Michael Jefferson #190620
Red Rock Correctional Center
1752 East Arica Road
Eloy, Arizona 85131

UNITED STATES SUPREME COURT

ON PETITION FOR WRIT OF CERTORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MICHAEL ANTHONY JEFFERSON
APPELLANT,

VS.

DAIVD SHINN, et. al.
Appellee.

S. CT NO. 19-6869
9TH Cir. NO. 19-15487

APPLICATION TO INDIVIDUAL JUSTICES

HONORABLE WILLIAM C. CANBY JR.
HONORABLE SIDNEY R. THOMAS

INTRODUCTION

Pursuant to Rule 22 of the Rules of the United States Supreme Court, Petitioner hereby submits an Application to Individual Justices of the United States Court of Appeals for the Ninth Circuit to resolve a conflict on an issue that was decided differently by Justices William C. Canby Jr. and Sidney R. Thomas in the case of US v. Jenkins, 564 F. 3d 694 (9th Cir. 2007). Petitioner

was denied a Certificate of Appealability (COA) on the same issue presented in Petitioner's Application for a Writ of Habeas Corpus. These Justices of the 9th Circuit have the authority to grant the relief requested in the form of a COA, and allow an appeal to proceed.

THE REASON JUSTICES SHOULD GRANT RELIEF REQUESTED

Petitioner was recently denied a Certificate of Appealability in the Ninth Circuit Court of Appeals, and Petitioner is currently on certiorari to the United States Supreme Court from a Writ of Habeas Corpus from the State of Arizona and.

Petitioner was convicted in the Superior Court of Arizona by a jury trial for money laundering in the first degree, control of an illegal enterprise, 3 counts of aggravated identity theft, trafficking in stolen identities, and fraud schemes and artifices. Petitioner was sentenced to 31.5 years for these crimes and committed to the custody of the Arizona Department of Corrections on January 27, 2012.

All appeals and Rule 32 Post-Conviction proceedings were denied and the Arizona District Court denied relief and a COA. Petitioner appealed to the Ninth Circuit Court of Appeals on March 18, 2019. On September 13, 2019, the 9th Circuit denied the application for a Certificate of Appealability and a rehearing en banc. Petitioner is now on a Writ of Certiorari and now submits to Justices William C. Canby Jr. and Sidney R. Thomas an issue raised that is in conflict within the Ninth Circuit and other Circuit Courts, as well as, the United State Supreme Court Authorities.

All the claims raised in the Habeas Corpus were properly exhausted and this case has no procedural or preclusion issues. The main focus is to obtain a Certificate of Appealability on a major issue that is a very serious constitutional violation. Petitioner had made a substantial showing of a denial of a constitutional right pursuant to **Miller-El v. Cockrell**, 537 U.S. 322, 123 S. Ct. 1029 (2003) and the claim raised is of national importance and the Supreme Court has not had a case of this magnitude since 1978 in the case of **Bordenkircher v. Hayes**, 433 U.S. 357, 364 (1978) regarding vindictive prosecution, and there is no recorded precedent on ineffective assistance of counsel in habeas corpus proceeding regarding vindictive prosecution. Petitioner's case regarding vindictive prosecution has the same set of circumstances as the case of **U.S. v. Jenkins**, 564 F. 3d 694 (9th Cir. 2007), which was decided by William C. Canby Jr. and Sidney R. Thomas. The only difference is that, in Petitioner's case, ineffective assistance of counsel led to counsel missing the fact that Petitioner was punished for exercising his constitutional rights on a successful motion to suppress. The District Court, M. Smith, and Hurwitz on the 9th Circuit panel did not properly consider the evidence Petitioner provided in support of his vindictive prosecution and speedy trial claim. The District Court should have resolved the claims differently.

TIMING AND FACTS ON VINDICTIVE FILING

In the present case, there is a conflict with this issue within this Circuit and the claim of vindictive prosecution has been decided differently by different panels of the 9th Circuit and is in direct conflict with Authorities of both U.S. Court of Appeals and Supreme Court of the United States. The case of **U.S. v. Jenkins**, 564 F. 3d 694 (9th Cir. 2007) has the same set of circumstances as Petitioner's case. In the Jenkins' case, the Court determined that the filing of

charges after Jenkins testified in her own defense at her separate marijuana smuggling trial created an appearance of vindictiveness, as well as the timing of the charges, and the Court ruled that dismissal was appropriate action. Petitioner, in this present case, has the same set of circumstances regarding the appearance of vindictiveness and the timing of the charges being filed against him. Right after Petitioner exercised his right and won a motion to suppress he was immediately arrested in Court on a case that was in the government possession for nearly 5 years prior. (See Exhibit A Court Docket, this shows the timing of the charges being filed after the successful motion to suppress) The charges were brought in retaliation for Petitioner exercising his constitutional right on a motion to suppress, which he won. After Petitioner won the case, the prosecutor entered the Court room and cussed at Petitioner's Attorney Terrea L. Arnwine for winning on the motion to suppress. The prosecutor said to Attorney Terrea L. Arnwine, "bitch you won that case let's see you win this one!" The prosecutor then filed the charges in hostility and had Petitioner arrested in the Court room and immediately taken into custody. (See Attorney Arnwine's affidavit Exhibit B, who litigated the case on a motion to suppress in CR 2009=179875-001DT. This also proves the timing of the charges were filed after the successful motion to suppress.) At any point in Petitioner's case, the government could have charged Petitioner with the fraud charges, which it was well aware of nearly 5 years earlier, yet it chose to pursue the harsher charges only after Petitioner's successful suppression motion. (See **U.S. v. Groves**, 571 F.2d 456 (1978)) The circumstances in Jenkins' case are similar to Petitioner's case. Jenkins was charged with additional charges only after she testified in her smuggling case as Petitioner, in this case, was charged with additional charges only after he won his motion to suppress on charges the State knew about 5 years prior. Another factor is

since this case was pending for so long, there is a reasonably likelihood that the State would not have brought the fraud charges had not Petitioner moved to suppress the illegally seized evidence in another case. The appearance of vindictiveness results only where as a practical matter there is a realistic or reasonable likelihood of prosecutorial conduct that would not have occurred but for hostility or a punitive animus toward the defendant because he has exercised his specific legal rights. (See **U.S. v. Goodwin**, 4547 U.S. 368 (1982) and **Blackledge v. Perry**, 417 U.S. 21 1974)

Another case that is similar to Petitioner's case is out of the 6th Circuit Court of Appeals in **United State v. Ladeau**, 734 F .3d 561 (6th Cir. 2013), Petitioner in that case was punished for exercising his rights on a motion to suppress and the Court determined that the government's decision to charge the defendant after his successful motion to suppress created a presumption of prosecutorial vindictiveness in as much as there was a realistic likelihood that the additional charges were filed in retaliation for his successful motion to suppress. These are the same set of circumstances in Petitioner's case and counsel was ineffective for failing to investigate this claim and move for dismissal regarding vindictive prosecution. This case is of importance because punishing defendants for exercising legally protected rights is insidious and a violation of due process under the 14th Amendment of the United States Constitution. (See Exhibit C which shows the Jenkins case)

RELIEF REQUEST

Since Judges William C. Canby Jr. and Sidney R. Thomas are familiar with this type of issue and have ruled on this same issue in the past Petitioner humbly asks these Honorable Justices to grant or recommend relief to be granted in the form of a Certificate of Appealability and allow full briefing in the 9th Circuit because Petitioner has made a substantial showing of a denial of a constitutional right and is entitled to a COA.

CERTIFICATE OF SERVICE

A copy of this Application was forwarded to the following parties on 12 / 19 / 2019.

9th Circuit

Office of the Clerk of the
Supreme Court of the
United States
Washington, DC 20543-0001

Attorney General's Office
Terry M. Crist III
Criminal Appeals Section
2005 N. Central Avenue
Phoenix, Arizona 85004-1580

Signature Michael Jefferson

Date 12/19/2019

EXHIBIT:

A

CRIMINAL CASE - DOCKET DISPLAY

CR2009179875 001 DT

DOCKET EVENTS

Filed	Docketed	Minute Entry	Docket Type	Filed By
7/19/2010	7/19/2010	7/15/2010	042 - ME: Case Dismissed - Full	The Court
7/14/2010	7/14/2010	7/9/2010	005 - ME: Hearing	The Court
7/14/2010	7/14/2010		MTD - Motion To Dismiss	Bradley Francis Perry
Note: WITHOUT PREJUDICE				
7/13/2010	7/13/2010		STA - Statement	Bradley Francis Perry
Note: JOINT PRETRIAL STATEMENT				
7/9/2010	7/14/2010		REL - Reply	Terrea Arnwine
Note: TO STATES RESPONSE TO MOTION TO SUPPRESS				
7/9/2010	7/14/2010		WSH - Worksheet	The Court
Note: TRIAL HEARING				
7/9/2010	7/15/2010		EXW - Exhibits Work Sheet	The Court
7/6/2010	7/6/2010	7/2/2010	003 - ME: Hearing Reset	The Court
7/1/2010	7/2/2010		RES - Response	Terrea Arnwine
Note: TO MOTION TO CONTINUE				
6/30/2010	6/30/2010		MCO - Motion To Continue	Bradley Francis Perry
Note:				
6/23/2010	6/23/2010	6/22/2010	088 - ME: Case Transferred	The Court
6/21/2010	6/21/2010		RES - Response	Bradley Francis Perry
Note: TO MOTION TO SUPPRESS				
6/17/2010	6/17/2010	6/16/2010	056 - ME: Hearing Set	The Court
6/7/2010	6/9/2010		MOT - Motion	Terrea Arnwine
Note: TO SUPPRESS				
5/21/2010	5/21/2010	5/12/2010	027 - ME: Pretrial Conference	The Court
5/18/2010	5/18/2010	5/6/2010	083 - ME: Conference Reset/Cont	The Court
5/12/2010	5/28/2010		STA - Statement	The Court
Note: COMPREHENSIVE PRETRIAL CONFERENCE/				
4/9/2010	4/9/2010	4/7/2010	194 : Me: Initial Pretrial Conference	The Court
4/6/2010	4/6/2010		ALG - Allegation	Bradley Francis Perry
Note: OF PRIOR FELONY CONVICTION				
4/6/2010	4/6/2010		RQH - Request For Hearing	Bradley Francis Perry
Note: RULE 609				
4/6/2010	4/6/2010		ACO - Allegation of Historical Priors	Bradley Francis Perry
Note:				
4/6/2010	4/6/2010		AOP - Allegation of Prior Dangerous and /or More T	Bradley Francis Perry
Note:				
4/6/2010	4/6/2010		DAR - Notice of Disclosure and Request for Disclosu	Bradley Francis Perry
Note:				
3/15/2010	3/15/2010	3/3/2010	073 - ME: Motion Withdrawn	The Court
2/26/2010	2/26/2010	2/23/2010	152 - ME: Not Guilty Plea Arraign	The Court
2/23/2010	3/1/2010		WPH - Waiver Of Preliminary Hearing	The Court

CR2010135286 001 SE

Note: Motion to Quash Bench Warrant				
2/22/2011	2/22/2011	2/15/2011	099 - ME: Withdrawal Of Counsel	The Court
2/15/2011	2/17/2011		OCW - Order for Withdrawal of Counsel	The Court
2/8/2011	2/11/2011		MFW - Motion For Withdraw of counsel	Anne Michael Williams
1/31/2011	1/31/2011	1/25/2011	027 - ME: Pretrial Conference	The Court
12/7/2010	12/7/2010	12/2/2010	591 - ME: Complex Case/Trial Setting	The Court
12/2/2010	12/6/2010		STA - Statement	The Court
Note: COMPREHENSIVE PRETRIAL CONFERENCE /				
11/3/2010	11/3/2010	11/2/2010	194 : Me: Initial Pretrial Conference	The Court
10/14/2010	10/15/2010		MOT - Motion	Anne Michael Williams
Note: TO DESIGNATE CASE AS COMPLEX				
9/16/2010	9/16/2010	9/13/2010	152 - ME: Not Guilty Plea Arraign	The Court
8/30/2010	9/1/2010		NAR - Notice Of Appearance	Anne Michael Williams
8/17/2010	8/17/2010	8/16/2010	056 - ME: Hearing Set	The Court
8/16/2010	8/17/2010		ORD - Order	The Court
Note: ACCEPTING THE WAIVER OF PRLIMINARY HEARING				
8/16/2010	8/17/2010		INF - Information	RICHARD M ROMLEY
8/10/2010	8/10/2010		NOT - Notice	Terrea Amwine
Note: OF WITHDRAWAL				
8/9/2010	8/9/2010	8/6/2010	584 - ME: Preliminary Hearing Continued	The Court
8/6/2010	8/9/2010		NAR - Notice Of Appearance	Terrea Amwine
8/6/2010	8/9/2010		REQ - Request	Terrea Amwine
Note: FOR DISCLOSURE				
8/6/2010	8/9/2010		NOT - Notice	Terrea Amwine
Note: OF DEFENSES				
8/6/2010	8/10/2010		OTC – Order to Continue	The Court
7/27/2010	7/29/2010		FIN - Financial Information	The Court
7/27/2010	7/27/2010	7/23/2010	029 - ME: Status Conference	The Court
7/26/2010	7/28/2010		OTC – Order to Continue	The Court
7/19/2010	7/19/2010		IAD - Initial Appearance Document	The Court
7/13/2010	7/13/2010		DCO - Direct Complaint	COUNTY ATTORNEY C

9

The Judicial Branch of Arizona, Maricopa County

Search

Criminal Court Case Information - Case History

Case Information

Case Type: Criminal Location: Southeast

Party Information

Party Name - Number	Relationship	Sex	Attorney	Judge	Case #
State Of Arizona - (1)	Plaintiff	N/A	County Attorney, Maricopa		
Michael Anthony Jefferson - (2)	Defendant	M	Debrigida, Ronald	Unit	CR2010-135286-001

Disposition Information

Party Name	ARSCode	Description	Crime Date	Disposition Code	Disposition	Date
Michael Anthony Jefferson	13-2312 (F3)	ILLEGAL CONTROL OF ENTERPRISE	3/4/2006	Guilty By Jury	Guilty By Jury	10/26/2011
Michael Anthony Jefferson	13-2317 (F2)	MONEY LAUNDERING	3/4/2006	Guilty By Jury	Guilty By Jury	10/26/2011
Michael Anthony Jefferson	13-2310 (F2)	FRAUDULENT SCHEMES/ARTIFICES	11/1/2006	Guilty By Jury	Guilty By Jury	10/26/2011
Michael Anthony Jefferson	13-2009 (F3)	AGG TAKING ID-PERSON/ENTITY	1/1/2007	Guilty By Jury	Guilty By Jury	10/26/2011
Michael Anthony Jefferson	13-2010 (F2)	TRAFFICKING ID-PERSON/ENTITY	4/3/2007	Guilty By Jury	Guilty By Jury	10/26/2011
Michael Anthony Jefferson	13-2009 (F3)	AGG TAKING ID-PERSON/ENTITY	10/19/2006	Guilty By Jury	Guilty By Jury	10/26/2011
Michael Anthony Jefferson	13-2009 (F3)	AGG TAKING ID-PERSON/ENTITY	5/4/2006	Guilty By Jury	Guilty By Jury	10/26/2011

Case Documents

Filing Date	Description	Docket Date	Filing Party
5/17/2013	905 - ME: Correspondence Received By Court - Party (001)	5/17/2013	
5/13/2013	PPM – Pro Per Motion/Notice/Mail - Party (001)	5/14/2013	Defendant (2)
NOTE: MOTION TO STAY RULE 32 POST CONVICTION RELIEF UNTIL DIRECT APPEAL IS FINAL WITHOUT PREJUDICE			
5/10/2013	PPM – Pro Per Motion/Notice/Mail - Party (001)	5/13/2013	Defendant (2)
NOTE: LETTER			
5/7/2013	905 - ME: Correspondence Received By Court - Party (001)	5/7/2013	
5/2/2013	596: Me: Rule 32 Pcr (trial) - Party (001)	5/2/2013	
4/17/2013	PPM – Pro Per Motion/Notice/Mail - Party (001)	4/19/2013	Defendant (2)
NOTE: MOTION FOR MISTRIAL AND DISMISSAL BASED ON PROSECUTION MISCONDUCT			
4/17/2013	PPM – Pro Per Motion/Notice/Mail - Party (001)	4/19/2013	Defendant (2)
NOTE: MOTION TO COMPEL DISCOVERY			
4/12/2013	PPM – Pro Per Motion/Notice/Mail - Party (001)	4/16/2013	Defendant (2)
NOTE: MOTION TO PROVIDE DISCOVERY			
4/8/2013	NAR - Notice Of Appearance - Party (001)	4/8/2013	
NOTE: OFFICE OF CONTRACT COUNSEL			
3/12/2013	PPM – Pro Per Motion/Notice/Mail - Party (001)	3/13/2013	Defendant (2)
NOTE: NOTICE OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL			
3/12/2013	PPM – Pro Per Motion/Notice/Mail - Party (001)	3/14/2013	Defendant (2)
NOTE: NOTICE OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL			
3/6/2013	ALT - Appeals Letter Of Transmittal - Party (001)	3/11/2013	
3/6/2013	CAO - Court Of Appeals Order - Party (001)	3/11/2013	
NOTE: DECLINING TO ACCEPT JURISDICTION OF SPECIAL ACTION			
1/31/2013	019 - ME: Ruling - Party (001)	1/31/2013	
1/29/2013	CAO - Court Of Appeals Order - Party (001)	2/4/2013	
NOTE: DECLINING TO ACCEPT JURISDICTION OF SPECIAL ACTION			
1/23/2013	PPM – Pro Per Motion/Notice/Mail - Party (001)	2/25/2013	Defendant (2)
1/9/2013	PPM – Pro Per Motion/Notice/Mail - Party (001)	1/11/2013	Defendant (2)
NOTE: NOTICE OF PREJUDICIAL DELAY ON DIRECT APPEAL			
1/9/2013	PPM – Pro Per Motion/Notice/Mail - Party (001)	1/11/2013	Defendant (2)
NOTE: NOTICE OF HARRASSMENT BY PROSECUTING ATTORNEY ALANE ROBY AND DETECTIVE JEREMIAH STOUT			
1/9/2013	PPM – Pro Per Motion/Notice/Mail - Party (001)	1/11/2013	Defendant (2)
NOTE: NOTICE OF SPEEDY TRIAL RIGHTS VIOLATION AND VINDICTIVE/SELCTIVE PROSECUTION			
1/9/2013	PPM – Pro Per Motion/Notice/Mail - Party (001)	1/11/2013	Defendant (2)
NOTE: NOTICE OF EX PARTE COMMUNICATION VIOLATION			
12/21/2012	905 - ME: Correspondence Received By Court - Party (001)	12/21/2012	
11/28/2012	PPM – Pro Per Motion/Notice/Mail - Party (001)	11/30/2012	Defendant (2)

illegal stuff to me. So I am just trying to get an investigation going, malicious prosecution, that I feel has taken place.

THE COURT: What is it about you that you think that they particularly give a crap about you?

THE DEFENDANT: Well, there was another matter that I was attending September 13, I want to say, 2009, I was in court on another matter, and as I was dealing with that matter, you know, the case was in my favor, and there was a little disturbance in the courtroom, and I was arrested that day. And I called a couple attorneys about it, and they said it was like a vindictive type of thing. There was an argument between Ms. Roby and my attorney, and, you know, that's another issue with this malicious prosecution.

THE COURT: So you think they are going after you because of that?

THE DEFENDANT: It is a lot of stuff. The detective has been harassing me. I think that he might have a record as well for the same thing. There is just a lot of issues in this case that involve that a lot of discovery has to be contested.

THE COURT: Okay. Well, let me tell you what happens. I think that your attorney is going to try to talk Ms. Roby into giving you an extension past today to

EXHIBIT:

B

SWORN AFFIDAVIT

I, Terrea L. Arnwine, Attorney-at-Law, under oath do swear that the letter dated March 19, 2014 is an accurate accounting of events as they unfolded on July 9, 2010. This letter reflects the events to the best of my recollection.

Terrea L. Arnwine — March 19, 2014

Terrea L. Arnwine — March 19, 2014

Beverly R McCabe — 3/19/14

Notary Public — Date

SEAL

BEVERLY R MCCABE
Notary Public - State of Arizona
MARICOPA COUNTY
My Commission Expires
April 7, 2015

TERREA L. ARNWINE, P.L.L.C.
Attorney at Law

Practicing in Family, Juvenile and Criminal Law

March 19, 2014

RE: Michael Jefferson
Letter and Affidavit of Events July 9, 2010

TO Whom It May Concern;

My name is Terrea L. Arnwine. Michael Jefferson has asked me to recount under oath what occurred in July of 2010 following an evidentiary hearing on CR2009-179875-001DT where I represented him.

On July 9, 2010, an evidentiary hearing on a motion to suppress took place. The same day the Honorable Judge Robert Gottsfield found in favor of my client Michael Jefferson on the motion to suppress. This ruling was filed on July 14, 2010. On July 15, 2010 the day of trial, the State moved to dismiss the matter with the Honorable Judge Warren Granville granting the same. The record reflects the filing of this minute entry on July 19, 2010.

On July 9, 2010, following the evidentiary hearing and after the Honorable Judge Robert Gottsfield left the bench, my client was taken into custody by Chandler Police Agency officers (I believe this was the police agency) in open court. My client was subject to pretrial services throughout the case. I asked immediately what was going on as this was not expected and was done in open court. The courtroom was full of people. My client was blind-sided. I could not tell him what or why this happened as it did. Deputy County Attorney Bradley Francis Perry litigated the evidentiary hearing. However, another female Deputy County Attorney was present and was vocal throughout the evidentiary hearing. She was also present at the time my client was taken into custody. I still do not know who she was.

According to the Maricopa County Superior Court website, a direct complaint was filed on July 13, 2010. I have attached the minute entries relevant to the facts as well as the Case History. I have attached a sworn affidavit to these facts.

Respectfully submitted.

Terrea L. Arnwine

Terrea L. Arnwine, Attorney at Law

Enclosures:
July 14, 2010 Minute Entry
July 19, 2010 Minute Entry
Case History

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
07/14/2010 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2009-179875-001 DT

07/09/2010

HONORABLE ROBERT L. GOTTSFIELD

CLERK OF THE COURT
T. Henninger
Deputy

STATE OF ARIZONA

BRADLEY FRANCIS PERRY

v.

MICHAEL A JEFFERSON (001)

TERREA ARNWINE

PRETRIAL SERVICES AGENCY-CCC
VICTIM SERVICES DIV-CA-CCC

MINUTE ENTRY

8:39 a.m.

State's Attorney:	Bradley Perry
Defendant's Attorney:	Terrea Arnwine
Defendant:	Present
Court Reporter:	Kimberly McAndrews

Prior to commencement defendant's exhibits 1 and 2 are marked for identification.

This is the time set for evidentiary hearing motion to suppress.

FILED: Reply to State's Response to Motion to Suppress

Joshua Waldeck is sworn and testifies.

The witness makes an in court identification of the defendant.

Defendant's exhibits 1 and 2 are offered and admitted into evidence.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2009-179875-001 DT 07/09/2010

The witness is excused.

Argument is heard.

IT IS ORDERED taking the matter under advisement.

Based on state's oral motion to take physical evidence (defendant's fingerprints) this date and there being no objection by the defendant,

IT IS FURTHER ORDERED granting state's motion to take physical evidence (defendant's fingerprints).

IT IS FURTHER ORDERED affirming trial on 7/15/10 at 8:00 a.m. before the Master Calendar Assignment Judge, Central Court Building, Courtroom 703.

LAST DAY REMAINS: 8/22/10

IT IS FURTHER ORDERED affirming prior release orders.

FILED: Exhibit Worksheet; Trial Worksheet

This case is eFiling eligible: http://www.clerkofcourt.maricopa.gov/efiling/default.asp

9:46 a.m. Matter concludes.

LATER:

After reviewing defense motion , response and reply and after considering the evidence admitted at the hearing, the court agrees with the defense and grants defendant's *motion to suppress*.

The testimony showed the defendant's vehicle was running, its lights were off, it was midnight, there was movement in the vehicle, and the officer knew there had been a theft from a vehicle close to that location about an hour before. It was also established that the vehicle was not improperly parked as in the City of Surprise vehicles may park in bicycle lanes.

The officer attempted to make an investigatory stop. The defendant could reasonably conclude, however, that he was not free to leave when the officer made a u-turn and parked directly behind the defendant's vehicle and put on his spotlight which lit up the entire interior of

the vehicle, admittedly and understandably for officer safety. There was at that time no reasonable suspicion founded on specific and articulable facts that defendant was engaged in criminal activity. Only when the defendant rolled down his window did the officer smell a strong odor of marijuana.

The court is aware that the reasonable suspicion standard for justifying an investigative stop is a lower standard than that required for probable cause to make an arrest and it requires a showing considerably less than a preponderance of the evidence. *Arizona v Johnson*, 129 S. Ct. 781 (2009); *State v. Fornof*, 218 Ariz. 74, 76, 179 P.3d 954, 956 (App. 2008), *rev. denied*; *State v. Ramsey*, 223 Ariz. 480, 224 P.3d 977 (App.2010). *Ramsey* is one of the most recent *Terry* stop Arizona cases and the evidence there was much more than presented here even when the instant case is viewed in the context of the totality of all the relevant circumstances.

See also: *State v. Richcreek*, 187 Ariz. 501, 930 P.2d 1304 (1997); *State v. Rogers*, 186 Ariz. 508, 924 P.2d 1027 (1996); *State v. Canales*, 222 Ariz. 493, 217 P.3d 836 (App. 2009); *State v. Livingston*, 206 Ariz. 145, 75 P.3d 100 (App. 2003), *rev. denied*; *State v. Wyman*, 197 Ariz. 10, 3 P.2d 392 (App. 2000); *State v. Stricklin*, 191 Ariz. 245, 955 P.2d 1 (App.1996).

EXHIBIT:

C

Attorney(s) appearing for the Case

Bruce R. Castetter, Neville S. Hedley, Assistant United States Attorneys, San Diego, CA, for the plaintiff-appellant.

Martin G. Molina, San Diego, CA, for the defendant-appellee.

Before: WILLIAM C. CANBY, JR. and SIDNEY R. THOMAS, Circuit Judges, and SUZANNE B. CONLON, District Judge.

Opinion by Judge CANBY: Partial Dissent by Judge CONLON.

ORDER AMENDING OPINION AND AMENDED OPINION

ORDER

The majority opinion filed by this court on July 17, 2007, slip op. at 8677, is amended as follows:

At slip op. p. 8687, delete the second and third sentences on the page and the included citations and parentheticals (thus deleting the material beginning "The fact that separate charges . . ." and ending ". . . from associated individuals."), and insert the following passage in place of the deleted passage: [1]

> The government relies on United States v. Martinez, 785 F.2d 663 (9th Cir.1986). Martinez cited United States v. Robison, 644 F.2d 1270, 1272 (9th Cir.1981), for the proposition that, if a second charge is unrelated to the first, a presumption of vindictiveness does not arise. Martinez, 785 F.2d at 669. Robison, however, made clear that relatedness of the charges is neither dispositive nor essential to prove vindictiveness. Robison, 644 F.2d at 1272 (citations omitted); accord Groves, 571 F.2d at 454 (stating that the fact that a second charge is unrelated is not controlling in any case or dispositive on the question of vindictiveness). Although Martinez certainly supports the proposition that the mere filing of a second, unrelated charge after a first charge does not give rise to a presumption of vindictiveness, we do not read Martinez as holding that a presumption of vindictiveness can never arise when the second charge is unrelated to the first. And Martinez depended in large part on the fact that Martinez could have exercised no right in the [first] Colorado trial that would have affected the [subsequent] Arizona indictment. Martinez, 785 F.2d at 670; see also Robison, 644 F.2d at 1272 (finding that Robison has failed to demonstrate any connection between the exercise of procedural rights in prior prosecutions and the federal prosecution challenged here.). Here, in contrast, Jenkins' exercise of her right to testify that she thought she was once again smuggling aliens can easily be viewed as triggering the filing of the alien smuggling charges. The petition of the United States for rehearing en banc is pending and has not been ruled on. No additional petitions for rehearing may be filed because of this amendment. OPINION CANBY, Circuit Judge: The United States appeals the district court's dismissal of an indictment of Sharon Ann Jenkins for alien smuggling. The ground of dismissal was the appearance of vindictive prosecution. Jenkins was apprehended twice for attempting to cross the U.S.-Mexico border while driving a vehicle containing undocumented aliens. Both times, Jenkins stated that she had been paid to drive the car across the border. She was not charged with any crime. Almost three months later, Jenkins was apprehended while attempting to cross the border as a passenger in a vehicle containing marijuana. She stated that she had been paid to drive the car, which she believed contained illegal aliens, across the border. Jenkins was charged with importation of marijuana. At trial, she testified in her own defense and maintained that she believed the vehicle in which she had been a passenger contained illegal aliens because she had been paid on two previous occasions to smuggle aliens. While the jury was deliberating, the government filed alien smuggling charges against Jenkins in connection with her first two border apprehensions. The district court found that the prosecutor's conduct created the appearance of vindictive prosecution because the alien smuggling charges were brought only after Jenkins exercised her right to testify in her own defense at her separate marijuana smuggling trial. We affirm. We conclude that, because the government could have prosecuted Jenkins for alien smuggling well before she presented her theory of defense at the marijuana smuggling trial, the timing of the charges created the appearance of vindictiveness. The government's assertion that its case against Jenkins was much stronger after her in-court admission does not suffice to dispel the appearance of vindictiveness. We therefore conclude that the indictment should be dismissed. I. Factual and Procedural Background On October 19, 2004, Sharon Ann Jenkins, a United States citizen, attempted to enter the United States at the San Ysidro port of entry, driving a white Mazda. The officer inspecting her vehicle discovered two non-citizens concealed in the trunk. When questioned, Jenkins stated that she had been offered $400 by a man named Pablo in exchange for bringing the undocumented individuals into the country. The next day, Jenkins attempted to enter the United States driving a Dodge Caravan. The inspecting officer discovered two non-citizens concealed in the back of the vehicle. Jenkins was issued Miranda warnings, waived her rights, and stated that she was driving the vehicle across the border in exchange for $100 from a man named Pablo. Jenkins said that she did not know that the car contained illegal aliens, but that she was aware that it is illegal to transport undocumented individuals into the United States. The government did not press charges at that time against Jenkins for the October 19 and October 20 incidents. On January 9, 2005, Jenkins attempted to enter the United States as a passenger in a 1989 Dodge Ram van driven by her husband. A search of the van uncovered marijuana concealed in the interior panels, speaker compartment, and radio compartment of the van. Jenkins was given Miranda warnings and waived her rights. She stated that she had been paid $500 by a woman named Maria to bring an undocumented alien across the border, and that she believed the vehicle contained an undocumented alien. Jenkins also said that she had been paid by a man named Pablo to smuggle aliens on two previous occasions, and that she had been apprehended. The agent interviewing Jenkins on January 9 possessed records detailing her previous alien smuggling arrests. Jenkins was charged with importing marijuana in violation of 21 U.S.C. §§ 952, 960. At trial on April 6, 2005, Jenkins testified that she did not know that the van contained marijuana because she believed she was smuggling undocumented aliens. She stated that she had met Maria, the woman who paid her to drive across the border on January 9, through Pablo, the man who previously had hired her to smuggle aliens. Special Agent Chase testified that when he questioned Jenkins on January 9, she told him that she had attempted unsuccessfully to smuggle aliens on two previous occasions. The jury began deliberation on April 6 but did not reach a verdict by the end of the day.1 At 4:46 p.m., the government filed a complaint charging Jenkins with smuggling one of the undocumented aliens involved in the October 20, 2004, incident. Jenkins subsequently was indicted for smuggling all four of the individuals involved in the October 19 and 20 incidents. She pled not guilty to the alien smuggling charges. Jenkins moved to dismiss the alien smuggling indictment on the ground of vindictive prosecution, arguing that the charges were brought only after she elected to testify in her defense at the marijuana

importation trial. The Assistant United States Attorney who filed the alien smuggling charges against Jenkins testified at the motion hearing. He conceded that the United States could have charged Jenkins with alien smuggling both at the time of her October apprehensions and at the time that the marijuana charges were filed, but he asserted that Jenkins's in-court testimony greatly strengthened the government's case. The district court granted Jenkins's motion to dismiss the indictment. The court noted that the government had been aware of Jenkins's alien smuggling activities well before it decided to file charges, and that Jenkins's in-court testimony was not vital to the government's case. The court explained that its ruling was a prophylactic measure intended to prevent the chilling of a defendant's ability to take the witness stand. The government filed an unsuccessful motion for reconsideration of the district court's decision. This appeal followed. II. Jurisdiction and Standard of Review We have jurisdiction under 28 U.S.C. § 1291. The standard of review of a district court's decision whether to dismiss an indictment for vindictive prosecution is unsettled in this circuit. United States v. Hernandez-Herrera, 273 F.3d 1213, 1217 (9th Cir.2001). We have reviewed vindictive prosecution cases de novo, for abuse of discretion, and for clear error. Id. We conclude that the district court's decision should be reviewed de novo because the issue presents a mixed question of law and fact. The trial court first determines whether the prosecutor's course of conduct appears motivated by a desire to punish the defendant for exercising a legal right. The court then decides whether the prosecutor has come forth with sufficient evidence to dispel any appearance of vindictiveness. Because our review of these determinations requires us to consider legal concepts in the mix of fact and law, de novo review is appropriate. United States v. Martinez, 785 F.2d 663, 666 (9th Cir.1986) (reviewing vindictive prosecution claim de novo) (quotations and citation omitted); see also United States v. Bridges, 344 F.3d 1010, 1014 (9th Cir.2003) (motion to dismiss an indictment for improper or outrageous government conduct is reviewed de novo); United States v. Fuchs, 218 F.3d 957, 964 (9th Cir.2000) (decision whether to dismiss an indictment for prosecutorial misconduct is reviewed de novo). III. Discussion The government violated Jenkins's right to due process of law if it filed the alien smuggling charges to penalize her for exercising a protected statutory or constitutional right. See United States v. Goodwin, 457 U.S. 368, 372, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982). Jenkins may establish prosecutorial vindictiveness by producing direct evidence of the prosecutor's punitive motivation towards her. See United States v. Gallegos-Curiel, 681 F.2d 1164, 1168 (9th Cir.1982). Alternatively, she is entitled to a presumption of vindictiveness if she can show that the alien smuggling charges were filed because [she] exercised a statutory, procedural, or constitutional right in circumstances that give rise to an appearance of vindictiveness. Id. This case involves the latter situation, as the record contains no direct evidence of the government's improper motivation. Cf. United States v. Hollywood Motor Car Co., Inc., 646 F.2d 384, 388 (9th Cir.1981) (finding actual vindictiveness when government threatened to bring additional charges against defendants if they exercised their right to request change of venue), rev'd on other grounds, 458 U.S. 263, 102 S.Ct. 3081, 73 L.Ed.2d 754 (1982) (per curiam). A. Whether the filing of alien smuggling charges created the appearance of vindictiveness To establish a presumption of vindictiveness, Jenkins need not show that the prosecutor acted in bad faith or that he maliciously sought the alien smuggling indictment. United States v. Groves, 571 F.2d 450, 453 (9th Cir.1978); see also United States v. Ruesga-Martinez, 534 F.2d 1367, 1369 (9th Cir.1976) (We do not intend ... to impugn the actual motives of the United States Attorney's office in any way.). Rather, she must demonstrate a reasonable likelihood that the government would not have brought the alien smuggling charges had she not elected to testify at her marijuana smuggling trial and present her theory of the case. Gallegos-Curiel, 681 F.2d at 1169 ([T]he appearance of vindictiveness results only where, as a practical matter, there is a realistic or reasonable likelihood of prosecutorial conduct that would not have occurred but for hostility or a punitive animus towards the defendant because he has exercised his specific legal rights.) (citing Goodwin, 457 U.S. at 373, 384, 102 S.Ct. 2485). The mere appearance of prosecutorial vindictiveness suffices to place the burden on the government because the doctrine of vindictive prosecution seeks[s] to reduce or eliminate apprehension on the part of an accused that she may be punished for exercising her rights. Ruesga-Martinez, 534 F.2d at 1369. As the district court noted, the prophylactic doctrine is designed, in part, to prevent chilling the exercise of [legal] rights by other defendants who must make their choices under similar circumstances in the future. United States v. DeMarco, 550 F.2d 1226, 1227 (9th Cir.1977). The case before us presents an unusual situation because the government's alien smuggling case essentially was open and shut even before Jenkins testified in court. The government's evidence prior to Jenkins's in-court confession included: (1) her October 19 admission that she had been paid by a man named Pablo to smuggle aliens, (2) her October 20 admission that Pablo had paid her $100 to drive a car across the border and that she was aware of the illegality of alien smuggling, and (3) her January 9 admission that she had smuggled aliens on October 19 and 20 and had been apprehended.2 Indeed, the government admitted that prior to Jenkins's testimony it had enough to go forward, unquestionably, and that it could have brought charges earlier on. In these circumstances, the government's decision to press charges only after Jenkins asserted a reasonably credible defense to the marijuana importation charges raises, at the very least, a reasonable or realistic likelihood that the government's decision was motivated by a retaliatory purpose. We therefore conclude that the government's conduct created the appearance of vindictiveness. We are sensitive to the government's concern that the dismissal of charges resulting from a defendant's in-court admission may hamstring prosecutorial efforts. This might be a different case if the government had not been equipped with Jenkins's previous admissions at the time of her in-court testimony. But the government had more than enough evidence to proceed with the alien smuggling charges prior to Jenkins's decision to testify. See Groves, 571 F.2d at 453-54 (finding appearance of vindictiveness when government knew all of the facts relating to the second charge against the defendant at the time the first charge was brought, but only brought the second charge once the defendant moved to dismiss the first charge under the Speedy Trial Act). We therefore find it appropriate to place the burden on the government to justify its course of conduct. Finally, we reject the government's argument that, because the alien smuggling and marijuana importation charges do not arise out of the same nucleus of operative fact, the doctrine of vindictive prosecution is inapplicable. The government relies on United States v. Martinez, 785 F.2d 663 (9th Cir.1986). Martinez cited United States v. Robison, 644 F.2d 1270, 1272 (9th Cir.1981), for the proposition that, if a second charge is unrelated to the first, a presumption of vindictiveness does not arise. Martinez, 785 F.2d at 669. Robison, however, made clear that relatedness of the charges is neither dispositive nor essential to prove vindictiveness. Robison, 644 F.2d at 1272 (citations omitted); accord Groves, 571 F.2d at 454 (stating that the fact that a second charge is unrelated is not controlling in any case or dispositive on the question of vindictiveness). Although Martinez certainly supports the proposition that the mere filing of a second, unrelated charge after a first charge does not give rise to a presumption of vindictiveness, we do not read Martinez as holding that a presumption of vindictiveness can never arise when the second charge is unrelated to the first. And Martinez depended in large part on the fact that Martinez could have exercised no right in the [first] Colorado trial that would have affected the [subsequent] Arizona indictment. Martinez, 785 F.2d at 670; see also Robison, 644 F.2d at 1272 (finding that Robison has failed to demonstrate any connection between the exercise of procedural rights in prior prosecutions and the federal prosecution challenged here.). Here, in contrast, Jenkins' exercise of her right to testify that she thought she was once again smuggling aliens can easily be viewed as triggering the filing of the alien smuggling charges. The government itself recognizes that it brought the alien smuggling charges only because Jenkins admitted to them during the marijuana importation trial. Therefore, to the extent that we consider the relatedness of charges important to our analysis, this factor does not foreclose application of the doctrine of vindictive prosecution. B. Whether the government rebutted the presumption of vindictiveness The presumption of vindictiveness raised by the prosecutor's decision to file alien smuggling charges against Jenkins must be overcome by objective evidence justifying the prosecutor's action. Goodwin, 457 U.S. at 376 n. 8, 102 S.Ct. 2485. The prosecution must show that the additional charges did not stem from a vindictive motive, or [were] justified by independent reasons or intervening circumstances that dispel the appearance of vindictiveness. Gallegos-Curiel, 681 F.2d at 1168.3 The government argues that, even if the content of the evidence against Jenkins was available all along, the evidence was stronger once Jenkins testified in court. The Assistant United States Attorney stated that Jenkins gave the government no choice but to bring charges and that to walk away from (the opportunity) would be inexcusable. Although a confession in open court certainly added to the repertoire of evidence against Jenkins, we find the government's explanation unpersuasive. As the district court noted, it was not necessary to wait to file charges until Jenkins took the witness stand and confessed under oath: cases for illegal alien smuggling in this district are proven on much less than that. Although we are reviewing the issue of vindictive prosecution de novo, we recognize that the district judge is well-positioned to relate how cases are usually conducted in his district. We also are unconvinced by the government's argument that it brought the alien smuggling charges precisely because bringing them after trial would have seemed vindictive. From the moment she was apprehended for smuggling marijuana, Jenkins maintained that she believed she was smuggling aliens and pointed to her October apprehensions. There was no reason for the government

to think that she would not continue with this defense at trial. If the government had been concerned with appearing vindictive, it could have filed the alien smuggling charges in January, when Jenkins first asserted that she did not know she was smuggling marijuana. We therefore conclude that the justifications offered by the government do not suffice to dispel the appearance of vindictiveness created by the timing of the alien smuggling charges. IV. Conclusion For the reasons set forth above, the judgment of the district court is AFFIRMED. CONLON, District Judge, dissenting in part: I concur in the majority's statement of jurisdiction, as well as the conclusion that de novo is the appropriate standard of review. Whether the circumstances of this case created an appearance of vindictiveness requires a mixed consideration of legal principles and the facts of record. United States v. Martinez, 785 F.2d 663, 666 (9th Cir.1986). I respectfully dissent from the majority's conclusion that the alien smuggling indictment was properly dismissed by the district court. I. Background Sharon Ann Jenkins was arrested on January 9, 2005, at the Otay Mesa port of entry in a Dodge van driven by her husband. Concealed in the van were 118.20 kilograms (more than 260 pounds) of marijuana. Jenkins told a border officer she believed she was smuggling illegal aliens, and denied knowing there was marijuana in the van. Three months later, she testified at trial on the drug charges that she believed she and her husband were smuggling an undocumented alien into the United States, not drugs. She testified that several months before the drug arrest, she twice smuggled illegal aliens into the United States in exchange for money. According to Jenkins, the person providing the Dodge van loaded with marijuana was introduced to her by the person who hired her to smuggle aliens on two recent occasions, October 19 and 20, 2004. Indeed, Jenkins was stopped at the border twice with undocumented aliens hidden in her vehicle two months before the drug stop. On both prior occasions, she was questioned, she admitted she was paid to drive the car across the border, and she was released. A criminal complaint charging alien smuggling was not filed against her until later the same day she testified at her drug trial. The indictment that is the subject of this appeal followed several weeks later. II. Dismissal of the Indictment Jenkins moved to dismiss the indictment relating to alien smuggling on a vindictive prosecution theory: the government brought the alien smuggling charges in retaliation for exercising her right to testify at her drug smuggling trial. According to the district court, the United States had all the information it needed to prosecute her for alien smuggling when she was stopped at the border on October 19 and 20, almost five months earlier. The United States responded that the alien smuggling charges were initiated only after Jenkins admitted under oath that on two occasions, she attempted to smuggle undocumented aliens into the United States for money. The supervising Assistant United States Attorney, who approved the alien smuggling charges, testified at the hearing. He explained to the district court that he approved prosecution based on the content of Jenkins' testimony, not her decision to testify. The decision to prosecute was made when she confessed in detail to those other crimes under oath. The credibility of the prosecutor's explanation was not questioned by the court. The district court dismissed the indictment because the timing of the alien smuggling charges immediately following Jenkins' testimony gave rise to an appearance of vindictiveness. It was the district court's opinion the government had sufficient information to prosecute Jenkins without her courtroom confession. (Cases for illegal alien smuggling in this district are proven on much less than that), 163. The court characterized its decision as prophylactic to insure that a defendant's right to testify and defend herself is not chilled. At the initial hearing on this issue, the district court stated, my ruling should not in any way, shape, or form be construed as casting doubt or indicating that I do not believe government's counsel, or that I believe that they did anything improper. At a later hearing on the government's motion to reconsider, the court reiterated that the government did not do anything wrong. But the timing of the alien smuggling charges did not pass the smell test and gave the appearance of being coercive. The sequence of events was the only reason given for finding an appearance of vindictiveness. The prosecutive importance of Jenkins' detailed in-court confession to alien smuggling was given no weight. The district court relied instead on its opinion that the government could have filed alien smuggling charges when Jenkins was first detained in October 2004 and admitted the crime. The majority concludes that charges could have been brought when Jenkins was arrested in January 2005 for drug smuggling and claimed she believed she was smuggling undocumented aliens. In the view of both the majority and the district court, the prosecutor's explanation was insufficient to dispel an appearance of vindictiveness. III. Analysis A. An appearance of vindictiveness was not established Prosecutions are prohibited under circumstances that suggest a realistic likelihood of vindictiveness by the prosecutor. Blackledge v. Perry, 417 U.S. 21, 27, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974). There is no suggestion that the prosecutor was actually motivated by vindictiveness or engaged in any improper conduct to punish Jenkins for testifying at her drug trial. Jenkins successfully staked her claim on the timing of the alien smuggling charges immediately after she testified to create an appearance of retaliation for exercising a constitutional right. It is true that Jenkins need not show that the prosecutor actually acted in bad faith or maliciously. United States v. Ruesga-Martinez, 534 F.2d 1367, 1369 (9th Cir.1976). But the appearance of vindictiveness results only if there is a realistic or reasonable likelihood of retaliatory conduct. United States v. Gallegos-Curiel, 681 F.2d 1164, 1169 (9th Cir.1982). Jenkins failed to establish that there was a realistic or reasonable likelihood that alien smuggling charges were brought to punish her for taking the witness stand. The district judge acknowledged that his ruling dismissing the indictment had absolutely no relationship to reality. There was no reasonable basis to conclude the government likely would have filed alien smuggling charges absent Jenkins' unequivocal in-court confession to those crimes, just to punish her for taking the stand. B. The government rebutted any appearance of vindictiveness There was a clear relationship between Jenkins' in-court confession and the ensuing alien smuggling charges. The prosecutor was entitled to reevaluate his decision to prosecute Jenkins in light of new information: Jenkins' confession under oath. The district court did not question the credibility of the prosecutor's explanation for the timing of the charges. There is no evidence to suggest the prosecutor's explanation was pretextual. The district court recognized Jenkins' in-court confession was that last piece of evidence making a solid case a slam dunk one. Nonetheless, the district court applied a subjective smell test based on timing and its opinion that the government did not really need Jenkins' in-court confession to prosecute her. The district court equated the purported admissions Jenkins made to border officers with her detailed confession under oath. The majority minimizes the value of Jenkins' in-court confession as merely adding to the repertoire of evidence against her. However, purported admissions to law enforcement officers may be denied or challenged on a number of grounds, including voluntariness and accuracy. As the majority notes, there is no indication Jenkins was given Miranda warnings before her first statement to law enforcement officers. In contrast, trial testimony under oath is virtually unchallengeable and easy to present without the necessity of bringing in law enforcement officers to testify about statements taken on three different occasions. The prosecutor explained that the quality of the alien smuggling evidence against Jenkins became significantly stronger with her in-court confession. Jenkins' in-court confession provided an intervening circumstance justifying the alien smuggling charges. Gallegos-Curiel, 681 F.2d at 1168. Any appearance of vindictiveness was adequately rebutted. C. Dismissal of the indictment preempted prosecutorial discretion The dismissal of the indictment was predicated on a finding that the government did not need Jenkins' in-court confession to file alien smuggling charges; the charges could have been filed either when she was apprehended with the aliens, or two months later when she was stopped with the marijuana and claimed she thought she was just smuggling aliens again. This reasoning second guesses matters of prosecutorial discretion. The United States Attorney has broad discretion in determining prosecutorial policies and priorities. United States v. Goodwin, 457 U.S. 368, 380 n. 11, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982); Bordenkircher v. Hayes, 434 U.S. 357, 364, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978). Charging decisions are particularly ill-suited to judicial review. Wayte v. United States, 470 U.S. 598, 607, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985). The Supreme Court has admonished that a prosecution's deterrence value, and prosecution priorities and plans are not readily susceptible to the kind of analysis the courts are competent to undertake. Id. The prosecutor is in the best position to evaluate the costs and benefits of a particular strategy, allocation of resources, evidentiary problems, general or specific deterrence values, and prosecution priorities. These considerations are all inherent in the executive branch functions of United States Attorneys. Substituting the conventional wisdom of judges as to when charges could or should be filed inappropriately preempts the prosecutor's role. The Supreme Court has addressed similar issues in selective prosecution cases. In invoking judicial power over the United States Attorney to preempt an executive function, the government is presumed to have properly exercised its constitutional responsibilities to enforce the nation's laws. United States v. Armstrong, 517 U.S. 456, 463, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996), quoting Heckler v. Chaney, 470 U.S. 821, 832, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985). The presumption of regularity in a prosecutorial decision is strong and must be overcome with clear evidence. Id. Here, the prosecutor's explanation was not accorded a presumption of regularity. Rather, the majority accepts the district court's opinion that Jenkins' in-court confession was not vital to the government's case, so alien smuggling charges could have been filed either when she was apprehended with illegal aliens, or two months later when she was apprehended and claimed she thought the contraband was human, not drugs. The doctrine of vindictive prosecution does not diminish the principle of prosecutorial discretion.

United States v. Griffin, 617 F.2d 1342, 1348 (9th Cir.1980) ([n]othing in Blackledge presumed to give a defendant a free ride for separate crimes he may have committed, or to prevent a prosecutor from bringing new charges as a result of changed or altered circumstances which properly bear on prosecutorial discretion). A prosecutor necessarily considers the quality and strength of evidence in deciding when or whether to prosecute. Here, the prosecutor admittedly had sufficient evidence to bring alien smuggling charges against Jenkins before she testified, but he chose not to. His conclusion that Jenkins' in-court confession greatly strengthened the alien smuggling case and his decision to file a criminal complaint on these charges fell within the bounds of prosecutorial discretion. I would reverse the dismissal of the indictment.

FootNotes

* The Honorable Suzanne B. Conlon, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

1. The passage to be amended may also be found at 2007 WL 2034037 *4, second paragraph with headnote number [9].

1. The next day, the jury informed the court that it could not reach a unanimous verdict. Jenkins was retried and convicted, and her conviction was affirmed on appeal. *United States v. Jenkins*, 214 Fed.Appx. 678 (9th Cir. 2006). She is serving a 63-month sentence.

2. Jenkins made the second and third statements after being given warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The police report describing the first statement does not indicate whether Jenkins was Mirandized.

3. "For example, if the victim of an assault has died since the return of the first indictment, a subsequent indictment may properly charge the accused with murder rather than assault." *Ruesga-Martinez*, 534 F.2d at 1370 n. 4 (citing *Blackledge v. Perry*, 417 U.S. 21, 29 n. 7, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974)).

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