UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
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UNITED STATES OF AMERICA,

-vs-

Crim. No. 16-155(JLL)
Hon. Jose L. Linares
Newark, New Jersey

GUY GENTILE,

Defendant.

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REPLY MEMORANDUM OF LAW IN SUPPORT OF GUY GENTILE'S MOTION TO DISMISS THE INDICTMENT BASED ON VIOLATIONS OF THE STATUTE OF LIMITATIONS, HIS RIGHT TO A SPEEDY TRIAL, AND HIS RIGHT TO DUE PROCESS

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PRELIMINARY STATEMENT

The Government's Memorandum in Opposition to Mr. Gentile's Motion to Dismiss ("Gov. Opp.") falls woefully short of rebutting his arguments which mandate dismissal of the present Indictment. Apparently acknowledging that it did not have the necessary legal support, the Government instead begins its opposition by complaining about "overblown rhetoric," addressing the purported merits of the allegations in the Complaint, and otherwise footing its argument on a single letter from Mr. Gentile's counsel while ignoring most everything else that happened before and after that letter's submission. While the Government may seek to downplay the extent of its violation of Mr. Gentile's Constitutional rights, misleadingly arguing that the restrictions it placed on his liberty were limited, the Court should take these points for what they are, an attempt to distract it from the obvious conclusion that Mr. Gentile's rights to a Speedy Trial and Due Process were violated, and that the statute of limitations expired well before the Indictment was filed.

Beyond its focus on collateral points, the Government also made two critical admissions in its memorandum that further support dismissal here. First, the Government acknowledges that at the time it drafted the two tolling agreements signed by Mr. Gentile, it believed the relevant statute of limitations was five years. That admission should bring this case to a full stop. Taking the Government at its word, that admission means both the Government and Mr. Gentile believed the relevant statute of limitations applicable to all crimes Mr. Gentile was agreeing to toll was five years – which precludes the Government from applying a different limitations period now. Equally significant is the Government's acknowledgement that it *always* intended to charge Mr. Gentile with a felony. If so, the Government tricked Mr. Gentile into waiving Constitutional rights by informing him that it would consider in "good faith" not reinstating his

felony charges if he provided extraordinary cooperation; which he did. This admission also means that when the Government withdrew the original July 2012 Complaint, it did not do so – as Mr. Gentile believed – as a good faith demonstration that he might not be charged with a felony at the end of his cooperation. Rather, the Government dismissed the Complaint in bad faith for the purpose of convincing Mr. Gentile to waive his Constitutional rights and cooperate, knowing all along that it fully intended to charge him with a felony without any such good faith consideration.

Besides these fatal admissions, in response to Mr. Gentile's statute of limitations argument, the Government contends that 18 U.S.C. § 3301 extended the statute of limitations to six years, and applies to pre-enactment conduct. Because Congress did not expressly provide for the new limitations period to apply retroactively, however, this Court is precluded by *Richardson* and *Langraf* from so applying it. Even if this Court finds that § 3301 does apply to pre-enactment conduct in general, the Court should nevertheless refrain from applying it in Mr. Gentile's case, as he reasonably relied on the five-year statute of limitations – the one the Government believed applied – when waiving Constitutional rights and agreeing to cooperate and toll the applicable limitations period.

While the Government claims that the tolling affidavits were actually waivers, and therefore should not be construed against it (as the drafting party), the plain reading of the affidavits demonstrates that all possible charges would be time-barred if the Government failed to file them before June 30, 2015. Therefore, it does not matter whether the tolling affidavits are waivers or agreements; the outcome is the same – the limitations period that the Government believed applied, 18 U.S.C. § 3282, expired nine months before the present Indictment. But, even if there is some ambiguity in the affidavits, they are obviously agreements, because, as even

the Government acknowledges, they included a *quid pro quo* whereby Mr. Gentile agreed to toll a period of time and the Government in exchange agreed not to prosecute him during it. Thus, construing the affidavits against the Government (as the drafting party) and in accordance with Mr. Gentile's understanding of that to which he was agreeing, leads again to the conclusion that the charges must be deemed time-barred if filed after June 30, 2015 – as they were here.

The Government also asserts that neither Mr. Gentile nor any other defendant has a Speedy Trial right if no accusatory instrument is on file. This is simply wrong, and ignores a long line of Supreme Court cases explaining what type of Government conduct violates the Speedy Trial Clause. Obviously, the undisputed Governmental restrictions on Mr. Gentile's liberty, the public nature of his accusations, and the anxiety they caused him demonstrate a Speedy Trial violation. The *Barker* factors, weighing in Mr. Gentile's favor, support dismissal with prejudice.

Finally, the Government argues that there has been no Due Process or Fundamental Fairness violation because it made no promises to Mr. Gentile. However, despite detailed affidavits submitted by the defense, the Government has failed to put forth one sworn assertion to support its own position. Instead, it relies heavily on a single letter to suggest that one sentence within it captures the entirety of the statements and promises made between the Government and Mr. Gentile. They do not, as a hearing will demonstrate. While the defense is prepared to proceed to a hearing on this final issue (or on that of Speedy Trial if necessary), we respectfully request that the Indictment be dismissed outright without need for a hearing, as the statute of limitations expired well before the present Indictment and the Government violated Mr. Gentile's Sixth Amendment right to a Speedy Trial.

LEGAL ARGUMENT

I. The Government's Arguments in Support of a Six-Year Statute of Limitations are Precluded by Binding Third Circuit Precedent

The Government misconstrues Mr. Gentile's statute of limitations argument, so as to set up and then attack a strawman. By replying only to Mr. Gentile's secondary argument – whether subjecting him to § 3301 would be impermissibly retroactive – it was able to entirely ignore Mr. Gentile's primary argument, the antecedent (and determinative) question of which limitations period Congress intended to apply here: § 3282 or § 3011.

As Mr. Gentile has demonstrated in his opening brief, and in more detail below, because Congress did not clearly express its intent for § 3301 to apply to pre-enactment conduct (as the Government candidly admits in its opposition papers), this Court is obligated to apply § 3282, the five-year statute of limitations in effect at the time of the alleged conduct, which explicitly states that it must apply unless "otherwise expressly provided by law." Because § 3301 is a *criminal* statute of limitations, unlike a *civil* statute of limitations, it is to be interpreted in favor of repose and, therefore, cannot be applied retroactively to pre-enactment criminal conduct unless Congress expressly intends for it to do so – even if applying the new limitations periods would not violate the *ex post facto* clause.

Since no clear intention by Congress to apply § 3301 retroactively exists here, this Court need not perform the secondary "retroactivity" or *ex post facto* analysis, thus rendering almost the entirety of the Government's argument beside the point. However, even if the Court reaches the second prong, the absence of clear Congressional intent to apply § 3301 retroactively mandates the same result.

The Government's argument in support of a *post-facto* enacted six-year statute of limitations is premised on four fatally-flawed legal points: First, the Government misleadingly asserts that § 3301 "replaced" § 3282. This is untrue. Obviously, § 3282 remains to this day the default statute of limitations, which applies "[e]xcept as otherwise expressly provided by law." This is crucial because whether a new limitations period replaces in total a prior one – or merely adds a new one – is a key factor in determining Congressional intent.

Second, the Government asserts that there is no difference in how courts are required to analyze new limitations periods enacted for criminal versus civil laws. This is wrong, and in direct contravention of consistent Supreme Court and Third Circuit authorities, which hold that criminal (as opposed to civil) statutes of limitations: (1) are to be interpreted in favor of repose, and (2) are entitled to a presumption of *prospective* application unless Congress explicitly provides otherwise (without violating the *ex post facto* clause).[1] Notwithstanding some overlap, courts analyze new civil statutes of limitations differently than new criminal ones, even post-*Landgraf*.

To avoid acknowledging that this case should be decided solely on *Landgraf's* initial Congressional intent prong, the Government's third erroneous argument is to assert that *Richardson* has been overruled. Of course, *Richardson* and *Landgraf* are entirely consistent. *Richardson* held that the limitations period provided in § 3282 must be applied, rather than a new limitations period, because the new limitations period lacked a clear Congressional intent for it be applied retroactively. Notably, the Court based that holding on the fact that criminal limitations periods are to be interpreted in favor of repose. That is wholly supported by

[1] As set forth below, Congress, even with a clear expression of retroactive intent, may never revive a moribund criminal claim, without violating the *ex post facto* clause. In contrast, Congress may, with such a clear expression of retroactive intent, permissibly revive a moribund civil claim.

Landgraf. Because *Richardson* remains good law, this Court must follow its directive, which forecloses a ruling that a new limitations period, for which there exists no clear intent of retroactivity by Congress, can apply over § 3282.

Finally, the Government also disingenuously focuses solely on the second prong of *Landgraf*, and then argues that "simply extending a statute of limitations that has not yet expired does not have an improper retroactive effect and does not violate the Ex Post Facto Clause." (Govt. opp. at 11). This misguided argument misses the true mark. While a court can rule that a civil statute extends an unexpired civil limitations period, so long as there is no improper retroactive effect, even if Congressional intent is unclear, a court cannot apply a criminal statute retroactively *unless Congress has clearly expressed such an intent*. As demonstrated below, Congress did not expressly provide that § 3301 should apply retroactively, and, to the contrary, given the statute's precise language, expressly provided that it should only apply prospectively. Because prong one of *Landgraf* (involving "Congressional intent") dictates that § 3282 controls, this Court should not reach its second prong, which explains why the Government slyly ignores the first prong and skips directly to the second.

Nonetheless, assuming *arguendo* that this Court, after considering the statutory language, addresses the second prong of *Landgraf*, it must reach the same result. The critical question raised by *Landgraf*'s second prong is whether the new limitations period would have an improper retroactive effect, which courts have found to be either: (1) because there is an *ex post facto* violation, or (2) because, in criminal cases, Congress did not expressly provide for the new limitations period to apply to pre-enactment conduct. Since, as the Government acknowledges, Congress did not expressly provide for a retroactive application of § 3301, this Court must, in

any event, find that the limitations period in effect at the time of the alleged conduct (§ 3282) applies.

A. The Charges Against Mr. Gentile Are Expressly Governed by the Five-Year Statute of Limitations under 18 U.S.C. § 3282, and *Landgraf* and *Richardson* Mandate this Conclusion

As highlighted in Mr. Gentile's opening brief, *United States v. Richardson*, 512 F.2d 105, 106 (3d Cir. 1975), guides here. *Richardson* addressed the exact scenario now before this Court – whether a new criminal statute of limitations, enacted before the otherwise applicable five-year statute of limitations under 18 U.S.C. § 3282 expired, would apply retroactively in the absence of clear Congressional intent that it should do so.

Specifically, the defendant in *Richardson* was indicted for failing to timely register for the Selective Service System draft. Under the statute of limitations in effect at the time of the offense, 18 U.S.C. § 3282, the Government had five years to bring charges, rendering its indictment time-barred. However, the Government opposed the defendant's motion to dismiss by making the identical argument it makes here – that its indictment was timely because a new statute of limitations for draft offenses enacted while the charges were not yet time-barred applied retroactively. *United States v. Richardson*, 393 F. Supp. 83, 84 (W.D. Pa. 1974), *aff'd*, 512 F.2d 105 (3d Cir. 1975).

In rejecting the Government's argument, and affirming dismissal of the indictment based on a violation of the five-year statute of limitations, the Court set forth the appropriate inquiry used to determine whether a new criminal statute of limitations will apply retroactively to a claim that was not yet moribund on the date of its enactment:

> The question is one of ascertaining Congressional intent. Congress, of course, has the power to extend the period of limitations without running afoul of the ex post facto clause, provided the period has not

> already run. *Falter v. United States*, 23 F.2d 420, 425-26 (2d Cir. 1928). Criminal statutes of limitations, however, are to be interpreted in favor of repose. *Toussie v. United States*, 397 U.S. at 115, 90 S.Ct. 858. Moreover, a law is presumed to operate prospectively in the absence of a clear expression to the contrary. *Hassett v. Welch*, 303 U.S. 303, 314 (1938). Therefore, we must decline to hold that Congress in fact has exercised its power to extend the limitations period in the instant case, unless we discern a clear intention on the part of Congress that section 462(d) should apply to offenses committed before September 28, 1971. The language of section 462(d) is silent on this point…. We therefore hold that section 462(d) applies only to offenses committed after [its enactment date]. Since Richardson's offense is governed by section 3282, his indictment was time-barred, and properly was dismissed.

Building on *Richardson,* and using almost identical language, the Supreme Court in *Landgraf* set forth a clear and concise statement on how to address apparently competing *civil statutes of limitations in the context of a civil case*, noting that "the court's first task is to determine whether Congress expressly proscribed the statute's proper reach." *Landgraf v. USI Film Prod.,* 511 U.S. 244, 280 (1994). If so, the analysis ends, and the Court must follow Congress's express directions. If not, "the court must determine whether the new statute would have a retroactive effect." *Id.*

While *Landgraf* signaled a slight shift in the manner in which federal courts analyze questions involving the application of new *civil statutes* to conduct that has already occurred, nothing in *Landgraf* or any subsequent case suggests any such shift in the analysis of which *criminal statute* should apply. *Landgraf's* and *Richardson*'s holdings are entirely aligned, and premised on a well-documented historical presumption against retroactivity in the criminal context. *See Toussie v. United States*, 397 U.S. 112, 114-15 (1970) ("*criminal* limitations statutes are to be liberally interpreted in favor of repose" and "[t]he purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the

occurrence of those acts the legislature has decided to punish by criminal sanctions."); *Richardson*, 512 F.2d at 106 (same).

While the principles underpinning the *Landgraf* analysis have been incorporated into some cases evaluating criminal limitations periods, these cases, to date, have universally been decided on the first prong – that of Congressional intent – as the cases cited by the Government prove. *See, e.g., U.S. v. Leo Sure Chief*, 438 F.3d 920, 924 (2006) ("Congress evinced a clear intent to extend the statute of limitations" by including express language that: "No statute of limitations that would otherwise preclude prosecution for an offense involving sexual or physical abuse. . . shall preclude such prosecution"); see also *United States v. Jackson*, 480 F.3d 1014, 1018 (9th Cir. 2007) ("This [Congressional intent] determination ends the inquiry demanded by *Landgraf* and its progeny and makes it unnecessary for us to decide whether [defendant's] prosecution would violate the Ex Post Facto Clause."). The standard for finding such unambiguous Congressional direction that a statute should be applied retroactively is a demanding one. As the Supreme Court has instructed, "cases where this Court has found truly 'retroactive' effect adequately authorized by statute have involved statutory language that was so clear that it could sustain only one interpretation." *I.N.S. v. St. Cyr,* 533 U.S. 289, 316–17 (2001) (citing *Lindh v. Murphy,* 521 U.S. 320, 328, n. 4 (1997)). This has remained the law of the land both before and after *Landgraf*.

1. There Is No Clear Congressional Intent to Apply 18 U.S.C. § 3301 Retroactively

While the Government wishes to first consider whether there was an improper retroactive effect, under proper analysis the starting question is which of two potentially competing statutes of limitations applies to this case: § 3282 (the only one in effect at the time of the alleged conduct), or § 3301 (a subsequently enacted limitations period in effect at the time of

Indictment). This Court's first step – under *Richardson* and *Landgraf* – is to determine whether Congress made clear which limitations provision should apply. *Landgraf*, 511 U.S. at 280; *Richardson*, 512 F.2d at 106. The key to this determination is "the language of the act, and the apparent intent of the legislature to be gathered therefrom." *Sohn v. Waterson*, 84 U.S. 596, 599 (1873). Congressional intent for a new statute of limitations to apply retroactively to pre-enactment conduct will not be found where neither the statute's language nor its legislative history show that Congress intended that result. *see e.g., United States v. Schneider*, No. CRIM. A. 10-29, 2010 WL 3656027, at *1, n.1 (E.D. Pa. Sept. 15, 2010), *aff'd*, 801 F.3d 186 (3d Cir. 2015) (Government conceding that new limitations period does not apply where alleged conduct occurred before law became effective and "does not appear to be retroactive"); *United States v. Lopez de Victoria*, 66 M.J. 67, 74 (C.A.A.F. 2008) ("Considering the lack of any indication of Congressional intent to apply the [new statute of limitations] retrospectively to cases such as this, the general presumption against retrospective legislation in the absence of such an indication and the general presumption of liberal construction of criminal statutes of limitation in favor of repose, we decline to extend the reach of the [new statute of limitations] to cases which arose prior to [its enactment]").

The five-year statute of limitations in effect at the time of the alleged conduct, 18 U.S.C. § 3282 – which has remained in effect up through the present – states: "*Except as otherwise expressly provided by law*, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed." (emphasis added). 18 U.S.C. § 3301 does not "expressly provide" that it applies retroactively, or that no other limitation period applies. Indeed, it merely states: "No person shall be prosecuted, tried, or punished for a securities fraud

offense, unless the indictment is found or the information is instituted within 6 years after the commission of the offense."

In accord with the foregoing, the Government concedes, "§ 3301 does not clearly state in its text whether it applies to actions arising from pre-enactment conduct." (Govt. Opp. at 12). But, the Government also has not presented any legislative history to support such a retroactive interpretation. Nor does any exist.

Given a lack of clear expression in the text and legislative history that § 3301, a criminal statute of limitations, should apply to alleged conduct predating its enactment, no such retroactive application can made in lieu of § 3282. This Court could rule that § 3282 applies just on a review of these two statutes.

But further support against retroactive application of § 3301 can be found in a comparison of its statutory language to that used by Congress in connection with other newly enacted statutes of limitations – a "Congressional intent" analysis which the Government has completely ignored. Such a comparison reveals that when Congress wants to "expressly provide" that a limitations period should apply retroactively, it knows how to do so. For example, when Congress wishes to express such an intent, it customarily uses unequivocal language, such as "*this subsection shall apply to an offense committed before the effective date of this section*." 103 Stat. 501 (emphasis added). Congress uses such terminology because it knows that courts require language "so clear that it could only sustain one interpretation," as needed before a statute will be construed to have a retroactive effect. *St. Cyr*, 533 U.S. at 316–17. Such unequivocal language is absent from § 3301, indicating that Congress did not intend for the statute to apply to pre-enactment conduct.

Additional evidence that § 3301 cannot be interpreted to apply to pre-enactment conduct is that such an interpretation could lead to *ex post facto* violations (regardless of whether it would operate impermissibly *ex post facto* in this case). When Congress wants a criminal statute to apply retroactively, it includes language to ensure that it cannot be interpreted to revive moribund criminal charges, which would violate the *ex post facto* clause. Congress does so by expressly providing that any retroactive application does not reach charges time-barred as of the statute's enactment date by using specific language to avoid that outcome, such as "The Amendments made by subsection…shall apply to any offense committed *before* the date of the enactment of this section, *if the statute of limitations applicable to that offense had not run as of such date*." 104 Stat. 4862 (emphasis added). Here, Congress intentionally omitted the prophylactic "ex post facto" language from § 3301, knowing that if it intended § 3301 to apply a new, longer limitation period to pre-enactment conduct, it must include such language.[2]

Perhaps most tellingly, Congress did not expressly exclude the five-year statute of limitations under § 3282 from applying to indictments filed after § 3301's enactment. Quite the opposite. Indeed, § 3282 specifically states that it applies "except as otherwise *expressly* provided by law." (emphasis added). If Congress intended for § 3301 to apply to pre-enactment conduct, it would have satisfied this prerequisite under § 3282, by including "express language" in § 3301 such as "no statute of limitations that would otherwise preclude prosecution…shall

[2] *See, e.g.*, 18 U.S.C. § 3293 (Financial Institution Offenses) ("The amendments made by this subsection shall apply to an offense committed *before* the effective date of this section, *if the statute of limitations applicable to that offense under this chapter had not run as of such date.*") (emphasis added); 104 Stat. 4862 (amendments "shall apply to any offense committed *before* the date of the enactment of this section, *if the statute of limitations applicable to that offense had not run as of such date*.") (emphasis added); 18 U.S.C. § 3295 (Arson) ("The amendment made by subsection (a) shall not apply to any offense described in the amendment that was committed more than 5 years [i.e., the old limitation period] prior to the date of enactment of this Act."); 18 U.S.C. § 3297 (Cases Involving DNA Evidence) ("The amendments made by this section shall apply to the prosecution of any offense committed *before*…the date of the enactment of this section *if the applicable limitation period has not yet expired*.") (emphasis added).

preclude such prosecution." 108 Stat. 2021; 104 Stat. 4805. Yet, Congress intentionally omitted such language, which it customarily uses when it intends for a statute of limitations to apply to pre-enactment conduct. *See* also 18 U.S.C. § 3283 (Offenses Against Children) ("No statute of limitations that would otherwise preclude prosecution…shall preclude such prosecution….").

Despite the foregoing, the Government argues "the Dodd-Frank Act contains a clear enough manifestation of Congressional intent to apply § 3301 here" relying solely on the heading entitled "extension." (Govt. opp. at 18-19). According to the Government, the mere use of the word "extension" in the heading, without any additional language of the type addressed above, is sufficient to demonstrate Congressional intent that § 3301 should apply retroactively.

The Supreme Court rejected this argument in *R.R. Trainmen v. Baltimore & Ohio R.R.*, 331 U.S. 519, 528–29 (1947), holding:

> That heading is but a short-hand reference to the general subject matter involved… [H]eadings and titles are not meant to take the place of the detailed provisions of the text. Nor are they necessarily designed to be a reference guide or a synopsis. Where the text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most general manner; to attempt to refer to each specific provision would often be ungainly as well as useless…. For interpretative purposes, they are of use only when they shed light on some ambiguous word or phrase. (internal citations omitted).

Based directly on the preceding rationale, the Court in *United States v. Lopez de Victoria,* 66 M.J.at 73, while citing *R.R. Trainmen*, rejected the exact argument now raised by the Government regarding the caption "extension" in a newly enacted statute of limitations it sought to apply retroactively:

> "Extended limitation period for prosecution of child abuse cases in courts-martial" evinces an intent to extend the period to cases such as this. Catchlines or section headings such as this are not part of a statute. They cannot vary its plain meaning and are available for interpretive purposes only if they can shed light on some ambiguity in the text. Here, however, the text of the statute is not ambiguous;

> it is silent. It is the section heading itself that is ambiguous. The amendment ipso facto provides an "extended limitation period," from five years to the date the child reaches the age of twenty-five. The wording of the section heading could apply with equal force to a purely prospective extension or a retrospective one. That being the case, it is of no assistance in determining the intent of Congress.

Here, as in *R.R. Trainmen* and *Lopez de Victoria*, the text of the statute § 3301 is *not* ambiguous; it purposefully does not expressly provide that it applies retroactively, which is as instructive as an express statement that it applies prospectively given that § 3282 provides that it applies unless expressly stated otherwise. What may be ambiguous here is the section heading of § 3301 itself, which could apply equally to a prospective or retrospective application. But, as observed in *Lopez de Victoria*, "[t]hat being the case, it is of no assistance in determining the intent of Congress." 66 M.J. at 73.[3] Consequently, the Government's feeble attempt to argue that the heading of § 3301 is sufficient to demonstrate a clear Congressional retroactive intent must fail.

2. The Government Cited Only to Cases Involving Statutes Which Congress Expressly Provided Should Apply Retroactively, and Have No Bearing on this Case

The Government, citing a string of cases, asserts that "[c]ourts in criminal cases have consistently applied statutes of limitations that were extended after the offense conduct occurred but before the previous limitations period expired" (Govt. opp. at 16), and that "[e]very court to

[3] In furtherance of its argument that the term "extension" in the caption of § 3301 supports its retroactive application, the Government cites *United States v. Jeffries*, 405 F.3d 682 (8th Cir. 2005); and *United States v. Sure Chief*, 438 F.3d 920 (9th Cir. 2006). (Govt. opp., p.18-19). Neither case assists the Government. The Courts in *Jeffries* and *Sure Chief* both addressed the new statute of limitations set forth in § 3509, which – contrary to § 3301 – explicitly provided that it applied to pre-enactment conduct by containing language expressly precluding the application of any other limitations period. It is true that the heading the statute provided, "Extension of child statute of limitations." However, more importantly, the statutory language of § 3509 expressly provided that "no statute of limitations that would otherwise preclude prosecution should act as a bar before the victim reaches the age of twenty-five." 405 F.3d at 684. Thus, it was not just the heading term "extension" which underpinned the retroactive application of §3509, but the unambiguous and explicit text in the statute itself.

decide the question since … *Landgraf* … has held that legislation simply extending a statute of limitations that has not yet expired does not have an improper retroactive effect and does not violate the ex post facto cause." (Govt. opp. at 11). In addition to being demonstrably false (see *Jackson, supra; Lopez de Victoria, supra; and Schneider, supra*), that assertion is misleadingly beside the point. What the Government declined to inform this Court is that in each and every one of the criminal cases it cited, Congress expressed its "clear intention" to apply the newly enacted statute of limitations at issue retroactively by using unambiguous language in the new limitations period that was only subject to one interpretation. These statutes of limitations, therefore, are entirely distinct from § 3301, which, as the Government candidly acknowledges "does not clearly state in its text whether it applies to actions arising from pre-enactment conduct" (Govt. Opp. at 12), and which co-exists with another primary limitations period that applies unless "otherwise expressly provided by law" 18 U.S.C. § 3282.

Some of the cases cited by the Government deal with how to treat old limitations provisions that were repealed and replaced with new ones. In these scenarios, courts conclude that Congress intended only the new limitations period to apply, as there exists no conflict between statutes. For example, the Government's prominent case, *United States v. Leo Sure Chief*, involved § 3283's replacement and extension of an already existing statute of limitations. In analyzing Congressional intent relating to § 3283, the Court noted, "we have held that when Congress repeals one statute of limitations by enacting another, the second statute of limitations can simultaneously replace the former statute and apply even to cases in which the actions at issue predate the most recent statute." *Id*. at 920, 924. Moreover, the criminal statute of limitations in *Leo Sure Chief* contained language which "evinced a clear intent" by Congress that it was to exclude the application of any other limitations period: "No statute of limitations that

would otherwise preclude prosecution for an offense involving sexual or physical abuse … shall preclude such prosecution…." *Id.* at 922, 924.

Similarly, in *United States v. Grimes*, 142 F.3d 1342 (11th Cir. 1998), the Court addressed a newly enacted statute that replaced and extended the limitations period for arson under § 844(i). And, as in *Leo Sure Chief*, Congress again clearly expressed its intent for this newly enacted statute of limitations to apply retroactively to the defendant's offense (which took place not "more than five years prior to" its enactment), stating, "The amendment [extending § 844(i)'s statute of limitations] shall not apply to any offense described in the amendment that was committed more than five years prior to the date of enactment of this act." Pub. L. 103-322, § 320917(b) (1994).

In the same vein, *United States v Jeffries*, addressed § 3283's replacement and extension of an already existing statute of limitations, by means of Congress explicitly providing in that statute that "no statute of limitations that would otherwise preclude prosecution [e.g., the old limitations period] should act as a bar…." 405 F.3d 682, 684 (8th Cir. 2005). Given the fact that the prior statute no longer existed, there was no conflict as to which statute applied, leading to the Court's finding that "Congress intended [ ] to extend the general statute of limitations." *Id*. That is not the case here.

The remaining three cases upon which the Government relies all involved the retroactive application of the same statute of limitations, 18 U.S.C. § 3293. However, attached to that statute is the statement of clear Congressional intent which is missing as to § 3301. Indeed, with respect to § 3293, Congress expressly provided: "The amendments made by this subsection [§ 3293] shall apply to an offense committed before the effective date of this section, if the statute of limitations applicable to that offense under this chapter had not run as of such date." Financial

Institutions Reform, Recovery, and Enforcement Act of 1989, Pub.L. No. 101-73, § 961(l)(3), 103 Stat. 501; 18 U.S.C. § 3293 note. Accordingly, the Court in *United States v. De La Mata*, 266 F.3d 1275, 1286 (11th Cir. 2001), found no impediment to § 3293's retrospective application, where "Congress expressly made the prolonged limitations period applicable to all such offenses which had been committed but as to which the former five year limitations period had not yet run." *See also United States v. Knipp*, 963 F.2d 839 (6th Cir. 1992) (§ 3293; same result); *United States v. Madia*, 955 F.2d 538 (8th Cir. 1992) (§ 3293; same result).

Every case cited by the Government deals with materially, factually distinguishable statutes for which there exists a clear Congressional intent. They do not support the Government's contention that § 3301 should be applied retroactively.

3. The District Court's Opinion in *Lewis* Addressing § 3301 Completely Misstates the Law, is Contrary to *Landgraf* and *Richardson*, and Should Be Disregarded by this Court

The Government attempts to show that the new statute of limitations at issue in this case, 18 U.S.C. § 3301, can be applied retroactively based on an unpublished opinion out of the Northern District of Texas; *United States v. Lewis*, 12-CR-15, 2013 WL 6407885 (N.D. Tex. Dec. 9, 2013), *aff'd on other grounds*, 774 F.3d 837 (5th Cir. 2015). (Govt. opp. at 15). While *Lewis* did apply § 3301 retroactively, this Court should reject its import, as the opinion's reasoning is fundamentally flawed, giving rise to the Fifth Circuit's decision to expressly affirm that case *on other grounds*. *United States v. Lewis*, 774 F.3d 837 (5th Cir. 2014) (refusing to address defendant's argument that "the statute of limitations should not be applied retroactively because it lacks an explicit retroactivity provision," as defendant "waived his affirmative statute of limitations by not asserting it at trial.") (internal quotation omitted). The Fifth Circuit would

not even address the district court's conclusion in dictum, let alone adopt it. Yet, the Government now asks this Court to do so. Such an invitation should be declined.

Significantly, the district court in *Lewis*, while recognizing that "the Fifth Circuit has not addressed this argument in the context of 18 U.S.C. § 3301," incorrectly held that § 3301 could apply retroactively to conduct predating its enactment in the absence of "an express instruction" from Congress. 2013 WL 6407885, at *9. But it premised that erroneous conclusion on the same deeply flawed analysis now advanced by the Government. Indeed, the district court all but ignored the antecedent issue of Congressional intent under prong one of *Langraf*, and instead skipped directly to prong two without any consideration of (1) whether Congress expressed which statute should apply or (2) the differences between how courts are required to analyze new civil limitations periods versus new criminal limitations periods, which must be interpreted in favor of repose.[4] *Lewis* also pointed to the same criminal cases to which the Government cites in its brief here, without acknowledging that each of those cases involved new limitation periods which Congress expressly intended to be applied retroactively to non-moribund claims. *Id.,* citing *Leo Sure Chief* (discussed *supra*); *Jeffries* (discussed *supra*); *United States v. Chandler*, 66 F.3d 1460, 1467 (8th Cir. 1995) (Congress expressly stated new limitations period "shall apply to an offense committed before the effective date of this section, if the statute of limitations

[4] In relying on *St. Louis v. Texas Worker's Comp. Comm'n*, 65 F.3d 43 (5th Cir. 1995), a civil case involving the retroactive application of a civil statute of limitations, the *Lewis* court failed to recognize the critical distinction between *civil* and *criminal* statutes of limitations. This was manifested by its blanket decree that "[w]hen claims are already time-barred at the time the limitations period is enlarged, a clear statement from Congress is required before a court will apply an amendment retroactively to revive the claim." 2013 WL 6407885, at *10. This is wrong, in the criminal context. Obviously, Congress cannot revive a time-barred criminal case no matter how clear its statement without violating the *ex post facto* clause – a fact that has been well-settled for at least 130 years. *See Stogner v. California*, 539 U.S. 607, 607, 123 S. Ct. 2446, 2454, 156 L. Ed. 2d 544 (2003) ("Given the apparent unanimity of pre-*Frazer* case law, legal scholars have long had reason to believe this matter settled. As early as 1887, Henry Black reported that, although 'not at all numerous,' the 'cases upon this point ... unmistakably point to the conclusion that such an act would be *ex post facto* in the strict sense, and void.' Constitutional Prohibitions § 235, at 297").

applicable to that offense under this chapter had not run as of such date"); *United States v. Mayfield*, 999 F.2d 1497 (11th Cir. 1993) (same).

This Court should reject the superficial and flawed analysis in this unpublished Northern District of Texas opinion, and instead be guided by *Landgraf* and *Richardson*.

4. *Richardson* Remains Good Law and, Given the Relevant Statutory Language, Instructs this Court to Apply § 3282

Recognizing that *Richardson* is fatal to its position, the Government, quite incredibly, asserts that *Richardson* is no longer good law and should be disavowed by this Court because it "cannot be reconciled" with *Landgraf v. USI Film Products*, 114 S.Ct. 1483 (1994); *Steven I. v. Central Bucks Sch. Dist.*, 618 F.3d 411 (3d Cir. 2010); and *Lieberman v. Cambridge Partners, L.L.C.*, 432 F.3d 481 (3d Cir. 2005). (Govt. opp. at 18). In essence, the Government seeks to save the present Indictment by asking this Court to overturn Third Circuit precedent.

It is true that *Landgraf*, *Steven I.*, and *Lieberman* collectively support the Government's position that a newly enacted statute extending a limitations period for an unexpired claim will not have an improper retroactive effect even in the absence of clear Congressional intent – in a civil case. These cases, however, do not remove the presumption of prospective application for newly enacted criminal statutes of limitations, as espoused by the Supreme Court. *See Landgraf*, 511 U.S. at 266 ("Due Process Clause … protects the interests in fair notice and repose that may be compromised by retroactive legislation"); *Toussie*, 397 U.S. 112, 115 (1970) ("criminal limitations statutes are to be liberally interpreted in favor of repose"). Accordingly, the Government's civil cases are irrelevant to the issue here. [5]

[5] Civil cases, in which Congressional intent is not clear, have engaged in a procedural versus substantive discussion, only to find that civil statutes of limitations "lie on the cusp." *Steven I.*, 618 F.3d at 414, suggesting that, in civil cases, it is a close call. But no decision addressing a criminal statute of limitations has engaged in such a procedural/substantive analysis.

The Government's argument in favor of overruling *Richardson* is further undercut by the Supreme Court citing favorably to *Richardson* in *Stogner v. California*, 539 U.S. 607, 618 (2003). Similarly, as recent as 2010, the Third Circuit affirmed a case relying on *Richardson* in *United States v. Schneider*, 10-CR-29, 2010 WL 3656027, at *1 (E.D. Pa. Sept. 15, 2010), *aff'd*, 801 F.3d 186 (3d Cir. 2015) (noting Government "concede[d]" that newly enacted statute, which abolished the statute of limitations for certain federal offenses committed against minors, did not apply retroactively, while citing to *Richardson*, 512 F.2d at 106, for explanation that "a law extending a statute of limitations period is 'presumed to operate prospectively in the absence of a clear expression to the contrary.'"). If *Richardson* is incompatible with *Landgraf*, no other court has so recognized.

Even if there existed a credible argument that *Landgraf* overturned *Richardson* – which there is not – principles of *stare decisis* require this Court to follow Third Circuit law until the Third Circuit (or Supreme Court) overturns it. *See Al-Sharif v. U.S. Citizenship & Immigration Servs.*, 743 F.3d 207, 212 (3d Cir. 2013) ("We do not overturn our precedents lightly. Precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error.") (internal quotation omitted). As the Supreme Court put it more bluntly: "[I]t is this Court's prerogative alone to overrule one of its precedents." *Bosse v. Oklahoma*, WL 5888333, at *1 (U.S. Oct. 11, 2016) (internal citations omitted).

5. The Courts May Not Apply a New Criminal Limitations Period Retroactively Without Clear Congressional Intent, Even in the Absence of an *Ex Post Facto* Violation

Even assuming this Court finds Congressional intent regarding which statute applies to be unclear (which should, by itself, end the analysis in favor of § 3282), and then proceeds to

Landgraf's second prong (which we submit is unnecessary), as explained in Mr. Gentile's opening brief, the result is the same, regardless of any *ex post facto* analysis.

The critical question raised by *Landgraf's* second prong is whether the new limitations period would have an improper retroactive effect, which courts have found to be either: (1) because there is an *ex post facto* violation, or (2) because, in criminal cases, Congress did not clearly express its intent for the new limitations period to apply to pre-enactment conduct. Since here, there exists no such clear Congressional retroactive intent, application of § 3301 to pre-enactment conduct would produce an improper retroactive effect, irrespective of an *ex post facto* violation. As the district court in *Richardson* explained, in what the Third Circuit praised as a "well-reasoned opinion," *Richardson*, 512 F.2d at 105: "In the absence of a clear statement from Congress that it intended retroactive application of the extended statute *we do not think we should extend it by judicial order*. To do so would presume that Congress was in error — that it passed a statute which did not reflect its intent. We think the better course is to presume that Congress was not mistaken; and that the statute contains no reference to retroactive application because Congress did not intend it to be so applied." *United States v. Richardson*, 393 F. Supp. 83, 87 (W.D. Pa. 1974), *aff'd*, 512 F.2d 105 (3d Cir. 1975) (emphasis added).

In sum, where Congress has intentionally withheld a "clear expression" that the six-year statute of limitations under § 3301 should apply to pre-enactment conduct, this Court is bound by *Landgraf* and *Richardson* to apply the five-year statute of limitations under § 3282 (in effect during the alleged offense conduct) in determining whether such conduct is time-barred.

B. Both Mr. Gentile and the Government Reasonably Believed His Alleged Conduct Was Subject to a Five-Year Limitations Period When He Signed Each Tolling Agreement, Precluding Retroactive Application of a Six-Year Limitations Period In This Case

Even if this Court were to conclude that Congress intended § 3301 to apply to pre-enactment conduct in general, it should nevertheless find that the statute does not apply *to Mr. Gentile in this case* because: (1) he reasonably believed – as did the Government – that the statute of limitations for all potential charges was five years, and (2) he entered into a cooperation agreement and related tolling agreements, waiving significant rights based on such reasonable reliance. The Supreme Court has held that this type of reliance, resulting in the waiver of Constitutional and other rights, is sufficient to render the retroactive application of a new statute impermissible as to a particular defendant.

The Government acknowledges that until sometime after August 2014, it believed that all of the charges subject to the tolling agreements (and included in the instant Indictment) were subject to a five-year statute of limitations. (Govt. opp. at 26). Indeed, while denying that it tricked Mr. Gentile into thinking he was tolling a limitations period of five years, the Government explains: "[T]he fact is that the Government could not have misled him on this point, as it was unaware at that time that § 3301 had extended the securities fraud statute of limitations." *Id.* The Government further suggests that this was a "possible mutual mistake." *Id.*

There was no mistake. As demonstrated above, § 3301 does not apply retroactively. And, accordingly, Mr. Gentile was advised that his conduct was subject to a five-year limitation period at the time. Moreover, he reasonably believed that based not only on the advice of counsel, but on the Government's representation which, even if not verbalized, was conveyed by the obvious language in the tolling agreements it drafted for his review and signature. As the Government confesses, it drafted and presented Mr. Gentile with those two tolling agreements (in the form of

affidavits), which, by their plain terms, provided that: (1) they would toll the limitations period for one year, and (2) Mr. Gentile could assert his statute of limitations defense if the Government did not bring charges within eleven months after the agreements expired, i.e. five years after the alleged conduct.

Mr. Gentile would *not* have signed either tolling agreement had he known, at the time, that they afforded the Government an additional 23 months (instead of just 11 months) after their expiration to file charges. That fact is supported by Mr. Gentile's refusal to sign a third agreement when the Government repeatedly presented one for his signature in July and August of 2014 (Gentile Memo at 4), because he wanted to ensure that his cooperation and the case would be resolved by the following summer, June 30, 2015 – the date upon which everyone at the time believed the statute of limitations would expire. The Government does not dispute this fact.

In this respect, *United States v. Jideonwo v. INS*, 224 F.3d 692 (7th Cir. 2000), *and I.N.S. v. St. Cyr*, 533 U.S. 289 (2001), are instructive. In *Jidwonwo*, a defendant waived certain rights by pleading guilty, with the understanding that his plea bargain would exempt him from deportation under an applicable immigration law. A new statute was subsequently enacted which eliminated the exemption, thereby exposing the defendant to deportation. Although the Government argued that the defendant's claim against retroactive application of the new statute presented only a statutory interpretation, the Court in *Jideonwo* disagreed, finding that it raised a question of Constitutional dimensions. 224 F.3d 692, 697 (7th Cir. 2000) (*citing Bradley v. School Bd. of City of Richmond*, 416 U.S. 696, 716, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974)) ("The Supreme Court has held that applying a law retroactively such that it results in "manifest injustice" violates the Due Process Clause. Manifest injustice may occur where a new law

changes existing rights or imposes unanticipated obligations on a party without providing appropriate notice"). Because the newly enacted statute (eliminating the exemption upon which the defendant relied) "change[d] the consequences of [his] bargain," the Court in *Jideonwo* held that it could not be applied retroactively as to that defendant. 416 U.S. at 699-700.

In positively reviewing *Jideonwo*, the Supreme Court in *I.N.S. v. St. Cyr*, 533 U.S. at 323-24, reached the same conclusion as to a defendant before it facing the same scenario. In so doing, the Court observed that the decision to plead guilty by defendants under the same circumstances, resulting in a waiver of their rights, was based "upon settled practice, the advice of counsel, and perhaps even assurances in open court." 533 U.S. at 323–24. As a result, it would run afoul to "familiar considerations of fair notice, reasonable reliance, and settled expectations" to retroactively apply a law so as to strip those defendants of their agreed upon benefits, while simultaneously enforcing, for the benefit of the Government, their waivers, which were "likely facilitated by [ultimately mistaken] belief." *Id.* (internal quotation omitted).

As in *Jideonwo* and *St. Cyr*, Mr. Gentile, here, waived his rights under the cooperation and tolling agreements, reasonably relying on the belief that the applicable limitations period – and, indeed, the one he was agreeing to toll – was five years. That belief, shared by both Mr. Gentile and the Government, was reflected in the tolling agreements and conveyed to Mr. Gentile by "competent" defense counsel. (Govt. opp. at 26). Even if the Court holds that § 3301 does apply retroactively to cases in general, it would be fundamentally unfair and an improper retroactive application to apply that new limitations period *in this case*. *See Ponnapula v. Ashcroft*, 373 F.3d 480, 483 (3d Cir. 2004) ("Moreover, on this record, where given the petitioner demonstrated a clear fact that both the Government and defendant had reasonable actual reliance on the former statutory scheme in making the decision to go to trial, there is *a*

fortiori an impermissible retroactive effect.").

C. The Tolling Affidavits Unambiguously Provide That the Government was Required to Formally Charge Mr. Gentile by June 30, 2015 or the Charges Would Be Time-Barred

Notwithstanding the express language in the tolling affidavits, and the Government's admission, the Government now asserts that the inclusion of the "June 30, 2015" date did not create a deadline by which the Government was required to bring formal charges against Mr. Gentile. Rather, the Government argues, that was only the date upon which Mr. Gentile could first assert a statute of limitations defense, even though, according to it, no statute of limitations would have run by that date. The Government fails to explain why, under this interpretation, Mr. Gentile was precluded from asserting a statute of limitations defense eleven months earlier, a day after the agreement expired on July 31, 2014.

The Government's argument makes little sense. Nevertheless, it argues that the tolling affidavits were unilateral waivers, and not bi-lateral agreements, and that the plain terms of the affidavits refute Mr. Gentile's arguments. Mr. Gentile dispenses with these arguments in reverse order, because the plain terms of these affidavits – whether they are waivers or bi-lateral agreements – drive the result. In the event this Court concludes that the plain language is ambiguous, such language must be construed against the Government (and consistently with Mr. Gentile's sworn assertion regarding the terms to which he believed he was agreeing when signing the them) because the affidavits are in fact, as proven below, bi-lateral agreements drafted by the Government.

Notwithstanding the Government's assertions, the language the Government drafted within the tolling affidavits is clear and unambiguous. The affidavits provide that Mr. Gentile would agree to toll the statute of limitations for one year, so long as the Government filed any

charges against him no later than 11 months after the agreements expired. If the Government did not bring charges by that deadline, the charges would be time-barred and Mr. Gentile could enforce that by asserting his limitations defense. The Government disputes this interpretation, claiming that "[i]t defies logic that the parties would have agreed to such an important term ... in such a vague, roundabout way." (Govt. Opp. at 24). But there is nothing vague about this agreement, and the Government fails to put forth any other reasonable interpretation of the affidavits (specifically, as to paragraph 3), so as to contradict Mr. Gentile's plain-reading of them.

The Government agrees that paragraph 3 has to have some meaning different than the preceding paragraphs, so it claims that "paragraph 3 was intended to clarify that none of the applicable statute of limitations expired at the conclusion of the tolling period" and that it "reflects the earliest date on which Gentile could assert any statute of limitations defenses." (Govt. Opp. at 25). This strained interpretation makes no sense.

In fact, paragraph 3 set the deadline by which the Government must file charges under the applicable five-year statute of limitations – consistent with both the Government's and Mr. Gentile's beliefs. Even without paragraph 3, Mr. Gentile was able to assert a statute of limitations defense the day after the agreement expired 11 months prior to June 30, 2015. Indeed, Paragraph 2 (of the second affidavit) provided that Mr. Gentile agreed to toll the limitations period "for a period of one year (365) days, commencing on July 31, 2013 and ending on July 31, 2014." There is no language in the affidavit remotely suggesting that Mr. Gentile could not assert a statute of limitations defense if he was charged the day after the tolling period expired – on August 1, 2014. Why would the agreement then in paragraph 3 merely confirm that he could assert a limitations defense 11 months later, on June 30, 2015? The only reasonable

interpretation for the language relating to June 30, 2015, is because – as the Court now knows – that was the date both parties believed the limitations period would expire.[6] Mr. Gentile was not just reserving his ability to assert a lame legal argument, but ensuring that he had a legal mechanism to enforce his rights in Court. Indeed, the affidavits were drafted so that Mr. Gentile could begin asserting a limitations defense as to the allegations relating to Raven Gold Corporation ("RVNG"), which concluded one year earlier than those pertaining to KYUS. Obviously, the Government would have expected Mr. Gentile to raise a statute of limitations defense as to any charges concerning RVNG brought before June 30, 2015, as Mr. Gentile believed the tolling agreements permitted – regardless of the KYUS charges expiring on June 30th of the following year.[7] For these reasons, the Government's argument regarding paragraph 3 fails.

1. If the Six- Year Limitations Period Applies, the Affidavits – Whether They Are Agreements or Waivers – Were Made Unknowingly, Unintelligently, and Involuntarily

In his opening memorandum, Mr. Gentile argued that the Government tricked him into signing tolling agreements that, according to it, tolled a six-year limitations periods when he, in fact, believed he was tolling a five-year limitations period. In response, the Government argues that it cannot be found to have tricked Mr. Gentile, because the Government itself believed at the time that the applicable statute of limitations was five years. (Govt. Opp. at 26). This admission compels dismissal of the Indictment.

[6] June 30, 2015 – when discounting the two 1-year tolling agreements – represents exactly five years after the allegations relating to the second alleged stock promotion, Kentucky USA Energy ("KYUS"), ended in or about June 2008.

[7] The Government inappropriately charges the RVNG and KYUS promotions as a single conspiracy. While not relevant for purposes of this motion, the transactions were not part of a single conspiracy, as they were separate and distinct, starting and ending at different times, and involving different individuals.

Mr. Gentile was advised by counsel, and understood by virtue of his reading of the affidavits before signing them, that he was tolling a five-year limitations period. As a result, if in fact it turns out that the six-year limitations period under § 3301 actually applies, then Mr. Gentile signed the waivers in an unknowing, involuntary, and unintelligent manner.[8]

"Much like plea bargaining, a waiver of the statute of limitations is a pretrial agreement between the state and the defendant." *United States v. Levine*, 658 F.2d 113, 124 (3d Cir. 1981).[9] Because waivers of limitations statutes, similar to guilty pleas, involve the relinquishment of important rights, "they should also be made with the advice of counsel and informed by an understanding of the consequences of waiver." *Id.* at 234, n.17.

The Government cannot have it both ways. It cannot, on the one hand, maintain that the statute of limitations is six years under § 3301, and, on the other hand, maintain that Mr. Gentile knowingly, voluntarily, and intelligently waived that limitations period, while believing only a five-year statute of limitations applied under § 3282. Even if the second tolling agreement is called a "waiver," Mr. Gentile's tolling of the statute of limitations must be deemed ineffective, based on a misunderstanding of its consequences, particularly when the Government had the same misunderstanding.[10]

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[8] The Government suggests that Mr. Gentile's failure to inform it that he wanted a resolution to any potential charges by June 30, 2015, before executing the second waiver, undermines his argument. Quite the contrary is true. Because the terms of the document were clear to Mr. Gentile, he never believed it necessary to convey his understanding of its plain terms to the Government. In any event, the defense did inform the Government, in August 2014, that Mr. Gentile wanted to ensure a resolution of any criminal charges by June 30, 2015, prompted to do so by the Government's repeated presentation of a third tolling document for his signature in July and August of 2014, which he refused to sign. (Gentile Memo at 4). Notably, the Government does not dispute this factual record; nor could it.

[9] The fact that the Third Circuit refers to a waiver of the statute of limitations as a pretrial "agreement," akin to a plea agreement, supports our position that the documents tolling the statute of limitations here should be construed against the Government, regardless of whatever nomenclature the Government elects to use for them.

[10] The Government's suggestion that Mr. Gentile waived his rights to make this argument is not supported by the facts or the law. Mr. Gentile asserted in his opening brief that that the Government "tricked" him into signing the agreements, which is tantamount to saying his waiver was unknowing and involuntary.

The Government appears to acknowledge this fact by noting that the tolling affidavits were a product of a "possible mutual mistake." (Gov't Opp. at 26). However, it then ignores the necessary result of that fact – namely, *it would void the agreements (or waivers)*. Putting aside for the moment that there was no mutual mistake because Mr. Gentile was never mistaken about the applicable five-year statute of limitations, if the Court finds, as the Government has argued, that the statute of limitations is actually six years, and that both tolling affidavits were signed on the basis of a mutual mistake (as the Court would be compelled to do), they are void and the Government cannot rely on them to toll the statute of limitations, regardless of Mr. Gentile's textual arguments. *See, e.g.*, *Houmis v. United States*, 558 F.2d 182, 183 (3d Cir 1977) (where "substantial confusion" calls into question whether there was a "meeting of the minds" over a plea agreement, there is no agreement to be enforced); *United States v. Bradley*, 381 F.3d 641, 648 (7th Cir. 2004) ("Both parties were mistaken as to the nature of the 924(c) charge…. Given the parties' mutual mistake as to an essential element of the plea agreement, the entire agreement is invalidated.").

Mr. Gentile's reasonable reliance argument, discussed *supra*, is equally applicable to interpreting the affidavits in a manner consistent with *his* reasonable understanding of what the affidavits meant, and what rights *he* was agreeing to waive by signing them. Similarly, because the affidavits waiving the statute of limitations are "pretrial agreement[s]," *United States v. Levine*, 658 F.2d at 124, the parties should be bound by their terms, as construed *in favor of Mr. Gentile and against the Government (as their drafter)*, in accord with contract principles. *United*

And, in any event, the Government "for the first time" in its opposition papers argued that the affidavits were "waivers," thereby entitling Mr. Gentile "to respond to [that] issue[ ] in [his] reply brief." *Biegalski v. Am. Bankers Ins. Co. of Florida*, No. 14-6197 (RBK/KMW), 2016 WL 1718101, at *3 (D.N.J. Apr. 29, 2016). Finally, *United States v. Pelullo*, 399 F.3d 197 (3d Cir. 2005), cited by the Government, is inapposite, as the case only purports to assert that arguments first brought before an appellate court must be raised below or in an opening appellate brief.

States v. Nolan-Cooper, 155 F.3d 221, 236 (3d Cir.1998). Because the terms of the tolling affidavits, as construed in favor of Mr. Gentile, contractually limited the time for bringing charges to a period of five years, despite any statute of limitations to the contrary, the parties must be bound by the applicable five-year statute of limitations. *See Smith v. TA Operating LLC*, 2011 WL 3667507, at *3 (D.N.J. Aug. 19, 2011); *see also Mirza v. Ins. Adm'r of America*, 800 F.3d 129, 133 (3d Cir. 2015).

2. The Tolling Affidavits Were Agreements – Not Waivers –Which Are Construed Against and Bind the Government

The Government tries to escape the repercussions of (1) the tolling language it drafted, (2) its admission that it believed the statutes of limitations to be five years, and (3) the fact it required, by their express terms, both tolling agreements to be effectuated as affidavits. And, it does so, by seeking to classify the tolling documents, not as "tolling agreements" or "affidavits," but as "waivers." (Govt. opp. at 23). That revisionism ignores the following facts.

The tolling agreements are expressly captioned "Affidavits," meaning their very title makes clear the manner in which they had to effectuated – a notarization or compliance with 28 U.S.C. § 1746 (by stating that they were signed under the penalty of perjury). As a result, the Government's contention that "neither Waiver expressly said it had to be notarized before it could be effective" (Govt. opp. at 29) is without merit.

Also, the Government and Mr. Gentile continuously referred to the affidavits as "Tolling Agreements" over the course of four years, throughout Mr. Gentile's active cooperation and negotiations with the Government. Indeed, Assistant U.S. Attorney Nicholas Grippo sent numerous emails during that period requesting that Mr. Gentile sign "another one-year tolling agreement." Ford Aff. ¶ 5-8. The subject heading of these emails was "Gentile Tolling

Agreement." And, the document Mr. Gentile was requested to sign was entitled "Gentile Tolling Agreement."

That the documents were bi-lateral agreements is also supported by their own terms. In particular, each agreement stated that Mr. Gentile would agree to toll the statute of limitations for one-year, *provided* the Government, *in exchange*, would: (1) file any charges against him no later than 11 months after the tolling period ended, and (2) refrain from filing any charges against him during the tolling period. There existed a standard contractual *quid pro quo*, with each side obtaining a benefit in exchange for consideration.

The Government acknowledges as much in its opposition papers, noting that Mr. Gentile "signed two statute of limitations waivers to ensure the Government did not prosecute him during that time" (Govt. opp. at 37)**,** and that in July 2013, Mr. Gentile "opted" to sign a second agreement that "preserve[d] the status quo." (Govt. opp. at 22). The Government cannot deny with a straight face that these documents were contractual agreements.[11]

The Government reaches back almost a century citing to a series of cases – *Fischer*, *Stange*, *Rohde*, and *McGaughey* – addressing the very precise question of whether an agreement drafted under § 250(d) of the Revenue Act of 1921 and, subsequently, § 6502 of the Internal Revenue Code ("IRC") of 1954 – pertaining to the collection of tax deficiencies – were waivers

[11] The Government, while referring to the second tolling agreement as but a "unilateral waiver" (Govt. opp. at 23), attempts to view them in isolation. Of course, these affidavits were not created in a vacuum. Rather, they were signed in connection with Mr. Gentile's verbal cooperation agreement with the Government, and should be viewed in that broader context as part of the cooperation agreement. The Government acknowledges as much, explaining: "After the complaint was dismissed [pursuant to a verbal cooperation agreement], the parties took various steps to facilitate Gentile's cooperation while protecting his interests and the Government's," and "to preserve the Government's ability to prosecute Gentile in the future, Gentile signed a waiver tolling 'any statute of limitations….'" (Govt. opp. at 5-6).

or contracts based on Congress' intent with respect to those specific statutes. (Govt. opp., at 23). Those cases have no applicability here.[12]

Significantly, the Government has been unable to point to a single case in which a tolling agreement, entered into pursuant to a cooperation agreement, was found to be a "waiver," not interpreted in accord with standard contract principles. *See*, *e.g., United States v. Mergen*, 764 F.3d 199, 209 (2d Cir. 2014) (language in a tolling provision of a cooperation agreement is "contractual verbiage," and court must "construe … strictly against the Government.") (internal citation omitted). Accordingly, even if this Court finds the tolling affidavits are ambiguous, under standard contract principles, they must be construed against the Government as the drafting party.

II. The Government Violated Mr. Gentile's Sixth Amendment Speedy Trial Right By Imposing Strict Extrajudicial Bail Conditions On Him and Otherwise Substantially Restricting His Fundamental Rights

The Government arrested Mr. Gentile on a criminal complaint and then restricted his liberties while subjecting him to public accusation and anxiety for 44 months before finally indicting him on the same conduct for which he was arrested. Yet, the Government contends that it did not violate Mr. Gentile's Sixth Amendment right to a Speedy Trial during that lengthy period because: (1) no such right existed after it dismissed the Complaint in good faith; and, (2) even if the right did exist, the surrounding circumstances did not trigger its violation under *Barker v. Wingo*, 407 U.S. 514 (1972). The Government's claims are belied by the law.

[12] The Court in *Rohde*, 415 F.2d 695, 699 (9th Cir. 1969), specifically held that the waiver at issue never became effective because it was not signed by both parties. Thus, its application to these circumstances would render the second tolling agreement ineffective in any event.

The Government's first contention can be distilled to three points: (1) the Sixth Amendment does not apply when there is no pending accusatory instrument, regardless of whether other Government conduct has restricted a defendant's liberties; (2) the deprivations of liberty it caused Mr. Gentile to suffer during the 44 months between his initial arrest and Indictment were not that bad; and, (3) the Sixth Amendment has no application to an individual involved in "long-term proactive cooperation with law enforcement." (Govt. opp. at. 33). These arguments are without merit as explained in the very case upon which the Government relies, *United States v. MacDonald*, 456 U.S. 1 (1982), which exempted from its holding those unique circumstances present here, where (1) a defendant remains subject to restraints on his liberty and public accusation following the dismissal of an accusatory instrument, and (2) as the Government has all but admitted, the accusatory instrument was not dismissed in good faith.

A. The Sixth Amendment Applies Where A Defendant is Subject to Actual Restraints on His Liberty After Arrests, Even If There Are No Formally Pending Charges

The Government's claim that the Sixth Amendment does not apply when there is no pending accusatory instrument hinges on a myopic reading of *United States v. MacDonald*, *supra*. While *MacDonald* held that the Sixth Amendment "has no application after the Government, acting in good faith, formally drops charges," the Court's rationale for that general rule sets forth the exception-that the Sixth Amendment will continue to apply if the defendants' liberty remains restricted:

> Once charges are dismissed, the speedy trial guarantee is no longer applicable. At that point, the formerly accused is, at most, in the same position as any other subject of a criminal investigation.… But with no charges outstanding, personal liberty is certainly not impaired to the same degree as it is after arrest while charges are pending. After the charges against him have been dismissed, "a citizen suffers no restraints on his liberty and is [no longer] the subject of public accusation: his situation does not compare with that

> of a defendant who has been arrested and held to answer." *United States v. Marion*, 404 U.S., at 321, 92 S.Ct., at 463. Following dismissal of charges, any restraint on liberty, disruption of employment, strain on financial resources, and exposure to public obloquy, stress and anxiety is no greater than it is upon anyone openly subject to a criminal investigation.

Id. at 8-9.

Notably, *MacDonald* reflects a broader implication contrary to that which the Government restricts it. *See United States v. Marion*, 404 U.S. 307, 321, n.12 (1971) (observing that invocation of speedy trial right need not await formal charge, and that "the time at which the beginning of the delay period should be computed [is] the date the charge is filed, *except that if the defendant has been continuously held in custody or on bail or recognizance* until that date to answer for the same crime or a crime based on the same conduct or arising from the same criminal episode, then the time for trial should commence running from the date he was held to answer.") (internal quotation omitted) (emphasis added). The Eighth Circuit eloquently explained this exception in *United States v. Stead*: "Closer analysis shows that an arrest triggers the speedy trial right only where it is beginning of *continuing restraints on defendant's liberty imposed in connection with the formal charge on which defendant is eventually [indicted]*." 745 F.2d 1170, 1172 (8th Cir. 1984) (emphasis added).

Even where charges are dismissed, an accused remains protected by the Speedy Trial Clause if he remains subject to public accusation and the Government has placed restrictions on his liberty relating to the formal charges for which he will eventually be indicted, such as bail and the curtailment of fundamental rights, including the right to speech, to travel, and to bear arms. *Id.; see also Doggett v. United States*, 505 U.S. 647 (1992). The Supreme Court has explained the reasoning behind this rule:

> The Clause is directed not generally against delay-related prejudice, but against delay-related prejudice to a defendant's liberty. "The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, *to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges*." *United States v. MacDonald,* 456 U.S. 1, 8, 102 S.Ct. 1497, 1502, 71 L.Ed.2d 696 (1982). Thus, "when defendants are ***not*** *incarcerated or subjected to other substantial restrictions on their liberty*, a court should not weigh that time towards a claim under the Speedy Trial Clause." *Loud Hawk, supra,* 474 U.S., at 312, 106 S.Ct., at 654.
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> Although being an "accused" is necessary to trigger the Clause's protection, it is not sufficient to do so. *The touchstone of the speedy trial right, after all, is the substantial deprivation of liberty that typically accompanies an "accusation," not the accusation itself.* That explains why a person who has been arrested but not indicted is entitled to the protection of the Clause, *see Dillingham*, *supra*, even though technically he has not been "accused" at all.

Doggett, 505 U.S. at 661, 663 (emphasis added).

The Government does not even attempt to address these cases, or reconcile its conduct with the Constitutional restrictions imposed on the Department of Justice. Rather, it bases its entire argument on the disfavored notion that the Government has limitless power over individuals so long as no accusatory instrument is on file. This has never been the law in the United States, and now is not the time to adopt such a position.

1. Mr. Gentile was Subject to Lengthy and Substantial Governmental Restrictions and Public Accusation

The Government ignores that Mr. Gentile was not "in the same position as any other subject of a criminal investigation." *See MacDonald*, 456 U.S. at 8-9. Nor was he no longer free from "restraints on his liberty" and "public accusation." *Id.* To the contrary, he was in the same position as a criminal defendant subject to strict bail conditions. After the Government dismissed the Complaint, it stripped Mr. Gentile of his essential liberties *for 44 months* (the last

18 of which post-dated his unambiguous statement to the Government that he no longer wished to cooperate in the absence of an assurance that he would not be charged). All the while, his arrest and charges remained "pending" in an official database, open for all with access to see. These are precisely the type of restrictions against which, the Supreme Court in *Doggett* explained, the Sixth Amendment is intended to safeguard.

Despite these severe restrictions on his liberties, the Government brushes them aside, noting that Mr. Gentile "exaggerates the scope of the so-called restrictions on his liberty." (Govt. Opp. at 32). This is horrifying. Mr. Gentile lost his right to travel freely, to possess firearms, and to go wherever he pleased without requesting Government permission. And, to make matters worse, his right to participate in local charitable and political endeavors were purposefully restricted. The relevant question is whether the Government imposed actual restrictions upon Mr. Gentile during the 44 months between his initial arrest and Indictment, such that he was no longer in the "same position as any other subject of a criminal investigation" following the dismissal of charges. *MacDonald*, 456 U.S. at 8-9. Obviously, he was not.

2. Mr. Gentile Did Not Waive His Right to a Speedy Trial By Cooperating

The Government claims that the Sixth Amendment has no application to an individual involved in "long-term proactive cooperation with law enforcement" (Govt. opp. at 33), though it provides neither legal support nor a rational policy reason for this proposed new rule of Sixth Amendment law. The Government strangely paints Mr. Gentile's cooperation as voluntary, merely for the ability to "delay prosecution." But as the Government is well aware, his bail conditions were not "voluntary." Rather, they were unilaterally imposed conditions which Mr. Gentile sought to lessen at every opportunity. His agreement to cooperate was not merely to "delay prosecution" but to receive his good faith determination to – at first not be recharged with

a felony – and then to not be charged at all. Of course, speedy trial rights protect individuals unless they are expressly waived, not unless they are expressly; waived *or* because the individual is engaged in long-term cooperation with the Government. *See United States v. Williams*, 591 F. App'x 78, 86 (3d Cir. 2014).

In any event, this Court should reject the Government's request for it to impose a rule announcing that the Government may disregard a cooperating witness's speedy trial rights, if for no other reason than to ensure that the Department of Justice does not usurp the Judiciary's role by setting private bail conditions without judicial supervision for all cooperators going forward. As detailed in Mr. Gentile's opening brief, courts have repeatedly enforced defendants' speedy trial rights, even where those defendants were cooperating. And, the Government's attempt to distinguish the case law cited by Mr. Gentile on this issue fails to acknowledge that, like the defendants in those cases, Mr. Gentile has been subject to substantial restrictions on his liberty.

3. The Government Did Not Dismiss the Complaint in Good Faith

The Government also asserts that once a complaint is withdrawn "in good faith," the inquiry ends there. (Govt. opp. at 30). This position finds no support in the case law. But even assuming that it did, the key to the Government's argument is that it dismissed the charges *in good faith*, which it did not do here, according to its own admissions that it always intended to recharge him with the same felony.

As set forth in his opening brief, Mr. Gentile understood the dismissal of the Complaint in July 2012 to be a show by the Government that if he provided the type of extraordinary cooperation he ultimately provided, the Government would "in good faith" consider not charging

him with a felony.[13] The Government puts the cooperation agreement in terms of the Government agreeing "to give Gentile an opportunity to persuade the USAO leadership that he should not be charged with a felony" at the conclusion of his cooperation. (Govt. opp. at 3). But, of course, the deal that Mr. Gentile struck was not just an opportunity to blow smoke at a wall. Instead, it was that the Government would agree to not reinstate any felony charges if Mr. Gentile provided the extraordinary cooperation that he promised. This determination was to be made "in good faith."

The Government now states that "the decision did not go his way" (Govt. opp. at 3), but it never explains why that decision did not go his way. Mr. Gentile did everything the Government asked of him, for over three years. His cooperation yielded the Government dozens of indictments and guilty pleas, millions of dollars in disgorgement, and visibility into sophisticated securities laws cases. And, of course, the lead prosecutor was able to leverage all of these cases into his new position as the Bergen County Prosecutor, one of the most prestigious political positions in New Jersey. The Government has not once suggested that Mr. Gentile was anything less than 100 percent truthful or provided anything less than exactly the extraordinary cooperation that was first promised. In fact, for his efforts, as the Government candidly admits, it offered Mr. Gentile the opportunity to receive a guaranteed term of probation, pursuant to a Fed.R.Crim.P. 11(c) plea, during a meeting in the summer of 2015.[14] Nevertheless, despite that offer, the decision to charge Mr. Gentile with a felony instead of a misdemeanor, as originally

[13] As Mr. Gentile's cooperation progressed, the Government expressed that it would consider not charging him at all.

[14] This offer was consistent with the original oral cooperation agreement requiring the Government to do everything possible – including providing a 5K1 letter – to ensure that Mr. Gentile did not receive a custodial sentence if he cooperated.

contemplated, is a decision that is not supported by any objective rationale. Accordingly, Mr. Gentile did not receive the "good faith" consideration that the Government promised.

Furthermore, notwithstanding the Government's language about a "decision" being made, the Government now concedes that "it was always the Government's expectation that Gentile would face criminal charges" (Govt. opp. at 7), belying its position that it, in fact, intended to undertake such a consideration "in good faith."

Based on the foregoing, when the Government, in order to induce Mr. Gentile's cooperation, dismissed the Complaint as a supposed "good faith" showing that it might not reinstate felony charges against him, it actually did so in bad faith. As a result, the Speedy Trial Clause runs from the dismissal of that Complaint, in any event.[15]

B. Each of the *Barker* Factors Supports Dismissal of the Indictment

As set forth in Mr. Gentile's opening brief, each of the factors under *Barker v. Wingo*, 407 U.S. 514 (1972), weighs heavily in favor of dismissing the instant Indictment. Because each of these factors was discussed at length in Mr. Gentile's brief, we address herein only those responses by the Government that require discussion.

1. The 44 Month Delay Between Arrest and Indictment Is Presumptively Prejudicial

The Third Circuit has definitively held that "fourteen months is sufficient to trigger" further review of the *Barker* factors and that once this initial threshold has been met, "the

[15] The Government asserts that it dismissed the Complaint "to preserve the cooperation opportunities that Gentile presented" (Govt. opp. at 5), but that is an incomplete expression of the understanding. The Government's current justification for dismissal of the original 2012 Complaint simply does not make sense. After all, the Government could have just as easily arraigned Mr. Gentile before a Magistrate Judge and asked that the matter remain under seal, if it truly sought just to preserve his cooperation opportunities. As the Court will undoubtedly recognize, the manner in which the Government proceeded here – withdrawing a complaint and imposing its own bail conditions – is not sanctioned by the United States Attorney's Manual or Constitutional Law.

state….bears the burden to justify the delay." *United States v. Velazquez*, 749 F.3d 161, 174 *3d Cir. 2014). The 44-month delay in the instant case far exceeds this threshold.

2. The Delay Was Caused By the Government's Desire to Use Mr. Gentile as a Cooperator

The Government seeks to attribute the delay solely to Mr. Gentile's desire to cooperate. While it is true Mr. Gentile wished to cooperate and receive the non-felony result he was led on to believe he might receive, and then ultimately promised, the Government too sought to delay the indictment and, in fact, continued using Mr. Gentile long after he unambiguously expressed his desire to stop cooperating. Therefore, the Government is responsible for the length of the delay. *United States v. Davis*, 679 F.2d 845, 850 (11th Cir. 1982) ("When the Government deliberately prolongs a defendant's case for its own benefit, it does so at its own risk."); *United States v. Carini*, 562 F.2d 144, (2d Cir. 1977) ("we…reject the notion that a defendant in effect waives his right to a speedy trial by consenting to [a cooperation] agreement. Thus, if the Government wishes to bargain for this condition, it may but should do so mindful of the risks which it thereby assumes of dismissed indictments for unconstitutional delay." *United States v. Roberts*, 515 F.2d 642, 647 (2d Cir. 1975)); *United States v. New Buffalo Amusement Corp.*, 600 F.2d 368, 378 (2d Cir. 1979) ("Good faith plea negotiations by a defendant should not be equated to a waiver of speedy trial rights, and, under the circumstances, the Government must assume responsibility for the risk of institutional delays where the bargain ultimately is unsuccessful."); *Bulgin v. State*, 912 So. 2d 307, 311 (Fla. 2005) ("any delay…was attributed to the State in the first instance by…seeking the benefit of the cooperation of the defendants to make other cases.").

3. Mr. Gentile Asserted his Right Immediately

The Government claims that Mr. Gentile delayed asserting his Speedy Trial rights by waiting until the summer of 2015 to do so. But there was no need to do so any earlier, as Mr. Gentile, until such time, reasonably believed that he would not be recharged with a felony. The relevant date is how quickly Mr. Gentile asserted his right after being told he would be charged. Holding Mr. Gentile accountable for any period of time during which the assertion of such right appeared unnecessary would be fundamentally unfair. [16]

4. Mr. Gentile Was Prejudiced by the Substantial Delay

The Government asserts that Mr. Gentile was not prejudiced by its conduct on the claims that: (1) he was not subject to pre-trial incarceration, (2) his ability to defend himself has not been hampered, and (3) any claims of inaccessibility of witnesses or documents are too speculative. These arguments ignore the two-part test set forth in *Doggett*, 505 U.S. at 655, for establishing prejudice under the fourth *Barker* factor, which permits Mr. Gentile to show prejudice by either: (1) demonstrating excessive delay – which ends the inquiry as prejudice is presumed (and does not require the defendant to establish an actual inaccessibility of documents or deterioration of witness memories), or (2) showing that "he was subject to oppressive pretrial incarceration, *that he suffered anxiety and concern about the impending trial, or that his defense was impaired as a result of the delay.*" *Barker*, 407 U.S. at 532. (emphasis added).

[16] The Government's arguement that Mr. Gentile waived his right to a speedy trial is contrary to the teachings of *Baker v. Wingo* that "[t]he Court has defined waiver as an intentional relinquishment or abandonment of a known right or privilege" and, therefore, "[c]ourts should indulge every reasonable presumption *against* waiver, and they should not presume acquiescence in the loss of fundamental rights." 407 U.S. 514, 524 (1972) (internal quotations omitted) (emphasis added). "Presuming waiver from a silent record is impermissible." *Id.*; *See Roberts*, 515 F.2d at 647 ("a defendant's failure to demand an earlier disposition of his case does not mean that he has waived his right to a speedy trial during the period of his silence.").

Mr. Gentile's opening brief demonstrated both factors. A delay of 44 months is excessive, so as to give rise to a presumption of prejudice. (Gentile memo at 44). And, Mr. Gentile suffered anxiety and concern during the nearly four years this matter has been pending, as a direct result of the Government's conduct. (Gentile memo at 45). Although the Government states that "amorphous complaints" of anxiety are not sufficient to establish prejudice (Govt. opp. at 39), Mr. Gentile's assertions have been anything but amorphous. In fact, Mr. Gentile's resulting anxiety was so severe that it necessitated his taking anti-anxiety medication. (Ford Aff at 9). [17]

III. Due Process Mandates Dismissal, as the Government Promised Not to Prosecute Mr. Gentile in Exchange for His Continued Cooperation and He Fulfilled His End of the Bargain

As set forth in his opening brief, the Government agreed not to prosecute Mr. Gentile in exchange for his continued cooperation beyond the fall of 2014. (Gentile memo at 50). Mr. Gentile lived up to his end of the bargain, induced to do so based on what he "reasonably understood" to be a promise of immunity. Thus, the Due Process Clause precludes the instant prosecution.

In response to these facts, the Government "suggests that the Court hold a limited evidentiary hearing on [this] issue, focused on the actions and statements after the date of the [October 10, 2014] Ford letter." (Govt. opp. at 51). But the Government has not presented any evidence, in the form of affidavits of otherwise, to successfully refute the sworn factual averments presented by the defense. Accordingly, we submit that the Court should rule in favor

[17] Should the Court request additional medical information regarding the extent of Mr. Gentile's severe anxiety resulting from the Government imposed liberty restrictions over the course of four years, he stands prepared to provide it.

of the defense without the need for a hearing. Nevertheless, should the Court believe a hearing on these or any issues would be helpful, Mr. Gentile welcomes such an invitation.[18]

The Government's factual argument rests mostly on the October 10, 2014 Ford letter, and in so doing, paints an incomplete picture of what occurred between the parties during the three years of extensive cooperation Mr. Gentile provided. While the Government denies without evidence that Assistant U.S. Attorney Gurbir Grewal said something to the effect that Mr. Gentile would "get what he wanted" if he just kept cooperating on the high-profile matter from the fall of 2014, a hearing will demonstrate this conversation occurred, as did others which included similarly promissory language.[19] The Government is accurate in noting that Mr. Gentile's counsel "did not make any blanket assertions at the meeting with the USAO leadership that Gentile would not continue to cooperate in the absence of a formal non-prosecution or similar agreement with the Government." (Govt. opp. at 43). But, his counsel was clear at that meeting that Mr. Gentile no longer wanted to cooperate absent such formal agreement. And, in response, the Government continued to call upon Mr. Gentile for his cooperation.

The Government contends it is "preposterous" that defense counsel and Mr. Gentile would have relied upon these circumstances in forming a belief that Mr. Gentile would not be

[18] If a hearing is to be conducted, the actions and statements *before* the October 10, 2014 Ford letter should be a part of it, as they are equally germane to this matter, particularly given the Government's suggestion that Mr. Gentile "asks the Court to accept that the Government promptly reversed course and thereafter agreed not to prosecute him." (Govt. opp. at 2). No one ever suggested the Government promptly reversed course, and a hearing will flesh out the full extent of the Government's relevant statements and conduct.

[19] Based on the foregoing, the Government discounts the nature of Mr. Gentile's cooperation after December 18, 2014 contending that "Gentile's work with the FBI after the December 18, 2014 meeting was limited in scope and duration." (Govt. opp. at 43). Although the defense disagrees with that characterization, it is not legally relevant. The relevant question is not what weight the Government now self-servingly ascribes to Mr. Gentile's efforts after December 18, 2014 but whether those efforts were provided in consideration for an assurance by the Government that he would not be prosecuted under the instant Indictment. The answer to that question is unequivocally yes.

charged with a felony if he continued to cooperate after the December 18, 2014 meeting. (Govt. opp. at 44). But there is nothing preposterous about defense counsel taking the words and actions of the Government to understand what it is conveying. What is preposterous is the Government charging Mr. Gentile with a felony after the Assistant U.S. Attorney leading the investigation told him, though his counsel, that he "would get what he wanted," meaning a non-felony disposition, if he continued to cooperate on a particularly high-profile case that eventually advanced the AUSA's career. What is equally preposterous, given the instant Indictment, is the idea that the Government would then continue to use Mr. Gentile as a cooperator, even if "limited in scope and duration," after he subsequently expressed his desire to stop cooperating without an assurance that he would not be charged with a felony.[20]

Whether the preceding circumstances, and others not yet in evidence but which can be fleshed out during a hearing, created a binding agreement between the Government and Mr. Gentile is a question of law, to be applied to the underlying facts found by the Court. *See ATACS Corp. v. Trans World Comms. Inc.*, 155 F.3d 659, 665 (3d Cir. 1998).

The Government also argues that the U.S. Attorney's Office, itself, did not make an agreement with Mr. Gentile, thereby implicitly downplaying the significance of AUSA Grewal's words and actions. But, importantly, AUSA Grewal alone can – and did – bind the Government through his words and actions. *See, e.g., United States v. Gebbie*, 294 F.3d 540, 550 (3d Cir. 2002) ("We hold, therefore, that when a United States Attorney negotiates and contracts on

[20] The Government cannot truly believe that Mr. Gentile's and his counsel's reliance on the Government's words and actions following the December 18, 2014, meeting was unreasonable. After all, during that meeting, one of the questions discussed was whether the U.S. Attorney's Office would be setting a bad precedent extending to Mr. Gentile a deferred prosecution agreement, as requested in the October 10, 2014 Ford letter. And, in response to that concern, the parties during the meeting engaged in an extensive discussion about simply permitting Mr. Gentile to continue cooperating for another six months, after which everyone would just "go home."

behalf of 'the United States' or 'the Government' in a plea agreement for specific crimes, that attorney speaks for and binds all of his or her fellow United States Attorneys with respect to those same crimes and those same defendants."). The question then is whether AUSA Grewal's words and actions, by themselves, bound the Government, notwithstanding senior leadership's role in making final charging decisions. For the reasons set forth herein and in our opening brief, they, in fact, did so.

Furthermore, the Government's present suggestion that it never would have agreed to a non-felony disposition based on Mr. Gentile's putative "widespread criminal conduct" (Govt. opp. at 1) is undercut by: (1) its prior words and actions to the contrary, as detailed herein and in our opening brief; (2) its decision to dismiss the Complaint instead of proceeding with it under seal; and (3) its recent admission that it was certainly satisfied with Mr. Gentile receiving a guaranteed non-incarceratory sentence pursuant to Fed.R.Crim.P. Rule 11(c). Given the fruits of his extensive cooperation and how sorely the Government wanted them particularly in the fall of 2014, it is not at all hard to fathom that the Government would have agreed to not charge Mr. Gentile with a felony in order to induce his ongoing assistance. And, even if that were never truly the Government's intention, it nonetheless led Mr. Gentile, through its words and actions, to reasonably believe otherwise. *Baradacco*, 954 F.2d at 939 (in determining whether the Government has violated an agreement with a defendant, the Court must determine whether its "conduct is inconsistent with what was reasonably understood by the defendant" when entering into such an agreement) (internal quotation omitted). Because the Government's conveyed "promise must be fulfilled," *Santabello v. New York*, 404 U.S. 257, 262 (1971), the only appropriate remedy here is dismissal of the Indictment.

IV. The Numerous Statements of the FBI Agents, Together with the Totality of the Circumstances, Mandate Dismissal of the Indictment under the Fundamental Fairness Doctrine of the Due Process Clause

The Government flat out misstates Mr. Gentile's argument for dismissal based on the fundamental fairness doctrine, suggesting that his entire argument rests on claims about "the alleged misconduct of law enforcement agents." (Govt. opp. at 47). It is not only the misconduct of law enforcement agents, however, but the totality of the circumstances which warrant dismissal, including: (1) the promising words of AUSA Grewal, (2) the promising and misleading words and conduct of the agents, (3) the Government's revisionary interpretation of the tolling agreements, and (4) the length of delay in the prosecution of this matter, during which time the Government subjected Mr. Gentile to extra-judicial bail conditions and substantially restricted his fundamental rights and liberties.

While the Government correctly points out that a law enforcement agent generally cannot make a promise that creates a binding plea or cooperation agreement, courts may nonetheless bar the Government from prosecuting an individual if the unauthorized promise (whether express or implied) would "render the prosecution fundamentally unfair." *See, e.g., United States v. Flemmi*, 225 F.3d 78, 88 (1st Cir. 2000). The issue here is not simply whether the agents bound the U.S. Attorney's Office, but whether the agents promises, taken together with the totality of the circumstances, "render the prosecution fundamentally unfair."

The Government's attempt to distinguish the facts of *United States v. Pascal*, 496 F. Supp 313 (N.D. Ill. 1979), misses the significance of that case. The point of *Pascal* is that there are some circumstances in which the misconduct of agents will be sufficient, even without involvement of the U.S. Attorney's office, to warrant dismissal. 496 F. Supp. at 313 ("there has not been even the slightest hint of any misconduct or impropriety on the part of the United States

Attorney's office").[21] While it may be true that the Third Circuit rarely has found Governmental action to be "so outrageous as to violate defendants' due process rights" (Govt. opp. at 45), if ever there were a rare case involving such sufficiently outrageous conduct by the Government, it is this one, as a hearing will fully prove.

The unique facts of this case, taken together, render Mr. Gentile's prosecution fundamentally unfair and warrant dismissal of the Indictment in the interest of justice.

CONCLUSION

For the reasons set forth above and in Mr. Gentile's opening memorandum of law, the defense respectfully submits that the Court should dismiss the instant Indictment outright, with prejudice. In the alternative, the defense requests a hearing on any and all issues deemed necessary by the Court for a determination of the arguments raised herein.

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[21] Although the Government attempts to use the October 10, 2014 Ford letter to dismiss the agents' statements, the letter did not address the statements by the agents. Rather, it referred only to the statements made by the Assistant U.S. Attorneys. This was made clear during the December 18, 2014 meeting.