THE HONORABLE RONALD B. LEIGHTON
NOTED FOR: MAY 3, 2018
ORAL ARGUMENT REQUESTED

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

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TROY X. KELLEY,

Defendant.

Case No. 3:15-cr-05198-RBL

DEFENDANT TROY X. KELLEY'S MOTION FOR NEW TRIAL PURSUANT TO RULE 33

I. INTRODUCTION

After nearly six weeks of trial, the jury convicted Defendant Troy Kelley of nine counts and acquitted him of the remaining five. Dkt. No. 556. As the mixed verdict and prior mistrial attest, this was an incredibly close case, in which any number of small things could have made all the difference between Mr. Kelley going to prison or returning to his family. Unfortunately, several factors pushed the jury toward a guilty verdict that was not supported by the evidence.

First, the Court declined to grant a continuance after the government revealed on the eve of trial that it had been coordinating with Fidelity to obtain a small subset of emails from 2003 concerning Mr. Kelley's relationship with Fidelity. The lack of a continuance proved highly prejudicial to Mr. Kelley. The government relied heavily on the late-produced emails, while Mr.

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SEATTLE, WASHINGTON 98101
TEL (206) 407-2200 FAX (206) 407-2224

Kelley was left with insufficient time to marshal evidence from 2004 and 2005 to fill in the incomplete picture painted by the emails.

Second, the government misrepresented key facts to the jury and deliberately had one of its witnesses suggest that Mr. Kelley should have presented evidence. It represented to the jury that a key piece of evidence, a spreadsheet Mr. Kelley allegedly falsified, was an authentic document, when all competent evidence was to the contrary. It repeatedly misrepresented a court order from a class action case with direct bearing on Mr. Kelley's case, telling the jury it could ignore arguments made by title companies and accepted by courts which supported Mr. Kelley's position because, according to the government, a court determined that PCD did owe refunds. But contrary to the government's suggestions, no court reached this conclusion. And it allowed its tax expert, Agent Paul Shipley, to testify that Mr. Kelley had "numerous opportunities to explain himself" in the criminal investigation, a blatant attempt to shift the burden to Mr. Kelley.

Third, the government sought to relitigate whether Mr. Kelley made a false statement to IRS Agent Kerry Nordyke about revenue recognition—despite the fact that Mr. Kelley was acquitted of this charge at the first trial. The government relied on these supposedly false statements to prove Mr. Kelley's *mens rea* on the remaining tax counts. In so doing, it violated the Fifth Amendment guarantee against Double Jeopardy.

Finally, during less than two days of deliberations, the jury informed the Court three times that it was hung. Nonetheless, the Court directed the jury to continue its deliberations, providing several supplemental instructions that did not follow established Ninth Circuit procedures to ensure the jurors were not coerced into compromising their genuine beliefs to reach a verdict. Only after the Court's *third* charge to keep deliberating did the jury return its guilty verdict. But the Ninth Circuit has recognized that verdicts reached in these circumstances are impermissibly tained by coercion and cannot stand.

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Given the closeness of the case, any one of these individually could have tipped the balance. Taken together, it is apparent that the jury's verdict was tainted. For each of these reasons, Mr. Kelley respectfully requests a new trial.[1]

II. ARGUMENT

A. Legal Standard.

Federal Rule of Criminal Procedure 33 provides that, "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). The district court has discretion to grant a motion for a new trial. *United States v. Marques*, 600 F.2d 742, 747 (9th Cir. 1979).

"A district court's power to grant a motion for a new trial is much broader than its power to grant a motion for judgment of acquittal." *United States v. A. Lanoy Alston, D.M.D., P.C.*, 974 F.2d 1206, 1211 (9th Cir. 1992). "The district court need not view the evidence in the light most favorable to the verdict; it may weigh the evidence and in so doing evaluate for itself the credibility of the witnesses." *Id.* at 1211–12 (quoting *United States v. Lincoln,* 630 F.2d 1313, 1319 (8th Cir. 1980). "If the court concludes that, despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred," it may set aside the verdict and grant a new trial. *Id.*

While a Court's discretion to grant a new trial is broad, a court "*must* grant a new trial if there is a reasonable probability that error infecting the prior proceedings could have had a substantial influence on the jury's decision." *United States v. Bevans*, 728 F. Supp. 340, 343 (E.D. Pa. 1990), *aff'd*, 914 F.2d 244 (3d Cir. 1990) (emphasis added).

[1] Mr. Kelley moves for a new trial on all grounds previously argued in his briefing and orally and on all other grounds available. This brief by Mr. Kelley is intended to elaborate on a certain arguments but not to the exclusion of others that are available.

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B. The Denial of Mr. Kelley's Motion for a Continuance Prejudiced Mr. Kelley and Necessitates a New Trial.

Three weeks before the second trial began, the prosecution informed defense counsel that Fidelity had recovered a back-up tape featuring Julie Yates's emails from 2003. This was a significant development because Ms. Yates was the key person at Fidelity who managed their relationship with PCD and Mr. Kelley from 2003–2006. Unfortunately, this development came far too late; with only three weeks until trial, Mr. Kelley was left with insufficient time to address the new materials or to conduct any additional investigation as required by the new evidence. In particular, Mr. Kelley was unable to subpoena or otherwise obtain Fidelity backup tapes with emails from 2004 or 2005, or from custodians besides Ms. Yates. Accordingly, Mr. Kelley promptly moved to exclude the new emails or, in the alternative, for a continuance to seek additional materials. The Court denied Mr. Kelley's requests, however. Dkt. No. 471. As a result, the 2003 Yates emails came in and, with Mr. Kelley unable to effectively address them at trial, they proved pivotal to the government's case. The Court's decision to deny Mr. Kelley a continuance was erroneous. It prejudiced Mr. Kelley's ability to prepare for trial and obtain records material to his defense; it should be corrected by ordering a new trial.

A trial court "has considerable latitude in granting or denying continuances." *United States v. Pope*, 841 F.2d 954, 956 (9th Cir. 1988). But the court's discretion must be guided by four factors: "(1) the requester's diligence in preparing for trial; (2) the likely utility of the continuance, if granted; (3) the inconvenience to the court and the other side; and (4) prejudice from the denial." *Id.* (citing *United States v. Flynt*, 756 F.2d 1352, 1358 (9th Cir. 1985)). In this case, each factor weighed in support of a continuance. Allowing a continuance would have enabled Mr. Kelley to seek Fidelity backup tapes with emails from 2004 through 2005, which would have explained what happened in the critical time period in which the government contends Mr. Kelley began stealing money from Fidelity's clients.

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When this Court denied Mr. Kelley's request for a continuance, neither the Court nor defense counsel had fully reviewed the 2003 Yates emails, and so the potential for prejudice to Mr. Kelley was largely theoretical.[2] As trial unfolded, however, the prejudice became apparent. The government relied heavily on the newly discovered emails, claiming they showed Mr. Kelley's promises to pay refunds to Fidelity's customers. Calfo Decl., Exs. A, B (Exs. 300A, 300B). The government cited the emails in its opening, its closing, in questioning its own witnesses, and in cross-examining Mr. Kelley's witnesses. *See, e.g.*, Calfo Decl., Ex. C (Nov. 14, 2017, Opening Tr.) at 35:23–36:2, 62:2–7; Ex. D (Dec. 18, 2017, Closing Tr.) at 3:5–10, 9:7–20; Ex. E (Nov. 28, 2017, Phillips Tr.) at 29:5–31:4; Ex. F (Nov. 29, 2017, Phillips Tr.) at 3:16–5:24; Ex. G (Dec. 15, 2017, Schedler Tr.) at 18:22–19:21. Mr. Kelley had no way of effectively responding to this new evidence, however. With additional time, Mr. Kelley could have explored what other evidence existed from 2003 and later, and in particular, whether Fidelity backup tapes contained emails from 2004 through 2005 or from other relevant custodians.

This inability to obtain 2004 and 2005 emails was particularly prejudicial because the government claimed that Mr. Kelley *did* pay refunds in 2003—at the time of the newly discovered emails—but that *something* happened in 2004 or 2005 which caused Mr. Kelley to stop paying refunds. The emails from 2004 and 2005 could well have explained what happened—but Mr. Kelley never got the chance to obtain those emails.

Exhibit A-529 provides a case-in-point. That exhibit shows that in January 2004, Julie Yates and Mr. Kelley discussed and apparently agreed to an additional $5 fee. That email demonstrates that Mr. Kelley's agreement with Fidelity was nowhere near as rigid or as static as the government has long contended. There is no telling how many more emails like this Mr. Kelley might have found had he been provided an opportunity to review Fidelity's email records from 2004 and 2005. Instead, Mr. Kelley was left with only the one email. And in an ironic

[2] The government provided defense counsel and the Court with one of the newly discovered emails less than an hour before the hearing on Mr. Kelley's motion for a continuance.

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1 twist of the knife, the government's strategy for downplaying Exhibit A-529 was to cast doubt on
2 its authenticity—an argument they could only make because Mr. Kelley could not access the
3 Fidelity backup tapes. *See, e.g.*, Calfo Decl., Ex. D (Dec. 18, 2017, Closing Tr.) at 23:13–24:1,
4 68:13–21. Had Mr. Kelley been able to obtain the version of the email directly from Fidelity's
5 backup tapes, the government would not have been able to suggest it was inauthentic.

6 In the end, Mr. Kelley was no doubt prejudiced by his inability to obtain additional
7 Fidelity records. Nor were the interests of justice served by denying a continuance.

8 The reason Mr. Kelley was caught off-guard by the 2003 emails was not because he was
9 dilatory in preparing for trial—it was because the government was. As explained in defense
10 counsel's letter to the Court of October 22, 2017, prior to and during the first trial, Mr. Kelley
11 had repeatedly been told that Fidelity's backup tapes from 2003 through 2005 were effectively
12 irretrievable. Dkt. No. 470. In March 2016, shortly before the first trial, defense counsel
13 subpoenaed Fidelity's records relating to PCD, but was told in no uncertain terms by Fidelity's
14 counsel that all such documents still in existence had been turned over to the government. *Id.* at
15 4–5. Despite those representations, however, a Fidelity IT person testified at the first trial that
16 emails from prior to 2006 might exist on backup tapes, but that he had never searched for them.
17 *Id.* at 5, 21–23.

18 As the government recently admitted, it knew that Fidelity records from pre-2006 existed
19 *before* the first trial. Dkt. No. 468 at 2.

20 Then on October 19, 2017, just three weeks before trial, Mr. Kelley first learned that
21 Fidelity had obtained the 2003 backup tape. Dkt. No. 470. At the same time, Mr. Kelley learned
22 that the government had been corresponding with Fidelity for months about the existence and
23 potential recovery of backup tapes, but had never informed defense counsel about these highly
24 relevant pre-2006 emails. *Id.* As the government later conceded, it reached out to Fidelity in
25 July 2017 to obtain the pre-2006 emails it had known about since March 2016. Dkt No. 468 at 3.

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Which means two things: first, the government, knowing it was retrying Mr. Kelley, waited more than a year, until just a few months before the second trial, to obtain Fidelity's backup tapes; and second, the government waited another three months—until the month before trial—to tell Mr. Kelley what it was up to. And then, "through happenstance," Fidelity just so happened to find Julie Yates's 2003 emails, which detailed the beginning of PCD's relationship with Fidelity, but none of the 2004 or 2005 emails, which would have explained what happened at the time the government claims PCD's relationship with Fidelity changed. *Id.* at 4. Had the prosecution intentionally set out to sandbag Mr. Kelley, it could hardly have come up with a more audacious scheme.

Once defense counsel learned of the existence of the 2003 backup tape, it sought to exclude the 11th-hour evidence or, alternatively, continue the trial, but both requests were denied. Dkt. No. 471. Thereafter, Mr. Kelley did what he could—deposing certain Fidelity employees and using the 2003 emails as far as they were helpful—but with no way to obtain and review the 2004 and 2005 emails in time, Mr. Kelley was left unable to adequately prepare for the introduction of the government's new evidence.

Nor would a continuance have caused substantial inconvenience to the Court or the government. Retrial in this matter was initially scheduled for March 13, 2017. Dkt. No. 310. The parties agreed to multiple lengthy continuances, during which time the government was, unbeknownst to defense counsel, working with Fidelity to obtain the 2003 backup tape. In light of these repeated continuances, there is no basis for the government to argue that *this* continuance somehow would have caused it inconvenience. And even if the government could make such an argument, its own dilatory behavior in failing to obtain backup tapes it knew were retrievable would undermine any claim of prejudice.

Denying a motion for a continuance is an abuse of discretion where the denial prejudices a defendant who has been diligent in pursuing his defense and where the continuance would not

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cause substantial inconvenience to the other side. *Pope*, 841 F.2d at 958. While the prejudice to Mr. Kelley may not have been apparent at the time this Court denied his request for a continuance, in the end it proved devastating, and a new trial is necessary to cure the error.

C. The Prosecution Presented Testimony and Arguments it Knew or Should Have Known Were False.

When a prosecutor misrepresents the evidence at trial or presents evidence he knows to be false, a new trial should be granted if it is more likely than not that the misconduct materially affected the fairness of the trial. *United States v. Reyes*, 577 F.3d 1069, 1076–78 (9th Cir. 2009). In *Reyes*, the prosecution argued to the jury material facts that it knew to be false, or at the very least had strong reason to doubt. The Ninth Circuit explained that "[d]eliberate false statements by those privileged to represent the United States harm the trial process and the integrity of our prosecutorial system." *Id.* at 1078. A "prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *United States v. Young*, 470 U.S. 1, 18–19 (1985) (citing *Berger v. United States*, 295 U.S. 78, 88–89 (1935)). "For this reason, it is improper for the government to present to the jury statements or inferences it knows to be false or has very strong reason to doubt." *Reyes*, 577 F.3d at 1077.

1. Thomas Song's Testimony Should Have Been Excluded.

a. Thomas Song's Testimony about Exhibit 436 Was Not Reliable.

One of the government's central claims was that Mr. Kelley had provided falsified spreadsheets to the title companies to make them believe that he was issuing refunds or using the money to pay trustees; the government argued that this supported the theory that the money was stolen. *See, e.g.*, Calfo Decl., Ex. D (Dec. 18, 2017, Closing Tr.) at 22:8–9 ("Exhibit 436 . . . is another lie, another part of the fraud."). It presented only one document to support this theory: Exhibit 436. Jason Jerue, a PCD employee, testified that Mr. Kelley instructed him to falsify spreadsheets to make it appear as if the balance was "zeroed out," but he could not explain how

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1 Exhibit 436 had been sent from PCD to Old Republic Title. There were no emails sending it,
2 although there were other emails sending other spreadsheets. Patty LeVeck, an Old Republic
3 employee, testified that Old Republic was never able to download spreadsheets from PCD's
4 website.

5 In fact, Exhibit 436 came from Scott Smith, outside counsel for Old Republic. The
6 metadata on Exhibit 436 showed that it had been last modified by Mr. Smith on May 13, 2010.
7 The government affirmatively presented Exhibit 436 as if it was attached to Exhibit 436A, an
8 email sent from Ms. LeVeck at Old Republic to Mr. Smith on May 11, 2010. *See, e.g.*, Calfo
9 Decl., Ex. D (Dec. 18, 2017, Closing Tr.) at 69:14–20 ("That exhibit was identified by Scott
10 Smith. It was given to him by Julie (sic) LeVeck. You have the email. It was given to him in
11 2010. 436A is the email."). But if a native version of Ms. LeVeck's email attaching Exhibit 436
12 exists, the defense has not seen it. The email and attachment have only ever been produced
13 separately, and the government introduced no competent evidence tying them together.[3]

14 The government's rebuttal computer forensics expert, Thomas Song, testified that the
15 reason the attachment to the email was modified by Mr. Smith *after* he received it was that when
16 an email recipient makes changes to an attachment, the changes are saved—"synchronize[d]"—
17 on both the local user machine and the server. Decl. of Eric Blank in Supp. of Def.'s Mot. for
18 New Trial ¶¶ 10–11.

19 In fact, this testimony was simply incorrect. As the defense's computer forensics expert,
20 Eric Blank, testified, saving changes to an attachment to an email would save a local copy,
21 typically in a "temp" or "cache" folder unless the user designates a different location. Blank
22 Decl. ¶ 13. The version on the server, as received from the sender, would not change. *Id.* Mr.
23 Blank gave this testimony, and a follow-up declaration, based on his years of experience as a
24 forensic computer expert and owner of a business that managed billions of email messages a
25

[3] Even if the email and attachment somehow went together, there was no evidence the attachment came from PCD or what changes were made to it.

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month, as well as his own tests to attempt to recreate what Mr. Song had done. *Id.* Mr. Blank's testimony is also common sense; if a recipient could overwrite an attachment he received in an email, recipients would regularly have to request that the sender resend the original attachment. As anyone who regularly works with email is aware, even after the recipient has made changes to an attachment and saved it locally, the email as received (*i.e.*, in Outlook) would still contain the original version of the attachment. *Id.* ¶ 14. Even if that default could somehow be changed to overwrite the original, Mr. Smith did not testify that he did so.

Not only was Mr. Song's testimony wrong, but it missed the bigger point. Eric Blank testified that there were numerous locations, both at Old Republic and at Riddell Williams (Mr. Smith's law firm, now called Fox Rothschild), in which the original, non-modified email and attachment should be found. Mr. Song agreed with that testimony. *See* Blank Decl. ¶ 15. Mr. Song testified that he did not go to any of those locations to find the original attachment. *Id.* He agreed that "the most reliable way to find out whether or not it was modified is to look on one of these various locations where that original email would be found." *Id.* He never testified that it would not be possible to find the original email and attachment. *Id.* In fact, his testimony simply did not address why the only available copy of Exhibit 436 was the one modified by Scott Smith. The government attempted to minimize this problem by presenting testimony by Mr. Song that Mr. Smith's modifications could have been minor—*e.g.*, sorting columns. But there is no way to know what changes Mr. Smith made without finding the unmodified spreadsheet.

The defense raised the issue of Exhibit 436's veracity multiple times. The government was well aware of the problem, and did nothing. Riddell Williams produced the May 11 email and Exhibit 436—with metadata showing it was modified by Scott Smith on May 13—on April 15, 2016, a few days before closing argument in the first trial. Blank Decl. ¶ 5. In producing it, Riddell Williams never claimed that Mr. Smith overwrote the original attachment or saved it in a manner that removed the original from Riddell Williams' server. *Id.* Yet the government did not

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seek to obtain an unmodified version of the spreadsheet from Old Republic or Riddell Williams, despite its expert's acknowledgement that it should be possible to do so. If it ever tried to uncover the truth, it did not disclose as much to the defense; it produced *no* notes of its conversations, if any, with Riddell Williams on the topic.[4] In explaining why he had not asked pertinent questions of Old Republic, Mr. Song even testified that "a lot of times, it is better not to ask." Calfo Decl., Ex. H (Dec. 15, 2017, Song Tr). at 28:16–29:11. The defense repeatedly sought information about the topic, and was told on September 29, 2017, that the government had no additional discovery to provide relating to the provenance of Exhibit 436. Calfo Decl., Ex. I. Instead of attempting to correct this deficiency with one of its key pieces of evidence, the government stood before the jury and told it that Exhibit 436, modified by Scott Smith, was attached to an email sent from Ms. LeVeck two days prior.

b. A Retroactive Daubert Hearing or Evidentiary Hearing Is Necessary.

Mr. Song's surprise testimony that Mr. Smith somehow saved over the server version of Exhibit 436 should have been excluded as unreliable. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Supreme Court held that Federal Rule of Evidence 702 imposes a special obligation on a trial judge to "ensure that any and all scientific testimony . . . is not only relevant, but reliable." *Id.* at 589. That gatekeeping obligation was extended to "all expert testimony" in *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999).

The government's letter disclosing Mr. Song as a rebuttal expert did not disclose that he would give this opinion. *See* Calfo Decl., Ex. J. However, the government certainly knew he would be offering this opinion; Exhibit 3028, which was used in Mr. Song's testimony, states on page 3 that upon exiting Excel, the computer would prompt the user to save changes: "By

[4] The defense has since subpoenaed Riddell Williams and Old Republic to obtain this information, which it expects to receive on March 23.

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1 clicking on Yes, the 'changes' is saved back into the attachment. On Closing of the e-mail,
2 Outlook would present a similar dialog box. By click on Yes, the changed Excel file is *saved*
3 *back into the e-mail*." Calfo Decl., Ex. K (Ex. 3028) (emphasis added). Exhibit 3028 was not
4 produced to the defense until December 15, 2017—the day Mr. Song testified. Calfo Decl., Ex.
5 L. Because the defense was not informed that Mr. Song would make this claim on the stand, it
6 could not have brought a *Daubert* motion before trial.

7 Mr. Song's testimony also made it clear that the government never asked Riddell
8 Williams about its server (or even, remarkably, what version of Office it was using in the
9 relevant time period), so Mr. Song's testimony was completely speculative in opining on the
10 nature of the server or whether the document could have been saved over. Now that trial is over
11 and we know that Mr. Song's testimony was completely unfounded, speculative, and false, it
12 must be excluded retroactively. *See Kumho*, 526 U.S. at 148–49 (gatekeeper must determine
13 validity of expert's qualifications and reliability of proposed testimony, and proffered expert
14 must demonstrate a valid connection to the pertinent facts). After a *Daubert* hearing, a new trial
15 will be warranted on this ground because Mr. Song's testimony on Exhibit 436 corroborated this
16 key piece of evidence supporting the government's theory of intent. In the alternative to a
17 *Daubert* hearing, the defense requests an evidentiary hearing on the basis for Mr. Song's surprise
18 testimony.

19 Nor is a hearing necessarily required before dismissing on this basis. The government's
20 failure to get to the bottom of the modified spreadsheet demonstrates, at best, disinterest in the
21 truth. "[I]t is improper for the government to present to the jury statements or inferences it
22 knows to be false or has very strong reason to doubt." *Reyes*, 577 F.3d at 1077. Given the
23 government's obligation to "give those accused of crime a fair trial," *Donnelly v. DeChristoforo*,
24 416 U.S. 637, 648–49 (1974) (Douglas, J., dissenting), this lapse is serious enough to warrant a
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new trial. *See Reyes*, 577 F.3d at 1077 ("it is improper for the government to present to the jury statements or inferences it knows to be false or has very strong reason to doubt").

2. The Government Mischaracterized Judge Pechman's Summary Judgment Order in *Cornelius v. Fidelity*.

As this Court is by now well aware, the government's stolen property theory is intimately bound up with a series of class action cases brought against title companies challenging the legality of reconveyance fees. These class actions are critically important for several reasons, including that in each one, the title companies defended themselves by arguing that the plaintiffs agreed to pay the entire reconveyance fee—one of Mr. Kelley's key arguments in this case. *See, e.g.*, Calfo Decl., Ex. M (Ex. A-704) at 9–10; Ex. N (Ex. A-705) at 1; Ex. O (Ex. A-801) at 2. In each case, these suits were dismissed, lending credence to Mr. Kelley's claim that the borrowers transferred ownership of the reconveyance fees once they agreed to pay them. And just as crucially, the dismissal of these class action suits was critical evidence of Mr. Kelley's state of mind, because he had no reason to believe the borrowers were entitled to the fees paid to him when their suits to recover the fees were uniformly rejected by courts.

The government therefore repeatedly attempted to undermine the effect of the class action cases. It tried to do so first by seeking to exclude the class action pleadings altogether, Dkt. No. 158, but the Court rejected this gambit. Dkt. No. 218. So instead, in the most recent trial, the government resorted to misconstruing what happened in the class action proceedings. Specifically, by seizing on two sentences in Judge Pechman's order dismissing *Cornelius v. Fidelity National Title Company of Washington*, the prosecution argued, misleadingly, that the case—and by extension, all the class action cases—was dismissed merely because the plaintiffs sued the wrong parties: the title companies instead of PCD. This false characterization of highly probative evidence was improper and warrants a new trial.

The Cornelius plaintiffs brought several causes of action challenging the title companies' authority to charge the reconveyance fees at issue in this case. Each was dismissed, either on

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Fidelity's motion for judgment on the pleadings, *Cornelius v. Fid. Nat. Title Co.*, C08-754MJP, 2009 WL 596585 (W.D. Wash. Mar. 9, 2009), or its motion for summary judgment, *Cornelius v. Fid. Nat. Title Co. of Washington*, C08-754MJP, 2010 WL 1406333, at *7 (W.D. Wash. Apr. 1, 2010). Among their many claims, the *Cornelius* plaintiffs argued that Fidelity had committed an unfair and deceptive act under Washington's Consumer Protection Act by "fail[ing] to disclose that [plaintiffs] would not receive a 'full refund from Fidelity as was their entitlement.'" *Cornelius*, 2010 WL 1406333, at *7. In rejecting this claim, the court reasoned that plaintiffs had not proven Fidelity deceptively failed to disclose that borrowers would not receive refunds:

> Plaintiffs have in fact failed to establish that Fidelity was responsible for refunds of reconveyance fees. Any refunds due and owing would have had to come from PCD, not FNTCW. In any event, Plaintiffs present no evidence that there was any way of knowing at the time of signing whether any refunds would be owing because the reconveyances had not yet been performed. Nor, as discussed previously, have Plaintiffs established that was there any contractual duty on FNTCW's part to track whether refunds were in fact owing.

Id. In other words, the court concluded Fidelity did not have a duty to inform borrowers they would not receive refunds because Fidelity had no obligation to provide refunds nor any way of knowing whether refunds might be due.

The court's reasoning was limited to its CPA claim. The court did not apply the same reasoning to the plaintiffs' claims that the reconveyance fee was improperly charged. Indeed, in an earlier section of the same opinion, addressing the plaintiffs' breach of contract claim, the court made clear that the plaintiffs' demands for refunds failed because they had *agreed* to pay the full reconveyance fees and nothing in their contracts with the title companies precluded the title companies from charging the fees. *Id.* at *4. As Fidelity argued in its motion for summary judgment, "[t]he undisputed facts . . . show[ed]: (1) FNTCW disclosed the fees up front; (2) Plaintiffs and their lenders instructed FNTCW to disburse the fees to PCD; . . . and (4) PCD received the entire amount of the fees and rendered services for them." Calfo Decl., Ex. N (Ex. A-705) at 1. Judge Pechman agreed, dismissing plaintiffs' refund claims because "charging or

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1 collecting separate fees for services . . . is not a breach of the escrow contract[.]" *Cornelius*,
2 2010 WL 1406333, at *4.

3 What the court emphatically *did not* hold was that borrowers were in fact owed refunds,
4 that PCD had any obligation to pay refunds, or that the failure of plaintiffs' claims stemmed in
5 any sense from the fact that they had sued Fidelity when they should have sued PCD.

6 Nonetheless, when the prosecution sought to convince the jury to ignore the class action
7 lawsuits, that is exactly how they characterized the court's ruling. Most emphatically, in its
8 opening, the government described the *Cornelius* ruling as follows:

9 At one point in the Cornelius case, the class action lawyer said, "What about
refunds? Our clients may be entitled to refunds." And the judge said, "If you
10 have claims to refunds, you sued the wrong person. You sued Fidelity. You
should have sued Troy Kelley."

11 And here is what the judge said specifically, "The plaintiffs have failed to
establish that Fidelity was responsible for refunds. Any refunds due and owing
12 would have had to come from PCD, not Fidelity.["] You can't sue Fidelity for
this money.[]
13
So the judge threw out the case against Fidelity.
14
Calfo Decl., Ex. C (Nov. 14, 2017, Opening Tr.) at 59:20–60:5. The government further
15
suggested the class action suit against Old Republic had been dismissed on the same ground. *Id.*
16
at 60:5–7.
17
This was an entirely new argument that the government never made in the first trial, nor
18
in any of its prior pleadings. And it was misleading for at least two reasons. First, the court
19
never said, indicated, suggested, or hinted that plaintiffs "sued the wrong person" or "should
20
have sued Troy Kelley." This is simply made up by the prosecution to remove the sting of the
21
class action cases. PCD was not a party to the *Cornelius* suit and the question whether they
22
owed plaintiffs refunds was never litigated. With all due respect to the prosecution, no
23
reasonable lawyer could make the argument that Judge Pechman simply ruled that the wrong
24
party had been sued.
25

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Second, as discussed above, the court's dismissal of plaintiffs' refund claims had nothing to do with the section of the opinion quoted by the government. The court dismissed plaintiffs' refund claims on the ground that plaintiffs' contracts with the title companies—the escrow instructions—did not preclude the title companies from charging plaintiffs for reconveyance fees. By contrast, the language referred to by the government concerned plaintiffs' CPA claim, and specifically, whether Fidelity had an obligation to disclose to borrowers that they probably would not receive a refund. The court merely concluded that it was not deceptive of Fidelity to withhold this information because Fidelity was not involved with the issue of refunds. The government's claim that "the judge threw out the case against Fidelity" because plaintiffs "sued the wrong person" is false.

In a letter sent shortly after opening statements, defense counsel wrote to the government expressing its concern that the prosecution had misleadingly characterized the *Cornelius* opinion. Dkt No. 514-2 at 3. As defense counsel wrote, the government's "efforts to stretch evidence beyond its reasonable bounds is extremely concerning and a violation of Mr. Kelley's due process rights." *Id.* (citing *Reyes*, 577 F.3d at 1077). Nonetheless, in questioning Frank Cornelius, the government elicited quasi-expert testimony—without prior notice to Mr. Kelley— that Judge Pechman's order held "that Fidelity owed [him] no duty of care, that they weren't responsible for reconveyance fees, that it was PCD . . . that would have been responsible for it." Calfo Decl., Ex. P (Nov. 30, 2017, Cornelius Tr.) at 31:14–18. Then, in its rebuttal following closing, the government repeated its prior mischaracterization, falsely claiming that "Judge Pechman, in dismissing the *Cornelius* case, started to turn the spotlight towards Troy Kelley. What she said was, in her written opinion, 'If anybody owes refunds to the borrowers, it is that guy.'" Calfo Decl., Ex. D (Dec. 18, 2017, Closing Tr.) at 69:9–13. This was false for the same reason it was false the first time the government said it: Judge Pechman never found that Mr. Kelley owed borrowers a refund, nor did her dismissal of the class action cases turn on the idea

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that Mr. Kelley alone bore the responsibility for refunds. The government's attempt to mischaracterize Judge Pechman's order to avoid the probative effect of the class action cases was misleading and prejudicial to Mr. Kelley, and it warrants a retrial.[5]

3. The Government's Tax Expert Improperly Shifted the Burden to Mr. Kelley.

On cross-examination, the defense asked the government's tax expert, Paul Shipley, a series of questions about civil audits, attempting to demonstrate that taxpayers have the right to disagree with the IRS. *See* Calfo Decl., Ex. R (Dec. 7, 2017, Shipley Tr.) at 175:6–180:4. Agent Shipley gratuitously argued that Mr. Kelley could have "explain[ed] himself" to the Department of Justice, improperly shifting the burden to Mr. Kelley:

> Question: And the other [right] is the right to challenge the IRS's position and be heard, right?
>
> Answer: As it relates to a civil audit, yes.
>
> Question: Do we have a right here to do that, as well?
>
> Answer: Well, I think that Mr. Kelley definitely had an opportunity to explain himself. He was interviewed by two special agents in April of 2013, and he had numerous opportunities to explain himself to the Department of Justice attorneys.

Id. at 179:4–12. Agent Shipley later admitted that he had discussed that view ahead of time with the prosecutors:

> Question: And did you talk to the prosecutors about giving an answer like that during your testimony? Did you let them know that was your view?
>
> Answer: I think we had discussed that issue.

[5] It appears the government may also have elicited false testimony regarding Fidelity's practices following termination of its contract with PCD. Specifically, the government called Fidelity witness Tami Henderson to testify, among other things, that after Fidelity took reconveyance work in-house, it refunded borrowers some portion of the $140 fee it was still collecting for reconveyances. But a document obtained from Fidelity shortly before trial suggests that Fidelity did not, in fact, issue refunds as Ms. Henderson testified, and may instead have pocketed more than $140,000 in "excess" reconveyance fees. Calfo Decl., Ex. Q. Defense counsel has issued a subpoena to obtain the documents regarding whether Fidelity actually gave refunds—critical information that the government chose not to obtain. *Id.* Fidelity has not yet provided documents in response to that subpoena, and Mr. Kelley may seek leave to supplement this brief once Fidelity does so.

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Question: And was it agreed that if this issue came up, you would make that comment?

Answer: They didn't tell me how to answer, but we discussed that issue.

Calfo Decl., Ex. S (Dec. 11, 2017, Shipley Tr.) at 52:9–53:1.

The defense moved for a mistrial upon Agent Shipley's testimony, which was denied. *Id.* at 53:14–55:19. The Court also declined the defense's request that it issue an immediate curative instruction on the presumption of innocence. *Id.* at 55:20–24, 56:23–57:11.

Agent Shipley's—and by extension, the government's—attempt to shift the burden to Mr. Kelley was highly troubling. Where prosecutors have made similar statements in closing argument, the Ninth Circuit has found reversible error. *See United States v. Sandoval-Gonzalez*, 642 F.3d 717, 724–27 (9th Cir. 2011) (vacating conviction where prosecutor suggested that "elements" of derivative citizenship "must be established" by a criminal defendant in prosecution for reentry after removal); *United States v. Segna*, 555 F.2d 226, 230–32 (9th Cir. 1977) (reversing and remanding for new trial where prosecutor stated that presumption of sanity existed after defendant had mounted an insanity defense). Because the government, through Agent Shipley, attempted to shift its burden to Mr. Kelley on the tax counts, Mr. Kelley is entitled to a new trial.

D. The Government Violated the Double Jeopardy Clause of the Fifth Amendment by Relitigating Whether Mr. Kelley Lied to Agent Nordyke about his Tax Reporting.

At the first trial in this matter, the jury acquitted Mr. Kelley of making a false statement to IRS Agent Kerry Nordyke. According to the government, Mr. Kelley falsely stated that "Blackstone International earned" income in "2011 and 2012[] by continuing to perform work on reconveyance files." SI ¶ 154. As Mr. Kelley has previously argued, the jury's acquittal on this Count necessarily meant that the first jury determined Mr. Kelley did not knowingly lie to Agent Nordyke when he said he continued to earn income for doing work on reconveyance files. Dkt. No. 308. The government disputes this, however, arguing that the jury's acquittal may just as

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well have been based on the conclusion that Mr. Kelley never told Agent Nordyke that he continued to perform work on reconveyance files. Dkt. No. 313. Either way, the jury concluded one of two things: Mr. Kelley never said he was continuing to do work or he was not lying when he did say it.

And yet, in its closing argument, the government reargued *both* of these points, claiming that Mr. Kelley falsely told Agent Nordyke that he continued to do work to earn income:

> Remember, the IRS, when this whole thing became public, Agent Kerry Nordyke contacted Troy Kelley. She sought to interview him. And Troy Kelley gave her yet another explanation about the money. ***Troy Kelley said he was working on reconveyances, and he was recognizing income as he did the work. Yet another story*** different from the deposition, different from what he told Mr. Leffler, and ***entirely inconsistent with all of the evidence in the case.***

Calfo Decl., Ex. D (Dec. 18, 2017, Closing Tr.) at 44:15–23. The government's re-litigation of Count 16 violated Mr. Kelley's Fifth Amendment Double Jeopardy right. *United States v. Stoddard*, 111 F.3d 1450, 1458 (9th Cir. 1997).

"The collateral estoppel doctrine means that 'when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.'" *United States v. Webbe*, 755 F.2d 1387, 1388 (9th Cir. 1985) (quoting *Ashe v. Swenson*, 397 U.S. 436, 443 (1970)). Even if the government were correct to argue that we cannot know for certain the basis of the first jury's verdict of acquittal, it is beyond dispute that the jury rejected the two-part premise that (1) Mr. Kelley lied when (2) he told Agent Nordyke he continued to earn income as he performed work on reconveyance files. The government therefore cannot relitigate this conjoined premise in a second trial.

Nevertheless, the government relied on Mr. Kelley's supposedly false statement to Agent Nordyke to prove ultimate issues in the second trial. *See Dowling v. United States*, 493 U.S. 342, 348 (1990) (holding that collateral estoppel does not bar introduction of evidence related to prior acquittals where "the prior acquittal did not determine an ultimate issue in the present case"). In order to prove Counts 12–15 and 17, the government was required to show Mr. Kelley

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acted willfully, that is, that he knew his plan to report fees received in 2006–2008 as income over a ten-year period violated federal law. Dkt. No. 560, Instruction Nos. 23, 24. The government sought to show this by showing that he lied to Agent Nordyke about the basis for recognizing this income over ten years. Similarly, in order to prove Count 11, the government had to show that Mr. Kelley "knowingly" obstructed the IRS' functions. *Id.*, Instruction No. 22. Here again, the government's argument that Mr. Kelley *knew* his conduct was corrupt relied in large measure on the fact that he supposedly lied to Agent Nordyke about the basis for reporting his income. The government's attempt to prove the elements of its charges at the second trial by relying on the allegations underlying the charge of which he was acquitted at the first trial violated the collateral estoppel doctrine, and therefore violated Mr. Kelley's Fifth Amendment right against Double Jeopardy.

As Mr. Kelley previously argued, the proper remedy for the government's Double Jeopardy violation is dismissal of Counts 11–15 and 17 to the extent those counts allege Mr. Kelley falsely reported income on his tax returns. Dkt. No. 308.[6] Although the Court previously ruled against Mr. Kelley on this point, Dkt. No. 330, the government's arguments on retrial vindicate Mr. Kelley's prior argument, and merit reconsideration of this Court's prior order denying Mr. Kelley's motion for acquittal. The government's arguments on retrial leave no room to doubt that Mr. Kelley's alleged false statements to Ms. Nordyke are inextricably bound up with the other tax counts. The government's acquittal on Count 16 thus requires a verdict of acquittal on the remaining tax counts.

But even if the Court remains doubtful that Mr. Kelley's acquittal on Count 16 necessarily decided an element of the remaining tax counts, it is clear that the first jury irrevocably rejected the conjoined premise that (1) Mr. Kelley lied when (2) he told Agent Nordyke he continued to earn income as he performed work on reconveyance files.. The

[6] For the sake of brevity, Mr. Kelley will not repeat his previous double jeopardy arguments, but instead incorporates them by reference. *See* Dkt. Nos. 308, 319.

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government's relitigation of this argument on retrial violated Mr. Kelley's Double Jeopardy rights. At a minimum, a new trial is required at which the government will be precluded from relitigating Count 16 in violation of Mr. Kelley's Fifth Amendment rights.

E. Improper Jury Coercion Necessitates a New Trial.

1. The Jury Repeatedly Informed the Court It Was Deadlocked.

Over the course of deliberations, the jury sent three notes. None were substantive. All asked what the jury should do if it was deadlocked. Given that the prior jury had deadlocked on these charges, this was not surprising.

The jury's first note, sent at 12:47 pm—after about two hours of deliberation—stated: "What happens if we can't reach a unanimous decision on count one, does that result in a not guilty verdict?" Dkt. No. 561. The Court responded: "You have heard the testimony, you have the exhibits and the instructions on the law. You have everything you need to make your decision, if you can." *Id.* Later that day, the jury again indicated its inability to reach a verdict—implying that it was still deadlocked on count one: "If we find the defendant guilty (or not guilty) on one charge, but deadlocked on another charge, what happens? ie.. If we never reach concensus [sic] on one charge, do we proceed with deliberations on the other charges?" *Id.* The Court responded, "See attached," and attached Instruction No. 10: "A separate crime is charged against the defendant in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count." *Id.* The defense objected to this response, arguing that (1) singling out one instruction was problematic, and (2) the defense had argued in closing that there was in fact a connection between Count 1 and the other counts. *See* Calfo Decl., Ex. T (Dec. 19, 2017, Tr.) at 4:1–6:7.

Finally, the next day around 1:13 p.m., the jury *for the third time* indicated its inability to reach a verdict: "We have come to unanimous decision on eight charges. We have polled four times on the remaining six charges and are not close to a unanimous decision. No person has

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changed their determination. It's clear there are individuals on both sides that will not be changing their position. What is your recommendation?"

The Court noted its opposition to issuing an *Allen* instruction, given the hung jury in the first trial and the potential for a hung jury on six counts—indicating that an *Allen* instruction would be overly coercive. Instead, the Court stated its intent to poll the jury to determine whether it was deadlocked, and if so, to send a note stating "Your work is done, sign the appropriate verdict form." *See* Calfo Decl., Ex. U (Dec. 20, 2017, Tr.) at 2:15–24. The defense objected to bringing out the entire jury, seeking to have only the foreperson brought out, to avoid "a more pressure-packed environment, thinking they need to go back and reach a verdict." *Id.* at 4:23–5:4. The Court decided to poll the entire jury.

Bringing out the jury, the Court asked the foreperson if the jury was permanently deadlocked. The foreperson responded: "I think we are permanently deadlocked." *Id.* at 6:2–13. The Court then asked for a show of hands of how many jurors agreed with the foreperson. Three or four jurors did not raise their hands. *Id.* at 6:14–7:4.

After sending the jury back, the defense argued that "this is what a hung jury is. If we say, 'Continue to deliberate,' then I think we are in dangerous territory at this stage . . . ." *Id.* at 8:1–4. The Court disagreed, and sent the following note: "Read Instruction #25 and discuss whether there is the possibility that votes can be changed. If so, continue to deliberate. If not, complete the verdict form as it stands and notify the clerk that you are ready to return with your verdict." Dkt. No. 561. Instruction No. 25 stated:

> When you begin your deliberations, elect one member of the jury as your foreperson who will preside over the deliberations and speak for you here in court.
>
> You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict, whether guilty or not guilty, must be unanimous.
>
> Each of you must decide the case for yourself, but you should do so only after you have considered all the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

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> Do not be afraid to change your opinion if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right.
>
> It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

Dkt. No. 560. The jury then returned with a verdict on all counts that very afternoon.

2. The Jury Was Deadlocked and a Mistrial Should Have Been Declared.

"[A] hung jury occurs when there is an irreconcilable disagreement among the jury members." *Brazzel v. Washington*, 491 F.3d 976, 982 (9th Cir. 2007). Here, as advised by the Model Instructions, the Court polled the jury to confirm that they could not reach a verdict "and, thus, that there [was] a basis to declare a mistrial." Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit, Instruction 7.8, available at http://www3.ce9.uscourts.gov/juryinstructions/sites/default/files/WPD/Criminal_Instructions_2017_12.pdf. Eight or nine jurors stated that they were permanently deadlocked, and yet the jury was told to discuss whether votes could be changed.

In determining whether to declare a mistrial because of jury deadlock, relevant factors to consider "include the jury's collective opinion that it cannot agree, the length of the trial and complexity of the issues, the length of time the jury has deliberated, whether the defendant has objected to a mistrial, and the effects of exhaustion or coercion on the jury." *United States v. Hernandez-Guardado*, 228 F.3d 1017, 1029 (9th Cir. 2000). The record should reflect that the jury is "genuinely deadlocked." *Richardson v. United States*, 468 U.S. 317, 324–25 (1984).

"*The most critical factor is the jury's own statement that it is unable to reach a verdict.*" *United States v. Cawley*, 630 F.2d 1345, 1349 (9th Cir. 1980) (emphasis added). As defense counsel argued at the time, nine jurors saying that further deliberations will not be fruitful is the very definition of a hung jury. Numerous courts have appropriately declared mistrials in such a

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situation. "[Y]ou don't need an agreement to disagree. You just need some jurors to say, 'I will not change my mind.' That is a deadlock." *United States v. Klein*, 582 F.2d 186, 193 (2d Cir. 1978) (quoting approvingly from trial court; upholding declaration of mistrial where defendant argued that jury was not deadlocked because only nine of the twelve jurors believed they were deadlocked); *see also United States v. Byrski*, 854 F.2d 955, 963 (7th Cir. 1988) (trial court did not abuse its discretion in declaring a mistrial where one juror emphatically stated that he would not change his mind, and others stated they were being pressured into changing their positions); *Arnold v. McCarthy*, 566 F.2d 1377, 1387 (9th Cir. 1978) (upholding declaration of mistrial where one juror felt there was a reasonable probability of reaching a verdict); *United States v. See*, 505 F.2d 845, 849 (9th Cir. 1974) (affirming declaration of mistrial where court had asked jurors whether "most of you feel" that further deliberations would not produce a unanimous verdict).

"The jury need not be unanimous in finding itself deadlocked to justify a declaration of mistrial, however. All that is required is some jurors must indicate they are unwilling to change their minds." *Kaluna v. Iranon*, 952 F. Supp. 1426, 1432 (D. Haw. 1996), *aff'd*, 131 F.3d 146 (9th Cir. 1997) (denying writ of habeas corpus following declaration of mistrial over defendant's objection where nine jurors believed jury was deadlocked). In the first trial here, the jury was polled and *five* jurors believed further deliberations could be fruitful at least as to some counts, and yet the Court accepted the hung verdict. *See* Calfo Decl., Ex. V (Apr. 26, 2016, Tr.) at 10:23–13:18. In the second trial, in contrast, eight or nine jurors believed the jury was deadlocked, and yet the jury was told to keep deliberating. A mistrial should have been declared, and a new trial is therefore warranted.

3. The Court's Responses to the Jury Questions Resulted in Impermissible Coercion.

There are no bright-line rules for determining what constitutes an impermissible coercive effect on the jury, as this is determined from the totality of the circumstances of the particular

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case. *United States v. Della Porta*, 653 F.3d 1043, 1050–51 (9th Cir. 2011). Here, the jury told the Court three times that it was unable to reach a verdict on some counts—something that was eminently reasonable, given that the prior jury also could not reach a verdict. When polled, nine jurors stated that they did not believe that further deliberations would be fruitful. But instead of a mistrial, the jurors were told for the third time that they should resume deliberations. While the Court's hesitance to give a full *Allen* charge was understandable, the cumulative effect of the three responses was ultimately more coercive than an *Allen* charge would have been.

The Ninth Circuit's approved *Allen* charge contains numerous protections to guard against coercion. *Allen* "charges are proper 'in all cases except those where it's clear from the record that the charge had an impermissibly coercive effect on the jury.'" *United States v. Banks*, 514 F.3d 959, 974 (9th Cir. 2008) (quoting *United States v. Ajiboye*, 961 F.2d 892, 893 (9th Cir. 1992)). In assessing the coerciveness of an *Allen* charge, the Ninth Circuit considers "(1) the form of the instruction, (2) the time the jury deliberated after receiving the charge as compared to the total time of deliberation, and (3) any other indicia of coerciveness." *United States v. Freeman*, 498 F.3d 893, 908 (9th Cir. 2007). It is reversible error to give even a neutral *Allen* charge that has a coercive effect on the jury's deliberations, such as where the Court is told of the jury's numerical division yet proceeds to give an *Allen* charge. *Ajiboye*, 961 F.2d at 893–94.

The Ninth Circuit's Model Instruction to be used when a jury is deadlocked is extremely thorough:

> Members of the jury, you have advised that you have been unable to agree upon a verdict in this case. I have decided to suggest a few thoughts to you. As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict if each of you can do so without violating your individual judgment and conscience. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to reexamine your own views and change your opinion if you become persuaded that it is wrong. However, you should not change an honest belief as to the weight or effect of the evidence solely because of the opinions of your fellow jurors or for the mere

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> purpose of returning a verdict. All of you are equally honest and conscientious jurors who have heard the same evidence. All of you share an equal desire to arrive at a verdict. Each of you should ask yourself whether you should question the correctness of your present position. I remind you that in your deliberations you are to consider the instructions I have given you as a whole. You should not single out any part of any instruction, including this one, and ignore others. They are all equally important. You may now retire and continue your deliberations.

Manual of Model Criminal Jury Instructions 7.7. That instruction could have been given after any of the three jury notes. Instead, each time, the Court gave a watered-down version, each of which had the effect of telling the jury to keep deliberating, but without the protections of the full *Allen* charge.

Crucially, the three responses the jury received contained the basic essence of an *Allen* charge—keep deliberating, if you can—but not its protections. Where the charge given is not an *Allen* charge but "merely sending the jury back for further deliberations," courts look to the context—whether it "serves the same purpose, was given in an *Allen* situation, and [was] fraught with the same—indeed greater—potential for coercion of the jury," it should be "judged by the standards which we have demanded of *Allen* charges." *United States v. Bass*, 490 F.2d 846, 853–55 (5th Cir. 1974).

Allen charges should caution jurors not to abandon their conscientiously held views. *United States v. Lorenzo*, 43 F.3d 1303, 1307 (9th Cir. 1995); *see also* Model Instruction 7.7. While the third response to the jury's note contained an abbreviated version of this, the first two responses did not. The failure adequately to advise the jury not to abandon its sincerely held beliefs contributed to the coercive effect of the instructions. *See Rodriguez v. Marshall*, 125 F.3d 739, 750 (9th Cir. 1997) ("We found impermissible judicial coercion in [*Jiminez v. Myers*, 40 F.3d 976 (9th Cir. 1993)] principally because the judge failed to remind the jurors of their duty not to surrender their sincerely held beliefs while at the same time making it clear that he wished them to return a unanimous verdict."); *United States v. Bass*, 490 F.2d 846, 853–55 (5th

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1 Cir. 1974) (quasi-*Allen* charge that failed to make plain that jurors have duty conscientiously to
2 adhere to honest opinions violated the defendant's right to an uncoerced jury).[7]

3 The approved *Allen* charge also explicitly states that "I remind you that in your
4 deliberations you are to consider the instructions I have given you as a whole. You should not
5 single out any part of any instruction, including this one, and ignore others. They are all equally
6 important." Model Instruction No. 7.7; *see also United States v. Ponce*, 51 F.3d 820, 833 (9th
7 Cir. 1995) (when giving supplemental instruction in response to jury question, trial court "also
8 reminded the jury of their obligation to consider all of the instructions as a whole and
9 admonished them not to single out any one instruction as alone stating the law"). Here, however,
10 two of the three responses to the jury highlighted a single jury instruction, and contained no
11 reference to considering the instructions as a whole.

12 Furthermore, a second *Allen* charge is generally impermissible because it conveys a
13 message that "'the jurors have acted contrary to the earlier instruction' . . . and that message
14 serves no other purpose than impermissible coercion." *United States v. Evanston*, 651 F.3d
15 1080, 1085 (9th Cir. 2011) (quoting *United States v. Seawell*, 550 F.2d 1159, 1162–63 (9th Cir.
16 1977)). In holding that "it is reversible error to repeat an Allen charge in a federal prosecution in
17 this circuit after a jury has reported itself deadlocked and has not itself requested a repetition of
18 the instruction," the Ninth Circuit in *Seawell* explained that "[a] single Allen charge, without
19 more, stands on the brink of impermissible coercion." *Seawell*, 550 F.2d at 1163. Thus, a per se
20 rule was necessary to protect the defendant's right to an impartial jury. *Id.*

21 The coercive effect of the multiple instructions to the jury to keep deliberating, and the
22 failure to give the corresponding protective instructions that normally accompany an *Allen*
23 charge, resulted in jury coercion. This effect was compounded by the circumstances. Enough
24
25

[7] It is also helpful to incorporate an instruction on the burden of proof in an *Allen* charge. *United States v. Quintero-Barraza*, 78 F.3d 1344, 1350 (9th Cir. 1995); *United States v. Cuozzo*, 962 F.2d 945, 952 (9th Cir. 1992). None of the Court's three responses did so.

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TEL (206) 407-2200 FAX (206) 407-2224

inadvertent references to the "first trial" were made in front of the jury that it would have been impossible for the jury not to know that it was participating in a retrial. The pressure to come to a verdict would thus have been stronger than normal. Further, the jury's deliberations took place after more than five weeks of trial, in the days before Christmas. The Seventh Circuit has previously found timing near the holidays to affect the risk of coercion: "The risk of a coerced verdict was even more pronounced due to the timing of the deliberations—the next day was Christmas Eve. The jurors indicated on more than one occasion that they were concerned about the possibility of being required to deliberate on Christmas Eve." *United States v. Byrski*, 854 F.2d 955, 963 n.13 (7th Cir. 1988). What's more, the morning of closing argument—December 18—an Amtrak train derailed south of Tacoma, closing I-5 southbound for two days, until December 20, and causing serious traffic problems.[8] Defense counsel believes that at least one juror was required, unexpectedly, to stay overnight in Tacoma during deliberations—an added pressure on the already-exhausted jury to finish and go home on December 20. After the jury was told repeatedly to keep deliberating, without the protections of an *Allen* charge, and in light of the circumstances, the verdict was the result of coercion.

Because of the effect of coercion on the jury, the Court should grant a new trial on all counts.

III. CONCLUSION

For the foregoing reasons, Defendant Troy X. Kelley respectfully requests that this Court order a new trial on all counts on which the jury voted to convict.

[8] *See* https://www.seattletimes.com/seattle-news/transportation/special-equipment-brought-in-from-oregon-to-remove-derailed-amtrak-locomotive-from-i-5/.

LAW OFFICES
CALFO EAKES & OSTROVSKY PLLC
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL (206) 407-2200 FAX (206) 407-2224

1 DATED this 22nd day of March, 2018.

2 CALFO EAKES & OSTROVSKY PLLC

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4 By: *s/Angelo J. Calfo*
Angelo J. Calfo, WSBA #27079
5 Patricia A. Eakes, WSBA No. 18888
6 Emily Dodds Powell, WSBA #49351
Andrew R.W. Hughes, WSBA #49515
7 1301 Second Avenue, Suite 2800
Seattle, WA 98101
8 Telephone: (206) 407-2200
Email: angeloc@calfoeakes.com
9 pattye@calfoeakes.com
emilyp@calfoeakes.com
10 andrewh@calfoeakes.com

11 *Attorneys for Defendant Troy X. Kelley*

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CERTIFICATE OF SERVICE

I hereby certify that on March 22nd, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Andrew C. Friedman	Andrew.Friedman@usdoj.gov
Arlen R Storm	Arlen.Storm@usdoj.gov
C. Seth Wilkinson	Seth.Wilkinson@usdoj.gov
Michelle Jensen	Michelle.Jensen@usdoj.gov
Katheryn Kim Frierson	Katheryn.k.Frierson@usdoj.gov

s/ Mary J. Klemz
Mary J. Klemz

LAW OFFICES
CALFO EAKES & OSTROVSKY PLLC
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL (206) 407-2200 FAX (206) 407-2224