Court of Appeals Docket No. 17-50197

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

NERSES NICK BRONSOZIAN
Defendant - Appellant,

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the United States District Court for the Central District of California
D.C. No. 2:16-cr-00196-SVW-1
(Honorable Stephen V. Wilson)

John L. Littrell, State Bar No. 221601
BIENERT, MILLER & KATZMAN, PLC
903 Calle Amanecer, Suite 350
San Clemente, California 92673
Telephone (949) 369-3700
Facsimile (949) 369-3701
jlittrell@bmkattorneys.com
On CJA Appointment

Attorneys for Defendant-Appellant

NERSES NICK BRONSOZIAN

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Regulations

I. INTRODUCTION

For the first time on appeal, the government argues that 26 U.S.C. § 5861(d) is justified under the Necessary and Proper Clause, and in the alternative, the Commerce Clause. The Court should ignore those arguments because the government made neither below. If the Court does consider either of those arguments, they should be rejected. 26 U.S.C. § 5861(d) generates no revenue, and it does not aid in the generation of revenue. Therefore, it cannot be justified as an exercise of Congress' tax power. Nor can the Court simply "borrow" a justification for the law from the Commerce Clause, a source of power that was never contemplated by Congress and which would be inconsistent with both the plain language of the law and legislature's intent to invoke the taxation power only.

This Court's *per curiam* decision in *Hunter* does not control the outcome of this case. *Hunter* was fundamentally flawed, and it has been invalidated by the Supreme Court's decision in *Sebelius*. The government acknowledged as much this year in *Texas, et.al. v. United States of America, et. al.*, when it agreed that the individual mandate of the Affordable Care Act has lost its constitutional legitimacy because it too generates no revenue.

The government's opposition also takes an unreasonably narrow and unsupported position about the scope of its *Brady* obligations. Special Agent Carr's prior statements and his knowledge of the violent threat posed by the Vagos Outlaw Motorcycle Gang were both favorable and material, and the government had an affirmative obligation to disclose them to the defense. Carr's testimony was so misleading that it violated Bronsozian's right to Due Process under *Napue*, even if it was "literally" true.

II. ARGUMENT

A. 26 U.S.C. § 5861(d) is Not Justified Under Congress' Tax Power

1. The Government Concedes that § 5861(d) Is Not Authorized by Congress' Power to Tax

The government concedes that § 5861(d) is not directly authorized by Congress' power to lay and collect taxes. *See* GAB 39. Instead, it argues for the first time on appeal that the statute is authorized by the Necessary and Proper clause, U.S. Const. art. I, § 8. GAB at 26.

2. The Government Waived its Necessary and Proper Argument by Failing to Raise it in the District Court or Provide Legal Support For it in its Opening Brief

"Issues not presented to the trial court cannot generally be raised for the first time on appeal." *United States v. Flores-Payon*, 942 F.2d 556, 558 (9th Cir. 1991); *see also United States v. Williams*, 419 F.3d 1029, 1035 (9th Cir. 2005); *United States v. Trujillo*, 713 F.3d 1003, 1007–08 (9th Cir.2013).

In its ten-page opposition to Bronsozian's motion to dismiss submitted to the district court, the government did not mention the "necessary and proper" clause nor did it argue that 26 U.S.C. § 5861(d) was authorized by it. *See* FER 1. Rather, the government argued only that Bronsozian's arguments were foreclosed by this Court's decision in *Hunter v. United States*, 73 F.3d 260 (9th Cir. 1996)(*per curiam*). *Id*. This Court's analysis of the issue in *Hunter* spans four sentences and does not mention the "necessary and proper" clause. *Hunter*, 73 F.3d at 262. Because the government did not raise the Necessary and Proper clause as a basis for upholding the statute in the district court, the issue was waived.

Alternatively, even assuming the government's failure to raise the Necessary and Proper argument in the district court didn't waive the issue, the government waived the issue by failing to develop it in its Opening Brief on appeal. In its Opening Brief the government does little more than mention the Necessary and Proper clause. *See* GAB 30-31. The government acknowledges that the Necessary and Proper clause was not mentioned in any of the cases upon which it relies. *See* GAB at 30. It cites no legal authority governing how and when Congress may invoke the Necessary and Proper clause, or what limits exist on that authority.

Because the government raised the issue in passing and provided no legal analysis, this Court has no obligation to address it, and should decline to do so. *See Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir. 1988) ("Issues raised in a brief which are not supported by argument are deemed abandoned."); *see also United States v. Loya*, 807 F.2d 1483, 1486 (9th Cir. 1987); *Acosta-Huerta v. Estelle*, 7 F.3d 139, 144 (9th Cir. 1992).

3. The Necessary and Proper Clause Does Not Authorize Congress to Punish the Possession of Machineguns in Support of its Power to Collect Taxes

If the Court does consider the government's Necessary and Proper argument, it should reject it. Congress has no power to legislate except insofar as the Constitution explicitly authorizes it. *United States v. Morrison*, 529 U.S. 598, 607 (2000). "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X; *see also United States v. Fox*, 95 U.S. 670, 672 (1877).

The Necessary and Proper Clause gives Congress the power to "make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, § 8, cl. 18. However, those laws must be "plainly adapted to that end" and within the scope of the enumerated power that justify them. *M'Culloch v. State*, 17 U.S. 316, 421 (1819). ("Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."). "[E]very such statute must itself be legitimately predicated on an enumerated power." *United States v. Comstock*, 560 U.S. 126, 148 (2010).

In sum, the law must satisfy the following criteria:

First, the *end* of the law must be legitimate and within the scope of the enumerated powers set forth in the Constitution. *M'Culloch*, 17 U.S. at 421.

Second, the *means* must be "plainly adapted" to that end. *M'Culloch*, 17 U.S. at 421. Absolute necessity is not a prerequisite; Congress may enact laws that are "convenient," "useful," or "conducive" to the exercise of an enumerated power. *Comstock*, 560 U.S. at 134. However, the means must be "rationally related to the implementation of a constitutionally enumerated power." *Id*. To be "rationally related," there must be a "demonstrated link in fact, based on empirical demonstration" to the constitutional aim to be served. *Id*. at 152 (Kennedy, concurring). The analysis depends "not on the number of links in the congressional-power chain but on the *strength of the* *chain*." *Comstock*, 560 U.S. at 150 (Kennedy, J concurring) (emphasis added); *see also Sabri v. United States*, 541 U.S. 600, 605 (2004).[1]

Third, the means cannot be prohibited by the Constitution. *Id*.

a. 26 U.S.C. § 5861(d) is not rationally related to Congress' power to collect taxes.

Congress went to great lengths to tether its regulation of machinegun possession directly to its taxation power. *See* AOB at 30. The government now argues that Congress relied on its authority under the "necessary and proper" clause (even though it did not say so). But even assuming that is true, Congress did not endorse the illogical argument that punishing the possession of unregistered machineguns would be "in aid of" a revenue purpose, *even if the law generated no revenue*. *See id*. In fact, Congress said precisely the opposite; it believed that revenue generation essential in order for the statute to be valid. *See* AOB 29. Congress was right. *See Nat'l Fed'n of Indep. Bus. V. Sebelius*, 567 U.S. 519 (2012).

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[1] The "rationally related" language from *Comstock* should not be confused with the more permissive "rational basis" test applied by courts in other contexts. *See, e.g., Nordlinger v. Hahn*, 505 U.S. 1, 11, (1992). Because the standard requires the government to show that a statute is "plainly adapted" to a legitimate end, it must "show more than that a particular statute is a "rational means" to safeguard that end. *Sabri v. United States*, 541 U.S. 600, 612–13 (2004) (Thomas, J., concurring). It must show "some obvious, simple, and direct relation between the statute and the enumerated power." *Id*. (quoting 8 Writings of James Madison 448 (G. Hunt ed.1908)).

b. There is no rational link between punishing the possession of unregistered machineguns and the power to collect taxes.

Even if punishing unregistered machinegun possessors was "rationally related" to Congress' power to lay and collect taxes when the law was enacted, *see Comstock*, 560 U.S. at 148, the means currently employed by the government bear no logical relationship to that end. The government now refuses to register previously unregistered firearms, *see* 27 C.F.R. § 479.105, and it is impossible to register or pay tax on unregistered firearms. *See* GAB at 27 (citing *United States v. Freed*, 401 U.S. 601 (1971) ("A transferee does not and cannot register, though possession of an unregistered firearm is illegal."). Therefore, there is no "demonstrated link in fact" between punishing the possession of unregistered machineguns and Congress' tax power. *Cf. Sebelius*, 567 U.S. at 574 ("Congress's authority under the taxing power is limited to requiring an individual to pay money into the Federal Treasury, no more. If a tax is properly paid, the Government has no power to compel or punish individuals subject to it.").

The government argues that ATF retains the *theoretical* "power" to tax the possession of machineguns, even though it doesn't currently use it. GAB at 32. But ATF has ruled out that possibility by passing regulations that prohibit it from accepting registration or tax payments on previously unregistered machineguns. *See* 27 C.F.R. § 479.105. The mere possibility that ATF could reverse course cannot provide the "demonstrated link in fact, based on empirical demonstration" to the constitutional aim to be served.

The government also argues that ATF retains the power to tax the *transfer* of previously possessed machineguns. GAB at 32. But that does not render § 5861(d), which prohibits the *mere possession* of an unregistered machinegun, constitutional. To the extent that the transfer of machineguns is still capable of producing tax revenue, then at most that authorizes Congress to punish the transfer of unregistered machineguns, as it does with § 5861(b), § 5861 (e), and arguably § 5861 (j). There is simply no rational link between punishing the mere possession of an unregistered machinegun under § 5861(d) and the tax revenue the government collects on the transfer of previously registered machineguns under other subsections.

c. No court has held that § 5861(d) is justified under the Necessary and Proper Clause

The government implies that previous courts have implicitly endorsed the notion that § 5861(d) is authorized under the Necessary and Proper clause. GAB at 30 (citing *Sonzinsky v. United States* 300 U.S. at 513 and *Jones*, 976 F.2d at 183-84). But it acknowledges that none of the cases upon which it relies even mention the Necessary and Proper clause.

Moreover, only a handful of the cases cited by the government concerned an Article I challenge to § 5861(d), which punishes the *mere possession* of an unregistered machinegun. In many of the cases cited by the government the defendant did not bring an Article I challenge at all. *See United States v. Elliot*, 128 F.3d 671 (8th Cir. 1997) (*per curiam*) (Due Process challenge only); *United States v. Rivera*, 58 F.3d 600 (11th Cir. 1995) (Due Process challenge only, possession of silencer). In the cases where the defendant *did* bring an Article I challenge, most concerned other provisions of the National Firearms Act that punished the transfer or manufacturing of machineguns, not simple possession under § 5861(d). *See, e.g., Sonzinsky*, 300 U.S. at 511 (decision was "limited to the question of the constitutional validity in its application under the first count of the indictment" which charged the defendant with *dealing* in firearms without paying the required tax); *Jones*, 976 F.2d at 183 (defendant charged with the unlawful manufacturing, transportation, and transfer of machineguns pursuant to §§ 5861(c), (e), and (j)); *United States v. Grier*, 354 F.3d 210, 212 (3d Cir. 2003) (defendant charged under Section 5861(c), (e), and (f)); *United States v. Ardoin*, 19 F.3d 177, 179 (5th Cir. 1994) (defendant charged under §§ 5821, 5861(d), (e), (f), (l), 5871, and 5845). The provisions of the NFA that formed the bases for the convictions in those cases could, at least theoretically, generate tax revenue. *See Grier*, 354 F.3d at 215. Section 5861(d)'s prohibition on machinegun possession cannot.

The only cases cited by the government that actually presented an Article I challenge to § 5861(d) of the NFA based on the mere possession of a machinegun are (1) this Court's *per curiam* decision in *Hunter*, 73 F.3d at 260, (2) *United States v. Dalton*, 960 F.2d 121, 125 (10th Cir. 1992), and (3) *United States v. Ross*, 9 F.3d 1182, 1194 (7th Cir. 1993), *cert. granted, judgment vacated*, 511 U.S. 1124 (1994). Because the holding in *Ross* was subsequently vacated, that leaves only *Hunter* and *Dalton*.

Dalton held that §§ 5861(d) and (e) were unconstitutional, both under the Due Process Clause and because Congress exceeded its authority under Article I. 960 F.2d at 123. That leaves only this Court's *per curiam* decision in *Hunter*. 73 F.3d at 161. But *Hunter* is flawed because it blindly adopted the reasoning of *Jones*, a case that did not involve a challenge to the mere possession of machineguns under § 5861(d). *See* AOB at 40.

4. The Government Should be Judicially Estopped from Arguing That § 5861(d) Is a Valid Tax Law

In *Sebelius*, the Supreme Court held that the "individual mandate" of the Affordable Care Act could be justified under Congress' power to tax. *See Sebelius*, 132 S. Ct. at 2566. The Court relied on the fact that the law generated revenue based on a "shared responsibility payment" that was imposed on people who did not purchase insurance policies that complied with the law. *Id*. at 2594. In the Tax Cuts and Jobs Act of 2017 ("TCJA"), Congress eliminated the "shared responsibility payment" from the law by reducing the amount of the penalty for failing to purchase individual health insurance to "zero." Pub. L. No. 115-97, § 11081, 131 Stat. at 2092. Because of this change, the government has now conceded that the individual mandate of the ACA is unconstitutional. *See* FER 11 (*Texas et. al. v. United States et. al.*, No. 4:18-cv-00167-O (N.D. Texas). As the government admitted, "critical" to the Court's analysis in *Sebelius* was the "fact that the individual mandate's shared responsibility payment 'yield[ed] the essential feature of any tax: [i]t produces at least some revenue for the Government.'" *Id*. at 6 (citing *Sebelius*, 567 U.S. at 564); *id*. at 9 ("[T]he mandate can no longer instead fairly be interpreted as a tax because it will raise no revenue . . ."); *id*. ("Because the [Tax Cuts and Jobs Act] eliminated the basis for the Court's saving construction in *NFIB*, the individual mandate is untethered to any source of constitutional authority.").

The government's concessions in *Texas v. United States* apply with equal force to this case. Just as the ACA's individual mandate is no longer justified under Congress' power to collect taxes because it generates no revenue, § 5861(d) can't be justified as a tax measure because it too generates no revenue. The fact that ATF could *theoretically* change course and accept tax payments and registration of machineguns, as the government argues, makes no difference, as the executive branch could just as easily raise the "shared responsibility payment" of the ACA above zero.

There is no principled way for the government to take different positions with respect to the validity of the ACA and § 5861(d). *See Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782–86 (9th Cir. 2001); *United States v. Lence*, 466 F.3d 721, 726 (9th Cir. 2006).

B. Hunter Is No Longer Good Law

Sebelius announced a multi-factor legal test that a law must pass to be valid as a tax law. The government does not argue that § 5861(d) satisfies *any* of the criteria announced by *Sebelius*. Because *Hunter* is inconsistent with the legal framework in *Sebelius*, it has been overruled.

It is true that the "clearly irreconcilable" standard announced in *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (*en banc*) is "high." *See United States v. Robertson*, 875 F.3d 1281, 1291 (9th Cir. 2017). But the standard does not depend on whether a case can be *factually* distinguished from Supreme Court precedent; it depends on whether Supreme Court precedent effectively undercuts the "*theory* or *reasoning* underlying the prior circuit precedent." *Miller*, 335 F.3d at 900 (emphasis added).

The government's attempts to distinguish *Hunter* and *Sebelius* have nothing to do with the "theory or reasoning" behind the decisions. First, the government argues that *Sebelius* and *Hunter* dealt with different *types* of statutes. GAB at 38 (noting that *Hunter* concerned a "wholly different statute" than Sebelius). But the *type* of law at issue does not matter, because the legal principle at stake is the same. Second, the government argues that

Sebelius did not "express any intention to overrule cases sustaining convictions under § 5861(d)." *Id*. But this Court's responsibility to apply intervening Supreme Court precedent, even in new factual contexts, does not require an express invitation from the Supreme Court. Third, the government argues that *Sebelius* announced no new law, and merely applied "long-standing legal rules" that would have been known to this Court when it decided *Hunter*. *Id*. But even assuming this were true, it would be irrelevant in the *Miller* analysis. It does not matter whether the legal principles announced in *Sebelius* pre-existed *Hunter* or should have been taken into account by this Court when deciding *Hunter*. If an intervening decision of the Supreme Court clearly undercuts the "theory or reasoning" behind the decision of a three-judge panel of this Court, then the panel decision must give way. *See Miller*, 335 F.3d at 900.

Hunter and *Sebelius* turn on precisely the same *legal* principle: In order to be justified under Congress' power to collect taxes, a law must (1) generate at least some revenue, and (2) not constitute a "penalty" as the Supreme Court defined that concept. *See* AOB at 41-45. Under the legal framework announced by the Supreme Court in *Sebelius*, § 5861(d) clearly fails. The government does not argue otherwise.

The government cites to *United States v. Green*, 722 F.3d 1146 (9th Cir. 2013), but *Green* doesn't help. In *Green*, this Court held that a Supreme Court decision applying *Apprendi* to the imposition of a criminal fine, *see Southern Union Co. v. United States, 567 U.S. 343 (2012)*, did not overrule existing Ninth Circuit precedent in which the Court had held that *Apprendi* did not apply to the imposition of restitution. *Id*. at 1150. But the legal framework for criminal fines and restitution were conceptually and legally distinct. *Green*, 722 F.3d at 1150. That is not the case here. There is no doubt that the legal framework in *Sebelius* applies to evaluating the constitutionality of Section 5861(d), and it *compels* a different result than the one this Court reached in *Hunter*.[2]

C. § 5861(d) Is Not Justified Under the Commerce Clause

The government also argues for the first time on appeal that this Court should uphold § 5861(d) as a valid exercise of Congress' Commerce Clause authority. GAB 40. The government waived that argument by failing to raise it in the district court. *See Trujillo*, 713 F.3d at 1007–08. However, even if the argument was not waived, it must fail.

The government starts with the unremarkable position that the Supreme Court has upheld other firearms laws (including 18 U.S.C. § 922(o)) under the Commerce Clause. *See* GAB at 40 (citing *Viriyapanthu v. Brandon*, 686 F.App'x 390, 391 (9th Cir.), *cert denied*, 138 S. Ct. 193 (2017); *United States v. Henry*, 688 F.3d 637, 641 (9th Cir. 2012). But the statutes in *Lopez* and *Henry* are both found in Title 18 of the United States Code and premised on the exercise of Congress' Commerce Clause authority. By contrast, § 5861(d) is a tax law, situated in Title 26, and promulgated *based solely on Congress' enumerated power to collect taxes*.

[2] If the Court is persuaded that *Hunter* was wrongly decided under the framework announced in *Sebelius* but not persuaded that *Hunter* and *Sebelius* are "wholly irreconcilable" then at minimum the Court should *sua sponte* hear this case *en banc* in order to resolve the conflict. *See United States v. Torres*, 869 F.3d 1089, 1100 (9th Cir. 2017)(Ikuta, J. specially concurring) ("[R]ather than effectively kick the can down the road, we should either clarify the law or make a *sua sponte* call for rehearing *en banc*."); *Cf. United States v. Hardesty*, 977 F.2d 1347, 1348 (9th Cir. 1992).

See AOB at 29-30. By passing the statute under its authority to tax, Congress invoked a source of authority that "does not give Congress the same degree of control over individual behavior." *Sebelius*, 567 U.S. at 573.

The government argues that two other circuits have "held that § 5861(d) is sustainable as a valid exercise of Congress's Commerce Clause authority." GAB at 41 (citing *Ardoin*, 19 F.3d at 180 and *Jones*, 976 F.2d at 184). But neither *Jones* nor *Ardoin* held that § 5861(d) was authorized under the Commerce Clause. In *Jones*, the Fourth Circuit stated in *dicta* that "even if the National Firearms Act's proscriptions concerning machine guns were no longer supportable as within Congress' power to tax, there can be no serious contention that their application in this case to two machine guns which were transported between two states for sale exceeds Congress' power to regulate interstate commerce." *Jones*, 976 F.2d at 184. In *Ardoin*, the Fifth Circuit merely parroted the same *dicta* (after adopting the analysis of *Jones*), stating that "no one could seriously contend that the regulation of machineguns could not also be upheld under Congress's power to regulate interstate commerce." *Ardoin*, 19 F.3d at 180. These offhand comments were neither necessary to the holdings of those Courts, nor correct. Nor would the analysis in those cases apply here, as both *Jones* and *Ardoin* concerned the making and transfer of machineguns (which arguably could affect commerce), whereas this case involved mere possession.

The government argues that this Court can evaluate the constitutionality of the statute without regard to the "recitals of the power which it undertakes to exercise." GAB at 41 (citing *Sebelius*, 567l U.S. at 570). But it cites to no authority for the proposition that the Court can simply "borrow" a constitutional justification from the Commerce Clause for a law that was explicitly premised on Congress' tax power. And even if it were possible to invent a *post hoc* rationalization under the Commerce Clause for § 5861(d), the government has not attempted to do so in this case.

D. Carr's Prior Statements and Knowledge of the Danger Posed by the Vagos Based on his Extensive Experience With the Gang Was Favorable to Bronsozian and Material

The Government makes four overlapping arguments in opposition to Bronsozian's *Brady* claim: First, it argues that there was no "discoverable" material. GAB at 44. Second, it argues that the material Bronsozian identified was not "favorable" to him. GAB at 50. Third, it contends that the evidence was not suppressed by the government. GAB at 52. And Fourth, it argues, that the evidence was not "material." GAB 58.

1. The Government's Narrow Interpretation of What is "Discoverable" under *Brady* is Wrong

The government begins by characterizing the only "possible 'evidence'" that could be exculpatory as "the public transcript of expert testimony given by Agent Carr." GAB at 44. But in addition to Carr's sworn testimony in *Kane*, he made several statements to the *Kane* prosecutors that formed the basis for their notice of expert testimony. *See* ER 96 (Notice of Expert Testimony). And when questioned in a post-trial hearing, Carr made more detailed statements describing the violent tendencies of the Vagos, based on his years of experience with the gang. *See* ER 37-47. The scope of *Brady* material in this case goes beyond the bare statements made on the record in *Kane*, and beyond what he told the prosecutors in that case. It also includes what Carr knew about the Vagos and what he would have disclosed had he testified truthfully in this case. *See United States v. Kennedy*, 890 F.2d 1056, 1059 (9th Cir. 1989).

The government also ignores voluminous case law that imposed an *affirmative duty* on the prosecutors to learn what Agent Carr knew, both about the violent nature of the Vagos organization, and about the violent nature of this informant specifically. *See Kyles v. Whitley*, 514 U.S. 419, 438 (1995) ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to other acting on the government's behalf in the case . . ."); *Carriger v. Stewart*, 132 F.3d 463, 479-80 (9th Cir. 1997)(*en banc*) ("Because the prosecution is in a unique position to obtain information known to other agents of the government, it may not be excused from disclosing what it does not know but could have learned."); *United States v. Price*, 566 F.3d 900, 909 (9th Cir. 2009) ("[I]f the prosecutor either failed to disclose the information or failed to discover that his agent knew of or possessed it, a *Brady* violation occurred."). The fact that the prosecutors deliberately chose not to ask Special Agent Carr what he knew about the Vagos does not excuse them from knowing what he would have said.

The government argues, with no supporting authority, that Carr's prior statements were not *Brady* because Carr was a "percipient (not expert) witness in the case." *See* GAB at 44. But evidence is exculpatory when it is "favorable to the defense." *Kyles*, 514 U.S. at 438. It makes no difference whether the source is a percipient witness, rather than an expert.

Next, the government argues that the prosecutors were not "obligated" to "furnish [Bronsozian] with an expert witness" to describe the violent propensity of the Vagos. GAB at 45. But it *was* required to produce exculpatory evidence in its possession to Bronsozian, so that Bronsozian could determine whether and how to present it to the jury. Had the government satisfied its obligation, the defense *would* have likely noticed Carr as an expert on the violent propensity of the Vagos. *See Kennedy*, 890 F.2d at 1060 (evaluating prejudice of alleged *Brady* violation based on what government's expert would have said had he been called by the defense).

Finally, the government argues that it was not "on notice" to ask Carr about the danger posed by the Vagos and the informant because Bronsozian requested only "impeachment" related to the informant, and not *Brady* related to the Vagos *generally*. *See* GAB at 10, n. 4. This is specious.

First, Bronsozian was not required to formally request anything. *See United States v. Agurs*, 427 U.S. 97, 107 (1976); *Milke v. Ryan*, 711 F.3d 998, 1016 (9th Cir. 2013). Second, the Supreme Court has "rejected any . . .[constitutional] distinction between impeachment evidence and exculpatory evidence" when evaluating a prosecutor's *Brady* obligation to produce exculpatory information. *United States v. Bagley*, 473 U.S. 667, 676 (1985). Third, Bronsozian's requests, which were repeated and on the record,[3] clearly put the government on notice of his defense, and specifically asked the government to produce evidence within the possession of its agents that corroborated that defense. *See* ER 298. If there was any doubt about whether Bronsozian was seeking *Brady* evidence, and not simply "impeachment," it was resolved when defense counsel stated that "for the purpose of *Brady*, the government needs to be on notice of what I think it may have in its possession." ER 290. And if there was any doubt about

[3] The government complains that Bronsozian also revealed portions of his defense to the Court in camera. GAB at 9, 12. But it cannot credibly claim that it was not on notice of Bronsozian's defense based on counsel's multiple filings setting forth the defense, *see*, *e.g.*, ER 298, and his multiple statements in open court describing his defense. *See* AOB 8-10.

where the government should look for that evidence, it was resolved when defense counsel stated "I think Special Agent Carr is intimately familiar with that gang and how it operates, and that he is aware of those facts about the informant." *Id*. As the Court noted to defense counsel, "you made your record; the response is up to the government. They have to consider what is within the realm of *Brady* or not, but you've made your record." ER 291.

2. The Evidence Was Favorable to the Defense

The government also takes an unreasonably narrow view of what "favorable" means. According to the government, Carr's knowledge about the violent tendencies of the Vagos was not "favorable" because it did not establish what Bronsozian subjectively believed to be the threat they posed. GAB 51. According to the government, Bronsozian's subjective fear of the Vagos (and the informant) was all that mattered. *Id*. As Bronsozian explained in the AOB, however, evidence of the violent acts by the Vagos was vital to the defense because it *corroborated his fear of the Vagos* and of the informant because of his membership in the gang. AOB at 64. The government ignores that argument, as well as *United States v. James*, 169 F.3d 1210 (9th Cir. 1999), a case that is right on point. *See* AOB at 64-66.

The cases the government does cite, *United States v. Komisaruk* 885 F.2d 490, 493 (9th Cir. 1989) and *United States v. Verduzco*, 373 F.3d 1022 (9th Cir. 2004), are inapposite. In those cases, the courts precluded expert testimony primarily based on Fed R. Evid. 704(b)'s prohibition on presenting expert testimony on the "ultimate issue" of the defendant's state of mind. Bronsozian did not wish to present expert testimony about his state of mind. He merely wished to present evidence, that corroborated the *facts* that made Bronsozian fear the informant. The government does not argue that such evidence would run afoul of Rule 704(b), and it wouldn't.

3. The Evidence Was Suppressed

The government cites *Milke*, 711 F.3d at 1017, for the proposition that there was no *Brady* violation in this case because Bronsozian had "enough information to be able to ascertain the supposed *Brady* material on his own." GAB 53. But *Milke* supports precisely the opposite conclusion.

In that case, the prosecution withheld evidence that its lead detective had a history of misconduct and untruthfulness. *Id*. at 1004. Evidence of the detective's prior misconduct were in the public record, but the defense team was able to uncover the full extent of the detective's misconduct only after it spent "nearly 7000 hours sifting through court records." *Id*. at 1018. This Court noted that "[a] reasonably diligent lawyer couldn't possibly have found these records in time to use them at Milke's trial." *Id*. Therefore, the fact "[t]hat the court documents showing [the detective's] misconduct were available in the public record doesn't diminish the state's obligation to produce them under *Brady*." *Milke*, 711 F.3d at 1017.

The same is true here. The government states that a court order in *Kane* regarding the admissibility of Carr's testimony was "available on Westlaw." GAB 55 at n. 12. But the government provided this Court with a helpful citation to the case. The government did not extend the same courtesy to defense counsel. Nor did the government identify which judicial district and state Carr testified in, or when. A check of the Nationwide PACER case would have been no help either. PACER does not permit a search of cases by witness, but only by "Court Type," "Case Number," "Case Title," "Region," or "Party." [4] None of those would have been helpful in this case. Compare the difficulty faced by the defense with the ease with which the prosecution could have uncovered this evidence. All they would have had to do is ask their own witness about what he knew.[5]

The government cites two other cases, but neither is binding, and neither advances the government's argument. In *United State v. Delgado*, 350 F.3d 520, 527 (6th Cir. 2003), the defense complained, in a *pro se* petition, that the prosecution failed to produce the prior testimony of a government informant. But the record reveals nothing about the circumstances or the diligence exercised by defense. Presumably, the informant had testified within the same district as the defendant and could be located using PACER by searching by "Party." Similarly, in *United States v. Jones*, 160 F.3d 473, 479 (8th Cir. 1998), the government failed to produce the transcript of a cooperating witness' plea colloquy. Again, because the informant was a party to a case, his plea colloquy could have been located by a simple searching on PACER. Not so in this case.

A finding that the evidence was not "suppressed" in this case would set a dangerous precedent. A prosecutor presented with *Brady* requests could confidently refuse to provide that material to the defense, knowing that those materials were "publicly available" on some database. Such a holding would be contrary to *Milke* and render *Brady* a dead letter.

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[4] *See* https://pacer.uspci.uscourts.gov/pcl/pages/welcome.jsf (visited October 8. 2018).

[5] The district court made no findings regarding counsel's diligence in locating Special Agent Carr's prior testimony. At a minimum, the Court cannot deny relief based on a finding that the material was "publicly available" and could have been located with due diligence without remanding to the district court for an evidentiary hearing.

4. The Evidence Was Material

The government cites to *Kennedy*, 890 F.2d at 1059, for the proposition that Carr's statements in *Kane* "cannot be *Brady* material at all" because they would have been inadmissible. GAB 59. But this reflects a fundamental misunderstanding of *Kennedy*, and it misses the point.

In *Kennedy*, the defendant claimed that the prosecution violated *Brady* when it withheld a letter authored by the government's consulting expert, Dr. Burton. As the government notes, this Court held that the *letter itself* was not material under *Brady* because it was inadmissible hearsay, and therefore could not have been presented to the jury. 890 F.2d at 1059. But the Court went on to note the obvious: that the letter's significance to the defense did not depend on it being presented directly to the jury. The statements in the letter would have been presented to the jury by calling the author as a witness. *Id*. ("Accordingly, we will discuss both the materiality of Dr. Burton's letter and the materiality of Dr. Burton's expected testimony had he been called as a witness at one of Kennedy's trials."); *see also Bagley*, 473 U.S. at 683 (court must consider "any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case."). The same analysis applies here. Although Carr's statements in *Kane* were hearsay, they were helpful to the defense because they provided material that could have been used to question Carr on the stand. *See Kennedy*, 890 F.2d at 1059.

Next, the government argues that Carr's prior statements aren't *Brady* because Bronsozian had an opportunity to ask Carr "the sorts of questions" he would have asked had the withheld material been turned over. GAB 60.

But as the government knows, counsel's questions are not evidence. Ninth Circuit Model Criminal Jury Instruction No. 3.7. And Carr's answers to defense counsel's questions were either non-responsive or highly misleading. Had defense counsel been provided with Carr's prior statements, and been able to impeach Carr with those statements, Carr's answers to counsel's questions would have been different, and those answers would have been profoundly helpful to the defense. *See* AOB 56-60.

Finally, the government argues that Carr's prior statements were cumulative, because (1) Carr "accepted defendant's premise" that there are members of the Vagos who had committed violent acts to get their patch. GAB 62; GER 122, and (2) Kakish also testified about Bronsozian's fear of the Vagos. But the transcript cited by the government show that Carr *did not* accept the premise posed by counsel's question. Indeed, it is a classic example of how Carr *avoided* counsel's questions by generalizing them, re-framing them, and then offering useless answers. This would not have been possible had defense counsel been provided with Carr's prior statements. *See* AOB at 60. Finally, Kakish's testimony was inherently suspect, and was no substitute for the direct testimony of John Carr, a law enforcement officer who had twenty years of experience studying the Vagos. *See* AOB at 58-59.

E. Carr's Trial Testimony Was False and Misleading

The government argues that Carr's testimony at trial was not "actually false." GAB 66. But Carr's responses to defense counsel's cross-examination were evasive, overly general, and non-responsive. Defense counsel's attempts to ask more targeted questions of Carr were shut down by the district court. And because defense counsel did not have the benefit of Carr's prior statements in *Kane*, there was no way to pin Carr down.

The government also contends that the prosecution's Expert Notice in Kane, is "neither a statement of nor testimony by Agent Carr." GAB 67. But the Notice begins by stating that "The United States *intends to offer* the testimony of Bureau of Alcohol, Tobacco, Firearms and Explosive Special Agent John Carr." ER 96 (emphasis added). It continues that "Special Agent Carr *will testify* as an expert in relation to motorcycle gangs and their propensity to commit acts of violence on behalf of the club." *Id*. (emphasis added). And indeed, Carr later adopted the statements in that Notice of Expert Testimony as his own in the post-trial hearing. *See* AOB 20-21.

Contrary to the government's argument, this case may require this Court to determine whether Carr's testimony, while "technically" true, was so misleading as to constitute a Due Process Violation. See GAB 69. The stark difference between Carr's statements in *Kane* (which he later adopted as true), and his evasive and goal-oriented testimony in this case, compels the conclusion that Carr's testimony was so misleading as to "misrepresent the truth" and render it "false for *Napue* purposes." *See* AOB at 69.

III. CONCLUSION

For the foregoing reasons, Bronsozian respectfully requests that the Court dismiss the indictment, and in the alternative, vacate his conviction.

Dated: October 12, 2018

BIENERT, MILLER & KATZMAN, PLC

By: */s/ John L. Littrel*
John L. Littrell

Attorneys for Defendant-Appellant
NERSES NICK BRONSOZIAN

CERTIFICATE OF COMPLIANCE TO
FED. R. APP. P. 32(a)(7)(C) AND
CIRCUIT RULE 32-1 FOR CASE NUMBER 17-50197

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that this brief is proportionately spaced, has a typeface of 14 points or more and contains 6422 words as counted by the Microsoft Word 2017 word processing program used to generate the brief.

Dated: October 12, 2018

/s/ John L. Littrell
John L. Littrell