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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
(HONORABLE GONZALO P. CURIEL)

UNITED STATES OF AMERICA,

Plaintiff,

v.

[REDACTED] (5),

Defendant.

) Case No. 18cr5382-GPC

) Date: May 29, 2020

) Time: 2:30 PM

) **Motions to:**

-) **1) Dismiss for vindictive prosecution;**
) **2) Dismiss or suppress evidence for use**
) **of an undercover informant against a**
) **represented defendant;**
) **3) Dismiss for bad-faith plea**
) **negotiations; and**
) **4) Dismiss Count 1 for violating**
) **the Double Jeopardy Clause.**

TO: ROBERT S. BREWER, UNITED STATES ATTORNEY; AND
MELANIE K. PIERSON, ASSISTANT UNITED STATES ATTORNEY.

[REDACTED] through counsel, John C. Lemon, consistent with the briefing
schedule set by this Court, moves to:

- 1) Dismiss the superseding indictment for vindictive prosecution;
2) Dismiss the superseding indictment or suppress evidence for use of an
undercover informant against a represented party;
3) Dismiss the superseding indictment for bad-faith plea negotiations; and
4) Dismiss Count 1 of the superseding indictment for violating the Double
Jeopardy Clause.

These motions are based on the federal Constitution, the Federal Rules of Criminal Procedure, the California Rules of Professional Conduct, and other relevant authorities, as well as the attached statement of facts and memorandum of points and authorities.

Respectfully Submitted,

Dated: May 1, 2020

/s/ John C. Lemon

JOHN C. LEMON

Attorney for Mr.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
(HONORABLE GONZALO P. CUriEL)

UNITED STATES OF AMERICA,

Plaintiff,

V.

$$\square \square \square (5),$$

Defendant.

Case No. 18cr5382-GPC

Memorandum of Points & Authorities

Introduction

The U.S. Attorney for the Southern District of California has prosecuted [REDACTED] Environmental, [REDACTED] [REDACTED] and [REDACTED] [REDACTED] [REDACTED] for alleged environmental offenses two times in less than three years. First, for the unauthorized discharge of portable-toilet waste to the sewer in violation of the Clean Water Act (CWA) and now for allegedly tampering with truck filters in violation of the Clean Air Act (CAA). Specifically, the *same* Assistant U.S. Attorney and the *same* two case agents are responsible for bringing separate, successive prosecutions, despite having been aware of *all* the alleged misconduct before resolving the first case.

Of particular significance to these motions, the prosecutor chose to pursue the current filter-tampering charges at the same time that the defendants were aggressively challenging the prosecutor's claim that [REDACTED] unauthorized discharge of portable-toilet waste harmed the environment by disrupting a local

1 water-treatment plant – an important issue, which the defendants ultimately won.
2 Indeed, just 12 days after the defendants proved at an evidentiary hearing that they
3 were *not* responsible for disrupting the plant and exactly one week after Judge
4 Benitez imposed sentences that were significantly mitigated by his express finding
5 that the defendants had *not* harmed the environment, the same two case agents raided
6 ██████ Environmental for the second time in less than two years.

7 The plant-disruption issue was bitterly contested. The government withheld
8 exculpatory information from the defendants before their guilty pleas, provided the
9 probation office with inculpatory “facts” that did not actually exist, and accused the
10 defendants of breaching their plea agreements when they objected to paying
11 restitution for the plant disruption absent a finding that they were actually responsible
12 for it. And it was in this window, as the plant-disruption and breach-of-plea
13 agreement issues were escalating, that the government sent an informant wearing a
14 wire to record the represented defendants regarding alleged filter tampering – an
15 allegation that was by then in the PSRs and being actively litigated.

16 The prosecutor had also been aware of the filter-tampering allegations since
17 September 2016 but chose not to disclose them to the defendants during plea
18 negotiations or take any other enforcement action. And while this Court has
19 previously expressed a concern about ongoing criminal conduct while on pretrial
20 release, with the exception of a single false-opacity test that allegedly occurred in
21 November 2017, the *only* alleged filter-tampering conduct in the indictment that
22 occurred after the guilty pleas in the CWA case was ██████ attempt to return the
23 filters to compliance in May 2018.

24 Moreover, those remediation efforts took place in anticipation of sentencing in
25 the CWA case and began well before ██████ then-fleet manager, ██████ ██████
26 had identified himself as a whistleblower. Every other act alleged in the superseding
27 indictment occurred *before* the guilty pleas in the CWA case. This is significant
28 because it demonstrates that a successive prosecution was not necessary to address

1 additional criminal conduct committed by the defendants while they were on pretrial
2 release.

3 To be sure, the government secured a tactical advantage by prosecuting the
4 defendants *ad seriatim*. In the first place, the defendants – who had been led to
5 believe the case was over – now have to expend even more resources to defend a
6 second case. The individual defendants are also now convicted felons, which will hurt
7 their credibility if they choose to testify in their own defense. And if convicted, the
8 individual defendants will be facing significant jail time. Had the cases been
9 prosecuted together, on the other hand, the alleged filter tampering would have
10 grouped with the unauthorized discharge under the same guidelines provision and the
11 sentencing range would have been virtually identical.¹

12 These two cases should have been treated as one. With the exception of [REDACTED]
13 [REDACTED] the defendants are the same, the nature of the alleged offenses is
14 the same (i.e., violating environmental regulations), the alleged offenses occurred at
15 roughly the same time, and the purported object of both offenses is the same – to aid
16 [REDACTED] Environmental in its day-to-day business operations. The government easily
17 could have – and should have – brought a single conspiracy charge with the object of
18 violating environmental regulations. It instead deliberately divided the conduct into
19 two conspiracies, prosecuting one and tucking the other away for a rainy day. That
20 neither comports with due process nor the prosecutor’s responsibilities as a “minister
21 of justice.”

22 [REDACTED] accordingly moves to dismiss for vindictive prosecution,
23 violation of his right to counsel, bad-faith plea negotiations, and violation of the
24

25 ¹ [REDACTED] is also facing an enhancement in Count 6 of the superseding
26 indict mitting an offense while on pretrial release. This enhancement would
27 require the Court to impose a mandatory-consecutive sentence of up to ten years. See 18
28 U.S.C. § 3147.

² References to “the defendants” in this pleading are to the [REDACTED] defendants and
do not include [REDACTED]

Double Jeopardy Clause (as to the conspiracy charged in Count 1). Consistent with Local Criminal Rule 47.1, he also joins codefendant [REDACTED] motion to dismiss for a pattern of governmental misbehavior.

Statement of Facts

A. Introduction

The following statement of facts reprises in part the statement of facts from [REDACTED] motion to compel specific discovery³ but has been edited and supplemented to reflect additional disclosures by the government and subsequent developments in the case. Although most of the relevant supporting documents were filed with the discovery motion, many have multiple file stamps or headers and are difficult to read (and impossible to cite by document number). For the convenience of the parties and the Court, the relevant documents have been redacted for legibility and resubmitted with this motion as follows:

Exhibit A – Reporter’s Transcripts from 17cr1305 and 18cr5382

Exhibit B – Discovery from 17cr1305

Exhibit C – Correspondence between defense counsel and the prosecutor

Exhibit D – Documents filed in 17cr1305

Exhibit E – Discovery from 18cr5382 (this case) filed under seal because of the protective order

In the interest of brevity, all citations will be to the exhibit and exhibit page number(s) only (e.g., Exhibit A at 1).

Mr. [REDACTED] does not wish to re-litigate the previous case. As explained in his discovery motion, however, the overlapping timelines of the alleged disruption of the water-treatment plant, the 2016-18 prosecution of the Clean Water Act violations, and the investigation of the current case are critical because they establish an appearance

³ Doc. 75.

1 of vindictiveness.⁴ Specifically, the chronology shows that the government's
 2 investigation into the filter tampering did not begin in earnest until it became apparent
 3 that the prosecutor would not be able to prove that [REDACTED] discharges to the sewer
 4 had damaged the plant. Even more importantly, the prosecutor's serial
 5 misrepresentations and discovery violations regarding the cause of the plant
 6 disruption are intertwined with the previous case and demonstrate *actual*
 7 vindictiveness. Indeed, the record reflects that the prosecutor was heavily invested in
 8 – if not solely and personally responsible for – the government's false claim that
 9 [REDACTED] caused the problems at the local water-treatment plant.

10 *B. The Beginning of the Investigation, the Problems at the North City Water*
 11 *Reclamation Plant, and the First Report of Filter Tampering*

12 Sometime in February 2016, [REDACTED] former “lead mechanic,” [REDACTED]
 13 [REDACTED] told one of [REDACTED] competitors, [REDACTED] that [REDACTED] was
 14 illegally discharging portable-toilet waste to the sewer. [REDACTED] gave [REDACTED]
 15 a cell-phone video of the discharging, which [REDACTED] then provided to Telemundo.⁶

16 At around the same time, a former [REDACTED] employee named [REDACTED]
 17 [REDACTED] filed a whistleblower complaint with the San Diego Industrial Wastewater
 18 Control Program (IWCP), providing the IWCP with two cell-phone videos of the
 19 discharging.⁷ Someone at the IWCP apparently notified the EPA, which began to
 20 investigate. EPA agent Leslie Carroll of the Criminal Investigations Division was the
 21 assigned case agent.⁸

22 In early April 2016, the North City Water Reclamation Plant (NCWRP)
 23

24 ⁴ See *United States v. Jenkins*, 504 F.3d 694, 700 (9th Cir. 2007).

25 ⁵ Exhibit B at 109.

26 ⁶ *Id.* at 29-30, 138.

27 ⁷ *Id.* at 71.

28 ⁸ See *id.* at 71, 103.

1 shortened its treatment process in order to save money, reducing its Solids Retention
 2 Time (SRT) from 10 days to 7.5.⁹ The plant, which had historically been unstable,¹⁰
 3 promptly suffered an ammonia breakthrough and was forced to shut down for a
 4 week.¹¹ It then returned to at least a 10-day SRT, which it maintained through at least
 5 May 2018.¹²

6 On June 16, 2016, Telemundo ran a story about [REDACTED] practice of
 7 discharging to the sewer, broadcasting the video taken by [REDACTED] On
 8 August 23, Agent Carroll applied for search warrants for [REDACTED] places of
 9 business.¹⁴ On August 25, a team of agents led by Carroll and FBI Agent Bradley
 10 Godshall raided [REDACTED] San Marcos and Miramar locations.¹⁵

11 On September 12, 2016, Godshall interviewed [REDACTED] who told him
 12 that [REDACTED] was also manipulating the filters on its trucks:

13 Of additional interest, [REDACTED] as the Lead Mechanic
 14 knows of a practice at [REDACTED] anti air pollution device
 15 installed on all of the [REDACTED] trucks, referred to by [REDACTED]
 16 [REDACTED] as a DPFS, [REDACTED] explained was like a [REDACTED] nverter
 17 [REDACTED] is being manipulated by [REDACTED] to save cost. [REDACTED]
 18 [REDACTED] stated the DPFSes requi [REDACTED] anges. [REDACTED]
 19 [REDACTED] does not change filters but inst
 20 through th [REDACTED] to facilitate exhaust flow. [REDACTED] has
 21 done this at the request of CHARPENT[I]ER. [REDACTED]
 22 stated that following this action the on board c [REDACTED] be
 23 “tricked” in order to not register the DPFS failure. [REDACTED]
 24 accomplishes the trick by bringing in an individual [REDACTED] xico, FNU

20 ⁹ Exhibit A at 116, 132, 180-81 (longer SRTs are safer for the plant but more
 21 expensive to maintain).

22 ¹⁰ *Id.* at 110; *see also* Exhibit B at 1.

23 ¹¹ Exhibit A at 164.

24 ¹² *Id.* at 127-28 (in the spring of 2018, well after [REDACTED] discharging had stopped,
 25 the SRT was increased again to 12 days “because of [REDACTED] n the plant”); *see also id.*
 at 134-35.

26 ¹³ *See* Exhibit B at 88, 86.

27 ¹⁴ *See id.* at 103.

28 ¹⁵ *Id.* at 24.

1 LNU, who performs the necessary work to trick the on board computer.¹⁶

2 On September 21, 2016, [REDACTED] testified before the grand jury, where the
3 prosecutor specifically asked him about the filter tampering:

4 Q. Now in addition to dumping to the sewer, you were also asked to
5 sort of alter an air pollution device installed on all the trucks?

6 A. That's correct.

7 Q. What is that device called?

8 A. A catalytic converter, DPF.

9 Q. What do those parts actually do?

10 A. They clean the air from the motor for the purpose it's on the truck
which is cleaning the air for the atmosphere.

11 Q. Now those particular devices require filter changes; right?

12 A. Yes.

13 Q. Does [REDACTED] make the filter changes?

14 A. They don't.

15 Q. What do they do instead?

16 A. They overrun the system or put a hole on the DPF just to let air
17 flow.

18 Q. So when you say they override the system, what does that mean?

19 A. They try to do it top secret, but I have heard [REDACTED] Carpenter [sic]
once talk to [REDACTED] as we were having lunch. [REDACTED] lled [REDACTED]
20 Carpenter [s [REDACTED] and he was over at the Mir [REDACTED] locati [REDACTED] r a
couple days, and I heard they were bringing a guy over from
21 Mexico to override the system, the computer, because when the
DPF is clogged, the truck, the truck derates which means it
22 doesn't do more than five miles per hour. So they were actually
tricking the computer.

23 Q. That is, they hacked it to avoid the –

24 A. Avoid the derate.¹⁷

26 ¹⁶ *Id.* at 29.

27 ¹⁷ *Id.* at 133-34 (the transcript of [REDACTED] grand-jury testimony was not
28 provided to the defense until October [REDACTED] onse to [REDACTED] [REDACTED] discovery
motion in this case).

1 *C. The Plea Negotiations and Guilty Pleas to Violating the Clean Water Act*

2 Shortly after the August 25, 2016 raids, the parties engaged in preindictment
3 plea negotiations regarding the government's allegation (which [REDACTED] did not
4 deny) that [REDACTED] had been discharging portable-toilet waste to the sewer without
5 authorization.¹⁸ At no time before the entry of the guilty pleas did the government
6 disclose the existence of the filter-tampering allegations.¹⁹ In fact, the government
7 refused to produce any discovery whatsoever²⁰ until June 1, 2017, after all the
8 defendants had pleaded guilty.²¹

9 On November 28, 2016, Agent Carroll sent an email to City of San Diego
10 Public Works officials regarding a previous conversation about ammonia spikes at the
11 NCWRP (which is located near [REDACTED] Miramar facility) and [REDACTED]
12 unauthorized discharges.²² In that email, Carroll specifically requested evidence to
13 support the theory that the plant was experiencing elevated ammonia readings at the
14 same time of day that [REDACTED] was discharging to the sewer lateral:

15 If I recall correctly, the plant was experiencing elevated readings during
16 the time of day [REDACTED] was discharging their trucked waste at the
17 Miramar yard. [REDACTED] ease have reports of the readings, perhaps
18 beginning in January 2016 to date? If [REDACTED] was responsible for the
19 elevated ammonia, the elevated readi [REDACTED] stop in June 2016 after
20 the Telemundo story ran. We'd like to address this with the criminal
21 case, if in fact [REDACTED] was responsible for the elevated ammonia
22 readings.²³

23 The government never produced this email (or the existence of this specific

24 ¹⁸ See Doc. 75-2 at 1 (Dec. of John C. Lemon).

25 ¹⁹ See *id.* at 2.

26 ²⁰ Apart from business records documenting deliveries of portable-toilet waste to
27 pump stations.

28 ²¹ See Exhibit C at 6-7 (email notice from USAO regarding discovery production
dated June 1, 2017).

²² Doc. 82-2 at 2-4 (Dec. of Agent Carroll).

²³ Doc. 82-2 at 8.

request) to the defense during the CWA case. It was instead produced only in response to [REDACTED] [REDACTED] discovery motion in *this* case. The government also never produced any of the evidence that Carroll requested (i.e., reports or responsive emails documenting elevated ammonia readings at the same time of day as [REDACTED] discharges). Nor did it ever produce any reports or emails documenting the *absence* of evidence of such a correlation, notwithstanding the fact that such reports would have been *Brady* material, which [REDACTED] [REDACTED] specifically requested.²⁴ As addressed below, however, roughly ten months *after* the defendants' guilty pleas and seven months *after* the date originally scheduled for sentencing, the government produced raw data from the NCWRP's influent ammonia probe, which proved that there was *no* correlation between [REDACTED] discharging and the plant's elevated ammonia readings.²⁵

Four days after Carroll's email, on December 2, 2016, the defense attorneys met with the prosecutor, who stated that the government was investigating some "ammonia issues" at a nearby water-treatment plant.²⁶ At the next meeting, on January 18, 2017, the prosecutor informed defense counsel that the NCWRP had suffered from ammonia spikes and that she believed those were the result of [REDACTED] unauthorized practice.²⁷ The prosecutor reiterated that allegation at the next meeting, on February 9, 2017.²⁸

On February 20, 2017, agents Godshall and Carroll interviewed the Chief Plant Operator of the NCWRP, [REDACTED] [REDACTED] regarding the prosecutor's theory that

²⁴ See Exhibit C at 2, 12, 14, 17-19 (defense discovery requests).

²⁵ See Exhibit A at 268-69 (testimony of defense expert interpreting probe data).

²⁶ Doc. 75-2 at 2.

²⁷ *Id.*

²⁸ *Id.*

1 [REDACTED] unauthorized discharge was the cause of the plant's ammonia problems.²⁹
 2 And although the agents suggested to [REDACTED] that "slugs of portable toilet waste
 3 could potentially elevate ammonia levels," which he "confirmed," he nonetheless also
 4 "advised [the agents] that *so many* different factors could have caused the elevated
 5 ammonia levels," including local breweries.³⁰ [REDACTED] also told the agents that he
 6 and the city's consultants "ultimately concluded that [the reduction to a 7.5-day SRT]
 7 was the cause of the NCWRP upset in April of 2016."³¹

8 Just two days later, defense counsel met with the prosecutor again, at which
 9 time she reiterated her claim that [REDACTED] was responsible for the disruption of the
 10 plant. She further stated that the defendants' plea agreements would: 1) require them
 11 to stipulate to restitution for the economic loss associated with the disruption; and 2)
 12 reserve the government's ability to argue to the court that the individual defendants
 13 should also receive a four-level enhancement under the guidelines for disrupting a
 14 public utility.

15 The prosecutor did *not* disclose at that meeting that her agents had interviewed
 16 [REDACTED] just two days earlier and that he had told them that "so many things" could
 17 have been responsible for the ammonia problems. Nor did she disclose [REDACTED]
 18 conclusion that the city's decision to reduce the SRT caused the disruption. And at
 19 the next meeting on March 3, 2017, the prosecutor held fast to her position regarding
 20 the plea offers – again without disclosing either the existence or the substance of the
 21 [REDACTED] interview.³²

22 On March 28, 2017, Knut Johnson, then counsel for [REDACTED] [REDACTED] [REDACTED] emailed the

23 ²⁹ Exhibit B at 1-3.

24 ³⁰ *Id.* at 1-2 (emphasis added). There were other potential causes, including an 84-
 25 inch-wide pipe under the 805 freeway that had collected waste for several years and a
 26 black foam of unidentified origin. *See id.* at 5-23 (power-point presentations by
 consultants Brown and Caldwell and CH2M Hill).

27 ³¹ *Id.* at 4.

28 ³² Doc 75-2 at 2.

1 prosecutor to protest the government's refusal to produce discovery, specifically
 2 citing the need for discovery regarding the disruption allegation:

3 I would like to first point out that we have yet to receive any discovery
 4 in this matter. . . . First, we should agree that there should be no 4 level
 5 enhancement for disruption of a public utility. I have not seen the
 6 discovery related to this issue, but my belief is that your proof will be
 7 entirely circumstantial; you intend to prove that the treatment plant had
 8 high ammonium levels while the unpermitted dumping was taking place.
 9 Setting aside the fact that thousands of other sources could have been the
 10 source of that ammonium increase, the early disposition in this case
 11 along with the significant financial penalties support a plea agreement
 12 without this enhancement.³³

13 The prosecutor first replied that her failure to produce any discovery "should
 14 [not] be an impediment to reaching an agreement."³⁴ She then elaborated that she was
 15 bound by DOJ policy to pursue the enhancement and that if the government's
 16 argument is "as weak as you suggest," the "defendants assume little risk" in letting
 17 the court resolve the issue:

18 In the proposed plea agreements, your clients are not required to agree
 19 that the enhancements for disruption of a public utility or for role are
 20 applicable. You are free to argue to the court the positions you espouse,
 21 just as the government will be free to argue its position. If the
 22 government's positions are as weak as you suggest, your clients assume
 23 little risk in agreeing that the court can decide the issue. As you are
 24 aware, Department of Justice policy does not permit me to agree to
 25 forego enhancements that appear to be factually supported by the
 26 evidence developed during the course of the investigation.³⁵

27 What the defendants would not discover until the evidentiary hearing that took place
 28 14 months later was that the prosecutor did not actually have *any* evidence supporting
 the enhancement at the time she wrote that email.

On April 26, 2017, [REDACTED] testified before the grand jury again
 regarding the unauthorized discharge of portable-toilet waste to the sewer. This time,

³³ Exhibit C at 1.

³⁴ *Id.* at 2.

³⁵ *Id.* at 3.

1 he was not asked about filter tampering.³⁶

2 On May 24, 2017, [REDACTED] [REDACTED] [REDACTED] pleaded guilty to conspiring to violate the
3 Clean Water Act in violation of 18 U.S.C. § 371. On June 1, 2017, [REDACTED] [REDACTED]
4 pleaded guilty to the same conspiracy charge and [REDACTED] pleaded guilty to
5 committing mail fraud in violation of 18 U.S.C. § 1341 as part of a scheme to violate
6 the Clean Water Act. The plea agreements imposed joint and several liability on all
7 three defendants for restitution associated with the plant disruption – regardless of
8 whether the government actually prevailed on its claim that the defendants were, in
9 fact, responsible for disrupting the plant.³⁷ The agreements for the individual
10 defendants also stated that the government was “free to recommend . . . an upward
11 adjustment of 4 levels for disruption of a public utility . . . which the defendant is free
12 to oppose.”³⁸

13 Importantly, the prosecutor also narrowly circumscribed the government’s
14 promise “not to file other charges” to conduct related to “the discharge of trucked
15 waste to the sewers for the period from 2009 through August 26, 2016.”³⁹ The district
16 court scheduled sentencing hearings for all three defendants for August 28, 2017.

17 *D. The Discovery Production, the Continuances of the Sentencing Hearing, and*
18 *the PSR*

19 Also on June 1, the government produced discovery for the first time.⁴⁰ The
20 production required an eight-terabyte hard drive and included over 300 boxes of
21 records seized from [REDACTED] in the August 25, 2016 raid.⁴¹ The proverbial needles
22

23 ³⁶ See Exhibit B at 31-45.

24 ³⁷ See, e.g., Exhibit D at 19 [REDACTED] [REDACTED] Restitution Addendum).

25 ³⁸ See, e.g., *id.* at 11 [REDACTED] [REDACTED] Plea Agreement).

26 ³⁹ *Id.* at 2.

27 ⁴⁰ Exhibit A at 67-68; see also Exhibit C at 6-7.

28 ⁴¹ Exhibit C at 5.

1 in this eight-terabyte haystack included the FBI 302 containing [REDACTED]
 2 September 12, 2016 statement that [REDACTED] had been tampering with the filters on
 3 its trucks, as well as the February 20, 2017 report of the [REDACTED] interview and the
 4 power-point presentations by the city's consultants regarding the likely causes of the
 5 plant disruption (none of which suggested that [REDACTED] was responsible).⁴² The
 6 transcript of [REDACTED] June 21, 2016 grand-jury testimony was *not* produced
 7 to the defense during the pendency of the CWA case, which the government now says
 8 was an oversight.⁴³ It was instead produced only in response to [REDACTED] [REDACTED] discovery
 9 motion in this case.

10 On July 3, 2017, the district court granted the parties' joint motion to continue
 11 the sentencing hearing to November 13, 2017. On October 10, 2017, the probation
 12 office filed [REDACTED] [REDACTED] Presentence Report.⁴⁴ Remarkably, the PSR recommended a
 13 four-level increase for the disruption of a public utility based on "facts" that appeared
 14 nowhere in the discovery and the government knew did not exist:

15 The NCWRP experienced high levels of ammonia and was required to
 16 shut down for approximately one week in order to determine the cause of
 17 the spikes. Consultants were hired, which cost \$202,061 . . . and they
 18 were able to determine that [REDACTED] illegal discharging of toilet
 19 waste correlated with the sp [REDACTED] ia levels. After the execution
 of the search warrant, it appears the ammonia levels returned to normal
 and the NCWRP was not required to expand its facilities or continue
 costly treatment of the wastewater. Taking this into consideration, this
 increase appears appropriate.⁴⁵

20 There are actually *three* false statements here: 1) although the city did hire
 21 consultants, those consultants *never* concluded that [REDACTED] discharges "correlated
 22
 23

24 ⁴² See *id.* at 6-7.

25 ⁴³ See Doc. 82 at 9, n.2.

26 ⁴⁴ 17cr1305 Doc. 38. Because the PSR is already in the court record in 17cr1305 and
 27 is highly confidential, it will not be resubmitted (under seal or otherwise) with this
 pleading.

28 ⁴⁵ *Id.* at ¶ 71.

1 with the spikes in ammonia levels”;⁴⁶ 2) the “ammonia levels returned to normal”
 2 after the plant returned to a 10-day SRT in April 2016 – *not* after the execution of the
 3 search warrant in August 2016;⁴⁷ and 3) the NCWRP *did*, in fact, have to continue
 4 costly treatment (i.e., maintain *at least* a 10-day SRT) after the execution of the
 5 warrant.⁴⁸

6 The PSR also contained an additional false statement regarding the cause of the
 7 plant closure, which it attributed directly to the case agent:

8 With regards to the NWCRP [sic], the case agent said that the
 9 representative [of the plant] was able to provide enough evidence to
 10 indicate that [REDACTED] involvement in the illegal discharging was
 directly relat [REDACTED] RP [sic] closing down.”⁴⁹

11 On the contrary, at the time the PSR was filed, the plant representative, [REDACTED]
 12 [REDACTED] did *not* believe that [REDACTED] was responsible for the plant closure. Indeed,
 13 he would later testify that he believed that any number of things could have caused
 14 the ammonia problems until he met with the prosecutor and case agents again on
 15 March 1 and 2, 2018 – six months *after* the publication of the PSR – and changed his
 16 mind.⁵⁰ Nor had [REDACTED] provided any “evidence” to indicate that [REDACTED] was
 17 responsible, because no such evidence existed.⁵¹

18 Separately, the PSR revealed to defense counsel for the first time the allegation
 19 that [REDACTED] had tampered with its truck filters:

20 ⁴⁶ Exhibit A at 391 (prosecutor stating to this Court that the consultants “did not
 21 reach that conclusion”).

22 ⁴⁷ Exhibit A at 134-35 (“[T]he plant returned to normal” after reverting to a 10-day
 23 SRT.).

24 ⁴⁸ Exhibit A at 142-43 (The plant maintained a minimum (costly) SRT of 10 days
 through the May 18, 2018 evidentiary hearing.).

25 ⁴⁹ 17cr1305 Doc. 38 at ¶ 56.

26 ⁵⁰ Exhibit A at 198-99; *see also id.* at 201-02.

27 ⁵¹ *See* Exhibit D at 41-88 [REDACTED] [REDACTED] objections to PSR containing *all* relevant
 28 discovery at that time); *see al* [REDACTED] A at 392-93 (prosecutor explaining to *this* Court
 that there were “no reports . . . or notes” supporting the allegation).

1 Additionally, [REDACTED] informed agents that the anti-air pollution device
 2 installed on a [REDACTED] trucks, referred to as a DPFS, was
 3 being manipulated by [REDACTED] to save cost. [REDACTED] said the DPFS'
 4 require filter changes, [REDACTED] was [REDACTED] nging the filters.
 5 Rather, holes were drilled thro [REDACTED] ces to facilitate exhaust flow.
 6 Following this modification, the on-board computer needs to be
 7 "tricked" in order not to register the DPFS failure. [REDACTED]
 8 reportedly accomplished the "trick" by bringing so [REDACTED] m
 9 Mexico who performed the necessary work to trick the computer.⁵²

10 On October 11, 2017, the probation office filed [REDACTED] PSR. It also
 11 recommended the four-level enhancement for the disruption of the utility and
 12 included the allegation of filter tampering. Both PSRs, however, also recommended a
 13 downward departure based on a lack of environmental harm.⁵³ The very next day, the
 14 prosecutor filed an objection to those favorable recommendations. In that objection,
 15 she presented her theory for [REDACTED] culpability for the plant disruption –
 16 bootstrapping some of the false statements in the PSR into a factual basis for denying
 17 the recommended departures:

18 High levels of ammonia are present in concentrated urine, such as the
 19 portable toilet waste discharged by [REDACTED] [PSR ¶ 44]. The North
 20 City Water Reclamation Plant (NCWRP) is located within three miles of
 21 the [REDACTED] facility on Rehco Road in San Diego. The plant
 22 exp [REDACTED] levated levels of ammonia during the time that [REDACTED]
 23 was illegally discharging the portable toilet waste at the San
 24 facility. [PSR ¶ 43.] This problem caused the NCWRP to spend
 25 approximately \$250,000 on consultants in an attempt to address the
 26 issue. It also caused the plant to run on a 10-day solid retention time
 27 (SRT), rather than the 5-day SRT for which it was designed. [PSR ¶ 44.]
 28 By running at a 10-day SRT instead of a 5-day SRT, the NCWRP could
 only not process [sic] the capacity for which it was designed, which
 resulted in additional costs for local taxpayers. According to [REDACTED]
 [REDACTED] Deputy Director of the San Diego Public Utilities [REDACTED] tewater
 and Disposal Division, when they tried to run the plant at 7.5
 SRT, high levels of ammonia caused them to exceed their permit limits
 for the NCWRP, such that the City shut down the plant entirely for a
 week in April of 2016. Once the illegal [REDACTED] discharges ceased,
 ammonia levels at the plant drastically i [REDACTED] [PSR ¶ 43.]⁵⁴

These statements were highly misleading if not downright false. All the evidence in

⁵² 17cr1305 Doc. 38, ¶ 41.

⁵³ See, e.g., 17cr1305 Doc. 38 at ¶ 70 [REDACTED] PSR).

⁵⁴ Exhibit D at 23-24.

1 the government's possession at this time – as well as the evidence later introduced at
 2 the evidentiary hearing – demonstrated that the plant's problems with ammonia
 3 incursions began *years* before ██████ started discharging to the sewer and
 4 continued well after ██████ had stopped. Further, the “drastic improve[ment]”
 5 occurred after the plant aborted its 7.5-day SRT experiment and returned to a 10-day
 6 SRT in April 2016 – *not* after ██████ stopped discharging to the sewer four or five
 7 months later.

8 Also on October 12, 2017, ██████ forwarded the plant's April 28, 2016 Self-
 9 Monitoring Report (submitted to the Regional Water Quality Control Board) to Agent
 10 Godshall. On October 13, ██████ forwarded to Godshall an official letter that the
 11 department sent to the RWQCB on March 23, 2017.⁵⁵ Neither correspondence
 12 mentioned ██████ as a possible cause of the disruption, notwithstanding the fact
 13 that ██████ was well aware that the prosecutor believed ██████ was the culprit
 14 when his office wrote to the RWQCCB on March 23, 2017.

15 On November 7, 2017, the government filed its sentencing summary charts for
 16 the individual defendants and its sentencing memorandum for the corporation. It
 17 recommended 30 months in custody for ██████ and a 10-month split sentence for
 18 ██████. With respect to the corporation, the government argued in aggravation
 19 that ██████ was responsible for the problems at the NCWRP:

20 The discharges at the San Marcos facility resulted in spikes of ammonia
 21 at the North City Water Reclamation Plant (NCWRP). The search for the
 22 source of the high levels of ammonia cost the City (and by extension, the
 23 ratepayers) approximately \$250,000 in consultants' fees. More difficult
 24 to quantify is the loss resulting from the disruption of the NCWRP. The
 25 NCWRP was required to operate for years at less than its designed
 26 capacity because longer settling times were needed to meet the discharge
 requirements for the plant (due to the need to treat the ammonia). In fact,
 the high levels of ammonia at one point caused the plant to violate its
 discharge limits, forcing the plant to close for a week. This occurred
 during a time of severe drought, when water from the plant was in high
 demand, and could have provided an additional source of revenue for the

27 ⁵⁵ Exhibit B at 46-51.

28 ⁵⁶ Exhibit D at 29-30.

1 City (which was lost).⁵⁷

2 That unequivocal assertion of fact – that [REDACTED] discharges caused the “spikes of
3 ammonia” and the disruption – was simply not true.⁵⁸ Nor was it based on any
4 evidence in the discovery.

5 On November 9, 2017, the parties jointly continued the sentencing hearing to
6 January 16, 2018. On December 14, 2017, undersigned counsel emailed the
7 prosecutor to state that he had reviewed the relevant discovery and wanted to confirm
8 that he wasn’t missing anything:

9 I’ve been through the discovery HD and wanted to confirm that I’m not
10 missing anything relevant to the plant-upset issue. . . . Assuming that I
11 do have everything, I have not seen any report concluding that
12 [REDACTED] unauthorized discharges were the cause of the disruption.
report exist? And are you planning to call an expert
witness? If not, how are you planning to establish that [REDACTED] was the
source of the disruption? Please advise.⁵⁹

13 The prosecutor responded that no such report existed and that the government’s proof
14 would somehow depend on the nature of the objection(s):

15 That sounds like you have found everything There is no report
16 specifically saying that an investigation concluded that [REDACTED] is
17 responsible, although that was [REDACTED] belief. When [REDACTED] ultants
18 did their investigation, they did [REDACTED] the benefit of knowing about
19 the illegal discharges. I have not seen any objection to the presentence
report (which recommends the four levels for the disruption of a utility)
so I am not yet certain what proof I would offer. It depends on what the
precise challenge is.⁶⁰

20 Once more, the statement that it was [REDACTED] belief” that [REDACTED] [was]
21 responsible” is false. Although [REDACTED] would prove to be the sole government
22 witness to offer that opinion, he would explicitly testify – at least twice – that he did

23
24 ⁵⁷ Exhibit D at 37.

25 ⁵⁸ The allegation that the discharges at the “San Marcos facility” caused the
26 disruption appears to be a mistake. The government alleged that the discharges from the
Miramar facility, which is three miles from the NCWRP, was the source of the problem.

27 ⁵⁹ Exhibit C at 12.

28 ⁶⁰ *Id.* at 12-13.

1 not form that opinion until much later – on March 1 or 2, 2018, when he met with the
 2 prosecutor and case agents again.⁶¹ In fact, the prosecutor cited [REDACTED] March 2
 3 epiphany during her argument to Judge Benitez at the evidentiary hearing,
 4 characterizing it as an “ah ha moment” that “explains everything.”⁶²

5 Defense counsel replied “[m]y objections aren’t due yet, but I’m sure you will
 6 not be surprised to learn that I am going to object that there is insufficient evidence to
 7 support the finding that [REDACTED] was responsible for the disruption.”⁶³

8 On January 4, 2018, the parties filed a third joint motion to continue the
 9 sentencing hearing, this time to February 12, which was granted. On January 29,
 10 defense counsel followed up again regarding the absence of evidence supporting the
 11 government’s statements of fact, specifically requesting evidence regarding a
 12 correlation between [REDACTED] now-discontinued practice and subsequent
 13 improvements at the plant:

14 I was just looking over the NCWRP discovery again and I don’t see
 15 anything about the plant’s operations after the April 2016 disruption. I
 16 know the PSR and your pleadings state that things got better after the
 17 summer [of] 2016, but I don’t see that anywhere in the discovery. I
 would also like to confirm that the plant returned to a 10-day SRT after
 the disruption and I would like to know if and when that ever changed.
 Please let me know. Thank you.⁶⁴

18 The prosecutor replied that she was preparing for trial and would forward the request
 19 to the case agent.⁶⁵

20 //

21 //

23 ⁶¹ Exhibit A at 198-99; 201-02; *see also id.* at 166 [REDACTED] explaining that he did
 24 not learn the “precise constituents” of the [REDACTED] di [REDACTED] til March 1, 2018);
 Exhibit D at 145 (expert disclosure of sa

25 ⁶² Exhibit A at 287.

26 ⁶³ Exhibit C at 13.

27 ⁶⁴ *Id.* at 14.

28 ⁶⁵ *Id.*

1 *E. The Plant-Disruption Litigation and the Investigation into the Alleged Filter*
 2 *Tampering*

3 On January 29, 2018, [REDACTED] [REDACTED] [REDACTED] filed his objections to the PSR,
 4 including his objection to the four-level increase for the disruption of the NCWRP.
 5 Appended to that pleading was the universe of relevant discovery at that time, *none*
 6 of which identified [REDACTED] as the culprit.⁶⁶ Defense counsel confirmed through
 7 email correspondence with the prosecutor that he had identified *all* the relevant
 8 discovery at that time.⁶⁷ [REDACTED] [REDACTED] objections to the PSR also included a factual
 9 objection to the PSR's report of filter tampering.⁶⁸

10 On February 1, 2018, the parties agreed to a joint motion to continue the
 11 sentencing (requested and filed by the government because of a schedule conflict). In
 12 that motion, the prosecutor acknowledged that the government would need to present
 13 evidence to support its claim regarding the disruption:

14 Now that some of defendants' sentencing pleadings were filed on
 15 January 29, 2018, . . . it is clear that sentencing will not proceed with a
 16 complete factual agreement by the parties. . . . [T]he four level
 17 enhancement under the Sentencing Guidelines applicable to the
 18 individual defendants for disruption of a public utility is also in dispute,
 19 and will require scientific testimony. To support the United States'
 20 position at sentencing, undersigned counsel for the government will
 21 need to present witnesses and documentary evidence.⁶⁹

22 What is again significant here is that no such "witnesses and documentary
 23 evidence" yet existed. The court did not grant the joint motion. It instead required the
 24 parties to appear on February 12, 2018, as scheduled. At that hearing, both defense
 25 counsel for the individual defendants noted that the discovery produced up to that

26 ⁶⁶ Exhibit D at 41-88. (objections and exhibits, which included *all* relevant discovery
 27 produced up to that time); *see also id.* at 90 (declaration of defense consultant that the
 28 government had produced "no evidence to support [its] claim").

⁶⁷ Exhibit C at 8-15.

⁶⁸ Exhibit D at 42. [REDACTED] [REDACTED] [REDACTED] and [REDACTED] also filed objections to the filter-
 tampering allegations. Do [REDACTED] [REDACTED] Doc. 59 at 6 [REDACTED]

⁶⁹ Exhibit D at 95.

1 time did not inculcate the defendants for the disruption of the utility and accordingly
2 renewed their discovery requests.⁷⁰ The court continued the hearing to March 2, 2018.

3 On February 23, 2018, the government filed its oppositions to the defendants'
4 objections to the PSR. In the opposition to [REDACTED] [REDACTED] objections, the prosecutor
5 again laid out her theory – still unsupported by evidence – that [REDACTED] was
6 responsible for the problems at the plant, specifically stating (incorrectly) that “the
7 ammonia incursions dropped dramatically after [REDACTED] ceased its illegal
8 discharges.”⁷¹ In her recitation of the allegations, the prosecutor did *not* claim that
9 there was a time-of-day relationship between [REDACTED] discharging and the elevated
10 ammonia levels at the plant.⁷²

11 Separately, the government also opposed the defendants’ objections to the
12 allegation of filter tampering:

13 The PSR accurately reflects the statement of the witness, who testified to
14 the same facts under oath. The United States did not perform an
15 examination of the anti-pollution devices to determine the veracity of
16 this allegation.”⁷³

16 In the same February 23 pleading, the government accused [REDACTED] [REDACTED] of
17 violating his plea agreement by objecting to the \$202,061 in restitution for the alleged
18 disruption, noting that [REDACTED] [REDACTED] has already agreed to make such payment in the
19 restitution agreement to his plea agreement.”⁷⁴ And despite the total absence of any
20 evidence in support of its disruption claim, the prosecutor reiterated that “the United
21 States will demonstrate at the sentencing hearing [that [REDACTED] was a reason the
22
23

24 ⁷⁰ Exhibit A at 6-7.

25 ⁷¹ Exhibit D at 99-101.

26 ⁷² *See id.*

27 ⁷³ *Id.* at 109.

28 ⁷⁴ *Id.* at 110.

1 nearby [NCWRP] slowed its operations, and ultimately shut down for a week.”⁷⁵

2 The following day, the government filed a motion to find [REDACTED] and
3 [REDACTED] in breach of their plea agreements because they had objected to paying
4 restitution for the plant disruption.⁷⁶ On February 26, 2018, the district court
5 continued the evidentiary hearing on its own motion to March 9. Also on February
6 26, the government produced the c.v. of [REDACTED] for the first time.⁷⁷

7 On March 2, 2018, the government for the *first time* produced any discovery
8 pointing the finger at [REDACTED] for the disruption. It was a two-page Investigative
9 Activity Report by Agent Carroll summarizing statements made by [REDACTED] to
10 Carroll and the prosecutor during interviews on March 1 and 2, 2018.⁷⁸ According to
11 that report, during the meeting, the agents showed [REDACTED] sampling data from
12 [REDACTED] discharges and he then concluded that [REDACTED] was responsible for the
13 disruption.⁷⁹ On March 6, the government produced a report of a [REDACTED] interview
14 that took place on March 5. The gist of that report was that Carroll asked [REDACTED] if
15 the city would have wasted money on consultants if it had known that [REDACTED] was
16 the problem and that [REDACTED] had said “no.”⁸⁰

17 Also on March 6, undersigned counsel wrote to the prosecutor to request
18 additional discovery regarding the plant’s SRT, as well as the bases and reasons for
19 the opinions offered by [REDACTED] on March 1 and 2, 2018, which was “the first time
20 that these opinions have been disclosed.”⁸¹ On March 7, the government produced
21

22 ⁷⁵ *Id.* at 112.

23 ⁷⁶ *Id.* at 118.

24 ⁷⁷ Exhibit C at 16.

25 ⁷⁸ Exhibit B at 52.

26 ⁷⁹ *See id.* at 52-53.

27 ⁸⁰ *Id.* at 54.

28 ⁸¹ Exhibit C at 17-19.

1 over 150 pages of discovery in response. On March 8, the government produced
2 another 540 pages.⁸²

3 In response, [REDACTED] moved for a continuance of the evidentiary hearing,
4 noting that despite “the fact that the parties agreed to disagree about this issue back in
5 May 2017, the government did not produce any evidence in support of its claim until
6 March 2, 2018 – just six days ago.”⁸³

7 At the March, 9, 2018 hearing, undersigned counsel explained to the court that
8 he had been asking for the discovery for several months and had made several
9 discovery requests by email “asking about where the discovery was that supported
10 the government’s position that [REDACTED] was . . . responsible” and that “[t]he
11 government did not produce any additional reports or any other evidence suggesting
12 that [REDACTED] was responsible for the disruption of the utility until March 2nd.”⁸⁴ The
13 prosecutor responded by claiming ignorance as to the nature of the defense objection
14 and citing the false statements in the PSR as evidence, which (as addressed below)
15 came from one of the case agents or the prosecutor herself, rather than a witness or
16 any actual evidence:

17 Well, I think we did produce in the initial discovery information to
18 support the four-level enhancement. In fact, we presented enough that
19 the probation officer recommended it in the PSR. So clearly there was
20 something there, enough for the probation officer to conclude that the
21 four-level enhancement was appropriate. Mr. Lemon asked me for
22 additional discovery and I said to him all along I will be happy to
23 provide whatever discovery. But so far, it’s been recommended in the
24 PSR. There’s been no challenge filed to it. And so I don’t know what my
25 response to your challenge is until I see what your challenge is.⁸⁵

26 Judge Benitez granted the continuance and rescheduled the evidentiary hearing for
27
28

24 ⁸² DES-020619-774; DES-020775-1313. These voluminous documents will not be
25 reproduced here, but were filed with the court as exhibits to [REDACTED] March 8,
26 2018 motions. 17cr-1305 Doc. 85.

27 ⁸³ Exhibit D at 121.

28 ⁸⁴ Exhibit A at 15-16.

⁸⁵ *Id.* at 17-18.

1 May 18. The court also ordered the prosecutor to instruct her expert witness to write
2 “a brief summary” of his conclusions:

3 I’m trying to keep this from getting any worse than it is. Ms. Pierson,
4 can you get Mr. [REDACTED] to write . . . a Rule 16 expert report; just a
5 brief summary of his conclusions and how he arrived at those
6 conclusions and submit it to Mr. Lemon . . . within the next two weeks?
7 Can you do that?⁸⁶

8 Also at the March 9 hearing, the government argued to the court that [REDACTED]
9 [REDACTED] and [REDACTED] had breached the plea agreement by objecting to restitution
10 related to the plant disruption. Specifically, the prosecutor argued that the defendants
11 had agreed to pay restitution for expenses related to the plant closure regardless of
12 whether the court found that [REDACTED] was responsible for it.⁸⁷ The defendants
13 countered that they certainly wouldn’t have agreed to pay that restitution had the
14 government produced the relevant discovery, which was exculpatory.⁸⁸ In response,
15 the prosecutor made additional representations regarding the plant-disruption
16 discovery, which are inconsistent with both her recent representations to this Court
17 and the record:

18 I totally dispute that we breached the plea agreement in any way. We
19 provided *full discovery*, and we had full discussions prior with counsel
20 and I *showed them the nature of the evidence that we had*. I asked them
21 if there was any *additional documentation* that they would like to see
22 before they entered the plea because *I was willing to show them all the*
23 *documents I had. They never requested to see anything further* other than
24 what I provided to them.⁸⁹

25 On March 19, 2018, Agent Carroll met with four consultants from Brown and
26 Caldwell to review the same sampling data that the prosecutor and agents had
27 reviewed with [REDACTED] on March 1.⁹⁰ Unlike [REDACTED] however, these
28

24 ⁸⁶ *Id.* at 21.

25 ⁸⁷ *See id.* at 31-32.

26 ⁸⁸ *See id.* 29-30, 34.

27 ⁸⁹ *Id.* at 30-31 (emphasis added).

28 ⁹⁰ *See Exhibit B at 23A-B.*

1 consultants did not embrace the government's theory of liability – stating instead that
2 the agents' data “did not show the whole picture” and that they “were not able to
3 conclude that the plant upset [was caused by ██████████]

4 On March 23, 2018, the government filed its court-ordered expert notice. The
5 summary of ██████████ opinions was *not* written by ██████████ himself, which is
6 what Judge Benitez had ordered.⁹² Instead, it was written by the prosecutor, who
7 stated that ██████████ “was first provided with covert sampling performed by the EPA
8 on March 1, 2018.”⁹³ That information, according to the prosecutor, led ██████████ to
9 “conclude[] that the ██████████ discharges were a major contributor to the NCWRP
10 upset in April of 2016.”⁹⁴ In other words, although the prosecutor had been insisting
11 that ██████████ was responsible for the plant closure since late 2016, she actually had
12 no witness who could reach that conclusion until ██████████ epiphany on March 1 or
13 2, 2018. The expert disclosure also made *no* mention of the government's original
14 theory connecting ██████████ to the plant disruption – that there was a time-of-day
15 relationship between ██████████ discharging and elevated ammonia readings at the
16 plant.⁹⁵

17 On April 5, 2018, ██████████ filed an objection to the government's expert-
18 witness disclosure and requested a status hearing.⁹⁶ The basis for the objection was
19 that the prosecutor had not complied with the court's order to submit a summary
20 report written by the expert witness, himself. The prosecutor filed an opposition the
21 following day – basically arguing that Judge Benitez's order exceeded his authority
22

23 ⁹¹ *Id.* at 23B.

24 ⁹² *See* Exhibit D at 142-48.

25 ⁹³ *Id.* at 145.

26 ⁹⁴ *Id.* at 146.

27 ⁹⁵ *See id.* at 142-46.

28 ⁹⁶ Exhibit D at 153.

1 under the federal rules.⁹⁷

2 Unbeknownst to the defendants, on April 15, 2018, [REDACTED] [REDACTED] a
3 disgruntled [REDACTED] employee, contacted the prosecutor claiming to have
4 information regarding the alleged filter tampering that she had already known about
5 for almost two years.⁹⁸

6 The following day, the district court scheduled a status for April 20. At that
7 April 20 hearing, the government again argued that [REDACTED] and [REDACTED] had
8 breached the plea agreement by objecting to restitution based on the plant
9 disruption.⁹⁹ The defendants countered that the government had breached the
10 agreement by failing to disclose the February 20, 2017 [REDACTED] interview – which
11 was exculpatory – before the defendants pleaded guilty.¹⁰⁰ Judge Benitez then stated
12 that he was inclined to declare the plea agreements void and set the case for trial.¹⁰¹
13 The parties ultimately agreed to withdraw their respective claims of breach and
14 stipulated that the defendants would be required to pay restitution associated with the
15 plant closure *only* if the court found them liable.¹⁰²

16 Also on April 20, agents Godshall and Carroll interviewed [REDACTED] [REDACTED]
17 regarding the alleged filter tampering.¹⁰³ On April 27, Godshall equipped [REDACTED] with
18 a hidden recording device and directed him to obtain inculpatory statements from
19 [REDACTED] [REDACTED] and [REDACTED] [REDACTED] as well as other [REDACTED] employees.¹⁰⁴ [REDACTED] [REDACTED] [REDACTED]

20 ⁹⁷ See *id.* at 158-63.

21 ⁹⁸ Exhibit E at 1-3.

22 ⁹⁹ Exhibit A at 47.

23 ¹⁰⁰ *Id.* at 61.

24 ¹⁰¹ *Id.* at 62.

25 ¹⁰² *Id.* at 71-72. The court also ruled that the parties were not required to submit expert
26 reports authored by the witnesses themselves. See *id.* at 51-52.

27 ¹⁰³ Exhibit E at 12-17.

28 ¹⁰⁴ *Id.* at 26-54.

1 and [REDACTED] were being represented by defense counsel for purposes of alleged
 2 environmental crimes at the time – including the allegations regarding filter
 3 tampering, which appeared in the PSRs and were the subject of pending objections.

4 On May 16, 2018, the prosecutor filed amended sentencing charts for both
 5 individual defendants, recommending an additional two-level reduction for the
 6 “nature of the waste.” The government’s revised recommendations were a 24-month
 7 sentence for [REDACTED] and a six-month, split sentence for [REDACTED]

8 *F. The Evidentiary Hearing, Sentencing, and Second Raid*

9 Two days later, Judge Benitez held an evidentiary hearing that lasted an entire
 10 day. The government presented two expert witnesses. The first, Yorobe Occiano, was
 11 a chemical and civil engineer from Brown and Caldwell who explicitly stated – twice
 12 – that the experts at his firm collectively didn’t “have enough information” to
 13 “conclude that the discharge from [REDACTED] was the cause of the disruption.”¹⁰⁶ The
 14 other government expert was [REDACTED] who testified that his opinion regarding
 15 [REDACTED] culpability changed – from “it could have been anything” to “it’s
 16 [REDACTED] fault” – when he was provided sampling data by the prosecutor and case
 17 agents on March 1 or 2, 2018.¹⁰⁷ Again, the city’s own consultants, Brown and
 18 Caldwell, disagreed with [REDACTED] new-found conclusion. Occiano testified that
 19 the firm’s experts believed that it was necessary to evaluate the “flow rate” and that
 20 the government’s sampling data “did not show the whole picture.”¹⁰⁸

21 The defendants presented the testimony of Dr. Larry Russell, an environmental
 22 engineer and expert in the operation of treatment plants and water chemistry. Dr.

24 ¹⁰⁵ Exhibit D at 149-50.

25 ¹⁰⁶ Exhibit A at 153; *see also id.* at 138-39 (same).

26 ¹⁰⁷ *Id.* at 198-99; *see also id.* at 201-02 (Q: “So you changed your opinion about this
 27 on March 2nd, 2018?” A: “Correct.”).

28 ¹⁰⁸ *Id.* at 137-38 (testimony of Occiano); *see also* Exhibit B at 23B (report of
 investigation documenting the opinions of a senior engineer at Brown and Caldwell).

1 Russell – who, unlike the government’s experts, *had* considered the flow rate –
 2 testified that ██████ could not have been responsible for the disruption for a
 3 number of reasons and that ██████ analysis was flawed – in large part – because
 4 he failed to account for the 1,000:1 dilution of the discharge.¹⁰⁹ The prosecutor’s
 5 cross-examination of Dr. Russell ran almost 40 pages of transcript and took up most
 6 of the afternoon.¹¹⁰

7 Significant to these motions, the prosecutor argued that the court should credit
 8 ██████ testimony because his March 2, 2018 epiphany “explain[ed] everything”:

9 Mr. ██████ came to the conclusion, once he saw that [sampling] data,
 10 it w h-ha moment for him. It was like “Oh my God.” This
 11 explains everything. We couldn’t figure it out before because there were
 12 all these different variables and we couldn’t figure out why. But the
 13 ██████ discharge was an unknown. And then when it became known,
 14 only that explained all sorts of things that were previously
 15 unexplained.¹¹¹

16 The prosecutor thus conceded that she had been alleging – without any evidence or a
 17 single witness – that ██████ was responsible for the problems at the plant for over a
 18 year before ██████ embraced her theory of what caused the disruption on March 2,
 19 2018. That was *six months* after the date originally set for the sentencing hearing.

20 Judge Benitez ruled in favor of the defendants, stating two times that he did not
 21 “think it’s a close case.”¹¹² On May 21, 2018, the government again amended its
 22 sentencing summary charts, this time to account for the court’s ruling on the
 23 disruption. It recommended 12 months for ██████ and probation for ██████

24 At the sentencing hearing on May 23, however, the prosecutor began her

25 ¹⁰⁹ Exhibit A at 230-31, 235, 251.

26 ¹¹⁰ *See id.* at 242-281.

27 ¹¹¹ *Id.* at 287.

28 ¹¹² *Id.* at 289.

¹¹³ Exhibit D at 151-52.

1 remarks by calling ■■■■ “a thief, pure and simple.”¹¹⁴ She then argued – in the face
 2 of the court’s express contrary findings – that ■■■■ was responsible for damaging
 3 the plant:

4 And while I understand that this Court found that we didn’t meet our
 5 burden about getting the four points for disruption, I think that there was
 6 universal agreement that the nature of the constituents of the waste that
 7 is produced by the ■■■■ portable toilets is not a good thing for the
 8 treatment plant. Th ■■■■ ia – 300 pounds of ammonia that was
 9 created is twice what they normally have. Now, whether it was dilute or
 10 whatever, it’s still more ammonia than any other discharger to the plant
 11 in the city of San Diego. . . . [T]he environmental damage, I would
 12 maintain is that there was a breakdown at the treatment plant where
 13 ammonia did pass through the plant without being – without being
 14 treated and caused the plant to exceed its limits, causing the plant to shut
 15 down for a week. . . . That actually occurred. . . . And it was Mr.
 16 ■■■■ from the city’s opinion, that that was caused by ■■■■
 17 ourt has found that we didn’t meet our burden, ■■■■ that
 18 even – you know, it certainly was a contributing factor, if it wasn’t the
 19 but for cause.¹¹⁵

13 After Judge Benitez responded that he “just didn’t hear it in the evidence,”¹¹⁶ the
 14 prosecutor again evinced a personal commitment to the allegation, reiterating that:

15 It costs us money [as taxpayers] because they have to operate the plant
 16 longer. And all of this is because people like ■■■■ These are the
 17 effects it’s having on you and I as rate payer ■■■■ they are not able to
 18 operate the plant as it should be operated. And it’s because of an
 19 unknown discharge, like this ■■■■ discharge, that went on for five
 20 years. Five years they put thi ■■■■ e sewer. Five years . . . they were
 21 sending slugs of ammonia and solids. And they ground it up, making it
 22 even harder for the treatment plant to process.¹¹⁷

20 Judge Benitez sentenced ■■■■ ■■■■ ■■■■ to probation and ■■■■ ■■■■ ■■■■ to five
 21 months in custody, which was seven months less than the government’s post-
 22 evidentiary-hearing recommendation, 19 months less than its previous
 23 recommendation, and 25 months less than its original recommendation.

25 ¹¹⁴ Exhibit A at 304.

26 ¹¹⁵ *Id.* at 308-10.

27 ¹¹⁶ *Id.* at 310.

28 ¹¹⁷ *Id.* at 312-13.

Unbeknownst to the defendants, on the *same* day as their sentencing hearings, the prosecutor submitted search-warrant affidavits to Judge Burkhardt for another raid.¹¹⁸ Exactly one week later, May 30, 2018, the same agents (Godshall and Carroll) raided [REDACTED] offices in San Marcos and Miramar for the second time in less than two years – this time based on warrants to search for evidence of filter tampering.

G. The Indictment of the CAA Case and Subsequent Disclosures

On December 13, 2018, the government indicted [REDACTED] Martin [REDACTED] (1), when agents arrested him crossing the border.¹¹⁹ On April 11, 2019, after preindictment negotiations were unproductive, the government obtained a superseding indictment adding the [REDACTED] entities, [REDACTED] and [REDACTED] as defendants.¹²⁰

Count 1 of the superseding indictment alleges a conspiracy to violate the Clean Air Act in violation of 18 U.S.C. § 371. Counts 2-5 allege substantive filter tampering in violation of 42 U.S.C. § 7413(c)(2)(C). Count 6 alleges obstruction of the investigation.¹²¹ [REDACTED] is named only in Counts 1 and 5.

Pertinent to these motions, the indictment alleges *only* three acts that occurred *after* the guilty pleas in the CWA case. The first is an allegedly false opacity test from November 2017.¹²² The second and third allegations both relate to [REDACTED] attempts to return the ECMs¹²³ to their original states on May 22-23, 2018:

//

¹¹⁸ Exhibit E at 59.

¹¹⁹ Doc. 1.

¹²⁰ Doc. 33.

¹²¹ Count 6 also alleges that [REDACTED] committed that offense (obstruction) while on pretrial release in violation 147(1).

¹²² See Doc. 33 at 6-7.

¹²³ “ECM” refers to the Electronic Control Module that monitors the filters; “DPF” refers to the Diesel Particulate Filter itself.

- 1 h. On or about May 23, 2018 . . . after receiving an email from an employee
 2 advising him that he had notified the authorities about the tampering with
 3 the emission systems monitoring devices, [REDACTED] [REDACTED] telephoned
 4 [REDACTED] [REDACTED] [REDACTED] to seek his assist raming [sic] the
 5 6 alterations.
- 6 i. On or about May 23, 2018 . . . [REDACTED] [REDACTED] altered the software of
 7 the on-board diagnostic syste heavy-duty diesel
 8 trucks that he had worked on in 2016 to conceal the 2016 alterations.¹²⁴

9 These allegations are misleading because they strongly suggest that the
 10 defendants did not attempt to return the filters to their original states until after [REDACTED]
 11 [REDACTED] sent his “whistleblower” email. That is not accurate. The government’s own
 12 reports of [REDACTED] interviews reflect that [REDACTED] [REDACTED] began the process of reprogramming
 13 the ECMs no later than April 30, 2018 – 21 days *before* [REDACTED] became known as an
 14 informant.¹²⁵ Moreover, these remediation efforts took place in anticipation of
 15 sentencing in the CWA case and were directed at conduct that was identified in the
 16 PSRs.

17 On October 11, 2019, [REDACTED] [REDACTED] moved for various discovery related to the
 18 government’s decision to bring this successive prosecution.¹²⁶ On October 30, the
 19 government filed its opposition.¹²⁷ In support of that opposition, the government
 20 appended a declaration from Agent Carroll and disclosed for the first time Carroll’s
 21 November 28, 2016 email to the city officials requesting “reports of the [ammonia]
 22 readings” that would demonstrate that the plant suffered ammonia spikes in the late
 23 afternoon, at the same time that [REDACTED] discharged to the sewer.¹²⁸

24 At a motion hearing on December 13, 2019, undersigned counsel pointed out

25 ¹²⁴ Doc. 33 at 6-7.

26 ¹²⁵ Exhibit E at 18; *see also id.* at 22-25 (follow-up reports documenting remediation
 27 efforts in early May, 2018).

28 ¹²⁶ Doc. 75.

¹²⁷ Doc. 82.

¹²⁸ Doc. 82-2.

1 the false statements in the PSR – specifically, the untrue statement that consultants
2 concluded that [REDACTED] was responsible for the disruption. The Court inquired:

3 The Court: So, consultants were not hired?

4 Mr. Lemon: Consultants were hired, but they didn't reach that
5 conclusion.

6 The Court: Is that right, Ms. Pierson?

7 Ms. Pierson: That is right.

8 The Court: They did not reach that conclusion?

9 Ms. Pierson: They did not reach that conclusion.¹²⁹

10 The Court then asked where those statements came from:

11 [T]his quote relating to the consultants were hired and they made certain
12 findings that in fact [were] not true, does the government know where
this information came from? Did it come from the case agent?"¹³⁰

13 The prosecutor responded by saying she didn't know what the case agent(s) told the
14 probation officer. She then pivoted to Carroll's November 28, 2016 email – citing it as
15 proof that undocumented "circumstantial evidence" supported the statements in the
16 PSR:

17 I am not sure what the case agents told the probation officer and what
18 they didn't.

19 You know, what I do know – and we – you have the sworn declaration of
20 Leslie Carroll, the case agent, submitted with my motion. And what that
21 indicated was, back in November, before we reached plea agreements
22 with these people, she was in contact with lower-level employees of the
city's industrial waste control program. And these lower-level employees
advised her that they believed that there was evidence that [REDACTED] was
responsible.

23 And the reason that they gave was that the ammonia spikes that occurred
24 at the plant occurred between 3:00 and 5:00 p.m., which was the same
25 time that the trucks were dumping. So they felt that was strong
26 circumstantial evidence that [REDACTED] was responsible for that. And that,
all along, was the evidence antially, obviously – but that was
the evidence that the government was relying on and intended to present
to the Court.

27 ¹²⁹ Exhibit A at 391.

28 ¹³⁰ *Id.* at 392.

1 And we did present it to the Court. The Court found that based upon the
2 other evidence that was presented there that we hadn't proved by a
3 preponderance that, but for the [REDACTED] discharges, there would have
4 been an upset at the plant. So e h [REDACTED] might have been a
5 contributing factor, because of the "but for [REDACTED], the Court ruled
6 against us.

7 And that's really all there was to it. It wasn't that there was no evidence;
8 there was circumstantial evidence. *There was no reports of these*
9 *conversations that were made, or notes . . .* but we had this information
10 all along.

11 When we were talking about plea negotiations, I informed defense
12 counsel that this was the reason for the government's belief this had
13 occurred. And that was the information I had. We provided all the
14 information that we had.¹³¹

15 As addressed below, this explanation is not consistent with the prosecutor's
16 previous representations to Judge Benitez. Nor does it square with the evidence
17 actually adduced at the evidentiary hearing.

18 This Court granted the discovery motion in part, undertaking an *in camera*
19 review of voluminous records. Although that review is ongoing, at a hearing on
20 December 20, the Court indicated that it had reviewed most of the material and not
21 identified anything discoverable. These motions follow.

22 //

23 //

24 //

25
26
27
28 ¹³¹ *Id.* at 392-93 (emphasis added).

Argument

I.

During the pendency of the CWA case, the government withheld exculpatory evidence, manufactured evidence, and misrepresented the state of the evidence in support of its claim that the defendants were responsible for the plant closure; this course of conduct is probative of the government's vindictive intent, its failure to negotiate in good faith, and its tactical decision to divide the conduct into two conspiracies and prosecute them *ad seriatim*.

A. *The prosecutor failed to comply with her constitutional and ethical obligations to disclose exculpatory evidence.*

1. *The federal Constitution and the California Rules of Professional Conduct require a prosecutor to timely disclose all evidence favorable to the accused.*

It should, by now, go without saying that a prosecutor has a constitutional obligation to disclose “evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment.”¹³² Prosecutors are also required by the California Bar to “timely disclose[] to the defense [] all evidence or information known to the prosecutor that the prosecutor knows or reasonably should know tends to negate the guilt of the accused, mitigate the offense, or mitigate the sentence.”¹³³ This is because “[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, [and] that guilt is decided upon the basis of sufficient evidence.”¹³⁴

2. *The prosecutor failed to disclose the case agent's request for evidence supporting the allegation that ammonia spikes at the plant coincided with [REDACTED] discharge, as well as the absence of such evidence and the contrary evidence.*

The government revealed to the defense for the first time in response to [REDACTED]

¹³² *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

¹³³ Cal. R. Prof. Conduct 3.8(d) (Nov. 1, 2018); Cal. R. Prof. Conduct 5-100(D) (Sept. 14, 1992).

¹³⁴ Cal. R. Prof. Conduct 3.8(d), Cmt. n.[1].

1 [REDACTED] discovery motion in *this* case that on November 28, 2016, Agent Carroll
 2 requested corroboration from the city for a word-of-mouth claim by “lower level”
 3 employees that there was a time-of-day relationship between [REDACTED] discharging
 4 to the sewer and elevated ammonia readings at the plant.¹³⁵ In her email, Carroll
 5 specifically requested “reports of the readings, perhaps beginning in January 2016 to
 6 date[.]”¹³⁶ No such reports were ever produced to the defense. Nor has a responsive
 7 email ever been produced.

8 Again, the existence of that request was not disclosed to the defendants during
 9 the CWA case. And it should have been, because the *absence* of reports documenting
 10 a correlation would undermine the validity of the allegation and therefore be
 11 exculpatory. In other words, the prosecutor should have simply told the defendants
 12 that the case agent had requested evidence to back up her theory and that no such
 13 evidence existed (or, at a minimum, that the request was still in process). Indeed, the
 14 defendants certainly had the expectation that the prosecutor *would* turn over such
 15 information because she represented in the plea agreements that “[a]ny information
 16 establishing the factual innocence of Defendant known to the undersigned prosecutor
 17 in this case has been turned over to Defendant.”¹³⁷

18 [REDACTED] was the first of the defendants to plead guilty. He did so on
 19 May 24, 2017. The prosecutor thus had almost six months between Carroll’s email to
 20 the city and the first guilty plea to make this disclosure but chose not to do so. Another
 21 troubling aspect of this nondisclosure is that the government had abandoned its time-
 22 of-day-correlation theory well before the evidentiary hearing¹³⁸ but never disclosed to
 23 the defendants that it had no evidence to support what had been its original claim.

25 ¹³⁵ See Exhibit B at 27; Doc. 82-2 at 8.

26 ¹³⁶ Doc. 82-2 at 8.

27 ¹³⁷ See, e.g., Exhibit D at 8 [REDACTED] plea agreement).

28 ¹³⁸ See Exhibit D at 142-46 (government’s expert disclosure).

1 Ultimately, ten months after the guilty pleas (and only after repeated discovery
 2 requests by the defendants), the government did produce hundreds of pages of records
 3 (mostly raw data) from the plant, some of which documented the readings of an
 4 influent ammonia probe (or meter). And while the government chose *not* to elicit
 5 testimony about the meter readings from its own witnesses at the evidentiary hearing,
 6 the defense expert concluded that a temporal relationship between [REDACTED]
 7 discharges and elevated ammonia readings at the plant – had it existed – would have
 8 been impossible to miss because the elevated readings would have been documented
 9 by the influent probe and immediately recognized by the city’s consultants and plant
 10 supervisors:

11 They have an influent ammonia meter. It is measuring the concentration
 12 of ammonia on an hourly basis that’s coming into the treatment plant. No
 13 calculations are necessary. You just gotta look at the data. The average
 14 tells you everything you need to know. If there were a spike, as he
 15 described, I guarantee you, from my experience at Brown and Caldwell,
 16 that they would have picked it up, the CH2M Hill [consultants] would
 17 have picked it up, the Trussell [consultants] would have picked it up.
 Because the reason they don’t pick it up is it’s invisible. It is in the data
 error level of the average. . . . If every day at 3:00 the ammonia levels
 went up 19 parts per million, continued for three hours, and dropped back
 down, I guarantee you my professional colleagues would have identified
 it as a significant event.¹³⁹

18 In other words, the information requested by Agent Carroll proved to be exculpatory.
 19 And it should have been produced *before* the guilty pleas – not as part of a last-minute
 20 discovery dump in the run up to the evidentiary hearing.

21 3. *During plea negotiations, the prosecutor did not disclose the February*
 22 *20, 2017 interview of [REDACTED] the substance of that interview, or*
 23 *any of the other disco [REDACTED] e plant closure – all of which was*
exculpatory.

24 On February 20, 2017, the case agents met with [REDACTED] the manager of
 25 the NCWRP. During that meeting, the agents specifically floated the theory that
 26 [REDACTED] practice of discharging to the sewer was responsible for the ammonia
 27

28 ¹³⁹ See Exhibit A at 231; see also *id.* at 268-69 (same).

1 problems at the plant. [REDACTED] was not convinced. He explained to the agents that
2 “so many different factors could have caused the elevated ammonia levels” and
3 concluded that the decision to decrease the SRT “was the cause of the NCWRP
4 upset.”¹⁴⁰

5 Just two days later, the prosecutor met with defense counsel and insisted that
6 any plea offers would require the defendants to pay restitution for costs associated
7 with the plant closure and permit the government to argue for a four-level
8 enhancement for disrupting the plant. She did *not* disclose either the existence of the
9 [REDACTED] interview or its substance, which was obviously exculpatory. And in
10 subsequent meetings, the prosecutor refused to budge on either requirement. The
11 prosecutor also failed to disclose – until after the guilty pleas – the work product of
12 the city’s various consultants, *none* of which implicated [REDACTED] as the cause of the
13 plant disruption.

14 The prosecutor’s failure to disclose this exculpatory information before the
15 guilty pleas is an obvious *Brady* violation. But it is all-the-more egregious because –
16 before pleading guilty – the defendants explicitly requested discovery regarding the
17 plant-disruption allegation and the prosecutor refused to provide it. On March 28,
18 2017, Knut Johnson emailed the prosecutor and specifically objected to *both* the four-
19 level enhancement *and* the prosecutor’s refusal to provide the relevant discovery. But
20 instead of complying with her *Brady* obligations, the prosecutor replied that the
21 absence of discovery “should [not] be an impediment to reaching an agreement.”¹⁴¹

22 This was a significant ethical breach because the defendants’ negotiating
23 positions would have been substantially improved if defense counsel had been aware
24 that there was *no* evidence supporting the prosecutor’s theory. Moreover, the
25 defendants never would have stipulated to pay restitution for a plant closure that they
26

27 ¹⁴⁰ Exhibit B at 2-4.

28 ¹⁴¹ Exhibit C at 1-2.

1 had nothing to do with.

2 *B. The government manufactured false evidence in the PSR, which the prosecutor*
 3 *bootstrapped into subsequent arguments in support of aggravated punishment.*

4 Another obvious applicable legal principal is that “there is a clearly established
 5 constitutional due process right not to be subjected to criminal charges on the basis of
 6 false evidence that was deliberately fabricated by the government.”¹⁴² Here, the record
 7 reflects that the government fed false information to the probation officer and then
 8 relied on the PSRs’ inaccurate statements of fact and findings to support the
 9 prosecutor’s arguments in aggravation.

10 Once more, there was *no* evidence or *any* discovery suggesting that [REDACTED]
 11 was responsible for the problems at the plant when the individual PSRs were filed on
 12 October 10 and 11, 2017. The PSRs nonetheless applied the four-level enhancement
 13 for the disruption of a utility. This finding was predicated on three false statements: 1)
 14 that the city’s consultants concluded that [REDACTED] discharging “correlated with the
 15 spikes in ammonia levels”; 2) that the “ammonia levels returned to normal” after the
 16 execution of the search warrant; and 3) that the NCWRP did not have to “continue
 17 costly treatment of the wastewater” after [REDACTED] discharging stopped.¹⁴³ *None* of
 18 those statements were true. And because they were not based on anything in the
 19 discovery, they necessarily came from either the prosecutor or the case agent(s).

20 The PSR also directly attributed yet another false statement of fact to the case
 21 agent: that the plant representative “was able to provide enough evidence to indicate
 22 that [REDACTED] . . . illegal discharging was directly related to the NWCRP [sic]
 23
 24

25 ¹⁴² *Devereaux v. Abbey*, 263 F.3d 1070, 1074-75 (9th Cir. 2001); *see also Limone v.*
 26 *Condon*, 372 F.3d 39, 44-45 (1st Cir. 2004) (“[I]f any concept is fundamental to our
 27 American system of justice, it is that those charged with upholding the law are prohibited
 from deliberately fabricating evidence and framing individuals for crimes they did not
 commit.”).

28 ¹⁴³ 17cr1305 Doc. 38, ¶ 71.

1 closing down.”¹⁴⁴ Again, no such “evidence” existed. And the plant representative,
 2 ██████████ would later testify that he did not believe ██████████ was the problem
 3 until after meeting with the prosecutor and case agents on March 1 and 2, 2018 – six
 4 months *after* the publication of the PSRs.

5 Absent any evidence whatsoever, then, the prosecutor (or case agent(s)) had
 6 secured both “facts” in support of the theory that ██████████ was responsible for the
 7 plant closure and a finding that the sentencing court should apply the enhancement.
 8 The prosecutor then promptly turned around and wielded that “evidence” against the
 9 defendants. Indeed, just one day after the PSRs were filed, the prosecutor cited the
 10 PSRs’ erroneous findings regarding the plant disruption in her objections to the PSRs’
 11 recommendations for downward departures for the individual defendants (based on a
 12 lack of environmental harm):

13 “[T]here is *no doubt* in this case that there has been significant
 14 environmental harm resulting from the defendants’ actions. As the
 15 Probation Officer noted, ‘the treatment facilities were ultimately
 16 impacted.’ [PSR ¶ 73.] The NCWRP spent countless hours of employee
 17 time and \$250,000 to hire consultants to unlock the source of its
 ammonia problem. The plant was forced to operate at half capacity to
 meet its permit limits. This is direct harm to the treatment facilities,
 which . . . constitutes harm to the environment.”¹⁴⁵

18 Later, when defense counsel objected that the government had failed to produce
 19 any evidence suggesting that ██████████ was responsible for the plant disruption, the
 20 prosecutor retreated to the cover of the PSRs. For example, on December 14, 2017,
 21 undersigned counsel emailed the prosecutor to inquire about the absence of proof,
 22 noting that nothing in the discovery produced up to that time supported the
 23 government’s allegation. She responded by stating that the PSR recommended the
 24
 25

26 ¹⁴⁴ *Id.* at ¶ 36.

27 ¹⁴⁵ Exhibit D at 26-27 (emphasis added); *see also id.* at 23-24 (citing false statements
 28 in PSR).

enhancement and that her “proof” would “depend on what the precise challenge is.”¹⁴⁶
 Of course, the prosecutor was well aware at the time that it was the government’s
 burden to prove the enhancement by at least a preponderance of the evidence.¹⁴⁷

Similarly, at a hearing on March 9, 2018, the defendants objected to the late
 production of discovery, noting that the government had produced no inculpatory
 evidence regarding the plant closure until March 2, 2018. The prosecutor responded
 that “we did produce in the initial discovery information to support the four-level
 enhancement. In fact, we presented enough that the probation officer recommended it
 in the PSR. So clearly there was something there. . . . [I]t’s been recommended in the
 PSR.”¹⁴⁸ Once more, the PSRs’ recommendations were based on false statements that
 did not appear in the discovery. The prosecutor thus defended her position by citing to
 evidence that she had spun out of whole cloth.

C. *The prosecutor has misrepresented both the state of the evidence and her
 willingness to produce discovery.*

At the same March 9 hearing, the government argued that [REDACTED] and
 [REDACTED] had breached the plea agreement by objecting to restitution based on the
 plant disruption. The defendants countered that the prosecutor had waited until after
 the guilty pleas to turn over the discovery – which was exculpatory – and that the
 government was therefore in breach. The prosecutor then represented to Judge Benitez
 that she had provided *complete* discovery, including *documentary evidence*, before the
 entry of the pleas and that defense counsel had made no additional requests:

We provided full discovery, and we had full discussions with counsel and
 I showed them the nature of the evidence that we had. I asked them if
 there was any additional documentation that they would like to see before
 they entered the plea because I was willing to show them all the
 documents I had. They never requested to see anything other than what I

¹⁴⁶ Exhibit C at 12-13.

¹⁴⁷ See *United States v. Restrepo*, 946 F.2d 654, 658 (9th Cir. 1991) (en banc).

¹⁴⁸ Exhibit A at 17-18.

1 provided to them.¹⁴⁹

2 Those statements are simply not true. In the first place, the prosecutor was not
3 “willing to show [defense counsel] all the documents [she] had” before the entry of
4 the pleas. Again, she actually withheld the exculpatory report of the February 20, 2017
5 interview (where ██████ told the case agents that “so many factors” could have
6 contributed to the disruption and that it ultimately resulted from the city’s decision to
7 reduce the SRT). That was critical, exculpatory evidence and the defendants were
8 oblivious to it until after their guilty pleas.

9 Second, the defendants *did*, in point of fact, specifically request “additional
10 documentation” regarding the plant disruption before the guilty pleas and the
11 prosecutor refused to provide any.¹⁵⁰ Finally, the prosecutor’s representation to Judge
12 Benitez that she showed counsel “documentation” and was willing to show them “all
13 the documents”¹⁵¹ cannot be reconciled with her recent statements to *this* Court that no
14 such documents ever existed and that the government’s “circumstantial evidence” was
15 always based on undocumented conversations:

16 It wasn’t that there was no evidence; there was circumstantial evidence.
17 There were no reports of these conversations that were made, or notes . . .
but we had this information all along.¹⁵²

18 Other aspects of the prosecutor’s remarks to this Court on December 13, 2019,
19 are also hard to square with the record. In addition to the statement recounted above,
20 that “[t]here were no reports of these conversations . . . or notes” (which is *not* what
21 the prosecutor told Judge Benitez on March 9, 2018), there are two other

23 ¹⁴⁹ *Id.* at 30-31.

24 ¹⁵⁰ See Exhibit C at 1-4 (March 28, 2017 email discovery request and response).

25 ¹⁵¹ The prosecutor also told Judge Benitez that “Mr. Lemon asked me for additional
26 discovery and I said to him all along I will be happy to provide whatever discovery” and
27 that “every single time they have come to me and requested additional backup data, I
have provided that backup data; every single time. So I am not trying to hide stuff here.”
Exhibit A at 17-18; 51.

28 ¹⁵² Exhibit A at 393.

1 misstatements. The first is the prosecutor's claim that the government "did present []
 2 to [Judge Benitez]" evidence of a time-of-day relationship between [REDACTED]
 3 discharging and elevated ammonia levels at the plant. In fact, the prosecutor did not
 4 even *attempt* to elicit testimony about a time-of-day relationship from a government
 5 witness at the evidentiary hearing.¹⁵³ She did try, however, to cross-examine the
 6 defense expert on the subject, who explained that the data collected by the plant's
 7 influent meter demonstrated beyond any doubt that no such temporal relationship
 8 existed:

9 You have a meter that measures the ammonia, and you cannot see the
 10 discharge from [REDACTED] That's the bottom line. . . . The model Mr.
 11 [REDACTED] used [REDACTED] t. I know it's incorrect because we have a meter
 yell at us saying, hey, this thing just jumped this much. But
 we don't see that at all.¹⁵⁴

12 The government then, actually presented *no* evidence at the evidentiary hearing of a
 13 time-of-day relationship between the elevated ammonia readings and [REDACTED]
 14 discharging.

15 The second additional misstatement is that "[w]hen we were talking about plea
 16 negotiations. . . . We provided all the information that we had." Once again, the
 17 prosecutor most certainly did not provide *all the information* the government had
 18 because she: 1) withheld the existence of Carroll's email to the city (requesting
 19 supporting evidence); 2) withheld the exculpatory report of the February 20, 2017
 20 interview of [REDACTED] and 3) rebuffed defense counsels' specific request for
 21 discovery.

22 //

23 //

25 ¹⁵³ [REDACTED] testified only that the "concentration of constituents" in the
 26 portab i ould cause problems for the plant. See Exhibit A at 165-66.

27 ¹⁵⁴ Exhibit A at 279-80; see also *id.* at 269 ("You cannot double the load in a three-
 28 hour period. [REDACTED] calculations do not represent reality as is demonstrated by the
 ammonia pr uent. If his calculations were correct, then the concentration of
 ammonia would jump up, go over for three hours, and drop right back down.").

1 *D. The prosecutor demonstrated that she was personally invested in the outcome of*
 2 *the plant-disruption allegation.*

3 The Ninth Circuit recently reiterated the well-worn maxim that “[a] prosecutor
 4 has the responsibility of a minister of justice and not simply that of an advocate.”¹⁵⁵
 5 Moreover, “[i]n determining whether to commence or recommend prosecution or take
 6 other action against a person, the attorney for the government should not be improperly
 7 influenced by . . . [t]he possible affect [sic] of the decision on the attorney’s own
 8 professional or personal circumstances.”¹⁵⁶

9 This is significant here because of the prosecutor’s professional circumstances.
 10 She is an environmental prosecutor, after all, and by failing to prove that [REDACTED] was
 11 responsible for the ammonia problems at the plant, she failed to establish any
 12 environmental harm. Indeed, Knut Johnson, then counsel for [REDACTED] relentlessly
 13 argued that his client’s wrongdoing was limited to his failure to secure permits for the
 14 discharge of the portable-toilet waste, that the waste was ultimately going where it was
 15 supposed to go anyway, and that there was simply no harm to the environment.¹⁵⁷

16 That argument was not well received by the prosecutor, who explicitly called it
 17 out in her opposition to de [REDACTED] request for downward departures:

18 The defense argues that [REDACTED] failure was in not having a permit, not
 19 i[n] what they discharge [REDACTED] discharged, or in what they did to the
 environment.” Nothing could be further from the truth.¹⁵⁸

20 And even after losing the plant-disruption hearing, she continued to insist at sentencing

22 ¹⁵⁵ *United States v. Miller*, 2020 U.S. App. LEXIS 8807, * 16 (9th Cir. March 20,
 23 2020) (quoting Model Rules of Professional Conduct Rule 3.8 Cmt. 1).

24 ¹⁵⁶ *Id.* at *17-18 (alterations in original) (quoting U.S. Attorney’s Manual § 9-
 25 27.260(A)(3)).

26 ¹⁵⁷ *See, e.g.*, 17cr1305 Doc. 69 at 1-2 [REDACTED] Sentencing Memo) [REDACTED] t in
 offense was in not having a permit . . . [REDACTED] . . . never harmed t [REDACTED] t in
 any way. The nature and circumstances [REDACTED] ense are that a company did not get
 27 permits but never endangered the environment.”).

28 ¹⁵⁸ Exhibit D at 112.

1 that “the case is not just about, well, we just put sewage down the sewer.”¹⁵⁹

2 Judge Benitez then inquired, “just out of curiosity, what is the environmental
3 damage that we’re talking about? . . . I’m trying to figure out the environmental
4 disaster, right?”¹⁶⁰ The prosecutor replied – the court’s express contrary findings
5 notwithstanding – that “the environmental damage, I would maintain, is that there was a
6 breakdown at the treatment plant where ammonia did pass through the plant . . . without
7 being treated and caus[ed] the plant to exceed its limits, causing the plant to shut down
8 for a week. . . . And it was Mr. [REDACTED] from the city’s opinion that that was caused
9 by [REDACTED]

10 Judge Benitez responded that “I just didn’t hear it in the evidence. . . . I’m telling
11 you, I heard the evidence, I wasn’t convinced.”¹⁶² The prosecutor, however, was
12 undeterred. She continued to argue that there was an environmental harm that costs *us*
13 money as taxpayers:

14 [W]hen people like [REDACTED] put stuff in when they don’t have a permit for
15 it, it has an effect. I [REDACTED] the balance. And so they were not able to go
16 down to 7.5 solid retention days. Even though all of their studies . . .
17 showed that the plant should be able to handle that, it couldn’t. And that
18 costs *us* money as taxpayers. It costs *us* money because they have to
19 operate the plant longer. And all of this is because people like [REDACTED] –
20 . . . [T]hese are the effects that it’s having on you and *I* as rate
21 because they are not able to operate the plant as it should be operated. And
22 it’s because of unknown discharge, like this [REDACTED] discharge, that went
23 on for five years.¹⁶³

20 As stand-alone commentary, these arguments would perhaps be of no moment.
21 But considered in context – the tortured history of the prosecutor’s claim that [REDACTED]
22 was responsible for the problems at the plant and the subsequent indictment of the same
23

24 ¹⁵⁹ Exhibit A at 306.

25 ¹⁶⁰ *Id.* at 307.

26 ¹⁶¹ *Id.* at 309-10.

27 ¹⁶² *Id.* at 310.

28 ¹⁶³ *Id.* at 312-13 (emphasis added).

1 defendants for allegedly tampering with a handful of truck filters – these comments
 2 reflect a deep, personal commitment to proving that the [REDACTED] defendants have
 3 harmed the environment. And that, in turn, is probative of the prosecutor’s intent.

4 5 II.

6 **The Court should dismiss the indictment for vindictive prosecution because this**
 7 **case was brought after the defendants’ successful exercise of their legal rights in**
 8 **the previous case, the government has no objective evidence justifying its actions,**
 9 **and there is ample direct evidence of vindictive intent.**

10 A. Introduction

11 A defendant moving to dismiss for vindictive prosecution may establish both
 12 presumptive vindictiveness (which is typically based on the sequence of events and
 13 which the government is required to rebut), and actual vindictiveness (which is based
 14 on direct evidence of a prosecutor’s vindictive motive and is irrebuttable).¹⁶⁴ The
 15 indictment should be dismissed on both bases here.

16 First, the prosecutor indicted the [REDACTED] defendants for the second time in three
 17 years only after they exercised their due-process rights to great effect – defeating the
 18 same prosecutor’s claim that they had disrupted a water-treatment plant and harmed the
 19 environment. There is accordingly a presumption of vindictiveness, which the
 20 government cannot dispel because the same prosecutor was well aware of the conduct
 21 underlying the second indictment when she indicted the first case.

22 Second, throughout the pendency of the CWA case, the prosecutor failed to
 23 disclose exculpatory evidence, manufactured evidence, misrepresented her willingness
 24 to disclose evidence, and otherwise demonstrated a personal commitment to holding the
 25 defendants accountable for disrupting the water-treatment plant – something that just
 26 wasn’t supported by any evidence. This pattern of conduct is direct evidence of

27 ¹⁶⁴ See *United States v. Jenkins*, 504 F.3d 694, 699 (9th Cir. 2007); see also *id.* at 703
 28 (Conlon, D.J., dissenting in part); accord *Wasman v. United States*, 568 U.S. 559, 567-69
 (1984).

1 vindictiveness and also warrants the remedy of dismissal.

2 *B. Because of the exercise of their legal rights in the CWA case, the defendants are*
 3 *entitled to a presumption of vindictiveness.*

4 “To punish a person because he has done what the law plainly allows him to do is
 5 a due process violation of the most basic sort.”¹⁶⁵ The Supreme Court has accordingly
 6 “establish[ed] a prophylactic rule imposing limits upon prosecutorial discretion [in]
 7 seeking new indictments . . . when such actions carry with them the opportunity of
 8 retaliation for a defendant’s exercise of a statutory right that has due process
 9 implications.”¹⁶⁶ Importantly, this “prophylactic rule is designed not only to [protect]
 10 the defendant who has asserted his right[s] . . . but also to prevent chilling the exercise
 11 of such rights by other defendants who must make their choices under similar
 12 circumstances in the future.”¹⁶⁷

13 “To establish a presumption of vindictiveness, [a defendant] need not show ‘that
 14 the prosecutor acted in bad faith’ or that ‘[s]he maliciously sought’ the [successive]
 15 indictment.”¹⁶⁸ Rather, a defendant need only demonstrate a “reasonable likelihood” that
 16 the government would not have brought the second case had the defendant not
 17 exercised his rights.¹⁶⁹ Accordingly, the Ninth Circuit has consistently held that “if the
 18 actions of a prosecutor, faced with a disappointing result, ‘up the ante’ for the
 19 defendant, the presumption of vindictiveness arises.”¹⁷⁰ “When, as in this case, the
 20 government chooses not to lodge charges for a period of time and then makes the
 21

22 ¹⁶⁵ *United States v. Goodwin*, 457 U.S. 368, 372 (1982).

23 ¹⁶⁶ *United States v. De Marco*, 550 F.2d 1224, 1227 (9th Cir. 1977).

24 ¹⁶⁷ *Id.*

25 ¹⁶⁸ *Jenkins*, 504 F.3d at 699 (citations omitted).

26 ¹⁶⁹ *Id.* at 700.

27 ¹⁷⁰ *United States v. Martinez*, 785 F.2d 663, 669 (9th Cir. 1986); *accord De Marco*,
 28 550 F.2d at 1227; *United States v. Hollywood Motor Car Co.*, 646 F.2d 384, 387 (9th Cir.
 1981).

1 decision to prosecute so close after a defendant elects to exercise his rights in the face of
 2 prosecution opposition, apparent vindictiveness is *clearly* established.”¹⁷¹ The
 3 government then bears the burden to present “objective evidence” that the prosecution
 4 “did not stem from a vindictive motive, or [was] justified by independent reasons or
 5 intervening circumstances that dispel the appearance of vindictiveness.”¹⁷²

6 Here, the event timeline demonstrates that the government chose to jumpstart its
 7 investigation into the filter tampering while the defendants were vigorously exercising
 8 their rights to challenge the plant-disruption enhancement by repeatedly objecting and
 9 requesting discovery. The rejuvenated investigation also took place at the same time
 10 that the parties were litigating the government’s claim that the defendants had breached
 11 the plea agreement by objecting to restitution based on the plant disruption and the
 12 defendants’ counter claim that the government had breached the agreement by not
 13 disclosing the exculpatory evidence before the guilty pleas. Indeed, agents Godshall and
 14 Carroll interviewed ██████ ██████ for the first time on the *same* day that the parties
 15 argued and resolved their respective claims of breach (April 20, 2018).

16 Ultimately, just 12 days after the government lost the evidentiary hearing and
 17 exactly one week after Judge Benitez imposed sentences that were substantially
 18 mitigated by his finding that the defendants had *not* harmed the environment, the *same*
 19 two case agents – working at the direction of the *same* prosecutor – raided the *same*
 20 defendants again. Furthermore, the defendants now face potentially more severe
 21 punishment based on alleged conduct that the government was aware of when it settled
 22 the first case.¹⁷³ There is accordingly “at the very least, a reasonable likelihood that the

24 ¹⁷¹ *United States v. Velsicol Chemical Corp.*, 498 F. Supp. 1255, 1264-65 (D.D.C.
 25 1980) (emphasis added).

26 ¹⁷² *Jenkins*, 504 F.3d at 701.

27 ¹⁷³ *See United States v. Tobin*, 598 F. Supp. 2d 125, 130 (D. Maine 2009) (“Tobin has
 28 presented circumstances – including sequence, the absence of any new factual
 developments, and exposure to more severe charges – that ‘reveal a sufficient likelihood
 of vindictiveness to warrant a presumption of vindictiveness.’”).

government's decision was motivated by a retaliatory purpose."¹⁷⁴

C. *Because the prosecutor was already well aware of the conduct underlying the CAA case, the government cannot satisfy its heavy burden to dispel the presumption of vindictiveness.*

The Ninth Circuit has held that "the prosecution bears a heavy burden" when it attempts to rebut the presumption of vindictiveness.¹⁷⁵ The courts have also uniformly rejected the government's attempts to overcome the presumption where it was already aware of the conduct underlying the second indictment when it brought the first case.

Here, the government became aware of both the alleged hole punching and ECM reprogramming (the subject of the current indictment), no later than September 12, 2016, when [REDACTED] former "lead mechanic" (and also one of the CWA whistleblowers), [REDACTED] told Agent Godshall about it.¹⁷⁶ On September 21, 2016, [REDACTED] testified before the grand jury, where the prosecutor asked him about the alleged filter tampering and elicited his testimony about both "put[ing] [] hole[s] on the DPF[s] and "overrid[ing] the system" by "bringing a guy over from Mexico to trick[] . . . the computer."¹⁷⁷

And although [REDACTED] allegation regarding the filter tampering was documented in only a single paragraph of a single page of a single report – out of roughly eight *terabytes* of discovery – the prosecutor made sure that the probation officer was aware of it because it also appeared in all the PSRs. Finally, when the defendants filed factual objections to the inclusion of this alleged conduct in the PSRs, the prosecutor defended the allegations by citing [REDACTED] sworn testimony (which had not been produced in discovery). The government was thus well aware of

¹⁷⁴ *Jenkins*, 504 F.3d at 700; *see also United States v. Ruesga-Martinez*, 534 F.2d 1367, 1369 (9th Cir. 1976) ("[T]he mere *appearance* of vindictiveness is enough to place the burden on the prosecution.").

¹⁷⁵ *Ruesga-Martinez*, 534 F.2d at 1369; *accord United States v. Groves*, 571 F.2d 450, 453 (9th Cir. 1978).

¹⁷⁶ Exhibit B at 29.

¹⁷⁷ *Id.* at 133-34.

1 this alleged conduct and could have easily obtained an indictment or search warrants
2 back in 2016.

3 The government will now undoubtedly attempt to justify its decision to prosecute
4 the same defendants again on the basis of ██████ ██████ coincidentally coming forward
5 as a second informant. That argument, however, enjoys no support in the case law.

6 *United States v. Jenkins* is directly on point. In *Jenkins*, the government indicted
7 the defendant for alien smuggling after she testified in her drug-smuggling trial that she
8 thought she was smuggling aliens. Jenkins, however, had made the same admission in
9 her post-arrest statement and had previously been apprehended transporting aliens, so
10 the government already had sufficient evidence to prosecute her for alien smuggling
11 before she confessed to the same conduct under oath.¹⁷⁸

12 Judge Benitez granted Jenkins’s motion to dismiss for vindictive prosecution
13 based on the appearance (or presumption) of vindictiveness. The government appealed,
14 arguing that its alien-smuggling case against Jenkins became “much stronger after her
15 in-court admission” and that failing to prosecute under the circumstances would be
16 “inexcusable.”¹⁷⁹ The Ninth Circuit affirmed the dismissal, explicitly rejecting that
17 argument:

18 The government argues that, even if the content of the evidence against
19 Jenkins was available all along, the evidence was stronger once Jenkins
20 testified in court. . . . Although a confession in open court certainly added
to the repertoire of evidence against Jenkins, we find the government’s
explanation unpersuasive.¹⁸⁰

21 Similarly, although ██████ ██████ decision to become an informant here “added
22 to the repertoire,” the government did not have to wait for ██████ to come forward
23 because it already had the credible, sworn testimony of a percipient witness and could
24

25 ¹⁷⁸ 504 F.3d at 697, 701.

26 ¹⁷⁹ *Id.* at 701; compare Exhibit A at 411 (prosecutor arguing to this Court that the
27 government would have been “derelict in its duty” had it not prosecuted the defendants
again after ██████ came forward).

28 ¹⁸⁰ *Jenkins*, 504 F.3d at 701.

1 easily have obtained additional search warrants and an indictment back in 2016.

2 *Jenkins* is not an outlier. Indeed, its holding is consistent with the rule
3 announced by the Ninth Circuit in *United States v. Gerard*:

4 Where the rebuttal of the possibility of vindictiveness is by the
5 presentation of additional information, “identifiable conduct on the part of
6 the defendant occurring after the time of the original sentencing
proceeding,” the *Pearce* requirement, is scarcely met by *transferring old*
facts from the presentence report to a separate count in the indictment.¹⁸¹

7 *Gerard* thus stands for the proposition that conduct already known to the prosecutor at
8 the time of the first prosecution cannot be used to justify a successive indictment.
9 Indeed, it specifically addresses the situation here, where the government has recycled
10 uncharged conduct that already appeared in the PSRs and made it the subject of a new
11 indictment.

12 The Ninth Circuit has since adhered to the *Gerard* rule. In *United States v. De*
13 *Marco*, for example, the court affirmed the dismissal of an indictment based on the
14 presumption of vindictiveness where “[t]he facts upon which the second indictment was
15 founded had been known to the Government long before the first indictment was
16 returned.”¹⁸² Similarly, in *United States v. Ruesga-Martinez*, the circuit reversed and
17 ordered a successive indictment dismissed where the evidence in the subsequent
18 indictment “was known to the prosecution before it brought the original lesser
19 charge.”¹⁸³ And again in *United States v. Groves*, the court reversed and ordered a
20 successive indictment dismissed where “the government forgot about” the alleged
21 misconduct in the second indictment and “did not resurrect it until after the appellant
22 had exercised his statutory right[s].”¹⁸⁴

24 ¹⁸¹ 491 F.2d 1300, 1306 (9th Cir. 1974) (emphasis added) (quoting *North Carolina v.*
25 *Pearce*, 395 U.S. 711, 726 (1969)).

26 ¹⁸² 550 F.2d at 1226.

27 ¹⁸³ 534 F.2d at 1370.

28 ¹⁸⁴ 571 F.2d 450, 454 (9th Cir. 1978); *cf. also United States v. Johnson*, 537 F.2d
1170, 1172-73 (9th Cir. 1976) (government arguing that its decision to bring a successive

1 Several trial courts that have considered similar claims are in accord. In *United*
 2 *States v. Velsicol Chemical Corp.*, for example, the district court dismissed an
 3 indictment where – just like in this case – “[t]he basic elements of the new charges were
 4 known to the prosecutor . . . at the time of the initial charging decision.”¹⁸⁵ And more
 5 recently, in *United States v. Picou*, a district court explicitly relied on the reasoning of
 6 the Ninth Circuit in *Jenkins* to dismiss a successive indictment:

7 [T]he facts here are more comparable to the facts in *United States v.*
 8 *Jenkins* . . . where the evidence supporting the additional charges brought
 9 by the government was in the government’s possession for an extended
 10 period of time, and presented the government with an open and shut case,
 yet the government did not decide to bring additional charges against the
 defendant until after the defendant exercised her right[s].¹⁸⁶

11 In the simplest terms, the government had a credible, percipient witness to the
 12 alleged filter tampering in 2016 but elected not to pursue those charges. Instead, the
 13 prosecutor chose to ensure that the conduct appeared in the PSRs so that Judge Benitez
 14 would consider it at sentencing. And only after multiple defense objections to the plant-
 15 disruption allegations and the government’s failure to produce discovery – as well as
 16 reciprocal finger pointing regarding alleged breaches of the plea agreement – did the
 17 government renew its investigation into the filter tampering. The [REDACTED]
 18 second-informant explanation is a fig leaf. It fails to cloak the government’s charging
 19 decision in legitimacy and falls well short of dispelling the appearance of
 20 vindictiveness.

21 *D. The prosecutor’s pattern of conduct establishes actual vindictiveness, which*
 22 *also warrants dismissal.*

23 While the defendants here are clearly entitled to a presumption of vindictiveness,
 24 they may also “prove objectively that the prosecutor’s charging decision was motivated

25 _____
 26 indictment was distinguishable because it was unaware of the alleged conduct at the time
 of the first indictment).

27 ¹⁸⁵ 498 F. Supp. at 1256; see also *id.* at 1265; *Tobin*, 598 F. Supp. 2d at 129 (same).

28 ¹⁸⁶ 2015 U.S. Dist. LEXIS 141962 at *14 (E.D. Cal. 2015).

1 by a desire to punish [them] for doing something that the law plainly allowed [them] to
2 do.”¹⁸⁷ Importantly, the Ninth Circuit has described such objective proof as “evidence of
3 an expressed hostility or threat to the defendant for having exercised a constitutional
4 right.”¹⁸⁸ This is significant here for two reasons.

5 First, as addressed in Section I, the government withheld critical, exculpatory
6 evidence from the defendants before their guilty pleas, provided the probation officer
7 with false statements of fact to support the plant-disruption enhancement, and later
8 relied on those false statements as evidence. The prosecutor also stated to the court that
9 she had at all times been willing to provide complete discovery when, in fact, she had
10 not. And even after losing the evidentiary hearing, the prosecutor continued to argue at
11 sentencing that ██████ was responsible for the plant closure and that the defendants’
12 behavior impacted “you and [me]” as ratepayers.¹⁸⁹

13 As addressed below, the government also took the extraordinary step of sending
14 an informant wearing a wire to record represented defendants regarding a matter (filter
15 tampering) that was already the subject of litigation. The government’s pattern of
16 conduct is objective proof of hostility. And it was expressed during the course of
17 protracted litigation.¹⁹⁰

18 Second, although the prosecutor never explicitly threatened to bring filter-
19 tampering charges if the defendants continued to resist her plant-disruption claim, she
20 *did* make a related, “undisputed express threat” based on the defendants’ exercise of
21 their rights.¹⁹¹ Specifically, she warned counsel for ██████ and ██████ that they
22 had breached their plea agreements by objecting to the restitution for the plant

23 ¹⁸⁷ *Goodwin*, 457 U.S. at 384; *accord Wasman*, 468 U.S. at 568-69.

24 ¹⁸⁸ *United States v. Gallegos-Curiel*, 681 F.2d 1164, 1168 (9th Cir. 1982).

25 ¹⁸⁹ Exhibit A at 313.

26 ¹⁹⁰ This course of conduct also weighs heavily against the government’s attempts to
27 dispel the presumption of vindictiveness.

28 ¹⁹¹ *See Hollywood Motor Car Co.*, 646 F.2d at 387.

1 disruption and told them to “modif[y] [] their position” or else she would notify the
2 court.¹⁹² And when the defendants did not withdraw their objections, the prosecutor
3 made good on her threat by filing a motion asking the court to find them in breach.
4 Once more, however, the defendants would never have agreed to pay restitution for the
5 costs associated with the ammonia problems at the plant if the prosecutor had disclosed
6 the exculpatory evidence before their guilty pleas, which she was obligated to do under
7 the Fifth Amendment. The prosecutor thus made an express threat intended to chill the
8 defendants’ rights to object to a term of the plea agreement when they discovered that
9 there had been fraud in the inducement.¹⁹³

10 There is ample, direct proof of vindictiveness here. And it warrants the remedy of
11 dismissal.¹⁹⁴

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26 ¹⁹² Exhibit D at 117; *see also* Exhibit C at 19A-C.

27 ¹⁹³ *See Southwest Admrs., Inc. v. Rozay’s Transfer*, 791 F.2d 769, 774 (9th Cir. 1986).

28 ¹⁹⁴ *See Wasman*, 468 U.S. at 568-69.

III.

The Court should dismiss the indictment because the government sent an informant wearing a wire into the defendants' offices to obtain incriminating statements when they were already represented by counsel with respect to the alleged filter tampering; this was a violation of the rules of professional conduct and the Sixth Amendment.

A. *The defendants were represented by counsel for purposes of alleged environmental crimes, including filter tampering, when the government utilized the informant.*

On June 1, 2017, the government produced roughly eight terabytes of discovery. Despite being only a one-paragraph drop in this eight-terabyte bucket, [REDACTED] [REDACTED] allegation regarding filter tampering somehow found its way into the Offense Conduct section of the PSRs, which were filed on October 10 and 11, 2017:

Additionally, [REDACTED] informed agents that the anti-air pollution device installed on a [REDACTED] trucks, referred to as a DPFS, was being manipulated by [REDACTED] e cost. [REDACTED] said the DPFS' require filter changes, b [REDACTED] was n [REDACTED] ing the filters. Rather, holes were drilled thro [REDACTED] es to facilitate exhaust flow. Following this modification, the on-board computer needs to be "tricked" in order not to register the DPFS failure. [REDACTED] reportedly accomplished the "trick" by bringing someone [REDACTED] ico who performed the necessary work to trick the computer.¹⁹⁵

On January 29, 2018, all the defendants objected, *through counsel*, to the allegation.¹⁹⁶

On February 23, the government filed an opposition, stating that "[t]he PSR accurately reflects the statement of the witness, who testified to the same facts under oath."¹⁹⁷

On April 15, 2018, [REDACTED] [REDACTED] left a voice mail for the prosecutor regarding alleged filter tampering at [REDACTED]. The prosecutor and agents then held a conference call and – despite the fact that the parties were then actively litigating that very same issue – concluded that [REDACTED] claim was a "new and different criminal

¹⁹⁵ 17cr1805 Doc. 38 at ¶ 41 [REDACTED] [REDACTED] PSR).

¹⁹⁶ Exhibit D at 42 [REDACTED] [REDACTED] 17cr1805 Doc. 61 at 3 [REDACTED] [REDACTED] Doc. 59 at 6 [REDACTED]

¹⁹⁷ Exhibit D at 109.

¹⁹⁸ Exhibit E at 1.

1 allegation.”¹⁹⁹ On April 20, the case agents interviewed ██████ On April 27, Godshall
 2 sent ██████ to ██████ offices wearing a wire.

3 It is well settled in this circuit that, in the era of the Sentencing Guidelines, a
 4 defendant’s right to due process attaches to disputed facts in a PSR. Indeed, “[e]ven
 5 before the Guidelines were enacted, a convicted criminal had a protected interest at
 6 sentencing.”²⁰⁰ Congress, however, did not believe that pre-guidelines protections were
 7 “adequate[] to serve[] [a] defendant’s interest in a fair sentence and [] decided to confer
 8 greater protection by providing uniform guidelines for sentencing.”²⁰¹ Defendants are
 9 accordingly entitled to the preponderance-of-the-evidence standard of proof and “the
 10 greater formality [of the process] itself – such as fully adversarial fact-finding
 11 procedures and the right to appeal sentencing findings.”²⁰² Furthermore, it is beyond
 12 cavil that “sentencing is a critical stage of the criminal proceeding.”²⁰³

13 The defendants’ due-process rights had attached to this allegation and they were
 14 being represented by counsel for that purpose when ██████ ██████ wore a wire to their
 15 offices on April 27, 2018.

16 *B. The government executed its undercover operation in violation of the rules of*
 17 *professional conduct.*

18 California Rule of Professional Conduct 4.2 prohibits lawyers from
 19 “communicat[ing] directly or indirectly about the subject of the representation with a
 20 person the lawyer knows to be represented by another lawyer in the matter.” This
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24 ¹⁹⁹ *Id.* at 2.

25 ²⁰⁰ *United States v. Restrepo*, 946 F.2d 654, 657 (9th Cir. 1991) (en banc).

26 ²⁰¹ *Id.*

27 ²⁰² *Id.* at 658.

28 ²⁰³ *Id.* at 659 (quoting *Garner v. Florida*, 430 U.S. 349, 358 (1977)).

1 prohibition also applies to contact with represented corporations.²⁰⁴ The commentary to
 2 the rule, however, “recognizes that prosecutors and other government lawyers are
 3 authorized to contact represented persons, either directly or through investigative agents
 4 and informants in the context of investigative activities, as limited by relevant federal
 5 and state constitutions, statutes, rules, and case law.”²⁰⁵

6 Over the years, the Ninth Circuit has had occasion to review the scope of Rule
 7 4.2's predecessor, Rule 2-100, a handful of times and has consistently held that
 8 “beginning *at the latest* upon the moment of indictment, a prosecuting attorney has a
 9 duty under ethical rules like Rule 2-100 to refrain from communicating with
 10 represented defendants.”²⁰⁶ Importantly, the court has not limited that no-contact rule to
 11 only the charged offense(s). And the circuit has since cited with approval the opinions
 12 of other federal courts that have reviewed similar rules in similar contexts and
 13 concluded that such safeguards are more expansive than the protections afforded by the
 14 Sixth Amendment. For example, in *United States v. Talao*, the Ninth Circuit adopted the
 15 Second Circuit’s opinion in *United States v. Hammad*,²⁰⁷ which first noted that “the
 16 Constitution prescribes a floor below which protections may not fall, rather than a
 17 ceiling beyond which they may not rise.”²⁰⁸ The *Hammad* court then observed that the
 18 rule is “designed to safeguard the integrity of the profession and preserve public
 19 confidence in our system of justice. . . . [It] secures protections not contemplated by the

21 ²⁰⁴ Cal. R. Prof. Conduct 4.2(a)&(b) (Nov. 1, 2018). Under 28 U.S.C. § 530B, Rule 4.2
 22 applies to federal prosecutors. *United States v. Joel*, 2015 U.S. Dist. LEXIS 131854, *8-9
 23 (S.D. Cal. 2015).

24 ²⁰⁵ *Id.* at Cmt. n. 8 (citing *United States v. Carona*, 630 F.3d 917 (9th Cir. 2011) and
United States v. Talao, 222 F.3d 1133 (9th Cir. 2000)).

25 ²⁰⁶ *Talao*, 222 F.3d at 1139 (emphasis in original) (quoting *United States v. Lopez*, 4
 26 F.3d 1455, 1461 (9th Cir. 1993)).

27 ²⁰⁷ *Id.* (citing with approval *United States v. Hammad*, 858 F.2d 834 (2d Cir. 1988));
 see also *Joel*, 2015 U.S. Dist. LEXIS 131854 at *9-10.

28 ²⁰⁸ *Hammad*, 858 F.2d at 839.

1 Constitution.”²⁰⁹

2 Of particular application here, the *Hammad* court also noted that “were we to
3 construe the rule as dependent upon indictment, a government attorney could
4 manipulate grand jury proceedings to avoid its encumbrances.”²¹⁰ According to the
5 Ninth Circuit, then, the protections afforded by Rule 4.2 take effect no later than
6 indictment and are broader than the protections guaranteed by the Sixth Amendment.
7 More directly to the point, the circuit court has also expressly held that “a prosecutor
8 has a duty under the Rule not to communicate with an indicted defendant known to be
9 represented by counsel and a court is empowered to exclude evidence obtained in
10 violation of the Rule.”²¹¹ And again, in making that pronouncement, the court did *not*
11 circumscribe the prosecutor’s no-contact obligation to the subject matter of the
12 indictment.

13 Here, the defendants were already under indictment and actively litigating the
14 exact-same allegations that were the subject of the undercover operation. The
15 government’s conduct was accordingly within the purview of – and proscribed by –
16 Rule 4.2. And while the government will probably rely on Ninth Circuit cases that have
17 held that the *preindictment* use of undercover informants against represented parties
18 does not violate this rule,²¹² there is *no* case that addresses the audacious use of an
19 undercover informant against an indicted defendant who is actively litigating the precise
20 subject matter of the undercover operation.

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25 ²⁰⁹ *Id.*

26 ²¹⁰ *Id.*

27 ²¹¹ *United States v. Powe*, 9 F.3d 68, 69 (9th Cir. 1993) (citations omitted).

28 ²¹² *See, e.g., id.*

1 C. The Court should dismiss the indictment or suppress the evidence under its
2 supervisory powers.

3 A trial court has the discretion to remedy a violation of Rule 4.2 by exercising its
4 supervisory authority to dismiss the indictment or to order a lesser remedy.²¹³ Indeed,
5 this Court, in *United States v. Joel*, has previously had occasion to consider potential
6 remedies where there was a much more innocuous, *potential* violation of the no-contact
7 rule.²¹⁴ Because there was “no clear precedent” holding that the contact at issue in *Joel*
8 was prohibited by the rule, the Court concluded that the potential violation could not
9 have been made in “willful disobedience of law” and therefore did not warrant
10 suppression.²¹⁵ The Court also noted that defendant Joel was unable to cite any Ninth
11 Circuit case suppressing evidence for a violation of the rule.

12 But the circumstances of the violation in this case are *sui generis*. And that is
13 because this violation is flagrant. There is *no* other case – apart from landmark Supreme
14 Court cases where convictions were reversed for violations of the Sixth Amendment²¹⁶
15 – where the defendants were already under indictment, were represented by counsel,
16 and were litigating precisely the same subject matter when the government deployed an
17 undercover informant to record them. Once more, Ninth Circuit law clearly holds that
18 the no-contact rule attaches no later than the time of indictment,²¹⁷ that the rule is
19 broader than the Sixth Amendment,²¹⁸ and that this Court is empowered to remedy

22 ²¹³ See *Lopez*, 4 F.3d at 1458, 1462.

23 ²¹⁴ 2015 U.S. Dist. LEXIS 131854 at *15-16.

24 ²¹⁵ *Id.* at *16.

25 ²¹⁶ See, e.g., *Massiah v. United States*, 377 U.S. 201 (1964); *United States v. Henry*,
26 447 U.S. 264 (1980); *Maine v. Moulton*, 474 U.S. 159 (1985).

27 ²¹⁷ *Lopez*, 4 F.3d at 1461.

28 ²¹⁸ *Talao*, 222 F.3d at 1139.

violations of the rule.²¹⁹ This was “willful disobedience of law.”²²⁰

Another aggravating factor here is that the government also violated Rule 16 when it failed to disclose the recorded statements to the defendants before sentencing. Rule 16 requires the production of “*any relevant* written or recorded statement by the defendant.”²²¹ The surreptitiously recorded statements obtained by the informant were quite obviously relevant to the upcoming sentencing proceedings. And although disclosing the existence of the recordings before sentencing may have impaired the government’s investigation, the prosecutor should not have the luxury of choosing which rules of criminal procedure have to be followed and which ones don’t. This Court should dismiss the indictment to preserve the appearance of judicial integrity and to deter future illegal conduct. At a minimum, it should suppress the evidence.

D. The Court should also dismiss the indictment because the government violated the defendants’ Sixth Amendment right to counsel.

The Supreme Court held in *Maine v. Moulton* that “[o]nce the right to counsel has attached and been asserted, the State must of course honor it.”²²² This means that “at the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel.”²²³ And that obligation includes a proscription on the post-indictment use of undercover informants.²²⁴

The government will undoubtedly rely on the Supreme Court’s holding in *Texas v. Cobb* to argue that the right to counsel is offense specific and does not attach until

²¹⁹ *Powe*, 9 F.3d at 69.

²²⁰ *See Joel*, 2015 U.S. Dist. LEXIS 131854 at *15.

²²¹ Fed. R. Crim. P. 16(a)(1)(B) (emphasis added).

²²² 474 U.S. at 170.

²²³ *Id.* at 171.

²²⁴ *See id.* at 172 (citing *Massiah*, 377 U.S. 201 (1964)).

1 indictment.²²⁵ That is, because the defendants had not yet been indicted for violations of
2 the Clean Air Act when the government deployed the informant, the defendants enjoyed
3 no Sixth Amendment protection from the undercover CAA investigation.

4 But the facts here, once more, are unique. Although not yet under indictment for
5 violations of the Clean Air Act, the defendants *were* litigating – through counsel – the
6 identical allegations in a closely related criminal proceeding involving the same
7 prosecutor. Of course, these circumstances could not have been foreseen by the
8 Supreme Court in *Cobb*. But the Court *did* state that the Sixth Amendment right is
9 triggered not only by an indictment but by “the initiation of *adversary judicial criminal*
10 *proceedings* – whether by way of formal charge, preliminary hearing, indictment, or
11 arraignment.”²²⁶ The *Cobb* Court also reiterated that “[i]n seeking evidence pertaining to
12 *pending charges* . . . the Government’s investigative powers are limited by the Sixth
13 Amendment rights of the accused.”²²⁷

14 Simply put, when the filter-tampering allegations appeared in the PSRs,
15 “adversary judicial criminal proceedings” had been initiated, the allegations became
16 “pending charges,” and the defendants were represented by counsel for those purposes.
17 The Court should also dismiss the indictment because the government violated the
18 defendants’ Sixth Amendment rights.

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26 ²²⁵ See 532 U.S. 162, 167-68 (2001).

27 ²²⁶ *Id.* (emphasis added).

28 ²²⁷ *Id.* at 170 (emphasis in original).

IV.

The Court should dismiss the indictment because the government did not negotiate the previous plea agreements in good faith.

In *United States v. Krasn*, the Ninth Circuit held that prosecutors have a duty to negotiate plea agreements in good faith, which in certain cases requires them to disclose other potential charges that could be filed:

[T]he plea bargaining phase of the criminal justice system “must be attended by safeguards to insure the defendant what is reasonably due in the circumstances.” One of these safeguards is a duty of good faith. . . . In certain cases, this duty of good faith would encompass an obligation to inform a defendant during plea bargain negotiations of other possible criminal charges which may be filed.²²⁸

In *Krasn*, the defendant pleaded guilty to improper-gratuities charges pursuant to a plea agreement and was later indicted for antitrust violations. Importantly, the two offenses “involved independent criminal transactions” and “[t]he only similarity between them [was] that they both arose from the same industry-wide investigation of the meat-packing industry.”²²⁹

The district court denied Krasn’s claim that the government breached its duty to negotiate in good faith because it should have made him aware of the possibility that he would be charged in the antitrust case. The Ninth Circuit affirmed (under the clearly-erroneous standard),²³⁰ primarily because the government was not actively pursuing the antitrust investigation at the time of the plea bargaining. Of critical importance here, the court also noted that “[i]f the government had its antitrust case against Krasn ready to submit to the grand jury during the plea negotiations on the gratuities charges, then a

²²⁸ 614 F.2d 1229, 1234 (9th Cir. 1980) (quoting *Santobello v. New York*, 404 U.S. 257, 262 (1971)).

²²⁹ *Id.* at 1234.

²³⁰ *Id.* at 1233.

1 different result might be required.”²³¹

2 In *United States v. Clark*, the Ninth Circuit revisited *Krasn*, citing it with
3 approval and elaborating on the due-process rights a defendant enjoys during the plea-
4 bargaining process:

5 The defendant’s underlying “contract” right is constitutionally based and
6 therefore reflects concerns that differ fundamentally from and run wider
7 than those of commercial contract law [T]he courts’ concerns run
8 even wider than protection of the defendant’s individual constitutional
9 rights – to concerns for the “honor of the government, public confidence in
10 the fair administration of justice, and the effective administration of justice
11 in a federal scheme of government.” [This means that] both constitutional
12 and supervisory concerns require holding the Government to a greater
13 degree of responsibility than the defendant . . . for imprecisions or
14 ambiguities in plea agreements.²³²

11 And although the court again rejected a challenge based on the government’s failure to
12 disclose conduct during plea negotiations that it subsequently chose to indict, it noted
13 that “the prosecutor’s reasons for not disclosing the future charges” (which included not
14 wanting to put an informant at risk) did “not suggest foul play.”²³³

15 The government’s conduct here is more aggravated than in either *Krasn* or *Clark*
16 in several important respects. First, in both *Krasn* (where the two types of criminal
17 activity were unrelated and the wide-ranging investigations covered an entire industry)
18 and *Clark* (where the defendant was charged in the District of Oregon with a series of
19 postal robberies and in the District of Idaho for the burglary of a pawn shop), the Ninth
20 Circuit cited the dissimilarity of the unrelated offenses as a justification for
21 nondisclosure.²³⁴ In contrast, the conduct at issue here is both related and quite similar:
22 environmental-regulatory violations allegedly committed by the same executives
23 managing the same small business at the same time. Further, both investigations were
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25 ²³¹ *Id.*

26 ²³² 218 F.3d 1092, 1095 (9th Cir. 2000) (second alteration in original).

27 ²³³ *Id.* at 1097.

28 ²³⁴ *See Krasn*, 614 F.2d at 1234; *Clark*, 218 F.3d at 1097.

1 supervised by the same prosecutor and spearheaded by the same two case agents.

2 Second, in *Krasn*, the court afforded significant weight to the government's
3 inability to present the antitrust case to the grand jury when the illegal-gratuities plea
4 negotiations were taking place. In fact, the government would not secure the antitrust
5 indictment until three years after Krasn's plea.²³⁵ Here, in contrast, the government had
6 presented to the grand jury a credible witness who testified about the subject of the
7 second indictment *eight months* before the guilty pleas in the first case.

8 Finally, the court in *Clark* relied on the prosecutor's justification for
9 withholding the existence of the second investigation (not disclosing an active
10 informant) to conclude that there was no "foul play" on the part of the government.

11 Here, however, the government had no similarly compelling reason to keep the
12 defendants in the dark. In fact, although the government did not disclose [REDACTED]
13 [REDACTED] September 21, 2016 grand jury testimony in discovery, the prosecutor went
14 out of her way to ensure that the filter-tampering allegations appeared in the PSRs so
15 Judge Benitez would consider the alleged conduct at sentencing. She then chose to
16 restart her investigation of the filter tampering during contentious ongoing litigation –
17 immediately after she had accused the defendants of breaching their plea agreements
18 and they had alleged *Brady* violations in response. That fairly smacks of foul play.

19 The government's conduct here is much more egregious than in either *Krasn* or
20 *Clark* and a "a different result" is required.

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28 ²³⁵ *Krasn*, 614 F.2d at 1234.

V.

The Court should dismiss Count 1 of the superseding indictment because the government arbitrarily subdivided the same conspiracy in order to obtain a second indictment in violation of the Double Jeopardy Clause.

It is well settled that the government may not “subdivide[] arbitrarily” a single conspiracy to obtain “multiple indictments for a single illegal agreement.”²³⁶ Further, the Ninth Circuit has held that a single agreement – even though it may have more than one object – constitutes only a single violation of § 18 U.S.C. § 371:

When there is only one agreement, there is only one violation of the general federal conspiracy statute. This remains true even though the conspiratorial agreement may encompass diverse criminal objectives which would violate several statutes.²³⁷

Accordingly, a strict application of the “same evidence” or “*Blockburger*”²³⁸ test is not sufficient for purposes of a double-jeopardy analysis for conspiracies. This is because “[a]cross the board application of *Blockburger* would sanction artful crafting of conspiracy charges which could permit the government to subdivide one criminal conspiracy into multiple violations of a single statute, a result which *Braverman* forbids.”²³⁹

Instead of the *Blockburger* test, the Ninth Circuit applies a “factor analysis to determine whether two conspiracy counts under one statute charge the same offense.”²⁴⁰ Specifically, courts are required to “compare the differences in the periods of time covered by the alleged conspiracies, the places where the conspiracies were alleged to

²³⁶ *United States v. Castro*, 629 F.2d 456, 461 (7th Cir. 1980).

²³⁷ *United States v. Bendis*, 681 F.2d 561, 564 (9th Cir. 1981) (citing *Braverman v. United States*, 317 U.S. 49, 52-53 (1942)); accord *United States v. Walker*, 653 F.2d 1343, 1352 (9th Cir. 1981).

²³⁸ *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

²³⁹ *Bendis*, 681 F.2d at 565; see also *United States v. Peters*, 333 F. Supp. 3d 366, 374 (D. Vt. 2018) (“The Second Circuit has long recognized the ease with which prosecutors can draft indictments that allege what appear to be separate conspiracies but may actually be parts of an overall conspiracy.”).

²⁴⁰ *Bendis*, 681 F.2d at 565 (quotation marks omitted).

1 occur, the persons charged as co-conspirators, the overt acts alleged to have been
 2 committed, and the statutes alleged to have been violated.”²⁴¹ “Where several of these
 3 factors are present, the conclusion follows that the alleged illegal combinations are not
 4 separate and distinct offenses.”²⁴² And all but one of those factors – the specific overt
 5 acts – militate toward a single conspiracy here.

6 Indeed, the conspiracy to violate the Clean Water Act in 17cr1305 and the
 7 conspiracy to violate the Clean Air Act alleged in this case cover the same period of
 8 time, they occurred at the same place of business, all the alleged coconspirators (with
 9 the exception of [REDACTED] are the same, and the statutes alleged to have been
 10 violated are both environmental regulations. Moreover, the objective of the conspiracies
 11 is the same – to aid [REDACTED] Environmental in conducting day-to-day business.

12 In short, the government should have charged a single conspiracy to violate
 13 environmental regulations. It instead “artfully crafted” a successive indictment to gain a
 14 tactical advantage and to extract an extra pound of flesh. That does not comport with the
 15 double-jeopardy guarantee.²⁴³

17 Conclusion

18 CAA prosecutions under Title II of the Act are exceedingly rare and have been
 19 characterized by at least one commentator as “a novel statutory interpretation.”²⁴⁴ In
 20 fact, there appear to be only two similar cases in the entire country. Moreover, the EPA
 21 typically focuses its criminal investigations where there has been significant

22 ²⁴¹ *Id.*

23 ²⁴² *Castro*, 629 F.2d at 462.

24 ²⁴³ Under this same “factor analysis,” the government’s use of an undercover
 25 informant to record represented defendants is also a violation of the Sixth Amendment as
 26 to Count 1. *See Cobb*, 532 U.S. at 172-73 (applying *Blockburger* test to the offense-
 specific, right-to-counsel analysis under the Sixth Amendment).

27 ²⁴⁴ *See INSIGHT: EPA’S Criminal Theory in Clean Air Act Breaks New Ground*,
 28 <https://news.bloomberglaw.com/environment-and-energy/insight-epas-criminal-theory-in-clean-air-act-breaks-new-ground>.

1 environmental harm.²⁴⁵ Here, however, there are – at most – 30 trucks in the [REDACTED]
 2 fleet that could have been altered. Furthermore, the government had known about the
 3 alleged modifications since 2016, yet chose not to act for two years. Of course, the
 4 government enjoys unfettered discretion in this regard. But “[f]ocusing scarce
 5 prosecutorial resources” on so few trucks “makes little sense” unless the government is
 6 trying to “send a message.”²⁴⁶

7 These cases should have been resolved at the same time. The defendants – who
 8 previously had no criminal record – have been unnecessarily harmed by this successive
 9 prosecution. Not only are they subject to significant, additional jail time and monetary
 10 penalties, the process itself takes a significant toll. And they have now been the subjects
 11 of federal, criminal actions brought by the same prosecutor for almost four years.

12 By any objective measure, the U.S. Attorney’s Office has abdicated its
 13 responsibility as a “minister of justice.” This successive prosecution is vindictive – both
 14 in appearance and in fact. The government breached its ethical obligations with the
 15 illicit use of an undercover informant against represented defendants. And the
 16 defendants did not receive the benefit of a plea bargain arrived at in good faith. This
 17 Court should dismiss the indictment.

18 Respectfully Submitted,

19
 20 Dated: May 1, 2020

/s/ John C. Lemon
JOHN C. LEMON
 Attorney for Mr. [REDACTED] [REDACTED]

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 27 ²⁴⁵ See *id.*

28 ²⁴⁶ *Id.*