NO. 18-3057

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff/Appellee	)	**Appellate Court No. 18-3057**
	)	
v.	)	**Appeal from the United States**
	)	**District Court for the Western**
JONATHAN WOODS	)	**District of Arkansas**
	)	
Defendant/Appellant	)	**Honorable Timothy Brooks**
	)	

Appeal from the United States District Court
For the Western District of Arkansas
The Honorable Timothy Brooks, Presiding
District Court No. 5:17-cr-50010 TLB

APPELLANT'S BRIEF

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Jon Woods appeals multiple decisions made by the district court throughout the proceedings that included a jury trial. Woods was indicted on multiple counts concerning alleged bribery pertaining to his work for the Arkansas General Assembly as a state senator. During the pretrial litigation, it was discovered that the lead agent for the government's investigation and prosecution intentionally destroyed evidence and lied under oath about the destruction. The remedy for this misconduct is the subject of two issues on appeal. Woods also appeals a pretrial ruling that the district judge recuse based on the appearance of bias. Another issue concerns the district court's jury instruction that was given *ex parte*. Finally, Woods appeals the district court's denial of a motion for continuance.

The issue of destruction of evidence as well as the recusal are governed by well-recognized case law; however, the intricate and in-depth factual situation should justify more oral argument than normally afforded. Woods respectfully requests 30 minutes of oral argument.

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JURISDICTIONAL STATEMENT

The Honorable Timothy Brooks, United States District Court Judge for the Western District of Arkansas, presided at Jon Woods' pretrial hearings, jury trial, and sentencing. The government invoked the jurisdiction of the district court pursuant to 18 U.S.C. § 3231.

The district court clerk entered judgment on September 7, 2018. Doc. 471. On September 20, 2018, the notice of appeal was filed timely within the meaning of Federal Rule of Appellate procedure 4(b). Doc. 485. Jon Woods invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

I. THE DISTRICT COURT ERRED WHEN IT DENIED WOODS' MOTION TO DISMISS DUE TO THE INTENTIONAL DESTRUCTION OF EVIDENCE BY THE GOVERNMENT'S LEAD AGENT.

United States v. Bohl, 25 F.3d 904 (10th Cir. 1994)
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II. THE DISTRICT COURT ERRED WHEN IT GRANTED THE GOVERNMENT'S MOTION IN LIMINE BARRING ANY EVIDENCE OF THE DESTRUCTION OF EVIDENCE.

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Moran v. Clarke, 296 F.3d 638 (8th Cir. 2002) (en banc)
Sentis Grp., Inc. v. Shell Oil Co., 559 F.3d 888 (8th Cir. 2009)

STATEMENT OF THE CASE

On March 1, 2017, Jon Woods, Oren Paris, and Randell Shelton, Jr. were indicted. Doc. 1. On April 18, 2017, the government filed a superseding indictment for fifteen counts of wire fraud between 2013 and 2015 as well as one count of engaging in monetary transactions in property derived from unlawful activity in 2013. Doc. 29. The allegations were generally involving Woods' solicitation and acceptance of bribes in exchange for favorable use of his position as an Arkansas state senator to direct funds to particular entities. Doc. 29. On September 13, 2017, the government filed a second superseding indictment adding one count of conspiracy to commit wire fraud between 2013 and 2015. Doc. 74.

In April of 2017, the government turned over a number of secret recordings that Micah Neal had made of conversations with Woods and others. Doc. 297, p. 30. In November of 2017, after Woods and his codefendants expressed doubts that the government had turned over all recordings, additional recordings were found to exist. Doc. 297, p. 30. In anticipation of a hearing about the government's discovery protocol, AUSA Aaron Jennen instructed lead FBI case agent to turn over his laptop to a forensic examiner to search it for information relevant to the hearing. Doc. 297, pp. 30-31. On December 12, Agent Cessario admitted that he defied the instructions and instead wiped the laptop. Doc. 297, p. 31. The district court then held a three-day hearing concerning the recording, laptop, and Agent

Cessario's destruction of the evidence. Doc. 297, p. 31. After the hearing, Woods filed a motion to dismiss referencing the testimony received at the hearing. Doc. 293. The district court found that Agent Cessario lied to the government about his actions and then lied to the district court about why he wiped the laptop. Doc. 297, pp. 36-38. The district court found Agent Cessario's actions characterized by bad faith in which he destroyed potentially useful evidence. Doc. 297, pp. 44-45. The district court denied Woods' motion to dismiss but ruled that the government could not introduce the covert recordings made by Micah Neal at trial nor could the government call FBI Agent Robert Cessario as a witness. Doc. 297, p. 45.

On January 9, 2018, Woods filed a motion to disqualify Judge Timothy Brooks based upon the appearance of partiality. Doc. 265. On March 2, 2018, the district court denied Woods' motion to disqualify. Doc. 296.

On March 9, 2018, the government filed a motion in limine and brief in support arguing that Woods should not be permitted to introduce evidence or elicit testimony of Agent Cessario's misconduct. Doc. 302; Doc. 303. On April 3, 2018, the district court granted the government's motion preventing any mention, evidence, or question about Agent Cessario's misconduct. Doc. 317, p. 7.

On April 4, 2018, Woods orally requested a continuance due to the fact that codefendant, Oren Paris, pled guilty a mere five days prior to trial. PT Hrg. April

4, p. 9. The district court denied the request for continuance. PT Hrg. April 4, p. 17.

The jury trial lasted nineteen days with the closing arguments on the seventeenth day. During deliberations, the jury sent a note to the district court asking a question. JT, Vol. 19, 4879. The district court notified the parties of the district court's proposed answer. JT, Vol. 19, 4880. Both defense counsel objected to the proposed instruction and requested the district court to inform the jury that they have all of the instructions. JT, Vol. 19, 4880-4885. The district court then retired to chambers, wrote a new instruction, and submitted it to the jury without apprising counsel prior to doing so. JT, Vol. 19, 4897-98. Afterwards, both defense counsel notified the district court that they believed that was an improper *ex parte* communication with the jury and requested a mistrial. JT, Vol. 19, 4901-06. The district court denied the mistrial request. JT, Vol. 19, 4909. Before the district court had finished the hearing with counsel, the jury announced they had a verdict. JT, Vol. 19, 4916.

The jury found Woods guilty of Count One (Conspiracy to Commit Honest Services Mail and Wire Fraud), Counts Two through Thirteen (Honest Services Wire Fraud, Aiding and Abetting), Count Sixteen (Honest Services Mail Fraud, Aiding and Abetting), and Count Seventeen (Money Laundering). JT, Vol. 19, 4921-28; ADD 1; Doc. 471. He was then sentenced to 220 months imprisonment

on each of Counts One through Thirteen and Count Sixteen with 120 months on Count Seventeen to run concurrently. ADD 2; Doc. 471. On September 20, 2018, Woods filed a timely notice of appeal. Doc. 485.

SUMMARY OF THE ARGUMENT

There were five errors that occurred affecting the integrity of the investigation, prosecution, and jury trial that resulted in the conviction of Jon Woods. To begin, the lead FBI agent purposefully wiped a laptop containing evidence of the case to prevent it from being forensically examined. That intentional destruction of potentially useful evidence should have resulted in a dismissal of all charges. In addition to erroneously denying the motion to dismiss, the district court committed error when it granted the government's motion to prevent the jury from learning about the illegal conduct of the lead agent.

Five days prior to the jury trial a codefendant pled guilty, which caused a shift in strategy and additional witness preparation. Despite this massive turn of events, the district court refused to grant even a brief continuance. The jury trial presentation concluded with closing arguments on the seventeenth day. On the nineteenth day, after approximately two days of deliberations, the district court gave a jury instruction to the jury without informing defense counsel of the precise instruction. Very soon thereafter the jury had a verdict. This was erroneous.

Finally, based on the cumulative treatment of defense counsel, rulings that failed to sanction government misconduct, and improper contact with the jury, the district court judge should have recused to an appearance of partiality.

ARGUMENT

I. THE TRIAL COURT ERRED BY DENYING WOODS' MOTION TO DISMISS THE CHARGES FOR INTENTIONAL DESTRUCTION OF EVIDENCE; OR, AT A MINIMUM, ERRED IN FASHIONING AN INSUFFICIENT AND LARGELY COUNTERPRODUCTIVE REMEDY.

Jon Woods filed a motion to dismiss the charges based on the government's intentional destruction of evidence from Lead Agent Cessario's laptop as a violation of the Fifth Amendment's due process clause. Doc. 293. The trial court denied Woods' motion to dismiss the charges due to the intentional destruction of evidence. Doc. 297. This Court has set out the standard of review and the requisite showing for a claim that the government destroyed evidence that was potentially useful in bad faith as follows:

> We review de novo the denial of a motion to dismiss an indictment based on the destruction of evidence. *United States v. Webster*, 625 F.3d 439, 446 (8th Cir. 2010). It is well established that the Government may not in good or bad faith suppress evidence favorable to the accused. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). "If, however, the evidence in question is only potentially useful, as opposed to clearly exculpatory, then a criminal defendant must prove bad faith on the part of the police to make out a due process violation." *United States v. Houston*, 548 F.3d 1151, 1155 (8th Cir. 2008) (*citing Arizona v. Youngblood*, 488 U.S. 51, 57, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988)). The burden is on the defendant to demonstrate the evidence was destroyed in bad faith, *Webster*, 625 F.3d at 447, and negligent destruction of evidence is insufficient to establish a due process claim, *Houston*, 548 F.3d at 1155. Additionally, this Court will defer to a district court's factual findings regarding destruction of evidence. *United States v. Clark*, 980 F.2d 1143, 1147 (8th Cir. 1992).

United States v. Bugh, 701 F.3d 888, 894-95 (8th Cir. 2012).

The district court found that the evidence at issue was potentially useful and destroyed in bad faith. Doc. 297, p. 45. Thus, the district court's factual findings in this regard are not being challenged on appeal. The district court's legal conclusion that the violation should be remedied by not permitting the government to use the recordings of Micah Neal or call Agent Cessario as opposed to dismissal was erroneous.[1] Even if this Court were to agree with the district court that there was a due process violation that could be cured with a lesser remedy, then Woods argues that the remedy was insufficient and effectively counterproductive, which in and of itself should garner Woods a new trial.

A. The Evidence Was Potentially Useful.

The district court found the evidence on the computer was potentially useful

[1] The district court cited inapposite and outdated case law on this issue. *See* Doc. 297, p. 33, 43, 45; *United States v. Ulbricht*, 858 F.3d 71 (2d Cir. 2017) (analyzing the proper limitations on defendant's use of information of agents' misconduct apart from current case and not discussing the matter as a *Youngblood* issue); *United States v. Jacobs*, 855 F.2d 652) (9th Cir. 1988) (reviewing district court's dismissal for failure to comply with a discovery order); *United States v. Blue*, 384 U.S. 251 (1966) (discussing the correct remedy for unlawfully obtained evidence by the government). However, the district court's error is irrelevant because this Court reviews the legal conclusions *de novo*.

evidence. Doc. 297, p. 45. This Court should do likewise. While the case law is rather vague about the technical definition of "potentially useful evidence," it seems to be that most evidence, even if entirely inculpatory at first blush, could be deemed potentially useful. Beginning in the seminal case of *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988), the Supreme Court described potentially useful evidence "evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." *Id.* at 57. That definition is not literal as numerous types of evidence have been found potentially useful in this context. *See United States v. Olivares*, 843 F.3d 752, 759 (8th Cir. 2016) (jail phone calls and visits and the agent's text messages with confidential information); *United States v. Zaragoza-Moreira*, 780 F.3d 971, 980 (9th Cir. 2015) (video footage that might have corroborated defendant's statement); *United States v. Tyerman*, 701 F.3d 552 (8th Cir. 2012) (firearm that did not have defendant's fingerprints on it); *United States v. Webster*, 625 F.3d 439, 448 (8th Cir. 2010) (crack cocaine that the government's test proved positive); *United States v. Houston*, 548 F.3d 1151, 1155 (8th Cir. 2008) (video of the traffic stop resulting in seizure of illegal narcotics); *United States v. Chase Alone Iron Eyes*, 367 F.3d 781, 786 (8th Cir. 2004) (mattress and bedding with urine stain in a possession of a stolen firearm case). In line with this expansive use of the term courts have applied, the district court found that the information on the

laptop concerning the case constituted potentially useful evidence. This Court should hold uphold the finding by the district court.

B. The Destruction of Evidence Was In Bad Faith.

The district court found the destruction of evidence in bad faith. Doc. 297, p. 45. This Court should find similarly. This is not a case of negligence, which is not bad faith. This is not a case of destroying evidence according to policy, which is not bad faith. Evidence of the secret recordings as well as all other evidence obtained through Micah Neal by Agent Cessario was sought by Jon Woods throughout the case. After allegedly negligently overlooking the additional evidence and recordings that were required to be turned over, the prosecution required Agent Cessario's computer to be turned over to another agent and analyzed for additional evidence pertaining to Agent Cessario's use of dropbox to obtain and manipulate the recordings. Doc. 297, pp. 36-37. It was only after it was clear that the evidence would be found and turned over to Woods' counsel that Agent Cessario wiped the computer multiple times and ensured the evidence would not be found. Doc. 297, p. 37. Agent Cessario lied to the prosecution when they asked about when, why, and how he wiped his laptop. Doc. 297, pp. 36-37, 39. Then Agent Cessario lied about it on the witness stand in multiple ways to attempt to cover up his prior illegal activities. Doc. 297, p. 39.

Case law has developed that essentially separates the conduct of bad faith

and good faith (or not bad faith) as whether the evidence destroyed pertained to the case and had been requested by the defense for exculpatory evidence (bad faith) or whether the destruction was negligent/reckless, according to policy, or the evidence destroyed was never thought to be relevant to the defense (good faith).

Cases that have found bad faith on the part of the government have been few and far between, but they have two key components in common. First, the government was placed on notice that Woods was requesting the evidence of the recordings and, subsequently, the information on laptop pertaining to the access of the recordings. Doc. 297, p. 30.; *see United States v. Zaragoza-Moreira*, 780 F.3d 971, 980 (9th Cir. 2015) ("As noted above, in concluding that the government did not act in bad faith, the district court did not address the AUSA's actions, or lack thereof, in light of the December 28, 2011, letter from defense counsel requesting the preservation of video evidence."); *United States v. Bohl*, 25 F.3d 904, 911 (10th Cir. 1994) ("Bell and Bohl repeatedly sent letters to, and met with, the FAA to request access to the allegedly nonconforming towers. Also, just after the grand jury issued the indictment in September 1990, counsel for Bohl sent two letters to Assistant United States Attorney Kirkpatrick, renewing the request for access to and preservation of the towers."); *United States v. Cooper*, 938 F.2d 928 (9th Cir. 1993) ("In response to defense requests for return of the equipment, government agents stated that they held it as evidence. This statement was repeated even after

the equipment had been destroyed."). Second, the government has no innocent explanation for the destruction of the evidence in this case. Doc. 297, p. 45 (terming the actions of Agent Cessario "reprehensible"); *see Zaragoza-Moreira*, 780 F.3d at 980 ("Contrary to the government's contentions, Agent Alvarado's actions were not merely negligent or reckless, nor was the video destroyed in the normal course of the government's usual procedures….Alvarado made no attempt to view or preserve the Port of Entry video before it was destroyed."); *Bohl*, 25 F.3d 904 at 913 ("Although the defendant has the burden of proving the bad faith of the government in destroying the evidence, *Donaldson*, 915 F.2d at 614, we note that the government here offers no reasonable rationale or good faith explanation for the destruction of the evidence. The government does not contend that the towers were destroyed inadvertently or negligently, or pursuant to standard procedure."); *Cooper*, 983 F.2d at 930 ("As the DEA knew, the company generally stored seized items for only a short time unless the government requested that the items be held as evidence. If requested to hold certain items, the company would set them aside for long-term storage….On December 12, Gammill's attorney called Croslin, reiterated Gammill's claims and demanded the return of the vats….Even though he knew the equipment would be destroyed, Croslin responded that it was being held as evidence….Although nothing suggested that the reaction vessel presented an imminent hazard, no one told American Environmental to preserve it

for evidence or inspection.") These two key similarities put this case in the heartland of the preeminent cases where federal courts of appeal have found bad faith.

The notably commonalities aforementioned are in stark contrast to the two predominant features found in cases of good faith. Courts do not find bad faith in cases of negligent or reckless destruction of the evidence. *See United States v. Gayle*, 608 F. App'x 783, 790 (11th Cir. 2015) (holding no bad faith in stating, "In short, there is no evidence that the police purposely destroyed the recording of Defendant's interview."); *United States v. Tyerman*, 701 F.3d 552, 560 (8th Cir. 2012) (holding that an ATF agent "mistakenly" destroyed the firearm during the appeal and not bad faith); *United States v. Webster*, 625 F.3d 439, 446-47 (8th Cir. 2010) (finding that the government's reckless destruction of drugs after testing did not demonstrate bad faith); *United States v. Garza*, 435 F.3d 73, 75 (1st Cir. 2006) ("Even if, as found by the district court, Sergeant Quinn's actions were 'short-sighted and even negligent,' this does not satisfy the requirement of bad faith."); *United States v. Femia*, 9 F.3d 990, 995 (1st Cir. 1993) (holding that the evidence was destroyed due to the government's gross negligence, not bad faith); *United States v. Sanders*, 954 F.2d 227, 231 (4th Cir. 1992) (holding that bad faith was not demonstrated where the video evidence was erased accidentally); *United States v. McKie*, 951 F.2d 399, 403 (D.C. Cir. 1991) (concluding there was no bad faith

where the government lost the evidence). Likewise, courts generally find cases of destruction of evidence according to policy in good faith absent exceptional circumstances. *Illinois v. Fisher*, 540 U.S. 544, 548 (2004) ("[I]t is undisputed that police acted in good faith and in accord with their normal practice.") (internal citations omitted); *United States v. Gomez*, 191 F.3d 1214 (10th Cir. 1999) (finding the destruction of seized contraband in accordance with statutory and regulatory policy as generally precluding a finding of bad faith); *United States v. Deaner*, 1 F.3d 192 (3d Cir. 1993) (same); *United States v. Gibson*, 963 F.2d 708, 711 (5th Cir. 1992) (concluding that bad faith was lacking because Border Patrol agents routinely destroyed controlled substances after sixty days in accordance with agency procedure).

As found by the district court, the situation here is the destruction of evidence in bad faith. Not only did Agent Cessario destroy evidence that he knew Woods was seeking, but he did so intentionally, after he was ordered to provide the evidence for analysis in the case, and then lied about when, how, and why he did it. Agent Cessario's misconduct that includes multiple crimes would be the most egregious example of bad faith in the aforementioned cases. This Court should uphold the district court's finding of bad faith.

C. The Potentially Useful Evidence Destroyed In Bad Faith Was Not Replaceable.

The potentially useful evidence on the laptop of Agent Cessario was not replaceable. As noted by this Court, if a defendant is able to adequately replicate the evidence destroyed, then there is no due process violation requiring dismissal. *See Tyerman*, 701 F.3d at 560 (*citing California v. Trombetta*, 467 U.S. 479, 489 (1984)). Although the district court did not directly address this issue, any findings to the contrary are contested as clearly erroneous.

To be explicitly clear, there were numerous aspects of the laptop that were potentially useful to Woods that were destroyed in bad faith when Agent Cessario wiped it after being ordered to provide it for examination. The most direct aspects were the presence or absence of recordings of Micah Neal, when Agent Cessario obtained the recordings concerning an ongoing discovery and Sixth Amendment dispute, the presence of additional material from Agent Cessario's relationship with cooperator Neal, and without question evidence that would attack the credibility of the central, lead FBI agent heading the multi-year investigation of Woods that involved multiple cooperators working at his discretion. In the district court's order, it refers to the claims of Woods that the evidence on the laptop was related to the investigation of Woods "speculation." Doc. 297, p. 40. The district court then speculates himself about other possibilities. *See* Doc. 297, p. 40 (stating

that the laptop could have had contraband, evidence of embezzlement, proof he extorted someone, or misconduct in another investigation). The district court states that they are as speculative as Woods' claims. Doc. 297, p. 40. The notable thing is that all of those claims from Woods *and* the district court would be material, prejudicial, and at a minimum, potentially useful evidence in support of Woods' defense. Thus, the district court was unable to even speculate about evidence destroyed that was immaterial or unimportant to the defense of Woods.

To take it further, let us take the speculative claims of the district court in turn and discuss how they cannot be replicated. First, Agent Cessario had contraband on his computer. No question illegal activity of the lead agent is material, prejudicial, and potentially useful evidence.

> In *Arnold v. Secretary, Department of Corrections*, 595 F.3d 1324 (11th Cir. 2010), *adopting opinion of Arnold v. McNeil*, 622 F. Supp. 2d 1294 (M.D. Fla. 2009), *aff'd and adopted*, 595 F.3d 1324 (11th Cir. 2010), the United States Court of Appeals for the Eleventh Circuit held that crimes committed by a police detective who was a lead investigator and key witness against a criminal defendant, although not known by the prosecutor until after the conclusion of petitioner's trial, was material exculpatory information that the prosecution was obligated to disclose to the defendant under Brady.

Kelley v. Burton, No. 2:18-CV-11161, 2019 U.S. Dist. LEXIS 73330, at *31 (E.D. Mich. May 1, 2019); *see McGowan v. Christiansen*, 353 F.Supp. 3d 662 (E.D. Mich. 2018); *United States v. McClellon*, 260 F.Supp. 3d 880 (E.D. Mich. 2017); *see also Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the

others acting on the government's behalf in the case, including the police."); *Giglio v. United States*, 405 U.S. 150, 154 (1972) ("When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within this general rule.") (internal quotations omitted). If it had been contraband as the district court speculated, then it would have been subject to disclosure that was not done. It would also have to been extremely serious contraband considering he committed multiple crimes to cover it up. *See* 18 U.S.C. § 1519 (up to 20 years for destruction of records in a federal investigation); 18 U.S.C. § 1621 (perjury); 18 U.S.C. § 1010 (false statement). This evidence could not be replicated because Woods was left without the evidence of contraband or illegal activity that was on the computer.

Next, the district court speculated that the evidence could have been evidence of embezzlement. For the same aforementioned reasons, illegal conduct of the lead FBI agent would have been relevant, material, and at a minimum, potentially useful. Furthermore, if the evidence was his embezzlement, that would be a theft that would impact his honesty as well. This evidence cannot be duplicated because Woods has no evidence of Agent Cessario's embezzlement.

Proof he extorted someone, as the district court speculated, would implicate all of the aforementioned reasons the evidence was useful to Woods, but it was also cast a shadow over the multiple cooperators in this case that were under the

thumb of Agent Cessario. For if he was extorting individuals, even without direct proof those were cooperators, the implication would be that he was extorting them as well. Woods would be able to get tremendous mileage in motion practice and trial out of evidence that the lead FBI agent was extorting those of which he possessed incriminatory evidence. This evidence could not be duplicated because Woods has no evidence of Agent Cessario's extortion.

For many of the same reasons it would be material to know that Agent Cessario was extorting individuals, it would be material to know Agent Cessario was committing misconduct, which would have to be severe, in other investigations. The only problem with this speculation from the district court is that the district is willing to speculate that there could have been misconduct in other investigations, but the district court is unwilling to believe there was misconduct in this investigation? That does not make sense. Regardless, this evidence could not be duplicated because Woods had no evidence of Agent Cesssario's misconduct in other cases at the time of trial.

The speculative types of evidence provided by the district court would have been important and were not able to be duplicated for trial. In fact, the district court's further orders made sure that Woods was unable to produce or use evidence of Agent Cessario's misconduct. Finally, if as Woods contended, the destruction of evidence in this case was due to the fact that there was exculpatory evidence or

evidence of misconduct in this case on the laptop, then that evidence was lost forever. Woods was never able to duplicate the missing evidence for trial, nor was he able to get some benefit out of addressing the matter with Agent Cessario on the witness stand. Thus, in addition to potentially losing recordings, proof of dropbox access or manipulation, additional evidence of Neal's participation and cooperation, and those host of benefits of Agent Cessario's illegal activity as speculated by the district court, Woods also lost the potentially useful evidence of Woods' innocence on the computer. None of that was duplicated nor could it be because Agent Cessario was not able to be called as a witness and evidence of his illegal conduct was hidden from the jury.

D. The District Court's Remedy Was Insufficient And Counterproductive.

The district court found that Agent Cessario destroyed potentially useful evidence in bad faith. Doc. 297, p. 45. However, the district court's remedy was to prevent the government from calling Agent Cessario to testify in the case-in-chief and excluded the recordings created by Micah Neal. Doc. 297. This remedy fashioned by the district court does not find its root in *Youngblood* or its progeny. As aforementioned, the district court relied on inapposite case law from other legal scenarios to create a sanction not discussed in *Youngblood* or its progeny. The *Youngblood* line of cases is clear that the issue is whether dismissal is appropriate,

not a discussion of what would be the sanction. Even if this Court were to analyze the remedy, then it should find the remedy untenable as a solution to the government's bad faith destruction of potentially useful evidence. There are two primary reasons the remedy fashioned was actual net beneficial to the government instead of punitive to the party that engaged in intentional, calculated wrongdoing.

First, the government never intended to use the recordings by Neal, as found by the district court. Doc. 297, p. 34. Thus, there is no harm to the government by the district court's order disallowing them. Likely, the government did not want to use the recordings because they contained exculpatory denials from Woods. Doc. 297, p. 42 ("The Government had *already turned over* recordings of Mr. Woods denying any wrongdoing….") (emphasis in original).

Second, the government's inability to call Agent Cessario was ineffectual as a punishment of any sort because it resulted in two positives for the government. It distanced Agent Cessario and his misconduct from the trial. For without Agent Cessario's participation, the government could keep out information of his illegal conduct pertaining to this case from the jury. Additionally, it sanctioned the government substituting in another agent as the lead agent for purposes of the trial. That agent would then be unencumbered by Agent Cessario's nefarious conduct and could rehabilitate the legitimacy of the government's investigation and prosecution.

This Court should find the *Youngblood* line of case demands dismissal for destruction of potentially useful evidence in bad faith. However, even if this Court decides to create its own path with a lesser sanction, it should find that the order of the district court was ineffectual and counterproductive as a sanction for the government's misconduct. As a result, Woods requests a dismissal of the charges, or, at a minimum, a new trial.

II. THE DISTRICT COURT ERRONEOUSLY PREVENTED WOODS FROM INTRODUCING EVIDENCE OF THE INTENTIONAL DESTRUCTION AND ARGUE THE INFERENCES TO THE JURY.

This Court reviews the grant of the exclusion of evidence for an abuse of discretion. *See Tyerman, supra*. The district court's remedy for finding intentional destruction of evidence, arguable obstruction of justice, and perjury by the government's lead agent was to bar the parties from introducing evidence of the recordings or the destruction thereof by Agent Cessario, notably that was evidence that the government already stated it was not going to introduce. Instead of fashioning a sanction for the government's intentional misconduct, the district court whitewashed the unlawful actions and effectively hid them from the fact finders. In a pretrial order, the district court granted the government's motion in limine to bar both parties from introducing evidence "concerning FBI Special Agent Robert Cessario's wiping of the laptop computer, or make any reference to

that event in the presence of the jury." Doc. 317, p. 7. Thus, the government benefited from the remedy instead of being penalized. That decision was erroneous.

A. Proof Of Agent Cessario's Destruction Of Evidence And Other Misconduct Was Relevant And Probative.

Assuming arguendo that the district court correctly found that dismissal was unwarranted, Woods should have still been able to present evidence of Agent Cessario's misconduct, illegal actions, and lies perpetrated in the prosecution of Woods to argue an inference to the jury. *See County Court of Ulster County v. Allen*, 442 U.S. 140, 156 (1979) ("Inferences and presumptions are a staple of our adversary system of factfinding.") One only need to look in two directions to conceptualize the ways case law has already accepted the evidence Woods should have been able to present.

First, the spoliation case law and jury instruction. It is well-settled that evidence of a parties' destruction of potentially useful evidence during the pendency of a case is relevant, material, and generally warranting a jury instruction concerning the matter. *See Swift Transp. Co. of Ariz., LLC v. Angulo*, 716 F.3d 1127, 1135 (8th Cir. 2013) (approving a spoliation instruction when the plaintiff intentionally allowed the electronic satellite tracking data to be destroyed but did not state any prejudice other than the inability to verify the printouts of the tracking

data); *Stevenson v. Union Pac. R.R.*, 354 F.3d 739, 746 (8th Cir. 2004) (approving the adverse inference instruction for the destruction of an audio recording despite no proof the destruction harmed the plaintiff's case and noting it was destroyed prior to any contemplated litigation). "Spoliation occurs when a party intentionally destroys evidence." *Swift Transp. Co. of Ariz., LLC*, 716 F.3d at 1135. Although this Court has not applied the spoliation doctrine or adverse inference instruction to a criminal case against the government, it appears this Court would be willing in a case of demonstratable bad faith. *See Tyerman*, 701 F.3d at 561; *see also United States v. Clark*, No. 8:12CR342, 2014 U.S. Dist. LEXIS 56411, at *27 (D. Neb. Apr. 22, 2014) ("A 'spoliation' instruction, allowing an adverse inference, is commonly appropriate in both civil and criminal cases where there is evidence from which a reasonable jury might conclude that evidence favorable to one side was destroyed by the other.") (internal citations omitted). Here, as aforementioned and found by the district court, bad faith was present.

Second, case law makes it clear that if a defendant were to destroy evidence during the pendency of a case it would be relevant, probative, admissible, and permissive of an inference of guilt in that the evidence destroyed contained inculpatory information. *See United States v. Howard*, 729 F. App'x 181, 187 (3d Cir. 2018) (unpublished) (affirming the use of a jury instruction that circumstantial proof of evidence having been destroyed could be used to infer consciousness of

guilt); *United States v. Mubayyid*, 658 F.3d 35, 72 (1st Cir. 2011) ("The government introduced the conversation to show that, notwithstanding his statement to the contrary at the time, Mubayyid ultimately removed and destroyed documents from the storage unit, evidencing his consciousness of guilt."); *People v. Unger*, 749 N.W.2d 272, 288 (Mich. App. Ct. 2008) ("A rational jury could have also inferred defendant's consciousness of guilt from evidence that defendant wished to have the victim's body immediately cremated. Defendant's desire to have the body cremated could be viewed as an effort to destroy evidence of the crime of murder, thereby showing a consciousness of guilt."); *United States v. Kuehne*, 547 F.3d 667, 691-92 (6th Cir. 2008) ("The AUSA's reference was not improper inasmuch as one could infer that Kuehne's attempt to tamper with evidence is probative of guilt. *See United States v. Munnerlyn*, 202 F. App'x 91, 95 (6th Cir. 2006) (unpublished). For example, in *Munnerlyn*, this Court held that a tape recording of a phone conversation in which a defendant arrested for a robbery made a call from jail to instruct another person to destroy 'it' 'was probative evidence suggesting [the defendant's] consciousness of guilt.' *Id.* (*citing United States v. Mendez-Ortiz*, 810 F.2d 76, 79 (6th Cir. 1986)). In the instant case, like *Munnerlyn*, Kuehne's attempt to destroy the photographs was probative evidence that the jury could consider."); 2 John H. Wigmore, Evidence § 276, at 122 (James H. Chadbourn rev. 1979) ("It is universally conceded today that the fact of an

accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself."); *United States v. Marchesani*, 457 F.2d 1291, 1298 (6th Cir. 1972) ("Evidence of a variance between the stated and actual interest rates of such notes followed by their destruction upon repayment under the circumstances in this case, could well have been construed by the jury as establishing a guilty conscience on the part of appellants and as showing an awareness by them of the fact that the transactions which the notes represented were illegal. It was proper to instruct the jury on how they might consider such testimony.")

These two perspectives already well-established in case law demonstrate the evidence of Agent Cessario's misconduct, illegal actions, and lies should have been admissible in the trial. The district court appeared to have put much stock in the possibility of unknown reasons unconnected to the case that could have caused him to destroy evidence. However, this Court has addressed that very issue previously, In *Clark*, this Court responded to a defendant asserting that there were a plethora of innocent reasons to flee by stating, "The district court properly left that issue for the jury. The existence of other possible reasons for flight does not render the inference impermissible or irrational." *United States v. Clark*, 45 F.3d 1247, 1251 (8th Cir. 1995). That notion applies with equal force here. Thus, the

district court's remedy was no remedy at all for Woods, and, instead, served merely to insulate the actions from fact finder scrutiny and legally proper inferences in favor Woods. The evidence was relevant and probative in support of Woods' defense.

B. The District Court Erroneously Concluded The Evidence Was Substantially More Unfairly Prejudicial, Wasting Of Time, And Confusing Than Probative.

The district court excluded mention of Agent Cessario's nefarious actions as unfairly prejudicial, risked wasting time, and possibly confusing to the jury. Doc. 317, pp. 6-7. The district court was erroneous on all accounts as will be dealt with in turn.

First, the probative value was enormous as noted by the aforementioned cases that permit the inference when evidence is intentionally destroyed by one party during litigation or in advance of litigation. That probative value is even furthered by the traditional giving of a jury instruction in such situations. It is well-established that the intentional destruction has enormous probative value. Notably, the district court did not cite any cases suggesting that the enormous probative value substantially outweighed by the risk of unfair prejudice in any case of intentional, bad faith destruction of evidence during the pendency of a case. Likely, that is because none such exists. Further, in addition to misreading the

probative value, the district court erroneously concluded there was a risk of unfair prejudice. The district court did not explain how it was *unfair* to a party to expose illegal, nefarious actions by that party to destroy and conceal evidence during the litigation. It strains reason to suggest that bringing such actions to light before a jury to argue the aforementioned inferences could be *unfair*. In fact, no case has been cited holding that it is unfair to inform the jury that one party intentionally destroyed evidence and lied under oath to conceal the true motives of the destruction. That is because it is not unfair. Finally, it is far from a situation where the unfairness is so prejudicial that it substantially outweighs the probative value noted in the preceding section. Thus, the district court erroneously found this a basis for excluding the evidence.

Second, the district court erroneously excluded evidence of Agent Cessario's conduct as a waste of time. The district court's finding lacked any rationale or citation to case law. It is likely due to the district court's failure to recognize the probative value of Agent Cessario's misconduct in finding that the probativeness is substantially outweighed by the waste of time. This was a multi-week trial in which the government took nearly all of it for its case. It is difficult to understand how a day spent on the lead agent's misconduct, destruction of evidence, and illegal actions to cover it up would have wasted time in light of the importance of that destruction, his role in the case, and the overall length of the case. Thus, the

district court erroneously excluded the evidence based upon the risk that such evidence would waste time.

Third, the district court erroneously found that the evidence of Agent Cessario's illegal actions to destroy and conceal evidence would confuse the jury. There is no risk of confusion. The district court did not explain how it is confusing or how a normal person would fail to understand what happened. It is quite simple. Agent Cessario was the lead agent on the investigation and prosecution of Woods. He obtained evidence, including but not limited to, covert recordings. He placed evidence on his personal laptop. When questions arose about discovery not being provided properly, he was ordered to have his laptop forensically examined. Agent Cessario then wiped the hard drive clean. He also lied to the prosecutors and lied to the district court about when and why he destroyed the evidence. What is confusing about that? Regardless, in so far as it is confusing about his motivations, it is only confusing because Agent Cessario has repeatedly lied and concealed his motivations. This confusion is the basis for the inference that the government destroyed evidence, concealed evidence, and lied because the evidence would be exculpatory. That is what is precisely suggested by the plethora of cases cited. Thus, the district court erroneously excluded the evidence of Agent Cessario's misconduct on the grounds that the probative value was substantially

outweighed by the risk of confusion. Thus, this Court should find the evidence should the evidence should not have been excluded and remand for a new trial.

III. THE DISTRICT COURT ERRED BY DENYING WOODS' MOTION TO CONTINUE.

This Court will reverse a district court's decision to deny a motion to continue if the district court abused its discretion and the moving party was prejudiced by the denial. *United States v. Thurmon*, 368 F.3d 848 (8th Cir. 2004). On April 4, 2018, Woods requested a continuance because his codefendant, Oren Paris, pled guilty to Count Two of the second superseding indictment that morning. PT Hrg April 4, 2018, pp. 9-10. Woods informed the district court that up until that point Paris and his counsel represented that Paris was not a part of any conspiracy. *Id.* He further stated that until April 4, it was unknown that Paris would enter into any cooperation or plea agreement with the government. *Id.* The addition of Paris as a witness, subtraction of Paris performing his anticipated duties with respect to the largely joint defense, and the change in strategy were cited as the basis for the request for continuance. *Id.* at 9-17. The district court denied the continuance and premised that denial primarily on the inherent possibility that always exists that a codefendant will plead guilty and the public's interest in a speedy and public trial. *Id.* at 16-17.

A. The District Court Abused Its Discretion.

"[A] myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality." *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964). Here, the district court recognized the "valid concerns," but determined the search for justice and public interest outweighed those concerns. PT Hrg April 4, 2018, p 17-18. The recognition of valid concerns, the lack of considering even a week continuance, the importance of the evidence at issue, the "fault" in the late change being due to the government, the lack of prejudice to the government if a continuance was granted, and the lack of legitimate foreseeability of this issue arising should all serve to make a very compelling case for a continuance. The district court's insistence on a trial three weekdays later regardless of these concerns demonstrates the type of "myopic insistence" discouraged in *Ungar*.

Persuasive case law from the Seventh Circuit in *United States v. Heron* supports the notion that the district court abused its discretion. In *Heron*, two codefendants were arrested after cocaine and marijuana were found during a traffic stop. *Heron*, 564 F.3d 879, 881 (7th Cir. 2009). On the eve of trial, Heron learned that Hamilton had changed his story to further implicate Heron at trial. *Id.* at 882. Heron requested a continuance due to the late change and the trial court denied the continuance. *Id.* at 881. On appeal, the Seventh Circuit found that the late change

was likely prejudicial due to the newly inculpatory nature of Hamilton's testimony. *Id.* at 883. In holding that the district court abused its discretion, the court stated, "Hamilton's changed testimony was a crucial piece of evidence that defense counsel should have had an opportunity to develop." *Id.*

Likewise, in *United States v. Williams*, the Seventh Circuit dealt with a situation where an accomplice to a robbery agreed to testify against the defendants the Wednesday before the following Monday trial. *Williams*, 576 F.3d 385, 386 (7th Cir. 2009). The defendants requested a continuance to address the change in testimony and the district court denied the continuance. *Id.* The district court noted that the five days prior to trial was sufficient to prepare for the change in testimony and reasoned that the defendants were aware from the outset of the possible involvement from the testifying accomplice. *Id.* at 388. Writing for the unanimous panel decision, Judge Wood explained the inability to prepare for an overhaul of defense strategy and prepare for a new, critical witness within two weekdays and two weekend days while preparing for a trial by stating:

> Given the impact of Walker's testimony, the supposition that the defense could prepare a response in just four days is unrealistic. The defendants learned of Walker's testimony the Wednesday before a Monday morning trial; they therefore had only one half-day, two weekdays, and two weekend days to prepare (at the same time as they were engaged in the remainder of their anticipated trial preparation). The government also counts the two days of trial before Walker testified (noting that the district court prevented the government from mentioning Walker during the opening statement), but that, too, is unrealistic. The defense needed to investigate Walker, evaluate the new evidence, and adapt its strategy. To expect meaningful investigation

> by attorneys during trial misunderstands both the reality of trial and defense attorneys' resources. It also ignores the fact that the defense naturally wanted to develop a consistent theory for the trial. Walker's testimony tied together the evidence, detailed the commission of the robbery, created contradictions in the evidence, and opened the door to a new defense theory. Two business days and two weekend days were not enough.

Id. at 389.

Both *Heron* and *Williams* address the need for a continuance after late disclosure of critical accomplice testimony. In *Williams*, the court was addressing the identical timeframe at issue here. However, unlike in *Williams*, Woods was preparing for a several week trial with a host of challenges not apparent in *Williams*. Additionally, unlike those two cases, Woods was actively led to believe that Paris would not be a participant for the government by Paris's counsel. Thus, the unpreparedness came without some sort of fault that would lie if Woods had ignored obvious indications that Paris would be a hostile witness. This only serves to ramp up the necessity of a continuance in this situation. They both also address the district court's statement that Paris turning into a government witness was always a possibility. Both cases reject the notion that the possibility of the occurrence obviates the legitimacy of the continuance request. Indeed, in *Williams*, Judge Wood directly confronted the timing of the cooperation as a failure on the government's fault, stating,

> Unlike the government, the defendants had nothing to offer Walker for his cooperation. They reasonably chose not to allocate their limited resources to investigating Walker. It was the government that failed to follow up with

> Walker, and therefore the government, not the defendants, is responsible for the timing of Walker's cooperation.

Id. at 390. Ultimately, those two decisions stand almost directly alongside the factual situation here and the logical reasoning should be applied as well. It was an abuse of discretion not to grant the continuance.

B. Jon Woods Was Prejudiced.

This Court requires a description of the inability of counsel to deal with the shift in circumstances. First, we must look into the circumstances that counsel was facing. The indictment was filed in March of 2017. It alleged that Woods, Shelton, and Paris were all working together in a conspiracy concerning kickbacks, fraud, and money laundering in a scheme to pass items in the Arkansas General Assembly in exchange for money and other benefits. Doc. 1. That in and of itself is a large, complex case. In addition, the government obtained hundreds of hours of secret recordings of conversations with Woods, failed to turn them over, then the lead law enforcement officer on the case, Agent Robert Cessario, deleted wiped his laptop when he was instructed to turn it over for examination to find the recordings. Further, the government had provided Woods with 4.3 million documents on August 7, 2017 with thousands of documents following through November of 2017. Doc. 155, p. 8. Inside these documents were 159,460 file folders. Doc. 155, p. 2. The government and defense had to finally prepare for a three-week jury trial consisting of numerous witnesses and documentation. During

preparation for trial, Oren Paris, Jon Woods, and Randall Shelton had been working together to prove their innocence. Finally, five days before trial, Paris pled guilty and agreed to cooperate with the government without any prior notice to Woods or his counsel. That is the situation that Woods found himself in on April 4, 2018. Thus, when analyzing the possible prejudice, it is critical to note that this was not a five-witness case that could be shifted on the fly. Essentially, millions of documents and over one-hundred thousand file folders came back into play and had to be conceived of in light of a monumental shift in strategy.

The adjustment of having a codefendant that has been preparing for trial with Woods seemingly cooperating with the government would be an enormous change. No one could brush off this alteration to the plans nor could one change gears on the fly regardless of prior preparation level. The attempt to reevaluate millions of documents to deal with an alleged coconspirator pleading guilty to the facts Woods was accused of takes significantly longer than five days. The district court seemingly understood by stating, "I can appreciate those concerns. I think that they are valid concerns, but by the same token, that's the nature of the defendant game. And the object here is a search for the truth. The object here is justice." PT Hrg., April 4, 2018, p. 16. The district court noted the hardships of the change. However, it claimed that was overruled by the search for truth and justice, which the district court appears to be using in place of conviction. It is

undisputed that the goal of the criminal law system is justice, but there are no cases or law that suggest a vague assertion of truth and justice overrule the right to due process and effective representation that come with adequate time to prepare. The only proper countervailing consideration to the legitimate need for preparation is the prejudice that would accrue to the opposing party from any delay. Here, no prejudice to the government was cited for their choice to make a deal with a codefendant on the eve of trial. Thus, this Court should reverse and remand for a new trial now that Woods has had time to prepare for a seismic shift in strategy that the district court recognized as valid.

IV. THE DISTRICT COURT ERRED BY HAVING *EX PARTE* COMMUNICATION WITH THE JURY DURING DELIBERATIONS.

This Court reviews whether a trial court conducted a proceeding in violation of defendants' right to be present during every stage of trial under an abuse of discretion standard. If a proceeding was conducted in violation of this right, it is subject to harmless error analysis. *United States v. Smith*, 771 F.3d 1060, 1063 (8th Cir. 2014). In this case, the district court responded to a juror question in writing without permitting the parties to be heard on the specific response the district court was submitting. That was an erroneous *ex parte* communication during deliberations that prejudiced Woods.

A. The *Ex Parte* Written Communication Was Improper.

It has long been the rule that the judge may not communicate in person or through writing to the jury without the presence of the parties and their knowledge of any proposed writings. The Supreme Court first took exception in 1919, writing:

> Where a jury has retired to consider of its verdict, and supplementary instructions are required, either because asked for by the jury or for other reasons, they ought to be given either in the presence of counsel or after notice and an opportunity to be present; and written instructions ought not to be sent to the jury without notice to counsel and an opportunity to object. Under ordinary circumstances, and wherever practicable, the jury ought to be recalled to the court room, where counsel are entitled to anticipate, and bound to presume, in the absence of notice to the contrary, that all proceedings in the trial will be had. In this case the trial court erred in giving a supplementary instruction to the jury in the absence of the parties and without affording them an opportunity either to be present or to make timely objection to the instruction.

Fillippon v. Albion Vein Slate Co., 250 U.S. 76, 81 (1919). Those concerns were applied to a criminal trial reversal in *Shields v. United States*, 273 U.S. 583 (1927); *see also* Fed. R. Crim. P. 43(a)(2). Since then, it has been the rule of law that any instruction, note, commentary or the like sent to the jury must be done so in open court with the parties present or after an on the record discussion of the instruction, note, commentary, or the like with all parties present. Here, that was not done. Admittedly the district court discussed the jury's note with all parties; however, it did so in the context of a proposed answer it had drafted. Both defense parties objected to the proposed answer. Instead of properly returning to the courtroom to

discuss the amended instruction it had drafted, the district court sent it to the jury without notifying the parties prior to its rendering. Both parties requested the court reconvene for purposes of objections, and they did so. The district court then stated, "What the Court did not do was give an opportunity for the parties to make any further record that they would like to make, which they certainly have a right to do, and the parties have requested an opportunity to make a further record…." JT, Vol. 19, 4900. The district court committed error by sending the note to the jury without discussing that specific matter with the parties first.

B. Prejudice Is Presumed.

This Court in *Rice* set forth the standard for a rebuttable presumption for *ex parte* contact with the jury, stating:

> It cannot be gainsaid that it constitutes error for a trial court in a criminal case to instruct the jury outside the presence of a defendant and his counsel. However, most courts now hold that the presumption of prejudice resulting from such error is a rebuttable one and in some instances may be overcome by evidence giving a clear indication of lack of prejudice. This court has consistently followed this rule.

Rice v. United States, 356 F.2d 709, 716-17 (8th Cir. 1966). This rebuttable presumption applies here for Woods. In addition to the rebuttable presumption, this Court as well as others have found the timing between the instruction and a verdict further evidence of prejudice. *See id.* at 717 ("In the case at bar, the jury deliberated for a considerable length of time and returned a verdict only after the 'Allen plus' instruction had been given."); *Rogers v. United States*, 422 U.S. 35, 41

(1975) (reasoning that the quickness of the verdict after the communication "strongly suggests" that the communication influenced the verdict); *United States v. Glick*, 463 F.2d 491 (2d Cir. 1972) (finding prejudice likely where verdict was soon after note); *United States v. Ronder*, 639 F.2d 931 (2d Cir. 1981) (noting the verdict was 30 minutes after note). Here, the district court retired to consider the formulation of the answer to the jury note based on comments of counsel at 11:25am. JT, Vol. 19, 4897. The district court then reformulated the answer and sent it to the jury at some point thereafter. The jury sent a note out stating it had a verdict at 2:49pm. JT, Vol. 19, 4916. This was after deliberating from 4:00pm on May 1 (JT, Vol. 17, 4848) until May 3 at 2:49pm. Similar to the aforementioned cases, the jury's verdict came soon after the improper *ex parte* communication. Not only is there a presumption of prejudice, but it is also supported by the timing of the jury's verdict. Thus, this Court should reverse and remand for a new trial.

V. THE DISTRICT COURT JUDGE SHOULD HAVE RECUSED.

Litigants have a constitutional right to a neutral and detached judge presiding over their matters. *Ward v. Village of Monroeville*, 409 U.S. 57, 62 (1982). The issue of disqualification of a district court judge is controlled by 28 U.S.C. § 455, applicable case law, and ethical standards governing judges. "Any justice, judge, or magistrate [magistrate judge] of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be

questioned." 28 U.S.C. § 455(a). Congress enacted subsection (a) to "promote public confidence in the integrity of the judicial process." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988). "What matters is not the reality of bias or prejudice but its appearance." *Liteky v. United States*, 510 U.S. 540, 548 (1994). Section 455(a) sets forth an objective standard for assessing a judge's duty to recuse; the question is "'whether the judge's impartiality might reasonably be questioned by the average person on the street who knows all the relevant facts of a case.'" *See Moran v. Clarke*, 296 F.3d 638, 648 (8th Cir. 2002) (en banc) (*quoting In re Kan. Pub. Emps. Ret. Sys.*, 85 F.3d 1353, 1358 (8th Cir. 1996)); *Sentis Grp., Inc. v. Shell Oil Co.*, 559 F.3d 888, 905 (8th Cir. 2009) (explaining that recusal is required if a reasonable person who knows all the circumstances "would harbor doubts about the judge's impartiality"). This Court should also recognize that "these outside observers are less inclined to credit judges' impartiality and mental discipline than the judiciary itself will be." *In re Mason*, 916 F.2d 384, 386 (7th Cir. 1990). This Court should find the failure to recuse here an abuse of discretion. *See Hooker v. Story*, 159 F.3d 1139, 1140 (8th Cir. 1998) (declaring the abuse of discretion standard of review for recusal motions). The best avenue of displaying Judge Brooks' appearance of partiality is to address the numerous instances in which he displayed it.

FIRST. The district court made numerous comments towards Woods'

arguments and person. On November 30, 2017, a pretrial hearing was held. At that hearing, Woods was asked to orally argue his second motion to continue which was filed on November 7, 2017. Doc. 155. The Court found Woods' arguments, "disingenuous" – six (6) times. PT Hrg, Nov. 30, 2017, pp. 56, 60, 64, 68, and 142. Disingenuous is defined as, "not candid or sincere, typically by pretending that one knows less about something than one really does." The Court referred to defense counsel's motion practice attempting to obtain relevant documents and recordings from the government as "hysterical." PT Hrg., Nov. 30, 2017, p. 71. Hysterical is defined as, "deriving from or affected by uncontrolled extreme emotion." Additionally, the Court indicated that it conducted an independent investigation of Counsel's website at www.bencaandbenca.com. At the end of its analysis, the Court found that a "reasonable inference" could be made by the timing of both Wood's continuance request and the co-defendant's request for severance "had more to do with the manipulative trial strategy than a legitimate basis for continuance." The "likely scenario," the Court concluded:

> is that these reasons are contrived for the…improper purpose of, number one, delaying the trial and/or, number two, is an orchestrated strategy designed to pit Woods' interest of delay against the co-defendants' interest in a speedy trail and/or, three, to force the government to pursue multiple trials and/or, number four, to give Mr. Woods a free preview of the government's trial presentation and/or five, embedding wholly self-serving 2255 issue into the case. Whatever the true purpose of this improper strategy, the Court isn't buying it.

PT Hrg. Nov. 30, 2017, p. 68. All of this was stated in front of Woods, the public,

and the press.

SECOND. Subsequently, Woods filed a motion to recuse, which was met with rather harsh language as well. In the Order denying Woods' motion, the district court reaffirmed its use of harsh language. Doc. 296, pp. 13-14. The district court went on to criticize defense attorneys for employing the "most heated and vitriolic rhetoric that I have ever seen any lawyer ever hurl against another in a criminal case." Doc. 296, p. 15. Specifically, the district court took issue with the defense attorneys accusing the government of improper conduct, which is odd since there is a finding that the lead FBI agent had destroyed his laptop rather than have it examined for evidence in the case, he then lied about it, and he was not prosecuted for the acts. When one is looking from the outside, it would appear the district court is more upset that the defense attorneys have accused the government of its actual conduct than the fact that the government destroyed evidence in the case. That would indicate bias as anyone would expect the opposite to be true. Even if that was not enough, the Order goes on to state that Woods' counsel's behavior has been "wildly inappropriate and among the rudest that any attorney has ever exhibited before me during my time on the bench." Doc. 296, p. 25. The district court then demonstrated that it had researched Woods' counsel independently to discover a case in which Woods' counsel interrupted a state court judge and was found in contempt. Doc. 296, p. 25. The belittling of Woods'

counsel repeatedly as well as the lack of respect for his legitimate arguments serves to significantly aid the claim that the district court was displaying bias.

THIRD. Another instance occurred when the district court objected, struck testimony, and admonished the jury prior to the government's objection. During Woods' counsel's examination, the following colloquy occurred:

> Q. Do you know Warren Stephens?
>
> A. No.
>
> Q. You have no idea who he is?
>
> A. No.
>
> Q. Okay. Do you know that he's a billionaire financier out of Little Rock?
>
> MR. ELSER: Your Honor, I'm going to object.
>
> THE COURT: Objection. Move -- the jury's instructed to strike -- well, the jury is instructed to recall the Court's prior instruction that the questions of the lawyers themselves are not evidence and you're to disregard that comment. JT, Vol. 9, 2380.

Although the excerpt appears to demonstrate that the government objected prior to the district court, it did not. Despite Woods' attempts to obtain the audio and/or remand to settle the record, this Court and the court reporter have prevented such resolutions. The district court's objection on behalf of the government evidences bias as it demonstrates a desire to assist the government in the presentation of its

case.

FOURTH. Further proof of the district court's bias can be seen is in the disposition of the government misconduct. The lead FBI agent for the case destroyed evidence intentionally. It was one of the most egregious examples of bad faith activity by a government agent in observable case law. In spite that, the district court found the appropriate sanction to simply insolate the misconduct from sanctions and the purview of the jury. In essence, the district court decided to assist the government in ensuring no consequences from its vile due process violation.

FIFTH. During jury deliberations, the jury sent out a note with a question. Both defense counsel objected to the giving of the proposed instruction by the district court. The district court rewrote the proposed instruction and gave it to the jury without even so much as consulting the defense. Thus, not only did the district court instruct the jury after being vigorously requested not to, it did so in violation of the law. The jury then ended nearly two days of deliberations with a guilty verdict.

SIXTH. The district court refused to grant a continuance to Woods despite millions of documents to review, over a hundred thousand file folders pertaining to the case, a terabyte of information, and a codefendant pleading guilty to work with the government five days prior to trial. Not only did the district court refuse the

continuance, it did not require the government to address any prejudice that would it would befall from a brief continuance. Instead, the district court counterbalanced the need for "justice," which in this context is an improper consideration for ruling on a motion for continuance.

Conclusion

Jon Woods respectfully requests this Court to reverse and dismiss all charges, or, at a minimum, reverse and remand for a new trial, and all other relief deemed just and proper.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. (32)(a)(6). The total number of words is 11986 using Microsoft Word Office 365 version 1904.

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CERTIFICATE OF SERVICE

I hereby certify that June 3, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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