United States Court of Appeals Docket Number: 05-10818
United States District Court Docket Number: CR-04-00313-PHX-FJM

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**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

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FILED
COURT OF APPEALS

United States of America,

Plaintiff-Appellee,

v.

Derrick McCreary,

Defendant-Appellant.

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Appeal from a Judgment of the United States District Court

District of Arizona

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# Appellant's Opening Brief

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Nancy Hinchcliffe
Attorney-at-Law
State Bar No. 004052
11 West Jefferson, Ste. 2
Phoenix, Arizona 85003-2302
(602) 252-3200

Attorney for Defendant-Appellant

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## STATEMENT OF JURISDICTION

Derrick McCreary appeals from a final judgment of conviction and sentence for conspiracy, two counts of armed bank robbery, two counts of use of a firearm in the commission of a crime of violence, all federal offenses. [CR[1]272,ER[2]153]

The district court had jurisdiction pursuant to 18 U.S.C. §3231.

McCreary was sentenced on December 5, 2005, to 462 months. [CR272, ER153;RT[3]12/5/05,p.50,ER650] He is serving his sentence at an institution in Victorville, California, and will be released in 2037.

A timely notice of appeal was entered on December 7, 2005. FED.R.APP.P.4(b). [CR266,ER151]

This court has jurisdiction pursuant to 18 U.S.C. §3742(a) and 28 U.S.C. § 1291 based on the final judgment by the United States District Court on December 14, 2005. [CR272,ER153]

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[1]Clerk's Record, followed by the applicable document number.

[2]Excerpts of Record, followed by the relevant Excerpts of Record page number.

[3]Reporter's Transcript of Proceedings, followed by the date of the proceeding and page number.

## STATEMENT OF ISSUES

I. **Issue One**

The court erred in admitting text messages. This error was not harmless. McCreary had a reasonable expectation of privacy in the content of text message communications stored with a third party. The acquisition of these messages by grand jury subpoena constituted a search without a warrant in violation of the Fourth Amendment and 18 U.S.C. §2703. The subpoena, used to obtain McCreary's text messages, was overly broad in scope and relevancy in violation of the Fourth Amendment. To the extent the Stored Communications Act authorized the Government to obtain McCreary's private text messages by subpoena, without a warrant and finding of probable cause, the Act violates the Fourth Amendment.

## II. Issue Two

McCreary stood trial based on an indictment that the Government knew was based partially on material perjurious testimony it had repeatedly improperly vouched for before the grand jury. At the time the Government discovered the perjury, jeopardy had not attached. This misconduct occurred in violation of McCreary's Fifth Amendment right to due process.

## III. Issue Three

The prosecutor engaged in prosecutorial misconduct by repeatedly vouching for key witnesses, Downs and McNair, which substantially prejudiced McCreary's right to a fair trial in violation of the Fifth Amendment.

## IV. Issue Four

The prosecutor engaged in prosecutorial misconduct in refusing to request immunity for, and the court erred by

failing to provide use immunity to, defense witness Austin. These actions denied McCreary his constitutional rights to due process, a fair trial, compulsory process and his right to present a defense as guaranteed by Amendments V and VI.

**V. Issue Five**

The court erred in refusing to instruct the jury on "mere presence" denying McCreary his rights to present a defense and to a fair trial in violation of Amendments V and VI.

**VI. Issue Six**

The mandatory minimum and consecutive sentencing scheme of 18 U.S.C. §924(c) violates the constitutional requirement of a separation of power between the executive and judicial branches; the non-delegation doctrine, delegating legislative authority to

sentence to the executive branch; due process; and the Eighth Amendment in mandating a sentence that is unreasonable and grossly disproportional to the crimes committed.

## STATEMENT OF THE CASE

On January 22, 2002, and February 28, 2002, armed individuals robbed the Tempe Schools Credit Union and Safeway Federal Credit Union respectively.

Dominic Austin, Jonathan Hunter, Derrick McCreary and Sahdiq McNair[4] were indicted in a nine count indictment on March 30, 2004.[5] [CR1,ER1]

McCreary and Austin were arrested in Phoenix, Arizona, on May 12, 2004. The defendants were charged in a superceding indictment on February 16, 2005, with seven counts.[6] [CR118,ER25]

McNair entered into a plea/cooperation agreement prior to trial. The court, at the Government's request shortly before trial, dismissed the indictment against Austin. [CR189,ER95]

McCreary and Hunter proceeded to trial on count 1, conspiracy to commit both armed bank robberies, in violation of 18 U.S.C. §371; counts 2 and 4, armed bank robbery, in violation of 18 U.S.C. §§2113(a) (d) and 2; and counts 3 and 5, use of a firearm in the commission of a crime of violence in violation of 18 U.S.C.

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[4]McNair was charged only with the Tempe robbery. He was convicted of the Safeway robbery in CR02-00027-PHX-MUM.

[5]Each robbery gave rise to conspiracy, armed bank robbery and use of a firearm in the commission of a crime of violence counts.

[6]The Government replaced the separate conspiracy counts with one conspiracy count.

§§924(c)(1)(A)(ii) and 2. [CR118,ER25;CR189,ER95]

The jury trial commenced on June 7, 2005. [RT6/7/05,p.35,ER346] McCreary and Hunter were convicted on all counts on June 22, 2005. [RT6/22/05,pp.1459-1460,ER624-625]

McCreary was sentenced on December 5, 2005, to 462 months. [CR 272,ER153;RT12/5/05,p.50,ER650]

The Notice of Appeal was timely filed on December 7, 2005. [CR266,ER151]

## STATEMENT OF FACTS

McCreary was indicted for two credit union robberies occurring in Tempe, Arizona. [CR1,ER1]

### I. Tempe Schools Credit Union Robbery

The first robbery occurred on January 22, 2002, at Tempe Schools Credit Union. [RT6/8/05,pp.379-380,387,ER432-433,437;RT6/9/05,pp.493,495,500,ER478, 480,484;RT6/15/05,p.915,ER564] A robber with a gun, wearing a white hooded sweatshirt, entered telling everyone to get down. [RT6/8/05,pp.355,380-381,399,ER425,433-434,441;RT6/9/05,pp.492,509,ER477,489] Two other ski-masked robbers in dark clothing, wearing latex gloves, jumped over the counter. One pointed a gun at the teller and ordered her to open the vault[7], while cash was removed from drawers. [RT6/8/05,pp.356-357,387-388,399,ER426-427,437-438; RT6/9/05,p.501,ER485] They stole $182,293 leaving bait bills behind. [RT6/8/05,pp.357-359,381-383,388,ER427-429,434-436,438;RT6/9/05,p.504, ER488] Employees pressed the alarm. One robber thanked everyone for their cooperation but warned not to move for ten minutes. [RT6/8/05,pp.360,382,388, ER430,435,438]

Outside, a customer noticed robbers leaving in a Camry.

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[7]Downs testified the manager opened the door to the vault. [RT6/9/05,p.503,ER487]

[RT6/8/05,pp.364,397-400,402,ER431,439-442]

Downs and McNair testified as cooperating witnesses. Downs testified as follows:

Downs met Hunter several months before the robbery. Both lived in Los Angeles. Downs owed Hunter $3,500 for wrecking Hunter's car. Hunter recruited Downs, McNair, Galvan, and Take-Off to commit the robbery, cancelling Downs' debt upon joining. [RT6/9/05,pp.480-482,ER466-468]

January 21, 2002, they left Los Angeles, traveling to Tempe. Hunter texted "Kobe" they were on their way. Downs first met Kobe at Kobe's Tempe apartment. Downs identified McCreary as "Kobe" at trial. [RT6/9/05,pp.479-487,ER465-473]

Arriving at McCreary's apartment at 4 a.m. on January 22, McCreary and Hunter left for 30 minutes to "scope out to rob the bank." [RT6/9/05,pp.479-484,487,489,ER465-470,473,474] Upon returning, McCreary mentioned the stolen car was available. Hunter told Downs, Take-Off and Galvan to change into clothes from the closet. [RT6/9/05,pp.489-492,ER474-477]

McCreary and Galvan left to pick up a gun. Later, McCreary gave the gun to Take-Off. [RT6/9/05,pp.489-490,493,495,ER474-475,478,480]

McCreary and Hunter instructed regarding the vault and cameras. They warned not to take bait bills or tracking devices. McNair was the get-away driver. Galvan the floor man. Downs and Take-Off were to enter the vault. [RT6/9/05,pp.494-

496,ER479-481]

McCreary and Hunter led the others toward the credit union. McNair drove the get-away vehicle. Galvan drove Take-Off and Downs in the stolen Camry. They rendezvoused in a residential neighborhood.[RT6/9/05,pp.496-498,ER481-483]

Three robbers drove to the credit union. Take-Off hesitated about using the gun. Downs grabbed the gun and entered. Galvan and Take-Off followed. Downs jumped the counter and directed tellers to the vault at gunpoint. Galvan ordered everyone down on the floor. The manager opened the vault. Money was placed in a pillowcase. The robbers exited, drove to the rendezvous point, ditched the stolen car, entered McNair's vehicle and followed McCreary and Hunter back to McCreary's apartment. [RT6/9/05,pp.500-504,ER484-488]

The robbers changed clothes. Hunter and McCreary counted the money putting it into a duffel bag and shoe boxes. Downs received $3,500. Downs, McNair, Galvan and Take-Off drove back to L.A. Hunter remained. [RT6/9/05,pp.509-513,ER489-493]

**II. Safeway Federal Credit Union Robbery**

February 28, 2002, at 9:00 a.m., Downs, Anthony Young and Deshawn Washington robbed the Safeway Federal Credit Union of $106,470. [RT6/7/05,pp.178-179,185-186,ER355-356,358-359;RT6/8/05,pp.423-426,ER445-

448;RT6/9/05, pp.423,433,ER445,455]

The manager observed robbers exit a car and enter. [RT6/8/05,pp.423-425,ER445-447] One robber grabbed the manager's phone cord yanking it from the wall. [RT6/8/05,pp.427,441,ER449,458] They ordered everyone down. Two jumped the counter. Downs, masked, armed with a gun, left a shoe print on the counter. Forcing the tellers into the vault room [RT6/7/05, pp. 184,188,200,ER357,360,362; RT6/8/05,pp.428-429,441,ER450-451,458;RT6/9/05,pp.428,456-457,556-557,ER450,462-463,524-525], cash was taken from drawers. [RT6/8/05,pp.433,ER 455;RT6/9/05,p.560,ER528] Downs threatened tellers to open the vault [RT6/7/05,pp.185-186;ER358-359] which the manager opened. [RT6/7/05,p.186,ER 359;RT6/8/05,429-431,ER451-453;RT6/9/05,pp.428,558;ER450,526] Downs and Young took money from the vault filling a pillow case. [RT6/9/05,pp.427,430-431,559-560,ER449,452-453] They fled in a blue-black car. [RT6/8/05,pp.425,431-432,ER447,453-454] and drove to the waiting van. [RT6/7/05,pp.188-189,ER360-361;RT6/9/05,pp.431,561,565,ER453,529]

Employees reported the robbery. A device hidden in the money transmitted [RT6/8/05,pp.433-435,ER455-457;RT6/9/05,p.434,ER456] signals from McCreary's complex. [RT6/7/05,pp.220-221,227,230-231,ER363-364,366,367-368;RT6/9/05, p.433-434,ER455-456]

That morning, a maintenance man at McCreary's complex observed three black

men acting suspiciously in the parking lot. [RT6/8/05,pp.239,241-242,256-257,273,ER370,371-372,383-384,388] Two were in a van. Another wearing latex gloves, was in a blue car. They left in both vehicles. [RT6/8/05,pp.242-247,256,258;ER372-377,383,385] The maintenance man recorded the van's license number reporting it to his supervisor who contacted police. [RT 6/8/05,p.242,245-248,ER372,375-378]

At 10:00 a.m., police located the tracking device at a neighboring business. The maintenance man described the van and license number. [RT6/7/05,pp.220-222,ER363-365;RT6/8/05,pp.243-245,272,ER373-375,387]

Police discovered the van was rented at the Los Angeles airport. Believing them involved in the robbery, police alerted authorities to stop the van. [RT6/8/05, p.277,ER391]

That same day, police stopped the van around Blythe. [RT6/8/05,pp.276-278,ER390-392;RT6/9/05,p.575,ER539;RT6/15/05,p.948,ER575] Everyone, including the driver, McNair, and passengers, Paul Weaver (Downs), Mark Hughes, Young and Washington, was arrested. [RT6/8/05,p.279-281,301-302,ER393-395,402-403;RT6/9/05,p.575,ER539;RT 6/15/05,p.949,ER576] Upon searching the van, police found a hooded sweatshirt, gloves, money bands and $27,655, including bait bills from the robbery. [RT 6/8/05,pp. 289-291,293-294,297,302,306-307,310-311,ER396-398,399-400,401,403,404-405,406-407]

McCreary and Austin leased apartment 3035. The day the lease expired, February 28, 2002, they vacated, putting trash into the dumpster. [RT6/8/05,pp.250,262,273,ER379,386,388;Exhibit101,ER298] Later that day, police and maintenance man searched the dumpster area recovering a map[8], encompassing the Safeway credit union's location with directions to McCreary's apartment, a bank statement addressed to McCreary and a bill addressed to Austin. [RT6/8/05,pp.252-254,318-322,ER380-382,409-413] A search of apartment 3035 resulted in the seizure of rubber gloves, black sweat pants, six pagers[9] and their boxes addressed to Austin. [RT6/8/05,pp.322-323,325,327-329,331,333,335,ER413-414,415,416-418,419,420,421]

Cooperating witness Downs[10] testified as follows:

Hughes[11], Young, Washington, McNair[12] and Downs were recruited to commit

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[8]McCreary's girlfriend testified the map was prepared for party guests. [RT6/14/05,pp.837-838,ER554-555]

[9]No usable fingerprints were on the gloves or map. [RT6/9/05,pp.448-449,ER460-461]

[10]"KB" is Downs' nickname. [RT6/9/01,pp.518,542,ER498,513]

[11]"Foot" is Hughes' nickname. [RT6/9/05,pp.518,542,ER498,513]

[12]McNair denied "Dee" was his nickname. [RT6/9/05,pp.518,542,ER498,513; RT6/15/05,p.981,ER580]

the robbery by Hunter.[13] [RT 6/9/05,pp.514-519,ER494-499] Hughes' friend rented the van. They left California at 9:00–10:00 p.m.[14], on February 27, arriving in Tempe about 4:00 a.m. on February 28. [RT6/9/05,pp.518-520,ER498-500] Hunter communicated their progress to McCreary using a pager. [RT6/9/05,pp.521-522,ER501-502;RT6/15/05,p.935,ER566]

They met McCreary at a Tempe Burger King following him to a friend's apartment. [RT 6/9/05,pp.523-525,ER503-505] The five Californians rested there while, aroung 4:30 a.m., McCreary and Hunter left for 30–60 minutes to scope out the credit union.[15] [RT 6/9/05,pp.525-526,ER505-506]

They returned and everyone went to McCreary's apartment arriving about 5:00 a.m. where they remained until 8:30 a.m. McCreary and Young left and stole a Camry for use in the robbery.[16] [RT 6/9/05,pp.527-531,543,ER507-511,514]

After returning, McCreary and Hunter instructed the robbers. Downs, Washington and Young were to enter. McNair was the get-away driver. [RT6/9/05,pp.494,529-530,544,ER479,509-510,515;RT6/15/05,p.941,ER570]

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[13]"Whack" or "Wack." [RT6/9/05,p.541,ER512]

[14]McNair testified 8:30–9:00 p.m. [RT6/15/05,p.935,ER566]

[15]McCreary's girlfriend testified no one came to her apartment during the early morning hours of February 28, 2002. [RT6/14/05,pp.823,832,ER552,553]

[16]McNair testified Downs, Hunter, McCreary and Washington stole the car. [RT6/15/05,p.939,ER568]

McCreary provided clothing and a gun. [RT6/9/05,pp.531,544-547,ER511,515-518;RT6/15/05,p.940,ER569]

Afterwards, McCreary purchased latex gloves. [RT6/9/05,pp.529,543-544,ER509,514-515;RT6/15/05,pp.940-941,ER569-670]The robbers changed clothes. [RT6/9/05,pp.529,544,ER509,515] Downs wore a mask[17] and Adidas shoes. [RT6/9/05,p.545-546,ER516-517] Young was given the gun, but Downs used it during the robbery because of his "experience."[18] McCreary insisted the gun remain unloaded. [RT6/9/05,pp.547-548,ER518-519]

McCreary and Hunter left in a Mirage. Downs, Young and Washington drove the stolen Camry. McNair drove to the "switch-out spot"[19] and parked. [RT6/9/05,pp.548-549,551-552,ER519-520,522-523;RT6/15/05,pp.942-943,ER571-572] McCreary and Hunter directed the robbers to the credit union waiting nearby. [RT6/9/05,pp.552,ER523;RT6/15/05,p.943,ER572]

Downs, Young and Washington entered. Downs, carrying a gun, jumped the counter leaving Adidas footprints. [RT6/9/05,pp.456-457,556-557,ER462-463,524-

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[17]McNair testified no beanies (masks) were given. [RT6/15/05,p.940,ER569]

[18]McNair testified McCreary gave Downs the gun. [RT6/15/05,p.940,ER569]

[19]They noticed a maintenance man changing bulbs. [RT6/9/05,pp.550-551,ER521-522;RT6/14/05,p.766,ER550]

525] No money[20] was taken out of the drawers. [RT5/9/05,p.560,ER528] Young escorted the manager to the vault. Downs and Young put money into a pillow case. They fled to the awaiting van, ditched the Camry, entered the van with the money and returned to McCreary's apartment.

Hunter took the money from the van. Only McCreary, Hunter and Downs went into the apartment where Hughes remained. Hunter discovered a tracker device with the money. McCreary quickly left with the device and returned. Everyone left the apartment. [21] Hunter gave a pillow case with money to Downs.[22] Downs, McNair, Hughes, Washington and Young departed for California in the van. As they departed, they observed police arriving. McCreary, Hunter and the remaining money left in the Mirage. [RT6/8/05,p.279,ER393;RT6/9/05,pp.431,558-561,565-570,572-574,ER453,526-529,530-535,536-538]

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[20]This proved untrue.

[21]On cross examination Downs testified that McCreary "got rid of the tracker device." [RT6/14/05,p.758,ER548]

[22].In an earlier police interview Downs stated that McCreary gave him the pillow case with money in it. [RT6/14/05,p.759,ER549]

## ARGUMENT ONE

### I. Issue

The court erred in admitting text messages. This error was not harmless.

McCreary had a reasonable expectation of privacy in the content of text message communications stored with a third party. The acquisition of these messages by grand jury subpoena constituted a search without a warrant in violation of the Fourth Amendment and 18 U.S.C. §2703.

The subpoena, used to obtain McCreary's text messages, was overly broad in scope and relevancy in violation of the Fourth Amendment.

To the extent the Stored Communications Act authorized the Government to obtain McCreary's private text messages by subpoena, without a warrant and finding of probable cause, the Act violates the Fourth Amendment.

### II. Standard of Review

Denial of a motion to suppress and validity of a warrantless seizure are reviewed *de novo*. United States v. Decoud, 456 F.3d 996, 1007 (9th Cir. 2006); United States v. Gill, 280 F.3d 923, 928 (9th Cir. 2002).

Constitutionality of a statute is a question of law which is reviewed *de novo*. United States v. Naghani, 361 F.3d 1255, 1259 (9th Cir. 2004).

Factual findings are reviewed for clear error. United States v. Gorman, 314

F.3d 1105, 1110 (9th Cir. 2002).

## III. Points and Authorities

### A. Background.

Police seized six text messaging pagers from McCreary's apartment. Those planning the robbery communicated with pagers. [RT5/13/05,p.23,ER317]

Police obtained their serial numbers. November 21, 2002, a subpoena was served on MCI for subscriber and text information for January 1, 2001, through March 1, 2002. [RT5/13/05,p.24,ER318;Exhibit7,ER157] McCreary was not the account subscriber.

Focusing on one pager, a second subpoena was served on June 25, 2003, seeking billing information and complete text messages for PIN 6370 from February 15, 2002, through March 3, 2002, under subscriber name Dominic Austin. Produced records contained truncated messages. [RT5/13/05,pp.25-27,ER319-321;Exhibit8,ER159]

August 19, 2004, a third subpoena requesting complete text messages for PINS 6370, 3801, and 1983, from January 1, 2002, to March 31, 2003, was served. [RT5/13/05,pp.27-28,ER321-322;RT6/14/05,pp.869-870,ER556-557;Exhibit9,ER162]

These subpoenas requested all messages with no attempt to distinguish between

criminal and non-criminal content. [RT5/13/05,p.30, ER323]

Government conceded it violated Stored Communications Act by failing to provide notice as required by 18 U.S.C. §2703(b) or 18 U.S.C. §2705. [CR146(8), ER36]

MCI submitted a compact disk containing 1,075 pages of text messages for three PINS. Contents included messages about family matters, sexual relationships, personal finances, drug use, friendships, bickering and other irrelevant topics.

McCreary filed a motion to suppress. [CR97,ER9] Government responded. [CR146,ER29] McCreary replied. [CR152,ER49]

Pagers were capable of sending and receiving messages via internet, radio transmissions, microwave, telephone land lines and satellite. [RT5/13/05,pp.35-39,44-45,ER324-328,332-333]

Historically, MCI kept text messaging data files from four to six months as back-up for its customers and for billing purposes. In mid 2002, MCI changed policy caused by litigation and court orders in bankruptcy and SEC proceedings requiring MCI to maintain certain records. MCI stored all two-way pager data from that day forward resulting in MCI possessing entire contents of two-way pager traffic from September, 2001, to the present. [RT5/13/05,pp.39-41,ER328-330]

The court ruled on May 20, 2005: "After careful consideration, IT IS ORDERED DENYING defendant McCreary's motion to suppress text messages (doc.

97). Under the facts of this case, there was no reasonable expectation of privacy in the text messages." [CR178,ER59]

Arguing the messages were self-authenticating to Hunter and McCreary, the Government introduced contents of text messages claiming it showed planning and participation in each count. This evidence was admitted over McCreary's objection. [CR97,ER9;RT6/15/05,pp.1091,1094,ER583,584;Exhibits78,84,ER232; RT6/16/05,p.1223,ER585A;Exhibit 67.]

**B. Constitutional Claim**

The Court in Katz v. United States, 389 U.S. 347, 351, 353, 88 S.Ct. 507, 511-512 (1967), determined "the Fourth Amendment protects people, not places."

> What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.

McCreary had a subjective expectation of privacy in the text messages. They were written digital conversations which revealed the parties' private thoughts, ideas, plans, feelings, hopes, attitudes, sexual needs, biases, drug usage, bickering and finances. McCreary assumed as he typed onto the keyboard, just as Katz assumed as he spoke in the phone booth, that his words would not be broadcasted.

A subscriber or user of text messaging has a reasonable expectation of privacy in the content of his messages. This expectation to protect the content of private communication is one which society should be prepared to recognize as reasonable.

If a person's conduct reflects an actual expectation of privacy and his expectation is one that society objectively is prepared to recognize as reasonable, the protection of the Fourth Amendment applies. Katz v. United States, 389 U.S. 347, 361, 88 S.Ct. 507, 516 (1967). (Harlan dissenting opinion.)

The Government argued that McCreary had no reasonable expectation of privacy in the text messages for three reasons.

First, McCreary could not object to the seizure of his conversations because he lacked standing to challenge the production of information from MCI accounts belonging to others. [CR146,ER43-44]

Second, MCI denominated the text messages as business records. Relying on business record cases, once the information is released to a third party, reasonable expectation of privacy ends. This allowed the Government to compel the production of business records with a subpoena. Couch v. United States, 409 U.S. 322, 93 S.Ct. 611 (1973); United States v. Miller, 425 U.S. 435, 96 S.Ct. 1619 (1976); Smith v. Maryland, 442 U.S. 735, 99 S.Ct. 2577 (1979). [CR146(16-19),ER44-47]

Third, relying upon personal property cases, the Government argued that McCreary retained no expectation of privacy in terminated pager accounts. United States v. Poulson, 41 F.3d 1330 (9th Cir. 1994). [CR146,ER47]

Fourth, although not argued below in this case, government informant cases have allowed an informant/undercover agent to disclose conversations as not

protected by the Fourth Amendment. Lopez v. United States, 373 U.S. 427, 439, 83 S.Ct. 1381 (1963); Hoffa v. United States, 385 U.S. 293, 87 S.Ct. 408 (1966); United States v. White, 401 U.S. 745, 91 S.Ct. 1122 (1971).

There are four factors relevant to an assessment of a person's reasonable expectation of privacy in electronic communications under the Katz test–the type of information communicated; the user's purpose in transferring information to the third party; the relevance of the content of the information to the parties' activities; and the limitations on the third parties' ability to gain access to or use the content of the information. Bellia, Surveillance Law Through the Cyberlaw's Lens, 72 Geo.Wash.L.Rev. 1375, 1403-1409 (2004).

First, the Supreme Court has cautioned against framing the issue of whether a defendant is able to show a Fourth Amendment violation as a question of "standing." Whether a defendant is able to show a violation, depends on whether he had a reasonable expectation of privacy in the communication. United States v. Davis, 332 F.3d 1163, 1167-1168 n 2 (9th Cir. 2003).

The Government argued that McCreary had no expectation of privacy in text messages stored in the accounts of others and cited United States v. Horowitz, 806 F.2d 1222 (4th Cir. 1986), a business records case, and United States v. Meriwether, 917 F.2d 955 (6th Cir. 1990), a case involving non-content information. Under the Government theory, Austin would have a legitimate expectation of privacy because

he is the account holder while McCreary, a party to conversation with someone other than Austin, would not. McCreary's legitimate expectation of privacy exists because he participated in the communication. [CR152,ER51] It matters not that he was not the subscriber. A person using a public phone or phone of another does not lose his privacy expectation because he does not own the phone or pay for the service. Likewise, McCreary did not lose his expectation of privacy because he did not own the pager or subscribe to the service.

Second, MCI text messages are kept in the short term to allow its users to access the messages and for billing purposes. They are kept for a longer period of time, as backup, to protect the company regarding billing disputes and to allow user access to the messages. They are kept forever because MCI, besieged in litigation (either was ordered or chose to) preserved them for its own self-protection while also providing a mirror system for technological testing. [RT5/13/05,pp.38-42,ER327-331]

The four factors distinguish text messaging records from business record cases. A person engaging in a business transaction provides content to be used by the business to complete a transaction. A text message is transmitting content to another individual for that individual's use. Not for the electronic communication service (ECS) to use or convey to the public. The content of the text message is not necessary for the ECS to transmit, receive or store the message. Just as the phone company

transmitted the message in Katz, the ECS transmitted the message for McCreary. The technological differences in communicating the message did not alter the parties' expectation of privacy in the content of the conversation. The business record cases have little application to the present analysis of whether an individual has a reasonable expectation of privacy in electronic communication.

Third, likewise, the government informant cases are distinguishable when using the same analysis. Unlike the informant who is the intended recipient of the message's content, an ECS like MCI is not the intended recipient of the content of the text message.

Finally, the Government argued that McCreary had no expectation of privacy in abandoned subscriber accounts citing United States v. Poulsen, 41 F.3d 1330, 1337 (9th Cir. 1994) where a renter had no expectation of privacy in the contents of his storage unit after the rental period expired. The termination of the account only ended the subscriber's ability to use the account. A person's expectation of privacy in the content of a past phone conversation does not cease once the account itself is terminated. An illegally wiretapped phone call does not cease to be an illegal act if at some later date the telephone account is terminated.

Evaluation of personal and third party contract cases assists in the determination of whether McCreary retains a reasonable expectation of privacy in the content of messages stored by a third party. *See, supra,* 72 Geo.Wash.L.Rev. at

1404-09.

> First, cases involving personal property maintained on the premises of another indicate that the owner of the personal property retains an expectation of privacy in it, so long as the property is secured against others' access and the owner of the premises has only a limited right of access to the premises. *Compare,* Stoner v. California, 376 U.S. 483, 489 (1964) (concluding that a search of a hotel room without a warrant violated the Fourth Amendment, despite the implied permission that one who engages a hotel room gives to personnel, such as maids, janitors, or repairmen to enter to perform their duties), and Chapman v. United States, 365 U.S. 610, 616-18 (1961) (concluding that a search of a house occupied by a tenant violated the Fourth Amendment, despite the landlord's authority to enter the house for some purposes), and United States v. Johns, 851 F.2d 1131, 1133-35 (9th Cir. 1988) (implicitly recognizing a reasonable expectation of privacy in a rented storage unit)
>
> Second, when an individual contracts for a third party to transmit or carry a communication or sealed package on his . . . behalf, the individual does not lose his expectation of privacy in the communication or the contents of the package.
>
> *See, e.g., United States v. Jacobsen*, 466 U.S. 109, 114 (1984) ("Letters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy; warrantless searches of such effects are presumptively unreasonable. Even when government agents may lawfully seize such a package to prevent loss or destruction of suspected contraband, the Fourth Amendment requires that they obtain a warrant before examining the contents of such a package" (footnotes omitted; *Ex parte Jackson*, 96 U.S. 727, 733 (1877) ("Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guarantee of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be.")

See, *supra*, 72 Geo.Wash.L.Rev. at 1405-1406, nn 185-186.

Contracting with a third party to hold property or transmit a communication does not result in the evisceration of one's reasonable expectation of privacy. It can be maintained even if a third party, like MCI or a postal inspector, has a limited right of access to protect its security and services.

The constitutional issue becomes whether or not an individual retains reasonable expectation of privacy in the content of stored communications with a third party such that acquisition of those communications by subpoena constitutes a "search" within the meaning of the Fourth Amendment.

First, "papers and effects" are protected by the Fourth Amendment. Electronic communication, like text messages, are modern "papers and effects." ACLU v. Reno, 929 F.Supp. 824, 834 (E.D. PA. 1996) (holding e-mail is "comparable in principle to sending a first class letter"), affirm'd 521 U.S. 884 (1997). The difference in technology between traditional letters mailed and text messages transmitted should not override the common nature of both. Katz recognized the common nature between telephone communication and earlier forms of communication. 389 U.S. at 352, 88 S.Ct. at 512.

Second, historically, the content of communications has strong Fourth Amendment protection. The Katz case discussed the importance of shielding private communications from government access. 389 U.S. at 353, 88 S.Ct. at 512.

Just as the Government's listening in to Katz' conversation in the phone booth

constituted a search and seizure violating the privacy upon which he justifiably relied while using the telephone booth, so too did the Government's seizure of the contents of McCreary's private text messaging conversations constitute a "search and seizure" within the meaning of the Fourth Amendment. 389 U.S. at 353, 88 S.Ct. at 512.

The Supreme Court has not yet decided whether stored communications, like the text messages in this case, are entitled to Fourth Amendment protection. However, the Court has recognized that as technology advances it should interpret the Fourth Amendment to "assure[s] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." Kyllo v. United States, 533 U.S. 27, 34, 121 S.Ct. 2038, 2048 (2001).

Today's technology permits private communication to occur in new ways. Technological advances in electronic communication necessitate an evolution in the way the courts must look at privacy expectations and protection. Increasingly, electronic communication, has become a common way for individuals to communicate regarding their private affairs. Millions of people use electronic communication instead of phone calls and letters. The differences between these forms of communication does not put them beyond the protection of the Fourth Amendment. "To read the Constitution more narrowly is to ignore the vital role . . ." that text messaging and other electronic communication ". . . has come to play in private communication." 389 U.S. at 352, 88 S.Ct. at 511-512.

## C. Stored Communications Act

The Government subpoenaed the text messaging records pursuant to the Stored Communications Act (SCA), 18 U.S.C. §§ 2701-2712. It issued a subpoena pursuant to §2703(a) which allowed it to obtain the records stored for greater than 180 days by the "means available under subsection (b)." Section 2703(b)(1)(A) authorizes the disclosure of content without a search warrant, in this case by subpoena, provided the Government complies with notice requirements.

As the Government concedes, it failed to provide notice, violated the act and illegally obtained the data files. Although the SCA provides that suppression is not a remedy, pursuant to §2708 for nonconstitutional violations, it presumably does not prohibit suppression for constitutional ones.

To the extent the Act allows the Government to obtain the content of private text messages by subpoena, without a search warrant and finding of probable cause, it violates the Fourth Amendment. As applied to McCreary, it violated the Fourth Amendment.

The Government below acknowledged the Fourth Amendment requires a subpoena to be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome." *See* United States v. Donovan, 464 U.S. 408, 415, 104 S.Ct. 769,773 (1984); United States v. Palmer, 536 F.2d 1278, 1282 (9th Cir. 1976).

All three subpoenas violated the Fourth Amendment. They were overly broad in requesting the content of all messages with no attempt to distinguish between criminal and noncriminal content. The November 21, 2002, subpoena was overly broad in requesting content starting from January 2, 2001, well over one year before the first robbery occurred. Likewise, the August 19, 2004, subpoena was overly broad in seeking all text messages from 1/1/02-3/31/03. These time frames were too great and made no differentiation between criminal and non-criminal content.

**D. Conclusion**

For these reasons, the court erred in admitting evidence of McCreary's text messages. The error was not harmless. McCreary is entitled to a new fair trial.

## ARGUMENT TWO

### I. Issue

McCreary stood trial based on an indictment that the Government knew was based partially on material perjurious testimony that it had repeatedly improperly vouched for before the grand jury. At the time the Government discovered the perjury, jeopardy had not attached. This misconduct occurred in violation of McCreary's Fifth Amendment right to due process.

### II. Standard of Review

Questions of prosecutorial misconduct and of perjurious testimony before the grand jury are mixed questions of law and fact which are reviewed *de novo*. Dismissal of an indictment is appropriate if the violation substantially influenced the grand jury's decision to indict or creates grave doubt the indictment was not substantially influenced by the wrongdoing. United States v. Spillone, 879 F.2d 514, 520-521 (9th Cir. 1989).

Claims are reviewed for plain error, when no objection was made by the defendant. United States v. Necoechea, 986 F.2d 1273, 1276 (9th Cir.1993).

### III. Points and Authorities

#### A. Background

The Government filed a supervening indictment on February 16, 2005.

[CR118,ER25] The effect of the new indictment was to charge one conspiracy encompassing all robberies rather than separate conspiracies for each as the previous supervening indictment had charged. [RT2/16/05,p.28,ER315]

One witness, Brian Nemec, appeared at the grand jury proceeding. Nemec read the February 16, 2005, testimony of Downs to the grand jurors. [RT2/16/05,p.7,ER314] Downs testified he had entered a plea agreement "to tell the truth," acknowledged he was "under oath in front of the grand jury," had "sworn to tell the truth," and if he lied at trial, he was "promised that [he] would be prosecuted for perjury. . ."

> Q. And during that plea agreement, you agreed to tell the truth; isn't that correct?
>
> A. Yes.
>
> Q. You realize that if you made statements during the trial and those statements were proven to be false, you could and you were promised that you would be prosecuted for perjury; is that correct?
>
> A. Yes.
>
> Q. You understand that you're under oath in front of the grand jury in this proceeding?
>
> A. Yes.
>
> Q. You understand that you have sworn to tell the truth?
>
> A. Yes
>
> Q. You understand that if you do not tell the truth, that you will be prosecuted for perjury?
>
> A. Yes.
>
> Q. And you understand that perjury is a crime, which is lying under oath?
>
> A. Yes.
>
> Q. You also understand, do you not, that good faith mistakes or something that you forget are not going to be perjury–will not be perjury?
>
> A. Yes.

[RT2/5/03,p.4,ER302]

Downs' previous grand jury testimony indicated prior to the Tempe credit union robbery, McCreary provided Take-Off with a .45 automatic. McCreary had the gun in his apartment. [RT2/5/03,p.12,ER303]

While Downs admitted to going into the bank, he lied under oath regarding his role in the robbery.

> Q. Okay. Tell me what each one of you did. What did Gavin (*sic*) do?
>
> A. Gavin was standing by the door area, and I was roaming the lobby area, and Arturo went behind the counter, and then it (*sic*) came back around, came back out, then we left.
>
> Q. Okay. Well, in between the time you went in the bank and the time you left, was any money taken?
>
> A. Yes.
>
> Q. Okay. How did Arturo get behind the counter?
>
> A. He jumped.
>
> Q. When you say "he jumped," did he clear the counter, or did he put his foot on the counter or what?
>
> A. He put his foot on the counter.

[RT2/5/03,pp.13-14,ER304-305]

Downs had been arrested wearing the tennis shoes that matched the tread left on the bank counter. He continued lying to the grand jury by claiming that Take Off had worn the shoes during the first robbery.

> Q. And who wore them at the first robbery?
>
> A. Take Off.
>
> Q. He wore them in the first robbery: you wore them in the second robbery?
>
> A. The second one?

Q. Yes.

[RT2/5/03,p.25,ER306]

Downs admitted he lied upon arrest in that he failed to tell the police he was involved in the Tempe robbery and told the police that the gun he carried in the Safeway robbery was a pellet gun. [RT2/5/03,pp.37-39,42,ER307-309,310]

Q. What did you tell them it was?
A. It was a pellet gun.
Q. That wasn't true, was it?
A. Yes.
Q. Pardon me?
A. No, it wasn't true.
Q. Okay. Later on you told the truth and admitteed you had a .45 --

. . .

A. Yes.

[RT2/5/03,p.39,ER309]

The prosecutor further questioned Downs about the "chats" that Downs had with the F.B.I. and with the prosecutors from his office.

Q. And during those chats, we asked you for specifics with regard to your knowledge not only of the bank robbery on February 27th at the Safeway Credit Union, but also of the bank robbery on January 22nd at the Tempe Schools Credit Union; is that correct?
A. Yes.
Q. And did you consent to take a polygraph examination?
A. Yes.
Q. Did you take one?
A. Yes.
Q. Were you ever told the results of that polygraph examination?
A. Yes.
Q. And what were they?

A. That I passed.

[RT2/5/03,pp.43-44,ER311-312]

When questioned about McCreary's role in the robberies. Downs agreed that McCreary scoped out the banks, while Hunter developed a plan and recruited the people for the robberies. [RT2/5/03,p.44,ER312]

At trial, Downs testified that as the three robbers arrived at the Tempe credit union, Down grabbed the gun from the hesitating Take Off. Downs entered the Tempe credit union first. It was Galvan, not Downs, who remained in the lobby. Downs waved the gun and jumped the counter first. Downs directed the tellers with the gun to the vault. [RT6/9/05,pp.500-504,ER484-488]

Downs has never been prosecuted for his lies as promised by the prosecutor in front of the grand jury.

The Government knew about Downs' perjurious statements before trial. On June 1, 2005, the Government filed its trial memorandum and noted that during the Tempe robbery, "Downs took the gun and all three entered the credit union. Downs brandished the weapon as he entered the credit union, yelling out that 'this is a robbery.'" [CR192,ER96]

**B. <u>Prosecutorial Misconduct</u>**

Government prosecutors engaged in misconduct by improperly vouching for the truthfulness of Downs' testimony read to the grand jury and by failing to inform the

grand jury of Downs' material perjurious testimony.

**1. Improper Vouching**

The Government's trial case against McCreary rested upon the testimony of Downs and McNair. Only Downs' testimony was read to the grand jury. The Government did not rely upon McNair's statements to obtain an indictment. The prosecutor improperly vouched for the truthfulness of Downs' testimony as reflected above and in Argument Three. Repeated references, to the plea agreement's "tell the truth" provisions, the empty threats and promise of perjury prosecution and the evidence Downs had passed a polygraph test, was vouching in the extreme and material to his indictment.

**2. Duty to Inform Grand Jury of Down's Perjurious Testimony**

In United States v. Basurto, 497 F.2d 781, 785 (9th Cir. 1974), the court held that "... the Due Process Clause of the Fifth Amendment is violated when a defendant has to stand trial on an indictment which the government knows is based partially on perjured testimony, when the perjured testimony is material, and when jeopardy has not attached."

Prosecutors have a duty to immediately inform counsel and the court once they learn of perjury before the grand jury. If the perjury is material, a prosecutor has the duty to inform the grand jury so that the "cancer of justice" can be corrected. *Id.* at 785.

The record does not indicate the exact date the Government became aware of Downs' perjury. The Government's trial memorandum indicates at least by June 1, 2005, six days before jury selection, the Government knew that Downs had perjured himself as described. The grand jury was never informed of Downs' perjury nor that he would never be prosecuted for his lies.

Downs' willingness to lie to minimize his involvement in the Tempe robbery–denial of using a gun, of jumping the counter, of wearing the same shoes in both robberies–in order to maximize another's involvement, despite repeated warnings of prosecution for perjury, was material to McCreary's indictment.

**C. Conclusion**

The Government's failure to notify the Court and grand jury of the perjurious testimony, its misconduct in repeatedly vouching for Downs' testimony and falsely assuring the grand jurors he would be prosecuted for perjury if he lied, substantially influenced the jury's decision to indict. The record creates "grave doubt" their decision "was free from substantial influence of such violations." Plain error occurred. McCreary was denied a fundamentally fair grand jury proceeding in violation of the Fifth Amendment. Bank of Nova Scotia v. United States, 487 U.S. 250, 108 S.Ct. 2369, 2374 (1988).

## ARGUMENT THREE

### I. Issue

The prosecutor engaged in prosecutorial misconduct by repeatedly vouching for key witnesses, Downs and McNair, which substantially prejudiced McCreary's right to a fair trial in violation of the Fifth Amendment.

### II. Standard of Review

Evidentiary rulings of a district court are reviewed for abuse of discretion. United States v. Rohrer, 708 F.2d 429, 432 (9th Cir. 1983). The issue of improper bolstering, Fed.R.Evid.608(a)(2), is a mixed question of law and fact. United States v. Santiago, 46 F.3d 885, 891 (9th Cir. 1995).

Where a defendant makes a contemporaneous objection to a prosecutor's conduct, this court determines *de novo* whether the prosecutor's conduct was improper vouching and, if so, whether the vouching constituted harmless error. United States v. Shaw, 829 F.2d 714, 716-718 (9th Cir.1987).

Claims that a prosecutor improperly vouched for the credibility of a witness are reviewed for plain error, when no objection was made by the defendant. United States v. Necoechea, 986 F.2d 1273, 1276 (9th Cir.1993).

### III. Points and Authorities

### A. Background–Instances of Prosecutorial Vouching

The prosecutor told the jurors in her opening statement that Downs and McNair, two of the robbers, would testify at trial regarding the inner workings of the conspiracy and that the evidence corroborated their testimony. [RT6/7/05, pp.161,163,167,ER347,348,349]

McCreary attacked the credibility of McNair and Downs in his opening statement. Both were felons and liars who had entered cooperation agreements to have their sentences substantially reduced. [RT6/7/05,pp.169-172,ER351-354]

The prosecutor, without objection, asked Downs on direct examination about what the cooperation plea agreement required Downs to do. Downs answered: "**To testify completely and truthfully.**" (emphasis provided) [RT6/9/05,pp.585-586,ER540-541]

Along with attacking credibility, McCreary cross-examined Downs regarding the benefits bestowed upon him as a result of the agreement. [RT6/9/05,pp.589-593,ER542-546]

On redirect, without objection, the prosecutor **entered the cooperating plea agreement (Exhibit 71,ER200) into evidence.** [RT6/14/05,p.784,ER551]

The prosecutor, without objection, asked McNair on direct examination what the cooperation plea agreement required McNair to do. McNair replied: "**To tell the truth.**" (emphasis provided) [RT6/15/05,p.899,ER559]

McCreary cross-examined McNair regarding the benefits of his plea agreement. McNair admitted that he cooperated so that he could obtain a lesser sentence. If he substantially assisted the Government, it would file a downward departure motion for a reduced sentence. [RT6/15/05,pp.976-978,ER577-579]

Without objection, on redirect, the prosecutor **introduced the cooperating plea agreement** (Exhibit 40,ER185). [6/15/05,p.1076,ER582]

> Q. What was your agreement with the United States in this case?
> A. I have to testify.
> Q. Okay. And what else did you have to do when you testified?
> A. **Tell the truth.**
> Q. Do you have any agreement with the United States as to how much time you're going to receive in this case?
> A. No.
> Q. Who decides your sentence in this case?
> A. **The judge.**
> . . .
> Q. Mr. McNair, **did you come here today and testify truthfully?**
> MR. CARPENTER: Objection. Improper vouching.
> THE COURT: Excuse me just a minute.
> The objection is overruled.
> . . .
> A. **Yes.**

(emphasis provided) [RT6/15/05,pp.1075-1076,ER581-582]

Both Downs' and McNair's plea agreements, admitted into evidence by the prosecutor, contained the following language:

> Nothing shall limit the United States' **methods of verifying the truthfulness of defendant's statements.** The United States may **confirm the accuracy** of any information which defendant provides under the terms of this agreement by use of **any investigative means**

> which it deems appropriate and necessary. Whether there has been a complete, truthful and candid disclosure by the defendant will be evaluated and **decided by the United States Attorney** for the District of Arizona and by him alone. As part of this process, in the sole discretion of the United States, the defendant **agrees to submit to polygraph examination to verify any information** the defendant may provide to the United States. Such examination will be conducted by a polygrapher chosen and conducted in a manner determined in the sole discretion of the United States. . .

(emphasis provided) [Exhibit40,p.4,ER185,189;Exhibit71,p.4,ER200,212]

During closing argument, the prosecutor argued:

> Ladies and gentlemen, I believe the United States has proven beyond a reasonable doubt--I submit to you that the evidence has shown beyond a reasonable doubt that Defendants McCreary and Hunter participated in a conspiracy with Downs and McNair and the other people mentioned in the bank robberies.

[RT6/21/05,p.1325,ER593] The prosecutor anticipated that the defendants would attack the credibility of Downs and McNair. [RT6/21/05,p.1327,ER594] After pointing out that the events occurred over three years before, the prosecutor acknowledged there were inconsistencies in their testimony. "But again, if they did remember it the same, then I think that we would have more cause to believe they were colluding. **I submit to you that they told you the truth as they remember it as they sat there in court today.**" (emphasis provided) [RT6/21/05,p.1329,ER595] Later, in explaining the inconsistencies in their testimony the prosecutor argued:

> He [McNair] could have corrected that. He could have tried to look at the photos ahead of time or asked to see the van photos so that he

could give you the best story.

But that's not what he was doing. **He was telling you the truth as he remembers it.**

(emphasis provided) [RT6/21/05,p.1330,ER596]

Antoine Downs kind of downplayed initially his role in the robbery. He didn't want to admit to having the gun at first or that he was wearing the Adidas tennis shoes who left (*sic)* the teller counter, because at the beginning he was trying to minimize his conduct and hoping probably that he wouldn't get in as much trouble.

**But he came in here and did fess up and tell the whole truth. .**

(emphasis provided) [RT6/21/05,p.1331,ER597]

McCreary, during closing argument, attacked both cooperating witnesses as being admitted liars who were felons testifying to preserve their own freedom and to minimize their sentences by entering cooperating plea agreements.

In final close the prosecutor countered: "Now, you've heard the words that they have to testify to make the government happy, there's a conspiracy here. First of all, there's two plea agreements or three plea agreements in evidence. **Look at them.** They set out the terms of what the agreements are. They show what the benefit is. And they show what the down side is if the witnesses don't tell the truth. **That's the bottom line of the plea agreements. They have to tell the truth. Look at them."**

(emphasis provided) [RT6/21/05,p.1413,ER599]

Finally, the prosecutor argued: "**I submit to you, ladies and gentlemen, Mr. Downs and Mr. McNair testified on all the material facts truthfully.** They've

admitted when they were not truthful. All of their observations as they related to you have been corroborated by independent evidence." (emphasis provided) [RT6/21/05,p.1413,1427,ER] See United States v. Necoechea, 986 F.2d 1273,1279 (9th Cir. 1993).

**B. Legal Standard**

Vouching "consists of placing the prestige of the government behind the witnesses through personal assurances of their veracity or suggesting that information not presented to the jury supports the witnesses' testimony." It is improper. United States v. Molina, 934 F.2d 1440, 1445 (9th Cir. 1991); United States v. Roberts, 618 F2d 530, 533 (9th Cir.1980). Prosecutors cannot express personal opinions regarding the defendant's guilt or the credibility of the government's witnesses nor can they refer to extra-judicial facts. United States v. Necoechea, 986 F.2d 1273, 1276 (9th Cir. 1993).

As reflected above, the prosecutors improperly vouched for McNair and Downs. There is no bright-line rule in regards to when vouching has taken place. However, this court considers the following factors in determining whether vouching will result in a reversal. 986 F.2d at 1279.

1. The form of vouching.
2. How much the vouching implies that the prosecutor has extra-record knowledge of or capacity to monitor the witness's truthfulness.
3. Any inference that the court is monitoring the witness's veracity.
4. The degree of personal opinion asserted.

5. The timing of the vouching.
6. The extent to which the witness's credibility was attacked.
7. The specificity and timing of a curative instruction.
8. The importance of the witness's testimony at the vouching to the case overall.

The Government repeatedly vouched for its witnesses–during their direct and redirect examinations, in its plea agreement exhibits and in closing arguments. The prosecutors expressed their personal beliefs that both men were telling the truth and provided evidence of extrinsic information and verification that supported the witnesses' testimony. Their improper comments and actions cumulatively amounted to error. In combination, these comments could reasonably be interpreted as an expression of the prosecutors' belief that McNair and Downs were telling the truth.

The Government introduced the plea agreements into evidence. In closing argument, the prosecutor invited the jury to look at the plea agreements and to examine their terms of cooperation. This evidence included the Government's capacity to monitor Downs' and McNair's truthfulness and to use any investigative means, including a **polygraph examination**, to determine the truthfulness of their testimony. According to the agreements, Downs and McNair agreed to submit to polygraph examinations–at most, conveying to the jury that they had taken the tests and passed, at least, conveying they were truthful because at any moment a polygraph could detect their lying ways. U.S. v. Brown, 720 F.2d 1059, 1071-1075 (9th Cir. 1984).

McCreary acknowledges that "every plea agreement that contains a requirement of truthful testimony contains an implication, however muted, that the government has some means of determining whether the witness has carried out his side of the bargain." United States v. Shaw, 829 F.2d 714, 717 (9th Cir. 1987). In McCreary's case, the Government by its conduct in front of the jury and by the terms of its plea agreement exhibits, conveyed its monitoring of truthfulness abilities.

In United States v. Brown, 720 F.2d 1059, 1072-1074 (9th Cir.1983), the prosecutor entered into evidence a plea agreement requiring truthful testimony and submission, upon request, to a polygraph examination. The prosecutor then argued that the witness would testify truthfully because of the plea agreement. The case was reversed pursuant to harmless error review because the prosecutor "improperly indicated that extrinsic information and verification supported the witness' testimony." United States v. Shaw, 829 F.2d 714, 717 (9th Cir. 1987).

As stated in United States v. Roberts, 618 F.2d 530, 532 (9th Cir. 1930) "A trial court should be alert to the problem of vouching before admitting a plea agreement containing a promise to testify truthfully. The court should consider the phrasing and content of the promise to ascertain its implications and decide whether an instruction to the jury would dispel any improper suggestion." The critical factor causing a reversal in Roberts was the extra-record reference to a detective's monitoring of the witness' truthfulness. United States v. Shaw, 829 F.2d 714, 717 (9th Cir. 1987).

Although the McCreary court gave standard closing instructions alerting the jury that they were the sole judges of the facts, that the attorneys comments were not evidence and that the coconspirators' testimony could be viewed with greater caution in light of their favored treatment, this was too little and too late. These instructions are given to every jury where cooperating witnesses testify and no curative instruction was given in a timely and effective manner designed to deal with repetitive Governmental vouching. Prompt and effective action by the trial court in giving a curative instruction may neutralize the damage. This did not occur in McCreary's case.

The testimony of McNair and Downs was crucial to the Government's case. It could never have obtained a conviction without the testimony of the two cooperating witnesses. Only they were able to connect McCreary to the crimes. McCreary did not confess or make any incriminating statements. The Government relied upon the pager testimony as corroboration of Downs' and McNair's claims that McCreary was involved. "Convincing the jury of their credibility was essential to the prosecution, for without them the case was open to doubt." U.S. v. Brown, 720 F.2d 1059, 1070 (9th Cir. 1984).

**C. Conclusion**

Vouching is especially problematic in cases where the credibility of the witnesses is crucial, and in several cases applying the more lenient harmless error

standard of review, [courts] have held that such prosecutorial vouching requires reversal." United States v. Molina, 934 F.2d 1440, 1445 (9th Cir. 1991).

The defense did object to vouching in one instance but was overruled. If an attorney objected, to reverse the court must determine in the context of the entire trial if it appears more probable than not that the vouching affected the jury's verdict. United States v. Simtob, 901 F.2d 799, 806 (9th Cir. 1990).

"Reversal for plain error occurs only in the exceptional situation where it appears necessary to prevent a miscarriage of justice or to preserve the integrity and reputation of the judicial process." United States v. Paris, 827 F.2d 395, 398 (9th Cir.1987).

The improper vouching, when evaluated in the context of the entire trial, materially affected the jury's ability to judge the evidence fairly and amounted to plain error. United States v. Rudberg, 122 F.3d 1199, 1205-1207 (9th Cir. 1997).

## ARGUMENT FOUR

### I. Issue

The prosecutor engaged in prosecutorial misconduct in refusing to request immunity for, and the court erred by failing to provide use immunity to, defense witness Austin. These actions denied McCreary his constitutional rights to due process, a fair trial, compulsory process and his right to present a defense as guaranteed by Amendments V and VI.

### II. Standard of Review

Findings of fact are reviewed for clear error." United States v. Alvarez, 358 F.3d 1194, 1216 (9th Cir. 2004).

A defense request for immunity, a mixed question of law and fact; a court's decision not to compel a grant of immunity to a defense witness; and its ruling on a motion to dismiss for prosecutorial misconduct are reviewed *de novo*. United States v. Alvarez, 358 F.3d 1194, 1216 (9th Cir. 2004); United States v. Baker, 10 F.3d 1374, 1414 (9th Cir, 1993); United States v. Lazarevich, 147 F.3d 1061, 1065 (9th Cir.1998).

### III. Points and Authorities

#### A. Pleadings and Ruling

McCreary's motion to dismiss the case for prosecutorial misconduct or to compel the Government to grant use immunity for defense witness Austin requested

an evidentiary hearing. [CR188,ER75] The Government filed its response. [CR196,ER138]

The court denied the motion without an evidentiary hearing reasoning this case was no different than any other multi-defendant case where a co-defendant pled guilty. The Government's dismissal of Austin from the indictment put McCreary in no worse position than he would have been in had Austin been a co-defendant at trial. [RT6/7/05,pp.16-25,ER336-345;CR169,ER57]

**B. Background and Basis for Motion**

Austin faced the same charges as McCreary and Hunter since mid 2004. [CR1,ER1;CR118,ER25;CR169,ER57;CR189,ER95] Austin's charges were dismissed upon Government motion six days before trial because "[t]he United States decided it would be tactically prudent to pursue the case against Hunter and McCreary first, and if successful, to see whether either one of them would cooperate against Austin in a subsequent prosecution." [CR196,ER142-143;RT6/7/05,p.22,ER342]

After keeping Austin under indictment for one year, the Government just dismissed his case.

McCreary wanted to call Austin as a crucial defense witness who possessed relevant information that would contradict cooperating witness McNair's testimony. McCreary's motion listed the following relevant information (but not limited to), based upon statements made by Austin on February 28, 2002, during a police

interview, that McCreary intended to elicit from Austin on direct examination.

> Austin, McCreary's cousin and roommate, stated there were no weapons of any type in the Grove Parkway apartment and McCreary had no weapons.
>
> Austin was living with McCreary at the Tempe Grove Parkway apartment for the last two years.
>
> Austin stated that he had no knowledge of McCreary being involved in any bank robberies nor was Austin involved in any robberies.
>
> Austin recalled when he returned to his apartment between job shifts on February 28, 2002, at 10 a.m., "Foot", a black male was sitting at the kitchen table.
>
> Austin informed that "Foot" and McCreary were friends.
>
> A few minutes later, Austin indicated that McCreary and two other black males, whom he did not know, walked into the apartment and all of them walked back to McCreary's bedroom.
>
> Austin stated that he did not see McCreary or the men carry anything into the apartment nor did he see anything in their hands.

[CR188,pp.2-3,ER76-77]

Austin's statement indicated he had lived with McCreary at the time the robberies occurred. Austin was not involved in any credit union robberies and was unaware of McCreary's involvement.

Cooperating witnesses' statements made it likely Austin was present during staging or aftermath of the robberies when they returned to the apartment complex to split the loot.

Austin told police that on the day of the Safeway robbery, no other people were in the apartment when he departed for work at 7:00 a.m. and McCreary spent the day moving their belongings. At 10:00 a.m., Austin returned to their apartment and saw

police cars at the complex. When he walked inside, "Foot" was sitting at the kitchen table. Later McCreary returned with two others.

Contrary to Austin's statement, Downs and McNair testified they spent hours in the apartment, McCreary furnished the gun inside the apartment, money was carried into the apartment by either Hunter or McCreary after both robberies and upon discovering the tracking device on February 28, the robbers left before the police arrival. [CR188,ER76-77,90;RT6/15/08,pp.910,912-914,922,938,940-941,945-946,ER560,561-563,565,567,569-570,573-574]

As stated in McCreary's motion, Austin's statements refuted the statements and chain of events outlined by McNair (and even Downs). Austin's attorney confirmed Austin's testimony would be consistent with his previous statements to the police. [CR188,ER77]

McCreary subpoenaed Austin who, through his lawyer, invoked the Fifth. [CR188,ER77,82] Austin, fearing reprisal from the Government and the possibility of future indictments, refused to testify without use immunity. [CR188,ER82]

McCreary submitted a written request to the prosecutor to grant use immunity to Austin as a crucial defense witness pursuant to 18 U.S.C. §§6002 and 6003. [CR188,ER77,84]

The prosecutor refused to grant use immunity writing:

... Though the government has dismissed Dominic Austin from the case,

> it does not mean the government has dismissed its intention to prosecute Mr. Austin. . . . Your contention that the fact-finding process "should seek the truth and not be distorted by any perceived prosecutions after a defendant has been dismissed from a case," intimates that by dismissing the case against Austin that the truth in this case will somehow be subverted. You have been provided with information, in discovery, which directly indicates Mr. Austin had knowledge of the conspiracy and **probably** was involved in it. One only has to read the excerpts from the text messages to glean this fact. Additionally, your conversations with Mr. Crowe, that Mr. Austin would have testified in his own defense and given exculpatory information with regard to Mr. McCreary's involvement, is not persuasive in light of the evidence of Mr. Austin's statements made regarding your client.

(emphasis provided) [CR188,Ex.D,ER75,87]

While refusing to grant use immunity to Austin, the Government had granted a §5K1.1 cooperation plea agreement to McNair–a functional equivalent of use immunity for purposes of a due process analysis. [Exhibit39,ER164,Exhibit40,ER185] It had entered a cooperation plea agreement with Downs, the robber with the gun in both robberies, who pled guilty to only one of the robberies and received a 39 month sentence. [CR188,ER75;CR196,ER138;RT6/9/05,pp.589-590,ER542-543;RT6/15/05,pp.976-977,ER577-578]

McCreary filed the above-described motion and request for "an evidentiary hearing at which he may show that the government is intentionally distorting the fact-finding process." [CR188,ER79]

### C. Legal Basis for Compelled Use Immunity

1. **The Claim**

By refusing to grant use immunity, the Government engaged in prosecutorial misconduct. The court in refusing to compel the Government to grant use immunity distorted the judicial fact-finding process and prevented McCreary from presenting a defense, depriving him of his rights to a fair trial, compulsory process and to present a defense in violation of due process and the Fifth and Sixth Amendments. United States v. Westerdahl, 945 F.2d 1083 (9th Cir.1991); United States v. Alvarez, 358 F.3d 1194, 1216 (9th Cir.2004); United States v. Lord, 711 F.2d 887, 892 (9th Cir.1983).

2. **The Test**

McCreary followed the proper procedure. United States v. Garner, 663 F.2d 834, 839-40 (9th Cir.1981) ("Thus, the proper procedure is for the defendant first to ask the government for immunity of a defense witness, and if the government refuses, then the defendant may petition the court for a grant of immunity.")

To sustain a claim of prosecutorial misconduct as a result of the Government's refusal to grant use immunity, and resultingly to compel the prosecution to grant immunity to a witness, McCreary must prove two things. First, that the proposed testimony was relevant and, second, that the prosecution's denial of use immunity distorted the judicial fact-finding process. United States v. Lord, 711 F.2d 887, 892 (9th Cir. 1983); United States v. Westerdahl, 945 F.2d 1083 (9th Cir. 1991); United States v. Alvarez, 358 F.3d 1194, 1215 (9th Cir. 2004).

McCreary's court ignored the proper test. It made no finding regarding the relevancy of the proposed testimony. It indicated that the extraordinary remedy requested was not appropriate. "There's no showing here of improper motive, nor is there any showing of prejudice to the defendant as a result of the dismissal of the indictment against the former defendant Austin. ¶Had that person still been a defendant, the defendant McCreary would still be in the same position he is in now." [RT6/7/05,p.25,ER345]

Austin's testimony was relevant and crucial because his statements refuted the anticipated testimony of cooperating witnesses.

As to the first prong of the test, a defendant does not have to show that the testimony sought was either "clearly exculpatory" or "essential to the defense." It need only demonstrate the testimony is relevant. United States v. Westerdahl, 945 F.2d 1083, 1086 (9th Cir. 1991).

The Government conceded that at least some of the proposed testimony was relevant. "The rest, if proper foundation can somehow be laid for the general observations and facially improper opinions expressed therein, appear to meet the Ninth Circuit's rather lenient relevancy standard." [CR196,ER142]

Thus, upon the record, McCreary made a *prima facie* showing of the relevancy of Austin's testimony–a fact the trial court did not even consider. United States v. Lord, 711 F.2d 887, 891 (9th Cir.1983).

As to the second prong of the test, it is important to note that before Westerdahl, the court seemed to require a showing that the government "took affirmative actions to prevent defense witnesses from testifying." In Westerdahl, the court held that "misconduct is not confined solely to situations in which the government affirmatively induces a witness not to testify in favor of a defendant." In other words, prosecutorial misconduct is not confined to those cases where the prosecutor actively discourages a witness from testifying. United States v. Westerdahl, 945 F.2d 1083, 1086-1087 (9th Cir. 1991).

Further, this court has "held that intentional distortion does not require affirmative misconduct by the prosecutor. ¶For the government to grant immunity to a witness in order to obtain his testimony, while denying immunity to a defense witness whose testimony would directly contradict that of the government witness, is the type of fact-finding distortion we intended to prevent in *Lord*." United States v. Croft, 124 F.3d 1109, 1116 (9th Cir. 1997).

In the present case, the Government denied immunity to defense witness Austin, while it granted cooperating plea agreements, with its concomitant immunity, to co-conspirators Downs and McNair. Downs. who brandished the gun in both robberies, pled to one robbery count, was never prosecuted for the other bank robbery, was sentenced to 39 months and never faced the consecutive mandatory minimum sentences that McCreary and Hunter faced. McNair plead guilty to one of the

robberies and served 63months. When implicated in the second bank robbery, he plead to conspiracy, entered a cooperation agreement and like Downs did not face the the consecutive mandatory minimum sentences that McCreary and Hunter faced at sentencing.

"The use of immunized testimony for the prosecution, while denying immunity to a defense witness who would directly contradict that of the government witness(es), distorts the fact-finding process." United States v. Alvarez, 358 F.3d 1194, 1216 (9th Cir.2004).

The Government distorted the fact-finding process in this case as a result of five actions. First, the Government indicted critical defense witness Austin, who was "probably" guilty and remained under indictment for over a year as a result of his "probable" guilt. Second, the Government dismissed the indictment against Austin, who was "probably" guilty, just prior to trial claiming that it was for tactical reasons. Counsel notes that as of the filing of this brief, Austin has never been re-indicted for any of these offenses. Third, the Government extended U.S.S.G. § 5K1.1 cooperating plea agreements, including immunity, to co-conspirators Downs and McNair whose testimony directly conflicted with that of defense witness Austin. Fourth, the Government refused to extend immunity to Austin pursuant to 18 U.S.C. §§6002 and 6003. Fifth, the Government let it be known by letter, refusing immunity for defense witness Austin, and its argument in court, that Austin was the subject of ongoing

investigation and still subject to indictment thus encouraging Austin to invoke the protection of the Fifth Amendment to protect himself from further Government harassment. [CR188,ER87] Sixth, it should be noted that Government witnesses Downs and McNair gave testimony at trial that was inconsistent and contradictory to their pretrial statements to police and the FBI regarding these robberies.

As a result of these actions, the Government distorted the judicial fact-finding process.

> For the government to grant immunity to a witness in order to obtain his testimony, while denying immunity to a defense witness whose testimony would directly contradict that of the government witness, is the type of fact-finding distortion we intended to prevent in *Lord. United States v. Westerdahl*, 945 F.2d 1083, 1087 (9th Cir.1991).

United States v. Croft, 124 F.3d 1109, 1116 (9th Cir. 1997).

The Government's misconduct, and court's failure to grant use immunity, violated McCreary's Fifth Amendment rights to due process and a fair trial and his Sixth Amendment rights to compulsory process and to present his defense. He is entitled to a new trial. The Government should be ordered to provide use immunity to witness Austin, If this does not occur, the case against McCreary should be dismissed with prejudice. In the alternative, if this Court determines that the court below did not use the proper standard in determining the issues, then McCreary requests that the matter be remanded for an evidentiary hearing regarding the issues.

## ARGUMENT FIVE

### I. Issue

The court erred in refusing to instruct the jury on "mere presence" denying McCreary his rights to present a defense and to a fair trial in violation of Amendments V and VI.

### II. Standard of Review

Whether an instruction adequately covers a proffered defense is reviewed *de novo.* United States v. Technic Servs., Inc., 314 F.3d 1031, 1038 (9th Cir. 2002).

Whether factual foundation exists for a mere presence instruction is reviewed for abuse of discretion. United States v. Medrano, 5 F.3d 1214, 1218 (9th Cir. 1993).

### III. Points and Authorities

McCreary's requested mere presence instruction read:

> Mere presence at the scene of a crime or mere knowledge that a crime is being committed is not sufficient to establish that the defendant committed the crime of [*crime charged*], unless you find that the defendant was a participant and not merely a knowing spectator. The defendant's presence may be considered by the jury along with other evidence in the case.

Ninth Circuit Model Jury Instruction, Crim. 6.9. [CR181,ER65]

The Government's cooperators testified the conspiracy continued at McCreary's apartment during both robberies. McCreary argued : "There are other people at that apartment. There is an argument that he was merely present, particularly if the jury

doesn't believe the informants or the cooperators. So I think it's highly applicable. They're claiming it happened in both robberies." [RT6/16/05,p.1296,ER586]

Referring to the comment to 6.9, the court indicated this is not a case in which the Government is resting primarily on the defendant's presence and nothing more. The defense retorted this might be so in the typical case. "But this is not a typical case, because it's conspiracy to commit armed robbery. And what the government is really saying here is, look, before and after significant events occurred, which they argue tie Hunter and McCreary to the robbery itself, and unless Hunter and McCreary are present before and after during those instances, there's no connection to the crime. So I would say in relation to those similarly situated, uniquely situated defendants, that this instruction would be appropriate. . . . they're charged with aiding and abetting those bank robbers. You know, if they were only charged with the actual robbery, okay." [RT6/16/05,pp.1296-1298,ER586-588]

The court ruled:

> THE COURT: I believe that a mere presence instruction is designed for a case in which the evidence is sufficient to go to the jury on some underlying offense but which–but, depending upon what the jury believes, it is possible that the jury could find that the defendant was merely present.
>
> In this case it seems to me it's the obverse of that. This case is largely a conspiracy case and liability for underlying offenses vicariously because the defendant was not present.
>
> So I believe this instruction as structured would be an erroneous statement of the law, because it would tell the jury that unless they found he was a participant, then he cannot be found guilty.

But our other instructions tell them the exact opposite, that he can be found guilty under both an aiding and abetting, accomplice, and Pinkerton liability theory.

So we'll decline to give 6.9.

[RT6/16/05,pp.1296-1299,1304-1305,ER586-589,590-591]

A mere presence instruction can be refused if the case rests on more that just a defendant's presence and the jury is instructed properly on all elements of the crimes charged. United States v.Howell, 231 F.3d 615, 629 (9th Cir. 2000).

Defendant's theory of the case instruction should be given if supported by the law and by adequate foundation. United States v. Garcia-Cruz, 978 F.2d 537, 540 (9th Cir. 1992).

McCreary was never identified as one of the robbers who went inside the banks. The case rested upon the two cooperators who identified McCreary as a co-conspirator. They alleged his participation occurred at his apartment and surrounding areas.

Evidence showed McCreary knew some of the others and resided at the apartment where bank robbers may have met and pagers were found. Mere presence at the apartment or association with others did not prove him guilty.

Before the jury, counsel argued mere presence versus actual involvement. McCreary was present at his apartment, as were others, and had access to the pagers, as did others. McCreary argued the Government must prove who used the pagers.

McCreary's mere presence or associations at the apartment, or in the Tempe area at the time of the crimes, did not make him guilty. [RT6/7/05,pp.168-169,ER350-351; RT6/21/05,p.1369,ER598]

Evidence supported this instruction. The court erred in not instructing the jury not to judge McCreary based on his mere presence or associations before and after the robberies. [RT6/21/05,pp.1429-1450,ER601-622] It compromised McCreary's right to argue this to the jury and deprived him of his rights to present a defense and ". . . to a fair opportunity to defend against the State's accusations" as guaranteed by the Fifth and Sixth Amendments. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 1045 (1973).

The error was not harmless.

## ARGUMENT SIX

### I. Issue

The mandatory minimum and consecutive sentencing scheme of 18 U.S.C. §924(c) violates the constitutional requirement of a separation of power between the executive and judicial branches; the non-delegation doctrine, delegating legislative authority to sentence to the executive branch; due process; and the Eighth Amendment in mandating a sentence that is unreasonable and grossly disproportional to the crimes committed.

### II. Standard of Review

The constitutionality of statutes or of a criminal sentence is reviewed *de novo.* United States v. Rambo, 74 F.3d 948, 951 (9th Cir. 1995); United States v. Harris, 154 F.3d 1082-1084 (9th Cir. 1998).

### III. Points and Authorities

#### A. The Mandatory Consecutive Minimum Sentence of 462 Months

McCreary was sentenced with an offense level of 26 and a criminal history category of III. [RT12/5/05,p.4,ER627] The advisory guideline ranges for the various counts were, as follows:

Count 1: Statutory maximum of 60 months.
Count 2: 78 to 97 months.
Count 3: Statutory minimum of 84 months–§924(c)(1)(A)(ii).
Count 4: 78 to 97 months.
Count 5: Statutory minimum of 300 months–§924(c)(1)(C)(i).

[RT12/5/05,pp.4-5,ER627-628]

McCreary was sentenced to 462 months, as follows:

Count 1: 60 months.
Count 2: 78 months.
Count 3: 84 months.
Count 4: 78 months.
Count 5: 300 months.

Counts 1, 2 and 4 were ordered to be served concurrently; count 3 consecutively to counts 1, 2 and 4; and count 5 consecutively to counts 1 through 4. Restitution of $253,798 was ordered. [RT12/5/05,pp.50-51,ER650-651]

Hunter was sentenced to 504 months; same restitution. [RT12/5/05,pp.78-79,ER654-655] Downs was sentenced to 39 months; restitution of $70,815. [Exhibit72,ER227] McNair was sentenced to 63 months; restitution of $70,815. [Exhibit39,ER164]

**B. The Sentencing Proceeding**

Based upon the lengthy statutory minimum sentences on counts 3 and 5, McCreary moved for reduced sentences of zero months on counts 1, 2 and 4. [RT12/5/05,pp.31-32,ER635-636]

The court expressed concern the consecutive minimums resulted in an excessive sentence. It opined that if the sentences on Counts 3 and 5 were overturned on appeal, the court could not re-sentence on the remaining counts. Therefore, it denied McCreary's request and imposed minimum advisory guideline range sentences.

[RT12/5/05,pp.28-34,41-47,67,72,ER632-638,642-648,652,653]

**C. Constitutional Claims**

McCreary was convicted of two counts, 3 and 5, of brandishing a firearm in the commission of a crime of violence. 18 U.S.C. §924(c) sets forth the penalties for committing this offense.

> . . . shall, in addition to the punishment provided for such crime of violence . . . if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years . . .

18 U.S.C. §924(c)(1)(A)(ii).

> In the case of a second or subsequent conviction under this subsection, the person shall–be sentenced to a term of imprisonment of not less than 25 years . . .

18 U.S.C. §924(c)(1)(C)(i).

> . . . no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence . . . during which the firearm was used, carried, or possessed.

18 U.S.C. §924(c)(1)(D)(ii).

The court rejected McCreary's four constitutional challenges raised at sentencing. [CR256,ER145;RT12/5/05,pp.18-19,31,ER630-631,635]

**1. Separation of Powers**

18 U.S.C. §924(c)(1)(A)(C) and (D) violates the separation of powers doctrine under Article I. Sentencing discretion is removed from the judge and vested in the

prosecutor.

Once a prosecutor charges violations of §924(c)(1)(A), and a jury convicts, the judge has no discretion but to impose the mandatory sentence–in this case 7 consecutive years on count 3 and 25 consecutive years on count 5. This scheme impermissibly infringes on the court's ability to impose a sentence of less than 32 consecutive years.

The Supreme Court has not yet found that mandatory minimum sentencing violates the separation of powers doctrine. It commented in United States v. LaBonte, 520 U.S. 751, 762, 117 S.Ct. 1673, 1679 (1997): "Such [prosecutorial] discretion is an integral feature of the criminal justice system and is appropriate, so long as it is not based upon improper factors [citations omitted]." In McCreary's case, the prosecutor's discretion was based upon an improper factor. McCreary chose to exercise his constitutional right to be tried by a jury of his peers. [RT12/5/05,p.36,ER639] The cooperators were not subjected to harsh consecutive sentences, while McCreary and Hunter, who went to trial, were.

McCreary notes LaBonte, 520 U.S. at 751, 117 S.Ct. at 1673, did not deal with a separation of powers argument but involved the United States Sentencing Commission's interpretation of 28 U.S.C. §994(h) which directed the commission to assure that the sentencing guidelines established a prison sentence "at or near the maximum term authorized for categories of" felons who had committed a violent

crime or their third felony drug offense.

However, in United States v. Chaidez, 916 F.2d 563, 565 (9th Cir. 1990), this court held the mandatory minimum penalty provision of 18 U.S.C. §924(c)(1) did not violate the separation of powers doctrine. "Control and enforcement of drug abuse and trafficking fall within the scope of Congress' delegated powers and such mandatory penalty provisions do not threaten the independence of the judiciary as set forth in Article III of the United States Constitution." Chaidez, 916 F.2d at 565. (See United States v. Kaluna, 192 F.3d 1188, 1199 (9th Cir. 1999) and United States v. Baker, 850 F.2d 1365, 1372 (9th Cir. 1988) where a separation of powers challenge to similar mandatory sentencing statutes was rejected.)

The 924(c) statutory scheme confers *de facto* responsibility for sentencing upon the prosecutor and has unconstitutionally intruded on the proper functioning of the judiciary. In doing so Congress has created a sentencing system that "unite[s] the power to prosecute and the power to sentence within one Branch." Mistretta v. United States, 488 U.S. 361, 391 n. 17, 109 S.Ct. 647, 664 n. 17 (1989).

**2. Violation of the Non-Delegation Doctrine**

Legislative powers are vested in Congress. U.S. Const., Art. I, § 1. Congress generally cannot delegate its legislative power to another branch of government. "The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government." Mistretta v. United States, 488 U.S. 361, 371-

372, 109 S.Ct. 647, 654 (1989).

McCreary argued below in applying §924(c):

> ... Congress has not provided "intelligible principles" so as to render the delegation of power to the executive branch constitutional. [Prosecutors] have complete discretion in whether to file a sentencing enhancement pursuant to 18 U.S.C. §924(c)(1)(A). They are free to indict such counts or not indict such counts. The statute is completely void of any "intelligible principle" to guide the executive branches (*sic*) discretion. As a result, the non-delegation doctrine is violated because there are no "intelligible principles" to direct the discretion of [prosecutors] in applying the sentencing enhancements pursuant to 18 U.S.C. §924(c)(1)(A).

[CR256,ER145]

Trial counsel noted two circuits have held that a similar statute is not unconstitutional. See United States v. Crayton, 357 F.3d 560, 571-572 (6th Cir. 2004) (holding that 21 U.S.C. §851 does not violate the non-delegation doctrine); United States v. Cespedes, 151 F.3d 1329, 1333 n. 1 (11th Cir. 1998) (holding that §851 does not unconstitutionally delegate legislative power in concluding that even if the sentence enhancement provisions of §851 were characterized as a delegation of legislative power, we would find that Congress had provided all together intelligible principles to render the delegation constitutional). [CR256,ER145]

**3. Fifth Amendment Due Process Violation**

18 U.S.C. §924(c)(1)(A) violates McCreary's Fifth Amendment due process right to an "individualized sentence." Downs testified that McCreary insisted that the

weapon used should remain unloaded substantially reducing chance of injury. The mandatory consecutive sentence did not allow the judge to consider this important fact in sentencing McCreary below the mandatory minimums established for counts 3 and 5. 18 U.S.C. § 924(c)(1)(A).

The judge must impose at least a mandatory minimum consecutive sentence unless the prosecution files a substantial assistance motion. Investiture of total discretion in the prosecutor and the deprivation of judicial discretion to impose a lesser term violates due process.

This court has rejected a similar argument in United States v. Jensen, 425 F.3d 698, 708-709 (9th Cir. 2005).

**4. Eighth Amendment Cruel and Unusual Punishment Violation**

18 U.S.C. §924(c) mandates the imposition of an unreasonable sentence that is grossly disproportional to McCreary's crimes. This is cruel and unusual punishment in violation of the Eighth Amendment. [CR256,ER145]

This circuit follows the narrow proportionality rule found in the concurrence in Harmelin v. Michigan, 501 U.S. 957, 111 S.Ct. 2680 (1991), a case without a majority position. The Eighth Amendment does not require strict proportionality between crime and sentence. It forbids only extreme sentences that are "grossly disproportionate" to the crime. U.S. v. Harris, 154 F.3d 1082, 1084 (1998) referring to Harmelin, 501 U.S. at 1001, 111 S.Ct. at 2705 (Kennedy, J., concurring). For an

Eighth Amendment violation to occur, a sentence must be so grossly out of proportion to the severity of the crime as to "shock our sense of justice." United States v. Cupa-Guillen, 34 F.3d 860, 864-865 (9th Cir. 1994).

McCreary, 34 at the time of sentencing, had two prior robbery felony convictions, at age 18, arising out of the same incident. These convictions resulted in three criminal history points. Two additional criminal history points were assessed because of two misdemeanor convictions, driving with a suspended license, occurring in 1995-96, and tampering with a vehicle, occurring in 1996 when McCreary was 25. [PSR,pp.2,12-13;RT12/5/05,p.39,ER641]

McCreary provided an unloaded gun so no one would be injured. The court considered this in imposing a sentence on counts 2 and 4 at the lowest end of the advisory guideline range. [RT12/5/05,p.48,ER649]

The mandatory minimum consecutive sentencing scheme of 18 U.S.C. §924(c), resulted in 32 years (7 years in count 3 and 25 years in count 5) being added onto the 6.5 years imposed on counts 2 and 4. [RT12/5/05,p.48,ER649]

The prosecutor acknowledged McCreary's sentence was "harsh" but deserved since McCreary had notice and took the risk by going to trial. [RT12/5/05,p.38, ER640]

The judge commented that McCreary's sentence by any measure was on the high side. But Congress had made this decision and based on Harmelin no Eighth

Amendment violation had occurred. [RT12/5/05,p.50,ER650]

McCreary's unreasonable sentence is tantamount to a life sentence, is grossly disproportionate to his crimes. [CR256,ER145; RT12/5/05,pp.39,48,ER641,649] It "shocks [one's] sense of justice because the defendant took steps to eliminate the likelihood of any civilian and law enforcement officer being injured. . . . As a result, the length of the sentence and the fact that a significant sentencing factor cannot be considered by the District Court in relation to counts three and five, creates an extreme sentence that is 'grossly disproportional' to the crimes for which the defendant was convicted." [CR256,ER149]

This court has rejected an argument similar to McCreary's in United States v. Estrada-Plata, 57 F.3d 757, 762 (9th Cir. 1995).

**D. Conclusion**

18 U.S.C. §924(c), prohibited the court from considering McCreary's individual characteristics and the circumstances of the crime in determining an appropriate sentence. It prevented the court from imposing a reasonable sentence. 18 U.S.C. §3553(b). See, United States v. Wilkins, 911 F.2d 337, 339 (9th Cir. 1990) ("Criminal defendants do not have a constitutional right to individualized sentences, and the legislature may set fixed mandatory and determinate sentences for particular offenses.")

For these reasons, 18 U.S.C. §924(c)(1) is, and as applied to McCreary is,

unconstitutional. His unreasonable sentence should be vacated and his case should be remanded for re-sentencing accordingly.

Dated this 15the day of March, 2007.

Nancy Hinchcliffe

Nancy Hinchcliffe
Attorney for Appellant

**Form 8. Certificate of Compliance Pursuant to Fed.R.App. 32(a)(7)(C) and Circuit Rule 32-1 for Case Number 05-10818**

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**(see next page)** **Form Must Be Signed By Attorney or Unrepresented Litigant *Attached to the Back of Each Copy of the Brief***

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A. Proportionately spaced, has a typeface of 14 points or more and contains 13,788 words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words),

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☐ Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines or text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

____ 2. The attached brief is **not** subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because

☐ This brief complies with Fed. R. App. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages;

☐ This brief complies with a page or size-volume limitation established by separate court order dated _____ and is

☐ Proportionately spaced, has a typeface of 14 points or more and contains _____ words,

**or is**

☐ Monospaced, has 10.5 or fewer characters per inch and contains _____pages or_____words or _____ lines of text.

____ 3. *Briefs in Capital Cases*

☐ This brief is being filed in a capital case pursuant to the type-volume limitations set forth at Circuit Rule 32-4 **and is**

☐ Proportionately spaced, has a typeface of 14 points or more and contains _____ words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 21,000 words; reply briefs must not exceed 9,800 words)

**or is**

☐ Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 75 pages or 1,950 lines of text; reply briefs must not exceed 35 pages or 910 lines of text).

____ 4. *Amicus Briefs*

☐ Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7,000 words or less,

**or is**

☐ Monospaced, has 10.5 or fewer characters per inch and contains not more than either 7,000 word or 650 lines of text,

**or is**

☐ **Not** subject to the type-volume limitations because it is an amicus brief of no more than 15 pages and complies with Fed. R. App. P. 32(a)(1)(5).

3/15/07
Date

Nancy Hirschcliffe
Signature of Attorney or
Unrepresented Litigant

## CERTIFICATE OF SERVICE

I certify that on March 15, 2007, I served an original and fifteen copies of Appellant's Opening Brief, five copies of Appellant's Excerpts of Record, and a sealed envelope containing four copies of the Presentence Investigation Report by mailing them via U.S. mail, postage prepaid, to Clerk at the U.S. Court of Appeals, 95 Seventh Street, P.O. Box 193939, San Francisco, CA, 94119-3939.

I certify that on March 15, 2007, I served two copies of Appellant's Opening Brief and one copy of the Excerpts of Record by mailing them via U.S. mail, postage prepaid, to Joan Ruffennach, Assistant United States Attorney, counsel for plaintiff-appellee, Office of the United States Attorney, Two Renaissance Square, 40 North Central Avenue, Suite 1200, Phoenix, Arizona 85004-4408.

I certify that on March 15, 2007, I served one copy of Appellant's Opening Brief and Excerpts of Record by mailing them via U.S. mail, postage prepaid, to Derrick McCreary, 82052-008, FCI Victorville Medium I, Federal Correctional Institution, P.O. Box 5300, Adelanto, CA 92301.

Dated this 15th day of March, 2007.

Nancy Hinchcliffe

Nancy Hinchcliffe, Attorney
11 West Jefferson, Suite 2
Phoenix, Arizona 85003-2302

## STATEMENT OF RELATED CASES

Derrick McCreary is aware of one related case involving John Freeman Hunter, 05-10827.