

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

SHANGO JAJA GREER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

BENJAMIN RAMOS, ESQ.
Counsel of Record
Law Office of Benjamin Ramos
705 E. Bidwell, Ste. 2-359
Folsom, California 95630
benjamin_ramos@comcast.net
Telephone: (916) 358-9842

Counsel for Petitioner
SHANGO JAJA GREER

QUESTIONS PRESENTED FOR REVIEW

- (1) Did the District Court improperly condone the prosecutor's profligate misconduct in not only *failing to disclose to the defense before trial* that a Government witness *had been paid* as an informant, but also by not correcting the informant's false trial testimony that he received no money from the Government?
- (2) Did the District Court improperly disregard this Court's precedents and condone the prosecutor's profligate misconduct in not only presenting false testimony to the grand jury, but by *vouching for the character and credibility* of a dishonest government witness after discovering that he lied to the grand jury that Petitioner shot someone?
- (3) Were Petitioner's 14th Amendment due process rights violated when the prosecution constructively amended the indictment by presenting evidence of gun and ammunition manufacturing not alleged in the indictment, and was appellate counsel ineffective for not challenging the amendment?
- (4) Was the evidence sufficient to support the "interstate commerce" element of the constructively-amended indictment, and did the lower courts properly apply the constitutional standard requiring proof of every fact necessary to support a criminal conviction beyond a reasonable doubt?
- (5) Was the Sixth Amendment violated regarding counsel's communication of the Government's pre-trial plea bargain?

**PARTIES TO THE PROCEEDINGS
AND RULE 29.6 STATEMENT**

Petitioner is Shango Jaja Greer. Respondent is the United States of America.

No party is a corporation

TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES	v
CITATIONS OF OPINIONS AND ORDERS	1
BASIS FOR JURISDICTION.....	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE	2
A. THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION	2
1. <i>Brady, Napue, and Giglio</i> Violations	2
2. Sufficiency of the Evidence	3
B. THE FIFTH AMENDMENT.....	3
C. THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION	4
D. TITLE 18.....	4
STATEMENT OF THE CASE.....	5
A. INDICTMENT AND VERDICTS	5
B. TRIAL EVIDENCE	7
REASONS FOR GRANTING THE WRIT	9
A. EXTREME PROSECUTORIAL MISCONDUCT UNDER <i>BRADY, GIGLIO AND NAPUE</i>	9
1. Prosecutorial Misconduct Before The Grand Jury	21
2. Appellate Counsel Provided Ineffective Assistance By Not Challenging The Constructive Amendment Of The Indictment, As Well As The Legally Inadequate Theory Submitted To The Jury .	24

3. The Evidence Was Insufficient To Support The Constructive Amendment Of The Indictment	30
4. Ineffective Plea Representation	34
CONCLUSION.....	35

APPENDIX TABLE OF CONTENTS

<u>Appendix A</u>	Order of the United States Court of Appeals for the Ninth Circuit Denying a Certificate of Appealability (February 27, 2019)	A-1
<u>Appendix B</u>	Order of the United States Court of Appeals for the Ninth District Denying Motion for Reconsideration (April 2, 2019)	B-1
<u>Appendix C</u>	Order of the United States District Court for the Eastern District of California Adopting the Magistrate Judge's Findings and Recommendations (June 15, 2018)	C-1 – C-2
<u>Appendix D</u>	Magistrate Judge's Findings and Recommendations of the United States District Court for the Eastern District of California (August 10, 2017)	D-1 – D-82
<u>Appendix E</u>	Government's Response to Motions Under Section 2255 Filed With the United States District Court for the Eastern District of California (May 31, 2013)	E-1 – E-103
<u>Appendix F</u>	Exhibit G to Government's Response to Motions Under Section 2255 Filed With the United States District Court for the Eastern District of California (May 31, 2013).....	F-1 – F-4
<u>Appendix G</u>	Indictment of the United States District Court for the Eastern District of California (January 28, 2003)	G-1 – G-12
<u>Appendix H</u>	Order of the United States District Court for the Eastern District of California Appointing Counsel (January 11, 2013).....	H-1 – H-2
<u>Appendix I</u>	Title 18, U.S.C. section 1961	I-1 – I-4
<u>Appendix J</u>	Order of the United States District Court for the Eastern District of California Denying a Certificate of Appealability (July 2, 2018)	J-1 – J-2

TABLE OF AUTHORITIES

	<u>Page(s)</u>
Cases	
<i>Adderley v. Florida</i> , 385 U.S. 39 (1966).....	25
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963).....	2
<i>Cole v. Arkansas</i> , 333 U.S. 196 (1948).....	24
<i>Combs v. Tennessee</i> , 530 F.2d 695 (6th Cir. 1975).....	30
<i>Cunningham v. Wong</i> , 704 F.3d 1143 (9th Cir. 2013).....	20
<i>Douglas v. Buder</i> , 412 U.S. 430 (1973).....	25
<i>Gaither v. United States</i> , 134 U.S. App. D.C. 154, 413 F.2d 1061 (1969)	4
<i>Giglio v. United States</i> , 405 U.S. 150 (1972).....	3, 15, 16
<i>Glover v. United States</i> , 531 U.S. 198, 121 S. Ct. 696, 148 L. Ed. 2d 604 (2001).....	30
<i>Gregory v. Chicago</i> , 394 U.S. 111 (1969).....	25
<i>Hamling v. United States</i> , 418 U.S. 87, 41 L. Ed. 2d 590, 94 S. Ct. 2887 (1974).....	25
<i>Hayes v. Brown</i> , 399 F.3d 972 (9th Cir. 2005).....	21
<i>Holland v. United States</i> , 348 U.S. 121 (1954).....	30
<i>Hovey v. Elliott</i> , 167 U.S. 409 (1897).....	25, 31
<i>In re Winship</i> , 397 U.S. 358 (1970).....	3, 30
<i>Jackson v. Brown</i> , 513 F.3d 1057 (9th Cir. 2008).....	12
<i>Jackson v. Virginia</i> , 443 U.S. 307 (1979).....	3, 30

<i>Jones v. United States</i> , 526 U.S. 227, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999).....	25, 29
<i>Lafler v. Cooper</i> , 132 S.Ct. 1376 (2012).....	34
<i>Lucas v. O'Dea</i> , 179 F.3d 412 (6th Cir. 1999).....	30
<i>Missouri v. Frye</i> , 132 S.Ct. 1399 (2012).....	34
<i>Napue v. Illinois</i> , 360 U.S. 264 (1959).....	3, 10
<i>Padilla v. Kentucky</i> , 556 U.S. 356, 130 S.Ct. 1473 (2010).....	34
<i>Presnell v. Georgia</i> , 439 U.S. 14 (1978).....	25
<i>Stirone v. United States</i> , 361 U.S. 212, 4 L. Ed. 2d 252, 80 S. Ct. 270 (1960).....	4, 25, 26
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).....	28
<i>Taylor v. Kentucky</i> , 436 U.S. 478 (1978).....	30
<i>Thomas v. Harrelson</i> , 942 F.2d 1530 (11th Cir. 1991).....	30
<i>Thompson v. Louisville</i> , 362 U.S. 199 (1960).....	25
<i>Turner v. United States</i> , 396 U.S. 398, 24 L. Ed. 2d 610, 90 S. Ct. 642 (1970).....	27
<i>U.S. v. Butler</i> , 567 F.2d 885 (9th Cir. 1978).....	16
<i>U.S. v. Necoechea</i> , 986 F.2d 1273 (9th Cir. 1993).....	21
<i>U.S. v. Shaffer</i> , 789 F. 2d 682 (9th Cir. 1986).....	17
<i>United States v. Bagley</i> , 473 U.S. 667 (1985).....	10
<i>United States v. Barona</i> , 56 F.3d 1087 (9th Cir. 1995).....	28

<i>United States v. Cox</i> , 342 F.2d 167 (5th Cir. 1965).....	4
<i>United States v. Dominic P. Gallo and Carmen Ricca</i> , 394 F.Supp. 310 (D. Conn. 1975)	4, 23
<i>United States v. Jingles</i> , 702 F.3d 494 (9th Cir. 2012).....	26
<i>United States v. Miller</i> , 471 U.S. 130, 85 L. Ed. 2d 99, 105 S. Ct. 1811 (1985).....	25
<i>United States v. Molina</i> , 934 F.2d 1440 (9th Cir. 1991).....	21
<i>United States v. Price</i> , 566 F.3d 900 (9th Cir. 2009).....	18
<i>United States v. Roberts</i> , 618 F.2d 530 (9th Cir. 1980).....	21
<i>United States v. Sedaghaty</i> , 728 F.3d 885 (9th Cir. 2013).....	18
<i>United States v. Streit</i> , 962 F.2d 894 (9th Cir. 1992).....	26
<i>United States v. Stubbs</i> , 279 F.3d 402 (6th Cir. 2001).....	29
<i>United States v. Ward</i> , 747 F.3d 1184 (9th Cir. 2014).....	26
<i>Vachon v. New Hampshire</i> , 414 U.S. 478 (1974).....	25
<i>Victor v. Nebraska</i> , 511 U.S. 1 (1994).....	3, 30
<i>Yates v. United States</i> , 354 U.S. 298, 1 L. Ed. 2d 1356, 77 S. Ct. 1064 (1957).....	27
<u>Constitutional Provisions</u>	
U.S. Const. amend. V.....	3
U.S. Const. amend. XIV, § 1	2
U.S. Cont. amend. VI.....	4
<u>Federal Statutes</u>	
18 U.S.C. § 1961(4)	5
18 U.S.C. § 1962.....	4

18 U.S.C. § 1962(c).....	5
18 U.S.C. § 1962(d)	6
28 U.S.C § 1254(1)	2

Petitioner Shango Jaja Greer respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

CITATIONS OF OPINIONS AND ORDERS

The Order issued by the United States Court of Appeals for the Ninth Circuit denying a motion for certificate of appealability and the separate order denying reconsideration are unpublished and reproduced respectively at Appendix A and B. Apps. A and B.

The judgment issued by the United States District Court for the Eastern District of California is reproduced at Appendix C. App. C. The Findings and Recommendations issued by the United States District Court for the Eastern District of California are unreported and is reproduced at Appendix D. App. D.

The Government's response to Petitioner's pro se 2255 motion is unreported and is attached at Appendix E. App. E.

Exhibit G to the Government's response to Petitioner's pro se 2255 motion is unreported and is attached at Appendix F. App. F.

The indictment charging Petitioner is attached at Appendix G. App. G.

The Order appointing counsel is attached at Appendix H. App. H.

Appendix I is the text of Title 18, United States Code, Section 1961.

BASIS FOR JURISDICTION

The Order denying a certificate of appealability was issued by the United States Court of Appeals for the Ninth Circuit on February 27, 2019. App. A. The Ninth Circuit denied Mr. Greer's Motion for Reconsideration on April 2, 2019. App. B. This Court has jurisdiction to review the judgment on a writ of *certiorari* pursuant to 28 U.S.C. Section 1254(1) .

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

A. THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Section 1 of the Fourteenth Amendment to the United States Constitution, provides in relevant part:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; . . .

1. *Brady, Napue, and Giglio Violations*

Under *Brady v. Maryland*, 373 U.S. 83 (1963), prosecutors are *constitutionally* obligated to disclose “evidence favorable to an accused . . . [that] is material either to guilt or to punishment.” This prosecutorial duty is grounded in the Fourteenth Amendment, *id.* at 86, which instructs that states shall not “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1.

In another landmark ruling involving defendants’ due process rights, this Court held, “The principle that a State may not knowingly use *false evidence*,

including *false testimony*, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness.” *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

In *Giglio v. United States*, 405 U.S. 150, 154 (1972), this Court observed that the “deliberate deception of a court and jurors by the presentation of *known false evidence* is incompatible with ‘rudimentary demands of justice.’” *Id.* at 153. Emphasis added. This Court held that the prosecution *was required to inform the defense about its agreement with the witness* because “evidence of any understanding or agreement as to a future prosecution would be relevant to [the witness’s] credibility and the jury was entitled to know of it.” *Giglio v. United States*, 405 U.S. at 154-155.

2. Sufficiency of the Evidence

“[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 358, 364 (1970).

The state’s burden to prove every element of the offense beyond a reasonable doubt is well-established. *Victor v. Nebraska*, 511 U.S. 1, 5 (1994); *Jackson v. Virginia*, 443 U.S. 307, 320, n.14 (1979).

B. THE FIFTH AMENDMENT

The Fifth Amendment to the U.S. Constitution provides that “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.” Accordingly, courts must be ever vigilant to preserve the functions of the grand jury as an effective “safeguard against oppressive actions

of the prosecutor . . .” *Gaither v. United States*, 134 U.S. App. D.C. 154, 413 F.2d 1061, 1066 (1969), quoting from *United States v. Cox*, 342 F.2d 167, 170 (5th Cir. 1965).

The accused has a right “to have the grand jury make the charge on its own judgment.” *Stirone v. United States*, 361 U.S. 212, 219 (1960). Neither by depriving the grand jury of its opportunity to evaluate the credibility of witnesses nor by making prejudicial remarks to sway the grand jury may the prosecutor deny the accused this substantial right. *United States v. Dominic P. Gallo and Carmen Ricca*, 394 F.Supp. 310, 313-314 (D. Conn. 1975).

C. THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The Sixth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides in relevant part:

In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defence.

D. TITLE 18

Title 18 U.S.C. § 1962 provides:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the

activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(b) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

STATEMENT OF THE CASE

A. INDICTMENT AND VERDICTS

On January 28, 2003, a federal grand jury returned an indictment against Petitioner Shango Greer and several others (App. G), including Jason Walker.

Count One alleged that Mr. Greer and others violated the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c), by associating in the Pitch Dark Family (PDF), the alleged “enterprise” under 18 U.S.C. § 1961(4). Count

One also charged nine racketeering acts involving murder, attempted murder, possession of cocaine base for sale and conspiracy to distribute illegal narcotics occurring between 1994 and 2000.

Count Two alleged that Greer and others conspired to violate RICO, 18 U.S.C. § 1962(d).

On April 7, 2006, the jury returned verdicts finding Mr. Greer guilty on Counts One and Two and not guilty on Count Four. ECF 681. App. D-3. Mr. Greer was **not** explicitly found guilty of any murder. The verdicts were vaguely worded in alternative, disjunctive forms, repeatedly using the conjunction “or.”

Regarding the murder of Larry Cayton, the federal jury found Mr. Greer *not guilty* on Count Four, “violent crime in aid of racketeering activity” in relation to Cayton’s murder. ECF 681-2. The jury’s finding necessarily establishes that it found Greer “not guilty” of Cayton’s violent murder, but found Mr. Greer “aided or abetted” it.

With respect to Count One, the jury found that Mr. Greer: (1) committed the attempted murder of Jason Hickerson on July 15, 1994, **or** aided and abetted in the commission of that crime; (2) committed the crime of possession of cocaine base with the intent to distribute on April 26, 1997, **or** aided and abetted in the commission of that crime; and (3) committed the murder of Larry Cayton on April 8, 2000, **or** aided and abetted in the commission of that crime. *Id.*

On Count Two the jury found that: (1) the pattern of racketeering activity agreed to by Mr. Greer included an act involving murder; (2) the pattern of

racketeering activity agreed to by Mr. Greer included an act involving attempted murder; (3) the pattern of racketeering activity agreed to by Mr. Greer included an act involving possession of a controlled substance with the intent to distribute; (4) the pattern of racketeering activity agreed to by Mr. Greer included an act involving conspiracy to distribute illegal narcotics; (5) Mr. Greer committed the attempted murder of Jason Hickerson on July 15, 1994, *or* aided and abetted in the commission of that crime; (6) Mr. Greer committed the murder of Keith Roberts on August 3, 1994, *or* aided and abetted in the commission of that crime; (7) Mr. Greer committed the crime of possession of cocaine base with the intent to distribute on April 26, 1997, *or* aided and abetted in the commission of that crime; (8) Mr. Greer committed the murder of Larry Cayton on April 8, 2000, *or* aided and abetted in the commission of that crime; and (9) Mr. Greer committed the crime of conspiracy to distribute illegal narcotics. ECF 681. App. D-3.

B. TRIAL EVIDENCE

The government alleged the “Pitch Dark Family” was a criminal enterprise that operated in Vallejo, California, from 1994 through 2000, purportedly selling drugs, protecting turf, and committing a number of unconnected murders the state never prosecuted.

No evidence established the nature of PDF, its alleged structure, or whether it had any rules, bylaws, agendas, chain of command, or leadership.

The government relied principally on the testimony of Detective Steven Fowler of the Vallejo Police Department (VPD) to establish that PDF was a RICO

“enterprise.” Over repeated defense objections, Det. Fowler was permitted to tell the jury that he relied on two main sources for his opinion: the word on the street from persons involved in criminal activity, which he called “street intelligence,” and admissions made by codefendants as part of their plea agreements. Although both of those sources were inadmissible hearsay, the jury was never told that they could use that information *only* to evaluate the expert’s opinion, not to establish guilt.¹

Det. Fowler believed that street gangs needed to control territory and commonly engaged in acts of violence to protect their turf. He admitted gangs *don’t* share profits from drug sales; it’s not a business; it’s “every man for himself.” Reporter’s Transcript, hereafter “RT,” 7785-7786.

Fowler also admitted that no “pass” was required from PDF to sell drugs in “PDF territory.” (RT 7860.) Hells Angels were selling drugs in the area (RT 7870), and alleged PDF “turf” could “fluctuate” several blocks in either direction. (RT 7869.) He further admitted that rock cocaine could be sold by non-PDF members in PDF “turf.” (RT 7875.)

The trial evidence showed a hodgepodge of unrelated crimes that were never proven to have been committed by PDF, acting as a “continuing unit” with a “common purpose, as part of a “pattern of racketeering activity.” Amazingly, appellate counsel on direct appeal never challenged the sufficiency of the evidence. No evidence was presented establishing that PDF, as an organization, purchased cocaine, distributed

¹ This issue was raised unsuccessfully on direct appeal by Mr. Greer’s former appointed counsel.

it to members to sell, collected the profits and used the proceeds for any other illegal activity.

Likewise, no evidence established beyond a reasonable doubt who actually perpetrated any of the predicate act murders, or that any was committed by or on behalf of PDF. At best, the unrelated crimes alleged in the indictment were for separate, independent drug debts to individual street dealers.

REASONS FOR GRANTING THE WRIT

Mr. Greer and his co-defendant both petition this Court separately to grant certiorari for mostly identical reasons: the lower federal courts have become tolerant of outrageous prosecutorial misconduct, often overlooking egregious violations of criminal defendants' 14th Amendment due process rights.

The reasons this Court should grant review are catalogued in more detail below.

A. EXTREME PROSECUTORIAL MISCONDUCT UNDER *BRADY*, *GIGLIO* AND *NAPUE*

This Court has repeatedly explained the Government's obligation to disclose material evidence to the defense, whether bearing on guilt, impeachment of a witness, or punishment:

Impeachment evidence, however, as well as exculpatory evidence, falls within the *Brady* rule. See *Giglio v. United States*, 405 U.S. 150, 154 (1972). Such evidence is "evidence favorable to an accused," *Brady*, 373 U.S. at 87, so that, if disclosed and used effectively, it may make the difference between conviction and acquittal. Cf. *Napue v. Illinois*, 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given

witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend").

United States v. Bagley, 473 U.S. 667, 676 (1985).

This Court condemned the Government's failure to correct false testimony

60 years ago:

The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend....

It is of no consequence that the falsehood bore upon the witness' credibility, rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. . . . That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.

Napue v. Illinois, 360 U.S. 264, 269-270 (1959).

Prosecution witness Derrick Shields testified Mr. Greer confessed to murdering Larry Cayton, but the material fact that Mr. Shields *was paid by the FBI* for information and testimony *was not disclosed to defense counsel before trial*. This crucial impeachment information was not revealed until 2013, after Mr. Greer filed his 2255 motion in the District Court. In response to the 2255 motion, the

Government provided a copy of a June 1, 2001 letter documenting Mr. Shields' cooperation with the FBI. App. F-3, F-4. The letter proves Mr. Shields (1) received thousands of dollars from the FBI, (2) a reduction in prison time and (3) assistance relocating to a different prison. *Id.*

The letter further explained funds were provided for "operating expenses, "motel accommodations," "food," and "entertainment in furtherance of the investigation..." as well as funds for "clothing and incidental expenses." App. E-3, E-4.

The Government's failure to disclose the letter to Mr. Greer before trial was a breach of *Brady* and *Giglio*.

More damaging, Mr. Shields was permitted to lie to the jury, and Mr. Greer was unable to impeach him without the June 1, 2001 letter. Even further worse, perhaps, the Government failed to correct Mr. Shields' lies:

Q. All right. Now, let me ask you this: You told us that the ***FBI didn't do anything for you to get your testimony***; is that right?

A. Yes. [False.]

Q. You're sure about that, right?

A. Yes. [False.]

RT 7337:1-6, Feb. 9, 2006.

The undisclosed June 1, 2001 letter proves Mr. Shields was lying.

The combination of Shields' lies and the Government's failure to correct them severely erodes confidence in the jury's verdicts. "Because each additional *Napue* and *Brady* violation further undermines our confidence in the decision-making process,

we analyze the claims ‘collectively,’ *Kyles*, 514 U.S. at 436, and proceed to consider the other asserted prosecutorial violations.” *Jackson v. Brown*, 513 F.3d 1057, 1072 (9th Cir. 2008).

Mr. Shields’ testimony was unquestionably “material,” as he, like the witness in *Napue*, was the *only* witness who purported to connect Mr. Greer to the murder of Larry Cayton. Though the jury found Mr. Greer *not guilty* on count three (violent crime in aid of racketeering activity), the jury found that he aided and abetted the murder of Larry Cayton. ECF 681-2. The only possible basis for the jury’s finding was Mr. Shields’ testimony. Thus, it was “material.” That testimony, however, was false in material respects, including Shields’ denial the government had paid him any money.

The Government admitted the crucial letter was *not* provided to the defense before trial: “Government counsel identified this letter [the June 1, 2001 letter] in Walker’s related case shortly before filing this brief. The Government is in the process of reviewing its correspondence and discovery files in the instant case, which are voluminous, to determine whether it was produced independently in this case. . . . [W]e assume for the sake of argument that the letter was not formally produced in the instant case.” App. E-92, footnote 51.

The magistrate judge also noted Mr. Shields’ undisputed cooperation with the government.

Shields cooperated with the government’s investigation of this case. He was in custody on May 9, 2000, on unrelated charges when the FBI interviewed him about the murder of Larry Cayton. Ex. A, (FBI-302). He told the FBI agents

what he knew at that time, which was consistent with his testimony at trial. Id. The FBI arranged for Shields to be released from custody for two weeks, for the purpose of wearing a wire on Greer, Walker, White, and others, after which Shields returned to custody and completed his sentence.

App. D-22. Footnote omitted.

The Government more accurately documented Mr. Shields' extensive cooperation and agreement, which was not disclosed before trial:

In a prior case against Petitioner Jason Walker, 2:00-CR-386, a felon in possession charge in which Shields was a witness and, in fact, based on the same time period in which he was working on the Government's investigation of PDF, the government provided to Walker a June 1, 2001, letter from the FBI outlining *almost \$3,500 in operational expenses paid to Shields for motel accommodations, food, transportation, clothing, and incidental expenses necessary to the work he was performing*. Ex. G, hereto. It *appears* that Walker *shared this letter, produced on June 4, 2001*, with his colleagues on the street, resulting in Greer approaching Shields sometime in December 2001 to confront him about getting paid and in Greer's attorney using information from the letter to impeach Shields in 2006.

App. E-100. Footnote omitted.

Contrary to the Government's speculation, Mr. Greer's trial counsel did *not* rely on the June 2001 letter when cross-examining Mr. Shields. The cross-examination makes no reference to the content of the letter. Rather, trial counsel expressly referenced the FBI-302 reports and FBI agents French and Butler:

Q. Now, in 2000 or 2001, did Shango Greer come up to you and say that the word's out on the street that you got \$3,500 from the FBI?

A. No.

Q. That never happened?

A. No.

Q. Well, do you remember telling the FBI in an interview on ***December the 12th of 2001***, by agents ***Butler*** and ***French***, that Greer knew how much money that the FBI had provided to you? Did you tell them that?

A. I don't remember saying that because ***I didn't get no money***. [False.]

Q. You don't remember saying that ***to the FBI, to Agent French, who is here***, and ***Agent Butler on December the 12th of 2001***?

A. No. I don't remember saying that.

Q. You never told them that? You never complained that, "Hey, Shango Greer knows how much money you guys paid me." You never complained like that to them?

A. ***Never was paid any money***. [False.]

App. E-89 - E-90. Emphasis added.

Agent French was in court when Shields lied. Instead of correcting Mr. Shields' false denials per the requirement of *Napue*, the Government allowed the perjury to go unchallenged and uncorrected. The Government also permitted Mr. Shields to misrepresent why he was testifying—because he had a "change of attitude" and "felt bad" for Larry Cayton:

Q. Were you interviewed by the Oakland Police Department regarding the Cayton murder?

A. Yes.

Q. Approximately when did that occur in relation to Larry's death?

A. In May.

Q. May of 2000?

A. Yes.

Q. So about a month after he was killed?

A. Yes.

Q. Now, going into that interview, what was your attitude about providing information about the murder?

A. I really didn't want to have nothing to do with it. I just was telling them what I heard on the streets, I wasn't saying who I heard it from. I just was telling them, Well, this is what I heard on the street.

Q. So you were just giving them information, not indicating you had any personal knowledge?

A. Yes.

Q. During the course of that interview, ***did your attitude change?***

A. Yes.

Q. ***Why did your attitude change?***

A. Because the officers just kept talking to me about how L got -- how he got murdered, and he didn't just get shot, he got executed. He just kept like saying the same thing over and over and over and over until I was like, Man, all right. I'm going to just tell you, because ***I felt bad for L*** because he kept telling me the same thing over and over and over that he didn't just get shot, he got executed. He got shot in the head this many times, and this is how they found him. And ***I felt bad for him.***

Q. And after your change of attitude, what did you tell the Oakland police officers?

A. Told them what Shango told me.

RT 7109-7110.

The Government's failure to correct Mr. Shields' repeated lies violated *Napue* and *Giglio*.

In *Giglio*, the witness testified for the Government at trial, stating that he had *not* received any promise that he would not be indicted. *Id.* at 151-152. Writing for the Court, Chief Justice Berger found reversible error under *Napue* and *Brady*:

“[w]hether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor’s office is an entity and as such it is the spokesman and for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government.” *Id.* at 154. (Cites omitted.) *Giglio*’s focus on the responsibility of the prosecutor to investigate all promises made on behalf of the Government extends to promises made by the police, who also make any such promises as spokespersons for the Government, and for whom the prosecutor bears responsibility. *U.S. v. Butler*, 567 F.2d 885, 891 (9th Cir. 1978).

The Court should grant review to remedy these disturbing abuses.

The magistrate found erroneously:

The government’s position that Greer’s trial counsel had seen the June 1, 2001 letter, with its mention of a payment to Shields, is supported by the record. As set forth above, Greer’s trial counsel specifically asked Shields whether Greer told him “word’s out on the street that you got \$3500 from the FBI.” 19 RT Feb. 9, 2006 at 7337. ***Thus, it is apparent that defense counsel was aware of the pertinent information and able to use it on cross-examination.***

App. D-80. Emphasis added.

Contrary to the magistrate’s speculation, trial counsel’s questions to Mr. Shields were *not* and could *not* have been based on the June 1, 2001 letter, as it had *not* been disclosed to Mr. Greer before trial, and the transcript of the cross-examination makes no reference to the benefits in the undisclosed letter.

Moreover, the Government’s disclosure of the letter to a co-defendant (Mr. Walker) in a prior case that did *not* involve Mr. Greer did not satisfy the

Government's *Brady* obligations. As the Ninth Circuit explained in 1986, "However, because the trial strategies of co-defendants often conflict (i.e., each may seek to place liability solely on the other), we do not think it prudent to allow the government to satisfy its due process requirements to each of several defendants by merely giving exculpatory evidence to one defendant." *U.S. v. Shaffer*, 789 F. 2d 682, 690 (9th Cir. 1986).

No facts or foundation supports the Government's argument that the June 1, 2001 letter was "shared" with Mr. Greer's counsel. As quoted above, trial counsel questioned Mr. Shields based on the FBI 302 reports disclosed by the prosecution, *not* the June 1, 2001 letter. The Government's brief acknowledged trial counsel's reliance on the 302 reports:

Both movants allege a *Brady* violation related to a purported failure to disclose payments allegedly made to witness Derrick Shields. To do so, they cite trial testimony from Shields in which Greer's attorney attempts to impeach Shields with evidence that Shields was paid. They allege that this information was never provided to them during trial, and had they had the information they could have impeached Shields. But they cite and attach the **FBI-302, Bates stamped 004069**, which was provided in discovery on or about April 11, 2003, well over two years before trial. Petitioners' Motions, Ex. L. It is clear that **the same document**, [the FBI-302 report—not the June 1, 2001 letter] and some additional information, is exactly what Mr. Kmeto was using in his attempt to impeach Shields, as **he cites the authors of the FBI-302, Agents French and Butler, and the date of the FBI-302, December 12, 2001...**[but does not cite the author of the June 1, 2001 letter, Michael C. Reidell]."

App. E-89. Emphasis added.

Despite the Government's attempts to conflate the evidence, the June 1, 2001 letter was *not* relied on by trial counsel to cross-examine Mr. Shields. The letter was *not* disclosed to Mr. Greer until May 31, 2013, **seven years** after he was convicted. Additionally, contrary to the magistrate judge's finding, this claim was *not* waived, as Mr. Greer did not know about the undisclosed evidence until May 31, 2013 and, therefore, could not have waived a claim of which he was unaware.

The Government knew that Mr. Shields repeatedly lied. In exchange for his cooperation, he received money, was given a reduction on his parole violation term, and was relocated to a prison closer to his family. App. F-3 - F-4. This information was never disclosed to Mr. Greer during discovery. App. E-92:24-26. The Government's failure to correct Mr. Shields' lies was highly prejudicial.

Moreover, the information suppressed by the Government would have provided co-defendants Walker and Greer with an effective means of impeachment. "Payments to a government witness are no small thing." *United States v. Sedaghaty*, 728 F.3d 885, 901 (9th Cir. 2013); *United States v. Price*, 566 F.3d 900, 911-12 (9th Cir. 2009) (stating, "to be 'material' under *Brady/Giglio*, 'undisclosed information or evidence acquired through that information must be admissible,' *U.S. v. Kennedy*, 890 F.2d 1056, 1059 (9th Cir. 1989), or capable of being used "to impeach a government witness.").

Here, although Mr. Shields had been cross-examined by the defense and denied receiving payments, the jury did not know about his *agreement* with the Government to cooperate in exchange for money, relocation, and reduced prison time. The

Government's failure to disclose its arrangement with Mr. Shields violated *Brady*, *Napue* and *Giglio*, among other cases. These were material facts relevant to Mr. Shields' credibility.

The Government's knowledge about Mr. Shields' payment and cooperation was particularly within its information, unlike the cases cited in the Findings and Recommendations, which involved defense counsel's failure to obtain records from a *third party*. Clearly, the Government violated its obligation under *Brady*.

The Government's Response (App. E) filed May 31, 2013, establishes it allowed Mr. Shields to commit perjury during his Grand Jury and trial testimony when he testified that he had "never" received any money or anything of benefit for his cooperation. This was a momentous lie that Mr. Greer should have been able to expose to the jury.

The Findings and Recommendations acknowledge, "Government counsel concedes, in the absence of evidence to the contrary, that the June 1, 2001 letter (indicating Shields had been paid and received a sentence reduction in exchange for his cooperation) was not 'formally produced' to either Greer or Walker in the instant case. *Id.* at 92 n.51." App. D-79. The Magistrate Judge, however, excused the Government's *Brady* violation, stating: "But even if the claim had not been waived, it lacks merit. '[W]here the defendant is aware of the essential facts enabling him to take advantage of any exculpatory evidence, the Government does not commit a *Brady* violation by not bringing the evidence to the attention of the defense.' *Raley v. Ylst*, 470 F.3d 792, 804 (9th Cir. 2006) (quoting *United States v. Brown*, 582 F.2d

197, 200 (2d Cir. 1978)). At the very least, Mr. Greer’s [Walker’s] trial counsel had enough information to alert him to the fact that Mr. Shields had been compensated for his cooperation and to seek these documents through discovery. App. D-80.

The District Court’s voluminous docket clearly establishes that Mr. Greer *did* seek all such information in discovery. See Docket Entry 342. Despite seeking all relevant discovery, the Government breached its duty to disclose its confidential agreement with Mr. Shields.

Cunningham v. Wong, 704 F.3d 1143, 1154 (9th Cir. 2013), cited by the Magistrate Judge, is inapplicable. In that case, the court found no *Brady* violation, because “Cunningham’s attorneys possessed the ‘salient facts’ that would have allowed them to access Cebreros’s medical records. They knew he had been shot and was treated by medical personnel following the shooting. There was no suppression of this easily attainable evidence.” *Id.* at 1154.

Cunningham involved disclosure of *third party* records, not records in the Government’s possession. Accordingly, *Cunningham* is irrelevant to the facts in this case, in which the Government suppressed information within its exclusive possession.

For the same reasons, *Raley v. Ylst*, 470 F.3d 792, 804 (9th Cir. 2006) (F&R, App. D-80) is inapplicable to Greer’ *Brady* claim.

The result of the Government’s failure to disclose the June 1, 2001 letter was Mr. Shields’ false grand jury and trial testimony, which the prosecution never corrected. “To prevail on a claim based on *Mooney-Napue*, the petitioner must show

that (1) the testimony (or evidence) was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) ... the false testimony was material.” *Hayes v. Brown*, 399 F.3d 972, 984 (9th Cir. 2005) quoting *United States v. Zuno-Arce*, 339 F.3d 886, 889 (9th Cir. 2003).

The Government’s misconduct in not correcting Mr. Shields’ false testimony violated the precedents cited above. This Court should grant review to remedy this abuse and reaffirm prosecutorial duties to provide discovery to the defense under *Brady*. Moreover, the Court should grant review to reinforce and reaffirm the prosecution’s obligation to disclose agreements with cooperating witnesses and its duty to prevent and correct false testimony under *Giglio* and *Napue*.

1. Prosecutorial Misconduct Before The Grand Jury

“As a general rule, a prosecutor may not express his opinion of the defendant’s guilt or his belief in the credibility of government witnesses.” *United States v. Molina*, 934 F.2d 1440, 1444 (9th Cir. 1991). Vouching consists of placing the prestige of the government behind a witness through personal assurances of the witness’s veracity, or suggesting that information not presented to the jury supports the witness’s testimony. *Id.* at 1445; *United States v. Roberts*, 618 F.2d 530, 533 (9th Cir. 1980). “Vouching is especially problematic in cases where the credibility of the witnesses is crucial, and in several cases applying the more lenient harmless error standard of review, [courts] have held that such prosecutorial vouching requires reversal.” *Molina*, 934 F.2d at 1445; accord, *U.S. v. Necoechea*, 986 F.2d 1273, 1276-1277 (9th Cir. 1993).

Disturbingly, the Grand Jury's indictment was based on false and material testimony. Derrick Washington testified that Mr. Greer shot Larry Rude. ECF 1126 at 6-7; 1124 at 7-8. However, Derrick Washington later testified he had *lied*. Washington admitted *he* actually shot Larry Rude, not Mr. Greer. ECF 1126 at 9-10; 1124 at 9-10.

Mr. Washington's false accusation against Mr. Greer was so critical to the Government's indictment that prosecutor Jody Rafkin tried to salvage his untrue and morally outrageous Grand Jury testimony by vouching for his low intelligence, remorsefulness, character, sincerity and explaining away his perjury. She did not "immediately" correct Mr. Washington's false testimony by bringing him back to the Grand Jury to explain for himself his lies or alert the court until months had passed, and she continued to present witnesses to the Larry Rude shooting, including Larry Rude himself, flagrantly misleading the Grand Jurors to believe this crime had been committed by Shango Greer for PDF purposes, strategically compounding the prejudicial effect of Mr. Washington's false testimony.

Months after the perjury occurred, Prosecutor Rafkin became an advocate for Derrick Washington. She vouched for his character, explaining: "[H]e has some severe learning disabilities and is not a really intelligent person. [¶] ... [¶] He says he feels very badly about it now. We've explained to him -- he now has a lawyer -- that it's bad enough that he was afraid to acknowledge that he was involved in the shooting, but that . . . a bigger problem was that he had falsely incriminated Shango."

ECF 402 *sealed* at 21-23. Mr. Washington testified that he just happened to pick Mr. Greer's name "right out of the sky." RT 5721.

There was no testimony from Mr. Washington establishing that he was "afraid of Shango" or that "he's seen and heard about Shango doing really bad things" or that "Shango was the most frightening of the people in the group," or "that he had seen Shango earlier that night with Fade, and he'd said that, you know, something was going to happen later." ECF 402 *sealed* at 21-23. This was all Ms. Rafkin's improper testimony. *Cf. United States v. Dominic P. Gallo and Carmen Ricca*, 394 F.Supp. 310, 313-314 (D. Conn. 1975) ("[C]ourts must be ever vigilant to preserve the functions of the grand jury as an effective 'safeguard against oppressive actions of the prosecutor...' ... 'The accused has a right 'to have the grand jury make the charge on its own judgment.' [Citation omitted]. Neither by depriving the grand jury of its opportunity to evaluate the credibility of witnesses nor by making prejudicial remarks to sway the grand jury may the prosecutor deny the accused this substantial right.").

After being asked how they felt about Derrick Washington's outrageous lies, one Grand Juror stated: "I would throw all that stuff out of, just throw it out. It's tainted by him lying, and if I was on the jury right now and listening to him, and he had lied in that, I wouldn't believe a damn thing he said, so. That's just a -- all of this, whatever he said." ECF 402 *sealed* at 27.

Mr. Washington's false testimony clearly had a prejudicial effect on the Grand Jury, because his testimony was material to the allegations that PDF was an

“enterprise.” Prosecutor Rafkin characterized the Rude shooting as PDF business; she stated: “basically because Lew was shooting and Lew was part of PDF and he (Shango) was part of PDF, it was sort of, if Lew’s going to be in it, I’m going to be in it.” ECF 1126, Exhibit B & ECF 1124, Exhibit B: Grand Jury proceedings at 9977-9988. This went to the heart of the Government’s charges of PDF being a “racketeering enterprise” that functioned as a “continuing unit” with a “common purpose,” and that PDF acted on impulse to protect its members.

Judge Damrell’s finding that Mr. Washington’s contemptable, false accusations were “not material” was plainly erroneous. Mr. Washington’s false testimony tarred Mr. Greer with involvement in a “RICO enterprise.” Another Grand Juror asked Ms. Rafkin:

GRAND JUROR: So is, is the part where he lied the part where he said that he loaned the pistol to Shango?

MS. RAFKIN: And that Shango was there and did the shooting.

GRAND JUROR: And Shango used it.

RT at 11, December 18, 2002.

This Court should remedy the Government’s decadent manipulation of Grand Jury witness testimony.

2. Appellate Counsel Provided Ineffective Assistance By Not Challenging The Constructive Amendment Of The Indictment, As Well As The Legally Inadequate Theory Submitted To The Jury

It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process. *Cole v. Arkansas*, 333 U.S. 196, 201 (1948);

Presnell v. Georgia, 439 U.S. 14 (1978). These standards no more than reflect a broader premise that has never been doubted in our constitutional system: that a person cannot incur the loss of liberty for an offense without notice and a meaningful opportunity to defend. *E.g., Hovey v. Elliott*, 167 U.S. 409, 416-420 (1897). A conviction based upon a record wholly devoid of any relevant evidence of a crucial element of the offense charged is constitutionally infirm. *See also Vachon v. New Hampshire*, 414 U.S. 478 (1974); *Adderley v. Florida*, 385 U.S. 39 (1966); *Gregory v. Chicago*, 394 U.S. 111 (1969); *Douglas v. Buder*, 412 U.S. 430 (1973). The “no evidence” doctrine of *Thompson v. Louisville*, 362 U.S. 199 (1960) thus secures to an accused the most elemental of due process rights: freedom from a wholly arbitrary deprivation of liberty.

The first step in the protection against an arbitrary deprivation of liberty is an indictment, which is a necessary prerequisite to a felony conviction and sentence in federal court. *Stirone v. United States*, 361 U.S. 212, 217, 4 L. Ed. 2d 252, 80 S. Ct. 270 (1960). An indictment is sufficient if it charges an offense, contains the elements of that offense, and fairly informs the defendant of the charge against him. *Hamling v. United States*, 418 U.S. 87, 117, 41 L. Ed. 2d 590, 94 S. Ct. 2887 (1974); accord *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999). Furthermore, it is well-established that after an indictment has been returned, its charge may not be broadened except by amendment by the grand jury itself. *Stirone*, 361 U.S. at 217-18; *see also United States v. Miller*, 471 U.S. 130, 138, 85 L. Ed. 2d 99, 105 S. Ct. 1811 (1985) (citing *Stirone*, 361 U.S. at 217-18).

An indictment is constructively amended where “the evidence presented at trial, together with the jury instructions, raises the possibility that the defendant was convicted of an offense other than that charged in the indictment.” *United States v. Streit*, 962 F.2d 894, 899-900 (9th Cir. 1992). “A variance involves a divergence between the allegations set forth in the indictment and the proof offered at trial.” *United States v. Ward*, 747 F.3d 1184, 1189 -1190 (9th Cir. 2014). Put another way, a variance occurs “when the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment.” *United States v. Jingles*, 702 F.3d 494, 500 (9th Cir. 2012). The terms “variance” and “amendment” “can, and often do, mean the same thing.” *Id.*

...[A] court cannot permit a defendant to be tried on charges that are not made in the indictment against him. Yet the court did permit that in this case. The indictment here cannot fairly be read as charging interference with movements of steel.... And it cannot be said with certainty that a new basis for conviction added, Stirone was convicted solely on the charge made in the indictment the grand jury returned. Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same. And the addition charging interference with steel exports is neither trivial, useless, nor innocuous... The variation between pleading and proof...destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be...dismissed as harmless error. The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge.

Stirone, 361 U.S. at 217-19.

No firearm or ammunition offenses were alleged in the indictment. Nevertheless, the jury was given the unalleged option of finding a connection to the Commerce Clause through gun use and ammunition sales. Jury instruction #32 stated:

The government contends that the enterprise in this case was engaged in, or affected, interstate or foreign commerce, in the following ways, among others: (1) the sale of illegal narcotics (including specifically cocaine base also known as “crack cocaine”); and (2) the use of firearms and ammunition manufactured outside the State of California. “If the government can prove that the enterprise or its activities engaged in or involved interstate or international drug trafficking or possession or use of weapons which traveled in interstate commerce, it will have satisfied this element.”

The jury was thus permitted to find a connection to interstate or foreign commerce if the “government can prove that the enterprise or its activities engaged in or involved “use of weapons which traveled in interstate commerce.” Thus, the District Court allowed the jury to convict based on a legally inadequate theory. *Yates v. United States*, 354 U.S. 298, (1957), and *Turner v. United States*, 396 U.S. 398, (1970) (*Turner*).

Yates involved a conspiracy consisting of two objects, one of which was insufficient as a matter of law to support the conspiracy conviction. The court in *Yates* stated: “In these circumstances we think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected.” 354 U.S. at 312. *Yates* expanded prior law, holding that a general verdict

must be set aside not only when one of the possible grounds for a conviction was unconstitutional, but also when one possible ground was legally impermissible.

The weapon element and instruction was unconstitutional in this case because neither Mr. Greer nor Mr. Walker was charged by indictment for any weapon or ammunition offenses. *United States v. Barona*, 56 F.3d 1087 (9th Cir. 1995). At trial, however, the Government attempted to satisfy the interstate nexus requirement by introducing evidence of gun use and ammunition manufacture. Appellate counsel was ineffective by failing to challenge this issue on appeal. Had appellate counsel raised the due process notice problem under the relevant case law, there is a reasonable probability that Mr. Greer's convictions would have been vacated by the Ninth Circuit Court of Appeals, satisfying the prejudice prong under *Strickland*: "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

The Government introduced testimony from A.T.F. Agent Trista Frederick concerning various firearms and ammunition. Agent Frederick testified:

Q. Is that the 38 Super Auto ammunition that you examined?

A. Yes, it is.

Q. All right. And what kind of markings did you determine were on that item?

A. If you look at the top, it says WIN. Then if you read from left to right, it is 38 SUPER AUTO+P.

Q. And the "WIN," what does that stand for?

A. That stands for Winchester .

Q. Did you determine the place of manufacture of this item?

A. Yes. It was manufactured by Winchester in East Alton, Illinois.

ECF 1126-1, Ex. K, Trial Tr. at 7676.

No testimony was presented to the Grand Jury pertaining to the manufacture or purchase of firearms or ammunition, and the indictment alleged *nothing* about guns providing a nexus to interstate commerce. Thus, Mr. Greer's 14th Amendment due process rights were violated.

This Court has established that the elements of an offense ***must be charged in the indictment***, submitted to a jury and proved beyond a reasonable doubt. *Jones*, 526 U.S. at 232. Due process and the Sixth Amendment require *each element be charged in the indictment*, submitted to a jury, and proved beyond a reasonable doubt. *Jones*, 526 U.S. at 244-52. The indictment in this case alleged broadly that the Pitch Dark Family was an “enterprise engaged in, and the activities of which, affected interstate and foreign commerce...” App. G-4. Had appellate counsel argued the *Jones/Stirone/Miller* line of opinions, there is the reasonable likelihood that the Ninth Circuit Court of Appeals would have reversed the convictions.

The witness testimony at trial unconstitutionally enlarged the allegations of the indictment to meet the RICO’s “interstate” commerce requirement. *United States v. Stubbs*, 279 F.3d 402 (6th Cir. 2001).

The Government could not have made the connection to interstate or foreign commerce without the impermissible instruction to the jury concerning the weapons and ammunition for which Mr. Greer was not indicted. Had appellate counsel appealed this plain error, there was a reasonable likelihood the convictions would

have been vacated. *Thomas v. Harrelson*, 942 F.2d 1530 (11th Cir. 1991); *Lucas v. O'Dea*, 179 F.3d 412 (6th Cir. 1999).

Under the unalleged theory presented to the jury, Mr. Greer was exposed to charges for which he had no notice and thus no opportunity to defend. The variance from the indictment to the jury instruction deprived Mr. Greer and his co-defendant, Mr. Walker, of their Fourteenth Amendment right to notice of the charges against them. *Combs v. Tennessee*, 530 F.2d 695, 698 (6th Cir. 1975) (holding that “such definiteness and certainty are required as will enable a presumptively innocent man to prepare for trial”). *Glover v. United States*, 531 U.S. 198, 203 (2001).

The Court should grant review to remedy these Constitutional violations.

3. The Evidence Was Insufficient To Support The Constructive Amendment Of The Indictment

The Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358. The state's burden to prove every element of the offense beyond a reasonable doubt is well-established. *Victor v. Nebraska* 511 U.S. 1, 5 (1994); *Jackson v. Virginia*, 443 U.S. 307, 320, n. 14 (1979). Cf. *Taylor v. Kentucky*, 436 U.S. 478, 485-486 (1978). “[T]aken as a whole, the instructions must correctly convey the concept of reasonable doubt to the jury.” *Holland v. United States*, 348 U.S. 121, 140 (1954).

Even if the Government's gun and ammunition theories were properly presented to the jury, no evidence connected them to Mr. Greer.

The magistrate judge found:

The introduction of evidence about use of firearms to show a nexus to interstate commerce in this case did not constitute facts “materially different” from the general allegations contained in the indictment. This can be demonstrated by the fact that none of the defendants objected or showed any surprise during trial when this evidence was discussed or introduced. There is also no reasonable possibility in this case that Greer was convicted of an offense other than that charged in the indictment simply because the government introduced evidence of gun use in order to support the element of interstate commerce.

App. D-62.

The magistrate’s finding was incontrovertibly in error. The indictment alleged *nothing* about gun or ammunition manufacturing. App. I. Thus, Mr. Greer had no notice of this basis for the required “nexus” to interstate commerce, in violation of fundamental notice requirements. *Hovey v. Elliott*, 167 U.S. 409, 416-420. Moreover, the Government *failed to prove* that the guns or ammunition were used in any predicate RICO crimes.

The insufficient gun evidence was summarized by the Government in its reply brief on Mr. Greer’s direct appeal:

On August 3, 1994, at approximately 3:30 a.m., Vallejo police officers responded to a shooting that occurred at the intersection of Sonoma and Louisiana in Vallejo, which is in PDF territory. R.T. 4698:10-11. Upon arriving at the scene, officers saw a black male, later identified as Keith Roberts, lying face down in the street. R.T. 4698:14-16. Roberts had sustained multiple gunshot wounds, R.T. 4698:21; and was pronounced dead at the scene. R.T. 4702:4-9. Officers collected nine .38 Super shell casings at the crime scene. R.T. 4711:15-4712:9. These casings were arranged all around Roberts’ body. R.T. 4700:11-20. Forensic analysis matched the .38 super shell casings to shell casings recovered from the scene of a carjacking that occurred two weeks later in the same area as the Roberts

murder. R.T. 5459:7-21. The shell casings also matched one of the weapons used to kill Richard Garrett (Racketeering Act Four).

The .38 Super is a fairly rare caliber ammunition. R.T. 4978:3-4. Joseph Thompson, the owner of one of the few gun stores in the region that sold .38 Super ammunition, testified that on August 19, 1994, two black males were in the store and purchased .38 Super ammunition. R.T. 4978:17-4979:11. Thompson recalled that these two individuals had been in the store a week or two earlier. R.T. 4979:12-24. On that occasion, one of the two men advised that he had a Llama .38 Super Auto for which he needed an additional magazine. R.T. 4980:12-25. After the two men departed the store, Thompson copied down the license plate of the brownish-colored Chevrolet the two were driving. R.T. 4982:12-24. He forwarded the information to the Vallejo Police Department. R.T. 4983:2-5. On September 1, 1994, officers were conducting surveillance on this car. R.T. 5022:2-12. While on duty, they observed a Buick driven by Jason Walker pull into the parking lot and park next to the Chevrolet. R.T. 5023:1-15; R.T. 5026:3-23. The officers then saw Jason Walker and another black male exit the Buick and enter an unknown apartment. R.T. 5023:11-5024:3. Approximately 45 minutes later, Walker came out of the apartment complex and opened the trunk of the Chevrolet. R.T. 5024:4-23. After a few minutes, Walker returned to the apartment. R.T. 5025:3-7.

9th Circuit Case No. 06-10643, 10/14/2009, ID: 7095479, Dkt 57 at 25-26.

The Government's evidence falls far short of proving that Mr. Greer or Mr. Walker used the .38 Super for any predicate acts. The evidence does not establish which individual purchased the .38 ammunition, nor who used it in any alleged RICO crime. If the person who used the weapon is unknown, the crime cannot be attributed to an "enterprise." Thus, the connection to interstate commerce was not proven.

Review of the Government's closing and rebuttal argument reveals that no evidence proved the guns or ammunition were used by PDF or Mr. Greer. The Government theorized that Keith Roberts and Richard Garrett were murdered for selling drugs in "PDF territory" but those theories are dramatically unsupported by any evidence. The murders of Roberts and Garret remain unsolved and unprosecuted by the State of California.

The Government's theory that the predicate crimes were done by PDF was unsupported by proof beyond a reasonable doubt. There was no "PDF territory;" the alleged boundaries were vague and constantly fluctuating, and it is undisputed that many non-PDF members sold drugs in "PDF territory" without permission or retaliation. The Government's theory that PDF protected "turf" is overwhelmingly unsupported by the evidence. The predicate acts were crimes, but the Government failed to prove any relationship among them, nor the motives of the unknown perpetrators, and no proof beyond a reasonable doubt ever established that PDF, as an organization, committed or ordered the commission of any predicate act. Since the Government was unable to prove at trial that PDF was an "enterprise" that functioned as a "continuing unit" with a "common purpose," the predicate acts could not possibly have been committed by or on behalf of PDF. Nothing about the facts of the predicate acts suggest any type of "pattern," let alone a pattern attributable to PDF. As mentioned, appellate counsel failed to challenge the sufficiency of the evidence, so it was not challenged on direct appeal.

4. Ineffective Plea Representation

Greer claimed ineffective assistance of trial counsel during the negotiations of a plea bargain, a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel. *Missouri v. Frye*, 132 S.Ct. 1399, 1406 (2012). See also *Padilla v. Kentucky*, 556 U.S. 356, ---, 130 S.Ct. 1473, 1486 (2010). “[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.” *Id.* at 1408. Similarly, “[d]uring plea negotiations defendants are entitled to the effective assistance of competent counsel.” *Lafler v. Cooper*, 132 S.Ct. 1376, 1384 (2012) (internal citation omitted). Counsel may be deficient by advising a defendant to reject a plea offer because he could not be convicted at trial, or when counsel has provided erroneous information regarding potential sentence outcomes should a plea offer be rejected. *Id.*

Here, both petitioners claimed counsel failed to advise them of the correct maximum penalty, a mandatory life sentence. Had Mr. Greer been advised of the maximum penalty, he would have accepted the government’s offer of 13 years. Due to the objectively unreasonable performance of counsel, Petitioner refused the plea offer and was later sentenced to life in prison.

“To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel’s deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel.” *Missouri v. Frye* at 1409.

There was a reasonable probability that, had they been advised as to the actual consequences of conviction, Mr. Greer and Mr. Walker would have accepted the offers, the prosecution would not have withdrawn them, the court would have accepted the terms, and neither would have received a life sentence.

CONCLUSION

This petition establishes prosecutorial misconduct that undercuts this Court's precedents (*Brady/Giglio/Napue*) going back to the 1950's. The Government's withholding of the June 1, 2001 letter is inexcusable, yet the lower courts condoned the violation.

The false evidence presented to the Grand Jury that Mr. Greer shot someone, when the testifying witness was the shooter, is almost not believable. The Government's vouching and rehabilitating of the lying witness should be remedied, but the lower courts have refused. This Court should grant review to reaffirm the solemn constitutional duties of prosecutors and vindicate long-recognized due process protections accorded criminal defendants.

The constructively-amended indictment deprived Mr. Greer of notice under the Fourteenth Amendment and deprived him of the opportunity to challenge effectively the unalleged "nexus" to interstate commerce.

The demands of the Sixth Amendment should be revisited to ensure appellate counsel raise competent challenges to the pleadings and evidence, rather than concede sufficiency, as occurred here.

Finally, another important Sixth Amendment interest supports granting the petition: the right to effective assistance regarding settlement offers. Plea bargaining makes up the bulk of the criminal process; therefore, constitutional standards must be rigorously enforced and reaffirmed, if defendants' rights are to be protected.

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Dated: June 20, 2019

Respectfully submitted,

/s/ Benjamin Ramos

Benjamin Ramos, Esq.

Counsel of Record

Law Office of Benjamin Ramos

705 E. Bidwell, Ste. 2-359

Folsom, California 95630

benjamin_ramos@comcast.net

Telephone: (916) 358-9842

Appointed Counsel for Petitioner
SHANGO JAJA GREER