

ARGUMENT

I. THE MOTIONS FOR JUDGMENT OF ACQUITTAL, OR THE MOTION TO VACATE, MADE IMMEDIATELY FOLLOWING THE TRIAL, SHOULD HAVE BEEN GRANTED.

At trial, the government's theory of the case was that investors were promised only nonexistent "prime bank" programs as displayed in GX-1*, upon which the "ponzi scheme investment fraud" was predicated (Schipper at TR 41-43, 3196; Gezon at TR 747, 3714-15), as substantiated by the "overwhelming evidence" of GX-1, a "prime bank" booklet, and Agent Flink's summary exhibits showing a "ponzi scheme" solely because he refused to include any non-prime bank investments in his exhibits (Flink at TR 2052).

The first mail fraud count was dated 10/21/99. A 6/99, investor newsletter (GX-31), provided notice that their investments were being held at Suisse Security Bank & Trust (hereafter referred to as "SSBT"). In 10/99, a newsletter provided notice of the main investments, the Bahamas CD Program (GX-2/GX-3), described as a certificate of deposit collateralized to purchase stocks (GX-33). The prosecution team removed the Bahamas CD flyer from this newsletter before

* Government trial exhibits referenced as "GX"

submitting it as evidence. GX-1 was not competent or substantial evidence to support summary exhibits or the charges. While the investor newsletters were also entered into evidence by the prosecution, other than to occasionally misconstrue their content by taking excerpts out of context, the jury was not directed to view them (Example: TR 3235-36).

Another main stock investment, the MLC Branson Project, was first noticed to investors in a newsletter (GX-41, p. 8), and later described as the "centerpiece" of the 5/01 investor seminar by AUSA Gezon in a filing after the trial (R. 501-1, p. 10). At trial, however, Agent Flink testified that MLC was not an "obvious" investment (Flink at TR 2058), and AUSA Gezon misrepresents it to the jury as something which was not done until 2002 (TR 3721). The Appellee persists in misrepresenting the MLC Branson Project as a venture which was not begun or promoted until after "Marcusse left Michigan" in "2002" (AB-p. 83), however, AUSA Gezon's 10/5/05 response to defendant Wesley Boss's objections to the PSR states,

"The government notes that the defendant was fully aware of the upcoming Branson Project and knew it was being represented as the next phase of Access' alleged highly successful business. The project was the centerpiece of the May [2001] seminar and was mentioned in newsletters" (R. 501-1, p.10). This filing had earlier indicated, Wesley Boss "no longer was a sales manager in April or May of 2001" (R. 501-1, p.4).

The government alleged in the indictment there were approximately 577 investors involved in this case. The 12/5/03 Criminal Complaint attested that "approximately 150 investors returned surveys" (R.2, p.2). In spite of this input and after 3-1/2 years of investigation, the prosecution team was only able to find 6 out of the 28 total investors that appeared as government witnesses who could testify they "recognized" GX-1, whereas several investors testified they had never seen it before (Exh. A). Even the Appellee Brief contains no investor testimony directly referencing GX-1 (AB-p. 15, 26-27). Investor Sharpe who is mentioned next to the reference to GX-1, at two separate points in his testimony, confirmed that he did not recognize GX-1 (TR 462, 481), thereby contradicting the Appellee Brief representations that the Bahamas CD Program was a "prime bank" program (AB-p.14; R.688: 1-4). Sharpe does testify that GX-2, the Bahamas CD Program, was the program he recognized and went on to describe (TR 462-63).

In essence, the evidence and testimony at trial by the prosecution team, were it to be accurately portrayed, established that NO INVESTORS could be located that believed GX-1, a "prime bank instrument", to be the only type of investment offered on their behalf (Exh. A).

Thus, GX-1 was immaterial to any criminal charges other than to prove the accused were innocent of "prime bank" fraud.

Exhibit A establishes that of the few investors that saw GX-1, it was likely around the time \$400,000 was invested in a small diversification called "Valley Boyz". These funds were seized by the government in 5/99 and returned to the accused (AUSA Pixler at TR 769-71) as AUSA Gezon confirmed "that's money that the defendants lost, and they didn't make any -- there wasn't any profitable high yield investment program." (Gezon at TR 749). Obviously no profits were obtained, but the mere act of returning principal to the investors in this matter, was charged as a monthly "profit" check in Count 40, Item 1, m and n (R. 323, p.10), yet AUSA Pixler, flown in from the Phoenix office (TR 633), testified the government determined the accused to be the "innocent victim" of "prime bank fraud" in a 5/15/00 contract regarding it (GX-380). AUSA Gezon used this contract to attest that the accused had "notice" that "prime bank instruments" were a crime (TR 3532). Hence, the reason that Richard Gerry and his advisor, Government Attorney James Kramer-Wilt, were added as investment advisors to the group shortly thereafter.

All 6 investors who saw GX-1 did so before the "notice" included in GX-380, and Exhibit A even establishes they all saw GX-1 before 10/21/99, the date of the first mail fraud count (R.323). The 10/99 newsletter disclosing the SSBT Bahamas investment was in "stocks" (GX-33, p. 2), also stated, "We have

been in the new program since late last year" (GX-33, p.1; Moore at TR 1675); and, "This program is not considered to be a standard bank debenture program" (GX-33, p.2), so the few investors who may have seen GX-1 thereby had notice that it was no longer valid as part of the current investment program.

It is further an irrefutable fact that the prosecution tampered with this main evidence at trial in order to create the probable cause to pursue the allegation that the accused were only "pitching" a "prime bank" type of program. The prosecution combined two inherently different investment products together, by taking the "flagship" one of stocks, the Bahamas CD Program (GX-33, p.2; Marcusse at TR 3040, 3043-44), from SSBT, the offshore bank recommended in writing by Agent Forrester (R.392-2, pgs. 15-18), and combining its features with that of GX-1, the "prime bank" program, a contradiction in terms, but which were nevertheless described in the indictment as a single "high yield" product (R.323, Items 11, 12, 13, 18, pgs.3-5). The prosecution removed the attached flyer (GX-2/GX-3) from the stock program described in the 10/99 investor newsletter (GX-33), and placed it with the "prime bank" booklet (GX-1), beginning with the 12/5/03 Criminal Complaint (R.2), used to obtain the indictment from the grand jury. A civil litigation case filed on 7/9/03 in the same court, prior to the instant case, proves this evidence tampering fraud occurred (Exh. B --

Case No. 1:03-cv-00454-RAE, Item 34, Document 1, p.4, Exhibit A, Document 1-2, pgs.1-7,). Exhibit A to the 2003 civil litigation case contains the entire 10/99 newsletter including its attachments. The accused informed the prosecution of this inaccuracy early on, yet this vital point was ignored to steamroll the case forward.

It was first brought to the prosecution's attention on the record almost a full year prior to trial at the detention hearings by Marcusse's cross-examination of their "expert" witness (Zawistowski at TR 95-96, 7/28/04). Detention exhibit GX #2 (GX-1 at trial) was objected to by Marcusse at this hearing for its irrelevancy to any fraud (TR 19, 7/28/04), but she was not permitted to object to any evidence at trial (Court at TR 31). FBI Agent Moore, who brought forth the initial "prime bank" Criminal Complaint (R.2, Affidavit, Item 8), admits at trial that there is no prime bank program that contains stocks (Moore at TR 1674-75). Moore had a background as a securities broker for six years prior to joining the FBI (R.2, Affidavit, Item 3) and concedes this fact only after Marcusse has him read from the 10/99 newsletter that, "We are instead in what is termed a stock trading program" (Moore at TR 1674). IRS Agent Flink further admits that, "it's possible that one can trade stocks with collateral as a certificate of deposit", identical to the investor program described in GX-33 (Flink at TR 2072-73).

Expert government witness Leonard Zawistowski concedes that prime bank debentures are not stocks, but "debt instruments" (TR 804). The prosecution's response to this fundamental flaw in their case was to relentlessly pursue the accusations through closing arguments (Gezon at TR 3532), and rebuttal closing arguments where AUSA Gezon tells the jury to "look" at the "believable evidence" of "Exhibit 1", right after he asks them to consider whether the accused "made deliberate lies" (Gezon at TR 3714). The prosecution's accusations were thus substantially aided not only by misleading the jury, but by the fact that it was functionally impossible for the accused to have "performed" what the prosecution alleged they "promised" on a product which was created after the fact.

The SSBT Bahamas CD program continues to be misrepresented as a "prime bank" fraud upon appeal, along with the trial testimony of investor John Beemer (AB-p.14-15, 27). GX-33, the 10/99 newsletter to which the investment flyer (GX-2/GX-3) had been attached, discloses "the program has a profit pool", which is "based on movements in the market, either up or down. The profit pool earnings are not guaranteed returns in that they may be higher or lower" (GX-33, p.2). Government witness investor John Beemer confirms the Bahamas CD Program "had to do with the stock market" and the "profit pool was going to be based on the profit at the end" (TR 349).

Another reason the government's theory of the case was knowingly false is that all investors signed contract agreements and received deposit receipts, entered into evidence, that included clauses for acknowledgements of "best efforts" only, no guarantees of profits, diversification, commissions, that funds would be liquid only in the event of a prior investment cashing out, arbitration, that the group would not be held responsible in the event of circumstances beyond their control, otherwise known as a "force majeure" clause. Further, a conveyance of discretionary control to the accused was made over the choice of investments, and the descriptions of the investments as "Private Placements" and as "Venture Capital Programs", denoted the existence of risk, equity or stock positions in companies, as well as the tax ramifications (Kaczor at TR 3592-95; Def. Exh. M-L; GX-69f; GX-63c; See Exh. E-3, E-4, E-5; Exh. B, Doc. 1-3, p.4). Item 12 in the indictment alleged that "investor could choose to leave the program at any time and their principal would be returned in full" (R.323, p.4). This was not true as established by these contracts. Even the investment product sheet on the Bahamas CD stock program (GX-2/ GX-3) clearly states, "Contracts are for one year. Individual investor may renew at anniversary date under mutual consent", as further confirmed by GX-33, p.4. It also mentions the "compounding" of returns several times. The prosecution seized upon the fact that

because wire transfers were not made from offshore, this was somehow "proof" of a ponzi because no profits were deposited in the accounts they selected to show the jury. This flyer demonstrates that in order for the accused to do what was represented to investors, i.e., "compound" their returns, they had to leave the funds offshore. That Agent Corcoran did not include any "related" offshore investment accounts in his investigation or the IRS's summary exhibits, suggests that this was purposefully omitted to support the prosecution's insidious claims (Corcoran at TR 2292-93).

Agent Flink makes the excuse that they were "not able to get any information from the Bahamas" (Flink at TR 1982-83). He further insists, "if it's not drug money, then they will not cooperate with us" (Flink at TR 1983). This was not true about the Bahamas or the United Kingdom as of 3/10/01 (R.422-3, pgs.27-30, Refer also to U.S. Attorney's Bulletin, July, 2001, p.43-44. In USA v. Horton, Case No. 1:06-cr-87 in the same court, the FBI was able to obtain a "Seizure Warrant" for \$1 million in funds in a non-drug case from Hong Kong (Exh. C).

The unexpected revocation of the banking license causing the failure of Suisse Security Bank on 4/2/01 certainly fits under the category of "force majeure". There is also the issue that an agreement to arbitration is irrevocable and enforceable as a remedy under Title 9, U.S.C. §2.

The investor contract was misrepresented and submitted at trial as being within GX-1, however, at the detention hearing, it had been a separate exhibit (Flink at TR 2042), indicating the investor contract had been a stand-alone document, and as confirmed by investor Sharpe (TR 486).

Closing arguments for Marcusse asked the jury to concentrate on the main offense charged, "What is this trial about? Please, I ask you to stay focused on this. What is this trial about? This trial is about whether or not Mrs. Marcusse operated a Ponzi scheme" (Kaczor at TR 3584). He defines it in the prosecution's own terms, "Foundation of a Ponzi scheme, it's a lie, it's a scheme. It's based upon the fact that there is no investment" (Kaczor at TR 3591). Counsel centered his argument on the numerous legitimate investments made invoking clear reasonable doubt and going over the investor contracts in detail.

In rebuttal closing, AUSA Gezon in effect dismisses the "ponzi scheme" charge by telling the jury, "you will not see the words Ponzi scheme in any of the elements that you have to consider in these crimes" (Gezon at TR 3713). This last minute reversal shows the prosecutor abandoned his main basis and theme for the mail fraud charges, substituting a tax offense instead, however, the Appellee Brief seeks to act as if this never occurred and resubmits the "ponzi scheme" charge (AB-p.5)

"What must be proven beyond a reasonable doubt is that the defendants knowingly devised or intended to devise a scheme to defraud that was substantially the same as the one alleged in the indictment." United States v. Gold Unlimited, 177 F. 3d 472, 482 (1999); Francis v. Franklin, 471 U.S. 307 (1985).

Legitimate investments were in fact made in this case and these contracts rendered the government's case alleging "investment fraud", based upon a single "prime bank instrument" product (otherwise known as "high yield investment fraud"), totally misleading and without merit. High yield investment fraud requires the presence of, "fraudulent prime bank financial instruments" as acknowledged by the prosecution (12/5/03 Criminal Complaint, R.2; PSR Item 42; AB-p.9, 27).

United States v. Howick, 263 F. 3d 1056, 1066-67 (9th Cir., 2001), cert. denied, 535 U.S. 946 (2002), reveals that Congress passed the Financial Instruments Anti-Fraud Act of 1995, specifying 18 U.S.C. §514, "Fictitious Obligations", to embrace the nonexistent instruments named as "prime bank notes, prime bank derivatives, [and] prime bank guarantees". The July, 2001, United States Attorneys' Bulletin provides notice of the same (pgs.25-29, Exh. G-2).

In essence, if the government had a legitimate "prime bank" prosecution in the instant case, they would have been able to bring these charges as Congress had intended, under 18 U.S.C.

§514, rather than constantly changing the label attached to infer "prime bank notes" without actually being forced to state an accusation known to be false.

"Failure to allege element which established very illegality of behavior and court's jurisdiction is fatal to indictment." United States v. Adkinson, 135 F. 1363 (11th Cir., 1998). In United States v. Holzclaw, 950 F. Supp. 1306 (S.D.W.Va., 1997), a judgment of acquittal was granted after conviction on securities fraud because it wasn't a security. See also United States v. Gatewood, 173 F. 3d 983 (6th Cir., 1999).

The establishment at trial of "legitimate" investments having been made, also wholly disproved the government's "classic ponzi scheme" allegation. Agent Flink conceded that at least two sizeable stock-based or "legitimate" investments had been made (Flink at TR 2064, 2110, 3375).

Notice given to investors in the newsletters, after accounting for the prosecution's tampering with them before submission as evidence, establishes there was no intent to defraud investors or "investment fraud". The investors were noticed of a stock-based program at the start of the time frame included in the 39 mail fraud counts (GX-33). The investors were noticed in a newsletter that the "bank failed" (Flink at TR 2048; 9/01 newsletter GX-49, p.4). This 9/01 newsletter was sent prior to any knowledge of a federal investigation, but after

SSBT made a request to appeal the license revocation and report back on 8/24/01 (Def. Exh. M-Q, p.2, Item 5). The prosecution has never questioned that a Bahamas program was presented to investors; instead they attempted to misleadingly describe it as a "prime bank" program. The prosecution conceded after trial in a filing made, regarding Wesley Boss only, that they were aware the MLC Branson Project had been a "centerpiece" for the group.

Therefore, not only was there insufficient evidence, there was no evidence presented to establish the government's theory of the case that GX-1 had been the only type of investment presented to the investor group, disproving "investment fraud". This does not meet the required standard of "proof beyond a reasonable doubt" that is necessary to sustain jury convictions. The Sixth Circuit has ruled that a judgment for insufficiency of the evidence will be reversed only if the judgment is not supported by substantial and competent evidence upon the record as a whole. United States v. Khalil, 279 F. 3d 358, 368 (6th Cir., 2002); United States v. Beddow, 957 F. 2d 1330, 1334 (6th Cir., 1992).

In regards to any tax offenses, the prosecution conceded at trial that those related to the "508" were possibly due to the accused "misreading" the tax code (Gezon at TR 3452), causing the essential element of "willfulness" to be lacking. Investor Margaret Linnell, who was an enrolled agent with the IRS with 50

years of experience as an accountant (Linnell at TR 2710), testified that she had "concluded that they [the 508 ministries] were legitimate" and that she had shared her "conclusions" with Marcusse (Linnell at TR 2726). AUSA Gezon further admits in a "post trial" filing, that the nature of the tax-related conspiracy charge in count 42 was not that of an offense described under 26 U.S.C. §7202 (R.501-1, p.8), as the charge had been described in the indictment. Instead, it was switched to a 26 U.S.C. §7203 type of conspiracy, based on the unreported income allegations against the accused and joined to the conspiracy to commit mail fraud, thereby changed and entered in the jury instructions after the defense had rested (See Issue XI). On appeal, the government now seeks to resubmit their withdrawn §7202 tax offense (AB-p.29); the "church" tax offense conceded at trial as "misreading" the tax code; and now add the new offense of an "abusive tax shelter" by misconstruing the distributions to investors as taxable when they were a non-taxable distribution under 26 U.S.C. §731, thereby attempting to keep afloat the "conspiracy" nature of Count 42, 18 U.S.C. §371, of multiple tax offenses to revive their flagging case (AB-p.12, 17-18, 27-29, 61). Agent Moore's initial Criminal Complaint of 12/5/03 had long ago put the issue to rest as to the joint venture investment activities being structured as a private placement (R.2). To avoid repetitiveness on the issue of tax

offenses in regards to the alleged improper mishandling of qualified funds, this unmerited charge is covered in depth in Issue III.

Prior to submitting the §7203 tax "conspiracy" to the jury, the trial judge denied the defense their requests to instruct the jury that "gross income" did not include "pass through" funds, gifts and loans (Valentine at TR 3457) or to include the phrase "unless excluded by law" (Garthe at TR 3456; Valentine at TR 3457-59), given the court's conclusion, "if I give that instruction with that in it, there would be no criminal prosecution of them because it wouldn't be income" (Court at TR 3465). Agent Goeman had earlier admitted that the definition of gross income should include "unless excluded by law" (Goeman at TR 2373).

After trial, the government reduces the Boss's unreported income by \$142,377 for "pass through" funds going into investments, leaving the others who are appealing the convictions uncorrected (PSR - Items 147, 171; R.501-1, p.6).

United States v. Jorn, 400 U.S. 470, 489 (1970), has ruled that future prosecutions are barred where a "judge exercises his authority to help the prosecution, at a trial in which its case is going badly, by affording it another, more favorable opportunity to convict the accused," Gori v. United States, 367 U.S. 364.

The Supreme Court has also mandated that a prosecutor is "ethically obligated -- to drop charges when he believes that probable cause as established by the available, admissible evidence is lacking." Newton v. Rumery, 480 U.S. 386, 409 (1987).

United States v. Sturman, 951 F. 2d 1466, 1473 (6th Cir., 1991), held that if an offense clause covers an act or offense, a person cannot alternatively be convicted under the broad defraud clause. The chief concern of this Court in Minarik was that the government by constantly changing the prosecution theory, never adequately informed the defendant of the charges against him.

After the jury had found the accused guilty of the revised mail fraud scheme of a §7203 tax offense, however, the prosecution, the U.S. Attorney, and the trial judge all engage in calling the offense a "ponzi scheme" again, a fact which was not found by the jury. "Of course, if a jury convicts on a count containing insufficient grounds, the conviction cannot stand since the verdict may have rested on insufficient ground." Zant v. Stephens, 462 U.S. 862 (1983).

The motions for judgment of acquittal, both that of the renewed one at trial (TR 3486-92), and the written one timely filed after trial (R.430), centered on two basic arguments, the investor contracts and the well-established fact that legitimate

investments had been made (Kaczor at TR 3489). A motion to vacate the charges was also filed (R.435-1), including 41 additional issues, such as Item 1, "This court cannot be party to fraud"; Item 12, that Marcusse was "never informed of the nature and cause of the action against her", referring to the on-again, off-again nature of the "ponzi scheme" allegation; and Item 35, "The state may not use false evidence to obtain a conviction. Napue v. Illinois, 360 U.S. 264, 269 (1959)."

The trial judge denies the motions for judgment of acquittal at trial and ignores the motion to vacate, stating in a written Opinion that the accused had operated a "Ponzi scheme" (R.499, pgs.5, 11, 15). The judge is quoted supporting the "intent to defraud" element as, "In reality, Access Financial was a Ponzi scheme in which investors were paid "interest" checks from other investors' funds. The remainder of the investor funds collected were spent by Defendants. The Sixth Circuit has previously held that the question of intent to defraud in a Ponzi scheme "is not debatable." Conroy v. Shott, 363 F 2d 90, 92 (6th. Cir., 1966); see also In re Indep.Clearing House Co., 77 B.R.843 (D. Utah, 1987) (finding intent to defraud from "mere fact that a debtor was running a Ponzi scheme"). Thus, the jury could reasonably infer an intent to defraud on the part of the Defendants from their operation of a Ponzi scheme." [end quote] (R.499, p.5).

The Sixth Circuit has also ruled, however, that the question of fraudulent intent is for the jury to decide in a mail fraud prosecution. United States v. Van Dyke, 605 F 2d 220 (1979).

Anderson v. Sheppard, 856 F 2d 741 (6th Cir., 1988), ruled that if a trial judge's involvement has resulted in an unwarranted prejudgment of the merits of the case, any resulting judgment in favor of the party so favored is invalid. In the instant case, the ruling that served to prohibit any kind of meaningful defense that "alleged investments" are "wholly unrelated and irrelevant" to the charges indicated the existence of such "prejudgment" (R.401). Marcusse had asked that the trial judge recuse himself for bias at trial, but he chose to press forward (Court at TR 20).

That this determination of a "ponzi scheme" by the trial judge was known to rest on a slippery slope is indicated by the change of the offense from that of a "ponzi scheme" used at the sentencings of both Bosses (TR 11, 10/7/05), Besser (TR 31, 10/13/05), and Buffin (TR 59, 10/14/05), but switched at Marcusse's to that of "specialized high return investments" (TR 45, 10/28/05, R.639). Marcusse specifically objected at sentencing to the "false claims of a Ponzi", including the exclusion of vital evidence and witnesses, which had been used to "deprive" her of a meaningful trial. She believed the court

to be lacking the constitutional and moral authority to go forward and sentence her when "there was no controversy to adjudicate" because the "intent to defraud" is "not debatable" (R.18, 10/28/05, R.639). The use of this new offense at her sentencing clearly demonstrates what a moving target the charges were at the district court level. "Specialized high return investments" have not even been defined as a criminal offense, and by making up this new term for sentencing, the judge clearly indicates he knew "high yield investment fraud" or "prime bank" fraud didn't apply to the case either.

Hudson v. Louisiana, 450 U.S. 40, 41 (1981) bars the jury's guilty verdict as to the crime or an element thereof and in the event that the state failed to prove its case as a matter of law. Even with the limited evidence allowed, it was well demonstrated that legitimate investments were made causing the prosecution to concede that the "ponzi scheme" allegation was no longer going to the jury "in any of the elements they had to consider". The "smoke and mirrors" used to confuse the jury is plain. The term "prime bank" was used in the initial Complaint (R.2), in the PSR (Item 42), and now again in the Appellee Brief (AB-p.14-15, 26-27), but "high yield" investment fraud was named in the indictment (R.323, Item 12) and in the judge's denial for Motion of Acquittal (R.499, p.5), then finally something termed "specialized" at sentencing. These ever-changing descriptions

for the fraud known as a "prime bank instrument", cannot replace the fact that investments based in stocks are widely accepted and legitimate. In essence, "the government's case was so lacking that it should not have even been submitted to the jury." Burks v. United States, 437 U.S. 1, 16 (1978).

II. CHARGING MULTIPLE CONSPIRACIES IS BARRED BY DOUBLE JEOPARDY;
THE COUNTS IN THE INDICTMENT ARE ALSO VOID FOR DUPLICITY.

The prosecution alleged two interwoven mail fraud schemes (R.323; Gov. Trial Brief, R.297, p.4), a "ponzi" scheme (Schipper at TR 41) and a "tax" scheme (Count 40, R.323; Gezon at TR 3453-55, 3744) to support three conspiracies (Counts 40, 41, 42). Once the presence of legitimate investments were established at trial, the prosecution withdrew the "ponzi" scheme (Gezon at TR 3713), and switched to a "failure to file and pay tax" scheme upon which to base mail fraud charges (Gezon at TR 3744).

"Where two distinct crimes are charged in one count, count is void since defendant is denied right to unanimous concurrence of jury on each offense charged before conviction." United States v. Warner, 428 F. 2d 730 (8th Cir., 1970), cert. denied, 400 U.S. 930.

"[A]t the indictment stage, the United States is free to prosecute under any applicable statute without regard to which

statute is most specifically tailored to the facts alleged." United States v. Mohney, 949 F. 2d 899, 901 (6th Cir., 1991). However, the prosecutor is not free to "circumvent Congressional intent." 18 U.S.C. §1341 does not include within proscription scheme to defraud Internal Revenue in collection of income taxes per United States v. Henderson, 486 F. Supp.1048 (S.D.N.Y., 1974). Tax Division Directive No. 99, Updated May, 2001, cautions against using mail fraud to prosecute an "abusive tax shelter", which is now being named as an allegation for the first time on appeal (AB-p. 12, 17). At trial, the "nature" of the tax conspiracy was that of a 26 U.S.C. §7202, switching to a §7203 by the end of the trial (Gezon at TR 3455), now the emphasis is changing to an "abusive tax shelter". Before the license revocation of SSBT in 4/01, investors had not received more than their original principal. Investor newsletters disclosed that the "profit pool" distributions would be taxable unless excluded by law and that 1099's would be issued (9/99, GX-31; 4/01, GX-44; Kaczor at TR 3597).

United States v. Helmsley, 941 F 2d 71, 91 2d (1991), has ruled that when the government proceeds under the conspiracy to defraud clause, it must plead the "essential nature" of the alleged fraudulent scheme.

Directive No. 99 further clarifies, "Tax offenses are not predicate acts of RICO or specified unlawful activities for

money laundering offenses--a deliberate Congressional decision-- and converting a tax offense into a RICO or money laundering case through the charging of mail, wire, or bank fraud based on a violation of internal revenue laws as the underlying illegal act could be viewed as circumventing Congressional intent unless the circumstances justifying the use of mail, wire, or bank fraud are present."

Legitimate probable cause justifying the use of mail fraud for a "ponzi scheme" was not present shown by the withdrawal of the charge before jury deliberations. To charge tax offenses within each count in the event the "ponzi scheme" could not be proven as a "backup" to keep the mail fraud and money laundering counts in place was an abuse of charging authority.

The Supreme Court has further ruled that it does not become several conspiracies because it continues over a period of time or because it is an agreement to commit several offenses. Braverman v. United States, 317 U.S. 49, 52 (1952); United States v. Broce, 488 U.S. 563, 580 (1989). To seek to punish the same behavior twice violates the Double Jeopardy Clause of the Fifth Amendment.

Double jeopardy protects against (1) multiple punishments for the same offense, and (2) prosecution for both a parent conspiracy and an offspring conspiracy. United States v. Barrett, 932 E. 2d 355, 360 (6th Cir., 1991). Absent specific

Congressional intent, conviction of the same offense under two statutes violates the Double Jeopardy Clause. United States v. Hebeke, 89 F. 3d 279, 284 (6th Cir.), cert. denied, 519 U.S. 999 (1996).

The July, 2005, AUSA Tax Resource Manual - Title 9 under Section 9-105.750 which amended money laundering provisions, specifically cautions that, "This amendment was intended to facilitate and enhance the prosecution of money launderers. It was not intended to provide a substitute for traditional Title 18 and Title 26 charges related to tax evasion, filing of false returns, including the aiding and abetting thereof, or tax fraud conspiracy." (Money Laundering Offenses in regards to the Anti-Drug Abuse Act of 1988 (Pub. L. 100-690)).

According to the Dept. of Justice website, Criminal Tax Manual, 23.00 Conspiracy to Commit Offense or to Defraud the United States, under 23.01, 18 U.S.C. §371, "If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

Therefore, this charging of multiple interchangeable conspiracies and duplicitous counts were used to support the outrageous sentencing recommendations of 14,590 months. This resulted in increasing the sentence to Marcusse by 2500% or a

full 24 years longer than the statutory maximum for the 26 U.S.C. §7203 offense found by the jury. There is also the issue that Count 40 charged no unreported income against Marcusse, making any prison sentence unreasonable for failure to file, as the "evidence" at trial presented by the IRS did not match the charges in the indictment.

United States v. Adesida, 129 F. 3d 846, 849 (6th Cir., 1997), cert. denied, 523 U.S. 1112 (1998), ruled that a duplicitous indictment that charged two or more separate offenses in a single count may not provide proper notice to the defendant. United States v. Resendiz-Ponce, 549 U.S. _____ (2007), ruled that in regards to indictments, "there are crimes that must be charged with greater specificity ... both to provide fair notice to defendants and to assure that any convictions would arise out of the theory of guilt presented to the grand jury."

Motions to dismiss the indictment under Federal Rules of Criminal Procedure Rule 12(b) were filed prior to trial (R.312, R.315, R.317), naming duplicitous and multiplicitous counts as two of many reasons, including lack of probable cause, prosecutorial misconduct with the grand jury, selectivity and vindictiveness, but were denied by the court (R.325). The defects in the indictment were not just limited to these types of issues. The constructive amendment or variance which occurred

at trial, that case law considers "per se prejudicial", was enabled by deliberately crafted defects so profound as to deprive the accused of all constitutional protections when a "ponzi scheme" allegation was included simply to make the "intent to defraud" an issue which was "not debatable". United States v. Ford, 872 F. 2d 1231, 1235 (6th Cir., 1989), cert. denied, 495 U.S. 918 (1990); Conroy v. Shott, 363 F 2d 90, 92 (6th Cir., 1966).

III. MISLEADING IRS SUMMARY EXHIBITS BASED ON THE SUPPRESSION OF ALL UNDERLYING BANK RECORDS HELD IN THE GOVERNMENT'S POSSESSION, AND THE INACCURATE APPLICATION OF TAX LAW RESULTED IN UNLAWFUL CONVICTIONS.

The government's case was heavily dependent upon the IRS's summary charts which represented to the jury that the accused had "spent" \$12.1 million "on themselves and others" (GX-170 at TR 1725; GX-171 at TR 1735-36; GX-172 at TR 1927-28). It was also dependant on all underlying bank records being suppressed. The Government's Trial Brief stated that for summary evidence to be admissible under Rule 1006 of the Federal Rules of Evidence, it must be "accurate" and acknowledged that the "only requirement is that the underlying evidence be admissible under some evidentiary theory" (R.297, pgs. 25-26). The summary evidence and charts used in this instant case were accepted on

its face, with no allowance made for the defense to use underlying bank records to challenge the validity of the evidence presented to the jury (Marcusse at TR 3191).

The summary exhibits were materially misleading. Agent Flink eventually admitted that if an investment had not been that of a "prime bank" type, then he didn't count it at all (Flink at TR 2052-54, 2058, 2070-76). This caused the substantial dispute over \$12.1 million the accused contended was "spent" on legitimate non prime-bank investments. IRS Agent witnesses alleged there was 70 bank accounts, but presented no list of the accounts, making the figure suspect.

Out of these 70 bank accounts, IRS agents admit they selected 20 to show the jury, (GX-170) including only those accounts into which investor funds were initially deposited, but suppressing from the jury's view all accounts that were "related" investment accounts (Corcoran at TR 2292; Flink at TR 2106). This ploy was further used to point out that the balance in the selected accounts was below the total amount of investor funds received (Corcoran at TR 2218), as if this were proof of fraud. A huge "timeline" chart was set up in the courtroom to illustrate this point (TR 1949; Exh. D). If the accused were in fact investing the funds, the deposit accounts should have been low, as one does not invest in offshore stock programs by leaving the funds in a checking account in Grand Rapids,

Michigan. Both IRS "investigators" claimed under cross that they did no investigation of any offshore accounts, thereby freeing them to act as if no investments had been made (Corcoran at TR 2292-93; Flink at TR 3420-24).

There were also many misleading unreported income summary exhibits that the IRS used to falsify "income" for the accused out of "pass through" funds into investments so that they might manufacture motive (Examples: GX-90, GX-94, GX-155, GX-171).

United States v. Brickey, 426 F. 2d 680 (8th Cir., 1970), cert. denied, 400 U.S. 828, ruled that when defense attorneys did not object to the use of charts in testimony, defendant waived alleged errors with regard to use of charts. Marcusse was silenced behind defense attorneys and not permitted to make objections at trial under the threat of removal (Court at TR 26-27, 31). She therefore preserves the objections she made to these same or similar summary exhibits at the detention hearing (TR 131, 133-134, 139, 7/28/04).

A chart submitted by prosecution is a very persuasive and powerful tool and must be fairly used, since...a chart for any reason that presents an unfair picture can be a potent weapon for harm, and permitting the jury to consider it is error.

United States v. Conlin, 551 F. 2d 534 (2nd Cir., 1977). cert. denied, 434 U.S. 831; United States v. Scales, 594 F. 2d 558, 564 (6th Cir., 1979).

The Bosses had removed most of the bank records in 2001 after their embezzlement (See Boss v. U.S., 1:06-cv-694, R.11, p.2; Marcusse at TR 3192). These bank records were then given to the government in return for a sentence reduction on a plea bargain as reported in the Grand Rapids Press in 2002 (Exh. G). Access to these bank records was limited and made just as difficult as possible by the prosecution and the court (TR 1762, 1859-61, 1986-91). The trial judge even gets angry (TR 1986), because the jury is coming in and he claims the bank records "were right here" (TR 1861) when neither defense attorneys nor Marcusse knew where they were or had been allowed to see them as promised over a lunch break (TR 1860). The government says that the records have always been available, but then the judge immediately says, "These exhibits will obviously be taken back with you to your offices, Mr. Gezon" ... where you have a conference room and the lawyers can come and look at them?" (TR 1987). Defense counsel admits Marcusse had earlier given him "a list that I brought to the government", further responds, "I understand they've been there for months. Unfortunately, Mrs. Marcusse hasn't had access to them." (Kaczor at TR 1988).

The judge then attempts to restrict access to the records for Marcusse by claiming, "this can't be a fishing expedition. I want this to be narrowed" (Court at TR 1989), limiting both the

records and the amount of time allowed to review them, which is not permitted with Rule 1006 summary evidence.

By court order, Jencks material was limited for the pro se's only, given at the time the witness actually testified and immediately removed thereafter (TR 13, 5/5/05 hearing), thereby drastically reducing its effectiveness for impeachment purposes and again improperly discriminating against the pro se accused. United States v. Arboleda, 929 F. 2d 858 (1st Cir., 1991), has stated that critical to the analysis of alleged violations of Jencks is whether the timing of disclosure of the material prevented its effective use by the defense.

The Appellee Brief claims Marcusse "took all of the Access records from the closed office and went into hiding." It even claims "the records of Access were never located" (AB-p.33). This was not true and used to prejudice her. The bank records in the government's possession would prove they are the original source documents, including the original cancelled checks and wire transfer forms. The prosecution knew it would be impossible for Marcusse to "produce" what she didn't have or to mount a meaningful defense without access to these records. Marcusse had "stipulated" to the bank records contained in summary exhibit GX-170 on the condition that she be allowed to use the records for her own evidence (TR 629-30). This was never permitted.

Chief government witness, Agent Flink, who was used to

present many of the government's exhibits, was evasive and contradictory, weaving foregone conclusions in his testimony. He testifies that he had worked for CID for 25 years (TR 1686), yet he's "not sure" if there needs to be a "live human being" as a signatory on a bank account (TR 2106-07). He also claims that, "in his experience", the way a "Ponzi" is "typically" run is to stop taking in new funds (TR 2109-10), in response to questions as to why the accused advised investors in an 11/00 newsletter that they would no longer be accepting new funds from any investors if they actually had been a "Ponzi" (TR 2060; GX-39; Beemer at TR 349).

Agent Flink changes his testimony regarding the amount of funds that went into MLC Development ("MLC" are initials for Chairman Michael L. Carney). At the detention hearing, Flink claims only \$160,000 (TR 7-9, 7/29/04), and he refuses to admit that a \$1.2 million wire transfer went to MLC and from there to Robert Plaster of Evergreen Investments (TR 21-23, 7/29/04).

On 7/11/04, shortly before Agent Flink's testimony, Briton's Sunday Mercury quoted a "National Crime Squad spokesman", that attorney Gurmail Sidhu's home and office had been raided under a search warrant for "drug trafficking", mentioning Starbright and City Center, when confiscating computers and records (See Exh. E). The raid prevented Marcusse from using these records to prove several wire transfers went to

MLC. Even halfway through trial, Agent Flink still would not admit that MLC had been an "obvious" investment even though "there was half a day of a seminar devoted to MLC" on videotapes openly shown to the jury by the government (TR 2058; GX-58). Efforts to impeach Agent Flink on his previous testimony resulted in a volley of sustained objections (TR 2060-62).

Investor Tim Bannister testifies that he had gone to Branson and found that this \$1.2 million wire transfer went to MLC. He testifies he had provided these documents to the government back in 2003. He even testifies that Mike Carney had been living in a home that "Bob Plaster had owned" (Bannister at TR 663-65). At trial on 6/1/05, after years of a "thorough investigation", Agent Flink still doesn't know, isn't sure, if this money went to MLC (TR 2057-58), but minutes later, contradicts himself to claim he didn't know about the wire transfer "until recently" (TR 2110-11). After Plaster testifies two days later on 6/3/05 that he did indeed obtain these funds (TR 2244), Agent Flink is recalled to the stand on 6/10/05 to fix his story. He now testifies that funds were sent to a

"barrister named Sidhu who set up some companies in England, Starbright Management, City Center Management; and then the money was transferred back to Sidhu and then somehow it went back to -- it was transferred from Sidhu to MLC, and then from MLC it was given to Robert Plaster as a down payment or a nonrefundable deposit on the land." (Flink at TR 3374-75).

As Agent Flink stumbles over his new story, by now insisting that these funds were "given" to Plaster, he ignores the fact that there was no evidence presented at trial to show that any of the accused or investors, had agreed to just "give" Plaster over a million dollars.

The term "Branson Project", where MLC Development was headquartered, was mentioned at trial at least 158 times (Exh. F), and "MLC" was used an additional 188 times. Exhibits F and B-2 demonstrate that the MLC Branson Project, and its dual purpose as both an investment and as a location for the health clinic, was acknowledged in most investors' testimony. In fact, so many references were made to the MLC Branson Project and Plaster's alleged involvement that after 10 days into trial, it forced the prosecution to add Plaster as a government witness in order to circumvent this investment and prepare him for testimony (R.397). Plaster had been requested by Marcusse three times before the prosecution sought this witness (R.324, R.379, R.392-1).

Plaster's "one-page" contract supposedly giving him a \$1 million "non-refundable deposit" on \$45 million of real estate (TR 2244; GX-160), contained no signatures of any of the accused agreeing to this "gift", only that of Carney, who died in 2002, with no witness to his signature (Exh. I). There was no testimony that anyone had even seen GX-160 prior to trial as

solely substantiated by Plaster himself (TR 2256). Plaster further refused to admit to any knowledge of the \$4 million in returns that had been promised on these funds linked to his other company, Evergreen Investments (TR 2261; R.157-2, pgs.45-48). This signed agreement was improperly blocked from entry as evidence by defense attorney Valentine (TR 2979-81). MLC evidence (Def. Exh. M-J) indicates that Stone County, Missouri, would have lost only \$3,000 in property taxes due to the Branson Project (Exh. C-2, MLC Project Synopsis, p.2), casting additional doubt on the authenticity of Plaster's \$45 million real estate "contract" in Stone County. None of the evidence from Def. Exh. M-J was actually viewed by the jury, because Dan Hammond's testimony where it was introduced, was objected to 36 times in 40 transcript pages (Exh. S), and Plaster also repeatedly denied knowledge of its individual documents (portions of Def. Exh. M-J included in Brief Exhibits B-2, C-2, C-3, C-4, C-5). AUSA Gezon uses Plaster's testimony to claim that Marcusse gave away the investors' money to Plaster, and then asks the jury, "And she claims that's a good faith attempt to protect their principal?" (Gezon at TR 3722 - Exh. TT), this after defense attorney Valentine aids the prosecutor by blocking evidence proving his remark was misleading. Using Valentine again to claim Marcusse's "credibility" is "zero", he further attests that she's an "illegal salesperson", "dishonest", and

"immoral" (Gezon at TR 3722).

The Appellee Brief misrepresents the Branson Project as a venture Marcusse began to promote "after the Access program collapsed in 2001" (AB-p.83). This statement is an utter fabrication as the trial record clearly reveals. Investor Darrell Massman testified he was flying tribal members to Branson for the Project in 2000 (TR 1587, 1593; Exh. F). The Sharpes, who were investors, testified that they went down to meet with Carney of MLC and invested funds in May, 2001, after seeing the half-day presentation on the Branson Project at the two-day investor seminar (TR 494, 505; Exh. F). A January, 2001, investor newsletter indicated the group would be moving for this new program (GX-41, p.8). Bonnie Kurnat, the Boss's secretary, testified that Marcusse had talked about moving to Branson for the Branson Project "significantly before the seminar in 2001" (Kurnat at TR 1100). Former associates, Daniel Hammond and Jessica Dudkiewicz, each confirm transferring funds to MLC prior to 2002 (Hammond at TR 2662, Dudkiewicz at TR 855). Exhibit F is full of evidence to establish that the Branson Project was a venture promoted long before "the Access program collapsed in 2001".

"For a prosecutor to convey, or even to permit a false impression, invades the area of due process." Miller v. Pate, 386 U.S. 1 (1987).

Agent Flink was also hostile regarding the Suisse Security Bank & Trust program (SSBT). At the preliminary hearing in 2004, he admitted that \$2.7 million went to "foreign investments" (Flink at TR 22-23, 7/29/04), causing Magistrate Carmody to rule prior to trial that while perhaps investments had been made, they were not the kind she thought investors had agreed to as shown in GX-1 (TR 12, 8/4/04). This may be another reason why the indictment did not use the term "ponzi scheme". In front of the first grand jury, Agent Flink testified this amount was \$2.9 million (TR 2039, 3421-23) whereas summary exhibit GX-172 at trial represents that \$2.37 million went to "foreign wire transfers". Agent Flink eventually settles on the figure of \$1.4 million that was sent "to the Bahamas" (TR 3375). He will not admit that it was sent to SSBT or even sent to a bank, claiming that an account number is not necessary to transfer the funds (TR 3420-24). Expert witness Zawistowski had previously testified that a "red flag" of a "prime bank" fraud is not naming a specific bank (TR 781).

Inaccuracies start really adding up when just one example shows the \$1.4 million conceded by Flink, added to the \$1.8 million that went to attorney Sidhu in Europe totals \$3.2 million, not the \$2.37 million represented in GX-172, as confirmed by Flink and AUSA Gezon at TR 3721. Just one bank statement from 7/99 evidences the \$1.4 million all by itself

(R.422-3, p.9). This was out of the emergency filing made to appeal counsel's refusal to use Marcusse's evidence (TR 3050-65, 3348). Obviously while most bank records could not be filed in R.422, at least one additional sizeable wire transfer from 2/99 was included that demonstrates Agent Flink was deceitful when he claimed \$1.4 million was all that was sent "to the Bahamas" (R.422-3, p.7), displaying another example that both his testimony and his summary exhibits to be inaccurate.

In contrast, Marcusse's summary exhibit evidence, such as that for the SSBT stock program, specifically included the sending bank account's name, dates, and exact amounts, which could then be matched to actual bank statements had they been allowed for use (Def. Exh. M-AA; Compare to the 7/99 bank statement of R.422-3, p.9; R.422-2, pgs. 42-43; R.422-3, pgs.3-4, 6-10, 20). Marcusse's testimony and this exhibit were torpedoed by AUSA Gezon's misleading rebuttal closing argument in which he claimed there was "nothing" by way of "bank statements" in "evidence" to prove that any investor funds had gone to Suisse Security Bank for this program (Gezon at TR 3721), gesturing to the boxes of bank records kept as stage props right in front of the jury box, in a highly prejudicial maneuver (TR 2649, 3498).

Investor Dennis Vandenberg, co-owner of Valley Corvette, had been used by the government to testify that the funds placed

with him in the "Valley Boyz" program at F & B Bank in Appleton, Wisconsin, were wired to the bank in the Bahamas in April of 1999 (Vandenbergen at TR 705, 720). The funds had not been transferred to the Bahamas; but instead, they were transferred from Appleton to the Isle of Mann, as confirmed by AUSA Pixler (Pixler at TR 773). Defense counsel Valentine tries to impeach Vandenbergen's testimony by asking if he had been convicted of any crimes while involved with the Teamsters, but Vandenbergen states "No" (Vandenbergen at TR 718), when public records prove otherwise (See Exh. VV).

AUSA Gezon later uses Vandenbergen's testimony to discredit Marcusse's summary exhibit by having Agent Flink testify that a listed \$490,000 wire transfer on 7/1/99 to SSBT was instead a transfer to the "Valley Boyz" program (Flink at TR 3377), thereby trying to deceitfully twist the SSBT stock program into the fraudulent "prime bank" program of "Valley Boyz". This was undoubtedly the reasoning behind Agent Flink's insistence the total funds sent "to the Bahamas" was only \$1.4 million. Both AUSA Gezon and Agent Flink had attested that no investor funds were actually placed into any "prime bank" programs such as GX-1 (Gezon at TR 747; Flink at TR 2053). Only by reducing the amount of funds transferred to SSBT in the Bahamas, suborning the perjury of investor Vandenberg to claim "Valley Boyz" funds were sent to SSBT in the Bahamas, and using the testimony of AUSA

Pixler that the "Valley Boyz" funds had been seized and then returned to the accused, could this fraudulent storyline be maintained. Agent Flink's testimony regarding the 7/1/99 \$490,000 transfer, however, fully contradicts AUSA Pixler's testimony that the "Valley Boyz" funds had been seized in "May, 1999" (Pixler at TR 774).

The Appellee Brief now takes this single "Valley Boyz" investment and seizure from May, 1999, and changes it, splitting it into several differently described episodes or investments in order to attest that the accused were repeatedly placing investor funds into "prime bank" products. It is referred to as an "Arizona scheme" (AB-p.41-42), a "large investment" investor Vandenberg had "placed with Access", and also as a "Texas forfeiture action" (AB-p.65). No mention is made of "Valley Boyz", the actual name on the account.

Marshall v. Hendricks, 307 F. 3d 36 (3rd Cir., 2002), has ruled that prosecutorial misconduct is not harmless when it renders the defendant's evidence worthless. United States v. Solivan, 937 F. 2d 1146, 1155 (6th Cir., 1991), has ruled that a "single misstep on part of prosecutor may be so destructive of right of fair trial that reversal is mandated."

The denial for entry into evidence of Def. Exh. M-Z for \$4,186,700 invested into Crawford Ltd. (Court at TR 3127) permitted the prosecution to pursue the false allegations of

over a million in "pass through" funds improperly attributed to Besser and Flynn as "income". \$880,834 of the funds which went into this investment were transacted by George Besser, comprising the vast majority of the \$1 million falsely attributed to him as "income" (Flink at TR 1736, 2120). The Appellee Brief admits that "Besser was signator on many of the accounts, including the major ones. He moved investors' funds offshore to the Bahamas and Nigeria" (AB-p.90). This also directly contradicts representations in AUSA Gezon's rebuttal closing argument that there were no bank statements to support that any funds had gone to Suisse Security Bank in the Bahamas (Gezon at TR 3721).

At least \$472,844 of "pass through" funds were falsely attributed as "income" to William Flynn. Def. Exh. M-Z exactly correlates to GX-98 A&B, yet Def. Exh. M-Z was denied admission because the underlying bank records supposedly had not been "proffered" by the defense (TR 3127), which of course was impossible.

After trial, the government quietly agreed to reduce the Boss's unreported income by \$147,377, the amount of "pass through" funds which went into the Crawford Ltd. investment, as shown in Def. Exh. M-Z (Item 147, 171, PSR; R.501-1, p.6). Extractions from Def. Exh. M-Z indicate that Besser, Flynn, Buffin and Marcusse all had "pass through" funds going into

Crawford Ltd., but the jury was not permitted to see this exhibit nor were unreported income allegations against any of them reduced in like manner (Exh. I-2, Note that "DeWeerd" refers to Diane DeWeerd Boss).

The IRS determined the amount of funds that had gone to Marcusse in 1998 was too small at \$6,744, to have been required to file a tax return (Goeman at TR 2337, Flink at TR 2098; GX-148). Apparently, this lack of seeming motive was so detrimental to the government's case that Agent Flink actually admits to having added \$600,000 to Marcusse's "income" in 2001 over that of his earlier grand jury testimony (Flink at TR 2098). Agents Flink and Goeman both admit adding it for the sole reason that Marcusse was a signatory on Worldwide E Capital, LLC (Flink at TR 2098, Geoman at TR 2379), a corporate entity that has always been owned by Winfield E. Moon, which a simple check at the Nevada Secretary of State proves (R.551-2, Rule 60(b) fraud claim). This makes Item 138 of the PSR, which claims Worldwide E Capital was "her company" (referring to Marcusse), without merit. IRS Agent Goeman testified that she did not know that Worldwide E is "actually a corporation" (TR 2378) when the IRS's chief exhibit, GX-170, states clearly that it is a "LLC". Agent Goeman instead insists Worldwide is a "personal" account (TR 2370, 2378), clearly attempting to apply case law of United States v. Middleton, Fed. App.0122P, (6th Cir., 2001), in

regards to an "unincorporated business entity". This is immaterial in the absence of personal gain, because Worldwide was not owned by any of the accused in addition to the fiduciary aspects of "pass through" transactions. The government's "bulk" records from GX-219 for Worldwide included the account opening papers evidencing that Moon was indeed the owner, but these papers were removed from Marcusse to prevent her from using them for impeachment purposes. To suppress their use, the IRS and the prosecution deceitfully claimed, "these are not part of our records" (Schipper at TR 3141-42). Control over the record and how it was presented as "fact" by the prosecution team was crucial in this case. Especially for intent and impeachment purposes when a jury doesn't generally suspect foul play and is led to believe that large amounts of money was taken from innocent hard-working victims solely for personal gain.

Detailed breakdowns of the IRS's totals for rebuttal purposes were never provided for their summary exhibits. Questions to tie the IRS down would result in vague responses (Flink at TR 2041-42) and then stymied by "asked and answered" objections. The trial judge also interrupts Marcusse's cross-examination in obvious anger, threatening to silence her once again when the IRC was discussed to support her beliefs as to tax law application (TR 2416, 2085-2087, 2056, 2105).

Had the accused been given detailed breakdowns for purposes

of rebuttal and access to the basics of stipulated bank records, Marcusse could have demonstrated that both she and Besser, for example, did not have enough net income for any of the years in question, 1998-2001, to have been required to pay any federal income taxes, making the "failure to pay tax" allegations baseless and without merit. Further confirmation of this comes from the lack of any unreported income alleged against Besser or Marcusse in Count 40 in the indictment as opposed to Wesley Boss, for example. In regards to Flynn, the existence of "pass through" funds and loans per his testimony are also evident in Count 40. Items 8 and 9 allege a total of \$179,917.89 in unreported income in contrast to Agent Flink's allegations of \$730,000 at trial (Flink at TR 1736; PSR, Item 150).

Thus, at least \$2.4 million was falsified against the accused in "pass through" funds, combined with the \$1.31 million the Bosses embezzled additionally applied by "conspiracy". This was highly prejudicial and damaging to the accused, with no allowance to offer the jury other verifiable explanations or to provide an exact figure of the total disputed amount upon appeal due to this lack of access to records.

The IRS also inconsistently applies these tax "rules". Otherwise, all \$5,185,731 of investor funds deposited into the unincorporated Sanctuary Ministries (GX-170) would have been deemed "income" to the signatories on the account. It is basic

tax law that deposits in a corporate or business account, are not personal taxable "income" solely by virtue of being a signatory unless the individual derives an "economic value" or "gain" from it. There are also the fiduciary issues in regards to the transactions having been completed by the accused on behalf of the investor group. Agent Goeman dodges the answer to this precise question;

"So in other words, if I were to work as fund manager for Merrill Lynch and I had signatory control over \$600,000 of other people's money, then that would be taxable income to me?" A: "I'm not sure what the rules are for Merrill Lynch" (Goeman at TR 2379-80).

United States v. Tarwater, 308 F. 3d 494, 520 (6th Cir., 2002), has stated that "income under the Internal Revenue Code includes all increases in wealth, clearly realized, and over which a person has complete control. A gain constitutes taxable income when its recipient has such control over it that, as a practical matter, he derives readily recognizable economic value from it." Further, "if the payments were passed through, Tarwater did not knowingly file materially incorrect or illegal tax returns." Agent Goeman does acknowledge that funds which are "passed through" are not "income" (TR 2350, lns. 6-15), however, the IRS does not change their summary exhibits to reflect these admissions nor was the jury informed.

The government reduced the unreported income of the Bosses by \$147,377 to reflect "pass through" funds that went into Crawford Ltd., but not until after trial. Clearly, the IRS knew the main tax issue at trial was over "pass through" funds falsely alleged as "income" against the accused in order to manufacture motive, but the prosecution team chose to bury the real issue under a mountain of irrelevant and prejudicial "tax protester" labeling and misconstruing a "speaker" at the investor seminar as one (A.B-p.29).

The Supreme Court in Maryland Casualty Co. v. United States, 251 U.S. 342, 345-48 (1920), has ruled that if one receives income as an agent for a principal, it is the income of the principal and not of the agent. See also Page v. C.I.R., 823 F. 2d 1263, 1270 (8th Cir., 1987). "Generally, liability to income tax attaches to ownership of the income." Blair v. Commission of Internal Revenue. 300 U.S. 5. The investors "owned" the principal invested, per the deposit receipts. Even after Agent Goeman's admission, the prosecution misstates the tax law in regards to "pass through" funds twisting it into a signatory issue with the Worldwide LLC to manufacture motive and intent for Marcusse (Schipper at TR 3208-3209). Exhibit D-2 proves that none of the \$2,161,530 invested with Moon, including this \$600,000, was personally "spent" by Marcusse, but the jury was not permitted to see it. United States v. Bishop, 412 U.S.

346 (1973) has ruled that if a taxpayer has relied in good faith on a prior decision of the Supreme Court, the requirement that a tax offense be committed "willfully" is not met.

The allegations made over mishandling qualified or retirement funds were able to be successfully pursued only due to the suppression of the evidence regarding investor profit sharing plans. The government claimed that transfers from Steelcase, a large local employer, were made directly to Access Financial as the "custodian" (GX-330). This was not an accurate portrayal. Transfers were made as directed by investor business profit sharing plans to a "product", not to a "custodian".

In regards to any qualified funds transfer, there were two options only, including Mid-Ohio Securities as the IRS custodian (GX-218), or setting up a Profit Sharing Plan through the investor's business as handled by Patrick Rohlof (Rohlof at TR 2490). This was later handled by accountant Greg Brown, as introduced in a 2/00 newsletter (GX-35, p.1). Testimony at trial established that some of the investors on the Steelcase list did in fact use Profit Sharing Plans (Murphy at TR 227; Beemer at TR 343; Shanahan regarding Albrecht at TR 1387), causing the prosecution to remove David Albrecht's name from their exhibit (GX-330) during trial. As soon as Cheryl Shanahan testified late on Monday afternoon, 5/23/05, the record shows the government scurried to offer Albrecht a plea bargain of 5 years, most

likely to eliminate the potential threat to their case of Albrecht testifying about these profit sharing plans.

A known exception was the Glen Jager. At trial Jager admits that he did not talk to anyone about how to transfer his qualified funds from Steelcase (Jager at TR 1455), yet the Appellee Brief claims that Jager testified that it was "represented that Access could pay out early payments on an IRA or 401k fund because Access was a recognized church organization, exempt from taxation" (AB-p.17). The Appellee Brief uses the testimony of Stinger and Beemer to represent how the accused supposedly abused the tax code in regards to church issues (p.18). At trial, however, Stinger admits that he "relied" upon the representations of Beemer "concerning the 508(c)", because Beemer was a "church secretary" at a large local church (Stinger at TR 203). As did many of the investors, Beemer was engaging in his own full-time ministry, which in his case was one of counseling troubled marriages, hence, the name "Marriage Builders, Inc." (GX-61), to which a self-directed profit sharing plan was attached. Beemer had both qualified and non-qualified funds, with one check paid directly to the Marriage Builders PSP, and another check to his ministry account, which was believed to be tax-free within the provisions of law. The intent was for all investors to pursue their own charitable or ministerial goals (Beemer at TR 50, 7/28/04).

Additional prosecutorial misconduct is in regards to the IRA transfer form, reportedly to Access Financial as "custodian", submitted by Siemen (GX-6; GX-7; Siemen at TR 894). The exhibits, GX-6 and GX-7, are empty forms, only used as "boilerplates" for illustration purposes. Many boilerplate qualified forms were available for the construction of qualified plans, which were for the investor's own business and attached qualified plan. "Advance approval is not required for a qualified plan" as shown in 33 Am Jur 2d, Federal Taxation (2002), ¶8768. Paragraph 8769 indicates that a "master or prototype plan which had received previous IRS approval" is acceptable for use. Rohlof testified at trial that he helped investors construct profit sharing plans which were attached to their own businesses (TR 2490). They were not attached to any church auxiliaries as none were incorporated. Therefore, for the prosecution to take boilerplate forms (such as GX-6 and GX-7), in order to misrepresent that Marcusse advised investors that Access was an authorized IRS custodian in the absence of proof investors actually used GX-6 or GX-7 to transfer funds to Access, is misconduct. Government witness Cheryl Shanahan from the profit sharing qualified plan department at Steelcase, an employer from which these investors originated, presented no testimony or evidence at trial that even one of these investors used GX-6 or GX-7, which the prosecution certainly would have

had her do had the form actually been used. It would have been required to have been kept in her files. In fact, it was Shanahan's testimony that defendant David Albrecht transferred the funds to Southwest Securities for the profit sharing plan attached to his own business. This may have been what caused the government to change the Steelcase investor exhibit and remove Albrecht from it (GX-330) as well as rid him from the trial. Copies of the investors' profit sharing plans were part of the "business" records which were blocked by defense counsel (Kaczor at TR 3049).

The allegations over the mishandling of retirement funds was included throughout the entire indictment, including the mail fraud and money laundering counts, however, the procedures to handle qualified funds correctly were further established to have been in place through the testimony of Tim Kuhman of Mid-Ohio Securities. Kuhman testified that Mid-Ohio was a licensed IRA custodian and that "each of the transactions handled" for the accused by Mid-Ohio were "done properly and legally" (Kuhman at TR 1447). Kuhman further clarified that Donald Buffin, Sr., who appeared on a list of Mid-Ohio IRA clients handled for the accused, had been handled by Donald Buffin, Jr. (TR 1447; GX-218). Government witness investor Dolores Walcott even expressed shock over the allegation that Access was used as an IRA custodian testifying she was informed she had to use Mid-Ohio

Securities (TR 386). GX-218 was not included in the Appellee's list of exhibits to be certified and forwarded to the Sixth Circuit (R.688).

AUSA Gezon in closing, repeatedly misrepresents the handling of qualified funds by claiming, "Not a qualified pension rollover plan" (TR 3516); and "No 401(k), IRA, 1040, W-2 records so that it would help the IRS ascertain these people's life savings, pensions, and appropriately identify those things" (TR 3566).

United States v. Powell, 955 F. 2d 1206, 1214 (9th Cir. 1990) has ruled that a district court "cannot exclude evidence relevant to the jury's determination of what a defendant thought the law was in §7203 cases because willfulness is an element of the offense". Whitehead v. Cowan, 263 F. 3d 708 (7th Cir., 2001), has further ruled that a misstatement of law can invalidate a conviction.

Agent Goeman was represented by the prosecution to be an "expert" witness, and even the judge specifically mentions her in jury instructions as such (Schipper at TR 56, Goeman at TR 2294, Court at TR 3779). The trial judge instructs the jury, "You heard the testimony of Darline Goeman and Leonard Zawistowski. These were considered expert witnesses." (Court at TR 3779). A simple generic reference to "government experts" would have sufficed instead of specifically mentioning these

government witnesses by name. He goes on to say the jury does not have to accept an expert's opinion, yet the "genie is out" and extra judicial weight had been given, thus lending special credence to their testimony as being "judicially approved". Neither Agent Flink nor Agent Goeman can be demonstrated to have been competent witnesses on tax law, much less "expert", as was promoted to the jury.

A Rule 60(b) fraud claim was filed after trial regarding the misapplication of tax law and unreported "income" misrepresentations made by the IRS at trial (R.551). It was also raised again at sentencing (TR 6, 9-10, 16-18, 22-25, 10/28/05, R.639). To date, the government has not denied any of Marcusse's allegations. Instead, the prosecution feeling cornered persists in ignoring legitimate facts in order to maintain a wicked line to cover the truth in their Appellate Brief. They claim no "usual business records" were kept (AB-p.29), ignoring the fact that the trial judge refused to permit any business records to be entered as evidence at trial by the defense (Court at TR 3679-80), and that the government had possession of most of the records given to them by the Bosses years ago.

Berger v. United States, 295 U.S. 78, 88 (1935), has long mandated that a prosecutor's "interest ... is not that [he] shall win a case, but that justice be done...while he may strike hard blows, he is not at liberty to strike foul ones."

Marcusse filed a motion to vacate the convictions after trial (R.435-1). Item 35 of this motion, raises a Napue issue of false evidence, which would apply to the summary exhibits. Item 36 raises Pyle v. Kansas, 317 U.S. at 216 (1942), which prohibits the deliberate suppression of favorable evidence to the accused. In conclusion, the motion asked the court to "vacate" this action" due to the "conspiracy fraud" of court officials and the IRS, acting in violation of 26 U.S.C. §7214.

United States v. Frost, 125 F. 3d 346, 382-83 (6th Cir., 1997), has ruled that, "A Brady claim may arise when the government has introduced trial testimony which was known to be, or should have recognized as perjury", which is not subject to harmless error. United States v. Stoddard, 975 F. 2d 1233, 1237 (6th Cir., 1989), ruled a "new trial must be held if there was any reasonable likelihood that the false testimony would have affected the judgment of the jury." \$12.1 million of false testimony had to have "affected" the jury.

IV. THE ACCUSED WERE DENIED A FAIR TRIAL BY THE COURT'S RULING THAT "ALLEGED INVESTMENTS" WERE "IRRELEVANT" TO A "PONZI SCHEME" CHARGE, WHICH PREVENTED ALL DIRECT WITNESSES TO INVESTMENTS AND BANK AND BUSINESS RECORDS AS EVIDENCE.

Vital defense evidence, including the use of actual bank records, was prohibited by the court and withheld by defense attorneys based upon this ruling, thus depriving the accused of a fair trial.

According to the Federal Rules of Evidence 104(b), relevancy is conditioned on fact. "Evidence is relevant if it makes the existence of any fact at issue more or less probable than it would be without the evidence." United States v. Williams, 900 F. 2d 823, 826 (5th Cir., 1990); Huddleston v. United States, 485 U.S. 681.

That actual bank records and direct witnesses to investments were prohibited, indicated that the trial court had taken judicial notice of "Ponzi law" prior to trial, from information provided by the prosecution (R.296, No.5). In their Trial Brief, the government made the claim that the "intent to defraud can be inferred as a matter of law from the mere fact that a Defendant is running a Ponzi scheme" (R.297, p.47), taking this quote from the non-published case In re Mark Benskin & Company, 59 F. 3d 170, (6th Cir., 1995). Thus, after 9 days of trial, an Opinion was issued on 5/27/05 denying Marcusse 13

defense witnesses primarily because "alleged investments" are "wholly unrelated and irrelevant" to the charges (R.401). Based on this ruling, virtually all of the "reams" of Marcusse's evidence given to counsel, including even "stipulated" bank records, are withheld by defense attorneys while acting as an "officer of the court" (Kaczor at TR 3049). Certainly, this ruling could have been made well before 5/27/05 to prevent what certainly appeared as a trial by ambush.

The application of "ponzi law" from a an unpublished Sixth Circuit opinion appears in error, as such opinions have no precedential value and can't be given such heavy weight in a district court or circuit court decision per Dotson v. Wilkinson, 300 F. 3d 661 (6th Cir., 2002); Manufacturer's Indus. Relations Ass'n v. East Akron Casting Co., 58 F. 3d 204, 208 (6th Cir., 1995).

Federal Rules of Evidence, Rule 201, normally would bar courts from taking notice of adjudicative facts to allow the jury to weigh all of the evidence, thereby maintaining constitutional guarantees as opposed to a "one man" jury.

On 5/13/05, Marcusse had filed a "failure to appear" on Kaczor for not filing her witness list as previously given to him (R.358). A proper motion listing defense witnesses and requesting witness fees was not filed until 5/25/05 (R.392). Defense counsel for Flynn, the only other accused testifying,

did not file his Ex Parte Motion until 5/26/05 (R.398). This permitted the prosecution adequate time to have Agent Flink testify and present his misleading summary exhibits on 5/25/05 and 5/26/05 (GX-170; GX-171; GX-172).

On 5/24/05, the 7th day of trial, Diane Boss pleads guilty after being threatened with a 25 year sentence if she continues with the trial (Case No. 1:06-cv-694, R.6, p.13). Boss states at the change of plea hearing that she knew "for a fact" that she was guilty of the conduct described as "basically a Ponzi scheme" (TR 9, R.685), in Count 40 (Conspiracy to Commit Mail Fraud) because of "not seeing transfers into our accounts from offshore" (TR 19, R.685).

Thus, it appears that court officials coordinated their actions to prepare a foundation for the trial judge to make his "ponzi law" ruling. The fact that Marcusse left the funds "compounding" offshore as represented by the stock investment flyer (GX-2) was used against her to artfully script a "confession" under coercion by one of the alleged defendants in a "conspiracy" so that it could be used against the rest of the defendants. This "confession" was not legitimate evidence of a "ponzi scheme" or "investment fraud" when the prosecution knowingly withheld exculpatory evidence with the aid of court officials.

Before trial, Marcusse had filed a motion seeking copies of bank records (R.333), but was denied (R.342). One of the accounts requested had been Starbright (TR 14; R.333), which had been handled by Barrister Gurmail Sidhu, and not included in the government's list of bank records (GX-170). The first morning of trial, Marcusse asks the court how she is to defend herself on a "Ponzi" allegation, while "trapped in jail" and the court was denying her access to this kind of evidence (TR 13). The trial judge attacks her for asking questions, claiming that Marcusse had "harassed" him with her "absolutely nonsensical" motions (TR 8). He dodges the evidence issue question by asking, "Have you discussed this matter with your lawyer?" (TR 13). The court then uses defense attorneys to tell her that the "rules of evidence allow her to review any of the bank records that were used to formulate the summaries, and therefore, she would be able to look at the bank records" (TR 14). This did not answer the question of using the records as evidence (TR 15). When she continues to question this, the court denies her the right to proceed pro se (TR 18), cross-examine witnesses (TR 18), "speak" for herself (TR 26), and make objections (TR 31), under the threat of removal from the trial (TR 26-27). United States v. Rogers, 118 F. 3d 466, 471 (6th Cir., 1999), has ruled that a waiver must be knowing, voluntary, and intelligent. Marcusse did not voluntarily waive her rights to act pro se to present a

meaningful defense, they were taken from her under threat and duress.

A Brady violation is grounds for setting aside a conviction or sentence only if the failure to declare the relevant material "undermines confidence in the verdict, because there is a reasonable probability that there would have been a different result had the evidence been disclosed. Coe v. Bell, 161 F. 3d 320, 344 (6th Cir., 1998), cert. denied, 523 U.S. 842 (1999), Cone v. Bell, 243 F. 3d 961, 968 (6th Cir., 2001). Since Brady, the Supreme Court has rendered the duty upon the prosecution to disclose material evidence applicable even when there has been no request for such evidence by the defendant, United States v. Agurs, 427 U.S. 97, 107 (1976), and regardless of whether such evidence pertains to impeachment or exculpatory evidence, United States v. Bagley, 473 U.S. 667, 676 (1985). A defendant need not demonstrate by a preponderance of the evidence that disclosure of the suppressed evidence would have resulted in the defendant's acquittal, Kyles v. Whitley, 514 U.S. 419 (1995), and United States v. Frost, 125 F. 3d 346, 382-83 (6th Cir., 1997), has ruled that the doctrine of harmless error does not apply once a court has found a Brady violation.

Besides not permitting bank records as evidence, the court would not allow evidence or questions of good faith on the Internal Revenue Code for reasons that it was "not relevant,

what you or others think the Internal Revenue Code says" (TR 2087); the group being that of charitable nature and what was presented at the investor seminar along those lines; the statutes pertaining to a church because this was "not at issue" (TR 2383); or because it was "not relevant to the programs that were pitched to the investors" (Schipper at TR 2290 - Court agreeing).

United States v. Doyle, 956 F. 2d 73, 75 (5th Cir., 1992), has ruled that "felony tax evasion requires willful commission, whereas the misdemeanor requires willful omission. Spies v. United States, 317 U.S. 492, 498-99 (1943). The element of willfulness "requires different states of mind." In the instant case, this was not permitted to be determined by the jury because the judge had already decided the issue.

Both Raymond Winder, Provisional Liquidator for Suisse Security Bank & Trust from Deloitte Touche, and Christopher Lunn, former CEO of SSBT, were denied as defense witnesses, from the ruling that "failure of certain Bahamian banks" was "wholly unrelated and irrelevant to this case" (R.401). None of the SSBT accounts were included in summary exhibit GX-170. Special Agent Gerard Forrester, who had endorsed SSBT in writing, was denied as a witness (R.401), because according to the prosecution, his existence was supposedly of "doubtful validity" (R.397). The prosecution removed the wiring instructions to an account at

SSBT from the 6/99 newsletter before its submission as evidence (GX-31, p.2, Item 4; Kaczor at TR 3598). This had been for investors who wished to send funds directly to the bank. Even SSBT's Y2K compliance statement was removed from the 6/99 newsletter before its submission as evidence (GX-31 P.2, Item 5). If defense counsel was aware the government had tampered with the evidence, as indicated in his closing argument, why did he not object to its entry as evidence? (GX-31 at TR 247; Kaczor at TR 3598). It is also representative of the prosecution's propensity of "misdirection" with its witnesses, such as Mr. Murphy, the investor used to submit GX-31 without any of its attachments.

Defense counsel substantially harmed Marcusse's defense by removing the specific pages from the SSBT brochure that had attested to the fact that investor funds were fully protected by \$500,000 of U.S. based "SIPC Insurance" on each customer account, totaling \$2 million in this case, and the additional insurance "without limit through Asset Guaranty Insurance Company" (Def. Exh. M-P; Marcusse at TR 3064-66; R.422-2, pgs. 2-3; R.563, Rule 60(b) fraud complaint; Exh. R-2). Claims were made, but the affairs of SSBT are still not settled as of 6/28/07.

This was a major issue in the instant case, and listed as the second of three main representations supposedly made to

investors in the Appellee Brief (AB-P.16). The accused were charged with not using any "safe" accounts or protection of principal per the 12/5/03 Complaint (Moore at TR 1669; R.2), and in Items 11, 18, 20 and 21 of the indictment (R.323, p.5; Gezon at TR 3715). One investor witness after another was used by the government to testify that the accused must not have used any "safe" accounts, as evidenced by the fact that they did not get their funds back. This was at a critical stage of trial where defense attorneys did not question or object to the misleading exhibits, and Marcusse was prohibited to speak given the court's threat of removal.

Another substantial "foul" blow was made by AUSA Gezon in his rebuttal closing arguments where he inferred that Marcusse fabricated a \$25.5 million check as an "excuse" to cover for a "Nigerian scam" (Gezon at TR 3720-21). AUSA Gezon suggests that defense counsel was not telling the truth about the check, which was presented as evidence,

"It wasn't deposited. It's stamped uncollectible on the front. You will not see any bank account, none that was shown or gathered up by these, the hundreds -- or the 50 to 70 bank accounts that these fellows examined had that deposit anywhere in it. And if you look at her exhibits, you won't find any bank records showing that money deposited. Just her attempt to wave around a check to claim she had \$25 million one day" (Gezon at TR 3720-21).

On the back of the check is the endorsement of Robert Rydberg, on behalf of Crawford Ltd., stating, "For Deposit to the Acct. of: Worldwide E Capital LLC Sub II Acct No: 0529467490, and stamped, "For Collection only", by the Maryland Parkway Office of Wells Fargo Bank, Nevada, N.A., Las Vegas, Nevada (Def. Exh. M-AA(2), Exh. D-2, p.6-8). Contained in GX-219 was a copy of the Acknowledgement Letter, Ref. No. 000C2226900SLT, dated March 5, 2001, for this \$25.5 million draft, from Wells Fargo to Worldwide E Capital, LLC, also displaying account no. 0529467490 (Exh. D-2). Mr. Rydberg, the President of Crawford Ltd., passed away in January, 2005 (Flink at TR 2121) so he was not available to rebut the government's claim. The stumbling around that AUSA Gezon makes in regards to the number of bank accounts, from "hundreds" to "50" or "70", suggests that these figures were fabricated for purposes of prejudice.

The denial of Def. Exh. M-Z showing the transfers of \$4,186,700 into Crawford Ltd. as evidence (TR 3127) removed the foundation for receipt of the \$25.5 million check. Crawford Ltd. was an oil partnership with two Nigerian government contract payments due of \$25.5 million each. Had Rydberg lived just another 5 months, he could have brought any number of documents to prove these were legitimate government contracts. The next best option was to call his son, Matthew Rydberg, but he was

also was denied as a defense witness (R.401). This permitted the prosecution to repeatedly mischaracterize the contracts as a typical "Nigerian scam" and ridicule this investment at least 11 times at trial (See Exh. J), greatly prejudicing Marcusse as juries tend to trust court officials to act honorably.

Defense witness, Dr. Brian Maisel, an independent investor directly placing \$300,000 with Mr. Rydberg in Crawford Ltd., testified that it was a "large oil storage facility that was built which included the tanks and the piping and the control surfaces" (Maisel at TR 2811). He also testified that based on his own research from the paperwork and certificates that he obtained, it did not appear to be a 419 scam (Maisel at TR 2819).

Associate Dan Hammond had worked for "ten years in the oil business" in Texas (Hammond at TR 2692). Hammond had initially reviewed the documents for Marcusse that Rydberg had provided, and advised her that they were "proper for what we used to see when it came to different tank batteries" and that it looked like a "legitimate project" (Hammond at TR 2693).

Plaster, founder of Empire Gas & Oil, with his many political connections, and Carney, his partner in MLC (R.157-2, R.309-6), had contracted with Marcusse for a POA to collect on Crawford Ltd. (R.309-4, Exh. D-4). At trial, however, Plaster denied any knowledge of this agreement (TR 2256), thereby

preventing Marcusse from entering the contract into evidence. Further, Christi Heuck, witness to this contract, was also denied as a defense witness (R.401).

The 8th Circuit reversed a RICO damage award to the plaintiff in Qually v. Clo-Tex, 212 F. 3d 1123, 1131 (8th Cir., 2000). In the fraud suit arising from a contract for sale of Nigerian oil, the district court had improperly relied on judicial notice of Nigerian fraud scams. The case was reversed because this did not specifically concern the parties before the court and "prejudicially influenced" the outcome of the case.

Defense counsel negligence or possible collusion with the prosecution occurred where counsel attests that Winfield Moon and Richard Gerry would be "detrimental" to the defense and asks the court for release as defense witnesses (TR 2220-23, 2231). Moon and Gerry could have testified that this \$25.5 million check was in fact deposited into Wells Fargo Bank in Worldwide E Capital as Moon owned Worldwide and Gerry was the Registered Agent as recorded with the Nevada Secretary of State (R.551, Rule 60(b) fraud claim). Moon and Gerry could have testified that \$1.8 million, including the \$600,000 the IRS deceitfully claimed was unreported "income" to Marcusse in 2001 were instead funds that had gone into investments with them (Def. Exh. M-U; Exh. D-2, Exh. E). Gerry was Marcusse's investment advisor from late 2000 forward. Gerry had as his advisor, James Kramer-Wilt,

who was an Attorney at the time with the Bureau of Public Debt, Dept. of Treasury, and considered a top "expert" of "prime bank" investment fraud (R.392-2, pgs. 11-13). Gerry was a trustee on the Starbright and City Center accounts from which the \$1.2 million wire transfer was sent to MLC and from there to Plaster. Gerry was regularly in Branson, Missouri, regarding MLC (Dudkiewicz at TR 859) and was a personal friend of Barrister Gurmail Sidhu, who could have testified directly to the funds sent to MLC if Sidhu hadn't been thwarted by intimidating drug-trafficking raids on his home and office through possible misuse of National Security Letters (Exh. E).

The trial transcript further indicates that Marcusse stated she had "no objection" to the loss of these witnesses (Marcusse at TR 2223), suggesting transcript tampering as this did not occur. Moon and Gerry had been mentioned by Marcusse in many pre-trial pleadings, requested as witnesses, and she never would have voluntarily released these key witnesses, particularly in light of being denied so many other witnesses by the court, in addition to being denied the use of actual bank records. This subject is brought up at sentencing, and Rule 60(b) fraud claims were filed after trial in regards to Moon and Gerry's prevention as witnesses (TR 16-23, 10/28/05, R.551, R.639). The Rule 60(b) fraud claim, "Court Reporter Official Misconduct", was in part based upon the bogus Moon witness "waiver" (R.590). The

government has never denied these allegations.

The Supreme Court in Chessman v. Teets, 354 U.S. 156, ruled that, "Consistent with procedural due process, a state court's affirmance of a defendant's conviction of a capital offense upon a seriously disputed record, whose accuracy he has no voice in determining, cannot be allowed to stand, even though the state court held that the record was adequate as a matter of state law and that, in any event, the inaccuracies claimed by the defendant would not have changed the result of this appeal."

Even two investor-witnesses, Dr. Reede Hubert and Edward Terlesky, each of whom invested \$100,000 as well as actively involved as shareholders of stock with MLC, were denied as defense witnesses by the court (R.401; TR 2220), a violation of 18 U.S.C. §3771(a), which had been invoked by the prosecution (R.328).

The Appellee Brief (AB-p.85) argues that the "court was correct in denying the subpoenas at Government expense to Hubert and Terlesky", going on to assert that the "court even invited Marcusse to proffer further information on the witnesses Hubert and Terlesky, but she did not" (referring to TR 2220-23). Marcusse requested Hubert and Terlesky as witnesses (R.384) and made another request (R.392) after the first request was denied (R.385), appealing yet again at trial, negating any notion that invitations were turned down when the opposite was true.

Further, the Appellee Brief references to pages 2220-21 are immaterial to Hubert and Terlesky as no references of these potential witnesses are made or discussed. Transcript page 2222, however, evidences that Marcusse begged the court to reconsider these two witnesses, "because they were both \$100,000 investors in the program", but the court refuses, stating, "once the Court rules on something, unless there's a change a circumstances, the Court doesn't rethink itself." (TR 2223). These two investors appear to have been blocked as defense witnesses because they had become actively involved in MLC and knew Plaster was part of the company (R.309-6, p.6; Exh. C-4; Def. Exh. M-J). Terlesky spoke directly with Plaster right after Carney died in 11/02, who assured him "the project would go forward" (R.392-1, p.9). Dr. Hubert was the chiropractor for the LVD Tribe in Watersmeet, Michigan who knew both Plaster and Carney, was the best friend of defendant Flynn's son, and the original source of information on the MLC Branson Project (R.392-1, p.9).

Associate Tom Wilkinson, who had been with the group longer than Buffin or Visser (Hammond at TR 2651), was prevented as a witness due to the threat of prosecution as a "target" if he testified (Kaczor at TR 2807; Gezon at TR 2872-79). Wilkinson drove all the way from Wisconsin and chose not to testify at the very last moment. Marcusse needed his testimony and his bank records from Access Global, LLC, to evidence investments being

directly made, such as to MLC and Crawford LTD. (Hammond at TR 2660-62). Access Global is also not included in the bank accounts in GX-170. As of 6/28/07, a check of the public records indicates that Wilkinson has not been charged in this or any other case.

United States v. Mohney, 949 F. 2d 1397, 1402 (6th Cir., 1991), states that the trial judge could have ordered "use immunity" to remedy the prosecutorial misconduct of keeping "exculpatory testimony from the jury."

Concealment is an essential element to money laundering counts. Marcusse was denied Randy Scott, V.P. of MLC (Exh. C-2) as a witness (R.401). Scott had traveled to Washington, D.C. with Marcusse and Carney, CEO of MLC, to join Richard Williams, LVD Tribal Chairman, to lobby for the Branson Project with members of Congress in April, 2002 (Exh. C-5). Marcusse's address was even filed with the U.S. Dept. of the Interior (Exh. C-4). Scott was requested as a witness to testify to the trip. Williams testified at trial that he went to John Ashcroft's office while in Washington, D.C. because of the influential connection Plaster and MLC had with Ashcroft (Williams at TR 2782-83; Exh. C-5).

The Appellee Brief argues that the "MLC venture had nothing to do with the false representations charged in the indictment" (AB-p.84). This is true and constitutes the entire point of the

appeal. A prime bank fraud committed against the accused was plucked out of an earlier time and inserted into the indictment through widening the time frame in Count 40 to permit this material misrepresentation of the facts. The Appellee Brief contradicts itself in that it claims that Marcusse made a "non-refundable \$1 million deposit on a purchase agreement for 420 acres of land in Branson for the MLC Project" (AB-p.83-84), and then goes on to state that Williams "did not even know who Marcusse was" (AB-p.84). As the head tribal chairman and a joint venture partner in MLC (Exh. C-2), it would seem odd that Marcusse would be the individual purchasing the land on behalf of MLC without a main partner knowing about her. The Appellee Brief suppresses the fact that Plaster was a partner in MLC and that Marcusse was not a party to the contract that the Brief references as its evidence (AB-p.83-84; GX-160). Plaster even confirms that he did not know where the \$1 million originated (Plaster at TR 2256). This continuing denial of the MLC investment as part of the investments made on behalf of the accused during the alleged 39 mail fraud counts merely illustrates how relentless the government has been in their determination to persist in camouflaging the investments made in this case.

Mike Carney, who passed away in 11/02, testified in front of the grand jury in 5/02 and Marcusse was told she could not

see or use his testimony because he was deceased (Exh. I). Federal Rules of Evidence 804(a)(4) and (b)(1) permit an unavailable witness's testimony to be admitted at trial. Carney's testimony may have proven MLC was an investment already in 1999, that Plaster was his partner and an executive in MLC, or even disclosed some material information on Crawford Ltd. and more.

United States v. Foster, 128 F. 3d 949, 955-56 (6th Cir., 1997), remanded for a new trial where the district court's abuse of discretion in refusing to admit exculpatory grand jury testimony could have had a significant impact on the jury's verdict. As it appears, Carney's testimony may have been admissible, the fact that the government did not use it and sought to suppress its availability for use at trial to Marcusse, indicates that it was likely that Carney's testimony was materially beneficial to the defense. Filings on the record indicate that the issue of hidden case numbers and hidden grand jury testimony had been an issue pretrial (R.281).

Of the 13 witnesses that were permitted, the defense attorney claimed he "couldn't find three or four witnesses" (Kaczor at TR 2644). One was former Dept. of Treasury attorney, James Kramer-Wilt, who would have still been on federal probation at the time (Exh. L). Another was Dan Evans, a licensed attorney involved in MLC (Exh. C-3). Other investor

witnesses needed were seen in the court's gallery during trial (R.392). Beth and Ray DeMeester (R.381), were both scared off by IRS intimidation as confirmed by their daughter and investor Kim Newell (TR 2601-02; Exh. M). Kim Newell's family constituted the largest investor group at \$759,312.30 (TR 2593) and Newell testified that she did not believe the government's case and was questioned by the IRS just prior to trial (TR 2607-09, 2611-14, 2616, 2620).

Newell further testified that she had sent a letter to the entire investor group, informing them that the government's hotline was erroneously claiming (during trial) that there were no trials currently scheduled (TR 2600-03; See Exh. M-2). While this may have been done to keep investors from hearing the case or testifying for the accused, it could also be considered a denial of the right to a public trial which "requires reversal without any showing of prejudice and even though the values of a public trial may be intangible and unprovable in any particular case." Arizona v. Fulminante 499 U.S. 279, 294, 295 (1991); Waller v. Georgia, 467 U.S. 39, 49 (1984). It is a fact that the Press Release issued from the Office of U.S. Attorney on 10/28/05 for public viewing, varied substantially from the theory the prosecution presented to the jury at trial (Exh. FF).

Former associate, Virgil Boss, not charged in this case but whose family were sizeable investors, was arrested based on a

"tip" regarding a stale traffic warrant the Saturday before his scheduled Monday appearance at trial on 6/6/05 (See Exh. Q). He had also been arrested and detained in Newaygo County Jail in May, 2004, for 3 weeks, based upon allegedly not appearing on a grand jury subpoena in the instant case that was not served until after the ordered time to appear. Questions about this type of repeated harassment were prohibited before the court (Court at TR 2566).

Former associate, Michael Brewer, was given an Offer in Compromise, which was still in negotiation at the time of his testimony at trial. He had pled to the misdemeanor charge, "failure to file", with no jail time attached to the agreement. Brewer had moved to Branson in 8/01, worked for MLC, and could have testified extensively on this investment, but that testimony was also effectively blocked (TR 1110, 1148-50).

Immediately following AUSA Gezon's resignation on 2/12/07, other witnesses that testified on behalf of Marcusse are presently being harassed and indicted on tax charges. Namely, investor Phyllis Eileen Calkins with threats made to her husband Daniel (CASE # 1:07-cr-00084-RHB), and investor Margaret Ethell Linnell who is nearly 80 years old and cares for her handicapped husband (CASE # 1:07-cr-00282). Another 65 year old woman, Judith Kay Cormier, who assisted Buffin as a Roman Catholic in the instant case, has recently been indicted on tax issues and

ordered to take a psychological evaluation for the second time by the same court (CASE # 1:07-cr-00084-RHB) and is now homeless from this action. Except for Linnell in New Mexico, the above cases are being handled by the same judge as the instant case and AUSA Davis, who was involved in its grand jury proceedings and who repeatedly found behind the scenes threatening to use his Homeland Security "hold card", if the defendant's in the Marcusse case chose to maintain their innocence. No other investors have been similarly targeted, however, this sends the clear message to all investors it would not be "safe" to testify for the defense in the event of a new trial.

Foster, 128 F. 3d at 953, has also ruled that, "This Court has found that government conduct which amounts to substantial interference with a witness's free and unhampered determination to testify will violate due process." United States v. Goodwin, 625 F. 2d 693, 703 (5th Cir., 1980), makes it clear, "Threats against witnesses are intolerable." United States v. Schlei, 122 F. 3d 944, 991 (11th Cir., 1997), has ruled, "if such a due process violation occurs, the Court must reverse without regard to prejudice to the defendants."

Between the court, the prosecution, and defense attorneys, not a single witness was ultimately permitted that could testify directly to the \$12.1 million invested (TR 1993-96; Exh. E-2). The Opinion which deemed "alleged investments" as "irrelevant"

was used by the prosecution to object to everything defense witnesses could testify to in regards to investments as hearsay or "vouching", particularly since verified bank records could not be used (Court at TR 2647-49).

This ploy was particularly disruptive in regards to the testimony of associate Dan Hammond. Hammond's testimony was objected to by the prosecution 36 times in his 40 pages of testimony, making it very difficult for the jury to follow (Hammond at TR 2650-90; See Exh. S). Hammond had also moved to the Branson area in 2001 over the MLC investment. He entered into evidence and testified about the returns MLC had projected from their sales materials in Def. Exh. M-J. Hammond, who had previously worked for Tom Wilkinson, testified that income on South Park had been projected at \$63 to \$126 million, with all areas at over \$1,210,815,862 (Hammond at TR 2688-89). Hammond personally worked on negotiating a "letter of interest...for in excess of \$98 million" from Church Consulting, Inc., the organization which provided the funding for Bonaventure Adventure Park in California and MLC (Hammond at TR 2672-73). Carney could not supply the necessary documentation to complete the process for this funding because he passed away and Plaster did not release the real estate as agreed to, as he had signed on Evergreen stationary on 1/3/02 (R.392-2, p.5, Exh. I). Hammond concludes his testimony by attesting that the MLC

Project "would have made a fortune" (Hammond at TR 2681).

"The Supreme Court has expressly recognized that a party's right to present his own witnesses in order to establish a defense is a fundamental element of due process." Foster, 128 F. 3d at 953 (6th Cir., 1997); Washington v. Texas, 388 U.S. 14 (1967).

Marcusse is eventually allowed just 9 witnesses to rebut 77 government witnesses to support over \$12.1 million in investments and 9 exhibits to rebut almost 400 government exhibits while confined to a county jail (TR 3896-97). The noticeable lack of defense witnesses is used to prejudice the accused when AUSA Schipper asks Marcusse on the stand, "You have the ability to call more witnesses if you want, right? Don't you?" Court appointed defense attorneys to Besser objects (Dunn at TR 3228). This objection prevented Marcusse's response to this improper prejudicial question, thereby permitting the inference to stand unchallenged in the jury's mind that the reason Marcusse did not call any more witnesses was only because she didn't have any to call.

United States v. Beeler, 587 F. 2d 340, 343 (6th Cir., 1978) has ruled that counsel must seek and obtain an advance ruling from the court on the permissibility of arguing for an adverse inference to be drawn from the absence of witnesses.

Marcusse's investor witnesses are asked by the prosecution

if they would still be in support of her if they were to learn their checks had been "fake payments" or using "other people's money getting paid to you" (Gezon to Gerbyshak at TR 2563; Schipper to Virgil Boss at TR 2563-65; Schipper to Newell at TR 2612). This inappropriate questioning was objected to by the defense attorneys (Kaczor at TR 2563; DeBoer at TR 2564), whereas the court told the prosecution to rephrase the question and proceed (TR 2565).

United States v. McGuire, 744 F. 2d 1197, 1204 (6th Cir., 1984), has ruled it would be error to allow the prosecution to ask character witnesses to assume defendant's guilt of the offenses for which he is on trial.

AUSA Gezon had also asked investor witnesses how they would feel to learn their checks had been "fake interest checks" (Gezon at TR 368, 1214-15, 1217). The prosecution's coined term assumed facts not in evidence and were argumentative, irrelevant, misleading and initially objected to by defense counsel Phelan three times (TR 1215, 1217, 1233) and was sustained three times (TR 1215, 1216, 1234). AUSA Gezon continues to collaborate his term with Agent Flink (TR 2124, 2126, 3361) until further objection was made to the prejudicial reference since "That's for the jury to decide" and was sustained once again (TR 3362). At this point, the damage before the jury was done, yet the prosecution chose to submit the

phrase a couple more times (Gezon at TR 3501, 3529).

At the final pretrial hearing, the court stated the accused did not need to present evidence exhibits in advance (TR 29, 5/5/05 hearing). Apparently, there was no need to view in advance what wouldn't be permitted for use at trial.

The denial of evidence is used by AUSA Gezon to commit another "foul" blow to Marcusse's defense where he states, "One other thing that's clear from this record is there's not records that you would expect a legitimate investment company to have" (Gezon at TR 3515).

The denial of virtually all defense evidence and witnesses essentially left only the "word" of Marcusse and Flynn, whose testimony was their only available defense. The prosecution neatly disposes of this defense by engaging in character assassination, using the various defense attorneys to assist, and misrepresenting the underlying bank records to the jury.

Gravelly v. Mills, 87 F. 3d 779, 790 (6th Cir., 1996), has stated that counsel's failure to object to serious instances of prosecutorial misconduct constituted ineffective assistance of counsel. "[I]mproper suggestings, insinuations, and especially assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."

AUSA Gezon calls the accused "liars", or claims they "lied" at least 12 times in closing arguments (Exh. T), twice claiming

that defense attorney Valentine agrees with him (Gezon at TR 3722, 3738). AUSA Gezon states, "to know Jan is to know she's a con" (TR 3537); "to know Jan ... is to want to run from her" (TR 3538); her "credibility" is "zero"; she is "an illegal sales person. She's a dishonest and immoral sales person according to this evidence" (TR 3772); even, "We've heard testimony from the investors who met her for the first time at that seminar. It made their skin crawl" (TR 3558).

The video of the May seminar instead showed a standing ovation by all investors for Marcusse at the end (GX-58). AUSA Gezon further tells the jury, she was "living on the wrong side of the tracks" (TR 3538). He even insinuates that the jury would be stupid if they acquitted her, "You've had the pleasure of knowing Ms. Marcusse for four weeks now. How long do you think it would take you to be in a relationship, a business relationship with this woman before you realized what she was?" (TR 3538).

United States v. Humphrey, 287 F. 3d 422, 433 (6th Cir., 2002), has ruled, "It is well established that a prosecutor may not argue his personal belief in a witness's credibility or in a defendant's guilt", and if this occurs, it is considered "prosecutorial misconduct", which may require reversal per United States v. Francis, 170 F. 3d 546, 547 (6th Cir., 1999).

Defense counsel Ken DeBoer claims in his closing arguments

that Marcusse had "got hauled" out of a former employer "in handcuffs", deceitfully inferring not only a prior arrest, but even worse, falsely stating that it had been at a prior employer, with no supporting evidence whatsoever (DeBoer at TR 3651). With conspiracy as a charge, DeBoer then compounds the damage to his own client by claiming that Buffin, a long-time friend of Marcusse's, "must have known a lot of negative things about her". Marcusse's counsel refuses to object to DeBoer's bogus claim, so she files an objection, but the court ignores it (R.420).

Marcusse refuses to close the evidence issue after defense attorneys rested her case (Marcusse at TR 3348). She has the evidence properly "certified" and recorded so she can enter it under Federal Rules of Evidence 902(4) (TR 3349). The evidence is denied again, this time by the court, because Marcusse as "lead defendant" is not the "proper custodian" of the records, yet the prosecution was allowed to use Julie Siemen (Boss's "cleaning lady") to submit and enter several business records into evidence (Siemen at TR 914, 1007; GX-80). The court also rules the evidence is not relevant, and he did not want a "confusion of the issues" before the jury (Court at TR 3679-80). This frees AUSA Gezon to then claim there were no bank records in evidence to support Marcusse's testimony and summary exhibit on the SSBT program (Gezon at TR 3721).

A motion to vacate was filed after trial (R.435-1), in which Item 4 claimed, "Certified evidence, including exculpatory evidence, was not given to the jury as required by this court to do under Fed. Rules of Evidence 902."

The court's ruling that "alleged investments" are "irrelevant" (R.401), causing the prevention of key witnesses and evidence was fundamentally unjust and prevented the Sixth Amendment right of a jury trial within its true meaning.

V. THE ACCUSED WERE PREJUDICED BY PRE-INDICTMENT DELAYS. THE RIGHT TO A FAIR TRIAL WAS PREVENTED BY VIOLATIONS OF THE SPEEDY TRIAL ACT.

The prosecution itself was delayed three years from the first "official accusation" in the Grand Rapids Press on 9/28/02 in which AUSA Gezon publicly admits he was knowingly violating grand jury secrecy rules in order to put his accusations in the media (Exh. LL). In this article, the headline reads, "Authorities are investigating a firm accused of losing millions of dollars". The first grand jury did not indict. It was only when the accusations switched to a "ponzi scheme" that the prosecution moved forward. In effect, the prosecution put the accused on the "shelf", until they could concoct a scheme to permit their case to proceed. Thus, the actual delay was that of almost three years from 9/28/02 until the trial started on 5/16/05. In that period of time, vital defense witnesses died,

including Carney, CEO of MLC, in November, 2002 (Sharpe at TR 505, Exh. I), a Director/Signatory on the SSBT bank accounts in 2003 (TR 3337), and Robert Rydberg, President of Crawford LTD. in January, 2005 (Flink at TR 2121).

Speedy trial analysis is said to be "triggered by arrest, indictment, or other official accusation", per Doggett v. United States, 505 U.S. 647, 655 (1992). "Official accusation" was during the investigation stage on 9/28/02 when an overzealous prosecutor comments to the press, infers guilt based on newsletters, and then concludes, "because it's not a good indication for their victims that their money has been well cared for" (Exh. LL-2). The term "victims" was used at least 117 times at trial.

Once the federal government becomes involved, all attempts to proceed with civil litigation to recoup funds for investors are stymied. Civil litigation is blocked against the Bosses by the federally-induced Motion to Adjourn, and the option for arbitration becomes effectively quashed (Exh. GG). Litigation against Plaster is blocked by the indictment of Richard Gerry, who was working with attorney Darwin Kal on Marcusse's behalf (Exh. L-2; R.392-1, p.9). Millions in "missing" funds at SSBT makes litigation on a contingency basis unrealistic, especially while the Bahamas Supreme Court was still deciding the issue.

On 12/5/03, a sealed Criminal Complaint was filed (R.2), but it was not until 7/29/04 that an indictment was obtained. The trial court's docket evidences that no trial date was ever set on

this initial indictment. The superseding indictment of 83 counts dated 10/27/04 included no "new" information not already long known to the prosecution as demonstrated by the same charges being added as stated in the original 12/5/03 FBI Complaint (R.2). The trial date is first set on 11/4/04 for 2/7/05 (R.113). The original indictment was not dismissed, and according to Section II(4)(d)(2) of the local Speedy Trial Act - Final Plan, the trial "shall" commence within the time limit for commencement of trial on the original indictment. Section II(5)(a) also instructs that the trial for "defendants in custody...shall commence within 90 days". Marcusse was arrested on 7/1/04 and went to trial on 5/16/05, with continual detainment in several county jails.

Marcusse initially delivered an objection over Speedy Trial violations on 11/9/04 (R.148, pgs.1-2), requesting the sanction of release under 18 U.S.C. §3164 be applicable to her.

The only direct response to her complaint is a court order on 11/30/04 for a competency exam (R.150), which seemed to have no legitimate basis other than retaliation and unwarranted stalling. Within the week, however, the first of several court-appointed defense attorneys files a motion for continuance, and "musical chairs" begins. Examination of their motions indicates that they were frivolous, and the timing suggests they were filed to aid the prosecution in delaying the trial.

On 12/6/04, Paul Denefeld, counsel to David Albrecht since 8/12/04, files a motion for an ends of justice continuance for more time to review and substitute new counsel from conflict of

interest by Ray Kent's anticipated move as Head of the Federal Public Defender's Office (R.153), which is granted on 12/22/04 thereby setting a new trial date from 2/7/05 to 4/18/05 (R.165).

On 12/13/04, Ray Kent, stand-by counsel to Marcusse since 7/23/04, files a motion to withdraw because he is being promoted as Head of the Federal Public Defender's Office, and it would be a "conflict" for him to continue to represent her because Mr. Denenfeld is from the same office (R.159).

On 1/20/05, Paul Nelson, Assistant Federal Public Defender since 1997, replaces Denenfeld because Denenfeld is no longer a Federal Public Defender (R.176).

On 1/31/05, Nelson files a motion to withdraw because Ray Kent is now Head of the Federal Public Defender's Office (R.181), which the court grants on 2/17/05 (R.203).

Chicago M.C.C., where Marcusse was shipped for the competency exam on 12/15/04, refuses to accept mail for her as evidenced by the docket, and all of her legal papers are taken by U.S. Marshals and shipped back home (R.169, 172, 173, 174 & 175). Therefore, Marcusse could not make any objections within that period and new counsel had just been appointed.

On 2/23/05, the same date as the competency hearing, a second motion for an ends to justice continuance is filed (R.206), this time by Lawrence Phelan, counsel to Wesley Boss since 8/10/04. Phelan wants a continuance based on his untimely realization that the trial date, which had been set over two months before, was going to conflict with his vacation to Germany for which travel arrangements had been made the previous fall.

The Speedy Trial Act, Section II(4)(f)(3), states that the grounds for a continuance are, "only if approved by the court and called to the court's attention at the earliest practicable time", yet the trial judge grants his motion on 3/15/05 (R.248).

On 3/18/05, the court orders the trial delayed until 5/16/05 (R.257). A second motion by Marcusse was made on 3/4/05 objecting to Phelan's continuance as not "timely", and is rejected for filing by the court (R.228). On 3/11/05, the filing is now accepted after being resubmitted but is auspiciously named as, "brief in support of motion for a thirty day ends of justice continuance" (R.237).

The delay of the trial for almost a year (318 days) greatly damaged the accused and helped to prevent a meaningful defense. Incarcerated in various county jails for over 10 ½ months, served a poor diet, no access to a law library or even a typewriter, hundreds of miles from home, with constant noise, and restricted or denied visits, dramatically takes its toll and weakens an individual, both spiritually and physically (R.157-3, P.31).

Doggett, 505 U.S. at 657, has also ruled that one type of harm in unreasonable delays is, "oppressive pretrial incarceration". The abusive tactics utilized by the custodial employees at Newaygo County Jail on a daily basis to harass, intimidate, tamper with the mail, threaten and confiscate legal papers, and even incite assaults against select targets was indeed "oppressive" (R.209, R.509).

For the third time, Marcusse files a pretrial Motion to Dismiss under 18 U.S.C. §3162(a)(2) regarding Speedy Trial

violations (R.356) and is responded to by the government on 5/16/05 (R.367), with incorrect statements, such as "no objections were made or filed" in regards to "a co-defendant's motion for continuance", referring to Phelan's motion. The government's response was in part adapted verbatim by the court in the Opinion denying Marcusse's motion on 5/17/05 (R.373, pgs.1-3).

Zedner v. United States, 126 S. Ct. 1976 (2006), ruled that "on a defendant's motion to dismiss, the court must tally the unexcluded days. This, in turn, requires identifying the excluded days. But §3161(h)(8)(A) is explicit that 'No period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable... unless the court sets forth...its reasons for [its] finding[s]'." No reasons were set forth in the court's denial (R.373) of Marcusse's motion to dismiss. Further, Section II(6)(b) of the local Speedy Trial Plan states that the "clerk of court shall enter on the docket...information with respect to excludable periods of time for each criminal defendant." There is no evidence this was done.

The trial was improperly delayed by 90 days by the superseding indictment. A vital defense witness, Robert Rydberg, President of Crawford LTD., passes away in January of 2005 of a heart attack after Marcusse had been detained over 180 days, thus enabling the prosecution to prejudice the accused over the Crawford investment at trial.

Moving Marcusse five times prior to trial, each time shipping all of her legal papers home, greatly hindered her

defense. Barker v. Wingo, 407 U.S. 514, 532 (1972), has ruled that the "interest" of limiting the possibility that the defense will be impaired, was the "most serious" in that, "the inability of a defendant adequately to prepare his case skews the fairness of the entire system." Chicago M.C.C. refusing to accept the mail sent to her, including mail from the court, thus preventing legal responses, definitely "impaired" her defense. Unwarranted and excessive psychological testing, commonly used in this court with tax cases to induce a plea, prevented access to the court and denied right to self representation per Faretta (Exh. AA; R.150). United States v. Marion, 404 U.S. 307, 324, (1971), has ruled that, "the Due Process Clause...would require dismissal of indictment if it were shown at trial that delay...caused substantial prejudice [a defendant's] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused." Feeding the competency issue to the media, along with biased reports prior to trial, seriously prejudiced Marcusse. See also United States v. Atisha, 804 F 2d 920, 928 (6th Cir., 1986) cert. denied, 479 U.S. 1067, has ruled that a pre-indictment delay to gain "tactical advantage" over the accused may violate a defendant's due process.

After arrest, Marcusse was brought before Magistrate England on 7/2/04 in Springfield, Missouri. 7/6/04 is the date that the Rule 5 documents were received from the Western District of Missouri per the docket. 18 U.S.C. 3161(g) sets a maximum of 180 days as does the Supreme Court in Fex v. Michigan, 507 U.S. 43 (1993). 7/6/04 is 314 days before the 5/16/05 trial start date.

11/9/04, the date of Marcusse's first complaint regarding Speedy Trial violations, is 188 days prior to the start of the trial, also violating the 180 day rule.

One reason which initially appears to have any legitimate merit to delay trial, was the arrest of George Besser on 1/12/05 (R.177-4), after Marcusse had already been detained for 192 days. The prosecution claims to have needed "confidential informant", David Rendleman, to obtain Besser's and Visser's addresses. Besser had retired to Mexico and registered his address with the government there while receiving Social Security retirement benefits, which is not indicative of hiding from the law. People close to Besser, none of his daughters, his granddaughter, nor his ex-wife were ever contacted about his whereabouts (Exh. U). The Appellee Brief uses the individual who purchases Besser's home to claim he left "no forwarding address" (AB-p.57). Visser was living with his brother, Ron Visser, and had two daughters registered in the public school system, yet his arrest was delayed until 10/04. This is not legitimate evidence of individuals "hiding". The accused had no reason to "hide" from authorities, but questions about this were blocked at trial (Hammond at TR 2683-85). Defense witness Hammond had attested in a sworn affidavit that the FBI had informed him in October, 2003, that they had determined the accused were victims and no charges would be pursued (R.157-2, pgs.35-39). The warrants were sealed, however, Marcusse fully admits after Plaster reneged on his written and verbal assurances following Carney's death, she was not comfortable to just recklessly waive her contact information

around until fiduciary responsibilities and remedies were exhausted. The Bosses son-in-law Joshua Hayes had threatened to put a hit on the accused through his uncle in Detroit as Jeff Visser placed on the record at a 12/27/02 Show Cause Hearing (R.16, TR 50 from Case No. 1:02-MC-074), and asked that his address be kept off the public record to protect his family. It was further discovered from Southwest Missouri natives and a local attorney, David Pointer, who was requested as a witness and denied (R.401), that Plaster had a long-standing reputation for being ruthless and retaliatory in his business dealings (R.392-1, p.6).

Mr. Rendleman was used by the prosecution to befriend Buffin, Visser and Besser after Marcusse was arrested on 7/1/04. Buffin filed pleadings that indicate Rendleman was directly assisting him under his advice (R.82, R.85, R.103, R.120, R.126). The defendants did not feel comfortable with public defenders or have the means to seek competent counsel and thought that Rendleman was offering honest support. The prosecution and the court later used these pleadings as their justification to attack the defendants in bitter diatribes, labeling them "frivolous, anti-tax, anti-government rhetoric" and "espousing nonsensical, anti-IRS, anti-government propaganda". Rendleman, who had the same judge and initially charged with mail fraud, was granted release pending trial on 4/27/04, signed a sealed plea bargain on 10/18/04 and was

sentenced just a few days after the defendants in the instant case on 11/03/05 (Exh. H). Part of Rendleman's reward for setting up the defendants was a significant downward departure for his "assistance". This is in spite of failing to appear on 10/29/04, "eluding police" until his arrest at home on 6/9/05 (Exh. H). On one hand, the government describes how unsavory this prior felon is and indicts him once again for fraud, yet Rendleman becomes immediately credible when it's to their advantage. This entrapment was used on inexperienced defendants in order to provide the means to prejudice them in front of the jury, force unwanted defense attorneys on them, and prejudice them on appeal.

United States v. Davis, 15 F. 3d 902 (9th Cir., 1994) has ruled that where the informant was clearly acting on behalf of government before inducing defendant, informant is a government agent for purposes of entrapment defense.

The competency exam order used as a delaying tactic by the prosecution (R.367), was fed to the Grand Rapids media to taint the local jury pool (Exh. V). A motion for a change of venue was filed prior to trial (R.311) due to these kinds of prejudicial issues, but was denied (R.325).

Even into this appeal, the only original defense attorney left, Anthony Valentine, does not file a brief until 2/9/07, five months after the others. AUSA Gezon resigns just three days

later on 2/12/07, permitting AUSA Schipper the means to request an additional 60 days. Four days later, on 2/16/07, the first wave of Marcusse's investor witnesses, Margaret Linnell, gets indicted (Case 1:07-cr-00282, U.S.D.C. New Mexico).

Thus, it can be established that the prosecutorial delay as aided by the defense attorneys, was "intentional" and that the accused "suffered actual prejudice" as required by United States v. Van Dyke, 605 F. 2d 220, 226 (6th Cir., 1979).

VI. DUE PROCESS WAS DENIED AND THE ACCUSED WERE PREJUDICED BY A LAST MINUTE COURT ORDER DENYING THE RIGHT TO PROCEED PRO SE.

Key to preventing a meaningful defense for the accused was not permitting them the right to be heard pro se by silencing them behind court-appointed defense attorneys. Counsel acted as advocates for the government to keep the case safe from adversarial testing. At least two attorneys were rewarded with senior positions at the Public Defenders Office immediately following their roles in the instant case. Item 17 of the PSR claims Marcusse was pro se at trial, but this was not an accurate portrayal of the facts as you will see.

In Arizona v. Fulminante, 499 U.S. 279 (1991), the Supreme Court has ruled that it is structural error to be deprived of the right to self representation at trial.

Besser was the first "lead defendant" to be stripped of his

Faretta right to proceed pro se. In an Opinion denying him this right (R.256, 3/17/05), the court claimed Besser had brought up "an apparent argument based upon the Uniform Commercial Code" (UCC), thereby concluding that "Defendant was not willing to abide by courtroom protocol." Nowhere in all the court transcripts will one find any mention of Besser discussing "UCC" or the "Uniform Commercial Code". As Besser effectively received a "life sentence" of 20 years at 67 years old, perhaps he should have been permitted to defend himself without this kind of "aid" from the court (R.268).

Buffin was the next to be denied his pro se right after having his bond revoked three days prior to trial. The timing of this indicates that it was in retaliation of his assertion of his protected rights as a Roman Catholic and to freely associate with counsel of his own choosing per Buffin's 5/17/05 bond hearing. Magistrate Carmody denies the government's motion for bond revocation (R.272; R.321), however, the trial judge overturns her ruling (R.334; R.335) in favor of AUSA Donald Davis. AUSA Davis personally supervises Buffin's arrest in his official capacity as "agent" for Homeland Security (TR 4, at 5/17/05 hearing). The court then seals the motion and order at the government's request (R.334). This signifies that Davis was abusing his authority to falsely profile the accused as "economic terrorists" as scripted for him in the July, 2001,

U.S. Attorneys' Bulletin (Exh. G-2, p.4), when charges are properly brought under 18 U.S.C. §514, however, §514 was not charged in this case.

As the result, Buffin is deprived of any counsel present at the 5/12/05 bond revocation hearing. He is also thrown into the drunk tank at Newaygo County Jail for 5 days straight, until such time as he disavows his religious association and agrees to accept court-appointed Ken DeBoer as his counsel (R.409, 5/17/05, TR 5-7, 10-11). Buffin was not permitted a shower or even a shave during the first two days at trial and appeared very disheveled before the jury. U.S. Marshals parade all accused that were detained pretrial in handcuffs in front of the entire prospective jury pool the first morning of trial (TR 28; See court video), but no defense attorney would object on the record as requested. Marcusse had just been threatened with removal if she tried to "speak" for herself (TR 26-27), and when Besser asked to be heard, the court refused to hear him (TR 28, R.545, 60(b) fraud claim).

Illinois v. Allen, 397 U.S. 337, 334 (1970), has ruled that the jury's view of a defendant while handcuffed implicates the Fifth Amendment right to due process.

At Buffin's second bond hearing after the second day of trial, the court informs Buffin he will be released only if he stays away from "Judith Cormier or any of her confederates" and

gets on "track" or it's back to county jail (R.409, TR 5,7-9, 10-11, 5/17/05 hearing). Cormier had filed an Amicus (R.289) "in re: Roman Catholic Action" (R.322-1; R.322-2) and is now facing conspiracy charges from Homeland Security specialist Don Davis as well as ordered for forensic studies connected to her beliefs and associations. The court states Buffin's bond was revoked because of these "utterly, utterly ridiculous documents" (R.409, TR 5). The court further claims that, "you were giving warning that I'm going to run or I'm going to do something here and not participate" (R.409, TR 6; Compare to filings at R.289-1 & R.330). Nowhere does Buffin indicate that he was "going to run", and the second half of this accusation is contradictory as well as an unconstitutional reason to deny bond. The prosecutor complains about the "frivolous stuff indicating that he doesn't think the court has any jurisdiction" (R.409, TR 8), acting as if anyone so much as files a motion attacking the merits of their case, or questions jurisdiction gives them the power on that basis to have the person locked up as a "threat" to them. The trial judge finally sets the "condition" that he wouldn't have released Buffin except attorney DeBoer attested he would "fully represent him" (R.409, TR 3), against Buffin's request for "stand-by" counsel only (R.409, TR 7).

Marcusse, the other "lead defendant", was denied the right to proceed pro se right from the outset of trial (Court at TR

18, 26-27, 31-32). On the other hand, Jeff Visser, who relied on Marcusse for his defense (TR 2644), was permitted to continue as pro se. The docket suggests that all of this was planned in advance. Motions for Discovery were filed by stand-by counsel for Marcusse on 4/26/05 and Buffin on 4/28/05 (R.283, R.287), with no similar motion having been filed by Visser's stand-by counsel, Donald Garthe, who first asks for the Rule 16 material after the government has rested their case at trial (Garthe at TR 2417).

At the final pretrial conference, the court orders an anonymous jury "due to no fault of anyone here" (TR 4, 5/5/05 hearing), based solely on Cormier's letter to the court (R.322-2), signaling her intent to watch the conduct of the trial court in this case so she may report on it in various media outlets read by Catholics. The court also orders pictures to be taken of all witnesses for the jury (TR 9, 5/5/05 hearing), thereby permitting the IRS to take these pictures and intimidate and scare the witnesses before their testimony (Exh. M). Mug shots are used for the accused despite the court's promise to the contrary at the final pre-trial hearing (Court at TR 9-10, 36, 5/5/05 hearing). The prosecution was ordered to "list their witnesses" prior to trial (TR 11, 5/5/05 hearing), but did not comply with the order until after 60 of the 77 total government witnesses had already testified, including 24 of the 28

investors they brought forward (TR 1763, ln. 15). Early into trial, Marcusse was suddenly denied the right to cross-examine witnesses when most of the critical exhibits were being entered (TR 30-31). This created an effective ambush with no way of preparing defense attorneys for any kind of meaningful cross-examination on the group's behalf as further facilitated by detainment in Newaygo, so far away from Grand Rapids that it thwarted defense attorneys from making the trip more than twice during the month long trial.

At trial, the Court strongly objects to the defense attorney's plea on Marcusse's behalf that she be permitted to give an opening statement (TR 74-78). Marcusse is eventually allowed to give the opening statement in which she outlines what she intended to offer as evidence, including "bank records will prove to you that we invested over \$10 million" (TR 79-80), with that specific figure being named to address the \$10 million having been alleged in Count 83. She attests that "proof will show that in March of 2001 a bank that we were using ... failed ... that the Department of Justice had an agent who had endorsed this bank in writing, and this was an endorsement upon which I had relied in order to make the decision that it was a safe bank" (TR 80). She discusses the plans for the "alternative health clinic" (TR 80), that the group had been invested in a "stock-based investment" (TR 81), that returns had been "left

offshore", and that retirement plans were handled by "legitimate organizations", such as Mid-Ohio Securities, or an investor self-directed "profit-sharing plan" (TR 81). She stated that taxes were not reported on this \$10 million (named in Count 83) because "there were no taxes due on monies that were invested elsewhere" (TR 81), indicating her understanding that "pass through" funds to investments are not taxable. She told the jury she believed that the Supreme Court had upheld her tax position as "legitimate" (TR 82), to which AUSA Gezon objected claiming she was "incorrect", and "in violation of the pretrial order", a Motion in Limine in which he had sought to deny Marcusse any good faith evidence including the use of statutes and Supreme Court cases as a defense to the tax charges (R.277), in violation of United States v. Bishop, 412 U.S. 346 (1973) and Cheek, which was permitted by the court (Court at TR 2424, 3773).

She attested that investor deposits had been "artificially enhanced", and that "one of our associates was not listed...so his bank accounts could not be included, as considerable amounts went to the Branson Project on behalf of the investor group" (TR 83). There never had been \$20 million or more in investor deposits. The figure was simply made up by the prosecution for purposes of sensationalism and to apply harsher sentencing guidelines if the accused failed to rush to a plea bargain.

McKaskle v. Wiggins, 465 U.S. 168, 178 (1984), ruled that the "pro se defendant is entitled to preserve actual control over the case he chooses to present to the jury. This is the core of the Faretta right."

Marcusse's planned defense was clearly sabotaged by court officials as she had feared from the start. Prior to trial, Marcusse was denied discovery of any IRS records on herself pertaining to the years in question (Exh. Q-3). Marcusse believed she could not risk further discovery with the prosecution because she was told it had to be reciprocal, and any information the prosecution gleaned was used to sabotage Marcusse's defense, such as the confiscation of attorney Sidhu's records. Another example was when Marcusse filed a pleading containing a sworn affidavit by associate Dan Hammond on 11/9/04 (R.157-2, pgs.35-39), attesting to investments made directly by himself and associate Tom Wilkinson, which caused the FBI to immediately confiscate their bank records so they could not be used at trial. Yet another was when Plaster reveals during cross-examination that he saw files from Marcusse's counsel in preparation for testifying and is questioned by defense attorneys over it (Kaczor at TR 2271). AUSA Gezon interrupts to claim, "Mr. Kaczor gave us a bunch of material, apparently from Ms. Marcusse, and I've shown him these documents in preparation for testimony" (Gezon at TR 2271). This was precisely what

Marcusse had been trying to prevent since the "playing field" was already quite unbalanced and caused the further distrust of the questionable motives of court-appointed counsel. This example displays the cooperative methods used by defense attorneys forced on the accused, in order to closely observe their defense and report findings back to the prosecution. This allegiance to the prosecution prepared AUSA Schipper and IRS agents to shield vital bank records from the jury in regards to the falsification of \$600,000 in "income" against Marcusse from GX-219, the bulk exhibit for the Worldwide E Capital bank account (Schipper at TR 3141-42). It also prepared government witness, Bruce Marcusse, to falsely testify he had not signed and notarized a sworn affidavit regarding another \$50,000 in "income" falsely attributed to Marcusse (TR 1408; Exh. HH). Records at the Grand Rapids, Kent County, Registrar of Deeds would establish Marcusse had sold a home she owned prior to 1998 for \$83,000 just before the \$69,400 house down payment alleged in Count 58. The closing documents were given to counsel, but not used at trial. The Appellate Brief uses the suppression of this evidence to claim Marcusse "had no assets" (AB-p.31). These acts materially damaged the accused. The trial judge had specifically ruled at the final pretrial conference that the accused did not need to present any of their evidence exhibits in advance (TR 29, 5/5/05 hearing). Only by forcing unwanted

defense attorneys on the accused was the prosecution able to obtain defense evidence so that they might dismantle it with witnesses who had their own best interests to protect.

Strickland v. Washington, 466 U.S. 668, 692 (1984), has concluded that interference with counsel's assistance is legally presumed to result in prejudice to the defendant.

AUSA Gezon attempts to deceitfully bolster a waiver of Marcusse's right to proceed pro se by claiming she was "quite ambivalent" about this right (Gezon at TR 138). The record is quite different. On 2/16/05, Marcusse filed a Writ of Mandamus in which she attested that a review of the public record had caused her to request that Kaczor be removed even as stand-by counsel because she believed him to be a "prosecutorial tool" (R.200). When the court denied the writ (R.213), she appealed it and the unlawful pretrial detention to the Sixth Circuit Court of Appeals on 3/11/05 (R.230), who dismissed the appeal entered under Case No. 05-1337 (R.290). While Marcusse responds affirmatively that Kaczor is "helping" her early on at the trial (TR 373), is not to be construed as a "voluntary" waiver of the pro se right as the response was made under duress to prevent further retaliation against her. McKaskle, 465 U.S. at 197, has commented that, "when the trial court has expressly refused to order standby counsel to serve in a purely advisory capacity, a pro se defendant cannot reasonably be expected to object to

counsel's every action."

Being silenced by the court allowed counsel the ability to control the questions asked as well as withhold the majority of critical evidence the jury needed to see to make an informed decision (Kaczor at TR 3049). With vital witnesses and evidence prevented, the only viable defense remaining was that of personal testimony and even that was controlled and limited by defense attorneys. Kaczor falsely claimed that the method of Marcusse's testimony was discussed between them and that it was decided he would ask the questions rather than allowing her to simply give testimony (TR 2181-82). Any objections by Marcusse to such behavior would have resulted in an instant removal from trial, as the trial judge had made very clear from the start.

The accused that were detained pretrial were physically abused during the trial. 48 year old Marcusse, Visser and 67 year old Besser were held in a drunk tank 6 hours or more each day in addition to the 8 hours per day spent at trial as confirmed by U.S. Marshals on the record (TR 635). Marcusse was not permitted her legal papers, pencil or paper in the tank. Oddly, jail policy was changed during the trial to allow the televisions in the cells to stay on and loudly blast 24 hours a day, causing serious sleep deprivation. An additional 3 hours each day was spent being transported to and from Newaygo County Jail, 46 miles away from the courthouse, when there was Kent

County Jail just 2.6 miles away. Kent County only had 2 inmates in federal custody whereas Newaygo was housing 98, as shown by DOJ statistics in 9/30/05 (See. Exh. W). This hectic pace causes Besser to have a seizure (TR 634). The trial judge expresses his concern by suggesting the accused may be at fault by "dragging their feet" when getting ready, as if the accused might actually have some control over their schedule while in jail (TR 634-36, 1174-77). The judge further claims Kent County is "full" so the accused can't be moved, yet there is room for Rendleman after his arrest on 6/9/05 during the trial.

The various court-appointed defense attorneys forced on the accused employed the "defense" strategy of casting blame on the other defendants, rather than the "united we stand" approach favored by the accused. It also demonstrates they failed to investigate the case at all. The original bank records were in the government's possession. Thus, their "defense" strategy was not only ineffectual, but substantially detrimental to "conspiracy" charges. "A common defense often gives strength against a common attack." Glassner v. United States, 315 U.S. 60. According to the trial judge, these were "all seasoned lawyers" that had spent "years in this court" (3/14/05 hearing, TR 17).

Marcusse was thereby saddled with a defense attorney that did not object when she was slandered by the report of a prior

arrest out of another defense attorney, supported by zero evidence (DeBoer at TR 3651), or when the prosecutor repeatedly used a defense attorney's name to claim Marcusse was a "liar" (Gezon at TR 3722, 3728; Exh. T). All of the defense attorneys remained silent rather than standing up and asking for a directed verdict of acquittal when the prosecutor admits he can't prove his "ponzi scheme" allegation in rebuttal closing (Gezon at TR 3713), and proceeds to re-argue his entire case, going on for another 8,000 words in over 31 additional transcript pages (TR 3744). These actions openly reveal a new standard of incompetence for the term of "ineffective" counsel.

The supposedly pro se accused were not permitted to attend the jury instruction conference. At this conference, defense attorneys did object to an instruction for "failure to file a tax return", claiming this had not been a charge in the indictment (Garthe at TR 3453). AUSA Gezon countered that not only had it been included, but the "nature of the conspiracy" was that of "failure to file" (Gezon at TR 3455). The court agrees (Court at TR 3456).

In closing arguments, it is only the two defense attorneys whose clients were not charged with any unreported "income" amounts in Count 40, Items 3-17, that argue "failure to file" has not been charged. Defense counsel to Besser states, "if my client was charged with failure to file taxes, they got him.

Failure to file taxes is not one of the charges here" (Dunn at TR 3642-43). Defense counsel to Marcusse also claims in his closing arguments, "she's not charged with failing to file a tax return" (Kaczor at TR 3589). He then argues, however, that \$343,370 is "how much she would have gotten paid once you deduct the \$600,000" (Kaczor at TR 3607), thus manufacturing an amount for her in unreported "income" in contradiction to evidence in his possession, Marcusse's testimony and underlying bank records. Thus, the road was conveniently paved for the trial judge's "altered" jury instructions (Court at TR 3445-46) to permit the prosecution's charges of "failure to file" as the "scheme to defraud" for mail fraud (Court at TR 3761-62, 3772-76, 3778).

The other defense attorneys can also be demonstrated to have been aware that the alleged mail fraud scheme given to the jury was only that of "failure to file and pay tax". This is evident from their motions filed prior to sentencing objecting to the PSR. Flynn's counsel uses a jury verdict calculation of "between \$200,000 and \$400,000" (R. 544-2, p.12), basing it on the amounts alleged in Count 40 in the indictment (Items 7-12). Agent Flink had alleged \$740,000 in unreported income against Flynn at trial (Flink at TR 1736). Counsel to Buffin argues that the "jury verdict and the Defendant's admissions reflect an offense involving \$250,000" (R.492, p.29), again using the

amount alleged in Count 40 (Item 5). If any of those defense attorneys had truly believed the accused had been found guilty of a "ponzi scheme investment fraud", or even an "investment fraud" regarding deceptive promises made, on investments, then these figures would have been considerably higher to reflect that concession.

Wiley v. Sowders, 647 F. 2d 642, 649 (6th Cir.), cert. denied, 454 U.S. 1091 (1981), held that, "an attorney may not admit his client's guilt which is contrary to his client's earlier entered plea of 'not guilty' unless the defendant unequivocally understands the consequences of the admission."

The record has clearly established that the nature of the prosecution's charges have varied literally by the hour and by the audience. The Appellee would argue that because Besser didn't understand the charges, he needed the assistance of counsel. It appears even the defense attorneys were confused about the charges as anyone accused of stealing \$12 million would be confused when underlying bank records are not allowed to be used as a defense.

Flanagan v. United States, 465 U.S. 259, 268 (1984) has ruled that in regards to the Sixth Amendment right to represent oneself, "Obtaining reversal for violation of such a right does not require a showing of prejudice to the defense, since the right reflects constitutional protection of the defendant's free

choice independent of concern for the objective fairness of the proceeding. See McKaskle v. Wiggins", 456 U.S. 168.

Assistance of counsel can be deemed inadequate as a matter of constitutional law when it was such as to make the trial a farce and mockery of justice per United States v. Taylor, 562 F. 2d 1345, 1360 (2nd Cir., 1977); United States v. Wright, 176 F. 2d 376, 379 (2nd Cir., 1949), cert. denied, 338 U.S. 950 (1950). Strickland v. Washington, 466 U.S. 668, 771, has ruled, "In cases in which the government acted in such a way that prevented defense attorneys from functioning effectively, we have refused to require the defendant, in order to obtain a new trial, to demonstrate that he was injured."

The active participation above by defense attorneys in the government's scheme to switch the alleged mail fraud scheme after the defense rested, from that of a "ponzi" to "failure to file", shows a concerted effort by court officials to work as a team to create a specific outcome. These maneuvers must not be allowed to stand where the law is very clear in these matters.

After seeing so much abuse from the court, Marcusse turns away from the podium at sentencing. That prompted U.S. Marshals to jump from each side and simultaneously twist her fingers in a brutal manner, indicating this had been planned in advance (See Court Video). She begs the court to "make them stop hurting me" (TR 46, 10/28/05, R.639). The court refuses to admonish the

Marshals, causing the attack to instead escalate. Marcusse's refusal to be attacked in silence results in her removal (TR 46-47, 10/28/05). As Marcusse's supposed "advocate", Kaczor says nothing during the attack, and rather than taking the court to task for permitting such outrageous misconduct to persist, apologizes by saying, "I obviously can't control her behavior" (Kaczor at TR 49). This allows the court to claim Marcusse had to be removed due to her "volitional actions" and results in more fodder for the media (Court at TR 50-51).

Rhodes v. Chapman, 452 U.S. 337 (1981), has ruled that practices that involve unnecessary and unrestricted infliction of pain are prohibited.

Ray Kent, initial defense attorney assigned to Marcusse, is made Head of the Public Defenders Office midway in the case. Kaczor, accepts the position as Senior Litigator for the Public Defenders Office shortly after Marcusse receives 25 years and is rewarded for his loyalty at sentencing by being thanked by the judge for handling this case in an "exemplary fashion" (R.487, R.488, TR 50 from 10/28/05 hearing). Marcusse remains in prison on false charges and suffers from constant pain in her hands and back to the present date.

VII. THE COURT PERMITTED PLEADINGS IN OPPOSITION TO THE GOVERNMENT'S CASE AS EVIDENCE OF GUILTY INTENT IMPROPERLY EXTENDING THE LENGTH OF THE ALLEGED "CONSPIRACY" AND PREJUDICING THE ACCUSED BY PROCEDURAL FLAWS CAUSING PRETRIAL DETENTION.

The time frame alleged in the 10/29/04 indictment, four months after the arrest of Marcusse on 7/1/04, that the "scheme" and "conspiracy" were "continuing to the time of this Superseding Indictment" (R.323) could only have been claimed by the continuing "criminal" act of the accused filing pleadings to contest "ponzi scheme" charges they knew to be false thereby violating their First Amendment rights.

Rule 12 of the Federal Rules of Criminal Procedure further allows for "Pleadings and Motions Before Trial; Defenses and Objections". This was severely limited at the district level by excessive stall tactics and legal wizardry. The court rejected outright 22 of Marcusse's pleadings on the record, and gave little to no consideration of the remaining 33 filings (Exh. X), commonly denying them without substance for such reasons as they were "void", "nonsensical", or of "no effect" (Court at TR 8). Filings were rejected in some instances for not following proper procedure, however, Marcusse was prevented from learning protocol by not being permitted near a law library in county jail by order of the court unless she forcibly accepted a lawyer

(See Exh. Y). The rejections were also a violation of the well-established doctrine of Haines v. Kerner, 404 U.S. 519 (1972).

The first morning of trial, the trial judge denies her need for bank records and ridicules her requests as "nonsense", at least 12 times, claiming her motions had "harassed" him (Court at TR 8). The prosecution repeatedly mocked her pleadings and beliefs as "goofy", while personally attacking her in front of the jury (See Exh. Z; TR 3558). Those filings challenging jurisdiction due to fraud produced particular outrage from court officials.

At the 11/9/04 arraignment, the simple request of asking to file legal papers on the record resulted in an assault by U.S. Marshals in open court. Marcusse was jumped with such violence that the leg of the wooden table where she had been sitting at the time she was attacked was broken (TR 120; See court video). This attack caused herniated disks in Marcusse's back (R.545). When these filings still had not shown up on the docket 3 weeks later, Marcusse made a second request to the Clerk of Court (R.157-1) which immediately was followed by a court ordered competency exam (R.150). This order was based upon the observation by the court on 11/9/04 that she had been "visibly out of control". The Magistrate's assessment is correct in that most middle-aged women are "visibly" out of control when being assaulted by a gang of large men. Initial defense attorneys, Ray

Kent, who remained silent during this attack was thereafter promoted to Head of the Public Defenders Office (R.159). Marcusse motioned the court for a copy of the video of the hearing (R.346), but was denied (R.362). The judge called her ideas "crazy" on the first morning of trial (TR 13). However unpolished or accusatory her beliefs might have initially appeared in pleadings, Marcusse was nevertheless defending herself the best way she knew how, given unwarranted delays, ineffectual counsel and no access to the minimal basics such as a typewriter and references to law. Those basics had to be supplied from outside the court system through the mail, hundreds of miles from home.

A sampling of the public record reveals that this trial judge routinely engages in the discriminatory practice of ordering competency exams, particularly against women when the charges are IRS related and the defendants won't agree to a plea bargain (Exh. AA).

During trial, AUSA Gezon submits the pleadings of the accused as "efforts to obstruct the investigation. Efforts to obstruct the investigation goes to intent to defraud" (Gezon at TR 1131-32; Moore at TR 1669). Several of the defense attorneys objected, including reasons that the filings were being used to improperly extend the time covered by the "conspiracy" past the time of the grand jury in 2002, and because the evidence was

"more prejudicial than probative" (TR 1131-32). The court overruled all of it. The admission of this evidence not only violated the First Amendment, but Federal Rules of Evidence 403 and 404(b). AUSA Gezon uses them in his closing arguments to claim that, "She accuses prosecutors of being corrupt, investigators, federal investigators of being corrupt, all in an intention to divert the issue about what she had done with this money" (Gezon at TR 3526).

United States v. Meriweather, 78 F. 3d 1070 (6th Cir., 1996), reversed the conviction due to the admission of evidence relating to uncharged conspiracy that was "more substantially prejudicial than probative" violating Rule 403 and 404(b) of the Fed. Rules of Evidence. United States v. Jobson, 102 F. 3d 213, 222 (6th Cir., 1996), ruled that "the failure to issue an effective limiting instruction was not harmless" in regards to Rule 404(b) as to "uncharged misconduct". No limiting instructions were given in the instant case.

Marcusse had appeared in front of the grand jury on 5/22/02, and submitted a motion at that time to quash, based upon what she believed to be the bad faith evidenced by the involvement of the IRS in response to her report to local law enforcement on 8/2/02 regarding the Bosses embezzling \$1.5 million of investor funds, and the fact no investors had received more than "adjusted basis" for any taxes to even apply.

While she answered questions about the Bosses and their embezzlement, Marcusse believed she was religiously and constitutionally protected over answering questions about the unincorporated Sanctuary Ministries until being heard by a judge on the motion (R.309-6, pgs. 11-14).

In United States v. Doe, 465 U.S. 605 (1984), the Supreme Court held that the act of producing books and records is entitled to Fifth Amendment protection. United States v. Grable, 98 F. 251, 253, 257 (6th Cir., 1996), cert. denied, 519 U.S. 1059 (1997), ruled that while the Doe protection does not extend to corporate documents, personal documents do merit at least some partial protection. The Morganroth Court indicated that the court must permit the witness to assert the privilege "with respect to particular questions, and in each instance, the court must determine the propriety of the refusal to testify." In re Morganroth, 718 F. 2d 161, 167 (6th Cir., 1983). The improper detainment of Grable on a contempt order was issued from the same court as in the instant case, in similar circumstances.

When some of the other defendants, who were also investors, appeared in front of the grand jury on 5/22/02, the investor "contract" issue was raised in addition, which should have triggered the issue of arbitration as the initial remedy to this matter (TR 102; GX-1, p.15-16). Jeff Visser's family was the second largest investor at over \$700,000 invested (GX-80).

26 U.S.C. §7611(a) prohibits church tax inquiries. United States v. Powell, 397 U.S. 48, 57-58 (1964), has ruled, "In order to quash a summons, the taxpayer must demonstrate that the summons was issued for an improper purpose or any purpose reflecting on the good faith of the particular investigation."

As "expert" witness, IRS Agent Goeman, testified to the grand jury on 4/22/03 in reference to filing tax returns, that a church organization is "not required to file anything with us". Geoman further clarified that there was an exception for "churches and their auxiliary units and conventions or associations of churches", which was "conditioned" on the fact that "they are attached to something that is tax exempt". The Roman Catholic issue was quashed just prior to the trial. At trial, the court would not permit Agent Goeman to be asked any questions about a church, ruling, "That's not at issue here, a church" (Court at TR 2382-83). It appears the court was relying on a non-rebuttable incorrect presumption that the organization involved was accurately named as "Access Financial Group", as alleged in the indictment. At trial, Marcusse asked about a "corporation versus non-incorporated", but received no answer (TR 2383). The Appellee Brief now misrepresents the structure of Sanctuary Ministries as "corporate" (AB-p.30), so it is likely the court presumed this from the start in order to use it to also avoid the protections of the Doe and Grable cases. It

further permits the prosecution team to persist in misconstruing the proper tax treatment of investor distributions. Marcusse had based the motion to quash on the unincorporated or 26 U.S.C. §508(c) status of Sanctuary Ministries.

These issues were prevented from being heard at the time of the grand jury by the intentional lack of legal service on her, which then facilitated the issuance of an improper arrest warrant to prejudice her (Exh. EE, R.145-2, p.6, GX-357). Agent Moore falsely testifies at trial that the subpoena had been sent by certified mail, when this is incorrect according to the certificate of service signed by Cindy Vine, the legal secretary for the Office of U.S. Attorney (See Exh. EE; Moore at TR 1673-74; R.309; R.145-2, p.6).

"Service of process...is fundamental to any procedural imposition on a named defendant." Faber v. United States, 69 F. Supp.2d 965, 967 (W.D. Mich., 1999); Murphy Bros. Inc. v. Michetti Pipe, 526 U.S. 344 (1999).

LSJ Investment Company v. O.L.D., 167 F. 3d 320, 323 (6th Cir., 1999), has ruled, "For service to be proper, it must not only comply with the relevant rule, but must comport with due process by providing notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." The process of service also violated Michigan Rules

of Civil Procedure, Rule 2.104 and 2.105.

At trial, GX-357 establishes the prosecution team knew the service was not "proper", but this evidence was withheld from the record (TR 3894). Agent Moore admits at trial that it had been their "strategy" not to arrest Marcusse (Moore at TR 1654). It may also have been their "strategy" not to serve her the subpoena so as to give them the means to later unlawfully detain her, to impede a defense as well as prejudice and slander her in the media, thereby affecting the jury (R.307, R.309-6, pgs. 6-10; R.309-6, p.8; R.309 Rule 60(b) fraud claim for unlawful pretrial detention).

The prosecution made a major production at trial that Marcusse was "extremely difficult to locate" by FBI Agent J.R. Smith (Smith at TR 1765-72), helping to bolster the deceitful claim that she had been "on the run" as fed to the newspapers to taint the local jury pool against Marcusse (Exh. BB). A motion for change of venue to the Western District of Missouri (R.311) was denied (R.325). Among several other options, all the FBI would have had to do to locate Marcusse was simply ask her mother (Exh. CC) or one of their own witnesses, such as investor Darrell Massman, but that was not part of the "strategy" according to Agent Moore. Massman testified on 5/25/05 that he had regularly met with Marcusse in Springfield, Missouri, the last time being "probably a year ago" (Massman at TR 1593).

Instead, all they did was obtain her address from former associate Jessica Dudkiewicz, in 10/03, in addition to threatening her with 20 years if she spoke to Marcusse about it. At the same time, the FBI told Hammond they were dropping the case (R.157-2, pgs.35-39).

A 6/4/02 fax sent to Agent Moore from MLC contained the fax number, 417-272-0216, listed under the Phoenix Foundation, as used by Marcusse in the office Phoenix was leasing in the same building as MLC in Branson West, Missouri (R.309-6, p.5). Mike Carney from MLC appeared in front of the grand jury in May, 2002. A 12/6/01 letter from James Sullivan, an investor and the attorney handling the investor lawsuit against the Bosses (Flink at TR 3413), who sent the letter "via facsimile transmittal to (417) 272-0216", establishes Marcusse was using the Branson office before she had any knowledge of the federal investigation as precipitated by the 12/18/01 search warrant on the old office in Michigan (Exh. DD). The improperly sworn-to search warrant obtained by Agent Moore shows that it was executed on 12/20/01, which is the earliest possible date the government can legitimately say that the accused were made aware of an investigation. An investor government witness at trial indicated that a March, 2001, newsletter had given everyone the contact name of Phoenix Foundation (Stinger at TR 128-29). Even a check of telephone records would have indicated that the telephone

lines for Phoenix had been connected since October, 2001, at 16282 MO-13, Branson West, Missouri. Key family members were never contacted for addresses of any of the accused (Exh. U, Exh. CC). Instead, an elaborate scheme was concocted by the prosecution team to use the media, permanently detain Marcusse, and as indicated in Issue V and Exhibit H, use Rendleman in order to have an excuse to also detain Besser and Visser pretrial and improperly label the accused as "anti-government".

The arrest warrant dated 7/29/02 "was placed under seal" (R.6, Item 4), as also shown in the Government's Motion and Order to Unseal Case. This Motion then claims that "Janet Mavis Marcusse remained a fugitive and was not arrested on the warrant" (R.6, Item 5). It further claims the government considers her a "flight risk" (R.6, Item 7). It is inherently impossible for Marcusse to have been "guilty" of not appearing on a subpoena for which she was never served, or for her to be a "fugitive" from a sealed arrest warrant, however, the trial judge signs the Order (R.6). The docket shows that Magistrate Carmody signed the Order, but in reality, her signature is absent (R.6, p.15 of docket). The Order further states that the grand jury before whom the proceedings occurred, expired on August 29, 2003, and thus the "Court's civil contempt warrant became moot and was recalled from the lien system" (R.6, Item 5). This was the same arrest warrant, however, used to arrest

Marcusse on 7/1/04 (R.9), signed by the trial judge, and executed by Ted Quist of the USMS on 7/21/04. FBI Agent Smith testifies at trial that he makes the arrest when "finally there was a warrant issued on an indictment for her" (Smith at TR 1766). The indictment was not issued until 7/29/04 (R.24).

See v. Seattle, 387 U.S. 541 (1967), has ruled that it is well-settled Constitutional doctrine that a subpoenaed party must be able to obtain judicial review of the reasonableness of the demand before being made to bear the consequences of non-compliance. It is constitutionally very plain that a fundamental maxim of law is to provide proper notice, follow due process while pursuing the least restrictive remedy when pretrial detainment is used and personal liberty is denied. The only response from the trial judge was to issue a bench warrant for failure to appear when Marcusse did not receive notice from proper service regarding an order to show cause in Case No. 1:02mc78, sealed on 7/29/02, after the order for a bench warrant was signed that same day (Exh. Q-2).

Marcusse returned to Missouri from a business trip and learned that she might have also been requested to appear in Grand Rapids as Visser had recently received notice to that effect. Marcusse sent a letter on 9/1/02 stating her position and petitioned the court to reconsider its recommendation, yet received no response from the court (Exh. Q-2). Marcusse sent

another letter that was received by the court on 12/27/02, clearly listing a mailing address, as once Carney died in 11/02 the offices were shut down, but still received no response (Exh. Q-2). She then assumed that the investigation had ended since the court did not respond, Dan Hammond was told by the FBI the case was closed, and the Grand Jury had expired without action.

For merely petitioning the court to reconsider their position, she was twisted into a "flight risk", held without bond pretrial, prejudiced before the jury, and publicly hammered as being "on the run" (Exh. BB). It is improper for even those defendants holding corporate records to be prejudiced by non-production at trial. The prosecution team did not follow due process concerning production of records, either by error or simply to gain tactical advantage and improperly label defendants as "anti-government tax protestors" [sic].

United States v. McLaughlin, 126 F. 3d 130, 133, (3rd Cir., 1997), cert. denied, 524 U.S. 951 (1998), was a case in which the IRS served a summons on Russell McLaughlin as the corporate custodian on records. At his trial, the prosecution argued that his failure to produce certain bank records was evidence of an intent to evade the assessment of tax. The Third Circuit held that McLaughlin's Fifth Amendment rights had been violated, reversing the conviction, citing Braswell v. United States, 487 U.S. 99 (1988). The Court held that "the corporate custodian qua

custodian must comply with a records subpoena and the government is barred from offering the testimonial and incriminating aspects of that production (including non-production) against him." United States v. McKee, 192 F. 3d 535 6th Cir., (1999), has ruled that a criminal tax conviction may be overturned if the IRS is found to have violated a provision in its manual designed to protect the Constitutional rights of taxpayers.

Guilty verdicts may not be obtained by using defense pleadings to misconstrue to the jury as "evidence" of "obstruction" or of "guilty intent" merely because the accused happen to disagree with the government's allegations.

There is also the issue over the overreach of power by AUSA Davis under Homeland Security in order to prevent Constitutional protections to apply to targeted defendants. The July, 2001, U.S. Attorneys' Bulletin (Exh. G-2), discussed the tools and techniques used against "notorious" anti-government groups, named as those led by Schweitzer and Broderick, and the legislation Congress had passed to combat them under 18 U.S.C. §514, a crime which was not charged in the instant case. The labels, tools and techniques scripted in this Bulletin were liberally applied to the accused, such as illegal tax protesters, detainment for failure to appear allegations, competency determinations, repeated cries of harassment by the prosecution team and judge, precisely executed right down to the

25 year maximum sentence applicable to a crime under 18 U.S.C. §514. The prejudice against the accused under the pretext of this crime having been charged was enormous. Proper procedures must be followed to receive due process or it must be admitted "there is no constitutional effect here" (Marcusse at TR 26).

There were other violations, including Rules 403 and 404(b). The inclusion of the Bosses highly prejudiced the other defendants, especially as it related to conspiracy issues. Evidence particularly related to the Boss's actions, was placed before the jury that was more "prejudicial than probative", in regards to their irrelevant uncharged misconduct, such as falsified W-2's prepared for loans and health insurance (GX-29; GX-319). Kurnat testified that Boss and Siemen had put together this "fraudulent information" (Kurnat at TR 1095). Marcusse was not included in this health insurance nor did she even know about it (GX-319, A-C; GX-29, A-F). Donald Beemer, V.P. of Reno Insurance Group, testified that a list of employees of Discovery Church had been submitted by the Bosses (Beemer at TR 1835-37). Beemer further testified that not only was Marcusse's name not provided, but "I don't even know who she is" (Beemer at TR 1838). Siemen had previously testified that, in regards to a fax from Reno, "it was faxed from Reno, so I would assume that it came from Vegas" (Siemen at TR 987). Since Marcusse had spent some time in Las Vegas with Gerry and Moon, the Reno Insurance

fax misleadingly inferred a tie between Marcusse and these falsified forms. At the Boss sentencing, AUSA Gezon concedes that Diane Boss was the one who "created" the falsified loan paperwork which greatly prejudiced the other accused (TR 14, 10/7/05, R.687).

United States v. Breinig, 70 F. 3d 850, 8530 (6th Cir., 1995), has ruled that the presentation of otherwise inadmissible, highly inflammatory evidence which "provided the government with unfair windfall that the rules of evidence and elemental notions of fairness would otherwise not allow, and that Rule 8(b) does not envision," was cause for reversal.

VIII. IT WAS PREJUDICIAL TO THE ACCUSED AND REVERSIBLE ERROR FOR THE PROSECUTION TO ENGAGE IN HEARSAY AND BRUTON VIOLATIONS.

The prosecution engaged in repeated acts of prejudicial hearsay in violation of the right to confrontation, including Bruton violations. Government investor witness, Joyce Stinger, was used to claim that non-testifying defendant Dave Albrecht supposedly told her, Jan's "not a believer" (Stinger at TR 209), when religious beliefs were given to the jury to decide (Court at TR 3772-73). This is from a witness Marcusse does not recall ever meeting, and not an individual Marcusse is permitted to cross-examine or lodge an objection (Court at TR 31).

Government investor witness, Tom Bannister, claims that

non-testifying defendant Wesley Boss told him, "wasn't it a coincidence that the checks quit coming at the time we were not involved with Access anymore" (Bannister at TR 670). The bigger issue with the Bannister testimony is not whether it violates McDaniel, so much as it is prosecutorial misconduct. Here, the government is using an unreliable witness to plant the deceitful impression of a "ponzi" with the jury by inferring it was a defendant that had control over whether or not the investors were paid, rather than that of the performance of the investments themselves. Bannister's testimony is also problematic because he is one of the government's witnesses who materially changes his sworn testimony from the preliminary hearing to that at trial (TR 67-70, 7/28/04; TR 663-65, 669-70). Marcusse is not permitted to cross-examine Bannister while silenced by the court.

Agent Moore testified that in a July, 2002 interview, non-testifying Buffin tells him that he "realized this thing went bad"; that "Jan's good at dangling the carrot in front of your face"; and that "he was afraid he was gonna lose his daughter if he went to prison" (Moore at TR 1649-51). Of the last claim, Agent Moore admits, "I did not include it in my 302" (TR 1651), making it suspect of having occurred, in addition to a violation of notice. Prior to the alleged "prison" comment, defense attorneys objects under McDaniel (Kaczor at TR 1650), but is

overruled by the court (TR 1651). Under cross, Agent Moore admits he told Buffin, "it looks like she set you up to be the fall guy" (Moore at TR 1663-64), but nowhere does the record indicate that Moore was honest with Buffin by also disclosing the material fact that IRS "investigators" were not including any investments that were not of a "prime bank" nature in their "Ponzi scheme" accusations (Flink at TR 2052-54, 2058, 2070-76). Webster's Dictionary defines "coerce" as, "to dominate or control, esp. by exploiting fear, anxiety, etc." For the FBI to falsely attest to Buffin that Marcusse made no investments would have been to "exploit" fear and anxiety.

AUSA Gezon uses Moore's testimony to attest, "Mr. Buffin basically confessed to Agent Moore...in July of 2002, that's when Mr. Buffin said, Yep, I knew a year ago that Jan was a crook" (Gezon at TR 3734).

No defense attorneys object to the above, nor does appellant counsel assigned to Marcusse mention this most flagrant violation in Issue II of his Brief, demonstrating their ineffectiveness as counsel. Bruton v. United States, 391 U.S. 123, 132, has ruled, "A defendant may be prejudiced by the admission in evidence against a co-defendant of a statement or confession made by that co-defendant. This prejudice cannot be dispelled by cross-examination if the co-defendant does not take the stand." Nor can its harmful effects be dispelled by jury

instructions. Justice Frank likened it to a kind of "judicial lie", which "undermines a moral relationship between the courts, the jurors, and the public; like any other kind of judicial deception, it damages the decent judicial administration of justice."

There is no legitimate evidence or testimony to indicate that Buffin did indeed "confess", however, because AUSA Gezon verifies it as truth before the jury, should qualify it as a "coerced confession" under the standards defined in Chapman v. California, 386 U.S. 18, 26 (1967), as that of a structural error requiring reversal.

AUSA Gezon's "confession" on behalf of Buffin is even used by defense attorneys DeBoer at the time of sentencing to claim in his objection to the PSR that, "Defendant's admissions reflect an offense involving \$250,000. The corresponding base offense level for five kilograms of cocaine is 20" (R.549, p.29). When DeBoer is confronted about "cocaine", the identical error to the "clerical error" made on Besser's detention documents (Gezon at TR 23), DeBoer changes page 30, not page 29 where the "error" occurs (R.523), leaving the "admission" fully intact for the record. Marcusse files a Rule 60(b) fraud claim about this legal maneuver (R.545-1). This furthered Marcusse's suspicion that the recurring discovery of bogus narcotics charges against the case were also being used by the Dept. of

Justice to keep the investor funds which are still "missing" from SSBT, and the likely reason for Count 83, the \$10 million money judgment. Neither DeBoer nor the prosecution ever deny these allegations.

At Buffin's sentencing two weeks prior to the 60(b) filing, DeBoer claims that the inclusion of the "level 20 for five kilograms of cocaine" was something that was "boiler-plated from another pleading" that he "missed" before signing the document (TR 6, 10/14/05 hearing). The trial judge covers for DeBoer by attesting that level 20 is the correct level for 5 kilograms of cocaine, and further claims that this type of thing "happens all the time" (TR 5, 10/14/05). Title 18 U.S.C. §2D1.1(c)(4) states that 5 KG of cocaine is a level 32, not a level 20. There is also the issue that defense attorney DeBoer appears to be "stipulating" to a \$250,000 unreported income tax offense by claiming "Defendant's admissions reflected an offense involving \$250,000 (R.549, p.29). Buffin did not testify at trial, and prohibited defense evidence indicated Buffin also had "pass through" funds falsely attributed to him as "income".

This type of violation did not occur only with Buffin. The government submitted a letter "confession" as evidence, which had been prepared and signed by the Bosses (GX-7ldd). Neither of the Bosses testified at trial, making the entry of Exhibit GX-7ldd yet another Bruton violation as it named Marcusse.

Hill v. Hofbauer, 337 F. 3d 706, 717 (6th Cir., 2003), ruled that "there is no occasion to depart from the time-honored teaching that a co-defendant's confession inculcating the accused is inherently unreliable, and that convictions supported by such evidence violate the constitutional right of confrontation." See also Lee v. Illinois, 476 U.S. 530, 546 (1986). Cruz v. New York, 481 U.S. 186, 195 (1987), ruled that, "Confessions of defendants have profound impact on juries, so much that we held in Jackson v. Denno, 378 U.S. 368 (1964), that there is justifiable doubt that juries will disregard them even if told to do so."

These Bruton violations were highly damaging to the accused, particularly in light of the conspiracy charges in the indictment, and warrant a reversal of the convictions.

IX. IT WAS PREJUDICIAL AND IMPROPER FOR THE ACCUSED TO BE JOINED WITH THE BOSSES, WHOM THE ACCUSED HAD REPORTED TO LAW ENFORCEMENT FOR EMBEZZLEMENT ON 8/2/01, THEREBY INITIATING A FEDERAL INVESTIGATION STARTED BY THE IRS.

Marcusse met Diane Marcusse DeWeerd Boss in 1975, marrying her brother Bruce in 1976. She divorced him in 1989, but the two women remained friends. Because of this lengthy friendship, Marcusse felt comfortable enough to place DeWeerd as a signatory on bank accounts. DeWeerd took advantage of this trust by

writing checks for herself, family, and friends in excess of \$1.5 million of investor funds for which she did not have permission. DeWeerd brought in long-time friends, Bonnie Kurnat as her assistant, Julie Siemen as her cleaning lady, and Wesley Boss as a sales associate, whom she married in 12/99 and sent a newsletter telling investors they were running Access (GX-34).

Siemen was the individual used by the prosecution to submit "business" records, such as GX-80, which had been tampered with before submission to remove Tom Wilkinson as a sales associate (Exh. J-2; TR 1015-16), as well as to misleadingly infer to the jury that "interest" checks to investors continued to be mailed for several months after SSBT's license was revoked (GX-82, GX-83, GX-84). The ability to use the underlying bank record statements would have proven that the check numbers posted in these exhibits were never cashed.

Marcusse was "rarely" in Michigan, traveling for business, and even termed as an "absentee owner" by AUSA Gezon (TR 8, R.687). DeWeerd (now Diane Boss), told her friends that if they called Marcusse, they would be fired, helping to hide the embezzlement and the fact that Diane was paying these individuals out of Access, rather than out of her own checkbook if she wanted help. Other associates, such as Rich Muma, Access International, deceased, and Tom Wilkinson, Access Global, paid for their own help (Kurnat at TR 1093-94). Investor deposits

were diverted to Access Financial, rather than as instructed to Sanctuary Ministries (R.2, Att. C).

Associates Buffin and Brewer contacted Marcusse about their suspicions regarding the Bosses. Marcusse moved \$700,000 in investor funds into her personal checking account solely to prevent Boss from writing any more checks. All of these funds were then immediately moved into investments with Moon and Gerry through Worldwide E Capital LLC in Las Vegas (Exh. D-2). In April of 2001, Boss was officially removed from the checking accounts with Buffin replacing her. A 7/3/01 newsletter (GX-48) advised investors that the Bosses were no longer associates and that more than \$1 million was missing. A police report was filed by Marcusse with the Ottawa County Sheriff's Dept. on 8/2/01 (R.309-3, p.1). Civil litigation was filed on 8/10/01 against the Bosses in Case No. 01-40847-NZ in the Ottawa County Circuit Court, and a lien was placed against their assets.

Det. Crumb contacted the IRS (Crumb at TR 1486), which is believed to be what initiated the instant case against Marcusse. Agent Moore's Complaint claims it was by an accountant on 3/01 (R.2), as does his trial testimony (TR 1626), but this is contradicted by the 10/28/05 Press Release from the Office of U.S. Attorney, which attests it was "late 2001" when "disgruntled investors notified the authorities" (Exh. FF, p.3). It would also seem more likely an accountant at tax time would

call the IRS rather than the FBI on a "suspicious" tax return. Thus, it appears this 3/01 claim was made solely to assert a date prior to the move to Branson so the move could be falsely alleged as an attempt to evade law enforcement.

The Boss civil litigation case is where the government's falsified trial evidence scheme regarding Exhibits GX-1, GX-2/GX-3, and GX-33 first surfaces. A Motion to Adjourn is filed on 7/29/02, which indicates the Bosses had been meeting with federal officials for "9 months" (R.144, Exh. GG, Item 6; Moore at TR 1665). They indicate they "have entered into a tentative plea agreement to plead guilty...to criminal charges including fraud and tax evasion. As part of the consideration for their plea agreement, the Defendants have agreed to continue to cooperate with the U.S. Attorney's Office by testifying in any prosecution of the Plaintiffs and their officers and Mrs. Jan Marcusse, in particular" (R.144, Exh. GG, Item 7, Exh. G). Their Brief claims that the "investment plan that Jan was offering" was that of "World Prime Bank medium term INTEREST BEARING NOTES" paying "three percent (3%) per month" (Exh. GG, p.2), thereby merging the "prime bank" booklet with the Bahamas Stock program. It further claims that the "Parties were involved in an illegal Ponzi-style scheme to defraud investors" (Exh. GG, p.7). It attests that, "Jan Marcusse never transmitted funds from the Access Financial and Sanctuary Ministries accounts to any

offshore location" (Exh. GG, p.7). Even Agent Flink, who was deceitful over millions of dollars, admitted that at least \$2.7 million went to "foreign investments" (TR 22-23, 7/29/04). The Brief concludes, "When a Plaintiff's action is based on his own illegal conduct, and the defendant has participated equally in the illegal activity, a similar common-law maxim known as the "doctrine of pari delicto" generally applies to also bar the plaintiff's claim" (Exh. GG p.7). In other words, a criminal can't sue a criminal (Flink at TR 2067-69).

Therefore, with the filing of the Boss's deceitful Brief, the government had the script for their case-in-chief in the instant case. They also benefited from the windfall of the Boss's confession in court and in the Grand Rapids Press on 8/25/02 (Exh. G), as well as in a mailing to all investors to solicit for claims for the government to subrogate (GX-71dd) on 8/28/02.

Without the inclusion of the Bosses in the instant case, there would have been no case to pursue. There was no "ponzi scheme" as conceded by the prosecution (Gezon at TR 3713). It was only the Bosses who had admitted to one as a deflection in their Brief, and again at their change of plea hearing during trial (TR 9, 19, R.685). Questions of Agent Moore regarding the Boss civil case, however, were blocked by the trial court as having nothing to do with the instant case (Court at TR 1668).

The public record further demonstrates that the prosecutor had been willing to offer Diane Boss a significant sentence reduction in return for her perjury on these issues (R.6, p.13). After sentencing, Boss filed a 28 U.S.C. §2255 Motion, citing "prosecutorial misconduct" as an issue (Case No. 1:06-cv-694). Boss complains that she had been entitled to a sentence reduction under §5K, but did not receive it as she was sentenced to 10 years. She was initially offered a stipulation of the guidelines at 26, which is 63-78 months (R.6-2, p.7). She attests that she was threatened with 25 years if she continued with the trial (R.11, p.3).

In the instant case, Marcusse filed a claim on 11/9/04 objecting to the Bosses as co-defendants (R.144). She further objected to the prejudice of their public confessions (R.144, p.5; GX-71dd), a violation of Rule 14. On 11/24/04, Wesley Boss also filed a motion for severance (R.140), and it was denied by the court (R.252).

The embezzlement was described as "payments" to the Bosses and attested to be \$1.4 million at the 7/29/04 detention hearing by Agent Flink (TR 39, 7/29/04). At trial, these were reduced to \$1,311,735 (GX-92), and divided (GX-91 & GX-92), with \$826,238.50 for Diane Boss, and \$485,495.50 for Wesley Boss (Court at TR 133), so as to appear less than that of Marcusse or Besser.

The IRS also moved "income" from the Bosses to the others. Diane Boss had written \$45,000 in checks from Access to her brother, Bruce Marcusse (GX-303, A&B), yet \$50,000 was moved to Janet Marcusse as unreported "income" at trial (GX-95; Flink at TR 39, 7/29/04 hearing). Bruce Marcusse protects himself and his sister by repeating Diane's initial story at the time of the civil litigation that Janet Marcusse had used his credit cards without permission (B. Marcusse at TR 1399). Bruce Marcusse denied that he had signed a notarized statement giving her the permission to use these cards (B. Marcusse at TR 1399-1400, 1407-08), which was shown to him in advance of his testimony as provided to the prosecution by defense attorneys (TR 1408). His perjury keeps Defense Exhibit 1, the notarized statement, from being placed into evidence (Exh. HH; R.553-2; Marcusse at TR 1408). It also permitted the prosecution to assume facts not in evidence and tell the jury the document was a "forgery" to further prejudice Janet Marcusse (Gezon at TR 2104-05). After trial, the State of Michigan attested that the woman who witnessed Bruce Marcusse's signature as a notary, was in fact registered as a Notary Public at the time in question. A Rule 60(b) complaint was filed over this, alleging prosecutorial misconduct in regards to the subornation of perjury (R.553).

The total attributed to the Bosses was also reduced by charging some of it as "income" to Siemen and Kurnat (\$113,000,

Kurnat at TR 1062), so that the basis could be manufactured for Count 42, Conspiracy against the IRS, regarding an "employer", allegedly Access Financial, for not filing W-2's, an offense described under 26 U.S.C. §7202. There were no salaries or W-2's. Access was not to be used as an employer. The Bosses admit in a 7/29/02 Brief filed in court over the civil litigation case there was no salary (Exh. GG, p.4).

28 of the 77 government witnesses at trial testified either to the prolific spending, or the bad acts of the Bosses, or both, in regards to an alleged "conspiracy" with the rest of the accused (See Exh. JJ). As soon as Marcusse became aware of the Boss embezzlement, she took steps to remedy the situation, including going to law enforcement. To charge the other defendants of a "conspiracy" with the Bosses, by using their wrongful acts and admissions was an abuse of charging authority enabling them to use the Bosses to prejudice the others as the government's case lacked any merit without them. By delaying until several days into trial, the threat to Diane Boss with 25 years, the prosecution was able to use their confessions in the media again (Court at TR 1406), without having the risk of submitting either one to cross-examination at trial over their bogus "prime bank" and "ponzi" allegations and inclusion in the evidence tampering scheme.

United States v. Frost, 125 F. 3d 346, 389 (6th Cir.,

1997), has ruled that improper joinder will be reversed when "actual prejudice" has resulted because it had a "substantial and injurious effect or influence" on the jury's verdict." Joinder is improper when the state joins evidentiary case with much weaker case in hopes that culmination of evidence will lead to convictions in both cases. Sandoval v. Calderon, 231 F. 3d 1140 (9th Cir., 2000). There is also the issue of "withdrawal", including going to law enforcement, or the "definite and decisive steps to disassociate." United States v. Battista, 646 F. 2d 237, 246 (9th Cir., 1981).

50 counts in the indictment, including 7 money laundering counts for \$223,789.76, are solely attributable to the Bosses for acting against known policy, and therefore are the result of acts unknown and unforeseeable to the others, but tied to them nevertheless through a concocted "conspiracy".

18 of the mail fraud counts and 8 of the money laundering "promotional" counts are from the Krogmans (D.K. & S.K.), Rodriguez (R.R.), Noormans (R.N. & D.N.), and Bannister (T.E.B.). Raul Rodriguez was the landscaper that received \$240,000 in embezzled funds for landscaping done on the Boss's home (Rodriguez at TR 1355, 1361, GX-73). \$35,000 of these funds were by way of a deposit receipt for investments in trade for landscaping (Rodriguez at 1357), that Marcusse refused to honor, which may be a reason why Rodriguez pursued his claim through

the government instead. Ronald Noorman received \$26,021 in embezzled funds from the Bosses for a Firebird sportscar (Noorman at TR 1206; GX-72f; Flink at TR 1747). Tim Bannister's brother, Tom, had yet another falsified investment deposit receipt from Boss, which Marcusse had publicly criticized in a newsletter (GX-54, p.1). If the government truly had 577 investors, certainly they should have been able to find some with "clean" hands.

In the cross-examination of Agent Flink, Marcusse objected to the many counts included in the indictment over the individuals that were party to the funds embezzled by the Bosses as included in the 8/01 civil litigation against the Bosses (TR 2111-15).

Other witnesses testified to the wild spending of the Bosses. Tom Lubbers testified that he received \$271,000 to pay off the Boss's home (TR 1264; GX-325). Maryann Vincini testified about receiving \$47,729 to pay up Wesley Boss's retirement plan to enable him to receive full benefits (TR 1329; GX-321). Richard Moon from Classic Chevrolet testified that the Bosses spent \$68,050.80 for two brand new SUV's (TR 1370-71; GX-323 A&B).

Investors Duane Krogman (TR 1563; GX-68k), and Stanley Krogman (TR 1867; GX-69a), testified under a plea bargain that they had deducted the \$280,000 they placed into the investment

programs on their taxes as contributions. Each produced a donation receipt from Discovery Church signed by Wesley Boss. The prosecution had alleged in their Trial Brief, "A second scheme involves the Defendants making 'charitable contributions' to a church, generally of 50% of adjusted gross income", that the defendant has set up for himself (R.297, p.50). There was no evidence presented at trial that anyone other than the Krogmans and the Bosses engaged in this "scheme". Nevertheless, the prosecutor tries to tie it to Marcusse. Stanley Krogman initially testifies that it was Marcusse who told him to claim the proceeds from the sale of his farm as a gift to the church (Krogman at TR 1868). He later admits he "never" talked to Marcusse (Krogman at TR 1876), and that the document used for deduction was provided by Wesley Boss (TR 1876; GX-69i). Krogman admits he had gotten GX-52, the newsletter that states, "a taxpayer may not generally deduct the amount of a charitable gift for gifts which the taxpayer receives a benefit" (TR 1877; GX-52, p.3). This is the same newsletter the trial judge excused the jury for, to give Marcusse a verbal thrashing for asking Agent Flink questions about it, thereby preventing the jury from seeing it (Court at TR 2085-89).

The Bosses wrote a 12/00 newsletter (GX-40), in which they stated, "Regarding taxes DO NOT report any funds received on your 2000 taxes." Marcusse was unaware of this newsletter as

stated in a 9/01 newsletter (GX-50, p.1), "I did not write a newsletter last December". This predated any knowledge of the federal investigation. The government tries to cover this up by listing the newsletter without a date (TR 3882).

The Bosses also disregarded policy regarding providing information on investments. They sent out statements of "earnings", such as GX-68i, which were tampered with to remove the "estimated and projected only" disclosure before mailing them. The 9/01 newsletter addresses this problem, "I clearly instructed that the profit pool statements be sent out "estimated or projected only." It was only in the past two weeks that I actually saw a statement and realized that my instructions were not followed." (GX-50, pgs. 1-2).

United States v. Adams, 581 F. 2d 193, 197 (9th Cir., 1978), cert. denied, 439 U.S. 1006, ruled that, "The government may not, however, add a conspiracy count merely to bypass the requirements of Rule 8(b). The conspiracy must be charged in good faith." See also United States v. Valenzuela, 596 F. 2d 824 (9th Cir., 1979), cert. denied, 441 U.S. 965.

Other tax issues apparently mishandled by the Bosses included at least one of the Steelcase employee trust fund transfers (GX-330). Glen Jager, while admitting he talked to no defendant about how to transfer his retirement funds (TR 1455), should have nevertheless been asked for a copy of his qualified

plan documents when his check arrived so the problems could have been remedied at the time. There is no evidence this was done by the Bosses. This issue was used to mislead and confuse the jury regarding the culpability of all of the accused. Any shortcuts that the Bosses may have taken in the structure of a proper qualified funds handling process may even have been in conjunction with the individual investors' instructions. The process to determine such culpability at trial was not permitted. It was circumvented by jury instructions that stated "it is not necessary for you to find that a defendant personally committed the crime" (Court at TR 3767), thus causing all to be found guilty by "association". The Jagers consisted of 7 counts in the indictment.

Even the nature of Count 42 in regards to 26 U.S.C. §7202, that the accused failed to file "W-2's" or submit "employee" information had been due only to the inclusion of the Bosses as defendants. Once the Bosses pled guilty and withdrew, the government also withdrew the §7202 allegation and switched to a §7203 charge.

United States v. Critton, 43 F 3d 1089, 1098 (6th Cir. 1995), cert. denied, 514 U.S. 1121 (1995), has ruled that antagonistic defenses do not mandate severance; severance is justified when the presentation of defenses in the same trial will mislead or confuse the jury. Tax issues are easy to confuse

even when presented correctly; when presented misleadingly, severe prejudice can result. When isolated examples of a tax offense are plucked out of a large group, and are in addition contrary to the published policy or normal practice, it is inappropriate to charge all of the rest with them under "conspiracy" or "aiding and abetting". The additional element of "willfulness" is essential to any "tax" conviction.

In an audio tape transcript made by investor Glen Jager dated 7/6/01 (GX-59a), the prosecution withheld from the jury (TR 3882), Diane Boss admits she knew the policy, "You cannot promise in this type of thing", and "the stock market is like this, you know" (GX-59a, Tape One, Side Two. p.10). It proves that both Boss and Jager knew the investments were in stocks, not in the "prime bank" program Boss later represents to court in her Motion to Adjourn in the civil litigation case. It even proves the prosecution knew they were engaging in fraud by pursuing the "prime bank" claim. The audio tape transcript also has Diane Boss admitting she changed Marcusse's newsletters, "Jan writes them. I fine tune them" (GX-59a, Tape One, Side One, p.10). A 9/01 update newsletter (GX-49, p.4), states that "prior newsletters were significantly altered". Diane Boss further admits in the tape transcript, "She never does that", in regards to Marcusse calling "Access Financial" the company (GX-59a, Tape One, Side One, p.13, ln. 22-23).

In the civil litigation case, the Bosses eventually admitted to improperly taking funds and a partial judgment was obtained in June, 2002 (Exh. KK). The government interfered with this civil case, causing the Motion to Adjourn in July, 2002, which was granted in September, 2002, thereby causing the accused to abandon the case. Investor Tim Bannister testifies at trial that the Bosses had admitted it was a "mistake on their part" to take the funds (Bannister at TR 672). After trial, AUSA Gezon concedes that he knew it was Diane Boss that "admonished investors not to report their income to the IRS" (Case No. 1:06-cv-694, R.6, p.11). After trial, Wesley Boss admits he was attracted to the group based on his desire for tax avoidance (R.502-1, p.9).

United States v. Falcone, 311 U.S. 205, 210 (1940), has ruled that the essence of the crime of conspiracy is the agreement. Without an agreement, there can be no conspiracy.

As the result during trial, a non-existent "agreement" is scripted and verbally fed by counsel to Wesley Boss at his change of plea hearing to claim "with Ms. Marcusse and others" to support his guilty plea of conspiracy to commit money laundering (TR 23-24, 5/24/05 hearing, R.685). Wesley Boss further claims that it "was agreed with Jan Marcusse to use investor funds to purchase the home that we had and to supply the landscaping around it to make the operation look successful"

(TR 23, R.685). The prosecution knew this coercion was not true from the audio tape transcript they withheld from the jury, and thereby, from this appeal.

In GX-59a, the Bosses stated they wanted to work out of their home, because according to Wesley Boss, "Part of it was the idea of why pay overhead you don't need to pay" (Tape One, Side One, p.17). Diane Boss admits that the "agreement" had been for their utility bills to be paid, such as "gas, electric, and phone and taxes" (Tape One, Side Two, p.37). She further admits that she "never took a pay check" because the utilities were paid for her (Tape One, Side Two, p.38). This tape is clear on the "agreement" that Wesley Boss was the one considered the sales associate for commissions (Tape One, Side One, p.17), with the Boss's utilities reimbursed because of the phone and fax. A 12/99 newsletter gave the Boss's phone number as the contact to take over Marcusse's investor referral base (GX-34), which was deemed to be of sufficient stature to fully compensate the Bosses as commissioned sales associates. The trial record demonstrates that none of the other accused, including the two "lead defendants", paid off their homes, spent hundreds of thousands on landscaping, or paid off boats, travel trailers, or vehicles. The Bosses purchased or paid off six vehicles with cash, including two brand new SUV's. A review of the indictment's money laundering charges attributed to each

defendant shows this disparity. Besser is completely absent in any "spending" or "concealment" charges, for example.

The prosecution is demonstrated to have interfered with the litigation against the Bosses, causing the liens for the benefit of the investors to be released, thereby impeding the obligation of contract, only to later charge the other accused with the same obligation of contract in a falsely charged "conspiracy" with the Bosses. Investors could have obtained relief back in 2002 on the Boss litigation, except for this interference, which caused investors to permanently lose out because, according to the government, once the liens were lifted, Boss "borrowed money against the house up to the limit of its value, effectively negating any substantial return to the victims" (R.501-1, p.6). Marcusse was also improperly charged with restitution for the Boss's \$1.5 million embezzlement. There were dozens of bogus investors on the government's sentencing restitution list who were friends of the Bosses that had never invested in the program.

The denial of the motion to sever caused prejudice against the rest of the accused and constitutes reversible error. The charging of counts in the indictment against all of the accused for criminal acts attributable only to the Bosses, and the invention of a "conspiracy" as to a "ponzi" and to their "tax" offenses, was an abuse of charging authority. AUSA Gezon

dismisses Marcusse's criminal charges and litigation against the Bosses as actions taken because it "diverts the attention away from her" (TR 3526). If this were true, then anyone who suffers an embezzlement could be subject to criminal charges as the result. All other counts in the indictment not attributable to the Bosses were as the result of being defrauded on legitimate investments.

X. A RUSH TO JUDGMENT WAS MADE ABUSING NOTICE, LAWFUL CONDUCT, EX POST FACTO PROTECTIONS, ARBITRATION, AND THE RIGHT TO CONTRACT. THE PROSECUTION TEAM ENGAGED IN VINDICTIVE ABUSES OF CHARGING AUTHORITY, SELECTIVENESS, AND PREVENTED THE DEFENSES OF GOOD FAITH RELIANCE AND ENTRAPMENT BY ESTOPPEL.

LACK OF PROPER NOTICE

The high return stock investment at SSBT was deemed a "high yield investment fraud" or "prime bank" fraud at trial in order to mislabel investments and confuse the jury. Congress made the specific provision under 18 U.S.C. §514 for a "prime bank" prosecution had this actually been a legitimate charge.

It is required that in a conspiracy, a member must understand the essential nature of the scheme and intentionally join in it per United States v. Warner, 690 F. 2d 545, 550 (6th Cir., 1982). Marcusse did not understand "prime bank" or "high yield investment fraud" to include stock investments. The first

morning of trial, the court informed Marcusse that she did not know what this trial was about (TR 8), and Marcusse put on the record that, as the result, she was confused as to the "nature and cause" of the charges (TR 9, TR 26).

The court sentenced most of the accused on a "ponzi scheme", but sentenced Marcusse on "specialized high return investments", demonstrating that notice was abused in this case.

LAWFUL CONDUCT MADE CRIMINAL

Investing in high return or high yield investments, such as stocks or other venture capital endeavors, is not a crime. Failing to file a federal income tax return when income is below the legal threshold necessary to file, is not a crime. The trial judge confirmed this point by stating, "Anyone with a gross income of more than \$13,400 was required by law to file an income tax return in years 1997 through 2001." (Court at TR 3772). It was impossible to effectively impeach the IRS witnesses on their "substitute" tax returns when bank records could not be used and any discussion on this topic was thwarted.

For the government to punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort. United States v. Sanders, 211 F. 3d 711 (2nd Cir., 2000).

EX POST FACTO VIOLATION

To have used "high return" or "high yield" investments to define a "prime bank" instrument is an ex post facto violation in this case in that it was not until 2002 that additional "red flags" were added to the term "prime bank" and noticed to the public per expert witness Zawistowski (TR 787). The last investment made on behalf of the investors was in 2001 to MLC.

Because the ex post facto clause only limits legislative action, the Court has characterized such judicial retroactive decision which alter the elements of an offense as Due Process violations per Rogers v. Tennessee, 532 U.S. 451 (2001).

ARBITRATION

Prosecution in this case was barred until remaining remedies were exhausted and the issue of arbitration was resolved. All investors had signed contracts agreeing to arbitration (Def. Exh. M-C(2)). 9 U.S.C. §2 states that an agreement for arbitration is "irrevocable and enforceable". The prosecution approached the investors claiming the accused had engaged in a "ponzi scheme" and "prime bank" fraud in order to obtain the right of subrogation for the United States in this matter. Fraud in its inducement renders this right null and void.

The Sixth Circuit has held in Fazio v. Lehman Brothers, 2003 Fed. App. 0284P, that "in order to void an arbitration clause, the complaint must contain a well founded claim of fraud in the inducement of the arbitration clause itself, standing apart from the whole agreement, that would provide grounds for the revocation of the agreement to arbitrate." Glazer v. Lehman Brothers, 03-4312 (6th Cir., 2005), ruled that, "the court must stay the proceedings until the arbitration process is complete", and that, "a court must conduct a hearing on this matter."

After Marcusse put in a Complaint to authorities about the Boss embezzlement, civil procedure was quashed and the government marched forward to criminal prosecutions (R.309-3). The prosecution sidestepped the contract issue by the "strategy" of subverting the normal procedure for the lawful delivery of subpoenas in order to deceitfully cause the court to issue and seal arrest warrants for Marcusse and Visser (Moore at TR 1654; R.307, R.309), rather than hold the required hearing on the contract issue as requested by Visser, Flynn and Buffin at the 5/22/02 grand jury appearances.

THE SUPERSEDING INDICTMENT WAS VINDICTIVE PROSECUTION

The superseding indictment dated 10/27/04 was an act of vindictive prosecution to increase the prison sentences. AUSA Schipper remarked that this level of punishment was "really off

the charts" and "nothing comes close" (Grand Rapids Press, 10/29/05, Exh. O). Now in the Appellee Brief, he claims the sentence calculations were accurate (AB-p.86), referring to a 14,520 month calculation (Exh. O). He further claims reducing the sentence 300 months was a "very substantial downward departure" (AB-p.86). For a Category I "white collar" defendant, these claims have no merit and are simply indicative of the outlandish types of claims the prosecution has sought to promote throughout the entire case. No other remedy was sought for relief while the prosecution took over 2-1/2 years to investigate this matter prior to the initial 7/29/04 indictment (Exh. FF, p.3). The superseding indictment's latest "new" count was in 2001, considerably before its 10/27/04 date.

An \$81 million "ponzi scheme", USA v. Horton, (1:06-cr-00087-RHB), had 4 total counts. USA v. Broucek (1:04-cr-00113-RHB), another \$134 million "ponzi scheme", had a similar disparity of only 2 counts. The above two cases came out of the same court with the same judge with the obvious difference of Marcusse choosing to exercise her right to a fair trial, which prompted 43 additional counts to be stacked onto the original 40.

In United States v. Andrews, 633 F. 2d 449, 454 (6th Cir., 1980), has ruled that when the prosecutor has already exercised his discretion, the probability that the prosecutor acted

vindictively by adding on extra charges is higher.

There was no "new" information underlying the counts added in the superseding indictment that had not already been known to the prosecution. The enormous number of counts alone was prejudicial. The additional counts, however, maliciously increased the maximum statutory sentence to 20 years over that of 5 years, and caused the prosecution to seek initial "guidelines" sentencing recommendations of over 1,200 years.

Andrews, 633 F. 2d at 455, 456, continues, "if, after carefully assessing a prosecutor's seeming retaliatory adding of charges, a court finds that the situation before it presents a realistic likelihood of vindictiveness, the ordinary remedy is to bar the augmented charge." In addition, "once a court has found the existence of a realistic likelihood of vindictiveness the burden of disproving it is on the government."

The superseding indictment was vindictive prosecution, and all of its additional charges, counts 41-83, should be dismissed as the result.

MONEY LAUNDERING COUNTS WERE AN ABUSE OF CHARGING AUTHORITY

In the superseding indictment, money laundering counts 66-76 are specifically tied to alleged tax offenses, which is barred by Tax Division Directive No. 99. Money laundering "promotional" counts, 44-53, are multiplicitous, being the

identical checks or transactions to those in mail fraud counts 7, 10, 17, 18, 19, 21, 26, 27, 28 and 30. Count 43 is multiplicitous to mail fraud count 15, but listed erroneously as \$3,300 (TR 3483). Counts 55-57 are investor returns of principal, and therefore not "promotional" or "profits" as alleged. Count 82 has the wrong date of 11/02/01, instead of 11/02/00 (TR 3482). The money laundering counts were claimed by the prosecution at trial to be based on the "unlawful activity" of a "ponzi scheme" (Gezon at TR 3570), making the counts null and void when the "ponzi scheme" was withdrawn (Gezon at TR 3713). They were also an abuse of charging authority because the checks paid investors were based on the representations by an offshore bank (SSBT) endorsed by Agent Forrester. The "unlawful activity" was switched to a tax offense during the adjustments to the jury instructions (Court at TR 3762-63).

"Generally, an indictment may not charge a single criminal offense in several counts without offending the rule against multiplicity and implicating the double jeopardy clause." United States v. Busacca, 936 F. 2d 232, 239 (6th Cir.), cert. denied, 502 U.S. 985 (1991). Multiplicity was argued in the pretrial motion to dismiss the indictment (R.310), but denied by the court (R.325).

Concealment was an essential element levied against some of the money laundering charges in counts 41, 66-76, 81-82. There

is no concealment involved in the deposit of a check into a checking account, or with writing a check to another account. The evidence for concealment was manufactured by the removal of the attachments to the 6/99 newsletter by the prosecution, which contained the wiring instructions to SSBT (GX-31; Kaczor at TR 3598) and 10/99 newsletter to Sanctuary (GX-33).

United States v. Willey, 57 F. 3d 1374 (5th Cir.), cert. denied, 516 U.S. 1029 (1995), ruled that transferring money between accounts was insufficient evidence of an intent to conceal.

"Spending" is not money laundering. United States v. Marshall, 248 F. 3d 525 (6th Cir., 2001), cert. denied, 534 U.S. 925, ruled that, "Subsequent purchases made with funds withdrawn from brokerage account, which was created from proceeds of illegal activity in violation of money laundering statutes, did not constitute sufficient evidence per se of intent to conceal source of money to support money laundering convictions for those derivative transactions, regardless of defendant's actual intent." The motion to dismiss money laundering counts also argued that basing it on "spending" (Counts 58-65, 77-82, R.323) was inappropriate (R.310). The denial was error (R.325). All of the money laundering counts, 41, 43-82, should be vacated and dismissed.

VIOLATION OF TITLE 15 EXEMPTIONS & INTERNATIONAL TREATY

The government based their case on the fraudulent presumption that, "Janet Marcusse operated an investment company called Access Financial Group" (R.323, Item 1). This was done to circumvent the exemptions provided Sanctuary Ministries, the actual investment company, from which all 39 checks in the indictments stemmed. Plumstead Theatre Society v. C.I.R., 675 E. 2d 245 (9th Cir., 1982), was found not to have violated the prohibitions in 26 U.S.C. §501(c)(3) by selling "limited partnerships with investors." See also Ohio Teamsters v. Commissioner, 692 E. 2d 432, 436 (6th Cir.,1982). Organizations, such as Sanctuary Ministries are unincorporated and exempt under the mandatory exception when affiliated with a recognized tax-exempt church. See St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772, 783 (1981). MLC 1871 of the Michigan law authorizes Roman Catholics to hold property for religious, charitable, and literary purposes. Ponce v. Roman Catholic Apostolic Church, 210 U.S. 206, ruled that a dedication to a public or charitable use may exist, even when there is no specific corporate entity to take as grantee.

At trial, AUSA Gezon abused the prejudicial term, "checkbook church", repeating it at least 18 times, in spite of repeated objections by the defense (Exh. T-2). He asked a former associate, Patrick Rohlof, if he had contacted the IRS before

using this "checkbook church" (Gezon at TR 2486-88). Marcusse asked Rohlof if he would consider it "normal to call the IRS before you decide what church to go to", or whether he'd "ever heard it's up to the IRS to tell you what is a church and what isn't" (TR 2489-90). Other outrageous questions asked by the prosecution included whether investors had asked to see the employment tax records of the organization (Gezon at TR 2590).

United States v. Seeger, 380 U.S. 163 (1965), has ruled that "any faith is correct and cannot be second-guessed."

Taxes and forfeiture were the real agenda behind the prosecution. The words, "tax", "taxes, or "taxable" were mentioned over 920 times at trial, in spite of the fact it had been conceded the essential element of "willfulness" was missing when AUSA Gezon admitted the accused may have been "misreading" the tax code in regards to the "508" (Gezon at TR 3452). The jury was instructed that the question of what constitutes a church for federal tax purposes may be before them (Court at TR 3772). Constitutionally, this was not an issue for jury determination, and this had not been a charge in the indictment. All 39 mail fraud counts were based on checks the prosecution alleged in the indictment were from Access Financial Group. In reality, all 39 checks were issued from Sanctuary Ministries (R.323).

"Apart from narrow exceptions, such as the advocacy of

bigamy, it is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment" per Fowler v. Rhode Island, 345 U.S. 67. "Civil and religious liberties are political rights" per Permoli v. Municipality No. 1 of New Orleans, 3 How 589, 11 L. Ed 739. Given the history of this court, Marcusse believed that no constitutional protections were in place and asked the court, "is that not a political question?", which the court then mischaracterized and interpreted as a refusal to put on evidence and witnesses (TR 4, 8/4/04 hearing). Marcusse was therefore unlawfully detained for almost a year prior to trial, which severely impeded a meaningful defense, given the malicious antics of the prosecution to tamper with her mail, phone calls, and even incite violence against her (R.545). Buffin was severely coerced over his Roman Catholic association during trial, forcing him to abandon his beliefs violating 28 U.S.C. §530B and Act 328 of the Michigan Penal Code, 750.543z, "Constitutionally protected conduct; prosecution prohibited".

It is evident that the prosecution engaged in an abuse of charging authority by hiding their "tax" agenda under their knowingly bogus, but highly prejudicial, "ponzi scheme" allegation to provide the means to circumvent Tax Division Directive No. 99, along with a litany of slander against

Marcusse that she was a "liar" and "immoral".

As the result, AUSA Gezon misstates the law and the circumstances surrounding this particular organization, characterizing the organization as "hocus-pocus" that "defied common sense" (Gezon at TR 3517), an improper means to measure compliance to tax law.

"Notice" was manufactured between the detention hearing in 2004 and the trial in 2005 in regards to some of the tax issues. Gov. Exh. 43, which was used at the detention hearing, was a list of 19 bank accounts, which was changed in order to add one additional account at West Michigan Community Bank with a \$10,500 deposit in GX-170, a similar exhibit to Gov. Exh. 43 and then used at trial. The account had been closed by West Michigan Community Bank on 9/3/99 (GX-240), shortly after it was opened. The IRS in Grand Rapids contacted the accused afterwards, was explained the circumstances, and they dropped a planned audit at the time (GX-41, p.3). Agent Flink admits at trial to having been involved at this time, but would not admit to having dropped the audit after contacting the accused (Flink at TR 2089-90). If the accused were in error on this tax position, wouldn't this have been the correct time to provide "notice" by the IRS, rather than waiting until a court ruling halfway through a criminal trial on the issue almost 6 years later? (Court at TR 2416).

At trial, Agent Flink manufactures "notice" by claiming that, "after they were asked to leave West Michigan Community Bank, they opened up accounts at National City Bank" (Flink at TR 1690). This was not true. The National City accounts were the "main" accounts, and Gov. Exh. 43 indicated that the Sanctuary Ministries account was first opened on 6/23/98, over a year before the West Michigan Community Bank accounts (See Exh. D-3). Exh. D-3 shows that GX-170, the exhibit used at trial dropped the opening and closing dates of the accounts, which had been included in Gov. Exh. 43.

Marcusse objected to the ability of the IRS to claim the jurisdiction necessary to pursue the case (R.392-1, p. 1; R.310; R.312; R.315), which the court denied (R.325). Motions regarding the improper inclusion of the IRS in the case (R.247; R.250), were deemed by the court as "Void" and of "No Effect" (R.245). The initial pleading (R.152) was retaliated against by a court-ordered competency exam (R.150).

SELECTIVE PROSECUTION

The government engaged in selective prosecution in this case. Not one of the individuals involved in investment advisory positions that made investment return commitments, some of which even retained investor funds after defrauding the accused, were charged in the instant case. The worst punishment meted out to

any of these individuals on the misdemeanor was that of 6 months of incarceration for James Kramer-Wilt, who had been an Attorney with the Dept. of Treasury at the time (Exh. L; R.392-2; R.551-4-6). Richard Gerry was fined \$4,000 and given 3 months of county jail (R.551-6). Management at SSBT, endorsed by Agent Forrester, and Robert Plaster, a good friend of John Ashcroft, were able to keep investor funds. Recently, certain investors have received checks from the Dept. of Treasury, in contrast to 82 felony counts and 106 years of prison for the 8 defendants, and \$12,651,244.80 in restitution ordered.

Yick Wo. v. Hopkins, 118 U.S. 356 (1886), coined the term, "Evil eye and uneven hand", which clearly applies in the instant case. A motion for Joinder of persons needed for just adjudication, due to Count 83, the money judgment civil charge, was filed pretrial to name these individuals (R.369). Associates, such as Tom Wilkinson, were also not named in the indictment or otherwise pursued. The motion was denied (R.373).

Litigation against the government was discussed in an investor newsletter (GX-54), suggesting a possible reason for this selective prosecution. Newton v. Rumery, 480 U.S. 386, 414, has stated that, "The prosecutor's potential conflict of interest increases in magnitude in direct proportion to the seriousness of the charges of police wrongdoing". Newton, 480 U.S. at 420, notes that, "The Government may not prosecute for

the purposes of deterring people from exercising their right to protest official misconduct and petition for redress of grievances." United States v. Allen, 954 F. 2d 1160 (6th Cir., 1992), has ruled that the prosecutor's decision in determining which case to prosecute cannot be based on defendant's race, sex, religion, or exercise of statutory or constitutional right.

The position of the Court on the tax law in this instant case was not made clear until over halfway through the trial in June, 2005 (Court at TR 2416), rather than at first contact by Agent Flink in 1999 (TR 2089). If the accused were in error of their understanding of Michigan law and Title 26, certainly there could have been a less extreme reaction than to treat them the way the record shows they were treated. After all, they were not murderers or child molesters, yet they were treated and sentenced as badly or worse. According to www.uscourts.gov and Table D-5 of the U.S. District Courts – The average criminal sentence during the 12-month period ending September 30, 2004 for first degree murder was 13.15 years.

GOOD FAITH RELIANCE/ENTRAPMENT BY ESTOPPEL

After being defrauded in "Valley Boyz", Marcusse sought out high-level authorities for investment advice. Richard Gerry, who used James Kramer-Wilt, Attorney, Dept. of Treasury, and a top government "expert" on investment fraud (R.392-2, pgs. 11-13),

appeared to be such a person. Marcusse also relied upon the written endorsements of Agent Forrester on SSBT (R.392-2, pgs. 15-18, Exh. M-2, R.423, p.7). For tax advice, Marcusse relied on several attorneys, both domestic and foreign, such as Gurmail Sidhu, as well as investor Margaret Linnell, an enrolled agent with the IRS with 50 years of experience as an accountant (Linnell at TR 2710). Linnell testified that she had "concluded" the 508 ministries were "legitimate" and shared this with Marcusse (Linnell at TR 2726). In his closing argument, AUSA Gezon asks the jury, "Did we hear any tax professionals testify that this was legitimate? No." (Gezon at TR 3724).

Information was also received directly from a Senior Reviewer on Exempt Organizations at the Dept. of the Treasury on 9/27/00, explaining the law and analysis that only 501(c)(3) organizations were required to file form 1023 whereas 508(c) was exempt (See Exh. P-2). Experts on the complexities of IRS code may disagree, however, the trial judge seemed certain and ruled there "ain't no 508 organization" and shielded the jury from any beliefs held by the accused on this issue (Court at TR 2416).

Marcusse made several pretrial filings indicating she had relied upon Agent Forrester and Attorney Kramer-Wilt (R.208; R.243; R.345; R.369), but they were prevented as witnesses (Exh. E-2). She testified, "I relied upon two different United States government employees to make decisions" (Marcusse at TR 3241).

The trial judge refused to consider this defense, exclaiming during trial, "What's that have to do with this case?" (Court at TR 1671).

The court rejected her initial pretrial filing as "nonsensical and void" (R.225). The next filing (R.243) was made to appeal the court's decision because the defense intended to use a "good faith reliance" (R.243, p.2). Incredibly, it is the trial judge himself that objects to a question regarding reliance on government officials such as Agent Forrester and Attorney Kramer-Wilt (TR 806, TR 810), during cross-examination of government "expert" witness Zawistowski (TR 806-811). A double-standard for reliance exists when the prosecution's expert from Washington, D.C. is allowed to vouch for GX-1 and other elements, yet that same expert says you can't trust experts from Washington, D.C. (Zawistowski at TR 775, 809).

United States v. Levin, 973 F. 2d 463, 467 (6th Cir., 1992), another case in which the accused relied upon "official letters issued by government", the Sixth Circuit affirmed that the indictment charging mail fraud "was subject to dismissal on ground that government was, as a matter of law, incapable of proving beyond reasonable doubt requisite intent requirement to convict...the government may not actively mislead individuals by authoritative assurances that certain activity is legal and thereafter initiate a prosecution for engaging in the sanctioned

activity...Criminal sanctions are not supportable ... if the Government's conduct constitutes "active misleading". See Raley v. State of Ohio, 360 U.S. 423, 438 (1959).

United States v. Young, 470 U.S. 1, 32 (1985), has ruled that "mail fraud and the making of false statements are specific-intent crimes and that good faith therefore stands as a complete defense."

Marcusse should have been entitled to rely upon the Forrester letters. His existence has been actively suppressed by the Dept. of Justice, whereas considerable evidence suggests that this operation was produced to manufacture the means upon which entrapment could provide for the forfeiture of millions in American funds. At the time of the second Forrester letter (1/10/01), a Senate Hearing Report dated 2/5/01, "Correspondent Banking: A Gateway to Money Laundering", demonstrates that Congress had considerable information on Suisse Security Bank, including the research to indicate "possibly fraudulent promises to pay extravagant returns and possibly fraudulent misuse of investor funds" (Exh. UU, p.276). This confirms reports made to Marcusse of her tremendous returns (TR 3358). The Report further discloses that, as of 9/15/00, Bahamian bank regulators had informed them that, "an external audit of SSBT ruled out any possibility of irregularity on the part of [SSBT]" (Exh. UU, p.276), confirming why Marcusse was not suspicious of the bank

until it was too late.

Agent Forrester was denied as a witness at trial because his existence was of "doubtful validity", according to the prosecution (R.397, R.401). United States v. Henthorn, 931 F. 2d 29 (9th Cir., 1991), has ruled that "the government must disclose information favorable to the defense that meets the appropriate standard of materiality." The initial request for information on Forrester and Kramer-Wilt had been requested under Henthorn (R.208, p. 8).

Multiple requests all throughout 2006 under FOIA's to the Dept. of Justice for information on Agent Forrester and SSBT resulted in responses that the DOJ had no records and that these requests were being forwarded to the Miami office of the FBI, who has acknowledged no requests to date, all sent directly with proof of delivery (Exh. RR). Agent Forrester's validity was later confirmed by the discovery of a police report dated 4/18/02 regarding a break-in to his Ford F-150 truck in Miami (Exh. R, p.7). Upon appeal of the FOIA's, the Dept. of Justice has claimed they have had no records on SSBT "since 1973" (Exh. RR). This is not a credible claim given the convincing evidence to the contrary.

At trial, expert witness Zawistowski from the Federal Reserve, testified that, the Financial Action Task Force had applied pressure causing several closures of "Class B" banks in

the Bahamas around 2001 (Zawistowski at TR 806). A 2/10/01 House Report No. 64-353, dated one day before the first Forrester letter, discusses an "Operation Dinero" wherein the IRS and DEA operated a Class B Bank in Anguilla, in which an "undercover agent promoted the bank's services", and "Operation Juno", which was an undercover stock brokerage (R.563, Att. 19, p. 5, Rule 60(b) fraud complaint). United States v. Payner, 447 U.S. 727 (1980), discusses a 1965 investigation headquartered in Jacksonville, Florida, supervised by FBI Special Agent, Richard Jaffee, which describes how he cultivated a friendship with a vice president of the Bahamas Castle Bank, approving an illegal "scheme to gain access to the bank records" at the time the banker intended to visit Miami. All these years later, it seems likely that some of the IRS's cover-ups have become more sophisticated, now finding scapegoats, such as the accused, to blame for their own well-crafted schemes.

By claiming that Agent Forrester's existence was of "doubtful validity", the Dept. of Justice was able to avoid having Agent Forrester appear to expose the IRS and FBI's involvement with SSBT. It is quite possible that "Forrester" could have been an alias used in the offshore sting. For the Dept. of Justice to claim they have no records on SSBT when Congressional documents and hundreds of news reports proves the contrary, cause the FOIA denials too unlikely to be credible.

After repeated stalls, the latest request in a FOIA appeal about this supervisory agent caused Daniel Metcalfe, Director of the Office of Information and Privacy, to finally state, "I am affirming the FBI's action in refusing to confirm or deny the existence of any records responsive to your request." (See Exh. RR).

United States v. Tweel, 550 F. 2d 297, 299 (5th Cir., 1977) has ruled, "Silence can only be equated with fraud where there is a legal or moral duty to speak or where an inquiry left unanswered would be intentionally misleading." See also United States v. Prudden, 424 F. 2d 1021 (5th Cir., 1970).

The conviction was overturned in United States v. Foster, 128 F. 3d 949, 957 (6th Cir., 1997), because, "A prior statement given by a witness made unavailable by the wrongful conduct of a party is admissible against the party if the statement would have been admissible had the party testified. The rule...is based on a public policy protecting the integrity of the adversary process by deterring litigants from acting on strong incentives to prevent the testimony of an adverse witness."

It is suspicious that the precise amount of the investors' \$10 million certificate of deposit at SSBT is the same amount as the money judgment requested in Count 83 (R.422-2, p. 26). The 8/4/02 Provisional Liquidator's Report stated that \$31 million was "missing" from the bank due to its former owner, Mr.

Harajchi (R.422-4, p.24). \$10 million is also the precise amount Harajchi contributed to a political party reported just prior to SSBT's failure (See Exh. TT). After the \$10 million judgment was obtained by special jury verdict and approved by the trial judge on 7/11/05 (R.452), the "missing" funds were then reported to be only \$21 million by the Nassau Guardian (Exh. QQ), 4 years after the bank's license was revoked from its Iranian owner (R.422-5, p.5).

The "Terrorism Risk Insurance Act of 2002" (H.R.3210) was passed, providing up to \$100 billion to cover "losses", including granting in Section 107(c), the "right of subrogation" to the United States to make a claim by law. Section 201 includes a special rule for cases against Iran in subsection (c), making the unlikely combination of Agent Forrester endorsing an Iranian's bank in the Bahamas, too unlikely to have been the result of mere happenstance. It instead is suggestive of an undercover bank particularly when the Federal Reserve admitted they revoked the banking license of such banks in the Bahamas in 2001, a foreign sovereign nation, where they have no jurisdiction to do so. Bogus "terrorist" accusations against the accused would further be a gross violation of the "innocent bystander" provision made by Congress in H.R. 64-353 (R.563, p.9).

On 3/6/01, the day after SSBT's license was revoked, the

IRS announced through its admitted shill, New York Times Reporter David Cay Johnston, that it was conducting the "most extensive raids ever" targeting "offshore banking" (R.422-4, p.1).

Martinez v. Wainwright, 621 F. 2d 184, 187-88 (5th Cir., 1980), has ruled that the "rule of Brady would be thwarted if a prosecutor were free to ignore specific requests for material information obtainable by the prosecutor from a related government entity, though unobtainable by the defense...The deception which results from negligent nondisclosure is no less damaging than that deception which is a product of guile, and such negligent nondisclosure entitles a defendant to relief." Martinez, 621 F. 2d at 187, has ruled, "The duty of disclosure affects not only the prosecutor, but the Government as a whole, including its investigative agencies." See also United States v. Bryant, 439 F. 2d 642, 650 (D.C. Cir., 1971).

In pretrial pleadings, Marcusse alleged that the Office of U.S. Attorney was hiding these individuals (R.369-1), and the prosecution has never denied these allegations.

"Good faith, or the absence of an intent to defraud, constitutes complete defense to a charge of mail fraud." United States v. Dunn, 961 F. 2d 648 (7th Cir., 1992). "If a man honestly and in good faith seeks advice of an attorney as to what he may do in a matter, and in good faith honestly follows

such advice, relying upon it and believing it to be correct, and only intends that his acts shall be lawful, he does not possess the specific intent required in order to be convicted of violating this section [18 U.S.C. §1341], even if such advice were an inaccurate construction of the law." Sachs v. United States, 412 F. 2d 357, (8th Cir., 1969), cert. denied, 396 U.S. 906.

Attorney Kramer-Wilt was considered a government "expert" on "prime bank" fraud. If he did not consider the investments in which Moon and Gerry were investing as such a product, then Marcusse was fully entitled to rely upon his representations.

Several Rule 60(b) fraud claims were filed after the trial regarding the suppression of Moon, Gerry, Forrester, and Kramer-Wilt as witnesses, as well as the prosecutorial misconduct in which the government engaged in regards to their falsified evidence and prejudicial claims that "nothing" had been sent to SSBT (Gezon at TR 3713; R.563; R.551; Item 191, PSR). Item 191 of the PSR even deceitfully charges that Marcusse engaged in "obstruction of justice" by claiming she lost investor funds in an offshore bank which the government is careful not to name in the PSR. The failure of SSBT has been widely reported and is a matter of public record.

The government has denied none of these allegations and FOIA will not deny or confirm requests based on FBI wishes.

The Appellee Brief continues the charade of keeping SSBT'S name out of it. The court at sentencing addresses only the false narcotics references by claiming, "The jury heard not a word about drugs in this case" (TR 29, R.639). This is not a denial of Marcusse's specific allegation that these bogus narcotics references had been used to confiscate investor funds from the SSBT license revocation apparently ordered by the Federal Reserve (Marcusse at TR 9-12; R.639).

Olmstead v. United States, 277 U.S. 428, 471-85 (1928), as quoted in the Payner case, ruled that the "Court will not redress a wrong when he who invokes its aid has unclean hands, and that in keeping with that principle the Court should not lend its aid in the enforcement of criminal law when the government itself was guilty of misconduct. Then aid is denied despite the defendant's wrong. It is denied to maintain respect for the law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination."

Sorrells v. United States, 287 U.S. 435, 457, has ruled that, "Proof of entrapment, at any stage of the case, requires the court to stop the prosecution, direct that the indictment be quashed, and the defendant set at liberty...but whatever may be the finding upon such submission the power and the duty to act remain with the court and not with the jury."

The evidence is compelling of entrapment on an ex post facto defined "crime" -- a "crime" manufactured to increase United States revenue from forfeitures, while innocent victims are discarded as collateral damage.

XI. THE JURY INSTRUCTIONS AND THE JUDGE'S SPECIAL VERDICT FORM IMPROPERLY REMOVED THE BURDEN OF PROOF FROM THE PROSECUTION. THE PRO SE ACCUSED WERE UNFAIRLY DENIED ATTENDANCE AT THE JURY INSTRUCTION CONFERENCE.

The prosecution alleged a "ponzi scheme" at trial (Schipper at TR 41) and described one in the indictment under "The Scheme" in Items 20 and 21 (R.323, Exh. A-2). In rebuttal closing arguments, however, AUSA Gezon withdrew the allegation, claiming,

"Let me just say about that that I don't think if you look at the indictment you will see the words Ponzi scheme anywhere in the indictment. I suspect that you will not hear the words Ponzi scheme coming from the Judge's instructions, and I know you will not see the words Ponzi scheme in any of the elements that you have to consider in these crimes" (Gezon at TR 3713).

United States v. Cusmano, 659 F. 2d 714, 719 (6th Cir., 1981), has ruled that a conviction can be sustained only when proof and instructions conform to the terms of the indictment. That the prosecution immediately resumed the use of the words

"Ponzi scheme" after the jury's verdict indicates that the omission of the term in the indictment was deliberate in order to remove the issue from the jury's deliberation. The trial judge indicated that he did not want to "track" the jury instructions to the indictment, instead considering "whether I want to start off brand new with instructions that kind of flow with what I like" (Court at TR 3351). As this was after the defense had rested their case, it is questionable as to how the accused were supposed to defend themselves under such a scenario, thus, violating "notice" to the accused. The proof and instructions did not conform to the indictment.

The court decided to "tie" a government exhibit to each count on the verdict form (TR 3472-73). The reason given for this "unusual" decision was so that the jury would not have to "go back and kind of hunt, look at the shells and try and find out which pea is under which shell and kind of hunt and peck for a while" (TR 3475). "The worst thing we want is an unfocused jury in there flim-flamming around trying to figure out what relates to what" (Court at TR 3475-76). The jury was told that this was done to help them "cut to the chase a little quicker" (Court at TR 3783), after they were instructed, "you are bound by the oath that you took at the beginning of this trial to follow the instructions that I give you even if you may personally disagree with them" (Court at TR 3745). Defense

counsel objects (TR 3484), because "what it really does is fundamentally change the burden of proof because I think what it does is give the government an assistance it doesn't deserve" (Valentine at TR 3473, 3483-86, 3786-88). One defense attorney had been chosen to "speak for the group" (TR 3448).

AUSA Gezon argued in favor of the judge's decision,

"Speculating, what might happen is the jury may say, Gosh, we don't think -- we don't understand, maybe we don't follow this closely enough. Maybe the government hasn't convinced us beyond a reasonable doubt. Maybe the effect in the long run would be that the indictments would be simpler indictments. Maybe the government would not expect verdict forms like this that lay out highlighted evidence to the jury" (Gezon at TR 3485).

The court at first claims that this maneuver is "something I rarely do" (Court at TR 3472), and later admits, "I'm a little troubled because I've never done this before, frankly, put the exhibit number beside it, but it seems to me that way we get the jury focused rather than unfocused" (Court at TR 3475).

Frankly, if the government hasn't convinced the jury beyond a reasonable doubt after it has rested its case, this may be the reason that acquittals are available to remedy such "problems".

"It is well settled that a jury instruction that relieves the prosecution of the burden of proving each element of the offense violates the defendant's due process." United States v. Gold Unlimited, 177 F. 3d 472, 490 (6th Cir., 1999); Carella v.

California, 491 U.S. 263, 265.

When the judge "tied" an investor check to the mail fraud count under the pretext of helping the jury "focus", or in other words, determine the "facts", he invaded the province of the jury. The mere existence of an exhibit, which pointed to an investor check only, indicated to the jury that this evidence alone, according to the judge, was of sufficient stature to "prove" that there had been mail fraud. It also achieved the dual purpose of being able to be used for whatever mail fraud scheme was being promoted at the time, i.e., that of a "ponzi" or of a "tax" offense in which the investors or defendants or both hadn't paid their taxes.

United States v. Murdock, 290 U.S. 389, 394 (1933), has ruled that, "decision of issue of fact must be fairly left to the jury." The "threat of prejudice is greatest when a judge overpowers a jury or when he unduly interferes with counsel's conduct of the case" per United States v. Morrow, 977 F. 2d 222, 229 (6th Cir., 1992), cert. denied, 508 U.S. 975 (1993). United States v. Riddle, 249 F. 3d 529 (6th Cir., 2001), ruled that a defendant has a constitutional right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings. Objections from the pro se accused were kept off the record by not permitting them to attend the conference.

Counsel to Marcusse was not permitted to present a "theory

of defense" in the instructions (Court at TR 3470). Instead the government's inaccurate theory was presented that, "You have heard evidence that the defendants claimed their income was exempt from income tax laws because they called themselves a church or a church auxiliary" (Court at TR 3772). This was not correct as Marcusse testified that she personally viewed the prime purpose of forming a church to shield tax responsibility an "appalling concept" and "offensive" (Marcusse at TR 3119).

The true position of the accused was not permitted to be heard (TR 2085-89, 2185, 2382-83, 2804-07). When associate Hammond was asked about the ministry that they had to help others, a sustained objection was made claiming there was no "relevance whatsoever" (Schipper at TR 2682).

United States v. Dandy, 988 F. 2d 1344, 1358 (6th Cir., 1993), has ruled that, "It is reversible error not to present a defendant's theory of defense adequately in a full statement of law." It was one of the defense attorneys, acting as an advocate for the prosecution, who requested the government's misleading theory of defense be reinstated into the instructions (Garthe at TR 3462-64).

Related to this issue was the prosecution claiming that, "Ms. Marcusse seems to suggest she's unincorporated, which really isn't a legal issue" (Gezon at TR 3447). This misrepresents the main issue over joint venture distributions

not being taxable until after original principal is returned. It also contradicts St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772, 783 (1981), which ruled that organizations not separately incorporated from the church with which they are affiliated are exempt under the mandatory exception for churches. The trial judge had ruled that there "ain't no 508 organization", and to even mention it was to "do so at your peril" (Court at TR 2416). This appears to contradict the St. Martin case, the IRC, Michigan MCL 1871 and other Supreme Court cases. The Sixth Circuit has ruled that lower courts are to "adhere to the commands of a superior court" in Brunet v. City of Columbus, 58 F. 3d 251, 254-55 (6th Cir., 1995).

Thus, the jury was misled as to the nature and the legal status of the organization run by the accused, and the accused were not permitted to address their position according to their beliefs. Marcusse had attempted to question Agent Flink about GX-52, to confirm her religious tax position noticed years ago and left unrebutted by this same court and trial judge entitled, "We Rest on the Law", but the judge interrupted her to excuse the jury in order to give her a verbal thrashing (Court at TR 2085-89). He informed her that if she were to "go off on one of her theories, I'm going to say you can not examine witnesses" (Court at TR 2088). He even complained that because the prosecution wasn't objecting enough to suit him, it was the

"obligation" of the court to do so in their stead (Court at TR 2088).

Cheek v. United States, 498 U.S. 192, ruled that a defendant can defend a tax-related charge by evidence that shows a good faith misunderstanding and/or belief about the defendant's duties under the tax laws. Although a Cheek defense was said to be available in the instant case (Court at TR 2424; R.338), this trial judge, in lock step with his "ponzi law" determination, further erred by blocking a Cheek defense as well.

The jury instructions violated Cheek and religious protections by stating, "The more farfetched a belief is, the less likely it is that a person actually held or would act on that belief" (Court at TR 3762). Cheek, 498 U.S. at 203, cautions, "Characterizing a belief as objectively unreasonable transforms what is normally a factual inquiry into a legal one, thus preventing a jury from considering it." Further, "forbidding the jury to consider evidence that might negate willfulness would raise a serious question under the Sixth Amendment's jury trial provisions."

The requirement that a tax offense be committed "willfully" is not met if a taxpayer has relied in good faith on a prior decision of the Supreme Court. United States v. Bishop, 412 U.S. 346 (1973); United States v. Cockett, 330 F. 3d 706, 712 (6th

Cir., 2003).

The "gross income" instruction handed to the jury, was erroneous given the circumstances of the case. "Gross income means all income from whatever source it is derived, including wages and compensation for services, tips, compensation in the form of personal expenses paid for by the defendant's organization" (Court at TR 3772). Business trips were termed as personal "vacations". No mention is made of "pass through" funds which went into investments or business expenses which would properly be paid by the organization. Defense counsel objected to this instruction, stating that it should read, "gross income did not include loans, gifts, or monies received to be transferred at another's direction" (Valentine at TR 3457), and because it did not include the phrase, "unless excluded by law" (Garthe at TR 3456; Valentine at TR 3457-59).

The trial judge refuses to change his definition of "gross income" in any manner (Court at TR 3460-61), reasoning that, "if I give that instruction with that in it, there would be no criminal prosecution of them because it wouldn't be income" (Court at TR 3465).

Defense counsel also objected to the allegation, "failure to file a tax return", because it had not been specifically mentioned in the indictment (Garthe at TR 3453). The government objects, claiming that not only had it been mentioned (Gezon at

TR 3454), but that the "nature of the conspiracy" was that of "failure to file" (Gezon at TR 3455), a violation 26 U.S.C. §7203. The court agrees (TR 3456). Count 42 of the indictment had alleged that the defendants had failed to file the appropriate employee and payroll tax information with the IRS, which in essence is a violation of 26 U.S.C. §7202. The government concedes, but not until after trial, that all sales associates had "operated independently" (R.501-1, p.8). Thus, at the jury instruction conference, the government obscures the charges and uses this to switch the mail fraud scheme and unlawful activity to a tax offense comprising of "failure to file and pay tax" on behalf of the accused and the investors.

The trial judge accommodates the switch by "altering" the jury instructions (Court at TR 3445-46), from the Standard Sixth Circuit jury instructions (R.296), to remove most references to the indictment. Initially, the Government's Requested Jury Instructions, such as No. 14 and No. 16 (R.296), made specific references to the counts in the indictment and their descriptions. The revised instructions appear so vague that the act of mailing anything will suffice to find the accused guilty, hence, the judge's verdict form which does precisely that (Court at TR 3755-56; 3783). The mail fraud jury instruction had originally been worded, "Each of these Counts charge the Defendants with devising and participating in a scheme to

defraud and a scheme to obtain the monies and funds of potential investors, (identified by initial within the indictment to protect their identity)" (R.296, No. 14). The whole part pertaining to "potential investors" is removed from the instructions. It is only when the trial judge comes to the tax issues, Count 40, Items 3-17, and Count 42, that he gets specific about the charges (Court at TR 3770-73). "The filing of a federal income tax return is not voluntary. An individual with gross income amounts charged in the indictment is required by law to follow -- to file an income tax return" (Court at TR 3772).

In his rebuttal closing arguments, AUSA Gezon quickly diverts the jury from the original "ponzi scheme" allegations (Gezon at TR 3713), and substitutes "failure to file" in his conclusion by asking the jury to "convict" the accused for "not paying their taxes" (Gezon at TR 3744).

United States v. Powell, 955 F. 1206, 1207 (9th Cir., 1991), has ruled that "such an instruction must not be framed in a way that it distracts the jury from duty to consider defendant's good faith defense". Caldwell v. Bell, 288 F. 3d 838 (6th Cir., 2002), has ruled that an instruction which tells a jury to presume an element of a crime without evidence is unconstitutional and requires reversal if the reviewing court is "in grave doubt about whether the unconstitutional instruction

given to the jury prejudiced [the defendant's] substantial rights."

The judge instructs the jury that the indictment had accused the defendants of several different crimes, but the government only had to prove an agreement to commit one of them in order to find them guilty (Court at TR 3773-75). The court further instructs that "with respect to the three conspiracies charged in Counts 40, 41, and 42 is that a member of the conspiracy did one of the overt acts described in the indictment for the purpose of advancing or helping the conspiracy" (Court at TR 3776). Count 40 is conspiracy to commit mail fraud, count 41 is conspiracy to commit money laundering, and count 42 is conspiracy against the IRS. The court finally instructs that if any of the objectives is to "defraud the United States, then the conspiracy is considered unlawful" (Court at TR 3778).

The "unlawful activity" for money laundering is defined as "mail fraud" (Court at TR 3761). The judge then ties the money laundering "unlawful activity" in counts 43-57 with Count 42 by instructing, "In order to convict a defendant under Counts 42 through 57, you must find that the government has proven that the law imposed a duty on a defendant, that a defendant knew of this duty, and that the defendant voluntarily and intentionally violated that duty" (Court at TR 3762). This clearly infers the "duty" to file and pay taxes. Counts 43 through 57 were the

"promotional" money laundering counts, encompassing alleged "profit" checks to the investors. Count 42 was the conspiracy to defraud the IRS, but it made no allegations in regards to the taxes of any investors. Thus, the accused had no "notice" prior to the jury instructions after they rested their case that these money laundering charges bearing 20 year maximum sentences were based on Access Financial being presumed as a corporation in order to circumvent the non-taxability of return of principal available under 26 U.S.C. §731. Counts 43 through 57 also alleged 18 U.S.C. §2, permitting the conviction of the defendants based on "aiding and abetting" (Court at TR 3767), thus permitting the two "lead defendants", who had no unreported "income" alleged in the indictment, to be found guilty as well.

United States v. Jones, 647 F. 2d 696, 700 (6th Cir., 1981), cert. denied, 454 U.S. 898 (1981), ruled that jury instructions that "materially altered the theory of criminal liability set forth in the indictment" was an "impermissible amendment of the indictment".

As previously discussed in Issue VIII, there were no limiting instructions regarding the Federal Rules of Evidence 403 and 404(b) evidence admitted at trial under objection.

There was the instruction issue of the "good faith reliance" on government officials, which should have been beneficial had key defense witnesses not been denied, such as

Agent Forrester and Attorney Kramer-Wilt. United States v. McGuire, 744 F. 2d 1197, 1201 (6th Cir., 1984), has ruled that a good faith instruction should be given if there is any evidence at all to support it.

Matthew v. United States, 485 U.S. 58 (1988), has ruled that a defendant is entitled to jury instruction on entrapment where there is sufficient evidence of entrapment, even when defendant denies one or more elements of the charged offense. "It is reversible error to refuse a charge on defense theory for which there is evidentiary foundation and which, if believed by the jury, would be legally sufficient to render accused innocent." United States v. Lewis, 592 F. 2d 1282 (1979).

It is evident from the record that court officials worked together in a last minute maneuver to insure guilty verdicts for the accused, through the court's "altered" jury instructions with improper "stipulations", and the prosecution's variance in allegations. This was inherently unjust in that these actions removed the burden of proof from the government. In essence, the accused were able to be found guilty of 83 counts based on the misdemeanor of "failure to file and pay tax", from a jury spun in circles and forced to decide within a narrowly mandated scope, which hampered and severely limited the intended role of the jury.

XII. JUDICIAL BIAS FAVORING THE PROSECUTION PREVENTED A FAIR TRIAL AND CAUSED BOTH AN UNREASONABLE AND ILLEGAL SENTENCE.

"This is jurisprudence reminiscent of Alice in Wonderland. As the Queen of Hearts might say, 'Acquittal first, sentence afterwards'," as opined by Judge Oakes in United States v. Frias, 39 F. 3d 391, 393 (2nd Cir., 1994). "Most lawyers, as well as ordinary citizens unfamiliar with the daily procedures of criminal law administration, are astonished to learn that a person in this society may be sentenced to prison on the basis of conduct of which a jury has acquitted him, or on the basis of charges that did not result in conviction." Daniel J. Freed, Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on The Discretion of Sentencers, 101 Yale L.J. 1681, 1714 (1992). This is precisely the reason that an impartial judge is vital to the appearance of justice to maintain public trust.

In the instant case, judicial bias decided that "alleged investments" were "irrelevant" to the "ponzi scheme" accusation prior to the presentation of a defense and the jury's verdict to prevent exculpatory evidence and vital defense witnesses. Judicial bias "altered" the jury instructions and verdict form to facilitate the switch in charges as described in Issue XI to produce an illegal sentence 2500% higher than the statutory maximum permitted for 26 U.S.C. §7203 in order to "teach respect for the law".

Yashon v. Hunt, 825 F. 2d 1016, 1026 (6th Cir., 1987), has ruled that it is a "general principle that the roles of judge and prosecutor should not be intertwined." See also In re Murchison, 349 U.S. 133 (1955). Tumey v. Ohio, 273 U.S. 510 (1927), ruled that the sentencing process may not be placed under the control of a party in interest to the litigation. There were several substantial conflicts of interest to the federal government pursuing the instant case.

A demonstrably biased judge is a structural error per Chapman v. California, 386 U.S. 18, 23 (1966), requiring reversal. Per McBee v. Grant, 763 F. 2d 811, 818 (6th Cir., 1985), "the test is whether the errors alleged...could have rendered trial fundamentally unfair. To violate a petitioner's right to a fair trial, a trial judge's intervention in the conduct of a criminal trial must be significant and must be adverse to the petitioner to a substantial degree." Per United States v. Tilton, 714 F. 2d 642, 644 (6th Cir., 1983), "a trial judge remains under a duty...to act at all times with a view towards soliciting the truth."

This trial judge is especially biased against those accused of tax-related offenses. On 3/5/05, two months before trial, the judge was quoted in the Grand Rapids Press attesting, "It all started with these tax protesters" (Exh. MM), in response to the murders of Judge Lefkow's family members. A "white supremacist"

had been one individual that was initially suspected in the killings. On 7/24/04, just 3 days after Marcusse arrived by airlift at Newaygo County Jail in Michigan, she was attacked by cellmates who had been told she was a "white supremacist" and a "Constitutionalist" (R.545-1; R.157-3, pgs.19-27 for eyewitness sworn Affidavits). The two labels do not relate on any level, and it can be safely assumed that the "Constitutionalist" label would never have originated with a prisoner or be the basis for such a beating. It is also not the general norm to equate "tax protesters" with "white supremacists", or for that matter, multiple murderers, however, New York Times Reporter, David Cay Johnston, discloses in his book, "Perfectly Legal", that this happens to be a ploy commonly used by the IRS to prejudice the public against political targets (Exh. NN).

On 5/16/05, Marcusse asks the court the first morning of trial, "Am I considered a tax protester in this case?" The trial judge responds, "I don't necessarily know what a tax protester is" (TR 19). On 3/5/05 the Grand Rapids Press reported that this same judge has presided over the cases of over 100 "tax protesters" (Exh. MM).

Defense counsel to Buffin admits he knows his client is being profiled as a tax protester (DeBoer at TR 3665), as does defense attorneys to Besser (Dunn at TR 3642). At Buffin's sentencing to 15 years as a first-time offender, the trial judge

concludes in regards to his analysis of "church people", that, "The true analysis of their character is many times the kind of income tax returns they file. That's where the rubber hits the road" (TR 56-57, 10/14/05). Buffin is also labeled a "tax rebel" and his beliefs are construed as "garbage" by the court (TR 34, 10/14/05 hearing) denying him free association tied to his beliefs. The Appellate Brief also alleges the accused are "tax protestors" [sic] (AB-P.31).

Marcusse had put together a legitimate ministry with charitable goals as substantially documented on the trial court's record (Exh. A; Def. Exh. M-J; Exh. B-2; Kurnat at TR 1096). It is certainly true in hindsight that at least two associates, the Bosses, and several clients, were attracted to the group based solely upon a desire for tax avoidance. As is true of any large group, one individual seeking to distort its message and goals can break the law, but that does not inculcate the rest who were unaware of such behavior and who even warned against doing it (GX-41, p.3). All members of the federal bench, for example, would probably not appreciate being wrongly labeled or associated with a fellow member that abuses discretion and places a black mark upon the whole justice system.

In like manner, Marcusse stated in a 1/01 newsletter that, "We appreciate but cannot embrace the position of tax protester as it will only get you into trouble in most

cases...You will instead find us diligently search for whatever lawful means within the 'system' we can utilize to avoid or significantly reduce the payment of taxes" (GX-41, p.3). IRS records show that all of the accused filed income tax returns for 20 years or more immediately prior to 1998, and most continued filing after 1998. The prosecution made a big deal over Marcusse "hating" the IRS in the instant case. She would submit that most Americans feel the same way, yet this theme was allowed to run rampant at trial and used to induce the jury to convict, because they have to pay their taxes, so why shouldn't the accused? This distorted the real issues over "pass through" funds and the non-taxability of principal returns to investors in a joint venture, along with the honest beliefs in tax law effectively quashed by court officials.

Gregory v. Helvering, 293 U.S. 465 (1935), has ruled, "The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted."

The following is most disturbing since free societies are largely judged by their sense of humaneness in dealing with justice and detainees. Marcusse filed pleadings on the trial court's record reporting the initial jail attack in Newaygo (R.157; R.309), the attack by U.S. Marshals in open

court on 11/9/04, for simply asking to file pleadings and mentioning Plaster and Ashcroft (R.194-15; R.309) and requested court video to evidence the assault (R.346). All were denied and the trial judge showed no interest in investigating any of the claims (R.362). Instead an Opinion is issued changing the court-observed behavior of Marcusse on 11/9/04 when she was attacked by U.S. Marshals, from that of being "visibly out of control" (R.150), to now that of a "violent outburst" (R.241), thus actively participating in the new profiling of Marcusse as "violent" to reverse the blame for the real violence perpetrated that day. This Opinion on 3/14/05, occurred just 3 days after Marcusse appeals all of the court orders to date to the Sixth Circuit (R.239, Case No. 05-1337), and 9 days after this same judge comments to the media, "It all started with these tax protesters ... They're angry with everyone and everything." (Grand Rapids Press on 3/5/05, pg. A1, Exh. MM).

The victim spokesperson, Sue Jager, is also used to script a "violent" history to support AUSA Davis's "terrorist" profiling scheme at sentencing when Jager slanders Marcusse by claiming, "She's had contracts out on people's lives before, and even charged with that offense" (Jager at TR 42, R.639). Jager further claims Marcusse engaged in "prostitution" (TR 42,

R.639). The U.S. Marshals called Marcusse a "whore" before and after the hearing (R.575-1, p.2). This appears to play off AUSA Gezon's repeated accusations at trial that Marcusse was "immoral", so that they could discredit her religious convictions with the jury. A check of law enforcement records would prove that both claims were outright fabrications and placed on the sentencing record to prejudice Marcusse with the public and in this appeal. The PSR further claims Marcusse is a disciplinary problem (Item 26), but a check of that issue would reveal that in the 3 years of jail and prison, she has received no incident reports, in spite of continuous harassment over her legal papers and ability to work on her case.

Blackledge v. Perry, 417 U.S. 21 (1974), states that the fear of vindictiveness may unconstitutionally deter a defendant's exercise of his rights. Fear of further physical abuse, court threats of removal, and 67 year old Besser's seizure during trial (TR 634), caused Marcusse to effectively be silenced at trial. Thaddeus-X v. Blatter, 175 F. 3d 378, 386 (6th Cir., 1999), ruled that the "law is established in this Circuit that retaliation under color of law for the exercise of First Amendment rights is unconstitutional."

After having been injured in jail, assaulted in open court twice, and then ordered to take a competency exam for filing pleadings alleging prosecutorial misconduct, Marcusse then

appealed pretrial detainment to the Sixth Circuit (R.239), under Case No. 05-1337, which was dismissed on 4/29/05, (R.290). She appealed unlawful detainment to the trial judge on 5/5/05 (R.307, R.309), who denied her motion on 5/10/05 (R.325). Marcusse filed a request for a protective restraining order against the U.S. Marshals (R.368), which was denied (R.373).

Chambers v. Florida, 309 U.S. 227 (1940), has ruled, "We are not impressed by the argument that law enforcement methods such as those under review are necessary to uphold our laws...the exalted power of some governments to punish manufactured crime dictatorially is the handmaid of tyranny." An old (1875) Michigan Report condemned the practice of holding someone in custody solely to secure their attendance at trial as "one of the relics of barbarism, which has outlived the growth of civilization, and should be abolished."

The court was also responsible for several arrest and search warrants which were flawed and falsified. The initial search warrant dated 12/18/01 does not contain the signature of the affiant, Agent Moore, but Magistrate Brenneman notarizes Moore's missing signature (Exh. PP). The warrants for Besser's arrest, additional "clerical errors" applied to Buffin, and the raid on Sidhu's home and office were all based on narcotics trafficking (Exh. E).

Marcusse made a claim for a motion to quash when the first

grand jury was in session on 5/22/02 (R.309-6, pgs.11-14), which was ignored. At the first appearance on 7/22/04 once charges were filed, Marcusse stated, "I don't understand the nature of that charge -- the reason being it is absolutely not possible for investigators to have done any sort of research and deemed this to be a Ponzi" (TR 5, R.680). Marcusse asks for a Franks hearing (TR 13, R.680). She reports the perjury used to obtain probable cause in a filing on 11/9/04 (R.145). She files another motion for a Franks hearing (R.345), which the court again denies (R.361), claiming that the Defendant would have the opportunity to challenge the government's witnesses and evidence at trial, but this right was effectively prevented by court officials.

Boyd v. United States, 116 U.S. 616 (1886), was the first Fourth Amendment case of any consequence to reach the Supreme Court. Its mandatory authority has not changed. United States v. United States District Court, 407 U.S. 302 (1972), has ruled that there is no "national security" exception to the Constitutional protections of the Fourth Amendment. If the government refuses to make disclosures, Alderman v. United States, 394 U.S. 165 (1969), has ruled that the case should be dismissed.

The inclusion of Homeland Security and the acts of the trial judge, both revoking Buffin's bond over his Roman Catholic

associations and then sealing the evidence regarding these acts, are an abuse of "national security" as well as the First Amendment. Rumsfield v. Padilla, 542 U.S. 426, 455-56 (2004), has determined that, "Unconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of a Star Chamber. The trial judge makes "a requirement that there be no known association with anti-government persons" at sentencing (TR 48, R.639), thus depriving Marcusse of her First Amendment rights and displaying an underlying bias to label all of the accused as "anti-government", simply because pleadings did not meet his approval.

In New York Times Co. v. United States, 403 U.S. 713,743 (1971) the Supreme Court ruled that branches of government should not impose limitations on expression by that which is so constitutionally clear, "Moreover, it may be considered politically wise to get a court to share the responsibility for arresting those who the Executive Branch has probable cause to believe are violating the law. But convenience and political considerations of the moment do not justify a basic departure from the principles of our system of government."

The scheming of AUSA Donald Davis, "agent" for Homeland Security and Steve Hetherington, U.S. Marshal and member of the Homeland Security Taskforce, as well as the Marshal to have caused the injuries to Marcusse both on 11/9/04 and again

on 10/28/05, as aided by the Chief Judge of the Western District of Michigan, suggest the "hallmark of the Star Chamber", particularly when the so-called "subversive activity" consists merely of an alleged tax "conspiracy" (See Exh. AA for other examples of this patterned behavior on the part of these individuals).

The Honorable Ron Paul of Texas has called it the "Nazification of the financial system", and concluded that, "All of this is really a smoke screen for increased tax collections" (R.563-14, pgs. 1-4). Indeed, according to Milton Hirsch, past President of the Florida Association of Criminal Defense Lawyers (FACDL) Miami Chapter, and a law professor, the "FBI now issues more than 30,000 national security letters a year", referring to 2005, but the "Bush administration...has offered no example in which the use of a national security letter helped disrupt a terrorist plot" (Refer to Fourth Amendment Forum, The Champion, NACDL, March, 2006).

A tax prosecution, being record intensive, is virtually impossible to fight when detained pretrial 13 hours away from home and one's records, with mail, phone, visits and legal papers limited. Had another trial judge been permitted control of this prosecution, it is unlikely that this case would have progressed as unjustly as the record indicates.

The denial of Marcusse's motion for change of venue (R.325)

also displayed bias, especially given the judge's public comments about tax protesters just weeks before trial. It is clear upon review of the trial court's record that the intent of the prosecution was only about a tax offense. As the result, Marcusse was entitled to have had any criminal charges against her relating to 18 U.S.C. §7203, which was conceded by the prosecution to be the "nature" of the charge against her, in the district of her residence, i.e., Western District of Missouri. United States v. Youse, 387 F. Supp. 132 (E.D. Wis., 1975), has ruled that the intent of Congress in passing 18 U.S.C. §3237(b) was to permit defendant to be tried in district of his residence; motion under 18 U.S.C. §3237(b) is not directed to court's discretion as Congress intended the defendants be given absolute right to be tried for alleged violations enumerated in 18 U.S.C. §3237(b) in district of their residence regardless of considerations of convenience. See also United States v. Nathanson, 813 F. Supp. 1433 (E.D. Cal., 1993).

Marcusse placed her objection to the trial judge stating, "I will be putting in a motion for bias and prejudice as well" (TR 20), however, defense attorneys refused to sign it as required by 28 U.S.C. §144, thereby preventing the filing.

The trial judge also may have engaged in misconduct by meeting with the jury privately several times during trial (TR 1763, 2035). Because of his prejudgment of the case, prejudice

should be presumed to exist. The private meeting described at TR 2035 is on the first morning following his ruling that "alleged investments" are "irrelevant" (R.401).

Krause v. Rhodes, 570 F. 2d 563, 567 (6th Cir., 1977), ruled that "private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officers in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear". See also Mattox v. United States, 146 U.S. 140, 150 (1892). "Private communications between judge and jury may violate defendant's right to be present at all stages of the proceedings. See Fed. R.Crim. P. 43(a)." United States v. Taylor, 562 F. 2d 1345, 1365 (2d Cir., 1977), cert. denied, 432 U.S. 909; Rogers v. United States, 422 U.S. 35 (1975).

Thus, the convictions and sentence were illegally obtained in violation of all Constitutional protections. Blakely v. Washington, 542 U.S. 296, 303-304 (2004), held that the Sixth Amendment prohibits imposition of a sentence above the legally prescribed maximum based on a fact or facts neither admitted by the defendant nor found by a jury beyond a reasonable doubt. [T]he relevant 'statutory maximum,' the Court clarified, "is not the maximum sentence a judge may impose after finding additional facts, but a maximum he may impose without any additional findings." Thus, this appears to preclude a sentencing court

from imposing upward adjustments based on facts (including determination of relevant conduct) that are not reflected in the jury verdict.

The trial judge sentences Marcusse to 300 months or 25 years on "specialized high return investments" (TR 45, R.639), a term not used in the indictment, never used at trial, not determined by the jury and something which has never even been defined as a crime, because, "It teaches respect for the law and affords an adequate deterrent to criminal behavior, and it protects the public from what this Court believes is likely to be a continuation of this behavior if in fact and when in fact this defendant gets an opportunity to come back into the public" (TR 47-48, R.639). For these stated reasons, this "off the charts" sentence was unreasonable, as well as illegal.

United States v. Evans, 68 S. Ct. 634, 635 (1948), has ruled, "defining crimes and fixing penalties are legislative, not judicial functions." According to the government's expert witness, "all" of these schemes included, "prime bank" instruments (Zawistowski at TR 781, 788).

The Supreme Court recently ruled in Cunningham v. California, 549 U.S. _____ (2007), that, "Fact finding to elevate a sentence from 12 to 16 years, this Court's decision makes plain, falls within the province of the jury employing a beyond-a-reasonable-doubt standard, not the bailiwick of a judge

determining where the preponderance of the evidence lies.” Justice Alito opines, “Both sentencing schemes...subject the exercise of that discretion to appellate review for “reasonableness”; both--the California law explicitly, and the federal scheme implicitly--require a sentencing judge to find some factor to justify a sentence above the minimum that could be imposed based solely on the jury’s verdict”.

The advent of the sentencing guidelines, with their “relevant conduct” rules, permitted judges to find all manner of “facts”, in order to enhance sentences over the minimum up to the statutory maximum and even beyond. United States v. Watts, 519 U.S. 148, 156-57 (1997). United States v. Booker, 543 U.S. 220 (2005) held that the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge’s determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant. The remedial opinion in Booker made the guidelines advisory and was subsequently determined by the various circuits to mean that the courts could revert to their traditional scheme of upward adjustments based on “judge-found facts” or preponderance of the evidence. It also raised the maximum sentence to the statutory maximum rather than the guideline maximum. As Justice Alito points out in Cunningham, however, even in the post-Booker

system of advisory guidelines, there exists a set of federal sentences (those at the upper end of the statutorily available range) that cannot legally be imposed in the absence of a post-conviction judicial finding of fact. Such facts as that of a defendant's criminal history are only those constitutionally able to be found by a judge rather than a jury. United States v. Almendarez-Torres, 523 U.S. 224 (1998). The defendants in the instant case did not have a prior criminal history and it can not be rationally justified to sentence at the high end of the range. The "recommended" sentencing of 14,590 months or "life" was so high and so unreasonable in the initial PSR, that one seasoned attorney comments, "I've never seen a 43, category I, in my entire career, so those two don't relate at some level" (Dunn at TR 24, 10/13/05 Besser sentencing hearing). Therefore, a sentence at the high end of the range is rationally unsupportable and legally unreasonable in the absence of a non-element fact unrelated to criminal history. In short, using advisory guidelines to support all manner of "judge-found facts" other than a verifiable criminal history, is a violation of the "bright-line rule" proclaimed in Blakely and embraced by the Cunningham majority.

The Supreme Court in a line of cases from Winship to Apprendi, has recognized that due process may require proof beyond a reasonable doubt in sentencing. The Court In re

Winship, 397 U.S. 358, 364 (1970), expressly acknowledges that the requirement of proof beyond a reasonable doubt is rooted in the Due Process Clause. The decision in Apprendi v. New Jersey, 530 U.S. 466, 476 (2000), was based in part on the Fifth Amendment, which provides a constitutional protection "of surpassing importance: the proscription of any deprivation of liberty without 'due process of law.'" The Court "made clear beyond peradventure that Winship's due process...protections extend, to some degree, 'to determinations that go not to a defendant's guilt or innocence, but simply to the length of his sentence.'" Apprendi, 530 U.S. at 484.

When the accused have not agreed through a plea bargain to contract away their constitutional rights, this traditional scheme of upward adjustments based on facts not determined by a jury, is a violation of both their Fifth and Sixth Amendment protections. The repeated denials of the right to a speedy trial was just one example of a continuous abuse of judicial discretion, while basing a draconian sentence on the remedial opinion in Booker, which was found in January of 2005, while ignoring its main opinion, as well as ignoring Blakely, the case law in effect had a speedy trial been granted. This violated ex post facto prohibitions. The PSR claims the maximum statutory sentence for mail fraud was 20 years (Item 270), rather than the 5 years applicable at the time of alleged offense. This was an

ex post facto violation as conceded by AUSA Gezon, because the last mail fraud count was dated 3/23/01 (R.537, R.576; TR 5, 10/13/05 hearing, TR 8, 10/14/05 hearing).

In violation of Blakely, the main opinion of Booker, and now Cunningham, which have all held that judicial fact-finding denies the accused the right to a jury trial, the PSR was admittedly not based on the trial or any jury-determined facts, but was instead based upon the Government's Trial Brief (Item 28, PSR), permitting the prosecution and Court to coordinate the construction of guidelines that recommended "life", supposedly downward adjusted to "only" 25 years. When a sentence is not based on the jury's verdict, it is considered improperly calculated nor can it be presumed lawful and reasonable.

The sentence was also not properly calculated because court officials used the November 1, 2004, Guidelines Manual. This was another ex post facto violation, which dramatically increased the sentences applied in this case. The amount of investor "loss" was increased from \$8,175,511.50 in the PSR (Item 188) to almost \$13 million at sentencing a month later (TR 48, R. 639). AUSA Gezon, however, conceded that restitution is a "different issue" than calculating loss under the guidelines (TR 9, R. 537).

Even if one were to admit that the government proved their case in its entirety (which Marcusse most emphatically does not

do in any way, shape, or form), merely using the November 1, 1998, Manual as updated November 1, 2000, instead results in a calculation of 28 levels vs. 46 (Item 211, PSR). The adjusted offense level (subtotal) becomes 29 vs. 50 (Item 218, PSR). This would be after using the sentencing calculations made in Items 195 through 233 in the PSR. The sections referenced and levels calculated in Items 204, 207, 213, and 214, totaling 14 levels, did not even exist at the time the alleged offenses supposedly occurred (See Exh. P). Item 205 for 2 levels was removed by court officials (TR 4, R. 639).

It is well-established that the ex post facto clause in the Constitution "forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred." Weaver v. Graham, 450 U.S. 24 (1981). The clause demands that where Congressional revision of the Federal Sentencing Guidelines "changes the legal consequences of acts completed before its effective date" to the detriment of the defendant, the Guidelines in effect at the time of the criminal act must be applied. Miller v. Florida, 482 U.S. 423, 431 (1987); United States v. Kussmaul, 987 F. 2d 345, 351-52 (6th Cir., 1993).

At sentencing, Marcusse objects to the calculation of the guidelines from Items 195 to 233 in the PSR (TR 28, R.639). Count 82 against Marcusse, a money laundering count, alleged a

date of 11/02/01 in the indictment. During the jury instruction conference, AUSA Gezon admits that the "correct date should be 11-2-00 rather than "01" (Gezon at TR 3482). The guidelines went up dramatically on "white collar crimes" on 11/1/01. This permitted the trial judge to sentence Marcusse to at least 192 months or 16 years more than the appropriate earlier version of the guidelines would have allowed (Offense level 29, Category I, vs. 43 "reduced" to 300 months or 25 years). This precise issue was brought up in the various defendants' objections to the PSR filed on the court's record, indicating that the sentences meted out in this case, ignoring this constitutional guarantee, were knowingly vindictive and unreasonably harsh. Booker imposes a sentence to appellate review for reasonableness. This means that it is a violation of the law, for which there is a cognizable remedy, for a judge to impose an unreasonable sentence.

As a threshold matter, this Brief has demonstrated how the government failed to prove their "ponzi scheme investment fraud" or their "failure to file" scheme at trial by either a preponderance of the evidence or by proof beyond a reasonable doubt. The jury was not trusted to determine the "fact" of a "ponzi scheme", but was essentially ignored on its finding of a "failure to file" scheme in the application of the sentencing guidelines. This way, the government, "having failed to meet its burden at trial, is permitted a second bite of the apple, a

chance to make its case before an alternative decision maker, the sentencing judge." (Barry L. Johnson, *If at First You Don't Succeed*, 75 N.C.L. Rev. 153, 182-183 (1996)). This "second bite of the apple" allows the government to perfect its case and ready it for re-litigation at the sentencing "mini-trial." *Id.* This ability creates the "temptation for prosecutors to decline to bring charges they fear could result in acquittal [so they] wait to bring supporting facts to the courts attention and sentencing." (*If at First You Don't Succeed* at 200). This might explain why the words, "ponzi scheme" and "prime bank", did not appear in the indictment and why no unreported income was charged against Marcusse in the indictment. It further explains why these specific terms now appear in the Appellee Brief.

Thus, clever court officials in cooperation together can produce a "cruel and unusual" PSR to manufacture an unreasonable and unconstitutional sentence at will, completely disregarding a jury's role in determining guilt or innocence.

Watts, 519 U.S. at 169-179 (Stevens, J., dissenting) explained, "the notion that a charge that cannot be sustained beyond a reasonable doubt may give rise to the same punishment as if it had been so proved is repugnant to...long-standing procedural requirements enshrined in our constitutional jurisprudence." See also United States v. Coleman, Case 2:02-cr-130, R.217 (S.D. of E. Ohio, 2005).

The PSR erred in this manner by using (1) "conduct" the government had contractually deemed over the "Valley Boyz" program was that of an "innocent victim", i.e., the "prime bank" allegations over GX-1 (Items 41, 42, 43, 44, 45, PSR; GX-380); (2) a "ponzi scheme investment fraud", which was withdrawn by the prosecution at trial (Gezon at TR 3713), but used again in the PSR to enhance the sentence under "obstruction of justice", because Marcusse supposedly perjured herself when she testified that she placed "millions of dollars in a bank located in the Bahamas that would pay tremendous returns" (Item 191, PSR); and (3) "tax" offenses, which at trial the prosecution admitted may have been based on "misreading" the tax code (Gezon at TR 3452). All three are based on conduct which was repeatedly changed at trial as the prosecution was unable to prove their allegations.

Duplicitous counts charging two different schemes should render the counts void. If, however, because the ponzi scheme investment scheme was withdrawn, the failure to file mail fraud scheme still stands, and therefore is the only jury-found basis for sentencing, United States v. Neuhausser, 241 F. 3d 460, 467-68 (6th Cir. 2001) ruled that, "the punishment imposed cannot exceed the shortest maximum penalty authorized in the statutes criminalizing the multiple objects ...". The maximum statutory sentence for 26 U.S.C. §7203, Willful failure to file return, supply information, or pay tax, is one year. 25 years grossly

violates this statutory maximum and is an illegal sentence.

The PSR was used as the basis for their sentencing recommendations, and even a deceitful non-existent Part B, Criminal History, is invented between the initial PSR and the revised PSR (See Exh. O).

At the initial meeting regarding the PSR, Marcusse informed the probation officer, Richard Griffis, that the PSR was so riddled with deceit, that she was taking exception to it in its entirety (PSR Addendum). As soon as Marcusse advised the prosecution of this position (R.483), she was moved to a different county jail and all of her legal files were confiscated (R.494), thus depriving her of any ability to make specific objections to the PSR. Therefore, she filed a Notice of Obstruction of Justice, Stolen Legal Papers, Blocked Phone Calls and Fraud (R.509). It seems likely that the confiscation of all of her papers was occasioned by the court's intent to rely on United States v. Lang, 333 F. 3d 678, 682 (6th Cir., 2003), in which it was ruled that if a defendant objects to a material fact in the PSR but offers no evidence beyond a bare denial, the district court may properly rely on the facts found in the PSR. This should not apply in the instance where such unfair tactics are employed to prevent the accused from being heard at all in the matter.

The sentences meted out in the instant case were 500% to

600% higher than those in similarly charged cases before this same trial court and judge, yet cases that had considerably more in losses, such as the Broucek case (TR 23, R.639). Marcusse's sentence was 50 to 100 times longer than given to her investment advisors-- 3 months was given to Gerry; 6 months was given to Kramer-Wilt (TR 21-22, R.639). The best "deal" was given to Plaster, who was granted the government's "blessing" on defrauding Marcusse and "keeping" investor funds (TR 22-23, R.639). Associates such as Wilkinson, were never charged. This constituted selective prosecution, the denial of equality under the law, and was a gross violation of 18 U.S.C. §3553(a)(6), unwarranted sentencing disparities. The sentence also seeks to severely punish Marcusse for exercising the constitutional right of taking the case to trial. The government should be prohibited from inflicting a harsh and punitive penalty merely for exercising a fundamental right. This also gives rise to the presumption of vindictiveness.

The trial court record indicates that once this judge made up his mind, he was not open to another point of view. Defense counsel acknowledged this, "Yesterday Your Honor indicated that obviously when you rule, you rule", to which the judge responded, "Yeah, I don't like to be talked out of anything" (court at TR 3483).

There was no reason given for consecutive sentencing, which

was used to go over the statutory maximum. United States v. Battle, 289 F. 3d 661 (10th Cir., 2002), has ruled that in exercising its discretion to impose consecutive sentences, a district court must state its reasons so that its decision may be meaningfully reviewed for abuse.

The money laundering charges were duplicative of the mail fraud counts, including many identical checks to investors. "The rule, required by the Double Jeopardy Clause, is that when one count in an indictment is a lesser included offense of another, duplicative convictions cannot stand." United States v. Houlihan, 92 F. 3d 1271, 1300 (1st Cir., 1996); United States v. Parrilla-Tirado, 22 F. 3d 368, 372 (1st Cir., 1994); United States v. Penton, 367 F. 3d 14 (1st Cir., 2004).

United States v. Allen, 76 F. 3d 1348 (5th Cir.) cert. denied, 519 U.S. 841 (1996), ruled that money laundering guidelines should have been based on the amount of money laundering, not the loss in a related fraud. Money laundering counts 43-57, 58, 81-82, against Marcusse total \$ 118,690.16. United States v. Jenkins, 58 F. 3d 611 (11th Cir., 1995), ruled that the "Rule of lenity" precluded counting money laundering transactions under \$10,000. If this were to apply, only count 58 for \$69,400 would remain.

The psychological assessment ordered in the Sentencing Judgment was without any legitimate basis as Marcusse, a college

graduate (Item 250, PSR), had no history of mental problems whatsoever, much less mental defects or disabilities (Item 251), and no history of any illegal drugs or alcohol abuse. The trial court deemed Marcusse competent on 2/23/05 (R.211). The Sixth Circuit ruled in United States v. Modena, 302 F. 3d 626, 629, 636 (2002), that an order for alcohol and drug treatment must be reversed when there is no legitimate basis for it. United States v. Kent, 209 E. 3d 1073 (8th Cir., 2000), ruled that a sentence with mental health counseling was improper when there was no history of mental condition. Likewise, the psychological assessment order is without merit and should be reversed.

The restitution order was incorrect and increased to produce a basis for sentencing enhancements. The number of investors and investor deposits was substantially inflated, and no list was ever submitted on the record to support the alleged investor total of 577. At the time of the PSR, three months after trial, and over a year after the initial 7/29/04 indictment in which Item 16 alleged, "Defendants collected approximately \$20,686,075.00 from approximately 577 investors", the "Addendum to the Pre-Sentence Report" indicates that the "Assistant U.S. Attorney could not provide amounts for each victim and hoped to have that information available for sentencing" (Exh. O).

Besides being incorrect, the restitution order was imposed

in violation of the rulings of the Sixth Circuit. A pretrial report prepared while Marcusse was still in Missouri indicated that she had no assets and no income. The Press Release of 10/28/05 issued by the Office of U.S. Attorney changes the story that the prosecution told the jury from that of the accused "spent millions" on "themselves and others" (GX-170; GX-172), to that of \$7.4 million being "spent" promoting the scheme (Exh. FF), thus indicating that the government knew the accused, other than the Bosses, had no assets. The government's story changes yet again on appeal based on the audience to claim that \$5 million was transferred and "never returned to the investors" (AB-p.25), apparently now attempting to prejudice the accused by inferring they secreted it away in an offshore locale.

The district court has already overturned the sentencing judgment for a \$6,000 special assessment due to the known inability to pay (R.663, R.672-675).

Recently, in March of 2007, checks were issued to investors by the U.S. Treasury displaying "RESTITUTION - JM MARCUSSE". There were 8 defendants in the instant case yet these checks single out Marcusse by name whereas "MARCUSSE, et al" is the name of the case (See Exh. SS). As of 3/07, Marcusse has made payments of \$25 per quarter, totaling \$110.00 (See Exh. OO), making this representation untrue. These checks were mailed without any explanation of the total balance to be disbursed,

the reasons for the disparate amounts among investors or the source of the funds. Since the "U.S. District Court of Grand Rapids, MI" is also listed on these checks, it's reasonable to suggest that this action had the approval of district court officials.

United States v. Wood, 364 F. 3d 704, 715 (6th Cir., 2004), has ruled that the Sixth Circuit has taken a "clear position against restitution orders in amounts that a defendant cannot possibly pay, reasoning that such restitution orders threaten respect for judicial orders generally and provide the defendants with less incentive to seek remunerative, rehabilitative, and non-criminal employment. United States v. Dunigan, 163 F. 3d 979, 982 (6th Cir., 1999)." The Judgment Order of \$1,000 per month upon Marcusse's release at over 70 years old with no current assets, making 12 cents an hour in the prison scheme, is unreasonable.

The supervised release ordered of 3 years unnecessarily lengthens the sentence and is not authorized by underlying statutes, such as 21 U.S.C. §841, which imposes statutory provisions for supervised release. United States v. Bates, 519 U.S. 1108 (1997), cert. granted, 96 F. 3d 964 (7th Cir., 1996), "we ordinarily resist reading words or elements into a statute that do not appear on its face."

Marcusse prepared several Rule 60(b)(3)&(4) motions that

were filed prior to sentencing. These included--Pretrial Detention used for Torture and Mental Abuse to Prevent a Fair Trial (R.545); Jury Verdicts to be Set Aside as Null & Void for Prosecutorial Misconduct and Defense Collusion (R.546); Witness Tampering in re Kramer-Wilt/Moon/Gerry to facilitate IRS Perjury (R.551); Solicitation of Perjury (R.553); Challenge of Authority to Bring and Maintain your Case (R.554); and Unclean Hands in re Suisse Security Bank & Trust (R.563). This last SSBT filing, at Att.19, p.6, included the statement of David B. Smith, former Assistant Director of the Asset Forfeiture Office, Criminal Division of the Justice Department, that if foreign bank records are denied, "the bill actually requires a judge to dismiss the claim. There is no discretion" (R.563, Att.19, p.6). After sentencing--Court Reporter Misconduct (R.590); and Sentencing Deemed Null & Void for Fraud (R.575-1) were filed.

At the sentencing hearing, Marcusse objected to the main allegations at trial (TR 6-36, 47, R.639), and to the PSR (TR 27-28, R.639). The PSR's "facts" had not been proven to a jury beyond a reasonable doubt nor had legitimate evidence and testimony been used to obtain the guilty verdicts (TR 47, R.639). She objected to ponzi law having been used to deprive her of all evidence and vital witnesses at trial (TR 18, R.639). Marcusse stated that her sentencing calculation should therefore be, "zero points, zero sentence" (TR 28, R.639).

There is a due process right to be sentenced on the basis of accurate information. United States v. Tucker, 404 U.S. 443 (1972); United States v. Tarwater, 308 F. 3d 494, 518 (6th Cir., 2002).

The objections at sentencing, as well as the proof attached to the Rule 60(b) fraud filings, should have triggered the court's fact-finding duty under Fed. R. Crim. Proc. 32(i)(3)(A)&(B). United States v. Darwich, 337 F. 3d 645, 666-67 (6th Cir., 2003). Rather, the presence of vindictiveness was indicated on the part of the judge against the defendants. At the end of the trial, he threatened that he would take any filings they made that he considered "garbage" into account when determining their sentences, because he personally "will not be made a fool" (Court at TR 3824). See also North Carolina v. Pearce, 395 U.S. 711 (1969).

Exhibit P illustrates the unreasonable difference between sentencing based on judge-found facts with the wrong sentencing guidelines manual applied vs. sentencing by jury-found facts causing a sentence that was at least 24 years too long. FRCP Rule 32(i)(3)(B) & (C) require that for any disputed portion of the PSR as a finding of fact, that the court must rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing; and (C)

must append a copy of the court's determination under this rule to any copy of the PSR made available to the BOP. Marcusse has been prejudiced by the PSR and its slander. These rules have been ignored, as the disputed issues grossly impacted the sentence given to Marcusse. As the result, a report specifically objecting to each inaccurate item in the PSR has been prepared, including the reasons for the objections, and is being submitted to the probation office in Grand Rapids, Michigan, for correction of these multiple serious errors. Within the confines of this appeal, Marcusse states that out of the 282 items in the 9/26/05 Pre-Sentence Report, she agrees that only Items 10, 18, 20, 21, 25, 26, 234, 237, 238, 239, 242, 244, 245, 247, 254, 258, 259, 261, 268 and 272 are correct. All of the rest of the items in the 9/26/07 PSR misrepresent the honest facts in some way, and she objects to each one of them on that basis.

The report is further being sent to AUSA Schipper. A.B.A. Prosecution Standards 3-6.2(b) obligate a prosecutor to correct any incomplete or inaccurate information contained in a PSR.

At the end of the sentencing hearing, the trial judge utters the first comment in the entire process upon which Marcusse could wholeheartedly agree --that the proceeding was a "miscarriage of justice" (TR 51, R.639), although the reason he gives is inappropriate in that he expected that Marcusse should have silently tolerated physical abuse from the U.S. Marshals at

sentencing (TR 46, R.639). This was after she had specifically requested the court at the beginning of the hearing, "I will charge you with my safekeeping as a witness to my safety and well-being in this matter" (TR 6, R.639), over her fears that she would yet again be physically harmed merely for wishing to be heard on the record.

As proclaimed, the sentencing hearing and judgment were indeed a "miscarriage of justice", and require all convictions and sentences to be vacated and the indictment dismissed.