

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA,	)	CRIMINAL ACTION NO.
)	
Plaintiff,	)	3:94-CR-433-T
)	
v.)	
)	
XXXX XXXX XXXX,)	
)	
Defendant.)	
_____)	

**DEFENDANT'S MEMORANDUM OF LAW IN
SUPPORT OF A NEW TRIAL FOLLOWING REMAND**

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TABLE OF CONTENTS

	<u>PAGE NO.</u>
TABLE OF AUTHORITIES	iii
I. <u>INTRODUCTION</u>	1
II. <u>FACTUAL BACKGROUND OF TRIAL</u>	3
A. <u>Counts 1-3</u>	3
1. <u>Government case</u>	3
2. <u>Defense case</u>	7
B. <u>Counts 4-8</u>	10
1. <u>Government case</u>	10
2. <u>Defense case</u>	16
C. <u>Evidence not directly related to Counts 1-3 or Counts 4-8</u>	17
III. <u>NEW EVIDENCE FURTHER INDICATING NICOSIA'S ATTEMPTS TO "POLLUTE THE WATERS OF JUSTICE"</u>	19
IV. <u>ARGUMENT</u>	23
A. <u>THE COURT SHOULD CLARIFY ITS PREVIOUS NEW TRIAL ORDER TO INDICATE WHY THE EVIDENCE ON COUNTS 4-8 WOULD NOT HAVE BEEN ADMISSIBLE IN A TRIAL ON COUNTS 1-3 ALONE AND IN ORDER TO INDICATE THAT ITS NEW TRIAL ORDER IS BASED, IN PART, ON ITS DETERMINATION OF TANYA NICOSIA'S CREDIBILITY.</u>	23
1. <u>Admissibility of Counts 4-8 evidence on Counts 1-3</u>	23
a. <u>Categories of Irrelevant Evidence</u>	24
b. <u>Fed. R. Evid. 404(b) exceptions inapplicable</u>	26
c. <u>Fed. R. Evid. 403</u>	31
d. <u>Prejudicial spillover</u>	31
2. <u>Credibility of Tanya Nicosia</u>	33
B. <u>TWO CATEGORIES OF NEW FOUND EVIDENCE ALSO SUPPORT GRANTING MS. XXXX A NEW TRIAL.</u>	36
1. <u>The government withheld exculpatory evidence from the defense during the trial</u>	36
a. <u>Knowing use of perjured testimony</u>	37

b. <u>Violations of Brady and Giglio Obligations</u>	.....38
i. <u>Suppression of Evidence</u>	.....39
ii. <u>Exculpatory Nature of Evidence</u>	.....40
iii. <u>Materiality</u>	41
2. <u>New evidence going to the core of Nicosia's credibility reveals that allowing the verdict to stand solely on the sworn word of Tanya Nicosia would "pollute the waters of justice."</u>	.....42
a. <u>New evidence involving post-trial conduct</u>	.....42
b. <u>New trial test</u>	.....45
V. CONCLUSION	.....49

TABLE OF AUTHORITIES

PAGE NO.

CASES

<u>Alvarez v. United States</u> , 808 F. Supp. 1066 (S.D. N.Y. 1992)	.....44, 46
<u>Berger v. United States</u> , 295 U.S. 78 (1935)	.....42
<u>Brady v. Maryland</u> , 373 U.S. 83 (1963)	22, 36, 37, 38, 39, 41, 42
<u>Giglio v. United States</u> , 405 U.S. 150 (1972)	22, 37, 38, 39, 41, 42
<u>Mesarosh v. United States</u> , 352 U.S. 1 (1956)	.....43, 45, 48
<u>Smith v. Black</u> , 904 F.2d 950 (5th Cir. 1990), <u>overruled on other grounds</u> , 503 U.S. 930 (1992)	.....39
<u>Tibbs v. Florida</u> , 457 U.S. 31 (1982)	.....33
<u>United States v. Agurs</u> , 427 U.S. 97 (1976)	.....46
<u>United States v. Antone</u> , 603 F.2d 566 (5th Cir. 1979)	.....37
<u>United States v. Bagley</u> , 433 U.S. 667 (1985)	.....39, 41
<u>United States v. Beasley</u> , 809 F.2d 1273 (7th Cir. 1987)	.....27, 29
<u>United States v. Brown</u> , 71 F.3d 1158 (5th Cir. 1995)	.....24, 30
<u>United States v. Casel</u> , 995 F.2d 1299 (5th Cir. 1993), <u>cert. denied</u> , 114 S.Ct. 1308 (1994)	.....38
<u>United States v. Deutsch</u> , 475 F.2d 55 (5th Cir. 1973)	.....37
<u>United States v. DiBernardo</u> , 552 F. Supp. 1315 (S.D. Fla. 1982)	.....45
<u>United States v. Duke</u> , 50 F.3d 571 (8th Cir. 1995)	.....37
<u>United States v. Fortenberry</u> , 860 F.2d 628 (5th Cir. 1988)	.....30, 31
<u>United States v. Freeman</u> , 77 F.3d 812 (5th Cir. 1996)	.....45
<u>United States v. Krezdorn</u> , 639 F.2d 1327 (5th Cir. 1981)	.....29
<u>United States v. Lincoln</u> , 630 F.2d 1313 (8th Cir. 1980)	.....33
<u>United States v. Martinez</u> , 763 F.2d 1297 (11th Cir. 1985)	.....33
<u>United States v. Morell</u> , 524 F.2d 550 (2d Cir. 1975)	.....37
<u>United States v. Price</u> , 877 F.2d 334 (5th Cir. 1989)	.....30

<u>United States v. Ridlehuber</u> , 11 F.3d 516 (5th Cir. 1993)	.....30
<u>United States v. Taglia</u> , 922 F.2d 413 (7th Cir.), <u>cert. denied</u> , 500 U.S. 927 (1991)	.....46
<u>Williams v. United States</u> , 500 F.2d 105 (9th Cir. 1974)	.....43, 44

MISCELLANEOUS

Fed. R. Crim. P. 33	2, 33, 36, 44, 45, 46
Fed. R. Evid. 403	.....29, 31
Fed. R. Evid. 404	.....24
Fed. R. Evid. 404(b)	.....26, 27, 30
1 Stephen A. Saltzburg, Michael M. Martin & Daniel J. Capra, <u>Federal Rules of Evidence Manual</u> (1994)	.....27
2 J. Weinstein & M. Berger, <u>Weinstein's Evidence</u> ¶ 404[16] (1986 rev.)	.....28
3 Charles A. Wright, <u>Federal Practice and Procedure</u> § 553 (1982)	.....33
Edward J. Imwinkelried, <u>Uncharged Misconduct Evidence</u> § 3:15 (1995)	.....27

I. INTRODUCTION

This Court previously awarded XXXX XXXX a new trial on Counts 1-3 of the indictment filed against her after having granted an unopposed motion for a judgment of acquittal on Counts 4-8 of the indictment and after determining that evidence from Counts 4-8 prejudicially spilled over onto the jury's consideration of Counts 1-3. In awarding the new trial, the Court also characterized the government's sole witness on Counts 1-3, Tanya Nicosia, as a witness of "questionable credibility." See Order Granting Defendant's Motion for Reconsideration of Order Denying Motion for New Trial on Counts 1-3 ("New Trial Order") at 2. The government subsequently appealed the Court's new trial order.

On appeal, the United States Court of Appeals for the Fifth Circuit determined that this Court did not fully explain why evidence on Counts 4-8 would not have been admissible on Counts 1-3 alone. See Opinion at 11. The Court of Appeals concluded that "because the admissibility of evidence is itself a matter within the trial court's discretion," the case should be remanded so that this Court could make a determination as to whether it would have allowed the extensive evidence admitted on Counts 4-8 into a trial on Counts 1-3 alone. Id. at 12.

This Memorandum will have two focuses. First, it will identify the areas of evidence on Counts 4-8 that would not have been admissible in a trial on Counts 1-3 alone.¹ At the same time, it

¹ In its Opinion, the Fifth Circuit noted that Ms. XXXX "bears at least the initial burden" of identifying the evidence that would have been inadmissible in a trial on Counts 1-3 alone. See Opinion at 11, n.3. (emphasis added). The Fifth Circuit noted that Ms. XXXX conceded this point on appeal. Id. Ms. XXXX understands the Court of Appeals to be saying that she has the burden of production (i.e. identifying the areas of inadmissible evidence). Indeed, this is what Ms. XXXX conceded on appeal and this would be consistent with the Fifth Circuit's use of the words "initial burden." Ms. XXXX contends, however, that the government has the burden of persuading the Court, as it would in a trial on Counts 1-3 alone, that the areas of evidence identified by Ms. XXXX would, in fact, be admissible in a trial on Counts 1-3 alone.

will also urge the Court to clarify the fact that its original new trial order was based, in part, on its determination of the credibility of Tanya Nicosia, the government's principal witness on Counts 1-3. Second, this Memorandum will identify new evidence not considered by this Court when it initially ordered a new trial that would independently support a new trial on Counts 1-3. The new evidence itself breaks down into two categories. The first category involves exculpatory jail records possessed by the government's case agent and not produced to the defense that would have severely undermined Nicosia's trial testimony.² The second category involves a post-trial crime spree of Nicosia and, incredibly, at least two recent attempts by Nicosia to falsely accuse fellow inmates in the State of Florida with threatening to kill federal officials.

² Ms. XXXX previously urged the Court to expand its new trial order to encompass this category of new found evidence. See Defendant's Motion, Pursuant to Fed. R. Crim. P. 33, to Expand Upon Court's June 26, 1995 Order Granting Defendant's Motion for New Trial on Counts 1-3 and Memorandum of Law in Support Thereof. On May 31, 1996, the Court denied this motion on the ground that its previous new trial order was sufficient and thus it was unnecessary to expand it. See Order Denying Defendant's Motion to Expand Order Granting Motion for New Trial at 2. The Court noted that "[s]hould a Fifth Circuit overturn the Court's [new trial] ruling, XXXX may make another motion for new trial and the Court will rule on its merits." Id.

II. FACTUAL BACKGROUND OF TRIAL

A. Counts 1-3

As the Court will recall, Counts 1-3 of the indictment in this case involve allegations that XXXX XXXX threatened to kill Postal Inspector David McDermott, Assistant United States Attorney Joseph Revesz, and Shenna Fisher on or about October 30, 1994 while Ms. XXXX was incarcerated in the Dallas County Jail.

1. Government case

Nicosia had previous convictions in 1978 for grand theft in Houston, Texas; in 1981 for passing worthless checks and grand theft in Seminole County, Florida; in 1986 for theft by worthless checks in Seminole County, Florida; in 1993 for interstate transportation of stolen securities, wire fraud and bank fraud in federal court in Dallas, Texas; in 1993 for theft between \$750 and \$20,000 in state court in Dallas, Texas; in 1993 for grand theft in Collin County, Texas; and in 1993 for grand theft in Pinellas County, Florida. (Tr. 3/15/95 at 4-5; 38-39; 51). Nicosia's 1993 federal conviction grew out of a multi-state crime spree and an attempt to defraud individuals and entities in California, Texas, Tennessee, Georgia, Florida, Hawaii, Illinois, Ohio and New York out of \$594,000. (Tr. 3/15/95 at 39-40). Indeed, Nicosia conceded at trial that she previously made her living stealing from and lying to other people. (Tr. 3/15/95 at 37-38 ("I use to define it as a housewife and thief.")).

Nicosia also admitted that in the past she used so many different aliases that she could no longer recall them all. (Tr. 3/15/95 at 35; 49). On occasion, she would actually use the name of her infant daughter, Kori Ott, as one of her aliases and, in fact, had a conviction under that name. (Tr. 3/15/95 at 36). Likewise, she used so many different social security numbers that she admitted that she once told a government agent that she could not remember which number was actually her true social security number. (Tr. 3/15/95 at 37).

Nicosia jumped bond on two occasions in the State of Florida. (Tr. 3/15/95 at 49-50). She also absconded in 1992 while on pretrial release in the federal and state cases pending in Dallas, Texas that resulted in her 1993 convictions in those jurisdictions. (Tr. 3/15/95 at 7; 43-44). After

being released on bond in the Dallas state case in 1992, Nicosia used the alias Tanya Corleone and obtained \$11,000 worth of plastic surgery, although she denied this was related to the fact that she jumped her bond on the state charges shortly thereafter. (Tr. 3/15/95 at 7; 41-42). While on the run from both the Dallas federal charges and the Dallas state charges, she also continued her schemes to defraud. (Tr. 3/15/95 at 44). After Nicosia was finally apprehended and in connection with the federal case, Judge Fitzwater made a finding that Nicosia had also obstructed justice. (Tr. 3/15/95 at 91).

Nicosia testified at trial in the instant case that she had been incarcerated in Tank 7E03 of the Dallas County Jail with XXXX XXXX. (Tr. 3/15/95 at 12). Although Nicosia originally told prosecutors that she was transferred to the Dallas County Jail and met Ms. XXXX for the first time on October 28, 1994, she later testified at trial that it was actually on October 29, 1994 that she was transferred to the Dallas County Jail and that she first met Ms. XXXX. (Tr. 3/15/95 at 12; 52; Government's Supplementary Response to the Defendant's Motion for a Bill of Particulars at 1). Nicosia testified that when she arrived at Tank 7E03 on October 29, 1994, Ms. XXXX, who she had never previously met, came to her cell and introduced herself; that the two talked for a "few minutes;" and that Ms. XXXX then told her that she needed to talk to her in Tank 7E03's day room early the following morning. (Tr. 3/15/95 at 13; 55-56; 60). Nicosia testified that the following morning, October 30, 1994, she and Ms. XXXX talked for about two and a half hours in the tank's day room. (Tr. 3/15/95 at 60). Nicosia testified that the meeting took place between 5:00 a.m. and 7:00 or 8:00 a.m.; that there was only one other person in the day room at that time; and that the other person in the day room was not sitting by her and Ms. XXXX. (Tr. 3/15/95 at 60; 94; 98-99; 104-105). Significantly, when Nicosia was cross examined regarding the danger of their alleged conversation being overheard given the tank's acoustics, she explained that "XXXX wanted to sit by the table under the T.V. so the noise would be drowned out." (Tr. 3/15/95 at 105).

During the purported conversation, Ms. XXXX allegedly told Nicosia that she had been convicted in federal court in a case involving stolen treasury checks but told Nicosia that she had informed everybody else in the tank that her federal trial ended in a mistrial and was very adamant

that Nicosia not tell the other inmates that she was actually convicted at her federal trial. (Tr. 3/15/95 at 15; 54-55). Nicosia testified that Ms. XXXX then revealed "that her (Ms. XXXX's) father had come from Pueblo, Colorado on October the 3rd, 1994 to visit with her and make arrangements for a contract to be put out on five people for them to be killed." (Tr. 3/15/95 at 21; 63-64 (emphasis added); 89). The victims that Ms. XXXX's visiting father allegedly made arrangements to kill included David McDermott, the case agent in Ms. XXXX's prior federal case involving stolen treasury checks (Count 1); Joseph Revesz, the prosecutor in that earlier case (Count 2); and Shenna Fisher, a witness in that earlier case (Count 3). (Tr. 3/15/95 at 22-24).

Nicosia also testified that later on October 30, 1994, the same day that she and Ms. XXXX had allegedly talked under the television, she also overheard Ms. XXXX talking on the tank's pay phone with her father regarding her plans to "XXXXminate" Inspector McDermott and Mr. Revesz. (Tr. 3/15/95 at 24). Again that same day, Nicosia alleges that she went to Ms. XXXX's cell; that Ms. XXXX's cellmate, Pam XXXX, then excused herself; and that Ms. XXXX repeated her threats against Inspector McDermott, Mr. Revesz and Ms. Fisher. (Tr. 3/15/95 at 98).

Nicosia testified that she took notes shortly following each of her several alleged conversations with Ms. XXXX. (Tr. 3/15/95 at 85; 92). "Within, you know a few minutes or so. Whenever I could get up on my bed and arrange books around me, just put my knees up and take the notes." (Tr. 3/15/95 at 85). These "contemporaneous" notes were introduced by the government at trial under the present sense exception to the hearsay rule. (Tr. 3/15/95 at 81; 86). Nevertheless, Nicosia, on cross examination, had to make numerous corrections in the "contemporaneous" notes and actually had to rearrange the chronology of the notes. (Tr. 3/15/95 at 93-103). The corrected, "contemporaneous" notes were introduced at trial as Defendant's Exhibit 28. (Tr. 3/15/95 at 113).

On cross examination, Nicosia denied that she had specifically inquired of other inmates upon her arrival at Tank 7E03 as to which inmates in the tank were incarcerated as a result of federal charges. (Tr. 3/15/95 at 55). She also denied asking another inmate to take her to Ms. XXXX's cell and to introduce her to Ms. XXXX upon learning that Ms. XXXX had a recent federal

conviction. (Tr. 3/15/95 at 55). She also denied telling other inmates she was a lawyer involved in the I-30 scandal, a well known Dallas federal criminal case. (Tr. 3/15/95 at 52-54). Finally, she even denied that she told other inmates that her nickname was "Tangie" and claimed that she was actually given that nickname by the other inmates. (Tr. 3/15/95 at 53). Nicosia, however, did admit that this was at least the third time involving at least the third different institution where she had alleged that an inmate unburdened themselves to her by admitting having committed a crime where she (Nicosia) then informed authorities. (Tr. 3/15/95 at 66-68).

2. Defense case

The Court will recall two other inmates who had been in Tank 7E03 with Ms. XXXX and Nicosia testified as defense witnesses at trial. The first was Carissa Wilson, who lived in the cell next to Ms. XXXX, and the second was Pam XXXX, Ms. XXXX's former cellmate. (Tr. 3/20/95 at 50; 88). Both Ms. Wilson and Ms. XXXX testified that Ms. XXXX had, in fact, told them of her prior federal conviction and never told them that her prior federal trial had ended in a mistrial. (Tr. 3/20/95 at 54; 93). Both testified that when Nicosia arrived in the tank, she introduced herself as "Tangie." (Tr. 3/20/95 at 54; 80). Ms. Wilson testified that Nicosia told inmates that she was a lawyer and involved in the I-30 case. (Tr. 3/20/95 at 54-55). Both Ms. Wilson and Ms. XXXX also testified that the first time Ms. XXXX and Nicosia met was when Nicosia came to Ms. XXXX's cell. (Tr. 3/20/95 at 55-56; 88-89).

Significantly, Carissa Wilson and Pam XXXX testified that Nicosia's day room story and her description of her conversation with Ms. XXXX were impossible. Contrary to Nicosia's testimony that Ms. XXXX wanted to meet under the television in order to drown out the alleged threats she was going to make to Nicosia, both Ms. Wilson and Ms. XXXX testified that there was no day room table under the television and that the television was never turned on until 7:00 a.m. (Tr. 3/20/95 at 45; 82-83). Pictures of Tank 7E03 introduced as defense exhibits 19a-e verified that none of the day room tables (all of which were fixed to the floor) were located under the television. (Tr. 3/20/95 at 81-82). The witnesses also estimated that had two people met the night before to plan a meeting in the day room for the following morning, the individuals planning the meeting

would have to expect at least five and up to fifteen people in the day room between 5:30 and 7:00 in the morning because that would be right after breakfast had been served. (Tr. 3/20/95 at 48-49; 83). Both witnesses also testified that the acoustics in the tank made private conversations impossible. (Tr. 3/20/95 at 49; 83-84).

Contrary to Nicosia's testimony that she came to Ms. XXXX's cell on the evening of October 30, 1994, that Pam XXXX excused herself, and that Ms. XXXX repeated her alleged threats, Ms. XXXX stated this never occurred. (Tr. 3/20/95 at 92). Ms. Wilson also testified that Nicosia specifically inquired as to which inmates had federal charges against them; that, on one occasion, she had observed Nicosia reviewing Ms. XXXX's legal papers; and that Ms. XXXX had kept her trial transcripts in her cell. (Tr. 3/20/95 at 56-57; 66). This explained how Nicosia knew about Ms. XXXX's prior federal case involving stolen treasury checks.

As noted above, Nicosia testified at the trial in the instant case that she had overheard Ms. XXXX speaking to her father on the tank's pay telephones during the evening of October 30, 1994 regarding her plans to XXXXminate Inspector McDermott and Mr. Revesz. (Tr. 3/15/95 at 24). Nevertheless, both Ms. Wilson and Ms. XXXX explained that all inmates considered phone conversations to be monitored and that acoustics made private phone conversations impossible. (Tr. 3/20/95 at 45-47; 86-87). Ironically, there was also testimony by government prosecutor, Joseph Revesz, that when Nicosia called to inform him of Ms. XXXX's alleged threats, Nicosia herself was afraid to use the phones for fear of being overheard. (Tr. 3/17/95 at 75; 80). Moreover, it was definitively shown that Ms. XXXX's father was incarcerated in the Pueblo County Jail in Pueblo, Colorado between October 18, 1994 and November 3, 1994. (Tr. 3/20/95 at 30-31; 133; 137). See also Defense Exhibits 20a-c; Government's Exhibit 24. Therefore, because a Dallas County Jail inmate could only make outgoing, collect calls and would be hung up upon if she attempted a three way call, Ms. XXXX could not have spoken with her father on October 30, 1994 as alleged at trial. (Tr. 3/20/95 at 46; 64; 75-76).

As to Nicosia's testimony that Ms. XXXX had told her during their early morning meeting in the day room that her (Ms. XXXX's) "Daddy" came to visit her in the Dallas County Jail from

Pueblo, Colorado on or about October 3, 1994 for the purpose of hiring a hit man, two of Ms. XXXX's aunts who live in Pueblo, Colorado testified that her father, Henry Clay XXXX, never came to Dallas in October of 1994. (Tr. 3/20/95 at 103-04; 111). Mr. XXXX lived with one sister in Pueblo during this time and maintained daily contact with the other. (Tr. 3/20/95 at 104; 111). Both sisters also testified that Ms. XXXX had no other male relatives in Pueblo, Colorado that she called "Daddy." (Tr. 3/20/95 at 105; 112). It was finally learned after the trial had concluded that the government case agent had copies of the Dallas County Jail visitation records in his possession at the time of Nicosia's testimony that showed definitively that Mr. XXXX never visited his daughter in the Dallas County Jail.³

³ On two occasions shortly following Nicosia's testimony and while the trial was still in progress, defense counsel made an oral request of case agent Bill Randall to obtain the Dallas County Jail visitor records of October 3, 1994. See Declaration of F. Clinton Broden ("Broden Dec.") (Attachment A to Appendix) at ¶¶ 5-6 (emphasis added). At least one of these requests was made in the presence of Assistant United States Attorney Michael Snipes. Id. at ¶ 6. Nevertheless, these records were not produced at any time during the trial. Id. at ¶ 7.

Unbeknownst to the defense, the government's case agent did have in his possession the Dallas County Jail records listing Ms. XXXX's visitors while she was incarcerated in the Dallas County Jail. See Affidavit of William R. Randall (Attachment B to Appendix) at 1; Broden Dec. at ¶ 12. Moreover, these records proved unequivocally that Ms. XXXX received no visits from her father or a man from Pueblo, Colorado on October 3, 1994 or at any other time while she was incarcerated in the Dallas County Jail. See Jail records (Attachment C to Appendix). Despite the case agent's possession of these records, the government still allowed Ms. Nicosia to testify that she was told such a visit had taken place when it was clear it did not.

Following Ms. XXXX's conviction and prior to sentencing, the government eventually produced copies of the Dallas County Jail records it had previously obtained. Those records

B. Counts 4-8

Counts 4-8 of the indictment arose out of activities that allegedly took place at a federal prison camp in Bryan, Texas. Ms. XXXX had been convicted of possession of stolen treasury checks in a federal trial held in Dallas, Texas in August of 1993. As a result of that conviction, Ms. XXXX was designated to FPC-Bryan in April of 1994. (Tr. 3/14/95 at 56; 83). Shenna Fisher was a co-conspirator who had testified against Ms. XXXX during Ms. XXXX's treasury check trial. (Tr. 3/14/95 at 54). As a result of her cooperation at that trial, Ms. Fisher was put on probation. (Tr. 3/14/95 at 55). Nevertheless, Ms. Fisher violated her probation and was designated to FPC-Bryan on January 28, 1994. (Tr. 3/14/95 at 56). Thus, Ms. Fisher had been at FPC-Bryan for about two months before Ms. XXXX arrived.

Counts 4-6 alleged that Ms. XXXX forced Shenna Fisher to write letters to judges in the Northern District of Texas falsely stating that she (Shenna Fisher) had not testified truthfully in the treasury check trial as a result of being coerced by Assistant United States Attorney Joseph Revesz and Postal Inspector David McDermott. Counts 7-8 alleged that Ms. XXXX wrote her own letter to Judge Sidney A. Fitzwater repeating that Ms. Fisher was coerced to give false testimony in the treasury check trial.

1. Government case

Ms. Fisher testified in the instant case that when Ms. XXXX arrived at FPC-Bryan, Ms. XXXX approached her and showed her a letter purportedly written by Judge Fitzwater to Ms. XXXX explaining that he was investigating Mr. Revesz and Inspector McDermott. (Tr. 3/14/95 at 57-58; 139). Ms. XXXX then allegedly told Ms. Fisher that if Ms. Fisher recanted her testimony from the treasury check trial, Ms. Fisher would be released from FPC-Bryan on home confinement. (Tr. 3/14/95 at 57; 63-64). Ms. Fisher also alleged that Ms. XXXX threatened the lives of her

clearly reflect that they were printed on November 22, 1994 - four months prior to Nicosia's trial testimony.

children and her mother in the event she did not recant her earlier testimony and, in addition, threatened to "knock off" Inspector McDermott and Mr. Revesz. (Tr. 3/14/95 at 58-60).

Ms. Fisher testified that Ms. XXXX made her write a letter to James Murphy, Ms. XXXX's lawyer, stating that she had been coerced to testify falsely at the treasury check trial. (Tr. 3/14/95 at 62-63). Ms. Fisher claimed that Ms. XXXX had written the letter originally but then made her write the letter out in her own handwriting and sign it. (Tr. 3/14/95 at 62-63). Significantly, Ms. Fisher testified that Hattie Hutson, an FPC-Bryan inmate who served as a librarian, observed Ms. XXXX forcing her to rewrite the letter and could testify to this. (Tr. 3/14/95 at 85-86; 107). Ms. Fisher also identified a notarized document entitled Affidavit to Any Fact dated May 12, 1994 that purported to be her own affidavit that set forth the allegations of coerced testimony at the treasury check trial and that was sent to Ms. XXXX's lawyer. (Tr. 3/14/95 at 65-67). Nevertheless, Ms. Fisher testified that she did not type the Affidavit and only signed it in the presence of a FPC-Bryan notary because she was made to do so by Ms. XXXX. *Id.* Ms. Fisher also testified that she did not type two letters that were sent to Judge Sidney A. Fitzwater in her name (letters forming the bases for Counts 4-5) or a letter sent to Judge Joe Kendall in her name (letter forming the basis for Count 6). (Tr. 3/14/95 at 68-71). Although Ms. Fisher admitted signing these letters, she testified that she was forced to do so by Ms. XXXX. (Tr. 3/14/95 at 68-71).

After the judges and the attorneys began receiving the letters from FPC-Bryan, Assistant United States Attorney Revesz moved the Court to prohibit representatives from either side of the treasury check case from having contact with Ms. Fisher. (Tr. 3/17/95 at 74; 77). See also Defense Exhibit No. 15. Nevertheless, in July of 1994, before the Court could rule on the government's "no contact" motion, Postal Inspector Rick Welborn went to FPC Bryan to interview Ms. Fisher. (Tr. 3/14/95 at 215). During that interview, Ms. Fisher told Inspector Welborn that she was forced to recant her testimony in the treasury check case by Ms. XXXX and that Ms. XXXX had more papers in her (Ms. XXXX's) dorm room that she was going to be made to

sign. (Tr. 3/14/95 at 71-76; 103; 219; 237).⁴ Despite testifying that she was afraid to tell prison officials of the alleged pressure by Ms. XXXX, Ms. Fisher testified that she was not afraid to tell Inspector Welborn. (Tr. 3/14/95 at 100). Notably, Ms. Fisher never mentioned in her written statement to Inspector Welborn that Ms. XXXX threatened her mother and children or that Ms. XXXX threatened to "knock off" Inspector McDermott or Mr. Revesz. (Tr. 3/14/95 at 109; 134-35; 235-37).

The government introduced a written statement that Ms. Fisher had given to postal inspectors prior to her testimony in the treasury check case. (Tr. 3/14/95 at 53). The government used that statement to show that it was consistent with her trial testimony and was given before she met Mr. Revesz. Significant for purposes of this motion, the statement contained numerous allegations regarding Ms. XXXX's participation and leadership in regard to the unrelated treasury check case. See Government Exhibit No. 1. The statement was also read to the jury verbatim by Postal Inspector Jack McDonough. (Tr. 3/14/95 at 204-05).

In short, Ms. Fisher testified that her testimony at the treasury check trial had been truthful and had not been coerced by Mr. Revesz or Inspector McDermott. (Tr. 3/14/95 at 54-55). Moreover, Ms. Fisher explained to the jury that she could not have typed the letters sent to Judge Fitzwater and Judge Kendall in her name because she did not know how to type. (Tr. 3/14/95 at 47; 65-66; 78).

On cross-examination, Ms. Fisher admitted that she went to secretarial school for two years, but still denied knowing how to type. (Tr. 3/14/95 at 78-79; 119-122). She claimed that Ms. XXXX began threatening her about a week after Ms. XXXX arrived at FPC-Bryan in April of 1994. (Tr. 3/14/95 at 83). She claimed that she lived in constant fear of what Ms. XXXX would do to her

⁴ Agent Welborn, who testified as a government witness at trial, testified he never bothered to search Ms. XXXX's dorm room in order to confirm Ms. Fisher's allegations regarding the additional papers. (Tr. 3/14/95 at 237-38). Nevertheless, prison officials testified that such a search could certainly have been performed. (Tr. 3/17/95 at 157-58).

mother and children, but admitted never having reported this to the officials at FPC-Bryan. (Tr. 3/14/95 at 87). Ms. Fisher denied seeking out Ms. XXXX when Ms. XXXX arrived at FPC-Bryan and also denied telling Hattie Hutson that she had, in fact, testified falsely against Ms. XXXX in the earlier case. (Tr. 3/14/95 at 84-86).

Ms. Fisher did admit that she and Ms. XXXX exchanged clothes and jewelry with each other while they were confined at FPC-Bryan; that she and Ms. XXXX bought things for each other at the prison commissary; and that she had lent Ms. XXXX a watch in order that Ms. XXXX could get to work on time. (Tr. 3/14/95 at 57; 95-97; 127-28; 137-38). She also admitted inviting Ms. XXXX to be her guest at her graduation ceremony in June of 1994. (Tr. 3/14/95 at 97; 127). A prison official testified that the graduation ceremony is considered a "big deal" to inmates. (Tr. 3/20/95 at 16).

Toward the end of Ms. Fisher's testimony, she was asked to spell Ms. XXXX's name. She spelled the name E-L-Y. (Tr. 3/14/95 at 122; 131). This misspelling was identical to the misspelling of "XXXX" that was contained in many of the letters that Ms. Fisher denied writing and/or typing. (Tr. 3/14/95 at 238-43).

The government called two other witnesses, Lindy Lovett and Danette Williams, who were incarcerated at FPC-Bryan with Ms. Fisher and Ms. XXXX. Ms. Lovett arrived at Bryan on May 2, 1994. (Tr. 3/14/95 at 150). Ms. Lovett testified that she met Ms. XXXX after being at Bryan for one week and became friends with her. (Tr. 3/14/95 at 151; 161-62). Ms. Lovett further testified that about one week after she met Ms. XXXX (i.e. two weeks after Ms. Lovett arrived at FPC-Bryan), Ms. XXXX told her that she was "going to get" Ms. Fisher to recant her testimony. (Tr. 3/14/95 at 171; 196).⁵ Thus, Ms. Lovett testified that Ms. XXXX was speaking in the future tense

⁵ A defense investigator testified that he had spoken to Ms. Lovett the night before she went through witness preparation with the government and during his interview he is positive Ms. Lovett had told him that she knew Ms. XXXX for one month before Ms. XXXX allegedly told her that she was "going to get" Ms. Fisher to recant her testimony. (Tr. 3/17/95 at 26-28).

when she allegedly told her that she was "going to get" Ms. Fisher to change her story and that this occurred about two weeks after Ms. Lovett's May 2, 1994 arrival at FPC-Bryan. (Tr. 3/14/95 at 171-74). Significantly, the first letter Ms. Fisher claims that Ms. XXXX forced her to write was the letter to Ms. XXXX's lawyer and is dated May 10, 1994, only eight days after Ms. Lovett's arrival at FPC-Bryan. See Government Exhibit 2 (Letter written and signed by Shenna Fisher to James Murphy (Ms. XXXX's counsel in the treasury check case)). Ms. Lovett also alleged that she witnessed Ms. XXXX type two of the letters that Shenna Fisher had signed. (Tr. 3/14/95 at 154-56).

Ms. Lovett did admit that she made several attempts to become an informant for the Drug Enforcement Agency in order to get her sentence reduced and also admitted that she told prosecutors that she would do "whatever it takes to get [herself] home to [her] children." (Tr. 3/14/95 at 178; 183). See also Defendant's Exhibit No. 10. Ms. Lovett expected to be rewarded for her testimony in the instant case and to have her sentence reduced. (Tr. 3/14/95 at 185-86; 191-92). Ms. Lovett identified a letter at trial that Ms. XXXX had written to her when Ms. XXXX was transferred from FPC-Bryan wherein Ms. XXXX used the alias "Peaches." (Tr. 3/14/95 at 164-65). It was explained at trial that prisoners in different institutions are not allowed to write to each other from one institution to another and it is common for them to use aliases in order to circumvent this rule. (Tr. 3/17/95 at 158).

Danette Williams testified that she was friends with Ms. Fisher while they were incarcerated at FPC-Bryan. (Tr. 3/15/95 at 194-95). She testified that Ms. XXXX would often send somebody to bring Ms. Fisher to her (Ms. XXXX's) dorm room and that Ms. Fisher always looked depressed and pressured after seeing Ms. XXXX. (Tr. 3/15/95 at 196-98).

The government also called Mr. Revesz and Inspector McDermott to testify. Mr. Revesz was permitted to explain to the jury many of the facts and circumstances regarding his prosecution of Ms. XXXX in the treasury check trial. For example, Mr. Revesz explained that there were many co-conspirators and that all but Ms. XXXX pleaded guilty. (Tr. 3/17/95 at 63-64). He explained that co-defendants Ricky Halton, Craig Halton, Shenna Fisher, Raymona Galloway, Margaret Dick,

JacquXXXXne Sewell and Tammy Nelms all testified against Ms. XXXX and that all but Ms. Sewell and Ms. Dick had testified that Ms. XXXX was the ringleader. (Tr. 3/17/95 at 68). Mr. Revesz also testified that that case was still under investigation. (Tr. 3/17/95 at 63-64).

Inspector McDermott was also allowed to offer extensive testimony regarding Ms. XXXX's initial case. He testified that twelve people were indicted and all but Ms. XXXX pleaded guilty; that six witnesses testified that Ms. XXXX was the ringleader of a scheme involving stolen treasury checks; and that Ms. XXXX's fingerprints were found on stolen treasury checks. (Tr. 3/15/95 at 242-43; 251-53).

2. Defense case

The defense called two inmates, Hattie Hutson and Johnnie Adams, both of whom were at FPC-Bryan with Ms. XXXX and Ms. Fisher. Ms. Hutson, who worked in the library, testified that she first met Ms. Fisher when Ms. Fisher came to the library and asked for a motion book in order to "correct a lie" she had told on a co-defendant. (Tr. 3/17/95 at 92; 95; 100; 108). Ms. Hutson testified that Ms. Fisher appeared to be at the library under her own free will and was not with Ms. XXXX. (Tr. 3/17/95 at 101-02). Ms. Hutson said that, although she later met XXXX XXXX when Ms. XXXX helped her manage her tray in the prison cafeteria, she did not even know Ms. XXXX when Ms. Fisher came to her wanting to "correct a lie." (Tr. 3/17/95 at 102; 106-07). Ms. Hutson advised Ms. Fisher, when Ms. Fisher approached her, that she should get her PSI and write a notarized letter to her sentencing judge. (Tr. 3/17/95 at 100-01). Ms. Hutson testified that some days later she talked to Ms. Fisher on the prison compound and Ms. Fisher seemed happy that she located her PSI and told Ms. Hutson she planned on writing her sentencing judge. (Tr. 3/17/95 at 106). Again, Ms. Fisher was alone with Ms. Hutson during their encounter on the compound and Ms. XXXX was not present. (Tr. 3/17/95 at 105-06). Contrary to Ms. Fisher's testimony at the instant trial, Ms. Hutson testified that she never saw Ms. XXXX force Ms. Fisher to rewrite a letter to Ms. XXXX's lawyer. (Tr. 3/17/95 at 109-10). Moreover, during her testimony, Ms. Hutson reviewed the letter to Ms. XXXX's lawyer that Ms. Fisher testified she was forced to sign (Government Exhibit No. 2) and testified that the wording of the letter was "just like" the wording

of the oral statements Ms. Fisher made to her when she came into the library looking for a motion book to "correct a lie." (Tr. 3/17/95 at 110).

Johnnie Adams, Ms. XXXX's roommate at FPC-Bryan, also testified. (Tr. 3/17/95 at 129). Ms. Adams testified that the day after Ms. XXXX arrived at Bryan, Ms. Fisher asked Ms. Adams for her room number so she could visit Ms. XXXX. (Tr. 3/17/95 at 130). Ms. Adams testified that she witnessed Ms. Fisher come to their dorm room on three occasions. (Tr. 3/17/95 at 149). Ms. Adams stated that each time Ms. Fisher appeared to be there on her own free will and that Ms. Fisher appeared calm. (Tr. 3/17/95 at 133-34). Ms. Adams told the jury that Ms. XXXX appeared stunned when she was invited by Ms. Fisher to Ms. Fisher's graduation ceremony. (Tr. 3/17/95 at 135).

The defense also called three FPC officials to testify. John Williams, the Associate Warden, explained the orientation at FPC-Bryan where inmates are told who they can approach if threatened by other inmates. (Tr. 3/17/95 at 155-56; 160-62). Contrary to Ms. Fisher's testimony, Associate Warden Williams stated that inmates could even make appointments directly with the Warden to discuss such matters. Compare Tr. 3/14/95 at 100-01 with Tr. 3/17/95 at 163. Barbara Leshikar, Ms. Fisher's case manager, testified that Ms. Fisher, contrary to Ms. Fisher's trial testimony in this case, explicitly denied to her that she had been threatened by another inmate. Compare Tr. 3/14/95 at 89 with Tr. 3/20/95 at 18. Finally, John Martinez, Ms. Fisher's counselor, testified that he would have been alone with Ms. Fisher when he notarized Ms. Fisher's signature on the document entitled Affidavit to Any Fact, a document Ms. Fisher alleged Ms. XXXX forced her to sign, and that Ms. Fisher never told him at any time that she was being coerced or threatened by XXXX XXXX. (Tr. 3/20/95 at 9-10).

C. Evidence not directly related to Counts 1-3 or Counts 4-8

Over objection, Raymona Galloway testified as a government witness. (Tr. 3/15/95 at 186-91). The government stated that it was offering Ms. Galloway's testimony to corroborate the testimony of Shenna Fisher. (Tr. 3/15/95 at 188). Ms. Galloway was arrested with Ms. XXXX in connection with Ms. XXXX's initial case involving the stolen treasury checks. (Tr. 3/15/95 at 220).

Ms. Galloway was allowed to testify that she and Ms. XXXX had a criminal business relationship and that Ms. XXXX was the "head honcho" of a scheme to cash stolen treasury checks that involved more than twenty-five people. (Tr. 3/15/95 at 218-20). She testified that when she and Ms. XXXX were originally arrested in the treasury check case and were waiting in a holding cell for their initial appearances, Ms. XXXX stated she would "get" the person that turned her in. (Tr. 3/15/95 at 221). Ms. Galloway stated that she told Postal Inspector McDermott of Ms. XXXX's statement at the time it was allegedly made. (Tr. 3/15/95 at 234). Nevertheless, Inspector McDermott candidly admitted that he did not recall Ms. Galloway ever telling him this. (Tr. 3/14/95 at 8).

III. NEW EVIDENCE FURTHER INDICATING NICOSIA'S ATTEMPTS TO "POLLUTE THE WATERS OF JUSTICE"⁶

Since Ms. XXXX's trial in March of 1995, new evidence demonstrates that allowing Counts 1-3 to stand on the sworn word of Tanya Nicosia alone would "pollute the waters of justice." This Court will recall that at trial the government presented Nicosia to the jury as a 'changed person.' Not surprisingly, time proved this portrayal to be false. Indeed, the only thing surprising is just how false it was.

In October of 1995, Nicosia stole two law books from a Florida law library. See Gov't Proffer at 7.⁷ From that, it was discovered that, since her return to Florida in February 1995 (a month prior to her testimony against Ms. XXXX), Nicosia had written "countless bad checks" and defrauded a Florida businessman of over \$50,000 by stealing his checks and forging his signature to those checks. Id. at 8-9.

Following her arrest on the various Florida charges in November 1995, Nicosia provided false documents to a bailbondsman in order to secure her release. Id. at 10. In January 1996, the United States District Court for the Middle District of Florida issued a warrant for Nicosia's arrest based upon violations of her supervised release. Id. at 10. As per usual, Nicosia fled the jurisdiction. Id.

Nicosia's flight originally took her to California and, using different aliases, she defrauded numerous banks. Id. at 11. While on the run, she married Anthony Hawkins "as a scam." Id. at 10, n.6.⁸ When Nicosia was eventually spotted by a bounty hunter in California, she and Hawkins

⁶ The information in this section was obtained from a document filed in October 1996 by the United States Attorney's Office for the Middle District of Florida in a proceeding to revoke Nicosia's supervised release. See United States' Written Proffer for Purposes of Sentencing ("Gov't Proffer") (Attachment D to Appendix).

⁷ In the trial in this case, Nicosia denied portraying herself to inmates as a lawyer despite other testimony that she did. Compare (TR 3/15/95 at 53) with (TR 3/20/95 at 54-55).

⁸ Nicosia is apparently married to three men simultaneously. See Gov't Proffer at 17.

again fled, this time leaving her children behind. Id. at 11-12.⁹ For another month, Nicosia promised United States Marshals that she would surrender herself but, instead, she "continued to defraud various banks nationwide." Id. at 13.¹⁰ Nicosia was eventually located by the Marshals on March 15, 1996 and captured after a foot chase. Id. at 14.

During her time on the run, Nicosia told Hawkins' mother that she had previously testified against white supremacists and was in the witness protection program. Id. at 12. She also **"repeatedly told Ms. Hawkins that she [would] not receive a substantial sentence [when she was apprehended] because she [would] provide information about others and be released."** Id. at 14, n.8 (emphasis added).

Significantly, "within 24 hours of her arrest, Nicosia contacted Deputy Ellis [the Marshal that arrested her] and reported the allegedly illegal activity of her cellmates." Id. at 14. Moreover, "since the **moment** of her [removal back to] the Middle District of Florida in April of 1996, [Nicosia] placed **dozens** of calls to law enforcement agencies offering testimony against fellow inmates." Id. (emphasis added). On May 21, 1996, Nicosia contacted the DEA in Orlando and reported that an inmate was conspiring with an associate to kill two people, including an Assistant United States Attorney and a federal witness. Id. at 15. It was later learned that Nicosia obtained this information from reading the inmate's presentence report. Id. A few weeks earlier, although she had not mentioned it to the Orlando DEA officials, Nicosia had also contacted federal officials in Tampa and reported a "similar 'death threat' by a different inmate against other federal officials." Id. at 6.

⁹ The children were placed into protective custody. They had dental problems, skin problems, and serious behavioral problems that included setting fires to houses. See Gov't Proffer at 12. Unfortunately, this is not surprising given that Nicosia apparently flaunted her most recent criminal activities to her children. Id. at 11, n.7.

¹⁰ These include banks in Illinois, Ohio, Michigan, Massachusetts, New York, Connecticut, New Jersey, Florida, Louisiana and California. See Gov't Proffer at 13.

The defendant was "working" two separate "death threat" cases simultaneously in the same district without advising either of the case agents of her activities. As a result of the defendant's reports, several government employees were needlessly frightened, investigations were conducted which produced no corroborating evidence, and the United States spent a substantial amount of money protecting people that did not require protection. Both investigations were later closed.

Id. Assistant United States Attorney Terri Donaldson characterizes Nicosia's activities as "nothing short of shocking." Id. at 2. Ms. Donaldson suggested that Nicosia may well be a "sociopath" and pointed out to the Florida Court that "[i]t's become a near full-time job for me to have to return the calls of law enforcement officers who have been contacted by Tanya Nicosia and avoid what could be a scenario that results in someone being prosecuted who didn't commit a crime." See Revocation Transcript in United States of America v. Nicosia, No. 96-1-CR-T-23B (M.D. Fla.) (Attachment E to Appendix) ("Nicosia Tr.") at 11-12.

In connection with Nicosia's supervised release hearing in Florida, the government asked the judge to impose the three year statutory maximum. See Gov't Proffer at 18. Unlike the United States Attorney's Office for the Northern District of Texas, its counterpart in Florida chose not to embrace Nicosia's attempts to falsely implicate other inmates by reading inmates' legal materials. Id. at 14-15 ("[T]his Defendant [Nicosia] cannot be used as a witness by this office in any prosecution." (emphasis added)). To the contrary, the United States Attorney's Office for the Middle District of Florida made the following unusual request to the Florida Court:

The United States further requests that the defendant be prohibited from acting as an informant or witness in any matter while in custody or on supervised release except with the consent of this Court. The defendant presents a grave risk of providing false information that may result in the wrongful prosecution of others.

Id. In making this request, Assistant United States Attorney Donaldson made specific reference to the instant case:

There's so many things to comment on, Your Honor, and perhaps I'm most troubled by the situation that comes from the Assistant U.S. Attorney in Dallas, the prosecutor who has actually called Tanya Nicosia as a witness in front of a jury.

Now, I had pointed out in my written proffer that that case was reversed on appeal, the three counts specifically pertaining to Ms. Nicosia. It was hotly contested. It was reversed on a legal ground, although her credibility was strenuously argued in the defendant's brief, which I reviewed.

Nicosia Tr. at 36.

The restriction requested by the United States Attorney's Office for the Middle District of Florida was ultimately adopted by the Honorable Steven D. Merryday in revoking Nicosia's release for three years.

The defendant is not to be removed from detention as a result of an order from any other United States District Court or any State Court until and unless this Court orders it. The defendant must notify Charles R. Wilson, the United States Attorney for the Middle District of Florida, or his authorized successor or designated representative prior to being interviewed by any law enforcement officer or other person in connection with providing information on the alleged criminal activities of others. The notification must include the name, agency, and telephone number of the law enforcement officer or other person seeking to interview the defendant.

Order (Attachment F to Appendix).¹¹

¹¹ The "United States' Written Proffer for Purposes of Sentencing" from the Middle District of Florida also contains several pieces of information that would indicate that Nicosia perjured herself in the instant case. Moreover, it contains information that may require a hearing to determine if the government in this case withheld Brady and Giglio information in addition to the Dallas County Jail records discussed above.

First, Nicosia was presented at trial as working for the Dallas law firm of Rutchik and Rosenberg doing legal research. (TR 3/15/95 at 2-4). Nevertheless, the United States Attorney's Office in Tampa reports that this was never true and, in fact, Nicosia actually had defrauded that firm of \$4,000. See Gov't Proffer at 17.

Second, it was never revealed to the defense in this case that, in connection with her plastic surgery (see, supra, at 4), Nicosia made a false report to the FBI and stated that her scaring came from two men connected with her bondsman who "punched her in the face" and told her that she had been "talking too much to the cops." Id. at 3.

IV. ARGUMENT

V.

A. THE COURT SHOULD CLARIFY ITS PREVIOUS NEW TRIAL ORDER TO INDICATE WHY THE EVIDENCE ON COUNTS 4-8 WOULD NOT HAVE BEEN ADMISSIBLE IN A TRIAL ON COUNTS 1-3 ALONE AND IN ORDER TO INDICATE THAT ITS NEW TRIAL ORDER IS BASED, IN PART, ON ITS DETERMINATION OF TANYA NICOSIA'S CREDIBILITY.

1. Admissibility of Counts 4-8 evidence on Counts 1-3

At trial, the government introduced the testimony of thirteen witnesses in its case-in-chief:

Counts 4-8

Shenna Fisher
Lindy Lovett
Danette Williams
Postal Inspector Rick Welborn
Postal Inspector David McDermott
Postal Inspector Jack McDonough
Assistant United States Attorney Joseph Revesz
Typewriter expert

Counts 1-3

Tanya Nicosia
3 character witnesses

Other

Raymona Galloway

a. Categories of Irrelevant Evidence

Third, it was never revealed to the defense in this case that, in connection with her capture in 1992 by the FBI (see, supra, at 4), Nicosia made a false police report claiming her van had been stolen when it had actually been seized by the FBI. Id. at 4.

Fourth, Nicosia claimed at trial in this case that she was raped by two guards transporting her from Connecticut to Dallas. (Tr. 3/15/95 at 74-76). In point of fact, while certainly a derXXXXction of their duties, Nicosia convinced one of the guards to have consensual sex with her three different times, including in the restroom of an airplane en route from Newark, New Jersey to Dallas. See Gov't Proffer at 7.

It is clear that much of the government evidence admitted at trial, with the exception of Tanya Nicosia and her three character witnesses, would not be admissible on the question of whether XXXX XXXX threatened to kill David McDermott, Joseph Revesz and Shenna Fisher on or about October 30, 1994 in the Dallas County Jail.

First, allegations that Ms. XXXX coerced and threatened Ms. Fisher to send letters to various judges in the Northern District of Texas recanting her previous trial testimony by, inter alia, forging a letter and telling Ms. Fisher the letter was written by Judge Fitzwater and threatening Ms. Fisher's mother and children are not relevant as to whether Ms. XXXX made the threats alleged in Counts 1-3.¹²

Second, allegations by Ms. Fisher that Ms. XXXX threatened to "knock off" David McDermott and Joseph Revesz during the time she and Ms. XXXX were incarcerated at FPC-Bryan in April-June 1994, four to six months before the threats alleged in Counts 1-3, would clearly be inadmissible in a trial on Counts 1-3 alone. Indeed, as will be discussed in the next section, such "did it once will do it again" type of evidence is exactly the type of evidence that is prohibited under Fed. R. Evid. 404. See, e.g., United States v. Brown, 71 F.3d 1158, 1162 (5th Cir. 1995) ("The only way in which Ms. Whitson's cross-examination testimony could help identify Mr. Brown was through the inference that because Mr. Brown committed the crime of possession with intent to distribute before, he had done so again. This is the inference that Rule 404(b) prohibits.").

Third, the testimony of Raymona Galloway that, on the day she and Ms. XXXX were arrested, Ms. XXXX threatened "to get" the person responsible for her arrest would be inadmissible

¹² Significantly, the threats Ms. XXXX supposedly made to Nicosia regarding Shenna Fisher were not for the purpose of getting Shenna Fisher to recant her trial testimony but, rather, to allegedly retaliate against Fisher for having testified. Thus, a previous threat made directly to Fisher in order to get Shenna Fisher to recant her previous testimony would not be relevant on whether Ms. XXXX made later threats for purposes of retaliation.

for similar reasons. Even if Ms. XXXX had, in fact, threatened "to get" the person that was responsible for her arrest (undoubtedly a common reaction immediately following an arrest), such a fact bears little, if any, relevance as to whether Ms. XXXX would actually threaten to hire a hit man to kill David McDermott, Joseph Revesz and Shenna Fisher more than a year later.

Fourth, the testimony of Lindy Lovett regarding Ms. XXXX's alleged attempt to trick Ms. Fisher to recant her testimony by forging a letter from Judge Fitzwater would be irrelevant on the issues involved in Counts 1-3. Ms. Lovett's testimony regarding Ms. XXXX's writing of the "Peaches letter," using an alias to communicate with another prisoner in violation of prison rules, would also be irrelevant on those issues.

Fifth, the testimony of Danette Williams regarding Shenna Fisher being scared of XXXX XXXX in no way addresses whether Ms. XXXX threatened to kill those individuals set forth in Counts 1-3 of the indictment in the presence of Tanya Nicosia.

Sixth, while limited testimony from Shenna Fisher, David McDermott and Joseph Revesz would likely be admissible to explain their positions and to offer a motive as to why Ms. XXXX might want to threaten to kill them, the extensive testimony regarding the detailed facts of Ms. XXXX's treasury check conviction would certainly not be admissible on Counts 1-3 alone. Indeed, both Inspector McDermott and Mr. Revesz were permitted to name the many participants in the treasury check scheme; the fact that Ms. XXXX was the ring leader of the scheme; that all of the participants in the scheme were willing to testify against Ms. XXXX and that most did; that Ms. XXXX's fingerprints were found on the stolen treasury checks; and that the scheme was still under investigation. See, supra, at 15. The government's sole assertion at the time for the admissibility of such damning character evidence was that it showed that Ms. XXXX "knew" she was guilty of the stolen treasury check scheme and, therefore, knew that Shenna Fisher had not testified falsely when she (Ms. XXXX) sent her own letters to Judge Fitzwater (Counts 7-8) claiming that Ms. Fisher had testified falsely. (Tr. 3/15/95 at 247-49). Obviously, this bears no relevance to Counts 1-3. Likewise, Postal Inspector Jack McDonough, in an effort to show consistency between Ms. Fisher's initial statements to postal inspectors and her trial testimony in the treasury check case, was actually permitted to read verbatim Ms. Fisher's initial statement that detailed Ms. XXXX's role in the entire treasury check scheme and that statement was introduced at trial as Government's Exhibit No. 1. (Tr. 3/14/95 at 204-05).

b. Fed. R. Evid. 404(b) exceptions inapplicable

Ms. XXXX anticipates that the government will offer the Court a laundry list of explanations as to why, under Fed. R. Evid. 404(b), the evidence outlined above would still be admissible in a trial on Counts 1-3 alone. For example, on appeal, the government argued that such

evidence would be admissible "to show, inter alia, motive, design, plan and pattern of conduct in making the threats against Fisher, Revesz and McDermott." Nevertheless, commentators have perceptively noted that Judges "should be wary when the proponent of bad act evidence cites a 'laundry list' of possible purposes, without being able to articulate how the evidence is probative of those purposes or even that those matters are at issue in the case." 1 Stephen A. Saltzburg, Michael M. Martin & Daniel J. Capra, Federal Rules of Evidence Manual at 323 (1994).

As a primary matter, it should be noted that the purpose of evidence introduced pursuant to Fed. R. Evid. 404(b) regarding motive, plan or pattern of conduct is almost always to show the identity of the perpetrator of a crime. For example:

The fact that the defendant had a motive for that particular crime increases the inference of the defendant's identity. Many other persons presumably had no motive, and the defendant's motive raises the probability of defendant's identity. "[A] person with a motive to commit a particular crime is more likely to commit the crime than is a person about whom nothing is known."

Edward J. Imwinkelried, Uncharged Misconduct Evidence § 3:15 at 69 (1995) (citations omitted).

Likewise, plan evidence is also usually admitted for the purpose of showing identity.

Proof that the defendant entertained a plan, including the commission of the charged crime, is logically relevant to show the defendant's identity as the criminal. Just as not all persons have the motive or opportunity to commit the crime, not all persons consider a plan to do so. Hence, proof that the defendant entertained a plan in his mind is probative of the defendant's identity as the criminal; the proof raises the probability of guilt by setting the defendant apart from innocent persons who had no such plan.

* * *

[For example] The defendant's burglary of a pawn shop can be used to show the defendant's plan to obtain the weapons for a robbery. The defendant's theft of a car can be employed to show the defendant's plan to use the car as a getaway vehicle in a kidnapping or robbery. The defendant's theft of a uniform is evidence of the defendant's plan to masquerade as a guard in order to rob an armored car.

Id. at § 3:21 at 99 and § 3:22 at 102-03 (citations omitted). Finally, "pattern" evidence is not even mentioned in Fed. R. Evid. 404(b). United States v. Beasley, 809 F.2d 1273, 1277 (7th Cir. 1987).

"Pattern" is missing...in Rule 404(b)'s list of permissible uses of bad act evidence. "Pattern" usually is a shorthand for a series of acts that collectively identify the offender - the ten bank robberies by a gang disguised by red polka dot bandannas, the series of counterfeit bills made by an engraver who never gets the Great Seal quite right, and so on. The pattern serves as the signature that enables the jury to determine that this offense, too, was committed by the defendant. See the summaries in McCormick on Evidence 449 (Cleary ed. 1972), and 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 404[16] (1986 rev.). This use of pattern to show identity, or sometimes the extent and membership of a conspiracy, is the usual one in this circuit, as in others.

Id. Nevertheless, here there is absolutely no question that, if Tanya Nicosia did, in fact, hear somebody threaten to kill David McDermott, Joseph Revesz and Shenna Fisher, it was XXXX XXXX who she heard. The question is whether the crime actually occurred; the question is not the identity of the individual who committed the crime.

Considering the government's anticipated 404(b) arguments in turn, Ms. XXXX concedes that the government would have been permitted to explain the role of Inspector McDermott, Mr. Revesz and Ms. Fisher in Ms. XXXX's earlier prosecution in order to offer a possible motive as to why she might be angry enough with the three of them to threaten to kill them in front of Tanya Nicosia. Nevertheless, this does not begin to explain why the details of the stolen treasury check scheme, the steps Ms. XXXX supposedly took to get Ms. Fisher to write letters to judges, and prior threats regarding Inspector McDermott and Mr. Revesz, show a "motive" to kill Inspector McDermott, Mr. Revesz or Ms. Fisher.

Likewise, this evidence is not admissible to show "design, plan and pattern of conduct." To begin with, it is difficult to understand the government's claim that an overarching "plan" existed encompassing the evidence in Counts 4-8 and the evidence in Counts 1-3. The alleged plan involved in Counts 4-8 was a plan to get a witness to recant her testimony so that a defendant could get a new trial, whereas the alleged plan involved in Counts 1-3 was a plan to kill those responsible for a defendant's earlier prosecution. Unlike a plan to steal a uniform in order to have a disguise as part of an overarching plan for an armored car robbery, it is difficult to see how a plan to get a new trial is part of an overarching plan that ultimately includes revenge. Likewise, the activities Ms.

XXXX allegedly engaged in as the "head honcho" of a stolen treasury check scheme were clearly not part of a plan to then kill the people responsible for her conviction arising out of those activities.

It is also simply not enough to show a pattern of criminal conduct, even similar, criminal conduct. Beasley, 809 F.2d at 1278. The pattern must be illustrative of some issue. Id. For example, showing that a defendant sold drugs in the past would not usually be admissible at a defendant's drug trial, but if it could be shown that in past sales the defendant established a pattern of using pink baggies, previous sales might then be admissible in a trial where the defendant is charged with selling drugs and the drugs were in pink baggies. Likewise, in United States v. Krezdorn, 639 F.2d 1327 (5th Cir. 1981), the Fifth Circuit held that it was error to introduce evidence of thirty-two additional forgeries to prove the four forgeries that the defendant was charged with committing. Id. at 1331. The Court held that this extrinsic evidence "would, at best, merely demonstrate the repetition of similar criminal acts, thus indicating [the defendant's] propensity to commit this crime." Id. In the alternative, the Court held that the admission of the evidence violated Fed. R. Evid. 403.

Moreover, even if the thirty-two forgeries could somehow be considered relevant to the existence of a plan, the evidence fails to satisfy the second prong of the test for admissibility under Rule 404(b). A primary danger inherent in the admission of evidence of extrinsic offenses is that the jury might, inadvertently perhaps, punish the defendant for the uncharged activity. Here, where the extrinsic evidence involves precisely the crime with which Krezdorn was charged, to allow the introduction of the extrinsic offense evidence would be to allow the jury to be overwhelmed by the sheer numerosity of the offenses. Thus, not only does the evidence relate only to defendant's character, which is specifically prohibited by Rule 404(b), but in addition, the probative value is substantially outweighed by the unfair prejudice.

Id. at 1332. See also United States v. Fortenberry, 860 F.2d 628 (5th Cir. 1988). Here, evidence that Ms. XXXX is alleged to have made prior threats against the purported victims named in Counts 1-3 simply shows the repetition of similar criminal acts and is exactly the type of evidence Fed. R. Evid. 404(b) protects against. See Brown, 71 F.3d at 1162.

Finally, the government will likely argue that the evidence on Counts 4-8 is intertwined with the evidence on Counts 1-3. It seems prosecutors use the words "inextricably intertwined" when they have run out of legitimate arguments for admissibility. Indeed, they have been content to allow

the "inextricably intertwined" argument to "swallow up" Fed. R. Evid. 404(b). See United States v. Ridlehuber, 11 F.3d 516, 524 (5th Cir. 1993). Evidence is "inextricably intertwined" only if it is "inseparable from the evidence of the charged offense." United States v. Price, 877 F.2d 334, 337 (5th Cir. 1989). While the existence of the treasury check case is admittedly intertwined with Counts 1-3 because it explains the relationship between the defendant and the alleged victims, the details of the treasury check scheme are not so intertwined.¹³ Likewise, there is no reason Counts 1-3 could not be tried without prejudicing Ms. XXXX with evidence that she allegedly forged letters from judges, circumvented prison correspondence rules and was an otherwise "devious" person.

c. Fed. R. Evid. 403

Even assuming arguendo that some of the evidence admitted in the instant trial may have had some evidentiary value under Rule 404(b) in a trial on Counts 1-3 alone, it is nevertheless clear that the prejudicial effect of such evidence would substantially outweigh its probative value; thereby making it inadmissible under Fed. R. Evid. 403 in any event. For example, the allegations that Ms. XXXX forged a letter from Judge Fitzwater and threatened Ms. Fisher's mother and young children creates a huge potential for juror prejudice against Ms. XXXX. Likewise, the dishonesty inherent in Ms. XXXX's being a leader of a stolen treasury check ring that was still under investigation clearly prejudiced Ms. XXXX when the government was allowed to offer extensive testimony as well as witness statements related to that case. Indeed, had such evidence been admitted in a trial on Counts 1-3 alone and had Ms. XXXX been convicted, there is no question that the tail would have wagged the dog. Fortenberry, 860 F.2d at 632.

d. Prejudicial spillover

¹³ The government at trial argued that the reason the details of the treasury check scheme were necessary was to show that Ms. XXXX "knew" she was guilty and knew that Ms. Fisher had not been coerced to testify falsely. See Tr. 3/15/95 at 247-49. Likewise, Ms. Fisher's original statement to Inspector Jack McDonough in which she carefully detailed Ms. XXXX's participation in the scheme was offered to show the similarity between the statement and Ms. Fisher's eventual testimony in the treasury check case. See Tr. 3/21/95 at 22 ("Shenna Fisher came in and told the same story [in the treasury check trial] that was marked in Government's Exhibit Number 1 that XXXX XXXX was responsible for the check cashing scheme.").

In its Opinion, the Court of Appeals did not seem to quarrel with this Court's conclusion that any error in admitting evidence on Counts 4-8, assuming it was error, was not harmless. See Opinion at 11. Indeed, there can be little doubt that the presence of Counts 4-8 at Ms. XXXX's trial had an extreme spillover effect prejudicing her defense of Counts 1-3.

First, the government was not content to let the seemingly separate set of facts as to the two groups of counts be presented separately, but continually asked the jury to consider the facts from Counts 4-8 to bolster its evidence as to Counts 1-3.

Second, the jury's determination that Ms. XXXX pressured and tricked Ms. Fisher into writing five false letters to two different United States District Court judges undoubtedly aroused the jury as to the lengths that Ms. XXXX might allegedly go in order to protect or vindicate herself and allowed the government prosecutor to repeatedly characterize her as a "devious" person in his final argument to the jury. (Tr. 3/21/95 at 79 (Arguing that writing letters to judges allegedly using Shenna Fisher's grammar and spelling is an example of XXXX XXXX being devious)); Id. (Arguing that writing "Peaches" letter using alias in circumvention of prison rules shows that "XXXX XXXX is devious...."); (Tr. 3/21/95 at 86 (Again arguing that the "Peaches" letter shows Ms. XXXX's deviousness)). Indeed, the evidence on the false statement counts and the prosecutor's repeated characterization of Ms. XXXX as "devious" would certainly make Ms. XXXX's plea of not guilty on Counts 1-3 almost devoid of credibility in the mind of the jury.

Finally, the facts and dishonesty related to Ms. XXXX's conviction in the treasury check case that were brought before the jury in support of Counts 4-8 almost certainly prejudiced Ms. XXXX in the eyes of the jury, again making her "not guilty" plea devoid of credibility and a conviction on Counts 1-3 much more likely.

In short, there can simply be no doubt that the jurors utilized the evidence introduced as to the alleged events at Bryan and the facts of the treasury check case to conclude in their minds that Ms. XXXX was "devious," that her "not guilty" plea was meaningless, and that Tanya Nicosia must have been telling the truth. Given Nicosia's "credibility gap," the government obviously needed something to firm up its weak proof on Counts 1-3, and that "something" was its much more

substantial proof on Counts 4-8 as well as the details of Ms. XXXX's alleged dishonesty involved in her treasury check conviction.

2. Credibility of Tanya Nicosia

In its previous order granting a new trial, even without consideration of the mountain of post-trial evidence bearing on Nicosia's credibility (see, supra, Section III), the Court noted that Tanya Nicosia was "a witness of questionable credibility." See New Trial Order at 2. The Court, however, did not elaborate on what weight Nicosia's "questionable credibility" played in its granting of a new trial. Ms. XXXX submits that on remand, the Court should make clear that its New Trial Order was based, in part, upon Nicosia's lack of credibility.

It should be noted that when considering a motion for a new trial under Fed. R. Crim. P. 33, it is well established that a trial court "may weigh the evidence and in so doing evaluate for itself the credibility of the witnesses." United States v. Lincoln, 630 F.2d 1313, 1319 (8th Cir. 1980). Indeed, a district court's power to grant a motion for a new trial is much broader than its power to grant a motion for judgment of acquittal.

On a motion for judgment of acquittal, the court is required to approach the evidence from a standpoint most favorable to the government, and to assume the truth of the evidence offered by the prosecution. If on this basis there is substantial evidence justifying an inference of guilt, the motion for acquittal must be denied.

On a motion for new trial, however, the power of the court is much broader. It may weigh the evidence and consider the credibility of witnesses. If the court reaches the conclusion that the verdict is contrary to the weight of the evidence and that a miscarriage of justice may have resulted, the verdict may be set aside and a new trial granted.

3 Charles A. Wright, Federal Practice and Procedure § 553 at 245-46 (1982). Accord, Tibbs v. Florida, 457 U.S. 31, 38 n.11 (1982); Alston, 974 F.2d at 1211-12; United States v. Martinez, 763 F.2d 1297, 1312-13 (11th Cir. 1985). Cf. Dula, 989 F.2d at 778.

If anything, the Court's characterization of Tanya Nicosia's credibility was charitable. Nicosia "previously" made her living lying and stealing from individuals and entities in numerous

states. See, supra, at 3. In the course of her criminal activities, she would ordinarily be arrested, jump bond, and then simply continue her criminal schemes. Id. Nicosia herself testified that she had been "a housewife and a thief." (Tr. 3/15/95 at 37-38). Suspiciously, Ms. XXXX is at least the third person in the third different jail that Nicosia claims opened up to her, upon minutes of meeting her, and confessing to a crime. (Tr. 3/15/95 at 66-68).¹⁴ Moreover, in the past, Nicosia has given false information to law enforcement officials regarding other individuals. (Tr. 3/20/95 at 123).

In the instant case, Nicosia denied numerous details relating her meeting of Ms. XXXX and other inmates in Tank 7E03 of the Dallas County Jail that were later testified to by two other inmates who were incarcerated with Nicosia and Ms. XXXX. More importantly, the key portions of her testimony were simply incredible. First, realizing that she would have to explain how she and Ms. XXXX could have a private conversation between 5:00 a.m. and 7:00 a.m. that was not heard by any of the other inmates despite the poor acoustics of the tank's day room, Nicosia explained that "XXXX wanted to sit by the table under the T.V. so the noise would be drowned out." (Tr. 3/15/95 at 105). Nevertheless, pictures reveal that there are no tables under the tank's television and two witnesses testified at trial that the television was never turned on until 7:00 a.m. (Tr. 3/20/95 at 45; 82-83; Defense Exhibits 19a-e). Second, Nicosia testified that Ms. XXXX told her that her (Ms. XXXX's) "Daddy" came from Pueblo, Colorado "to visit with her" and make arrangements for five people to be killed. (Tr. 3/15/95 at 21; Tr. 3/17/95 at 63-64; Tr. 3/15/95 at 89). Nevertheless, there was credible testimony that Ms. XXXX's father was in Colorado during the months of September and October and never traveled to Dallas and after trial it was learned that the government had records in its possession during Nicosia's testimony showing conclusively that Ms. XXXX's father never visited Ms. XXXX at any time at the Dallas County Jail. (Tr. 3/20/95 at 103-04; 111). Third, Nicosia testified that she overheard Ms. XXXX talking to her father by telephone on October 29, 1994 about arranging "hits." (Tr. 3/15/95 at 24). Nevertheless, it was proven conclusively that Ms. XXXX's father was incarcerated in Colorado from October 18, 1994

¹⁴ As noted above, Ms. XXXX was not to be the last. See, supra, 20-21.

to November 3, 1994 and, because Dallas County Jail inmates could only make outgoing, collect calls and would be hung up upon if they attempted a three way call, such a telephone conversation could not have taken place. (Tr. 3/20/95 at 30-31; 46; 64; 133; 137; Defense Exhibits 20a-c; Government Exhibit 24). Fourth, Nicosia claimed that she took contemporaneous notes of her alleged conversations with Ms. XXXX "within a few minutes or so" of the alleged conversations. (Tr. 3/15/95 at 85). Nevertheless, when cross examined regarding these "contemporaneous" notes, Nicosia had to make numerous corrections and actually rearrange the chronology of the notes. See Defendant's Exhibit 28.

The government will argue that there is no way that Nicosia could have lied about the threats and also known of the events at Bryan involving Shenna Fisher. Nevertheless, there was testimony at trial that Nicosia was actually observed reviewing Ms. XXXX's legal papers and correspondence and that Ms. XXXX had kept her transcript from the treasury check trial in her cell. (Tr. 3/20/95 at 56-57; 66). Moreover, Nicosia's testimony to the contrary, Ms. XXXX's federal criminal problems were common knowledge among the inmates in Tank 7E03. (Tr. 3/20/95 at 54; 93). Therefore, by reviewing Ms. XXXX's files and/or talking to other inmates, Nicosia could have easily learned the details of Ms. XXXX's treasury check trial as well as details regarding Shenna Fisher's allegations.

B. TWO CATEGORIES OF NEW FOUND EVIDENCE ALSO SUPPORT GRANTING MS. XXXX A NEW TRIAL.

In addition to the grounds set forth and implied in this Court's previous New Trial Order, Ms. XXXX submits that she is also entitled to a new trial pursuant to Fed. R. Crim. P. 33 based upon new found evidence. As noted above, the new found evidence consists of 1) evidence withheld from the defense by the government's case agent during the trial, and 2) a series of post-trial events involving Nicosia which indicate that allowing a conviction to stand against Ms. XXXX on Counts 1-3, without a jury having knowledge of the new evidence, would "pollute the waters of justice."

1. The government withheld exculpatory evidence from the defense during the trial

As discussed above, during the trial in this case, Nicosia testified that Ms. XXXX told her during their discussions that her (Ms. XXXX's) "Daddy" came to visit her in the Dallas County Jail from Pueblo, Colorado on or about October 3, 1994 for the purpose of hiring a hit man. After the trial, it was learned that the government's case agent, Bill Randall, listened to Nicosia's testimony in this regard and, the whole time, never informed the defense that he had obtained Dallas County Jail records that proved unequivocally that Ms. XXXX never received any visits from her father or a man from Pueblo, Colorado during the entire time that she was incarcerated in the Dallas County Jail. Ms. XXXX submits that either the government knowingly allowed Nicosia to perjure herself and/or it seriously breached its obligations under Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972).¹⁵ No matter whether this Court concludes that the government knowingly or negligently allowed perjured testimony or concludes that the government violated its Brady and Giglio obligations, this new evidence that was suppressed by the government independently merits a new trial on Counts 1-3.

a. Knowing use of perjured testimony

Where it is shown the government's case included false testimony and the government knew or should have known of the falsehood, a new trial must be held if there is any likelihood that the false testimony would have affected the jury. Antone, 603 F.2d at 569.

¹⁵ The United States Court of Appeals for the Fifth Circuit has held that material in the possession of the Post Office Department is considered to be in the possession of the government for the purpose of analyzing the government's Brady obligations. United States v. Deutsch, 475 F.2d 55, 57 (5th Cir. 1973). See also United States v. Morell, 524 F.2d 550, 555 (2d Cir. 1975) (Evidence in the possession of the case agent is in the possession of the government for analyzing the government's obligations under Giglio); United States v. Antone, 603 F.2d 566, 569 (5th Cir. 1979).

Ms. XXXX submits the Court could correctly conclude that the government either knowingly or negligently allowed Nicosia to perjure herself when she testified that Ms. XXXX's father had come to visit Ms. XXXX in the Dallas County Jail on or about October 3, 1994 and that there is a reasonable likelihood that this testimony may have affected the jury's verdict on Counts 1-3. See United States v. Duke, 50 F.3d 571, 577 (8th Cir. 1995) ("Any reasonable likelihood" standard applies when a court finds that the government knowingly, recklessly or negligently used false testimony). Nevertheless, the government will respond by pointing out that Nicosia testified as to what Ms. XXXX allegedly told her and, therefore, the Dallas County Jail records, while making Nicosia's testimony less plausible, do not show outright perjury.

Of course, it defies logic in the context of this case to argue that Ms. XXXX would tell Nicosia about a visit that is now known to have never taken place. Therefore, Ms. XXXX submits that the government knowingly or negligently allowed Nicosia to perjure herself. Moreover, it is beyond peradventure that Nicosia's false testimony, that Ms. XXXX had her father travel from Colorado to visit her in jail in Dallas for the purpose of hiring a hit man, gave support and an air of believability to Nicosia's allegations regarding Ms. XXXX's alleged threats against David McDermott, Joseph Revesz and Shenna Fisher and that there is at least some likelihood the false testimony affected the jury's verdict on Counts 1-3.

b. Violations of Brady and Giglio Obligations

Even assuming arguendo that, because Nicosia simply purported to recite what she was told by Ms. XXXX, her testimony was not outright perjury, the government still had an obligation pursuant to Brady and Giglio to produce the jail records in question. It is axiomatic under Brady that the prosecution in a criminal trial has a sacred obligation to disclose to the defense evidence that is favorable to the accused and material to either guilt or punishment. Brady, 373 U.S. at 87. The government's Brady obligation includes an obligation to produce evidence that may be used to

impeach the credibility of a government witness. Giglio, 405 U.S. at 153-54.¹⁶ "Successful establishment of a Brady claim requires three findings: (1) that evidence was suppressed; (2) that this evidence was favorable to the accused; and (3) that the evidence was material either to guilt or punishment." Smith v. Black, 904 F.2d 950, 963 (5th Cir. 1990), overruled on other grounds, 503 U.S. 930 (1992).

i. Suppression of Evidence

Prior to Nicosia's testimony, Ms. XXXX had absolutely no knowledge that Nicosia would claim that she was told that Ms. XXXX's father visited her at the Dallas County Jail for the purpose of hiring a hit man. See Broden Dec. at ¶ 3. While Ms. XXXX was not obligated to specifically request Brady or Giglio information,¹⁷ defense counsel requested Agent Randall to obtain the Dallas County Jail records showing Ms. XXXX's visitors on two separate occasions following Nicosia's testimony. See Id. at ¶¶ 5-6. On neither occasion did Mr. Randall tell defense counsel or Mr. Snipes that he had already obtained the records months before.

Because defense counsel only learned of Nicosia's allegations during the course of her testimony, it would have been virtually impossible, using reasonable diligence, for defense counsel to have subpoenaed the information already obtained by the government and to have received that

¹⁶ In previously filed pleadings, the government has cited United States v. Case, 995 F.2d 1299, 1307 (5th Cir. 1993), cert. denied, 114 S.Ct. 1308 (1994) as standing for the proposition that new "[e]vidence further impeaching the credibility of a trial witness is not sufficient for awarding a new trial." See, e.g., Government's Motion to Unseal the Defendant's Motion for a Continuance in the Sentencing Date at 2. Nevertheless, Case did not involve new found impeachment evidence that was actually suppressed by the government. Giglio itself stands for the proposition that impeachment evidence suppressed by the government may entitle a defendant to a new trial. Id. at 154.

¹⁷ See United States v. Bagley, 433 U.S. 667, 682 (1985) (Blackman, J.); id. at 686 (White, J.).

information in a timely fashion. Based upon prior dealings with the Dallas County Sheriff's Department, defense counsel concluded that it would have been futile to file a subpoena application with the Court, wait until the application was granted, serve the application, wait for the records, and to have received the information prior to the defense resting its case. *Id.* at ¶ 4. Indeed, when the defense served a subpoena requesting this information in connection with sentencing in this case, it took a few weeks before the information was produced. *Id.* at ¶ 13. Of course, defense counsel did not know that the records were at the table next to him.

Thus, the government had information in its possession that it did not produce to the defense despite two unequivocal requests. Clearly it cannot be argued that the evidence was not "suppressed."

ii. Exculpatory Nature of Evidence

Likewise, that the suppressed evidence was exculpatory, there should be no question. Had the defense been able to show that Ms. XXXX's father definitely did not come to visit Ms. XXXX in the Dallas County Jail, this showing would have severely undermined Nicosia's testimony that Ms. XXXX made serious threats against Mr. McDermott, Mr. Revesz and Ms. Fisher. Indeed, had the jury learned that Ms. XXXX had not been visited by her father, it would almost definitely had to have reached one of two conclusions. The first conclusion would have been that Ms. Nicosia, a witness of questionable credibility in the first place, had lied about being told of the supposed visit. In the alternative, the jury would have concluded that Ms. XXXX was simply boasting during her alleged conversations with Nicosia and was not making "serious" threats.

In short, had the evidence not been suppressed, Ms. XXXX likely could have further undermined Nicosia's credibility and served a death kneel. This particular impeachment evidence, unlike most of the Nicosia impeachment evidence presented at trial, would have went to the very heart of Nicosia's allegations in this case. However, even in the unlikely event that the jury determined that Ms. XXXX had actually boasted to Nicosia about her father visiting, this would have had serious ramifications on the government's ability to prove that Ms. XXXX's threats were

"serious" - a necessary element of Counts 1-3. See Court's Jury Instructions. Thus, under either analysis of the suppressed evidence, it was clearly exculpatory.

iii. Materiality

Evidence is material if there is a reasonable probability that had the evidence been disclosed to the defense in time for it to make full and effective use of the evidence, the result of the proceeding would have been different. Bagley, 473 U.S. at 682 (Blackman, J.); id. at 685 (White, J.). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Id. at 682 (Blackman, J.). See also Id. at 686 (White, J.).

In this case, the materiality analysis is almost identical to the analysis used to determine if the evidence was exculpatory. This Court has already determined that "the principal direct evidence [at trial] on Counts 1-3 was the testimony of Tanya Nicosia, a witness of questionable credibility." See New Trial Order at 2. Nevertheless, the impeachment of Nicosia at trial was collateral impeachment. The suppressed evidence, however, would have likely impeached Nicosia regarding a central issue of her testimony and of the government's primary proof on Counts 1-3. As noted above, even if the jury nonetheless believed that Ms. XXXX did tell Nicosia that her father visited her for the purpose of hiring a hit man, this would have severely undermined the seriousness of Ms. XXXX's threats allegedly made during the same conversation. Therefore, the Dallas County Jail records were exculpatory and their suppression created a reasonable probability that had they been produced to the defense when they were requested, the jury would have concluded either that Nicosia lied or that Ms. XXXX's alleged threats were not serious.

Regardless of whether this Court analyzes this issue as the government knowingly or negligently allowing Nicosia to perjure herself or whether it analyzes it as the government seriously breaching its Brady and Giglio obligations, the new found jail records evidence independently supports a new trial on Counts 1-3.

2. New evidence going to the core of Nicosia's credibility reveals that allowing the verdict to stand solely on the sworn word of Tanya Nicosia would "pollute the waters of justice."

Assistant United States Attorney for the Middle District of Florida Terri Donaldson is to be commended for her adherence to the concept that it should not matter to the government whether it wins a case, but only that justice is done. See Berger v. United States, 295 U.S. 78, 88 (1935) (A prosecutor "is in a peculiar and very definite sense, the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer."). Indeed, as noted above, Ms. Donaldson is "most troubled" by Nicosia's role in the instant case. See Nicosia Tr. at 36. Nevertheless, despite the new evidence regarding Nicosia's credibility, the conclusion by the United States Attorney's Office for the Middle District of Florida that Nicosia has a propensity to falsely implicate fellow inmates in the commission of serious crimes, and Assistant United States Attorney Donaldson's strong concerns over the instant case, the United States Attorney's Office for the Northern District of Texas has informed the defense that it will still oppose a new trial on Counts 1-3.

a. New evidence involving post-trial conduct

Seeking a win, rather than justice, the United States Attorney's Office for the Northern District of Texas will argue that, because the new evidence regarding Nicosia involves post-trial activities, it should be ignored by this Court.¹⁸ While the government's result oriented argument is generally correct, several courts, including the United States Supreme Court, have refused to let convictions stand under similar, but less egregious, circumstances.

In Mesarosh v. United States, 352 U.S. 1 (1956), the Supreme Court considered a new trial motion in a case in which the main government witness was later accused of post-trial perjury by

¹⁸ Of course, this argument ignores new evidence in the "United States' Written Proffer for Purposes of Sentencing" that indicates that Nicosia perjured herself in the instant case and that the government may have withheld Brady and Giglio information in addition to the Dallas County Jail records. See, supra, note 11.

the government.¹⁹ Mesarosh and his codefendants were convicted of using their alleged Communist Party ties to overthrow the United States Government largely on the testimony of Joseph Mazzei. *Id.* at 3, n.4; 10. Following that trial, Mazzei committed several instances of perjury, including false allegations of Communist Party membership against several other individuals. *Id.* at 5-7. The government informed the Court that Mazzei had perjured himself in these other cases, but it nevertheless argued that Mazzei's testimony against Mesarosh and his co-defendants was truthful and credible. *Id.* at 4. The Supreme Court reversed the convictions of Mesarosh and his co-defendants and ordered a new trial.

Mazzei, by his testimony, has poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurity. This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity.

* * *

The government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them. The interests of justice call for a reversal of the judgments below and direction to grant the petitioners a new trial.

Id. at 14.

In *Williams v. United States*, 500 F.2d 105 (9th Cir. 1974), the United States Court of Appeals for the Ninth Circuit considered a conviction based largely upon the testimony of a narcotics agent. Six months after Williams' trial, the agent pleaded guilty to perjury and depriving another individual of his civil rights. *Id.* at 106. The Ninth Circuit, in reversing Williams' conviction, noted that the agent's perjury, while subsequent to the case at bar, was in connection with an investigation similar in nature and contemporaneous in time to the investigation of Williams. *Id.* at 108.

¹⁹ Just as the government itself questioned its witness' post-trial credibility in *Mesarosh*, so too does the government, albeit a different United States Attorney's Office, question Nicosia's post-trial credibility in the instant case.

In Alvarez v. United States, 808 F. Supp. 1066 (S.D. N.Y. 1992), the defendant moved for a new trial pursuant to Fed. R. Crim. P. 33 based upon newly discovered evidence involving instances in which the main government witness against him committed perjury subsequent to his trial. The District Court for the Southern District of New York applied a three pronged test to determine if a new trial was justified. Id. at 1089. First, it concluded that the evidence could not have been discovered prior to Alvarez' trial because each instance of the witness' perjury occurred after the trial. Id. at 1092. Second, it concluded that the evidence was not "merely cumulative" or impeaching. Id. at 1092-94.

In the case at bar, Diaz [the government witness] was subjected to vigorous cross-examination. Counsel for Alvarez attacked his credibility on cross and in his closing statement to the jury. Counsel urged the jury to disbelieve the testimony of the former drug dealer, Diaz, and disbelieve the testimony of the defendant, Alvarez. The jury evidently disbelieved Diaz.

While other testimony may have assisted the jury in its search for the truth about the conversation between the CI [Diaz] and the defendant, there is no denying that, ultimately, the case was a "swearing contest" as to who was telling the truth and who was telling the lie--Alvarez or Diaz. "The jury was squarely faced with the hard question of whom to disbelieve." Given the importance of this single credibility determination, I hold that the newly discovered evidence of--inter alia--Diaz's later lies, is vital impeachment material and not "merely cumulative."

Id. at 1093 (citation omitted). Finally, the Court concluded that this new evidence of the witness' post-trial perjury would probably produce an acquittal. Id. at 1094-97.

Finally, in United States v. DiBernardo, 552 F. Supp. 1315 (S.D. Fla. 1982), the United States District Court for the Southern District of Florida dismissed an indictment when the government's case agent's "serious credibility problems" arose subsequent to his grand jury testimony. Several post grand jury events gave the Court cause to find that the case agent "ha[d] a great propensity to lie." Id. at 1323. Relying upon Mesarosh, the Court dismissed the indictments. Id. at 1324 ("Special Agent Livingston's subsequent behavior and perjurious propensities have created a significant taint on the administration of justice. In the Court's opinion, the Mesarosh reasoning is just as compelling with regard to testimony before a grand jury as it is before a petit jury. Therefore, the only way of being absolutely sure that the taint is removed is to dismiss the

instant indictments and allow the government to go before a new grand jury and present the evidence with full disclosure of all the facts.").

b. New trial test

It is clear, therefore, that this Court is not precluded from considering the new evidence regarding Nicosia's credibility to determine if a new trial is warranted under Fed. R. Crim. P. 33. The Court, nevertheless, must still determine whether the new evidence, in fact, justifies a new trial. A new trial based upon new found evidence requires a defendant to show:

1. the evidence is newly discovered and was unknown to the defendant at the time of the trial;
2. the defendant's failure to detect the evidence was not due to a lack of diligence;
3. the evidence is material, not merely cumulative or impeaching; and
4. the evidence would probably produce an acquittal at a new trial.

United States v. Freeman, 77 F.3d 812, 815 (5th Cir. 1996).

Obviously, the first two prongs of the new trial test are met. As discussed above, the new evidence occurred post-trial and could not have been discovered with due diligence. See, e.g., Alvarez, 808 F. Supp. at 1092. Moreover, while the evidence is obviously impeaching, it is not "merely impeaching." Indeed, the credibility of Nicosia in this case was determinative of Ms. XXXX's guilt on Counts 1-3, making this new evidence of vital importance. Id. at 1092-93.²⁰

²⁰ Judge Posner of the Seventh Circuit, in United States v. Taglia, 922 F.2d 413 (7th Cir.), cert. denied, 500 U.S. 927 (1991), eloquently explained the danger of dismissing all new found impeachment evidence as "merely impeaching."

The government defends the judge's ruling on the ground that newly discovered evidence that is merely impeaching is not a permissible ground for a new trial....Nothing in the text or history of Rule 33, or of the cognate civil rule (Rule 60(b)), supports a categorical distinction between types of evidence; and we cannot see the sense of such a distinction. If the government's case rested entirely on the

The only question that remains then is whether the new evidence revealed by the United States Attorney's Office for the Middle District of Florida would probably produce an acquittal. Of course, "if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." United States v. Agurs, 427 U.S. 97, 113 (1976). The government's entire argument on Counts 1-3 was that Tanya Nicosia was a credible informant because she could not have known about the events at FPC-Bryan concerning Shenna Fisher and because she did not benefit from her testimony. See, e.g., TR 3/21/95 at 33-36.

uncorroborated testimony of a single witness who was discovered after trial to be utterly unworthy of being bXXXXeved because he had lied consistently in a string of previous cases, the district judge would have the power to grant a new trial in order to prevent an innocent person from being convicted. The "interest in justice," the operative term in Rule 33, would require no less- as district judges have recognized in granting new trials in such cases.

Of course it will be the rare case in which impeaching evidence warrants a new trial, because ordinarily such evidence will cast doubt at most on the testimony of only one of the witnesses. The judicial language that seems to exclude impeaching testimony from the scope of Rule 33 thus illustrates the tendency to overgeneralize. It is easy to confuse a practice with a rule. The practice has been to deny new trials where the only newly discovered evidence was impeaching. But the practice should not be taken to imply a rule that even if the defendant proves that his conviction almost certainly rests on a lie, the district judge is helpless to grant a new trial. District judges do not in fact consider themselves helpless in such circumstances, and they are right not to.

Id. at 415-16. (emphasis added.)

However, the government now admits that Nicosia will, in fact, search through other inmates legal papers in order to falsely implicate inmates in serious offenses. See Gov't Proffer at 15.²¹ It is also known now that Nicosia has told others that she will never receive a substantial jail sentence because she will simply provide information about others. Id. at 14. Moreover, it is also known now that the government has concluded that Nicosia "presents a grave risk of providing false information that may result in the prosecution of others." Id. at 14-15. Finally, it is known now that a District Court Judge has went so far as to refuse to allow law enforcement officials to interview Nicosia regarding alleged criminal activities of others without special permission.

As to the government's contention at trial that Nicosia received nothing for her testimony, apparently it did not appreciate its Faustian bargain with Nicosia. Indeed, undersigned counsel was informed by Assistant United States Attorney Michael Snipes that he was recently contacted by Nicosia's attorney seeking a sentence reduction from her three year supervised release revocation term for her prior testimony against Ms. XXXX. While Mr. Snipes declined, there can be no doubt that Nicosia viewed her testimony in this case as a debt to be called due when she next found herself in trouble.²²

²¹ It will be recalled that there was testimony in the instant case that Nicosia was seen reading through the legal papers Ms. XXXX kept in her cell. (TR 3/20/95 at 56-57; 66).

²² Mr. Snipes did write a letter to Nicosia in August 1996 apparently for her use in connection with her troubles in Florida. See Nicosia Tr. at 21, 30. According to Nicosia, the letter states that she was "truthful, cooperative and forthright at all times." Id. at

In short, the new found evidence in this case regarding Nicosia's credibility independently warrants a new trial. The government, given the new evidence produced by its Middle District of Florida United States Attorney's Office, cannot afford to abide by a conviction based upon the testimony of Tanya Nicosia. See Mesarosh, 352 U.S. at 14.

V. CONCLUSION

This Court should clarify its New Trial Order in order to identify areas of evidence on Counts 4-8 that would not have been admissible on Counts 1-3 alone and in order to make clear that it was based, in part, on its determination of Tanya Nicosia's credibility. In addition, it should expand the New Trial Order to include the various categories of new found evidence discussed above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, F. Clinton Broden, certify that on January ____, 1997, I caused a copy of Defendant's Memorandum of Law in Support of New Trial Following Remand to be hand-dXXXXvered to Michael Snipes, Assistant United States Attorney, at 1100 Commerce Street, Third Floor, Dallas, Texas.

F. Clinton Broden

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA,	)	CRIMINAL ACTION NO.
)	
Plaintiff,	)	3:94-CR-433-T
)	
v.)	
)	
XXXX XXXX XXXX,)	
)	
Defendant.)	
_____))	

**APPENDIX TO DEFENDANT'S MEMORANDUM OF LAW
IN SUPPORT OF A NEW TRIAL FOLLOWING REMAND**

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TABLE OF CONTENTS

TAB

Declaration of F. Clinton Broden	A
Affidavit of William R. Randall	B
Jail records	.....	C
United States' Written Proffer for Purposes of Sentencing	.....	D
Revocation Transcript in <u>United States of America v. Nicosia</u> , No. 96-1-CR-T-23B (M.D. Fla.)	.....	E
Order	.....	F

CERTIFICATE OF SERVICE

I, F. Clinton Broden, certify that on January ____, 1997, I caused a copy of the foregoing Appendix to Defendant's Memorandum of Law in Support of a New Trial Following Remand to be hand-delivered to Michael Snipes, Assistant United States Attorney, at 1100 Commerce Street, Third Floor, Dallas, Texas.

F. Clinton Broden