations occurred here at the pretrial and trial proceedings.

Here, Ornellas and the prosecution knew that the hole in Busch's windshield was not caused by a bullet was hidden for years. Only in 2009, well after the federal cases, were the CW's grand jury transcripts provided to Pellicano (by the state) and the federal prosecution's secrets discovered.

Also, years after the trials, Pellicano learned that the main telephone company witness Teresa Wright had made an earlier undisclosed inconsistent statement. ER5324. Equally powerful impeachment evidence against Wright was the undisclosed fact that she was employed by another telecommunications company (Verizon) after being terminated by SBC for her actions. Not only did the prosecution know this fact, but in closing argument intentionally falsely portrayed Wright as someone deserving sympathy (and credibility) because she had lost her job due to her improper actions at SBC.

F. Vindictive Prosecution Originating From The Government's Frustration That Pellicano Would ***Not*** Become A Cooperating Witness.

The prosecution lost its sense of fairness and justice. From the start, the

government believed it could "flip" Pellicano into a prosecution witness. Pellicano's steadfast resistance frustrated the prosecution and it responded with vindictiveness. This was witnessed, for example, when Ornellas took the unusual step of authoring an affidavit for the LA District Attorney to support the state complaint. Suspiciously, Ornellas prepared his state declaration on June 16, 2005 – 4 days before the statute of limitations expired.

In December 2005, Ornellas and two prosecutors drove from Los Angeles to Taft Federal Correctional Institution and threatened Pellicano with a RICO prosecution if he did not become a government witness. When he refused, the government fulfilled its threat. To maximize Pellicano's prison time, the government merely waited until he served his very last day on the explosives conviction before making the drive to Taft in early February 2006 to "arrest" Pellicano on the "new" indictment pending since October 2005.

Such bullying tactics fall far beneath a prosecutor's sense of fair play and reveals a misguided "win at any cost" mission. Coupled with the flagrant acts of government misconduct in this case (misleading search warrant declarations, standing by silent when the court is inquiring about "what caused the bullet hole" when considering the *Franks* motion, obvious *Brady* and Rule 404(b) violations), such conduct mandates dismissal of the charges.

III. ANTHONY PELLICANO WAS DENIED A FAIR TRIAL

A. Introduction And Standard Of Review.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *United States v. Castillo*, 181 F.3d 1129, 1134 (9th Cir. 1999). If the district court abuses its discretion in admitting evidence, reversal is required unless the error is harmless. See *United States v. Tafollo-Cardenas*, 897 F.2d 976, 979 (9th Cir. 1990). This Court must reverse unless it is more probable than not that the error did not materially affect the verdict. *United States v. Mitchell*, 172 F.3d 1104, 1110-11 (9th Cir. 1999).

B. The Government Provided No Notice Of The Inflammatory Fed. R. Evid 404(b) Material.

On February 10, 2006, Pellicano made his request for notice of all Rule 404(b) material that the prosecution intended to introduce at trial. ER 552. On February 28, 2008, the government filed its 129 page trial memorandum which outlined its trial evidence. CR1215. The prosecution's detailed memorandum provided no notice of any 404(b) evidence. Instead, the brief represented that its evidence of the RICO conspiracy, the enterprise and racketeering acts would involve PIA investigative targets with corresponding personal information acquired from law enforcement and telephone company employees. The government's statement of facts was devoid of any of the irrelevant and highly inflammatory testimony that the prosecution then systematically elicited at trial.

For instance, the government represented in its brief that the presentation of the John Gordon Jones evidence would entail establishing that Pellicano worked on Jone's defense and that Arneson conducted computer runs on the "Jane Doe" victims. CR 1215; 80-81. Deputy DA Karla Kerlin was expected to testify that Arneson was not assigned to the Jones investigation. However, at no time did the prosecution give notice that it intended to elicit testimony that she was allegedly threatened by Pellicano.

Also, the prosecution represented to the court and the defense the trial evidence of the PIA investigation of Aaron Russo and his dispute with Adam Sender would involve SBC database information and DMV database runs by Beverly Hills Police Officer Craig Stevens. CR 1215; 91. The prosecution represented that Sender would testify that Pellicano played for him wiretapped telephone calls between Russo, his sons and others. Nowhere in the government's representation of trial evidence did it state that the prosecution planned to have Sender testify that Pellicano offered to have Russo murdered.

As to the evidence of PIA's investigation of Busch, the prosecution represented that the trial evidence would consist of Arneson's database inquires, Wright's SBC database inquiries and the SBC discovery of a wiretap on Busch's telephone. At no time did the prosecutors provide the requisite notice that the government's evidence would include the highly prejudicial evidence of vandalism

to Busch's car, dead fish and bullet holes, and an alleged attempt to run her down.

The prosecution deliberately embedded in the jury that Pellicano was a "thug" who threatened violence on prosecutors (Karla Kerlin), law enforcement investigators (George Mueller), state and federal witnesses (Tarita Virtue, Linda Doucett), victims (Jane Does, Laura Moreno, Kissandra Cohen) and that criminals "got off" (Kami Hoss, John Gordon Jones, George Kalta). Such irrelevant and highly prejudicial evidence had absolutely nothing to do with a case about "information gathering" and was purposely planted and cultivated by prosecution to instill fear, hatred and overwhelming prejudice against Pellicano.[16]

C. Pellicano Was Denied Meaningful *Voir Dire.*

Failing to disclose the inflammatory evidence it intended to present to the jury, the prosecution deprived Pellicano of meaningful *voir dire*. Pellicano conducted *voir dire* predicated on the representations of the straightforward evidence outlined in the government's brief. CR1215. The Government's Proposed Questions For Jury Questionnaire likewise misled not only by failing to request any questions concerning biases toward explosive topics such as murder, rape, and threats, but also by specifically requesting three questions concerning the specific "types of evidence that may be presented." CR 1105; p.16-17. The

[16] To underscore its explicit message to the jury that Pellicano was a "bad guy," the prosecution had an FBI agent testify about two hand grenades, plastic explosives and a detonator found in PIA during the November 21, 2002 search. (RT 3/6/08 PM 79). Prosecution evidence about Mario Puzo books, a severed rat in a mail box and the Busch dead fish, rose and bullet hole were introduced to garner juror fear of and disdain toward Pellicano. See *United States v. Waters*, No. 08-30222 (Sept. 15,2010, 9th Cir.)

government's three questions merely pertained to accomplice or cooperator testimony, search warrants and witnesses who previously lied. Id.

Based on the government's representations, the court fashioned and submitted its Juror Questionnaire which understandably omitted any questions involving the venire's experiences, predispositions and biases to someone who allegedly committed uncharged violent crimes but also someone who assisted others avoid prosecution. CR 1192.

Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled. Lack of adequate *voir dire* impairs the defendant's right to exercise peremptory challenges where provided by statute or rule, as it is in the federal courts. *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981). "[P]eremptory challenges are worthless if trial counsel is not afforded an opportunity to gain the necessary information upon which to base such strikes." Moreover, "justice requires that each lawyer be given the opportunity to ferret out possible bias and prejudice." *United States v. Ledee*, 459 F.2d 990, 993 (5th Cir. 1977). The importance of meaningful *voir dire* was recently discussed by the Supreme Court in *Skilling*. In *Skilling*, the Court found the jury-selection process

adequate notwithstanding the pretrial publicity because jurors' prejudicial feelings could be identified with a questionnaire and it served as a "springboard" for further questioning.

Here, no such adequate selection process occurred. RT 3/5/08 AM 17-131. The prosecution's deliberate concealment of its intended trial evidence violated Pellicano's Sixth Amendment's promise that "the accused shall enjoy the right to a . . . trial, by an impartial jury of the State and district wherein the crime shall have been committed." The court's juror questionnaire and live *voir dire* did nothing to ferret out the venire members' predispositions and biases given the prosecution's "back pocket" approach to its inflammatory trial evidence.

D. The Repeated Introduction and Argument of Unfounded Irrelevant And Highly Inflammatory Testimony And Evidence.

The joint brief outlined the inflammatory evidence introduced by the prosecution. Pelllicano timely brought his objection to the government's belated notice of its intent to introduce the irrelevant and unduly prejudicial evidence of unsubstantiated bad acts. Before opening statements, all defendants expressed their concern as to the introduction of irrelevant and powerfully prejudicial evidence such as handguns and grenades in a case about accessing computers for information and wiretapping.[17] RT 3/6/08 AM 12-14. Later, as the government's

[17] The trial defendants raised their concerns after hearing the government's opening statement which alerted the jury that it would hear evidence concerning PIA's work for client John Gordon

plan to unfairly prejudice the jury became evident, all defendants offered to stipulate to avoid inflammatory references to, for example, the "Jane Doe victims" in the John Gordon Jones matter. RT 3/14/08 AM 4-7. The government rejected the idea of a stipulation and continued its parade of improper evidence.

E. Pellicano Was Denied A Full Opportunity To Exam Ornellas Because the Court Failed To Require Production of Ornellas Statements Before The Grand Jury Testimony.

FBI case agent Ornellas testified at least 20 times before the grand jury. (RT 4/18/08 AM 47-49). His testimony was never produced to Pellicano. At trial, Arenson called Ornellas as a witness.[18] (RT 4/18/08 AM 17). In accordance with Fed.R.Crim.Pro. 26.2, all defendants moved for all *Jencks* material pertaining to Ornellas.[19] The court correctly ordered production of all *Jencks* which related to the *subject matter* of Ornellas' testimony. (RT 4/18/08 AM 66; 83). However, at the government's request, the court reversed its previous order and denied the

---

Jones and nine rape victims. RT 3/13/08 AM 4-6. As stated early in the trial, an objection for one defendant served as the objection for all.

[18] There can be no serious question that Ornellas was a pro-government witness although called by defendant Arneson. He was the lead case agent and stayed on the case on a contract basis after retirement from the FBI. The court highlighted Ornellas as part of the team of FBI agents working for the prosecution in its questionnaire to the venire. CR1192-2; Question 43. The prosecution objected to the defense request that Ornellas be sequestered from the courtroom. RT 3/6/08 PM 108-110. The court ruled with the government finding under Rule 615.2 Ornellas was a employee or officer of the government. RT 3/11/08 AM 6-7.

[19] Weeks earlier the defense made a similar request for all *Giglio* and *Jencks* material pertaining to Ornellas. RT 3/5/08 PM 70-72.

production of Ornellas' grand jury testimony. ER 294-295. The court stated that production was not required because Ornellas testified on the "narrow topics" concerning Arneson's knowledge and success as a vice detective who had been asked to join a task force. ER 295.

The court was incorrect in that Ornellas' direct examination, without government objection, concerned a wide range of subjects including Craig Steven's inconsistent statements about providing DMV and criminal history to Pellicano; Arneson running a license plate for Ornellas of someone who lived in his neighborhood; and, Ornellas's investigative interviews of former PIA employees and PIA clients. (RT 4/18/08 AM32-35;45-47;50-60). Ornellas also testified on direct examination about interviewing Busch; Patterson's calls to Busch; and, that Proctor had been hired by a detective agency to work for Seagal and that this was the basis for the search of PIA. (RT 4/18/08 AM 60-65).

The government opened the "subject matter door" even wider when it questioned Ornellas. The AUSA had Ornellas testify about checking Pellicano's bank records; why he believed that Pellicano instigated the Busch threat; that Ornellas conducted interviews of targets of Pellicano's investigations; and, that he found information on Pellicano's computers which coincided with Arneson's DMV and criminal history runs. (4/18/08 AM 67-83).

After the jury took a break, and fully aware that the court now ordered that

the government produce Ornellas' statements relating to the subject matter of his testimony, the prosecution resumed its questioning and continued to expand the scope of his testimony. RT 4/18/08 AM 83. Ornellas expanded on Arneson and Pellicano's connections to Busch. RT 4/18/08 AM 86-90. Ornellas discussed the investigation's results that Arneson engaged in unauthorized access of LAPD computers and then provided the information to Pellicano. RT 4/18/08 AM 91-96.

Ornellas, in sum, directly testified about a wide range of relevant topics directly *adversarial* to Pellicano. A plain reading of Rule 26.2 requires that after any witness, other than the defendant, has testified on direct examination, on motion of a party who did not call the witness, the court must order the production of the any statement of the witness that relates to the subject matter of the witness's testimony. A statement includes the witness's statement to a grand jury. Fed.R.Crim.Pro. 26.2(f)(3). That simple rule was not followed here.

Instead, the court denied production of the grand jury transcripts because it incorrectly characterized the subject matter of Ornellas's testimony. Second, the court incorrectly relied upon the decision in *United States v. Duncan*, 712 F.Supp. 124 (S.D. Ohio 1988) in its decision to withhold production. In *Duncan*, discovery rather than impeachment appeared to be the gravamen of the defendants' requests because the relationship between the parties was more cooperative rather than adversarial. That circumstance is not present in this case. Ornellas, both by

Arneson's direct examination and the prosecution's "cross-examination" delved into a vast array of topics that negatively impacted Pellicano.

The prejudicial effect of failing to produce Ornellas's transcripts of his 20 appearances before the grand jury was that he freely testified about numerous subjects adverse to Pellicano without the right of confrontation through informed cross-examination.[20]

F. The Prosecution's Closing Arguments In Essence Asked The Jury To Disregard The Court's Instruction Regarding Other Act Evidence.

The court gave the standard jury instructions regarding considering other acts evidence. While the court specifically instructed the jury that the defendants were not on trial for any conduct or offense not charged in the indictment, the prosecutor in his closing argument and rebuttal nonetheless immediately and repeatedly inflamed the jury with the unsubstantiated claims of violence, threats or intimidation by Pellicano.

This constant drum beating by the prosecutor (as detailed in the Rule 403 section of the Joint Brief) about unsubstantiated allegations was nothing short of an effort to cement the impression with the jury that Pellicano was a "very well-paid thug" who left mayhem as his "calling card." RT 4/29/08 AM 73-74. The

[20] This assertion is far from speculation given that the undisclosed CW grand jury transcripts and Ornellas's testimony at the August 4, 2009 state preliminary hearing which themselves contain valuable impeachment material against Ornellas.

prosecutor immediately tarnished the jury with irrelevant unproven claims that once PIA gets hired:

> "Witnesses start receiving threatening phone calls, witnesses' families get harassed, severed rat heads appear in informants' mailboxes, dead fish appear on reporters' cars, tires get slashed, computers get hacked, homes get broken into. People like Jude Green, just out trying to do their errands get blocked in and harassed." (RT 4/29/08 AM 74).

G. Pellicano Was Prejudiced By Joint Trial.

The Joint Brief asserts that a severance should have been granted in this case. Pellicano as well sought a separate trial and joins in the severance argument. He submits that he was prejudiced by the joint trial when, for example, Saunders made his irresponsible accusation that Arneson committed perjury on the witness stand. In fact, Saunders' repeated arguments to the jury that Appellants Arneson and Kachikian lied on the stand served to further prejudice Pellicano in the joint trial.

H. Prosecution Improperly Vouched For and Bolstered Its Trial Witnesses.

Whether a prosecutor's comments constitute improper "bolstering" is a mixed question of law and fact reviewed *de novo*. *United States v. Santiago*, 46 F.3d 885, 891(9th Cir. 1995). If there is no timely objection, vouching claims are reviewed for plain error. *United States v. Brooks*, 508 F.3d 1205, (9th Cir. 2007). Although no single comment or set of comments by a prosecutor may require a

new trial, improper statements do, when taken as a whole, constitute reversible error. *United States v. Francis*, 170 F.3d 546 (6th Cir. 1999).

Improper vouching typically occurs in two situations: (1) the prosecutor places the prestige of the government behind a witness by expressing his personal belief in the veracity of a witness, or (2) the prosecutor indicates that information not presented to the jury supports the witness's testimony. *United States v. Hermanek*, 289 F.3d 1076, 1098, (9th Cir. 2002).

In *Brooks*, improper vouching by the prosecution occurred when the jury was encouraged to draw inferences against the defendant because of government testimony discussing the length and process involved in obtaining a wiretap authorization. The fact that many government lawyers and a federal judge were involved in the wiretap process served to infer that the defendant must have been guilty.

The same form of improper vouching occurred here and was compounded when the prosecutor placed his personal approval on the investigation of Pellicano. In his closing argument, the prosecutor said:

> "You have heard that this investigation took years, countless hours of work in imaging and decrypting the massive amounts of computer evidence that were seize, hundreds of witness interview, extensive proceedings by a Federal Grand Jury, all so AUSA Lally and I could come into this courtroom over the last eight weeks and prove to you beyond a reasonable doubt the guilt of everyone one of these defendants." RT 4/18/08

AM 74-75.

Improper vouching occurred when the prosecution not only listed all the investigative work that went into the case, but the prosecutor implied that a *Federal Grand Jury* had already spent the time and determined Pellicano's guilt. The prosecutor further bolstered the entire case given the great amount of time it took for the investigation and because of the work accomplished by the Federal Grand Jury when he added that this was all accomplished so that he and AUSA Lally could come into the courtroom. The unspoken message was that he and Lally wouldn't bother being there if he didn't personally believe the government's witnesses.

Saunders took additional steps to bolster the government's witnesses by garnering sympathy for the witnesses with unsubstantiated acts unrelated to the charges that Pellicano was involved in illegal information gathering.

Saunders knowingly told the jury a well placed half-truth when he bolstered Teresa Wright's testimony by implying that she must be credible because she lost her job of 23 years with the phone company and suffered a felony conviction because she provided information to Turner. Yet, Saunders secretly knew, but never shared with the defense, that Wright had been gainfully employed at Version since losing her previous job. RT 4/18/08 AM 76. Finally, a form of vouchering occurred when at least two jurors heard Saunders exclaim that he believed Arneson

committed perjury. With his accussation, Saunders gave at least two jurors (the one who came forward and the foreperson who remained silent on the issue) that he knew something that wasn't before the jury.

IV. THE RICO CONVICTIONS MUST BE REVERESED FOR INSUFFICIENCY OF EVIDENCE

A. Introduction and Standard of Review.

Claims of insufficient evidence are reviewed *de novo*. *United States v. Sullivan*, 522 F.3d 967, 974 (9th Cir. 2008). When a claim of sufficiency of the evidence is preserved by making a motion for acquittal at the close of the evidence, this Court reviews the district court's denial of the motion *de novo*. *United States v. Stewart*, 420 F.3d 1007, 1014 (9th Cir. 2005). Pellicano, as did all defendants, preserved by making motions for acquittal at the close of the evidence.[21]

Setting aside the government's rabid efforts to sensationalize the trial into something more sinister, this case was simply about a private investigator acquiring information from people who accessed their work computers. No computers were "hacked" and no one accessed a database who didn't have the right to be there because of their employment.

The government took these simple facts, nonetheless, to inflate the case into RICO charges. To get some "sizzle," it attempted to forge RICO predicates by

[21] On December 5, 2008, Pellicano joined Arneson's Motion for Judgment of Acquittal. CR 2022.

asserting that Arneson, Stevens and Pellicano committed wire fraud through the deprivation of honest services when these officers obtained information for Pellicano from their computers.[22] Likewise, the government took these same facts and strained to fashion identity theft when names were simply "run" through these computers. The government went through the same exercise in charging RICO predicates of identity theft with Pellicano and Turner when the latter obtained SBC information from Wright and Malken's lawful access to their computers.

However, this RICO "house of cards" tumbles down given two recent decisions by the Supreme Court in *United States v. Skilling*, 561 U.S. ___. 130 S.Ct. 2896 (2010) and this Court in *LVRC Holdings LLC v. Brekka,* 581 F.3d 1127 (9th Cir. 2009) . Likewise, the guidance provided in *Skilling*, together with evidence at trial establish that the state bribery racketeering acts fail.

There is no doubt that Arneson, Stevens and Wright had lawful access to their work computers. In fact the government *alleged* this fact in its Fifth Superseding Indictment. ER 923; Paragraphs 6 and 8. The government alleged that Wright was authorized to access the SBC computer systems and databases. ER 923; Paragraph 12.

B. The Substantive RICO Charge Must Be Reversed.

[22] There can be no doubt that the prosecution wanted, if not needed, to bring significant charges in this highly anticipated closely watched investigation. Pellicano was high profile and his connections to Hollywood celebrities well known.

1. There Was Insufficient Evidence To Support The Racketeering Acts Alleging Honest Services Wire Fraud With Arneson And Stevens

Skilling clarified that only bribery and kickback schemes constitute the type of conduct proscribed by 18 U.S.C. § 1346. Because Skilling's alleged ymisconduct entailed no bribe or kickback, it did not fall within the confinement of §1346 proscription. The same conclusion holds true with regard to the allegations that Pellicano engaged in honest services wire fraud with officers Arneson and Stevens.

In fact, the court incorrectly instructed the jury that: " a deprivation of honest services occurs when a public official strays from his duty of loyalty to the public by making decisions based on personal interests instead of the public's interest. However, it does not encompass every instance of official misconduct that results in the official's personal gain. In order for a defendant to be found guilty of honest service wire fraud he must have actually intended to deprive the public of his honest services." ER 369.

Clearly the court's instruction did not restrict its definition to the correct and limiting language outlined in *Skilling*. Moreover, the prosecution in its closing argument told the jury that honest services fraud is an "intangible right" where Arneson, Pellicano and Stevens deprived the police departments and the citizens of their communities of their right to honest services. Using vague terms, the

prosecution defined honest service fraud as "corruption, lying and cheating and greed and arrogance. And putting self interest above the duty to protect and to serve."

In addition to these general descriptions, the prosecution labeled as a deprivation of honest services "being paid by the people of Los Angeles to protect and serve them, he was serving a different master. Mark Arneson was an employee of the City of Los Angeles. His salary was paid by the people of Los Angeles. And those people had the right to expect that he would be spending his working hours engaged in his law enforcement duties, doing his job of helping catch and prosecute criminals, not secretly working for the defendants to help them beat the rap by digging up dirt on their accusers."

The prosecutor incorrectly widened the scope of "honest services" when he told the jury "just think about it for a moment, hardworking law enforcement was trying to do their jobs of putting together cases . . . and "that man was secretly working to dismantle those cases by digging up and turning over confidential information about prosecutions, witnesses, about named victims of rape and sexual assault, and even about his fellow law enforcement officers and their undercover operations." The prosecution's laundry list of the deprivation of honest services included: providing confidential information to a private investigator; depriving citizens of the right to be protected by the police; depriving citizens of the right

that police would not violate their privacy and department policies; the deprivation of their right to have confidential information protected; the deprivation of the right to have their police serve them with honesty and integrity; deprivation of the right not to have the police on "police time" on "police computers" dig up information on them; and the right not to be investigated by the police when they have done nothing wrong.

Simply stated, the prosecution's evidence and closing argument is exactly what *Skilling* proscribed, boundless intangible descriptions of something called "honest services." Nowhere in the court's instruction and the government's endless definitions were the terms "bribes or kickbacks" mentioned once. Indeed, in considering the elements for honest services, the court did not mention any of the elements given for the racketeering acts considering state bribery.

Under *Skilling*, we know that 18 U.S.C. § 1346 pertains to well defined limited proscriptions not seen in the racketeering acts and substantive violations against Pellicano, Stevens and Arneson.

2. There Was Insufficient Evidence To Support The Racketeering Acts Alleging Identity Theft Through the Unauthorized Use of Computers.

The prosecution's effort to wordsmith racketeering predicate acts using 18 U.S.C. § 1028(a)(7) (identity theft) on the coattails of unauthorized computer access in either federal [18 U.S.C. § 1030 (a)(2) (4)] or state [California Penal

Code § 502(c)(2)] likewise fails. Although a civil case, this Court in *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127 (9th Cir. 2009) made abundantly clear that the Computer Fraud and Abuse Act (CFAA) was intended to exclusively address "hacking," and not when an employee misuses a work computer for which they have authorized access. It was undisputed that Arneson, Stevens and Wright had lawful access to their work computers in which they allegedly gathered the information for Pellicano.

The same is true for the state computer fraud section. In *Chrisman v. City of Los Angeles*, 155 Cal.App 4th 29 (2007), another civil case, the California Court of Appeals held that CCP 502(c)(2) did not apply to a police officer who was accused of misusing his computer to seek information that he was entitled to access, but for which he had no legitimate work-related purpose. Chrisman, a Los Angeles police officer was alleged to have accessed his work computer for no legitimate work reason to retrieve and sell confidential information about celebrities. Like this Court in *Brekka*, the California appellate Court stated: "One of the legislative purposes of Penal Code Section 502 was to deter and punish . . . browsers and hackers; outsiders who break into a computer system to obtain or alter information contained there. The Court held that "one cannot reasonably describe [Chrisman's] improper inquiries about celebrities, friends and others as hacking.

The prosecution's theory of the RICO predicates misses the mark. Arneson,

Stevens, Wright and Pellicano did not commit these alleged RICO predicates as forged by the prosecution. Likewise, based on the same analysis, they did not commit the corresponding substantive counts.

Finally, the identity theft and unauthorized computer access racketeering acts and counts do not specify on the verdict form which of the computer crime statutes (state or federal) was violated beyond a reasonable doubt. Without this clarification, the jury was simply asked to check a box if they found Pellicano guilty of the racketeering act and guilty of the substantive count. It is an impermissible mystery which of the two computer laws, if any, was found to have been unanimously violated.

3. There Was Insufficient Evidence To Support The State Bribery Racketeering Acts.

On October 29, 2007, in response to Arneson's motion to strike bribery from the RICO indictment, the court defined the conduct which constituted state bribery as alleged as racketeering acts in this case.[23] ER 143-150; CR 766. Specifically, the court, in rejecting the reasoning of a similar case in *Valdes v. United States*, 475 F.3d 1319 (D.C. Cir. 2007), strained with the *Valdes* dissenters to conclude that Pellicano's payments to Arneson or Stevens to conduct "runs" on work computers constituted "short investigations of innocent individuals." ER 148. The court

[23] Pellicano joined in this motion. CR865.

believed that searches on the work computers were "matters" undertaken by an official because "they are an investigation prompted by the bribery itself." ER148. Not only did the court error in this decision, but there was no evidence at trial supporting the court's definition of how computer "runs" of non active police matters suddenly became official matters.[24]

Los Angeles investigator Helen Lim from the Internal Affairs Division testified at trial. RT 3/14/08 RT 19-68; 3/14/08 PM 5-43. Although she confirmed that Arneson was an authorized user of his work computers, she never testified that "running" a person's name somehow constituted opening an investigation.

Finally, the bribery racketeering acts violated the statute of limitations. Under *United States v. Sears, Roebuck & Co.*, 785 F.2d 777 (9th Cir.1986), the new racketeering acts charged for the first time in the Fifth Superseding Indictment, impermissibly broadened and substantially amended the charges in the original indictment.

C. There Was Insufficient Evidence To Support The RICO Conspiracy Count.

Count Two alleged that Pellicano conspired with others to violate Title 18 U.S.C. 1962(c) (RICO) through an enterprise as defined in the indictment. The

[24] It is undisputed that none of the "runs"alleged as state bribery racketeering acts involved an open or ongoing police investigation. Rather, the "runs" were all associated with civil or private investigative matters.

definition of the alleged enterprise's racketeering activity was limited to racketeering acts (identity theft, wire fraud, bribery and unauthorized access of protected computer databases) of which there was insufficient evidence presented at trial.

Moreover, the government's theory of the alleged RICO conspiracy cannot stand. Put another way, the underpinnings of the government's theory has been totally rejected by the decisions in *Skilling* and *Brekka*.

The government erred in stating that "runs" by employees on work computers could be bootstrapped into wire fraud through the deprivation of honest services, identity theft through access of work computers or somehow serve as an official "act" for state bribery.[25] This is not a situation when a RICO conspiracy count survives notwithstanding acquittal on the substantive RICO charge. *United States v. Santo,* 128 S.Ct. 2020 (2008). Here, there was no enterprise and no racketeering acts in which to conspire to commit.

D. Pellicano Adopts and Joins Arguments Challenging RICO, RICO Conspiracy And All Substantive Counts Submitted By All Appellants Pursuant to FRAP 28(i).

Pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure,

[25] Moreover, reversal and remand is required if the Court finds one of the several theories of racketeering correct because, as in Count Two, there is no clarification which of the theories of racketeering the jury found beyond a reasonable double. Hence, as seen *Skilling*, remand was necessary because there were three objects of the conspiracy in order to determine whether reversal touched any of the other convictions. The same approach would hold true here. *See Yates v. United States*, 354 U.S. 298 (1957).

Pellicano adopts and joins by reference the arguments of appellants Turner and Arneson regarding their challenges to Count One (RICO), the racketeering predicates, Count Two (RICO conspiracy) and all corresponding substantive counts. Also, Pellicano adopts and joins in all other arguments concerning the substantive counts made by all appellants as they pertain to Pellicano.

V. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT IMPOSED AN UNREASONABLE SENTENCE OF 180 MONTHS

A. Statement and Standard of Review.

A district court's sentencing decisions are reviewed for abuse of discretion. *Gall v. United States*, 552 U.S. 38 (2007); *United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (en banc). Sentences are reviewed for reasonableness, and only a procedurally erroneous or substantively unreasonable sentence is set aside. *Rita v. United States*, 551 U.S.338 (2007). Procedural error includes failing to calculate the proper guideline range, failing to consider the factors from 18 U.S.C. 3553(a), and choosing a sentence based on clearly erroneous facts. *Carty*, 520 F.3d 993.

Here, the court imposed an unreasonable sentence and conducted several procedural errors. The court miscalculated the guidelines and failed to consider the statutory factors mandated in 18 U.S.C. 3553(a). Well before sentencing it was clear that the court was predisposed to impose an unreasonable sentence. In considering the prosecution's request for an anonymous jury, for example, and

without hearing any evidence, the court simply adopted the prosecution's unfounded claims that Pellicano could be dangerous, may have connections to organized crime, and made threats against Saunders and a potential witness (Proctor). CR1178. These comments, as well as the statements at sentencing, require a remand to a different judge.

B. The Probation Officer Correctly Recommended A Downward Departure To A Sentence of 70 Months.

On September 24, 2008, the probation officer recommended a term of imprisonment of 70 months. SER 1-4. On September 12, 2008, the United States Probation Office submitted its Presentence Investigation Report ("PSR") to assist the Court in the sentencing of Mr. Pellicano. In the PSR, the Probation Officer calculated that: (1) the base offense level was 24 points; (2) there were no points for role in the offense or specific offense characteristics; (3) 5 points were added for the multiple count adjustment; and (4) the total offense level was 29. With a criminal history category of II, the probation officer (PO) determined that Pellicano had an advisory sentencing guideline range of 97-121 months.

On October 24, 2008, the government filed its sentencing memorandum. The government objected to both the PO's calculation of 97-121 months as well as the sound reasoning supporting the 70 month term of imprisonment. The government contended that the final offense level should be 33 and the advisory

sentencing range should be 151–188 months.

In considering the prosecution's position, the P O identified several errors: (1) the prosecution incorrectly believed that a four-level enhancement should apply to all counts of conviction; (2) the prosecution mistakenly believed that a two-level enhancement for special skill should apply to the wire-tap convictions; and (3) no grounds for an upward departure existed.

On November 7, 2008, the Probation Office responded to the government. The Probation Office informed the Court that it ". . . stands by the calculations as set forth in the PSR." The PO expressly rejected the prosecution's "grounds" for an upward departure and found nothing warranting the two-level special skills enhancement but deferred the matter to the Court.

The PO did not sway from its 70 month sentence. The officer outlined for the court the reasoning for this reasonable sentence. It noted that Pellicano's conviction for illegal possession of explosives, stemming from the same search warrant and initial investigation, would have been included in the current PSR if they were charged together.[26] Furthermore, no criminal history points would have been calculated if the explosives and RICO cases were considered in the same PSR. Thus, Pellicano's advisory range would have been 57 to 78 months. Given 30 months already served by Pellicano, the reasonable sentence for the latter

[26] Pellicano respectfully submits with this appeal his earlier PSR for the explosives case originating from this same 2002 investigation. SER 44-77.

charges from this same 2002 investigation was 70 months. SER 43. The PO explicitly stated that she had balanced the aggravating and mitigating factors in Pellicano's case and believed that 70 months was sufficient, but not greater than necessary to comply with the sentencing purposes set forth in 18 U.S.C. 3553(a)(2). The court disregarded the recommendation and unreasonably nearly tripled Pellicano's sentence to 180 months.

C. The Court's Incorrect Application of the Sentencing Guidelines

The court's sentence was unreasonable by any measure. In comparison with the PO's recommendation of 70 months or the range of 97-121 months, the court's sentence was unreasonably harsh.

In fact, Pellicano's sentence is well over 100 months more than the sentences imposed on state judges and lawyer for RICO convictions predicated on bribery. *United States v. Frega*, 179 F.3d 793 (9th Cir. 1999). In *Frega*, a San Diego attorney for twelve years paid numerous bribes to three Superior Court judges in order to receive an unfair advantage in cases he was involved in Superior Court. RICO charges predicated on mail fraud and bribery were filed against the lawyer and judges. One judge became a prosecution witness. After a jury trial, the lawyer received a sentence of 41 months. The two judges received sentences of 41and 33 months.

The similarities between *Frega* and Pellicano's case are easily noticed. Both

involve RICO, fraud, bribery and, as the government stated in Pellicano, both involved efforts to gain an advantage in the legal system. Yet, sentences no higher than 41 months were imposed to the three officers of the court. It defies fairness, justice and reasonableness when a RICO conviction for a judge, taking bribes for 12 years, receives a 41 month sentence and a private investigator is slammed with a sentence of 180 months.[27]

D. The Court Did Not Adhere To Its Obligation To Impose a Fair and Just Sentence

It is well settled that the court's mandate is to apply the sentencing factors set forth in 18 U.S.C. § 3553 (a) and that the Federal Sentencing Guidelines are advisory rather than mandatory. *United States v. Booker*, 543 U.S. 220 (2005).

In *Rita v. United States*, 551 U.S. 338 (2007), the Supreme Court focused on the extent to which the guidelines must be honored by the trial court and observed:

> "In instructing both the *sentencing judge* and the *Commission* what to do, Congress referred to the basic sentencing objectives that the statute sets forth in 18 U.S.C. § 3553(a) (2000 ed. and Supp. IV). That provision tells the *sentencing judge* to consider (1) offense and offender characteristics; (2) the need for a sentence to reflect the basic aims of sentencing, namely (a) "just punishment" (retribution), (b) deterrence, (c) incapacitation, (d) rehabilitation; (3) the sentences legally available; (4) the Sentencing Guidelines; (5) Sentencing Commission policy statements; (6) the need to avoid unwarranted disparities; and (7) the need for restitution. The provision also tells

[27] The unreasonableness of this sentence is even further evident when one considers that an Los Angeles Police Officer wasn't prosecuted for selling information from law enforcement computers about celebrities. *Chrisman v. City of Los Angeles*,155 Cal.App.4th 29 (2007).

> the sentencing judge to "impose a sentence sufficient, but not greater than necessary, to comply with" the basic aims of sentencing as set out above."

Rita, supra, at 2463.

The § 3553 (a) factors should have been the focus of the sentencing court in the case.

A. Offense Characteristics.

As to the charges relating to access of work data bases, the court's sentence was extreme. For instance, on December 8, 2008, the government announced a guilty plea and plea agreement for Mark T. Rossini, a former Supervisory Special Agent of the FBI who "made over 40 searches of the FBI's Automated Case Support System (ACS) which contains confidential, law-enforcement sensitive information that relates to historic and on-going criminal investigations initiated by, and supported by, the FBI." Rossini was charged with five misdemeanors and received a sentence of one year probation.[28]

The claimed importance of the charges relating to improper access to the police data bases was exaggerated. Virtually all of the information accessed was public information. DMV information is available to bonded subscribers at low

[28] In another case from the Central District of California, another FBI agent, Peter Norell, was sentenced to probation with six months home confinement for his improper use of FBI databases. (SACR 10-46-AG, C.D. Cal.). That "slap on the wrist" serves as another example of how the government's charges in this case (including ignoring Ornellas "running" his neighbor on the LAPD database) were wildly unfair, unjust and blindly overzealous.

fees, convictions are public records, and the rest of the information, except for arrests without convictions, are readily available on data bases legally used by law firms and investigators nation-wide.

B. The Need For A Sentence To Reflect The Basic Aims Of Sentencing: (a) "Just Punishment" [Retribution], (b) Deterrence, (c) Incapacitation and (d) Rehabilitation**.**

The basic aims of sentencing would be satisfied with a 70 month sentence which was already far greater than any other sentence for similar conduct. This widely-publicized case had a substantial deterrent effect. Extended warehousing of Pellicano serves no rehabilitative effect and no public good. To the contrary, the 180 month sentence imposed here constitutes an improper disparity indicating an injustice.

C. The Sentencing Guidelines.

1. The Government's Burden Under the Guidelines.

The government has the burden of proving the facts necessary to support a sentence enhancement by a preponderance of the evidence. *United States v. Pham*, 545 F.3d 712 (9th Cir. 2008). This includes role enhancements. *United States v. Milton*, 153 F.3d 891 (8th Cir. 1998). Although hearsay statements may be used at sentencing, a district court must carefully scrutinize hearsay evidence to ensure that it has sufficient indicia of reliability. *United States v. Scheele*, 231 F.3d 492,

500, fn.5 (9th Cir. 2000).

2. Determining the Base Offense Level Under the Guidelines.

The PSR correctly determined one offense level for the RICO counts under USSG 3E1.1. PSR ¶ 96. Under USSG 2E1.1, the sentencing court must determine what was "the underlying racketeering activity." *United States v. Rose*, 320 F.3d 170 (2nd Cir. 2003). The PSR correctly assigned an offense level to each predicate act and applied the grouping rules. *Id. United States v. Nguyen,* 255 F.3d 1335 (11th Cir. 2001) (noting that Application Note 1 also refers to Chapter 3D which includes the grouping provisions). The PSR assigned offense levels for each substantive count. PSR ¶¶ 97-112. Because each particular offense witnessed varying levels of Mr. Pellicano's participation, each conviction (and predicate act) correctly had a different corresponding role in the offense adjustment. Finally, the PSR applied Chapter 3D and grouped the offense levels into the final offense level of 29. PSR ¶ 132.

Significantly, **wiretapping is not a RICO predicate** under 18 U.S.C. § 1961(1). The wiretapping sentencing facts cannot therefore be used in determining the 3B1.1 aggravating role enhancements. Put another way, the prosecution incorrectly applied the maximum four level enhancement to all offenses. Excluding the wiretapping facts from the determining the role in the offense adjustment was critical because it is the offense with the greatest leadership role as

well as the offense with the most extensive. PSR ¶ 102.

3. The Four Level Enhancement Does Not Apply For Each Count.

The PSR correctly assigned varying levels of USSG 3B1.1 *role* enhancements for the RICO convictions (2 levels), the wiretapping convictions (4 levels) and no role enhancements for the conviction pertaining to a wiretapping device. (PSR ¶¶74, 82, 91, 102, 109). Regardless of the factual distinctions and leadership in these counts (and ignoring its own charging decisions) the government argued that the maximum four levels should apply. This approach completely ignored the expressed language in USSG 2E1.1, Application Note 1 which requires the application of Chapter Three Parts A, B, C and D adjustments to the RICO predicate acts.

At sentencing, the prosecution mainly looked to *United States v. Damico,* 99 F3d 1431 (7th Cir. 1996) to support its broad brush approach to the role adjustment.[29] Damico conceded that the facts of the role enhancement would apply to the overall RICO conspiracy. Here, however, the offense which arguably included the facts showing Pellicano to be an organizer and in a leadership role (as well as being otherwise extensive) results in the four level enhancement was the non-RICO predicate of wiretapping.

[29] As a further example of sentencing disparity in RICO cases, it bears noting that the *Damico* court imposed a sentence of 87 months for the defendant's 15 year RICO leadership role of a criminal enterprise engaged armed robbery, extortion, gambling and book making.

Moreover, the fact that a defendant played an important or even essential role in a criminal enterprise does not necessarily require an aggravating role adjustment. A defendant must be a supervisor in the actual criminal conduct. It is not sufficient that he supervises other participants in the conspiracy in their non-criminal activities. A defendant who merely manages a business that was used in the offense is not subject to the role adjustment. *United States v. Ramos-Paulino,* 488 F.3d 459 (1st Cir 2007).

The PSR correctly noted that the only offense conduct warranting a 4 level increase because of Pellicano's role, the number of participants and because it was extensive was ***only*** the wiretapping conduct. Because wiretapping is not a RICO predicate those facts cannot be used to support a 4 level enhancement for Pellicano's role in the overall RICO conspiracy.

4. The USSG 3C1.1 Obstruction of Justice Enhancement Should Not Apply.

The government argued for a two level increase for obstruction of justice claiming that Pellicano intimidated witnesses and ordered the destruction of evidence. Appreciating the weakness of these allegations, no criminal charges were ever filed against Pellicano on any of these claims. Indeed, the claim that there was a plot to intimidate Proctor had been hauled out from the government's closet in the past for the media. In March 2003, Judge Tevrizian rejected a similar

prosecution story claiming that Pellicano threatened a witness (Tarita Virtue).

Although steadfast in his refusal to cooperate with the government, there were several instances where Pellicano had taken steps to assist the process. For instance, at the time of the first search warrant, he informed and directed the FBI to the explosives stored in his office. He self-surrendered to federal custody before ordered to do so after his conviction in the first case.

Absent from the prosecution's arguments for an obstruction enhancement were several "tests" that serve to qualify whether the enhancement applies. The "obstructive conduct" must be material; that is it must have some impact on the investigation or prosecution of the federal offense. *United States v. Zagari,* 111 F.3d 307, 328-29 (2nd Cir. 1997)(reversing even though defendant's false state deposition was motivated by the federal offense, "motivation alone does not equate to materiality;" *United States v. Jenkins*, 275 F3d 283 (3rd Cir. 2001) (finding no evidence that the federal proceedings were impeded by defendant's failure to appear in state court); *United States v. Jimenez-Ortega,* 472 F.3d 1102 (9th Cir. 2007) (remanding where district judge failed to find that false testimony was material).

The prosecution represented that the wiretapping investigation began at the time of Pellicano's detention hearing on November 22, 2002. There was nothing shown by the government that Pellicano knew of this investigation and had the

requisite *men rea* to obstruct the investigation. *See United States v. Campa*, 529 F.3d 980 11th Cir. 2008). Here, apart from conclusions and argument, the government failed to show that any alleged destruction of evidence either by Pellicano or by the employees at PIA was knowingly ordered so as to impede an investigation. Simply stated, if the government's theory was correct, Pellicano would have destroyed the evidence found and used in the case. Instead, the government was able to seize rooms of data from PIA computers with its unconstitutional warrants.

Equally lacking in evidentiary support was the prosecution's claim that Pellicano intimidated witnesses. Where a defendant's statements to a witness are ambiguous or not clearly intimidating, they may not justify an obstruction increase. *United States v. McLaughlin*, 126 F.3d 130 (3d Cir. 1997) (reversing enhancement even though defendant sent investigators to secretly tape record statements from witnesses); *United States v. Emmert*, 9 F.3d 699 (8th Cir. 1993) (statements advising witnesses to "stay strong" and "be quiet" were not so plainly obstructive as to warrant adjustment).

The same ambiguity is seen in the alleged "threats" to Tarita Virtue *via* her father and the letters pertaining to Proctor. Plus, the alleged "Proctor threat" was deemed baseless, had nothing to do with the RICO case and should not have been considered at sentencing.

5. The Enhancement For Special Skills Did Not Apply.

The PSR correctly concluded that the USSG 3B1.3 special skill enhancement did not apply to Pellicano because he had others perform the tasks requiring these skills. PSR ¶ 103. The "special skills" enhancement cannot be based on the co-conspirator's skills. *United States v. Gromley,* 201 F.3d 290 (4th Cir. 1990) (reversing increase where defendant simply gathered information from clients and fabricated dependent's information, filing status, and tax credit claims, which he then turned over to the other conspirators who possessed special skills). The fact that a crime was committed skillfully is insufficient to show that defendant used a special skill; nor does the mere fact that the defendant learned how to commit the offense justify a USSG 3B1.3 increase.

Finally, the adjustment for the use of a special skill may not be employed if the skill is included in the base offense level of the Chapter 2 guideline. This would result in impermissible double-counting. Both of the offenses of wiretapping or manufacturing an eavesdropping device inherently include a special skill to do so. To include this enhancement in the guideline calculation would result in impermissible double-counting.

6. The Guidelines Support a Finding of Criminal History Category I or a Concurrent Sentence Beginning on November 17, 2003.

The PSR placed Pellicano in criminal history category II due to his January

24, 2004 conviction for possession of explosives. PSR ¶¶ 136 – 146. It is undisputed that the charge Pellicano possessed explosives and allegedly wiretapped or "gathered information" originated from the same investigation and search warrant. Moreover, all of these cases concerned Pellicano, his role as a private investigator and the operations of the PI. The explosives were found in a safe at PIA. In other words, the conviction for possession of explosives was part and parcel of the conduct included in the RICO case – or, as the government labeled it, "a veneer of legitimacy" created by PIA.

USSG 4A1.2(a)(1) precludes counting as a "prior sentence" any sentence previously imposed for conduct that is "part of the instant offense." Where the prior sentence is part of the instant offense, it should not be counted in criminal history. *United States v. Henry,* 288 F.3d 657 (5th Cir. 2002) (reversing criminal history points where conviction was part of current offense); *United States v. Thomas,* 54 F.3d 73 (2nd Cir. 1995) (priors may be relevant conduct as part of "same course of conduct" even if they are not part of a common scheme or plan).

The delay in charging and bringing Pellicano forward to face the new charges resulted in a very real lost opportunity to have the instant sentence run concurrent with the explosives sentence. The government had knowledge of the wiretapping as earlier as January 2003 according to the search warrants and discovery in the case. Yet, the indictment was not returned until October 2005; and

the government waited 5 months, just as the term of the first sentence discharged, before "arresting" Pellicano in prison. USSG 5G1.1(c) along with the factors in 18 U.S.C. § 3553 support calculating Pellicano's sentence from November 2003, not February 2006.

Finally, case law permits remand to a different judge for resentencing if the court has displayed a predisposition against a defendant. *United States v. Huckins*, 53 F.3d 276 (9th Cir. 1995). The outrageous sentence itself, along with the court's *prepared* statement used to jump 110 months above the probation officer's recommendation, clearly shows that Anthony Pellicano would not be treated fairly if he were remanded for resentencing in that courtroom.

CONCLUSION

For all of the above reasons, Pellicano's convictions must be reversed. Alternatively, if the convictions are affirmed on the merits, his sentence should be reversed and the case remanded to a different judge for resentencing.

Respectfully submitted,

/s /Steven F. Gruel

Dated: December 1, 2010

STEVEN F. GRUEL
315 Montgomery Street, 9th Floor
San Francisco, California 94104
Telephone: (415) 989-1253

Attorney for Anthony Pellicano

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Opening Brief is: Proportionately spaced, has a typeface of 14 points or more, and contains 17,314 words.

Date: December 1, 2010 *s/Steven F. Gruel*
STEVEN F. GRUEL

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, appellant's counsel states that, in addition to the appeals with which this appeal has been consolidated, this appeal is related to the following matters:

In *United States of America v. Pellicano*, 135 F. App'x 44 (9th Cir. June 9, 2005), the Court considered and denied a challenge to the validity of the November 21, 2002 search warrant of PIA predicated on an application of *Leon* good faith exception to the exclusionary rule. Since that 2005 decision, Pellicano discovered and submitted to the court previously undisclosed evidence directly challenging the good faith grounds which upheld that same search warrant declaration. The district court's denial of Pellicano's challenges to this search warrant and denial of the request for a *Franks* hearing are before the Court.

This case is also related to *United States of America v. Pellicano*, Appeal No. 10-50464 which is currently pending. On September 29, 2010, a motion to consolidate was filed in that case relating it to this consolidated appeal (Dkt #2).

Finally, in *United States v. McTiernan*, 546 F.3d 1160 (9th Cir. 2008), the Court considered and granted a motion to withdraw the guilty plea of a defendant who was charged in a case as a result of the same FBI investigation in this case.

CERTIFICATE OF SERVICE

I, hereby certify that on December 1, 2010, I electronically filed the foregoing opening brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: December 1, 2010 *s/ Steven F. Gruel*
STEVEN F. GRUEL