

1 SEAN K. KENNEDY (No. 145632)
Federal Public Defender
2 (E-mail: Sean_Kennedy@fd.org)
John Littrell (No. 221601)
3 Deputy Federal Public Defender
(E-mail: John_Littrell@fd.org)
4 321 East Second Street
Los Angeles, California 90012
5 Telephone (213) 894-5310
Facsimile (213) 894-0081

6 Attorneys for Defendant
7 SERGIO SANTIAGO SYJUCO

8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10 WESTERN DIVISION
11

12 UNITED STATES OF AMERICA,)

13 Plaintiff,)

14 v.)

15 SERGIO SANTIAGO SYJUCO,)

16 Defendant.)
17

NO. CR 12-37-RGK

NOTICE OF MOTION; MOTION
TO DISMISS INDICTMENT DUE
TO DESTRUCTION OF EVIDENCE

DATE: November 12, 2012
TIME: 1:30 p.m.
JUDGE: Hon. R. Gary Klausner
ROOM: 850

18
19 TO: UNITED STATES ATTORNEY ANDRE BIROTT'É, AND ASSISTANT
20 UNITED STATES ATTORNEY MARGARET VIERBUCHEN:
21

22 PLEASE TAKE NOTICE that on November 12, 2012 at 1:30 p.m., in the
23 courtroom of the Honorable R. Gary Klausner, United States District Judge, defendant
24 Sergio Santiago Syjucó will bring on for hearing the following motion:
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MOTION

_____ Defendant Sergio Santiago Syjuco, by and through his attorney of record, Deputy Federal Public Defender John Littrell, hereby moves for an order dismissing the indictment on the ground that the government destroyed or failed to preserve potentially exculpatory evidence, specifically, all of the outgoing text messages sent by the undercover FBI agent to the defendants during this 18-month investigation. Co-defendants Cesar Ubaldo and Arjyl Revereza, through their counsel, join in the motion.

This motion is made pursuant to pursuant to the Due Process Clause of the Fifth Amendment to the United States Constitution, as well as California v. Trombetta, 467 U.S. 479 (1984), and Arizona v. Youngblood, 488 U.S. 51 (1988). This motion is based upon the accompanying Memorandum of Points and Authorities and its exhibits, all files and records in this case, and any such arguments and evidence that may be adduced to the Court at the hearing on this motion.

_____ Respectfully submitted,
SEAN K. KENNEDY
Federal Public Defender

DATED: October 15, 2012

By /s/ John Littrell
JOHN LITRELL
Deputy Federal Public Defender

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I.

3 STATEMENT OF FACTS

4 Sergio Santiago Syjuco, Cesar Ubaldo, and Arjyl Revereza are charged with
5 Conspiracy, 18 U.S.C. §371, Importation of Defense Articles Without a License, 22
6 U.S.C. §2778, Importation of Firearms 18 U.S.C. § 922(l), 924(a)(1)(C), and Criminal
7 Forfeiture. Trial is scheduled to commence on November 13, 2012.

8 The government contends that “for a period of roughly eighteen months, the
9 defendants engaged in a conspiracy to traffic[k] and import into the United States
10 restricted, military-grade weapons.” Dkt. No. 88 (Opposition to Motion to Dismiss
11 for Manufactured Jurisdiction) at 2. The government believes that the evidence will
12 show that the defendants were “eager to traffic[k] in weapons and that they were
13 capable of delivering high quality weapons, explosives, and body armor.” Id.

14 The defense maintains that the defendants were not predisposed to commit the
15 crimes charged against them, and that they acted as a direct result of aggressive and
16 improper conduct by the agent, including, but not limited to, (1) taking the defendants
17 to strip clubs and paying for prostitutes, see Dkt. No. 70 (Motion to Dismiss for
18 Outrageous Government Misconduct) at 10-13, (2) threatening Syjuco when he failed
19 to deliver the weapons that he had promised to the undercover agent, id. at 20-21, and
20 (3) bullying the defendants. Id. Subsequent investigation has revealed that the
21 undercover agent humiliated Syjuco in particular by mocking him for being “gay”
22 because he did not show enough enthusiasm for girls in the strip clubs that the agent
23 took him to. See Exhibit B (enhanced audio recording of undercover agent’s January
24 4, 2012 discussion with Sergio Syjuco, Cesar Ubaldo, and Arjyl Revereza).¹ These

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26 ¹ A copy of the enhanced audio recording is submitted separately, under seal,
27 pursuant to the protective order in this case. See Dkt. No. 40. The recording reflects
28 conversations between the undercover agent and all three defendants on January 4,
2012, the evening when the undercover agent took the defendants to the Spearmint
Rhino and Deja Vu, two strip clubs in the United States. One of the passages in which
the undercover agent mocks and humiliates Syjuco based on his perceived sexual
orientation appears approximately two hours and forty-five minutes (2:45) into the

1 tactics were particularly effective in inducing all three of the defendants, given the
2 fact that the agent was approximately ten to fifteen years older than the defendants.

3 Because the defense of entrapment will be presented to the jury, the precise
4 contents of the statements of both the defendants and the undercover agent and the
5 context in which those statements were made, will be critical at trial.

6 The undercover agent communicated with the defendants extensively *via*
7 email and text messages. The government has produced 419 pages of photographs of
8 *incoming* text messages sent from the defendants to the undercover agent. See
9 BATES 2097-2516. These text messages were produced in the form of photographs
10 taken of the screen of a cellular phone with the messages displayed. Id. Presumably
11 the government may introduce them at trial as admissions under Fed. R. Evid. 801(d).

12 The government has not produced any of the agent's *outgoing* text messages.
13 These messages contain the substance of the undercover agent's statements *to* the
14 defendants during this investigation, and helps explain the conduct of the defendants.
15 The agent's statements are admissible as non-hearsay because the defense wishes to
16 introduce them for a non-hearsay purpose: to establish their effect on the listener.
17 See United States v. Payne, 944 F.2d 1458 (9th Cir. 1991). The text messages sent to
18 the defendants will likely reflect the agent's humiliating and manipulative statements.
19 It will also put in context the text messages that he received from the defendants.

20 On September 11, 2012, co-counsel George Buehler inquired of Assistant
21 United States Attorney Margaret Vierbuchen why she had produced only photographs
22 of incoming text messages from the undercover agent's phone, and not the outgoing
23 text messages. See Exhibit A (September 13, 2012 email from George Buehler to
24 AUSA Margaret Vierbuchen). Ms. Vierbuchen responded by stating that the cellular
25 telephone used by the agent preserved only incoming messages and not outgoing

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27 longer, three-hour recording, when the undercover agent offers to take Syjuco to
28 clubs in Hollywood, because there are "lots of gays there." Id. The same type of
humiliation occurs is approximately six minutes into the second, shorter recording.
At that point, the undercover agent states that while he takes "Arvi" and "Arjyl" to
strip clubs to "have a good time," "Yogi" (Syjuco) will be "waiting in the car." Id.

1 messages. Id. Defense counsel has discussed the government's claim with an expert,
2 and the expert has indicated that this is unlikely. Id.² The government has offered no
3 other explanation as to why none of the outgoing text messages sent by the
4 undercover agent during his 18 month investigation have been preserved.

5 6 II.

7 ARGUMENT

8 Under Brady v. Maryland, 373 U.S. 83 (1963), the government violates the
9 Due Process Clause of the Fifth Amendment where it fails to disclose favorable
10 evidence in its possession that is material to either guilt or punishment, irrespective of
11 the good faith or bad faith of the prosecution. United States v. Nagra, 147 F.3d 875,
12 881 (9th Cir. 1998) (citing United States v. Hanna, 55 F.3d 1456, 1459 (9th Cir.
13 1995)). Under California v. Trombetta, 467 U.S. 479 (1984), and Arizona v.
14 Youngblood, 488 U.S. 51 (1988), the government violates the Due Process Clause of
15 the Fifth Amendment where it destroys or loses evidence and the defendant
16 demonstrates that (1) the evidence had an apparent exculpatory value, (2) he or she
17 cannot obtain comparable evidence by other reasonably available means, and (3) the
18 government acted in bad faith. Cooper v. Calderon, 255 F.3d 1104, 1113-14 (9th Cir.
19 2001) (setting forth test); Grisby v. Blodgett, 130 F.3d 365, 371 (9th Cir. 1997)
20 (same); United States v. Hernandez, 109 F.3d 1450, 1455 (9th Cir. 1997) (same).

21 “The presence or absence of bad faith turns on the government's knowledge of
22 the apparent exculpatory value of the evidence at the time it was lost or destroyed.”
23 United States v. Cooper, 983 F.2d 928, 931 (9th Cir. 1993); see also United States v.
24 Loud Hawk, 628 F.2d 1139, 1152 (9th Cir. 1980) (pre-Youngblood /Trombetta case
25 setting forth six factors for evaluating government conduct when evidence is lost or
26 destroyed). Where a court finds a due process violation based upon destroyed or lost

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28 ² The defense has retained a computer expert, and the government has agreed to allow the expert to examine the undercover agent's phone in order to determine whether it was, as the government claims, incapable of preserving outgoing texts.

1 evidence, the proper remedy is dismissal of the indictment. See Cooper, 983 F.2d at
2 933 (upholding district court's dismissal of indictment where government acted in bad
3 faith in destroying laboratory equipment seized from defendants).

4 Under the three-part test set forth in Trombetta and Youngblood, the defense
5 can show that the government destroyed potentially exculpatory evidence, that it did
6 so in bad faith, and that comparable evidence cannot be obtained by other means.

7
8 A. The Exculpatory Value of the Evidence

9 The exculpatory value of the evidence destroyed by the government is clear.
10 As the government concedes, its own undercover agent initiated the crimes charged in
11 the indictment. See Dkt. No. 90 (Opposition to Motion to Dismiss for Outrageous
12 Government Misconduct) at 2-16. At issue at trial will be whether the defendants
13 were entrapped by the agent to participate in the transaction, and that requires the jury
14 to consider whether the agent, by his conduct in this case, "induced" them to commit
15 the crime. See Ninth Circuit Model Jury Instruction No. 6.2 (Entrapment).

16 In this case, there is strong circumstantial evidence that the undercover agent
17 induced the defendants. The agent admittedly took the defendants to strip clubs in
18 Manila at least six times during the investigation, and each time he spent thousands of
19 dollars to buy them alcohol and prostitutes in order to encourage them to complete a
20 weapons deal. See Dkt. No. 70 at 10-13. Moreover, the agent threatened the
21 defendants, and particularly Syjuco, when he failed to deliver the weapons that he had
22 promised. Id. at 20-21. Investigation reveals additional proof that the agents mocked
23 and humiliated Syjuco in particular, stating in front of his friends that he was "gay"
24 when Syjuco failed to show his enthusiasm for the strip clubs. See Exhibit B (under
25 seal). The agent's aggressive and humiliating statements to Syjuco and his co-
26 defendants are precisely the evidence that would support an entrapment defense.
27 Given the substance of the undercover agent's statements in other fora (including his
28 oral statements on January 4, 2012), it is likely that additional manipulative

1 statements from the agent to the defendants appear in his outgoing text messages.

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3 B. The Government's Bad Faith in Destroying the Evidence

4 The government's bad faith in destroying the evidence should be inferred
5 based on the lack of any persuasive explanation as to why all incoming text messages
6 were preserved by the government, and none of the outgoing messages.

7 The government contends that the cellular phone used by the undercover
8 agent is incapable of preserving outgoing text messages (but capable of preserving
9 incoming ones). As set forth herein, this seems unlikely. But even if it were true, the
10 government would be compelled to take reasonable steps to preserve the evidence in
11 another way. For example, once the government realized this defect, it could have
12 replaced the agent's phone with one that does record outgoing text messages in order
13 to preserve what was obviously important evidence. Moreover, because the
14 government preserved the incoming text messages by taking photographs of them as
15 they appeared on the screen of the agent's phone, why would the government fail to
16 similarly take photographs of the outgoing text messages as they appeared?

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18 C. Comparable Evidence Is Unavailable

19 Given the volume of texts involved (419 pages of incoming text messages
20 alone), the volume of outgoing texts that the government failed to preserve is likely to
21 be significant. Literally hundreds of statements by the undercover agent, all of which
22 would be admissible at trial, and many of which would help establish a pattern of
23 manipulation and bullying behavior by the agent, have been lost or destroyed. Even
24 if he wanted to, the agent most likely could not remember the substance of all of the
25 text messages that he sent to the defendants. Cross-examination of the agent is
26 therefore not a reasonable alternative to actually accessing his text messages.

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III.

CONCLUSION

For the foregoing reasons, the Court should dismiss the indictment.

Respectfully submitted,

SEAN K. KENNEDY
Federal Public Defender

DATED: October 15, 2012

By /s/ John Littrell
JOHN LITTRELL
Deputy Federal Public Defender