No.

IN THE

Supreme Court of the United States

ANTONIO ULISES BARRERA MACORTY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

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

PETITION FOR A WRIT OF CERTIORARI - APPENDIX

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NOT FOR PUBLICATION

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JUL 29 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ANTONIO ULISES BARRERA-MACKORTY, Defendant-Appellant.	No. 23-50031 D.C. No. 2:19-cr-00404-DMG-1 MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Dolly M. Gee, Chief District Judge, Presiding

Argued and Submitted July 12, 2024
Pasadena, California

Before: IKUTA and NGUYEN, Circuit Judges, and ANELLO,** District Judge.

Antonio Ulises Barrera-Mackorty ("Barrera-MacKorty") appeals his conviction under 18 U.S.C. § 1425(a) for procuring naturalization by means contrary to law. We review a challenge that a statute is unconstitutionally vague

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Michael M. Anello, United States District Judge for the Southern District of California, sitting by designation.

de novo, *United States v. Mincoff*, 574 F.3d 1186, 1192 (9th Cir. 2009), the admission of evidence for abuse of discretion, *United States v. Cox*, 963 F.3d 915, 924-25 (9th Cir. 2020), and a denial of a motion for a judgment of acquittal de novo, *United States v. Aubrey*, 800 F.3d 1115, 1124 (9th Cir. 2015). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. Barrera-Mackorty argues that the statute, 18 U.S.C. § 1425(a), together with Question 15[1] of the Application for Naturalization, Form N-400, are unconstitutionally void for vagueness. Specifically, Barrera-Mackorty argues that the statute did not give him notice that he was committing a crime when he answered "no" to Question 15. He contends that because the words "crime" and "offense" are not properly defined in the question, and the context of the other questions in the form imply law enforcement involvement, a person of ordinary intelligence would not realize that his "no" response to Question 15 would be illegal.

We ask whether a person of "ordinary intelligence" would have notice that "the conduct in question is prohibited." *United States v. Parker*, 761 F.3d 986, 991 (9th Cir. 2014); *United States v. Fitzgerald*, 882 F.2d 397, 398 (9th Cir. 1989). Using the "common understanding of the terms of [the] statute," we find that

[1] Question 15 asks: "Have you **ever** committed a crime or offense for which you were **not** arrested?"

§ 1425(a) is not vague. *Fitzgerald*, 882 F.2d at 398. Under these facts, there is no confusion that Barrera-Mackorty's answer to Question 15 should have been "yes." By his guilty plea, Barrera-Mackorty admitted that he committed child molestation, conduct that any person of ordinary intelligence would know is a crime. Additionally, Barrera-Mackorty filled out form N-400 under penalty of perjury. A person of ordinary intelligence would know that lying on Question 15 in order to obtain citizenship is illegal.

2. The district court did not abuse its discretion in admitting evidence of Barrera-Mackorty's prior conviction, despite his willingness to stipulate that he was convicted of a felony offense. When evidence addresses a "number of separate elements," including "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," a stipulation does not have to be accepted by the government. *See Old Chief v. United States*, 519 U.S. 172, 187, 190 (1997).

Here, evidence of the prior conviction was relevant not only to show that Barrera-Mackorty was convicted of a crime, but also his knowledge and motive. A stipulation here would not be a "full admission of the element of the charged crime in issue" and thus the government need not accept it. *United States v. Allen*, 341 F.3d 870, 888 (9th Cir. 2003). Because the evidence was relevant, the district court did not allow any "potentially inflammatory details" to be admitted, and it

gave a limiting instruction, any prejudice did not substantially outweigh the probative value of such evidence here. *See United States v. Mende*, 43 F.3d 1298, 1302 (9th Cir. 1995).

3. Finally, the district court did not err in denying Barrera-Mackorty's motions for a judgment of acquittal based on insufficient. We "view[] the evidence in the light most favorable to the prosecution" then determine whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Nevils*, 598 F.3d 1158, 1163-64 (9th Cir. 2010). We find that there was sufficient evidence that Barrera-Mackorty knowingly made a false statement in violation of § 1425(a). Barrera-Mackorty filled out the form at a law firm with assistance, and then it was reviewed by an attorney. Officer Exum also testified that in the interview, he went through form N-400 with Barrera-Mackorty, who did not request an accommodation, did not appear to have trouble understanding any questions, and who passed the English proficiency part of the interview. Further, his ex-wife and foster son both testified that they all spoke English in the home.

AFFIRMED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. ANTONIO ULISES BARRERA-MACKORTY, Defendant.	No.: CR 19-404-DMG **ORDER REVOKING DEFENDANT'S CITIZENSHIP AND CANCELING HIS CERTIFICATE OF NATURALIZATION [181]**

The Court has read and considered the government's motion for an order revoking defendant ANTONIO ULISES BARRERA-MACKORTY's citizenship and canceling his certificate of naturalization. Defendant was convicted of unlawfully procuring United States citizenship in violation of 18 U.S.C. § 1425(a). Title 18, United States Code, Section 1451(e) mandates that an automatic consequence of such a conviction is the revocation of citizenship and cancelation of naturalization certificate.

THEREFORE, FOR GOOD CAUSE SHOWN:

IT IS ORDERED THAT judgment is entered revoking and setting aside the naturalization of defendant ANTONIO ULISES BARRERA-MACKORTY

and canceling his Certificate of Naturalization, No. 32438903, which was granted on or about February 5, 2010. As of the date of this order, defendant is no longer a naturalized United States citizen.

IT IS FURTHER ORDERED THAT defendant, from the date of the order, is forever restrained and enjoined from claiming any rights, privileges, or advantages under any document that evidences United States citizenship obtained as a result of defendant's naturalization.

IT IS FURTHER ORDERED THAT defendant surrender and deliver his Certificate of Naturalization, and any copies thereof in his possession, to the Attorney General immediately and return any other indicia of United States citizenship, and any copies thereof in his possession, including, but not limited to, United States passports, voter registration cards, and other voting documents.

The clerk of court shall transmit a copy of this Order and the Judgment to the Attorney General.

IT IS SO ORDERED.

DATED: January 30, 2023

DOLLY M. GEE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CRIMINAL MINUTES - GENERAL

Case No.	CR 19-404 DMG	Date	May 26, 2022

Present: The Honorable	DOLLY M. GEE, UNITED STATES DISTRICT JUDGE
Interpreter	N/A

Kane Tien	Not Reported	Not Present
Deputy Clerk	*Court Reporter*	*Assistant U.S. Attorney*

U.S.A. v. Defendant(s):	Present	Cust.	Bond	Attorneys for Defendant(s):	Present	Appt.	Ret.
Antonio Ulises Barrera-Mackorty	Not	✓		Callie Steele	Not	✓	

Proceedings: IN CHAMBERS - ORDER RE GOVERNMENT'S AND DEFENDANT'S MOTIONS *IN LIMINE* AND DEFENDANT'S MOTIONS TO DISMISS [27, 28, 31, 33, 35, 58]

I. BACKGROUND

Defendant Antonio Ulises Barrera-Mackorty is charged with one count of unlawful procurement of naturalization in violation of 18 U.S.C. § 1425(a), which provides that "[w]hoever knowingly procures or attempts to procure, contrary to law, the naturalization of any person" shall be subject to, among other things, mandatory denaturalization. *See* 8 U.S.C. § 1451(e); *United States v. Inocencio*, 328 F.3d 1207, 1209 (9th Cir. 2003).

The Government alleges that Defendant knowingly lied to procure naturalization in July 2009 when he checked "no" in response to Question 15 on his Form N-400, which asked: "Have you *ever* committed a crime or offense for which you were *not* arrested?" (emphasis in original), and again when he affirmed his Form N-400 answers in an October 2009 interview with a U.S. Citizenship and Immigration Services ("USCIS") officer. Defendant's alleged knowing lie stems from his engagement in felony criminal activity from January 2005 through December 2008, which he later admitted in his 2015 guilty plea for those crimes.[1] The Court heard oral argument on the below six motions on May 24, 2022:

1. On January 22, 2020, the Government filed a motion *in limine* ("MIL") seeking to introduce evidence of Defendant's 2015 conviction and underlying conduct. [Doc. # 27.]
    a. On February 4, 2020, Defendant filed a sealed opposition. [Doc. # 47.]
    b. On February 7, 2020, the Government filed a reply. [Doc. # 48.][2]

[1] The Government's briefing quotes from what appears to be Defendant's 2015 change of plea hearing for the underlying state crimes [Doc. # 27 at 6-7], but the Government has not submitted a certified transcript of those proceedings. In his briefing and at oral argument, however, Defendant did not dispute the accuracy of the hearing excerpts provided by the Government. [*See* Doc. # 47 at 4-5.]

[2] The Government did not seek leave before filing its MIL reply. [*See* Doc. # 20 (Criminal Motion and Trial Order) at 1 ("Replies relating to motions *in limine* are not accepted absent leave of court.").] Accordingly, Doc. # 48 is ordered **STRICKEN**.

2. On February 10, 2020, Defendant filed a sealed MIL to exclude evidence of Defendant's 2015 conviction and underlying conduct for impeachment purposes. [Doc. # 58.]
    a. On February 12, 2020, the Government filed its opposition. [Doc. # 59.]

3. On January 22, 2020, the Government filed a MIL to preclude reference to Defendant's potential sentence. [Doc. # 28.]
    a. On February 4, 2020, Defendant attempted to file a sealed opposition.[3] [Doc. # 42.]
    b. On February 7, 2020, the Government filed a reply. [Doc. # 49.][4]

4. On January 22, 2020, Defendant filed a motion to strike or dismiss the Indictment on vagueness grounds as well as a motion to suppress. [Doc. # 31].
    a. On January 29, 2020, the Government filed its opposition. [Doc. # 37.]
    b. On February 7, 2020, Defendant filed his reply. [Doc. # 51.]

5. On January 27, 2020, Defendant filed a sealed motion to dismiss the Indictment on unreasonable delay grounds. [Doc. # 33.]
    a. On January 29, 2020, the Government filed its opposition. [Doc. # 36.]
    b. On February 7, 2020, Defendant attempted to file a sealed reply. [Doc. # 50.][5]

6. On January 27, 2020, Defendant filed a sealed MIL to exclude certain testimony from USCIS officers. [Doc. # 35.]
    a. On January 29, 2020, the Government filed its opposition. [Doc. # 38.]

II. DISCUSSION

A. Government's MIL to Introduce Evidence of Defendant's 2015 Conviction and Underlying Conduct

In order to prove that Defendant violated 18 U.S.C. § 1425(a), "the Government must establish that an illegal act by the defendant played some role in [his] acquisition of citizenship. When the illegal act is a false statement, that means demonstrating that the defendant lied about facts that would have mattered to an immigration official, because they would have justified denying naturalization or would predictably have led to other facts warranting that result." *Maslenjak v. United States*, 137 S. Ct. 1918, 1923 (2017).

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[3] Defendant filed an *ex parte* application to seal his opposition, which the Court denied on the ground that he failed to establish good cause justifying the sealing. [Doc. # 45.] Per Defendant's request, the documents were ordered returned to Defendant's counsel. *See id.* Defendant refiled his opposition on May 24, 2022. [Doc. # 107.]

[4] The Government did not seek leave before filing its MIL reply. [*See* Doc. # 20.] Accordingly, Doc. # 49 is ordered **STRICKEN**.

[5] Defendant filed an *ex parte* application to seal his reply, which the Court denied on the ground that he failed to establish good cause justifying the sealing. [Doc. # 56.] Per Defendant's request, the documents were ordered returned to Defendant's counsel. *See id.* Defendant refiled his reply on May 24, 2022. [Doc. # 108.]

"The Government can satisfy that causal inquiry using one of two theories." *United States v. Nepal*, 894 F.3d 204, 209 (5th Cir. 2018). The first theory, sometimes referred to as the "disqualifying-fact theory" is fairly straightforward: "'[i]f the facts the defendant misrepresented are themselves disqualifying'—for example, if the defendant misrepresented her travel history to circumvent the requirement that an applicant be physically present in the United States for more than half of the five-year period preceding her application, or falsely denies being convicted of an aggravated felony to circumvent the good moral character requirement—then 'there is an obvious causal link between the defendant's lie and her procurement of citizenship.' In these circumstances, the inquiry is satisfied because 'her lie must have played a role in her naturalization.'" *Id.* (*quoting Maslenjak*, 137 S.Ct. at 1928–29). Under the second theory, "even if the true facts lying behind a false statement would not in and of themselves justify denial of citizenship, they could have led to the discovery of other facts which would do so." *Maslenjak*, 137 S.Ct at 1929 (citation and internal quotation marks omitted). Under this second "investigation-based theory," the Government must prove: (1) that the misrepresented fact was sufficiently relevant to one or another naturalization criterion that it would have prompted reasonable officials, seeking only evidence concerning citizenship qualifications,' to undertake further investigation" and (2) that the investigation 'would predictably have disclosed' some legal disqualification." *Id.* (citation and internal quotation marks omitted).

Here, the Government seeks to introduce evidence that falls within the first theory: that in 2015 Defendant pleaded guilty to four counts of lewd or lascivious acts against a child under 14 years old, in violation of California Penal Code sections 288(a) and 288(b)(1). Defense counsel stated at oral argument that Defendant will stipulate: in 2015, he was convicted of four unidentified felony offenses that occurred between 2005 to 2008; he knowingly committed these crimes; these crimes would have been material to an immigration official; and these crimes bore on his good moral character. The crux of his defense appears to be that Defendant did not understand Question 15 on the Form N-400 given its alleged confusing nature coupled with his limited English skills and limited formal education, and he thus could not have violated 18 U.S.C. 1425(a), which requires that a person act knowingly.

The Court finds that evidence of Defendant's 2015 convictions is admissible to permit the Government to attempt to meet its burden and satisfy the causal inquiry between Defendant's false statement and his naturalization. *See Maslenjak*, 137 S.Ct. at 1928–29. With respect to any Rule 403 concerns, the Court finds that permitting the Government to attempt to meet its burden in its case-in-chief by introducing limited evidence (i.e., that in 2015, Defendant pleaded guilty to four counts of lewd or lascivious acts against a child under 14 years old, in violation of California Penal Code sections 288(a) and 288(b)(1)) but without eliciting potentially inflammatory details surrounding those convictions, strikes the appropriate balance. *See United States v. Santos*, 947 F.3d 711, 732 (11th Cir. 2020) (affirming conviction for procuring naturalization unlawfully in violation of 18 U.S.C. § 1425(a), where defendant certified on his Form N-400 that he had never, *inter alia,* been convicted of a crime, but failed to disclose to immigration officials that he had been convicted of manslaughter in the Dominican Republic, and permitting the Government to introduce evidence of manslaughter conviction to meet its burden of establishing causal link between the defendant's lie and his procurement of citizenship). Prohibiting the Government from disclosing the nature of Defendant's felony convictions would deprive it of its ability to demonstrate the causal link in the disqualifying-fact theory, i.e., how Defendant circumvented the good moral character requirement by lying about facts that would have mattered to an immigration official.

Such evidence tends to show not only that Defendant had knowledge of the unlawful nature of his conduct, but is probative of his alleged intent and motive to knowingly provide false information on his Form N-400 in order to avoid detection. Given the serious, deliberate nature of his crimes, such evidence could rebut potential claims that he somehow forgot about his crimes or did not understand the question. *See United States v. Escobar*, 735 F. App'x 628, 630 (11th Cir. 2018) (holding district court did not abuse discretion in permitting Government to introduce evidence of defendant's convictions for lewd and lascivious conduct against a minor, notwithstanding defendant's stipulation to having committed the crimes). If Defendant testifies at trial that he did not know that what he did was a crime or offense, the Government will be permitted to impeach his testimony with details of how he attempted to evade detection.

Accordingly, the Court **GRANTS IN PART** the Government's MIL by allowing evidence of Defendant's 2015 convictions to be admitted in the Government's case-in-chief. Assuming that the parties are able to stipulate to certain facts relating to materiality as proposed by Defendant and set forth above, the Court is amenable to consider a limiting instruction proposed by the parties stating that the evidence of the 2015 convictions is admitted for the limited purpose of showing that Defendant knowingly lied on government Form N-400. The parties are **ORDERED** to meet and confer to determine whether they can agree on stipulated facts and proposed limiting instruction language to be read to the jury.

B. Defendant's MIL to Exclude Evidence of His 2015 Conviction and Underlying Conduct for Impeachment Purposes

"When impeaching the testimony of a criminal defendant, Rule 609(a)(1) provides in pertinent part, evidence that an accused has been convicted of a crime punishable by . . . imprisonment in excess of one year shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused." *United States v. Jimenez*, 214 F.3d 1095, 1098 (9th Cir. 2000) (quotation marks and brackets omitted). The factors to consider are: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. *Id.* (*citing United States v. Cook*, 608 F.2d 1175, 1185 n.8 (9th Cir. 1979) (*en banc*)).

Considering these so-called *Cooke* factors, the Court **GRANTS IN PART** Defendant's MIL. The Court finds that, for the same reasons discussed above with respect to the Government's MIL, should Defendant testify, the Government may question him regarding his guilty plea to four counts of lewd or lascivious acts against a child under 14 years old, in violation of California Penal Code sections 288(a) and 288(b)(1), and any conduct he engaged in to evade detection. The Government may not elicit potentially inflammatory details regarding the factual basis for those convictions that do not concern evasion from detection.

C. Government's MIL to Preclude Reference to Defendant's Potential Sentence

The Government seeks to preclude reference to Defendant's potential sentence, which includes mandatory denaturalization. 8 U.S.C. § 1451(e); *Inocencio*, 328 F.3d at 1209. The Government correctly

notes that sentencing considerations are outside the purview of the jury. *See, e.g., United States v. Frank*, 956 F.2d 872, 879 (9th Cir. 1992) ("It has long been the law that it is inappropriate for a jury to consider or be informed of the consequences of their verdict."); *see also* Ninth Cir. Model Crim. Jury Instr. 6.22 ("The punishment provided by law for this crime is for the court to decide. You may not consider punishment in deciding whether the government has proved its case against the defendant beyond a reasonable doubt.") (last updated Mar. 2022).

The Court finds that permitting Defendant to make arguments regarding his potential sentence, and any consequences that may follow, has the tendency to confuse the issues such that the jury may improperly consider a potential sentence in determining whether or not to convict. *See Frank*, 956 F.2d at 879. Accordingly, the Government's MIL is **GRANTED**. Defendant is precluded from referencing his potential sentence to the jury, including any references to deportation or being sent to Guatemala.[6]

D. Defendant's Motion to Strike or Dismiss Indictment and Motion to Suppress

Defendant seeks to dismiss the Indictment on the grounds that 18 U.S.C. § 1425(a) is void for vagueness on its face and as applied. Defendant also seeks to suppress his answer to Question 15 in his Form N-400 on the ground that it violates his Fifth Amendment right against self-incrimination.

i. Motion to Dismiss Indictment

"Laws are void for vagueness if they fail to give adequate notice to people of ordinary intelligence of what conduct is prohibited." *United States v. Parker*, 761 F.3d 986, 991 (9th Cir. 2014) (internal quotation marks and citation omitted). In considering vagueness, courts consider the common understanding of the terms used in the statute. *United States v. Fitzgerald*, 882 F.2d 397, 398 (9th Cir. 1989). It is "well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *United States v. Mazurie*, 419 U.S. 544, 550 (1975) (citation omitted). As Defendant does not raise a First Amendment challenge, he may only challenge Section 1425(a) as applied to him. *See id.*

Here, the Government must establish that Defendant acted knowingly, *see* 18 U.S.C. § 1425(a), which "relieve[s] the statute of the objection that it punishes without warning an offense of which the accused was unaware." *Screws v. United States*, 325 U.S. 91, 102 (1945) ("where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused

[6] As discussed in note 3, *supra*, the Court denied Defendant's *ex parte* application to seal his opposition and ordered the documents returned to Defendant's counsel. Defendant refiled his opposition on May 24, 2022, the day of oral argument. [*See* Doc. # 107.] Even if the arguments in Defendant's opposition were considered, the Court's decision would be unchanged. Defendant's arguments presented therein center on jury nullification. It is well settled that while jurors have the power to nullify, they do not have a right to nullify and "courts have no corresponding duty to ensure that juries are able to exercise this power[.]" *United States v. Kleinman*, 880 F.3d 1020, 1031 (9th Cir. 2017) (internal quotation marks and citations omitted). Instead, courts "have the duty to forestall or prevent nullification . . . . because it is the duty of juries in criminal cases to take the law from the court, and apply that law to the facts as they find them to be from the evidence." *Id.* (internal quotation marks and citation omitted). Moreover, Defendant's argument that his case is akin to a capital case is speculative under the circumstances and relies on hearsay from Defendant's ex-wife.

cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law."). The Court finds that Section 1425(a) is not void for vagueness as it clearly articulates to a person of ordinary intelligence what conduct is prohibited – namely, that one cannot knowingly do something illegal (here, make a false statement) in order to obtain, or attempt to obtain, naturalization. *See* 18 U.S.C. § 1425(a); *see also Maslenjak*, 137 S.Ct. at 1923.[7]

Question 15 on Form N-400 asks:

"Have you *ever* committed a crime or offense for which you were *not* arrested?"

[Doc. # 33, Exh. A-8 (emphasis in original).][8] Defendant contends that Question 15 is vague because: it does not give Defendant notice that he may be committing a crime when answering the question; it does not define the phrase "crime or offense"; it does not include the term "knowingly"; and the section immediately preceding the question (which references records) suggests that a crime or offense refers only to conduct for which records at one time existed.[9] [Doc. # 31 at 6-7.]

The Court finds that Question 15 is not vague. First, the question gives notice that the applicant may be committing a crime by not providing truthful answers, as the signature line requires the applicant to "certify, under penalty of perjury, under the laws of the United States of America, that this application, and the evidence submitted with it, are *all* true and correct." [Doc. # 33, Exh. A-10 (Part 11) (emphasis added).] Second, the question clearly asks a person of ordinary intelligence whether he or she has ever committed a crime or offense, using the plain and ordinary meaning of those terms, for which he or she was not arrested. Defendant appears to have understood what the phrase "crime or offense" meant, notwithstanding the lack of definition, because he answered Questions 17 and 18, which also included the phrase "crime or offense," and provided further requested information. [*See* Doc. # 33, Exh. A-8.] Third, the absence of the word "knowingly" from Question 15 does not create an issue. Question 15 simply seeks information regarding whether an applicant for naturalization had committed any crime or offense for which he or she was not arrested, so that a USCIS officer could further examine the issue and determine whether it bore on the applicant's "Good Moral Character," the section under which the question was being asked. *See id.* The "knowing" requirement is in Section 1425(a) itself. Finally, the immediately preceding section, referring to records, does not render Question 15 void. Contrary to Defendant's

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[7] Defendant's assertion that he had limited English skills at the time he completed his Form N-400 is unavailing, as the standard is construed in objective, not subjective, terms. *See Parker*, 761 F.3d at 991. Moreover, Defendant acknowledges that he had assistance from a law office in filling out his Form N-400, where employees would routinely translate questions if a client stated he or she did not understand the question. [*See* Doc. # 33, Exh. K-87, K-88, ¶ 5.]

[8] Form N-400 has since been amended. *See* https://www.uscis.gov/n-400. The Court reviews the form as it applied to Defendant in 2009.

[9] The section preceding Question 15 states:

> For the purposes of this application, you must answer "Yes" to the following questions, if applicable, even if your records were sealed or otherwise cleared or if anyone, including a judge, law enforcement officer, or attorney, told you that you no longer have a record.

[Doc. # 33, Exh. A-8.]

argument, that section does not suggest a crime or offense refers *only* to conduct for which records at one time existed. It simply states that the applicant must answer "yes" to the below questions, then qualifies that instruction by stating that the applicant must still answer "yes" *even if* his or her records were sealed, or he or she was otherwise cleared. *See id.*

Accordingly, Defendant's motion to dismiss the Indictment, on the grounds that Section 1425(a) and Question 15 in Form N-400 are void for vagueness, is **DENIED.**

ii. Motion to Suppress

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. "It is only when the required information is compelled, testimonial and incriminating that the Fifth Amendment privilege protects an individual's right to refuse to give information . . . . Applying for benefits is a voluntary action. It is in no way compelled by the government." *Ciccone v. Sec'y of Dep't of Health & Human Servs. of U.S.,* 861 F.2d 14, 17 (2d Cir. 1988) (*citing inter alia Doe v. United States*, 487 U.S. 201 (1988)) (rejecting appellant's argument that his refusal to state his former occupation on an application for retirement benefits violated his Fifth Amendment right against self-incrimination because submitting such information was voluntary). Here, Defendant's submission of his Form N-400 was entirely voluntary. Had Defendant not wished to answer Question 15, he simply could have not submitted the form. Because he chose to attempt to procure naturalization, his answer to Question 15 was voluntary and does not implicate his Fifth Amendment right against self-incrimination. *See Ciccone*, 861 F.2d at 17. Defendant's motion to suppress his answer to Question 15 is accordingly **DENIED.**

E. Defendant's Motion to Dismiss Indictment for Unreasonable Delay

Defendant also moves to dismiss the Indictment on the basis of unreasonable pre-indictment delay. The Indictment was filed on July 17, 2019, or within ten years from July 18, 2009, the date Defendant signed his Form N-400. Defendant asserts that the Government knew or should have known about the facts giving rise to the Indictment at the time of his arrest for the underlying conduct in December 2014, his guilty plea in March 2015, or at the very latest, in March 2018, when the Government received Defendant's A-file, which included documents relating to the underlying conduct. [Doc. # 33 at 7-8.] While Defendant expressly acknowledges that the Government filed the Indictment within the applicable ten year statute of limitations, *see id.* at 4; *see also* 18 U.S.C. § 3291, Defendant claims that at this late stage, Defendant and other witnesses' fading memories violates his due process rights.

Dismissing an indictment under Federal Rule of Criminal Procedure 48(b) is appropriate "only in extreme circumstances" involving both "caution," which in turn "requires findings of prosecutorial misconduct and actual prejudice to the accused" as well as "forewarning" to the Government. *United States v. Huntley*, 976 F.2d 1287, 1291 (9th Cir. 1992) (internal citation omitted). To obtain dismissal under the Due Process Clause, a defendant must satisfy a two-prong test. First, he must show that he suffered "actual, non-speculative prejudice from the delay." *United States v. Sherlock*, 962 F.2d 1349, 1353 (9th Cir. 1989). Establishing actual prejudice "is a heavy burden that is rarely met." *United States v. Corona-Verbera*, 509 F.3d 1105, 1112 (9th Cir. 2007) (internal quotation marks and citation omitted).

Second, a defendant must show that the delay offends the "fundamental conceptions of justice" and was caused by the government's culpability. *Sherlock*, 962 F.2d at 1353-54. "A showing of actual prejudice is required before the second prong will be considered." *United States v. Doe*, 149 F.3d 945, 948 (9th Cir. 1998) (citation omitted).

Here, Defendant cannot meet his heavy burden of demonstrating actual prejudice. It is well settled that fading memories in themselves do not establish the actual prejudice required for dismissal of an indictment. *See, e.g., United States v. Moran*, 759 F.2d 777, 782 (9th Cir. 1985) (reversing district court's dismissal based on pre-indictment delay, holding in relevant part that defendant's "assertions of prejudice consist solely of the loss of witness testimony and the impairment of other witness testimony by the dimming of memory"); *see also Doe*, 149 F.3d at 948 (Ninth Circuit "normally considers lost testimony to have been adequately protected when the government brings charges within the applicable statutes of limitation."). A claim based on loss of testimony "fails unless [defendant] establishe[s] that the lost testimony actually impaired meaningfully his ability to defend himself." *Id.* (internal quotation marks and citation omitted).

Here, Defendant makes only generalized statements regarding his fading memories, as well as those of former USCIS officer Robert Exum, and Milly Duarte, an employee at the law firm that helped Defendant prepare his Form N-400. These statements neither show that "lost testimony, witnesses, or evidence meaningfully has impaired his ability to defend himself" nor provide proof "by definite and non-speculative evidence how the loss of a witness or evidence is prejudicial to his case." *Corona-Verbera*, 509 F.3d at 1112 (internal quotation marks and citation omitted).[10]

Defendant's motion to dismiss the Indictment for unreasonable delay is **DENIED**. Because Defendant has not established the first prong of actual prejudice, the Court further **DENIES** Defendant's request in his unfiled reply to obtain discovery as to the second prong regarding any delay and whether it was caused by the Government's culpability. *See Doe*, 149 F.3d at 948.

[10] Defendant argues in his unfiled reply that had the Indictment been brought earlier, he would have been able to remember that he did not understand Question 15 at the time he completed Form N-400 and he would have been able to testify as to why he did not seek clarification. Defendant's declaration does not specifically state this: it only states that he does not understand Question 15 and does not remember answering Question 15 in 2009 or 2010. [Doc. # 33 at 11.] Even if his declaration did state what he argues in his unfiled reply, it would not rise to the level of actual prejudice. Robert Exum and Milly Duarte, moreover, also state in only general terms that they do not recall many specifics regarding Defendant's naturalization application. *Id.* at 106, 109-10. Defendant's reliance on *United States v. Benjamin*, 816 F. Supp. 373, 379-80 (D.V.I. 1993), and *United States v. Cardona*, 302 F.3d 494, 497 (5th Cir. 2002), is similarly misplaced. In *Benjamin*, the district court dismissed the indictment in part because defendant had established *actual* prejudice from the government's pre-indictment delay given the destruction of physical exculpatory evidence in the interim period from Hurricane Hugo. In *Cardona*, the Fifth Circuit vacated defendant's conviction with instructions to dismiss the indictment based on a post-indictment delay of five years which raised the presumption of prejudice and triggered a balancing test to determine whether defendant's Sixth Amendment speedy trial rights had been violated.

F. Defendant's MIL to Exclude Certain Testimony from USCIS Officers

Finally, Defendant moves to preclude the Government from eliciting testimony from former USCIS Officer Robert Exum, who conducted Defendant's naturalization interview in October 2009, or any other USCIS witness, about what he or she would have done as an individual decisionmaker, had he or she had accurate information regarding Defendant's underlying illegal conduct. [Doc. # 35.] Defendant claims that such testimony is irrelevant and unduly prejudicial. *Id.* at 6. In response, the Government points out that materiality is an element of the charged offense and a jury must evaluate Defendant's alleged knowing lie in objective terms from the perspective of a reasonable government official. [Doc. # 38 at 4.]

The Supreme Court addressed this issue in *Maslenjak*, stating that:

> [T]he question of what *any individual decisionmaker* might have done with accurate information is beside the point: The defendant in a § 1425(a) case should neither benefit nor suffer from a wayward official's deviations from legal requirements. Accordingly, the proper causal inquiry under § 1425(a) is framed in objective terms: To decide whether a defendant acquired citizenship by means of a lie, a jury must evaluate how knowledge of the real facts would have affected a *reasonable government official* properly applying naturalization law.

Maslenjak, 137 S. Ct. at 1928 (emphasis added).

Applying the *Maslenjak* standard, Defendant's MIL is **GRANTED.** The Government may not ask USCIS Officer Exum or other USCIS officials questions regarding what they, individually or in a personal capacity, would have done had they had accurate information regarding Defendant's prior illegal conduct. The Government is permitted, however, to ask Officer Exum or other USCIS officials questions regarding what they or other "reasonable government official[s] properly applying naturalization law" would have done using their knowledge, experience, and training, had they known about Defendant's 2015 felony convictions. *Maslenjak*, 137 S. Ct. at 1928; *see also Santos*, 947 F.3d at 733, (citing with approval, *inter alia*, USCIS officer's testimony "that a reasonable USCIS adjudications officer, knowing the real facts, would have deemed [defendant] ineligible for citizenship and denied his naturalization application.").

III. CONCLUSION

In light of the foregoing:

1. The Government's MIL to introduce evidence of Defendant's 2015 conviction and underlying conduct [Doc. # 27] is **GRANTED IN PART**;

2. Defendant's MIL to exclude evidence of Defendant's 2015 conviction and underlying conduct for impeachment purposes [Doc. # 58] is **GRANTED IN PART**;

3. The Government's MIL to preclude reference to Defendant's potential sentence [Doc. # 28] is **GRANTED;**

4. Defendant's motion to strike or dismiss the Indictment for vagueness and motion to suppress [Doc. # 31] is **DENIED;**

5. Defendant's motion to dismiss the Indictment for unreasonable delay [Doc. # 33] is **DENIED**;

6. Defendant's MIL to exclude certain testimony from USCIS officers [Doc. # 35] is **GRANTED.**

The Clerk is also directed to **STRIKE** Doc. ## 48, 49.

IT IS SO ORDERED.