No. _________________

IN THE

SUPREME COURT OF THE UNITED STATES

JANET MARCUSSE - PETITIONER

VS.

UNITED STATES OF AMERICA – RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIOARI

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QUESTIONS PRESENTED

On direct appeal of the jury convictions, after due process concerns were raised over the heavily disputed content of the court-appointed attorney's proof brief, rather than remove counsel for misrepresenting the underlying record, the Sixth Circuit Court of Appeals permitted the defendant to file a pro se supplemental brief. In the Opinion, however, the pro se brief was ignored, and only the unacceptable brief of counsel was considered, causing relief to be denied. The questions raised below all involve issues properly raised in the pro se brief and preserved at the district court, which have earned new or affirmed support in the intervening decisions of the Supreme Court since the time of the final judgment of the district court.

I.

In light of **Youngblood v. West Virginia,** 547 U.S. 867 (2006), **New Hampshire v. Maine,** 532 U.S. 742 (2001), and **Cleveland v. United States,** 531 U.S. 12 (2000), whether mail fraud and money laundering convictions can be upheld in light of the withholding of material exculpatory evidence from the jury, the withholding of an element of the alleged crime from jury deliberations, and the abuse of the disjunctive in the mail fraud statue?

II.

In light of **United States v. Santos,** 553 U.S. _____(2008), and **Cuellar v. United States,** 553 U.S. _____(2008), whether the money laundering convictions can be upheld in the absence of constructively received profits?

III.

In light of **Holmes v. South Carolina**, 547 U.S. 319 (2006), whether the defendants were unfairly denied the defense of third-party guilt on ponzi scheme charges?

IV.

In light of **Boulware v. United States**, 552 U.S. ________(2008), whether the defendants were unfairly denied the defense of return of capital distributions and pass through funds going into investments on tax charges?

V.

In light of **United States v. Gonzalez-Lopez**, 548 U.S. 140 (2006), and **Dye v. Hofbauer**, 546 U.S. 1 (2005), whether the defendants should have been denied the right to proceed pro se at trial or ignored on appeal after having been granted the right to be heard on the basis of due process concerns rather than **Faretta?**

VI.

In light of **Zedner v. United States**, 547 U.S. 489 (2006), whether the indictment must be dismissed over Speedy Trial Act violations?

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Janet Marcusse respectfully petitions that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The Opinion of the Sixth Circuit Court of Appeals is dated February 14, 2008 (Appendix "App." 1-31a), and is unpublished. The denial of the petition for panel rehearing and rehearing en banc, dated May 20, 2008 (App. 32a) is unpublished.

JURISDICTION

The Sixth Circuit Court of Appeals decided the case on February 14, 2008. A timely filed petition for panel rehearing and rehearing en banc was denied on May 20, 2008 (App. 32a). The jurisdiction of this Court is invoked under 28 USC §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case presents questions under the First, Fourth, Fifth, Sixth and Eighth Amendments to the Constitution of the United States found at App. 129-130a; 15 USC §77c(a)(4), §80a-3(c)(10)(B), and §80a-3a at App. 130-131a; 18 USC §2, §371, §1341 at App. 132-133a; 18 USC §3161 at App. 133-139a; 18 USC §3661 and §3663(a)(2) at App. 140a; 18 USC §1956(a)(1)(A)(i)&(B)(i), (h), and §1957 at App. 140-142a; 26 USC §501(c)(3), §508(c)(1)(A), §731(a), §7202 and §7203 at App. 142-144a; Federal Rules of Evidence §803(6), §902, and §1006 at App. 144-146a; Federal Rules Criminal Procedure 29 at App. 146-147a; Federal Rules Civil Procedure 19 at App. 147-148a; Federal Rules of Appellant Procedure ("FRAP") 10(b)(2)&(e) at App. 148a; Circuit Local Rules for a Pro Se at App. 148-150a.

STATEMENT OF THE CASE

A. BACKGROUND

On October 21, 1998, Janet Marcusse, on behalf of investors, starts sending wire transfers totaling $4,226,000 for a **stock** trading investment program, utilizing certificates of deposit as collateral, conducted through Suisse Security Bank & Trust ("SSBT") in Nassau, Bahamas (App. 306-326, 913-914, 917-924a). A June, 1999, investor newsletter names SSBT, attaching wiring instructions there (App. 261-263a). An October, 1999, newsletter discloses all funds are being left in the program to "compound", attaching the flyer, "Bahamas CD Trading Program" (App. 182-188, 701, 927, 929a). SSBT circulates two letters, dated February 11, 2000, and January 10, 2001, represented to be from FBI Supervisory Special Agent Gerard Forrester, indicating SSBT follows "proper procedures to curtail money laundering" (App. 457-460a). On April 2, 2001, the Central Bank of the Bahamas revokes the license of SSBT, freezing all accounts amidst allegations of money laundering (App. 333, 340a).

Marcusse was in Las Vegas, monitoring another investment of $1,861,330, managed by Richard Gerry and Winfield E. Moon of Worldwide "E" Capital, LLC ("Worldwide")(App. 940-943a). Gerry used as his advisor, attorney James Kramer-Wilt, Bureau of Public Debt, a leading expert on high yield investment fraud (App. 453-455a).

SSBT appeals the action, but loses (App. 340a). Raymond Winder, Provisional Liquidator, Deloitte & Touche, files his first report on August 24, 2001 (App. 334a). In September, Marcusse sends a newsletter advising investors they will not receive their "profit pool" as the "bank failed" (App. 265a). Investor contracts had agreed to no guarantee of returns, assigned discretion over investment choices, diversification, force majeur, arbitration and commissions, disclosing investment offerings were structured as a "private placement" or "joint venture", exempt from securities registration. 15 USC §77c(a)(4) and §80a-3a provide for such an exemption. Receipts confirmed "best efforts" (App. 130-132, 1406-1409a).

On August 2, 2001, Marcusse and Donald Buffin, Jr., file a complaint with police against former associates, Diane and Wesley Boss, for embezzling $1.5 million of investor funds (App. 245, 772, 930a). On August 10, civil litigation is initiated and their assets liened, through attorney Jim Sullivan, an investor (App. 246, 967a).

On September 11, Marcusse moves to Branson West, Missouri, where MLC Development, Int'l., Inc. ("MLC") is domiciled, in which from 1999, $2 million was invested, and where an alternative health clinic had been planned as a charitable goal (App. 934-937, 948, 953a). Investors were advised in a May seminar, in which the focal point was MLC, the office was moving there, and about a problem with SSBT (App. 697, 708a). MLC was located at 16292 MO-13, Suite E (App. 442a). Marcusse's office relocates to Suite K (App. 884, 948a).

MLC's principals were Michael Carney, CEO, and Robert Plaster, CFO, founder of Empire Gas & Oil (App. 443-444, 945a). MLC was developing the "Showcase Branson Project", a large theme park, through a joint venture with the Lac Vieux ("LVD") Tribe, whose Chairman was Richard Williams (App. 443, 466a). The profits projected by MLC were enormous (App. 806-807, 883-884, 898a). A $98 million letter of credit for financing was in place, except that Plaster reneged on releasing the land after he obtained $1 million of investor funds (App. 414, 416, 936-938a). MLC had also been granted the Power of Attorney to collect a foreign oil contract due Robert Rydberg, President, Crawford Ltd., of $25.5 million, from which MLC agreed to pay $16,270,625.20 to Marcusse's investors, but the wire transfer "disappears" (App. 945-946, 1396-1400a). $4,186,700 was invested in the Crawford contracts for oil storage facilities (App. 938-939a). After Carney passes away November 6, 2002, Plaster rejects responsibility on all contracts (App. 445, 908-911, 933a).

B. INVESTIGATION

In response to the Boss criminal complaint, Det. Crumb contacts the IRS (App. 766a). On December 18, 2001, a search warrant is issued on Marcusse's office, now empty, in Michigan (App. 1446a). On May 22, 2002, she testifies at a grand jury (App. 814a). On July 29, the Bosses file a motion to adjourn the civil litigation based on an agreement to plead guilty and have the federal government distribute the proceeds of their assets to investors (App. 247-249a). They had taken bank records, "proferring" them to the IRS for credit (App. 238a). The Bosses attest Marcusse "engineered" a ponzi scheme, promising investors "Prime Bank Notes", but "never" transmitting the funds offshore (App. 250-252a). This is also reported in the press (App. 253a). When the motion is granted, Marcusse abandons the case assuming the government will assure her investors are paid, however, on June 16, 2003, summary disposition is granted and the liens released, which results in the Bosses obtaining loans against their assets (App. 232, 254-255, 772-773, 932a).

The FBI tells associate Dan Hammond no indictment will be sought because they are "victims" (App. 462a). George Besser, 65, retires to Mexico, registering his address with the government there, and collects Social Security. The first grand jury expires without action on August 29, 2003 (App. 33a).

C. CHARGES FILED

On December 5, 2003, however, a sealed criminal complaint is filed against Marcusse, alleging a ponzi investment scheme based on prime bank notes in violation of 18 USC §1341, mail fraud, and 18 USC §1956(a)(1)(A)(i), money laundering (App. 151-188, 235-236a).

On July 1, 2004, Marcusse is arrested on a sealed warrant in Missouri and extradited to Michigan (App. 33-36a). She is described as a "fugitive" by Assistant U.S. Attorney ("AUSA") Thomas Gezon and "on the run for two years" in the press (App. 34, 1436a). After a combined preliminary detention hearing, in which she files a waiver of right to counsel, but after which she is denied any witnesses or evidence, the court orders she be detained pretrial (App. 37a).

On July 29, an indictment against 8 defendants charges 39 counts of mail fraud and a conspiracy to commit mail fraud, but no trial date is set. On August 16, Buffin declines to sign the waiver of right to counsel and is released on bond. On October 27, a superseding indictment adds 39 money laundering counts, a conspiracy to commit money laundering, a conspiracy against the IRS, and a forfeiture count (App. 190-223a). The trial date is set for February 7.

On November 9, at arraignment, Marcusse requests to file an extradition violation for being deprived of a lawful detention hearing, a speedy trial violation, objection to selective prosecution in which those individuals that caused investor loss were not being charged, and objection to the Bosses as co-defendants (App. 342-344a). Fifty counts were brought by investors directly involved in the embezzlement (App. 256-257, 831-835a). The pleadings are not filed for three weeks until Marcusse presses the issue (App. 345a). The court does not respond to her pleadings except to order a competency examination (App. 38-40, 276-277a). The trial is reset for April 18.

Besser is arrested in Mexico. On January 12, 2005, Rule 5 documents state the warrant charged conspiracy to distribute five kilograms of cocaine (App. 41a). He is transported to Michigan where he requests to proceed pro se, but is detained pretrial (App. 42a).

On February 23, a competency hearing is held for Marcusse. She had declined to participate in the exam, but is found competent, and this is reported in the press (App. 43, 259, 1433-1434a). The same day, counsel to Wesley Boss files an "ends of justice continuance", due to a conflict with his vacation and the trial (App. 348-350a). Marcusse files an objection to the motion's timeliness, but it is rejected from filing. She resubmits it, and it is named on the docket as a brief in "support" of his motion (App. 278-279, 351-352a).

On March 14, a continuance hearing is held. Marcusse refuses to waive her right to speedy trial (App. 577-578a). The court finds for the continuance, erroneously stating a couple of defendants were added in the fall (App. 189-190, 586a). Besser states he prefers to represent himself, and he was "kidnapped out of Mexico on a drug charge", causing the court to deny him the right to proceed pro se without finding if he waived his speedy trial right (App. 574-577a). The trial is continued to May 16.

On April 25, the prosecution files a motion in limine to prevent defenses to the tax count (App. 224-227a). Boss and Marcusse object to the motion (App. 353-362a). The court grants the motion, except to acknowledge **Cheek**, stating evidence "that defendants had a good faith belief their wages were not income" was admissible, but excluding any evidence "that the government's implementation of the statutes is erroneous" (App. 47-60a).

At final pretrial, the court orders an anonymous jury "due to no fault of anybody here", pictures of all witnesses to be taken, and the defendants need **not** submit their trial exhibits in advance (App. 592-593, 601a). AUSA Gezon states only summary exhibits will be used for the bank accounts (App. 595a). Marcusse presents motions to dismiss the various charges, including for speedy trial violations, compulsory joinder of individuals responsible for investor losses in light of the civil forfeiture count, and to have bank records subpoenaed (App. 363-364, 596-600a). All are denied (App. 61-73a).

On May 10, Buffin files a right to unobstructed self-defense (App. 408a). On May 11, the judge signs a sealed motion to revoke his bond (App. 74-76a). Previously, the magistrate had denied the motion to revoke bond (app. 77a). Buffin is left in the drunk tank for six days, without shower or shave, including the first two days of trial. Once he agrees to accept Kenneth DeBoer as full counsel at trial, he is released on bond (App. 78a, 603-605a).

D. THE TRIAL

The first morning of trial, the court denies Marcusse her intended theory of defense, "bank records show the money was invested with other individuals", because what a third-party may have done with the money was not relevant to the charges:

> This matter is not whether you invested money wisely. That's not the issue the government has put before us. So whether or not the money that you allegedly may have had to invest was run off with by a third party or a fourth party or someone else is really not the issue here, so that's why I want you to focus clearly on this. The allegation is that you and others--listen carefully to me. The allegation is that you and others fraudulently and deceitfully deceived other people, not that other people deceived you, which may be the case. I imagine the government might concede that if you ask them (App. 668a).

When Marcusse objects this prohibits a defense, the court asks court-appointed David Kaczor to explain how she will be able to use the underlying bank records to the prosecution's summary exhibits:

> I've explained to 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 bank records. And I don't know if they're all the bank records that she's interested in, but the bank records that would be relevant in formulating the summary sheet, she would be able to review those.
>
> DEFENDANT MARCUSSE: I'm sorry, that doesn't answer the question.
>
> THE COURT: I think it does. I think it does (App. 671-673a).

When Marcusse objects this allows the prosecution to withhold evidence, the court holds she does "not know what this case is about, and I have to protect your rights by asking Mr. Kaczor to speak on your behalf", denying her the right to proceed pro se and conditioning the right upon whether she will change her theory of defense:

> If you can demonstrate to me at a certain point that you do understand what this trial is about and you can stay focused on what this trial is about, then I definitely believe that you have the right to represent yourself under the Constitution. But when I hear all these irrelevancies, I can't let you do that to yourself, and I'm going to ask Mr. Kaczor to confer with you. But I'm going to ask Mr. Kaczor to do the examination of witnesses on your behalf (App. 676a).

When Marcusse responds that she will be putting in a motion for recusal based on bias, and states, "There is no constitutional effect here", the court threatens to remove her, also denying her the right to object in front of the jury (App. 678, 684-687a).

In his opening statement, AUSA Michael Schipper tells the jury, "Ponzi scheme. You've heard the word already, Ponzi scheme. That's what this case is about" (App. 688a). He attests a "key" to this fraud will be the words, "prime banks" or "bank debenture", which are "top secret investments" that "don't exist". He alleges representations were made the money was invested when instead it was "spent". "It wasn't invested" (App. 689-691a).

The prosecution is able to introduce without objection a prime bank brochure, Government Exhibit No. 1 ("GX-1"), to which Marcusse had objected at the detention hearing for its irrelevancy to the charges and the investor witness had admitted was shown to him before October, 1999 (App. 526, 529-533, 539-540, 695-696a). The first of 39 mail fraud counts was dated October 21, 1999 (App. 195a).

A small diversification of $400,000 with Valley Boyz in Appleton, Wisconsin, who added $600,000 to it, according to AUSA Reed Pixler, Phoenix, was transferred to the Isle of Mann, where the funds were seized by the government in May, 1999 (App. 730-732a). He testifies that Besser, signatory on the funds, was deemed the "innocent victim" of this "prime bank fraud", per government agreement GX-380, and the funds later returned (App. 725-730, 1028a).

Investor newsletters, such as June, 1999 (GX-31), and October, 1999 (GX-33), were introduced without objection, about which in closing arguments, Kaczor admits their attachments were missing (App. 699-700, 1022a). Eighteen witnesses are presented, including through AUSA Pixler, and forty-five exhibits entered into evidence, before Marcusse is permitted to cross examine a witness (App. 714, 736a). One exhibit, GX-71dd, is an August 28, 2002, letter sent by the Bosses to investors, in which they "confess", but blame Marcusse (App. 269a). The Bosses plead guilty during trial and do not testify (App. 755a). Their change of plea and letter of "confession" are reported in the press (App. 258a).

The defendants are asked to stipulate to the bank records so they can be entered as "bulk" exhibits. Marcusse conditions her approval on being able to use them (App. 710-711a).

IRS agents James Flink and Steve Corcoran act as investigators. Flink presents one-page summary exhibits, GX-170 and GX-172, alleging $4.8 million "spent" by defendants "on themselves", and $7.3 million "spent on others", totaling $12.1 million (App. 1596-1597a). He attests $7 million was "checks to individual--individual people", but refuses to provide names, amounts or checks to support any of it (App. 790, 799-800a). When Marcusse questions the figures of 577 investors and $20.7 million in investor deposits, Flink tells her to look in the boxes of bank records positioned in front of the jury as stage props (App. 789a). Other answers are similarly nonresponsive, nonsensical, or limited by the court (App. 778-780, 783, 789-812, 817-818, 826-831, 968-972a). Marcusse objected to similar exhibits at the detention hearing (App. 527-528, 540-546, 799a). The agents admit only some accounts were selected for use (App. 778-779, 856-857, 962a). Flink even admits if an investment was not GX-1, the account was not included (App. 794-797a).

No unreported income charge was made in the indictment against Marcusse, Besser, or William Flynn, yet at trial, $943,370, $1,022,642 and $730,627 was alleged respectively (App. 780a). IRS "expert" witness, Darline Goeman, and Flink testify that because Marcusse was sole signatory on a sub bank account for Worldwide, $600,000 of deposits were income to her (App. 782, 821-826, 864-867a). When Marcusse attempts to use records from bulk exhibit GX-219 for impeachment to show Moon was the owner and signed receipts for $1,501,300 to the parent account for investments, AUSA Schipper objects "these are not part of our records" (App. 941-942a). Identical records were available for Crawford in GX-241 (App. 1390-1395a). Kaczor does not object to this or similar maneuvers to prevent impeachment (App. 826, 915, 916, 949-951a). He refuses to allow Moon or Gerry to testify, claiming it would be "detrimental" to Marcusse (App. 843-847a). He attests he cannot locate witnesses, such as Kramer-Wilt (App. 878a).

While Anthony Valentine, Flynn's counsel, objects to the summary exhibits (App. 858-863a), he does not submit the evidence the real estate and bars were being developed for sale by MLC as a casino package to a tribe, with profits to go to investors (App. 904-906a).

Twenty out of twenty-eight defense witnesses are denied, including fourteen by the court, based on the opinion, "alleged investments" are "irrelevant" (App. 79-84a), and at trial, "because of the time" (App. 784-787a). No direct witness to any investment is permitted (App. 1494-1495a). Twice the judge meets privately with the jury, including right after this decision (App. 781, 788a).

The court prohibits a good-faith reliance defense, even when based on advice from federal government officials (App. 738-743, 774a). When Marcusse attempts to use for impeachment a previously admitted newsletter, GX-52, "We Rest on the Law", the court objects and excuses the jury, threatening to refuse to allow her to cross examine witnesses, because it is "not relevant, what you or others think the Internal Revenue Code says" (App. 266-267, 813-818a).

At the detention hearing, Flink had testified only $160,000 went to MLC, and it was not an investment, continuing with the same line into trial (App. 552-557, 800-801, 806a). Plaster is called at the last minute after witnesses testify to their knowledge of his involvement in MLC (App. 706-707, 718-720, 744-745, 777a). Plaster denies he was a "principal" in MLC, claiming no knowledge of public documents or newspaper articles attesting otherwise (App. 445, 1373-1381a). He denies knowledge of the Crawford contract, or the $4 million note due investors from the $1.2 million transfer to MLC (App. 851a). He attests $1 million was a "nonrefundable deposit" on a $45 million land acquisition per GX-160, a one-page contract with Carney (App. 848-849a). He admits he kept the money, however, there is no evidence presented any defendant was aware of or party to GX-160 (App. 830-831, 850-851a). During Flynn's testimony, Valentine objects, preventing Marcusse from entering the $4 million note due from MLC (App. 907-911, 1453a).

On July 10, 2004, barrister Gurmail Sidhu's home and office were raided, and Marcusse's business and bank records confiscated, under a drug trafficking warrant (App. 1611-1612a). Sidhu handled the $1.2 million MLC wire transfer and $1.8 million for Moon, which Flink admits only after Plaster testifies (App. 963-964a). Gerry was a trustee on the account (App. 1401-1403a; Def. Exh. M-X).

Given Plaster's testimony, Richard Williams appears as a defense witness. He testifies that as LVD Tribal Chairman, he wrote a letter to Missouri Gov. Carnahan expressing their "intent to team up" with the "principals of MLC, Carney and Plaster, on the Branson Project, Plaster's political influence "kind of assured that we had a chance at this thing", Plaster "willingly lent his name", and the project was "very solid" (App. 466-467, 892-898a).

Marcusse testifies to $12.2 million invested in the SSBT Bahamas program, Crawford, MLC, and Worldwide (App. 936, 942, 947, 953a). During her testimony, she is permitted just 9 exhibits to rebut nearly 400 exhibits (GX-397) presented by the prosecution (App. 1088a). Kaczor agrees to "weed out" exhibits from the "reams" of intended defense exhibits as an "officer of the court" (App. 916a). To prove the SSBT investment, only a letter fax from their Provisional

Liquidator, Def. Exh. M-Q, a SSBT bank brochure, Def. Exh. M-P, from which Kaczor removes the page disclosing SIPC and other insurance "to no limit", and a summary exhibit showing dates and amounts invested, Def. Exh. M-AA, are permitted (App. 306, 333-336, 920-924, 927, 1024a). No supporting wire transfers are allowed (App. 952a). A similar summary exhibit for Crawford, Def. Exh. M-Z, is denied entry for not having "proferred" underlying records (App. 939, 1410-1411a), records already in the prosecution's possession. The exhibit showed Besser handling $880,834 in pass through funds going into it (App. 840, 931a). The only evidence permitted to support the Crawford investment was a copy of its state charter, Def. Exh. M-V, and a returned check made out to it, Def. Exh. M-AA(2)(App. 939-940a). A letter from Marcusse to Moon, Def. Exh. M-U, and the letter to Sidhu, Def. Exh. M-X, are all that is permitted to support the Worldwide investment (App. 944, 1401a).

Afterwards, Marcusse refuses to close the evidence (App. 957a). She has Kaczor request to reopen the defense so she can testify to the profits represented to her from the SSBT program (App. 958-961a). She files "evidence packs", including some bank records, and has them certified, asking the court to accept them under Fed. R. Evid. 902 (App. 307-339, 957-959, 966a). Kaczor and the court characterize the evidence as only newspaper articles and Besser's business records, with the court holding it "irrelevant", Marcusse not the proper "custodian", and a "confusion of the issues" (App. 957-958, 1035-1038a).

Marcusse was not permitted to attend the jury instruction hearing. Defense attorneys object over failure to file, arguing this charge was not made in the indictment, however, the prosecution counters it was the "nature of the conspiracy" (App. 975-977a). Valentine requests "loans, gifts or monies received to be transferred at another's direction" be stated as excluded from income, but the court denies it (App. 979-983a). Instead, the theory of defense instruction originally requested by the prosecution is requested by defense attorney Donald Garthe, "you have heard evidence that the defendants claimed their income was exempt from federal income tax laws because they called themselves a church or a church auxiliary" (App. 984a). Garthe did not ask for Rule 16 materials until after the prosecution rests (App. 868-869a). Only Marcusse and Flynn testified. Marcusse testified she considered forming a church primarily for its tax benefits an "appalling concept" and "offensive" (App. 935-936a). She testified the funds ascribed to her as income went into investments, they were not gifts, and the records to prove it were being kept out of the trial (App. 954a). Flynn testified the funds he handled were under "instruction for investments" (App. 906a).

In closing arguments, AUSA Gezon discusses the "elements of money laundering", stating "one is...this Ponzi scheme they're running" (App. 1010-1011a). Kaczor responds by asking the jury, "What is this trial about? This trial is about whether or not Mrs. Marcusse operated a Ponzi scheme" (App. 1013a). He summarizes the various investments to which Marcusse testified, equating each to reasonable doubt, such as "Robert Plaster had 1.2 million reasons of reasonable doubt. He kept it all, but he came in and he's not charged with anything", and naming the government witness who confirmed each investment (App. 1016, 1023-1024, 1026, 1028a). He also goes over the conditions agreed to by investors in the contracts (App. 1016-1020a).

In his rebuttal closing, AUSA Gezon states:

> 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 word 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...You will not be asked to decide in any of the elements whether Mrs. Marcusse committed a Ponzi scheme. I suggest to you that that's a term of art that talks about a generic area of cases that are typically called Ponzi schemes, but that's not what we're here about today (App. 1039-1040a).

He instead argues that because the defendants did not invest funds in GX-1 as promised, the jury's decision is whether they "made statements where they represented by omission or half-truths, lies, or whether they made deliberate lies which were material to the investors' decision to invest" (App. 1040a). He argues "over and over and over again that they promised the principal is to be kept safe" (App. 1041a). Investor contracts are rejected as "gobbledygook" (App. 1042a). In reference to the wire transfers, he claims "she sent the money somewhere. And quite frankly, ladies and gentlemen of the jury, we'll never know what she did with all that money that she sent over there" (App. 1043a).

Gezon attacks Marcusse's evidence of the Bahamas program, her "stack of papers". "Take a look at that stack of paper. It's one brochure, one colorful brochure that you can get in the lobby of a bank, and that's almost it". He torpedoes her credibility stating, "See if there's one single bank statement in there. There's nothing". The letter faxed from SSBT's Provisional Liquidator to Besser is described as, "Something she could have gotten off the Internet" (App. 1044-1045a). He attests she takes the last million of investor funds and gives it away in a non-refundable deposit to Plaster, calling her "an illegal salesperson", a "dishonest and immoral salesperson"

(App. 1046a). He ends his argument with:

> These folks didn't lose their money. They made money. They made millions...I suggest to you that the evidence calls them all liars, and you should convict each and every one of them for taking the investors' money and for deceiving the federal government, in this case the IRS, and not paying their taxes. Thank you very much (App. 1049a).

The court "alters" the pattern jury instructions (App. 1050-1084a), to accommodate the shift in elements on mail fraud (App. 1054-1055a), and to change the nature of Count 42 from that of primarily a 26 USC §7202 offense to a §7303 offense, tying it to the charges for unreported commissions for defendants, such as Wesley Boss, in Count 40, conspiracy to commit mail fraud, and to the money laundering counts, 43-57, listing the counts instead as **42**-57:

> 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 (App. 1062a).

Count 42 is described as "failing to report significant amounts of gross income they had received during the conspiracy", and the "citizen's duty" to file federal income tax returns is discussed (App. 1071-1072a). The three conspiracy counts are joined, with only one overt act from any one defendant on any one conspiracy adequate grounds to convict on all three (App. 1076-1078a). The court ties a government exhibit to each mail fraud count on the verdict form, something the judge had "never done before" (App. 995a), to help the jury "cut to the chase a little quicker" (App. 991-996, 1083a).

The defendants were found guilty of all counts. Motions for judgment of acquittal were denied based on a ponzi (App. 85-104a).

E. SENTENCING

The Presentence Report ("PSR") recommends a total offense level of 43 or "life" for every defendant that did not waive their right to a jury trial. All had a criminal history level of I. The PSR admits it is based on the Government's Trial Brief and does not contain trial testimony (PSR, ¶28, ¶29). Marcusse responds to the PSR by taking exception to it "in its entirety" (App. 474a). The next day she is moved and all of her legal papers confiscated (App. 475-478a), causing her to be unable to prepare a specific written objections report to the PSR. At the October 28, 2005, sentencing hearing, Kaczor is used to claim he had given Marcusse a copy of the PSR (App. 619a). He neglects to mention it had been that morning. Marcusse objects to the use of ponzi law to prevent a "controversy" in that the "intent to defraud" was "not debatable" at trial, allowing the prosecution to block evidence to "grossly mislead" the jury, permitting her investment advisors to escape punishment and keep investor funds, concluding the sentencing calculations should be, "Zero points, zero sentence" (App. 632-637, 642a). The court ignores her objections, indicating the jury returned guilty verdicts (App. 659a).

Marcusse, 49, is sentenced to 25 years, consisting of 60 months for mail fraud and 60 months for the conspiracy against the IRS, to run concurrently, but consecutive to the 240 months for money laundering, for a total of 300 months. Total loss is calculated at $12,651,244.80 for restitution and $310,722 for taxes due (App. 105-115a). George Besser, 67, is sentenced to 20 years, Donald Buffin, 46, to 15 years, and William Flynn, 53, to 9 years.

F. THE APPEAL

All four defendants timely appeal the convictions and sentences. On November 18, the district court makes Marcusse a restricted filer (App. 116a). She had filed fraud pleadings under Fed. R. Civ.

Proc. 60(b) on a variety of issues, including that she had not agreed to release Moon or Gerry as witnesses and proof that Moon owned Worldwide from the Nevada Secretary of State (App. 469-472, 479-490a).

Marcusse requests to either proceed pro se or be appointed a new attorney on appeal. Melvin Houston is appointed. On June 22, 2006, he submits his proof brief (App. 1630-1659a), which Marcusse rejects as unacceptable in a Notice to the Sixth Circuit (App. 1526-1536a). On July 19, she files a motion to remove him for cause, such as misrepresenting the court denied her only three witnesses, and arguing that she should have been granted Richard Williams, a witness who did appear (App. 1483-1489a).

On August 8, the Sixth Circuit acknowledges receipt of her motion and grants permission to file a supplemental pro se brief (App. 117a). On August 21, three feet of her legal files are confiscated by SIS officials at FCI Tallahassee, but pleadings for relief to the Sixth Circuit are ignored (App. 304-305a). On October 3, the district court rejects Marcusse's pleading from filing, which requested copies of some trial exhibits for use in her brief (App. 118a).

On June 22, 2007, Houston submits his final brief, making no requested changes. Marcusse files her pro se brief on July 5 (App. 1089-1369a). She also files a motion under FRAP 10(b)(2)&(e)(2) (App. 148a), objecting to exhibits GX-1, GX-2, GX-3, GX-31 and GX-33, for tampering prior to submission at trial, and providing the basis for 66 IRS exhibits to misrepresent the facts (App. 1113, 1457-1462a). The Sixth Circuit ignores the motion. On July 9, the district court grants AUSA Schipper's motion for certification of government exhibits on appeal (App. 119-120a).

Oral arguments are set for November 29. At them, AUSA Schipper indicates he has no objection to the other defendants' requests to join with Marcusse in her pro se brief. Houston persists in arguing the denial of three witnesses only to have Schipper respond that Williams did in fact appear as a witness, causing the issue to seem frivolous in front of the panel of judges. Marcusse had requested to appear, including by telephone, but was denied (App. 121a).

On December 11, Marcusse files an Objections Report to the PSR at the district court pursuant to FRAP 10(e)(2)(App. 1463-1481a), but it is dismissed (App. 122-123a). She submits it to the Sixth Circuit, who denies it on January 25, 2008 (App. 124a). She files a motion for reconsideration, which is denied on February 19 (App. 125a).

On January 3, 2008, Marcusse files a petition for writ of mandamus to remove Houston as counsel and strike his briefs and oral arguments from her appeal, causing Case No. 08-1003 to be opened (App. 1482-1540a). The Sixth Circuit gives the district court judge until January 14 to respond (App. 126a). No response is received, however, the petition is denied (App. 127a). On February 5, the Sixth Circuit denies a reconsideration motion (App. 128, 1541-1547a).

On February 14, the Sixth Circuit affirms the convictions and sentences in an unpublished opinion under USA v. Flynn (App. 1-31a). The opinion ignores Marcusse's pro se appellant brief in its entirety. Marcusse's trial transcript is "lost" from storage at FCI Tallahassee (App. 1614-1615a).

On February 28, Marcusse files a Petition for Panel Rehearing under FRAP 40(a) and suggestion for Rehearing En Banc under FRAP 35(b), summarizing several of her claims, and specifically questioning whether due process was denied in an appeal where only the contested brief of counsel was considered (App. 1548-1613a).

On May 20, her petition is denied, claiming the "issues raised in the petition were fully considered under the original submission and decision of the cases" (App. 32a).

REASONS FOR GRANTING THE PETITION

I.

Necessary elements to sustain the convictions were withheld from the jury, are barred by judicial estoppel, and rest on withheld or tampered evidence, lending sufficient cause to vacate or reverse the convictions for mail fraud and money laundering. In light of **Youngblood v. West Virginia,** 547 US 867 (2006), **New Hampshire v. Maine,** 532 US 742 (2001), **Cleveland v. United States,** 531 US 12 (2000), the Sixth Circuit erred in affirming the convictions and the denial of the motions for acquittal, based on the judge-found fact of a ponzi scheme (App. 15-22a), derived by ignoring these issues as raised in the pro se brief (App. 1158-1208, 1213a).

The prosecution was only able to obtain convictions through confiscating, withholding, tampering with and misrepresenting the evidence with the aid of the court. While such conduct denied a fair trial, it also deprived the defendants of a government contract in which they had been deemed the "innocent" victim of a prime bank fraud in May, 1999. This prime bank fraud and GX-1 were plucked out of an earlier time than any mail fraud or money laundering count (App. 195-196, 213-221a).

The October, 1999, newsletter (GX-33), further provided investors notice GX-1 was no longer being used, "This program is not considered to be a standard bank debenture program...We are instead in what is termed a stock trading program" (App. 183a). At trial, however, the newsletter is submitted into evidence as GX-33 without its attachments and during a time in which Marcusse is not permitted to cross examine witnesses (App. 700a). At no time was she permitted to object in front of the jury. The Bahamas flyer is removed from GX-33, labeled GX-2 and GX-3, and placed next to GX-1, allowing for their "expert" witness, Leonard Zawistowski, to falsely attest it too was a prime bank investment (App. 724, 733-737a). This was contrary to investor testimony (App. 701, 703-705a).

That the prosecution knowingly tampered with their main evidence can be proven from FBI Special Agent Samuel Moore's Criminal Complaint of December 5, 2003, Attachment D, containing the October, 1999, newsletter fully intact (App. 181-188a). Attachment B contains the prime bank brochure (GX-1)(App. 158-180a), including a "current" program overview, showing 10% monthly interest (App. 177a), which is removed from GX-1 and not presented at trial.

While the terms, "prime bank" and "ponzi scheme" both appear in the Criminal Complaint (App. 152-153a), neither term actually appears in the indictment (App. 190-223a). At trial, however, the prosecution makes it clear the charge is a ponzi scheme, with intent to defraud that can be shown by GX-1, "pitching" prime bank notes but not investing in them or any other investment, a "classic" ponzi scheme (App. 689, 724, 735, 1003a). Six investors are located to testify they had "seen" GX-1. Had Marcusse been permitted cross examination, she could have asked "when" they saw GX-1 (App. 1601-1606a). In his renewed motion for acquittal, Kaczor argues investor contracts allowed for other than prime bank investments, and they were in fact made (App. 997-1002a). Zawistowski had testified "all" high yield fraud schemes include prime bank investments, and they don't name a bank. Both he and Moore admitted this fraud does not include stocks in it (App. 733, 736-737, 775-776a), however, this testimony and the notice provided in GX-33 are ignored by the prosecution under a relentless steamroller of anything that contradicts the script.

Motive is manufactured by the millions by ignoring pass through funds going into investments and withholding the evidence of all investments and accounts not of a prime bank nature (App. 821-824, 840, 911, 931, 968-972, 1024a). While IRS witnesses admit they did not include any investment that did not match GX-1 in their summary exhibits (App. 779, 792, 795-796, 810-812a), they repeatedly deny the investments made were in fact investments (App. 794, 799-801, 806-812, 824, 827-830, 840-841, 853-854a). In his rebuttal, Flink lies to discredit Marcusse's SSBT summary exhibit, contradicting AUSA Pixler's testimony several weeks back (App. 732a), in order to claim transfers made to SSBT in July, 1999, were instead for the Valley Boyz prime bank fraud (App. 965a). He refuses to admit any transfers went to SSBT, instead claiming the funds went merely "to the Bahamas" (App. 969-971a). He even admits adding $600,000 to Marcusse's 2001 unreported income because her 1998 income of $6,744 (GX-148) was below the filing threshold (App. 823, 861a). Placing boxes and boxes of bank records in front of the jury (App. 789, 879a), however, was diabolically effective for the bigger picture. People are trained to trust government officials, and as might be expected, the jury held it against Marcusse that she could not produce a single bank record to support her story as helpfully pointed out by AUSA Gezon (App. 1045a).

It is well established that the deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice. A new trial is required if the false testimony could...have affected the judgment of the jury. **Giglio v. United States,** 405 US 150, 153-154 (1972).

Clearly, the ponzi scheme allegation would not have survived adversarial testing if the jury had been permitted to view the bank records supporting Marcusse's summary exhibits. This can be demonstrated by comparing the SSBT summary exhibit to the "certified" bank records denied by the court (App. 306-325a). Business records are admissible under Fed. R. Evid. 803(6) and may be certified under Rule 902 (App. 144-146a). The denial of the proof of $12.2 million in investments made had to have "affected" the jury's judgment. The IRS summary exhibits were bald assertions (App. 862, 867a), supported only by references to bulk bank records (App. 1956-1958a), establishing their utter lack of credible or competent substance.

Even so, the prosecution changes tack in rebuttal closing, dropping the ponzi scheme as an element, not trusting it to jury deliberation after Kaczor argues there were at least $5 million in legitimate investments made **admitted** by several government witnesses (App. 1016, 1023-1024, 1026, 1028a). Instead, AUSA Gezon tells the jury they are to decide whether the defendants "made deliberate lies which were material to the investors' decision to invest" in light of the combined characteristics of GX-1 and GX-2 (App. 1040a), basing this theory on tampered-with evidence. In essence, after the defense rests their case, the prosecution's theory becomes the defendants lied about investing in an investment which did not even exist until the prosecution invented it at trial, a conundrum used not just to confuse the defendants, but spin the jury in circles too. For this "crime", the prosecution's recommended sentence is life (App. 1613a).

Houston's brief ignores these issues, instead discussing investor contracts and Marcusse's testimony on only some investments. He ignores MLC to bolster the prosecution's false conclusion MLC was not "promoted" until after "the Access program collapsed" (App. 244, 934, 936a). He misrepresents the Bahamas CD Program and SSBT as two separate investments (App. 739, 919, 927-928a), claiming Marcusse testified the Bahamas CD Program was "expected to return $25 million on a $350,000 investment", citing transcript page 3214, which does not state this (App. 923, 924, 1645, 1660a), thereby bolstering the prosecution's false prime bank theory. Houston's brief acted to cover up the devastating effect the deprivation of all material evidence and direct witnesses to investments made on the verdicts and the sentences. Other than the Bosses, who were reported to law enforcement once discovered, the defendants did not directly cause the loss of any investor funds.

The prosecution, however, resurrects their ponzi scheme allegations for sentencing. Investor loss calculations added to the sentencing guidelines increased the offense level by 20 levels (PSR, ¶203), increasing the guidelines on a criminal history category I from 46-57 months (level 23) to life (level 43). This treatment conflicts with the other circuits. **United States v. Ebbers,** 458 F 3d 110, 128 (2nd Cir., 2006), has held the loss must be the result of the fraud. **United States v. Olis,** 429 F 3d 540, 544, 547 (5th Cir., 2005), held this causes potential for constitutional violation under **United States v. Booker,** 543 US 220 (2005). **United States v. Fallon,** 470 F 3d 542, 549 (3rd Cir., 2006), indicated "we are unaware of any cases holding that the definition of 'victim' for scheme-based crimes diminishes the requirement that losses be 'directly' caused by the defendant's actions."

Judicial estoppel forbids the use of intentional self-contradiction as a means of obtaining unfair advantage. **New Hampshire v. Maine,** 532 US 742, 751 (2001). This is a different matter than seeking punishment on acquitted conduct. Once the prosecution withheld the ponzi scheme element from jury deliberation, they should be estopped from raising the claim for sentencing, particularly in front of such a biased adjudicator. At Besser's sentencing, the judge expresses "perverse pleasure" that other individuals "basically scammed" the defendants, yet he sentences him for a ponzi (App. 610-611a). AUSA Schipper crows to the media the sentences are "really off the charts", yet to the Sixth Circuit, they were a "very substantial downward departure" (App. 1140, 1351, 1415-1416). The use of a November 1, 2004, guidelines manual, an ex post facto violation, by itself increased Marcusse's sentence by 16 years (App. 1353-1355, 1417-1419a).

18 USC §1341 (App. 132-133a), which includes the two phrases identifying the proscribed scheme in the disjunctive, (1) "any scheme or artifice to defraud", or (2) "any scheme or artifice...for obtaining money or property by means of false...representations", does not define two independent offenses. **Cleveland v. United States,** 531 US 12, 25-26 (2000). As argued in the pro se brief (App. 1348-1357), "Every criminal defendant has the right to insist that the prosecutor prove to the jury all facts legally necessary to the punishment." **Blakely v. Washington ,** 542 US 296 (2004). In general, "ambuiguity concerning the ambit of criminal statutes should be resolved in favor of lenity". **United States v. Bass,** 404 US

336, 347-349 (1971).

The tying of a mailing to a mail fraud count on the verdict form was objected to on the basis of removing the other elements from jury consideration (App. 992-996, 1085-1087, 1324-1326a), and argued in the pro se brief (App. 1323-1336). Where the defendant contests an omitted element and raises evidence sufficient to support a contrary finding, a reviewing court should not find the error harmless. **Neder v. United States**, 527 US 1, 19 (1999).

II.

The convictions for money laundering should not be sustained in light of **United States v. Santos**, 553 US ____ (2008), where it was held the meaning of the term, proceeds, refers to profits only and not all receipts.

Investor funds were either invested or paid to investors in distributions. Profits in the stock trading program were "compounded", as required by contract and provided notice in GX-33 (App. 186a), in the main trading account at SSBT, an account not owned or controlled by any defendant. While investor distributions were made based on earnings representations to Marcusse, this profit was never constructively received before the bank's license was revoked (App. 925-929a), explaining why regular monthly distributions stopped past March, 2001. That Marcusse did not physically move profits back to the originating account was used against her to "prove" she was running a ponzi scheme (App. 796, 824, 857, 1043a). She was unaware of any accounting rule that an investment account must remain in the same bank account as the one in which the funds are received or paid out (App. 872, 877, 926-929a).

There were also counts under 18 USC §1957 (App. 1012a), which should be covered under the **Santos** holding. According to **United States v. Savage,** 67 F 3d 1435 (9th Cir., 1995), **cert. denied,** 516 US 1136 (1996), "criminally derived property" under 18 USC §1957 is equivalent to "proceeds" under 18 USC §1956 (App. 140-142a).

Motions to dismiss before trial were denied (App. 64, 370-374a). The pro se brief argued the money laundering counts were an abuse of charging authority in that tax crimes do not constitute predicate offenses for money laundering per Tax Division Directive No. 99 (App. 283-285, 1177-1182, 1303a). It also argued there was no concealment, the counts were multiplicitous violating double jeopardy, distributions were returns of capital, not "profits", and because the prosecution had defined the "unlawful activity" at trial as a ponzi scheme only to withdraw it, all the counts were "null and void" (App. 1223, 1303-1305, 1333-1334, 1359-1360, 1676a). **Cuellar v. United States,** 553 US ____ (2008), held concealment must be the purpose of the transaction. Using a bank check lends no cause for intent of concealment (App. 215, 2220, 903, 911a).

At the time of sentencing, the Office of U.S. Attorney issues a Press Release targeted to investors in which the $7.4 million AUSA Gezon had told the jury was "missing" and hidden in bank accounts worldwide had been found, "spent" on expenses promoting the scheme (App. 1043, 1440a). Their storyline changes to suit the audience. Such conduct should not go unrewarded. The money laundering counts should be dismissed.

III.

The denial of the district court to allow Marcusse to present evidence and witnesses to establish third-party guilt lends cause for this Court to vacate or reverse in light of **Holmes v. South**

Carolina, 547 US 319 (2006). This denial did not merely involve the admissibility of evidence to rebut the charges, but also the denial for Marcusse to use bank record evidence already admitted by the court for the prosecution and misleadingly portrayed to the jury. This violated **Hampton v. Mow Sun Wong,** 426 US 88 (1976), which states the federal sovereign must "govern impartially". It also violated the Confrontation Clause when cross examination of a vital witness was limited and entirely denied for 18 other witnesses. Denial of the right of effective cross examination is constitutional error of the first magnitude, which no amount of want of prejudice can cure. **Davis v. Alaska,** 415 US 308 (1974); **Olden v. Kentucky,** 488 US 227 (1988). This Court has long recognized that the exclusion of logically relevant evidence which is necessary to present a defense may violate the due process clause. **Crane v. Kentucky,** 476 US 683 (1986); **Washington v. Texas** , 388 US 14 (1976).

From the start, Marcusse has contested the charges based on third party guilt. The motions to dismiss were based on it and on good faith reliance, but denied for "potential relevancy" (App. 64, 363-389a). Even the civil litigation against the Bosses was held irrelevant at trial (App. 773a). The deprivation of twenty witnesses was mischaracterized by the Sixth Circuit in finding the denial of two witnesses as argued by Houston harmless (App. 25-26, 1654-1655a), and ignoring the pro se brief (App. 1145, 1209-1235a).

The Sixth Circuit also ignores the reliance on federal government officials for advice. Marcusse is even enhanced two levels for "perjury" for testifying an offshore bank failed (PSR, ¶191), a bank endorsed by a federal official kept hidden (App. 81, 346-347a). The Dept. of Justice has never denied Agent Forrester endorsed SSBT.

Instead they duck the issue (App. 1310-1323, 1449-1452a). The pro se brief included excerpts from a February 5, 2001, Senate Hearing Report disclosing SSBT had engaged in "possibly fraudulent promises to pay extravagant returns" and "misuse of investor funds" (App. 1120-1124, 1454-1456a). The Dept. of Justice, however, claims in an April 18, 2006, letter they have had no records on SSBT "since 1973" (App. 1316, 1449a). Curiously, SSBT's affairs are still not settled (App. 1447-1448a). The Dept. of Justice has brought this case with unclean hands (App. 851, 871a). **Raley v. Ohio,** 360 US 423 (1959), has held fundamental fairness precludes convicting a defendant who has been misled by official actions to believe conduct was lawful.

IV.

The denial of the district court to allow a defense to the tax charges embedded in every count, such as return of capital distributions and pass through funds going into investments, was error in light of **Boulware v. United States,** 552 US ______(2008), and **Cheek v. United States,** 498 US 192 (1991), lending cause to vacate all counts.

The investment company was Sanctuary Ministries, which was considered exempt from registration under 15 USC §80a-3(c)(10)(B) and §80a-3a(App. 130-132a). No advertising was allowed, which was used to claim the defendants were being "secretive" (App. 689a). In a private placement or joint venture, gain is not recognized until the money distributed exceeds adjusted basis under 26 USC §731 (App. 143a). Investors were advised of this tax treatment in a newsletter (App. 264a).

The prosecution mischaracterizes the investment company as

Access Financial Group, Inc., beginning with the improperly sworn search warrant on December 18, 2001 (App. 1446a). At trial, Access is repeatedly called a "checkbook church", in spite of numerous defense counsel objections (App. 1428a). AUSA Gezon calls it "hocus pocus" that "defied common sense", to mischaracterize tax law compliance and prejudice the accused (App. 1005a). The terms, "tax", "taxes", or "taxable", were used 920 times at trial, whereas "ponzi" or "ponzi scheme" were used 160 times, demonstrating the importance of the tax issue to the prosecution (App. 1149-1150a).

This theory too was based on tampered-with evidence. The October, 1999, newsletter (GX-33) had a second attachment removed by the prosecution before submission, "Instructions to Make Investments", stating all investment checks were to go to Sanctuary Ministries (App. 188a). Lack of proper service and falsely alleging a corporate entity allowed 26 USC §731 to be ignored, and for contempt processes to be abused to detain Marcusse pretrial to tamper with her defense and prejudice her at trial by claiming it was "guilty intent" for her to request to have a judge review whether the IRS, through the grand jury process, was entitled to unincorporated ministry records (App. 33-35, 37, 342-343, 512-520, 599, 775, 1049a), as raised in the pro se brief (App. 1262-1276a). Investors that wished to testify for the defense were threatened by the IRS, causing several to back out (App. 1222-1229, 1412-1413a). Indeed, one investor testified the government's investor hotline during the trial stated there were no trials currently scheduled (App. 874-875, 1414a). Using the prejudicial "checkbook church" misnomer deflected attention away from the fact that the use of a church was entirely irrelevant to return of capital distributions not being taxable to investors or pass through funds going into investments not being taxable to the defendants. Several defendants were sizable investors, entitling them to distributions as any investor (App. 836-838a).

All 39 mail fraud counts were based on checks from Sanctuary Ministries, not Access (App. 270a). The use of a church or "508(c)" (App. 143a) was for purposes of building an alternative health clinic and investors supporting it (App. 873a), but to ask questions of IRS witnesses about it or present the nature of the ministry angered the court (App. 842, 855, 900-902a), and as threatened, was to "do so at your peril", because there "ain't no 508 organization" (App. 868a). AUSA Gezon advises the jury that the judge would tell them there was "no such thing" (App. 1005a). Prior to trial, the evidence that Sanctuary Ministries was attached to a recognized tax-exempt 26 USC §501(c)(3) was prohibited (App. 75a). This violated statutory and higher court case law as argued in the pro se brief (App. 268, 973, 1199-1202, 1306-1310, 1420-1423a), which in turn violates **United States v. Bishop,** 412 US 346 (1973), which has held if a taxpayer relied in good faith on a prior decision of the Supreme Court, the requirement that a tax offense be committed "willfully" is not met.

IRS witnesses misstate the law. If a defendant was merely a signatory on a business account, they would deem deposits to it taxable to them, refusing to consider economic benefit, ownership, or fiduciary aspects (App. 858-850a). Flink disavows all investments made not only to ascribe $4.8 million to the defendants, but allege $7.3 million was "spent" on "others" by arguing that if there was a human signatory on a business account, such "control" made it personally taxable (App. 827-828a). IRS "expert" Goeman agrees (App. 865-866a).

The prosecution falsely alleged the defendants claimed Access was an IRS qualified rollover company (App. 691, 1004a). A lawyer from Mid-Ohio Securities, a custodian recognized by the IRS, testified they had provided lawful self-directed IRA's (App. 275, 756-764a). An associate testified boilerplate self-directed corporate profit sharing plans were also available for an investor's business as allowed by Rev. Proc. 92-6, 1992-1, CB-611 (App. 870a). Investor witnesses testified to such plans (App. 698, 702a), however, Flink denies it (App. 819-820a), and Kaczor withholds the plan documents from evidence. A witness from a local employer even testifies that defendant David Albrecht transferred his 401(k) funds to a profit sharing plan at Southwest Securities (App. 750-754a). The next morning, the prosecution scurries to offer Albrecht a plea bargain of five years, presumably to rid themselves of a potential threat to their allegations (App. 755, 820a). Another investor witness admits he never talked to any defendant about how to handle his qualified funds (App. 765a).

Duplicitous counts permit the prosecution to withdraw the ponzi scheme allegation in rebuttal closing and switch its emphasis to a failure to file tax conspiracy to help maintain all counts (App. 975a). Motions to dismiss, including an objection to duplicitous counts, were denied (App. 64, 375-389a).

In closing arguments, Michael Dunn argues for Besser, "if my client was charged with failure to file taxes, they got him. Failure to file taxes is not one of the charges here" (App. 1031-1032a). Likewise, Kaczor argues Marcusse was not charged with failure to file, but $343,370 is "how much she would have gotten paid once you deduct the $600,000", misconstruing the balance as "gifts" (App.

1014, 1027a). Not only did these arguments contradict Marcusse's testimony (App. 824, 840, 931, 954a), but given the change in emphasis by the prosecution to a failure to file conspiracy at the jury instruction hearing, it appears these "defense" attorneys were acting to falsely stipulate to conduct which would enable their charges to be found guilty on all counts (App. 1007, 1049a).

Cheek is violated by the jury instructions, "You may consider the reasonableness of the belief in determining whether or not the defendant actually held that belief" (App. 1073a). The jury was prevented by the court and misled by the prosecution and defense attorneys as to what beliefs the defendants may have held.

Investor Margaret Linnell paid her own way from New Mexico as a defense witness. An enrolled agent with the IRS with 50 years of experience as an accountant, Linnell testified she concluded Marcusse's tax position was "legitimate", and she discussed this with Marcusse (App. 885-890a). Another witness was arrested shortly before his scheduled testimony (App. 294-295, 872a).

At the jury instruction hearing, AUSA Gezon admits the defendants may have been misreading the tax code even with the misconstrued manner in which their position was being portrayed (App. 974a). This is a concession the element of "willfulness" was missing. In front of the jury, however, the prosecution attests Marcusse had no professionals associated with the investments or tax experts, misrepresenting testimony from witnesses such as Linnell and Kuhman, and taking advantage of many such witnesses absent due to abuses of authority (App. 81-82, 432-435, 689, 758, 764, 1006, 1008-1009, 1611-1612a).

After trial, for the Bosses only, the prosecution quietly reduces their unreported income by $142,377 by removing pass through funds (PSR, ¶147, ¶171) (App. 240a), leaving the other defendants who went on to appeal uncorrected. Two defense witnesses, Margaret Linnell and Phyllis Calkins, are arrested for aiding and abetting tax offenses (App. 296-301a).

There were other material fallacies. At trial, the IRS failed to submit any substitute corporate income tax returns or allege any corporate tax deficiencies. Without such a tax deficiency, there is no criminal tax evasion or conspiracy as to the taxability of investor distributions. Indeed, AUSA Schipper misleads the Sixth Circuit as to this precise point. In his brief, he attests, "The defendants' filed no returns for the corporate entities, Access or Sanctuary Ministries", attributing the testimony to Agent Goeman (App. 242a). Transcript page 2344 cited does not support this claim (App. 862a). Exhibit 155 refers to the defendants' alleged unreported personal taxes due. AUSA Schipper also changed from a failure to file conspiracy at trial to mentioning an "abusive tax shelter" for the first time on appeal, changing the nature of the charge (App. 1149a).

At trial, the IRS had every opportunity to present any evidence they wanted unimpeded, but significantly, they did not provide any evidence of corporate profits. In regards to alleged personal tax deficiencies, it cannot be reasonably argued that depriving the defendants of the use of their own bank records or their theory of defense provided reliable results. This and other tax issues were included in the pro se brief, but ignored by the Sixth Circuit (App. 1110-1117, 1137-1138, 1147-1151, 1170-1173, 1177-1187, 1195-1208, 1282-1299, 1306-1312, 1317-1347, 1357a). The PSR

Objections Report refused submission demonstrated no personal taxes were due (App. 1468-1479a). On appeal, Houston misrepresents Marcusse's testimony as "she considered all amounts received to be gifts", ignoring even the $600,000 Kaczor argued was not income (App. 1027, 1645a).

V.

The Sixth Circuit erred affirming the district court's decision to deny Besser the right to proceed pro se (App. 10-15a), and by ignoring the pro se brief in which the other defendants were prejudiced by being denied this right (App. 1245-1651a).

The district court opinion denies Besser the right to proceed pro se, because he began arguing about the Uniform Commerical Code at the March 14, 2005, continuance hearing (app. 44a). A review of the transcript contains no such argument (App. 568-590a). Both the district court and the Sixth Circuit make much of Besser protesting he had "been kidnapped out of Mexico on drug charges", as if this proves he's incompetent, yet both incongruously find nothing wrong with enhancing him for "sophisticated planning" (App. 13-14, 29, 610, 678-684a). Agent Moore testifies at trial they could not have extradited Besser on a white-collar crime (App. 770a). For a case the prosecution protests had "nothing to do" with drugs, simple "clerical error" (App. 681a), does not suffice to explain how barrister Sidhu's home and office in England are raided under drug trafficking in a "mob probe", confiscating Marcusse's records so she cannot use them at trial, or why an "anonymous" jury is necessary because an elderly woman writes the court expressing concerns over abuses of process over Buffin's bond revocation (App. 401-407a). Sidhu refused to respond to Marcusse's requests for documents or to be a defense witness, suggesting abuse of National Security Letters (App. 292a). The letter-writer, Judy Cormier, is arrested after trial on IRS charges (App. 298-301a).

Incredibly, Agent Flink makes the excuse at trial he could get no information on any offshore bank accounts, because "if it's not drug money, then they will not cooperate with us" (App. 783a). According to the U.S. Attorneys Bulletin, July, 2001, this was no longer true of the Bahamas or United Kingdom as of March 10, 2001 (App. 280-282a). While it can be argued some actors in the trial were incompetent, Besser was not one of them.

Bond would be denied if a defendant wished to proceed pro se, or revoked as in the case of Buffin, until he agreed to submit to full counsel. As soon as Marcusse began to object in pleadings to the charges, the court retaliates against her by ordering a competency exam. This is reported in the media, causing possible tainting of the jury pool (App. 1433-1434a). A review of 200 cases indicates that court discriminately engages in this practice when the defendant is a woman and the charge is tax-related (App. 260, 301a). It also allows for Marcusse to be moved three times, each time causing her legal papers to be confiscated and shipped home. On March 5, 2005, when asked to respond to the Lefkow murders, the judge is quoted in the media, "It all started with these tax protesters", having presided over the cases of 100 such "volatile", "anti-government", "rebels", but professes not to know what one is at trial (App. 677, 1034, 1442-1443a). After the final pretrial, a court-approved defendant meeting to plan submission of evidence at trial is disrupted by the marshals (App. 70a).

When a defendant refused to change their theory of defense, counsel who would represent a theory approved by the court would be put into play, allowing for a trial by ambush. Kaczor is used to review Marcusse's intended evidence with the prosecution first, allowing them to dictate to him what defense exhibits to withhold, and to prepare their witnesses, such as Plaster for testimony (App. 852, 916a). Under this pressure, Marcusse's "reams" of exhibits are reduced to just 9, chosen for their ability to be easily discredited. Most importantly, because the evidence is never submitted in front of the jury, they never learn of its existance, allowing the prosecution to claim Marcusse kept no records (App. 692, 1003a). As the court made clear to defense counsel early on, "You know exactly what you can do and not do" (App. 693-694a). Marcusse could not reasonably prepare Kaczor for cross examination, because the prosecution withheld its witness list until after 60 of its 77 witnesses testified (App. 781a).

Kaczor would not object to evidence, except the substitute income tax return exhibits (App. 861-862a). He would not even object when DeBoer, the counsel forced on Buffin, tells the jury Marcusse had been arrested at a former employer (App. 912, 1033a). She files a written objection for the court to instruct the jury she had never been previously arrested, but it is ignored (App. 473a). Kaczor does not object when AUSA Gezon repeatedly argues in closing that Valentine agreed that Marcusse is a "liar" (App. 1046, 1048, 1427a). Under cross, AUSA Schipper asks Marcusse, "You have the ability to call more witnesses if you want, right? Don't you?" Dunn quickly objects (App. 955a), allowing the inference to stand unchallenged in the jury's mind she didn't call more witnesses because she had none to call. Kaczor refuses to call Gerry, who was a personal friend to Sidhu. After trial, however, Kaczor accepts the position of Senior Litigator at the Public Defenders Office.

McKaskle v. Wiggins, 465 US 168, 178 (1984), held the pro se defendant is entitled to preserve control over the case chosen to present to the jury. **United States v. Gonzalez-Lopez,** 548 US 140 (2006), affirmed the denial of self-representation as a "structural defect". It was error to deny Besser, Marcusse, and Buffin this right, or fail to consider that Flynn, who lived in Wisconsin, was dependent on Marcusse for an effective defense. Nor can it be legitimately argued that any defendant was incompetent for **Indiana v. Edwards,** No. 07-208 (2008) to apply.

Seven circuits have procedural rules allowing for an individual to proceed pro se on appeal.[1] Marcusse was unable to rid herself of the misrepresentations of Houston, which denied all of the defendants the right to be meaningfully heard on appeal after they had requested to be heard through her brief (App. 1678a). This discriminates against indigent defendants (App. 302-303a).

Houston omits $8 million in investments made to which Marcusse testified (App. 1645a). He dilutes **Bruton** claims, the Boss confession, using a frivolous example instead (App. 709, 721-723, 1276-1281, 1652-1653a), ignoring AUSA Gezon's mischaracterization of Buffin's statement (App. 767-772, 1047a). He omits the vital ponzi element issue, enabling the Sixth Circuit to erroneously affirm a ponzi finding to promote as law of the case (App. 17a), which would prevent any real relief under 28 USC §2255.

[1]Federal Circuit Rule 47.3(a); First Circuit Rule 46(a)(3); Third Circuit Rule 46.2; Fourth Circuit Rule 46(f); Ninth Circuit Rule 4-1(d); Tenth Circuit Rule 46.1(B); Eleventh Circuit Rule 46-1(h)(3). A copy of these rules is at App. 148-150a.

While Marcusse's pro se brief was quite large, so too was AUSA Schipper's, who filed a motion for an over-sized brief which was granted. When Marcusse files a similar motion, it is not filed on the record, however, once the Sixth Circuit is advised, the petition for rehearing is immediately denied (App. 32, 1616-1629a). In **Dye v. Hofbauer,** 546 US 1 (2005), this Court rejected a similar maneuver from the Sixth Circuit, holding lower courts must look to the substance of a defendant's pleading. Houston's misrepresentations lend cause to a more insidious basis for the Sixth Circuit to have ignored Marcusse's pro se brief. The Opinion states in part:

> Incredibly, in a brief before this Court, she states: "The fact that defendants used some of the money invested to reward themselves is also irrelevant to the various charges of mail fraud and money laundering". Such an affront is consistent with Marcusse's asserted view that the federal courts lack jurisdiction over her, that the tax laws are invalid, and that she can conduct herself in any manner she pleases. The jury no doubt perceived this attitude from Marcusse's trial testimony and concluded that, contrary to her assertions of good faith, Marcusse had merely "thumbed her nose" at the law.

(App. 19a). This erroneous conclusion both seeks to infer the quote was from her pro se brief, which is not true (App. 1650a), and promotes the deceitful "tax protestor", "anti-government", profiling scheme in which that district engages over tax charges (App. 108, 243, 289-291a). If the IRS had a legitimate case, it should not be necessary for the court to deny basic constitutional rights by abusing authority under homeland security (App. 74-75, 286-288, 395-400, 1336-1348a), or permit physical abuse to occur unchecked (App. 491-523, 712-714, 746-749, 660, 1255-1256, 1260-1264a). Congress has not defined enemy combatants as tax miscreants, causing this abuse of authority to be an abdication of Article III authority to the IRS, a "structural" defect. In light of **Hamdi v. Rumsfeld,** 542 US 507 (2004), **Boumediene v. Bush,** No. 06-1195 (2008), and 18 USC §3661, (App. 140a), a fair opportunity to contest such findings of fact, supplement the record on review with exculpatory evidence, and request release must be granted, or it is a violation of due process.

VI.

The defendants were denied the right to a speedy trial under 18 USC §3161 (App. 133-139a). This issue was raised in Marcusse's pro se brief (App. 1235-1245a), but ignored by the Sixth Circuit.

The district court denies Marcusse's third pretrial motion, citing exclusions for the competency exam and ends of justice continuance (App. 66-68a). No reason was stated for the continuance. The competency exam constituted gender bias, and used for purposes of tactical advantage to harm Marcusse's credibility and disrupt her defense preparation. She had no history of mental disabilities or defects and has a four-year college degree (App. 1481a). There was no legitimate reason to delay Besser's arrest. No family member was ever contacted as to his whereabouts (App. 1429-1432a). The delays cost her a vital witness in that in January, 2005, Robert Rydberg, President, Crawford Ltd., passes away (App. 841a). All of the defendants were prejudiced when Marcusse's defense was harmed.

Therefore, in light of **Zedner v. United States,** 547 US 489 (2006), Marcusse requests this Court to vacate the case. In addition, as it was 188 days from November 9 to the date of trial on May 16, 2005, she requests it be vacated for her under **Fex v. Michigan,** 507 US 43 (1993).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: August 5, 2008

Janet Marcusse

Janet Marcusse, pro se

NO: __________

IN THE

SUPREME COURT OF THE UNITED STATES

JANET MARCUSSE -PETITIONER

vs.

UNITED STATES -RESPONDENT

PROOF OF SERVICE

I, Janet Marcusse, do swear or declare that on this date, August 14, 2008, as required by Supreme Court Rule 29 I have served the enclosed **MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS** and **PETITION FOR A WRIT OF CERTIORARI** on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Clerk of Court
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

Solicitor General of the
United States
Room 5614
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 14, 2008.

Janet Marcusse

Janet Marcusse, Pro Se