CASE NO. 11-1170

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff- Appellee,

vs.

AREF NAGI,
Defendant-Appellant

On Appeal from the United States District Court
For the Eastern District of Michigan

BRIEF OF DEFENDANT-APPELLANT NAGI

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STATEMENT OF JURISDICTION

This is a direct appeal from Appellant's conviction imposed by the U.S. District Court for the Eastern District of Michigan. Appellate jurisdiction is pursuant to Rule 4 of the Federal Rules of Appellate Procedure and 28 U.S.C. § 1291. Subject matter jurisdiction arises under 18 U.S.C. § 3742.

STATEMENT IN SUPPORT OF ORAL ARGUMENT

The Appellant, Aref Nagi, respectfully requests that this Court grant oral argument. This appeal involves important constitutional questions concerning prosecutorial misconduct.

In light of the importance and complexity of this issue, Appellant Nagi believes that oral argument would aid this Court in resolving this appeal.

STATEMENT OF ISSUES PRESENTED

- Was there sufficient evidence to convict Nagi of the crimes he was ultimately convicted of?
- Did the Government prejudicially vary the Counts Charged Against Nagi Compared to the Evidence Presented?
- Did the Government Engage in Prosecutorial Misconduct Through Remarks and Treatment of Government Witnesses?
- Did the District Court err in the sentence is imposed on Nagi?
- Did the District Court err by not holding a Franks hearing regarding the wiretap calls?

STATEMENT OF THE CASE

The Highwaymen Motorcycle Club ("HMC") exists as a legal entity. This is not in contention. At issue is whether a disparate set of drug dealing HMC members were properly coalesced into an illegal enterprise for RICO purposes.

Aref Nagi ("Nagi") was charged on September 6, 2006 in a two-count Indictment (R-3) with Conspiracy to Possess with Intent to Distribute and Distribution of Cocaine, Marijuana and Ecstasy, in violation of 21 U.S.C. § 846. Additionally, Nagi alone was charged in a Continuing Criminal Enterprise as organizer, supervisor and manager, in violation of 21 U.S.C. § 848. More than three years later, the Indictment was followed by a 58-count Superseding Indictment which included 91 defendants.(R-198). Specifically, Aref Nagi was charged as follows:

- Count 1, Conducting or Participating in the Affairs in an Enterprise Through a Pattern of Racketeering Activity, a violation of 18 U.S.C. §§ 1962(c), 1963(a); (Disposition: Guilty)
- Racketeering Act Eight, Transporting and Receiving Stolen Vehicles, a violation of 18 U.S.C. § 2313; (Disposition: Guilty)
- Racketeering Act Eleven, Conspiracy to Distribute Controlled Substances, a violation 21 U.S.C. §§ 841(a)(1), 841(b)(1) and 846; (Disposition: Guilty)
- Count 2, Conspiracy to Participate in an Interstate Enterprise Through a Pattern of Racketeering Activities, a violation of 18 U.S.C. §§ 1962(d) and 1963(a); (Disposition: Guilty)
- Count 7, Assault with a Dangerous Weapon in Aid of Racketeering, a violation 18 U.S.C. § 1959(a)(3);

(Disposition: Guilty)

- Count 12, Conspiracy to Assault with a Dangerous Weapon in Aid of Racketeering, a violation of 18 U.S.C. § 1959(a)(6); (Disposition: Not Guilty)
- Count 15, Conspiracy to Transport Stolen Property in Interstate Commerce, a violation of 18 U.S.C. §§ 2312 and 371; (Disposition: Guilty)
- Count 16, Conspiracy to Alter or Remove VIN Numbers, a violation of 18 U.S.C. §§ 511 and 371; (Disposition: Guilty)
- Count 19, Conspiracy to Distribute Controlled Substances and Distribution of Controlled Substances, a violation of 21 U.S.C. §§ 846 and 841; (Disposition: Guilty) and
- Count 31, Use of a Firearm During or In Relation to a Crime of Violence, a violation of 18 U.S.C. § 924(c) (Disposition: Guilty).

Nagi was detained, pending trial, for over 39 months. A due process issue was raised with this Honorable Court and Nagi was subsequently released to prepare for his trial.[1]

After a two-month jury trial, Nagi was convicted on June 3, 2010 of nine of the ten charges. On July 27, 2010 Nagi filed a Joint Motion for Judgment of Acquittal and New Trial.(R-1525). Nagi was sentenced on January 24, 2011 to a term of 334 months in prison. (R-1763). A timely notice of appeal was filed on February 10, 2011. (R-1764).

STATEMENT OF FACTS

INTRODUCTION

[1] Sixth Circuit Case Number 09-1995, Order filed December 14, 2009.

In its case in chief, the Government presented testimony from numerous witnesses. A substantial basis of the Government's case comprised testimony from witnesses who were provided actual payment and some were awarded bonus money if cooperation resulted in convictions. Much of the testimony provided by these witnesses was contradictory at times. A common theme among the witnesses who dealt drugs, though, was they viewed other HMC members who dealt drugs as competitors. Specifically, cross-examination repeatedly uncovered the individuals who dealt drugs did so for their own financial benefit. No witness testified any proceeds from the sale of drugs were provided to the HMC.

Special Agent Ted Brzezinski was the lead FBI agent investigating the HMC. Brzezinski testified multiple times throughout the trial. He testified about wiretapped telephone conversations from Nagi, Mr. Burton and Mr. McDonald's telephones. Additionally, Brzezinski testified about the background of many witnesses who testified during the trial.

Richard Wozniak is a special agent with the Federal Bureau of Investigation. (R-1926, Trial Tr. 4/20/10, Vol 12, page 86, line 14). His responsibilities in the HMC investigation were debriefing cooperating witnesses, reviewing wiretapped telephone calls and controlled purchases.(R-1926, TT 4/20/10, Vol 12, page 87, lines 11-13). He was present when a search warrant was conducted on the HMC Westside clubhouse on Eight Mile Road in Detroit, Michigan. (R-1926, Trial Tr.

4/20/10, Vol 12, page 90, lines 11-13). A controlled purchase of one pound of marijuana was made to Nagi on September 15, 2005 through Doug Burnett. (R-1926, Trial Tr. 4/20/10, Vol 12, page 93, lines 8-9). Another controlled purchase of marijuana was made with Nagi on September 29, 2005. In neither of these transactions was Nagi present. (R-1926, Trial Tr. 4/20/10, Vol 12, page 113, lines 9-25; page 114, lines 1-13). There was no search of the clubhouse that was a predicate for the search of the clubhouse. (R-1926, Trial Tr. 4/20/10, Vol 12, page 115, lines 1-3).

Agent Wallman is employed by the Federal Bureau of Investigation. (R-1916, Trial Tr. 4/12/10, Vol 7, page 107, line 23). He conducted a search of 36603 Waltham Drive, Sterling Heights, Michigan on October 3, 2006. (R-1916, Trial Tr. 4/12/10, Vol 7, page 107, line 23). The agent found a number of firearms and ammunition. (R-1916, Trial Tr. 4/12/10, Vol 7, pages 108-129). All of the weapons were found stored inside a safe. (R-1916, Trial Tr. 4/12/10, Vol 7, page 133, lines 2-4).

The Government stipulated, although they believed the weapons taken from Nagi's house were stolen, only one of the weapons was found to have been stolen. (R-1942, Trial Tr. 5/13/10, Vol 21, page 102, lines 2-21). Further, the Government stated "[t]here are no obliterations on the weapon and there's no outward indication that the weapons were not legitimate. We further stipulate that rifles can be

purchased between individuals at gun shows and at gun stores and that there is no legal requirement for registration of rifles when they are purchased. It is not alleged by the government that Nagi knew that he had possession of a stolen weapon." (R-1942, Trial Tr. 5/13/10, Vol 21, page 102, lines 2-21).

GOVERNMENT WITNESSES ENGAGED IN SALE OF DRUGS

Doug Burnett testified he worked undercover for the Government after having been affiliated with the HMC for approximately six months. (R-1912, Trial Tr. 4/7/10, Vol 5, page 59, lines 21-25). Burnett was paid over $86,000 in his role as an informant. (R-1912, Trial Tr. 4/7/10, Vol 5, page 11, lines 20-25). Burnett was paid $2,500 a month, $27,000 for relocation expenses and two lump sums in the amount of $12,000 and $13,000, respectively. .(R-1912, Trial Tr. 4/7/10, Vol 5, page 12, lines 6-24). Furthermore, Mr. Burnett had been paid an additional bonus for convictions. (R-1912, Trial Tr. 4/7/10, Vol 5, page 31, lines 6-13). Burnett did not declare much of the money he received from FBI on his taxes.

Burnett denied he testified to absolve himself of criminal prosecution. He claimed altruism. He claimed he called the FBI and Agent Brzezinski called Burnett next day. (R-1912, Trial Tr. 4/7/10, Vol 5, page 125, lines 20-25; page 126, lines 1-5). Burnett said there was never a discussion about money; it was just given to him. (R-1912, Trial Tr. 4/7/10, Vol 5, page 129, lines 4-9). Burnett admitted the target of the FBI investigation was "mainly the club," but Nagi and

Robert Burton were also targets. (R-1912, Trial Tr. 4/7/10, Vol 5, page 83, lines 9-14). Burnett did not know if he was not going to be prosecuted. (R-1912, Trial Tr. 4/7/10, Vol 5, page 114, lines 17-25; page 115, lines 1-4).

Doug Burnett met Robert Burton and stole motorcycles at his direction. (R-1912, Trial Tr. 4/7/10, Vol 5, page 42, lines 21-25; page 43, lines 1-13). Burnett also sold drugs for Burton before joining HMC. (R-1912, Trial Tr. 4/7/10, Vol 5, page 139, lines 9-13). He described it as the Burton Operation . (R-1912, Trial Tr. 4/7/10, Vol 5, page 44, lines 7-15), and Burton sold drugs for himself. (R-1914, Trial Tr. 4/8/10, Vol 6, page 14, lines 4-25; page 15, lines 1-5). He testified Burton was involved in 2 or 3 marijuana deals with Nagi. (R-1912, Trial Tr. 4/7/10, Vol 5, page 86, lines 17-18).

Burnett moved because he perceived there to be a hit on his life. (R-1912, Trial Tr. 4/7/10, Vol 5, page 92, lines 23-25; page 93, lines 1-7). The alleged threat stemmed from actions taken by another Government informant and HMC member Philip McDonald. Mr. McDonald notified other HMC members about Burnett's cooperation. (R-1940, Trial Tr. 5/12/10, Vol 20, page 30, lines 6-11). Burnett was also present at the shovel handle attack by Robert Burton on Gerald Deese. (R-1912, Trial Tr. 4/7/10, Vol 5, page 99, lines 8-12). Burnett described Deese as being on the ground with his feet shaking after the assault. (R-1912, Trial Tr. 4/7/10, Vol 5, page 102, lines 11-12).

Robert Burton was a former member of the HMC. He first began cooperating with the Government on or about September, 2008, (R-1912, Trial Tr. 4/7/10, Vol 5, page 102, lines 15-17), after he found out Burnett was cooperating; after he found out about wiretapped phones. (R-1916, Trial Tr. 4/12/10, Vol 7, page 151, lines 23-25). Burton stated he is facing a life sentence for the crimes he is charged with. (R-1916, Trial Tr. 4/12/10, Vol 7, page 151, lines 7-9).

Burton was a drug dealer. He did not have any other job. He made approximately $2,000 a week selling drugs. (R-1916, Trial Tr. 4/12/10, Vol 7, page 165, lines 23-25; page 166, lines 1-9). He testified he considered other HMC members who dealt drugs to be competitors. (R-1920, Trial Tr. 4/14/10, Vol 9, page 24, lines 17-19). He stated selling drugs was his own way of making money, not anyone else's, including the HMC. (R-1920, Trial Tr. 4/14/10, Vol 9, page 95, lines 19-23). Burton, when asked if HMC members collected drug money for him, stated "I collected all of my own money." (R-1920, Trial Tr. 4/14/10, Vol 9, page 169, lines 22-24). When asked if HMC members sold drugs for him, Burton stated "They would be selling it for their self, but they got it from me and sold it to whoever they wanted to." (R-1920, Trial Tr. 4/14/10, Vol 9, page 169, lines 19-21). Burton categorized other HMC members selling drugs as "competitors." (R-1920, Trial Tr. 4/14/10, Vol 9, page 179). Burton conceded he was the "head of his drug business," and did not have any partners. (R-1920, Trial Tr. 4/14/10, Vol 9, page

37, lines 16-20). No members of the HMC watched Burton's drug money. (R-1920, Trial Tr. 4/14/10, Vol 9, page 94, lines 12-13). Selling drugs was Burton's deal, and no one else's. (R-1920, Trial Tr. 4/14/10, Vol 9, page 95, lines 19-21).

Burton stated when he was the president of West Side Chapter, Nagi was its vice president. (R-1920, Trial Tr. 4/14/10, Vol 9, page 179, lines 24-25). Burton commented he wanted to take over the Westside Chapter to "get away from the guys in Detroit." (R-1920, Trial Tr. 4/14/10, Vol 9, page 183, lines 15-17).

Burton also testified about the violent acts he engaged in pertaining to his drug dealing. He attacked Gerald Deese at Stanko's Bar with a shovel handle. (R-1920, Trial Tr. 4/14/10, Vol 9, page 186, line 25; page 187, lines 1-8). Burton alleged the attack occurred because Gerald Deese had taken HMC shirts. (R-1920, Trial Tr. 4/14/10, Vol 9, page 84, lines 9-12). He was with other HMC members when he found out Deese may have taken the shirts and ordered them to break the windows and deflate the tires on Deese's automobile. (R-1920, Trial Tr. 4/14/10, Vol 9, page 186, lines 2-8). Burton stated he was concerned Deese would press charges against him. (R-1920, Trial Tr. 4/14/10, Vol 9, page 89, lines 4-5). He contacted Leonard Moore and made a deal in exchange for $4,000 Deese would not press charges. (R-1920, Trial Tr. 4/14/10, Vol 9, page 90, lines 4-8). Burton stated the attack was for Highwaymen business, but stated the other HMC members with him when he attacked Deese "looked surprised because I didn't plan

on doing it, I just took the stick and hit him, and then like I said, we just got the hell out of there." (R-1918, Trial Tr., 4/13/10, Vol 8, page 10, lines 5-9).

Burton also discussed a situation where he attacked Ruben Guzman, an individual he purchased cocaine from. (R-1918, Trial Tr., 4/13/10, Vol 8, page 11, lines 19-24). He testified he attacked Guzman because Guzman fled with Mr. Burton's drug money. (R-1918, Trial Tr., 4/13/10, Vol 8, page 12, lines 22-24). Burton devised a plan to track Guzman down and get his money back. (R-1918, Trial Tr., 4/13/10, Vol 8, page 14, lines 10-13). Burton hid at Guzman's house and he and others attacked Guzman, culminating with Guzman being taken to a garage. (R-1918, Trial Tr., 4/13/10, Vol 8, page 16, lines 1-23).

Burton did not specifically get a deal for his testimony. (R-1918, Trial Tr., 4/13/10, Vol 8, page 36, lines 12-14). He just hoped for the best deal. Defense counsel, on the second day of Robert Burton's testimony, received a disk with materials to impeach Mr. Burton. (R-1918, Trial Tr., 4/13/10, Vol 8, page 37, lines 15-25). Burton was paid 11k to move family. (R-1918, Trial Tr., 4/13/10, Vol 8, page 76, lines 6-9). Burton owes 150k in child support. (R-1918, Trial Tr., 4/13/10, Vol 8, page 77, lines 16-17).

William Bridges was another former member of the HMC. He stated the HMC made money by throwing parties. Bridges acknowledged some HMC members made money on the side by selling cocaine on the side. He did not know

if any of the proceeds of drug sales went to HMC. (R-1922, Trial Tr. 4/15/10, Vol 10, page 18, lines 21-25; page 19, lines 1-5). Bridges testified the function of the club was not to sell drugs. (R-1922, Trial Tr. 4/15/10, Vol 10, page 40, lines 14-16). The club was not responsible for dealing drugs; individuals were responsible for dealing drugs. R-1922, Trial Tr. 4/15/10, Vol 10, page 42, lines 1-13).

Christopher Miller was in his late 20's when he joined the HMC. (R-1922, Trial Tr. 4/15/10, Vol 10, page 118, lines 10-11). He attained the rank of "mother hen," which made him responsible for social events and the upkeep of the clubhouse for the HMC. R-1922, Trial Tr., 4/15/10, Vol 10, page 135, lines 20-24). He testified he has seen drugs sold in the clubhouse, sharing was "pretty common." (R-1922, Trial Tr., 4/15/10, Vol 10, page 127, lines 21-23). Mr. Miller testified he had purchased cocaine from Gary Ball, Jr. (R-1922, Trial Tr., 4/15/10, Vol 10, page 131, lines 2-7). Specifically, he stated he had been to Mr. Ball's house to purchase cocaine. Miller stated he had not seen Nagi distribute cocaine. (R-1922, Trial Tr. 4/15/10, Vol 10, page 134, lines 17-22). Mr. Miller stated on one occasion he was sent to Nagi's restaurant to retrieve a package.(R-1922, Trial Tr. 4/15/10, Vol 10, page 136, lines 6-10). Upon returning to the clubhouse he looked inside the package and saw what he estimated to be between $45,000 to $60,000 in cash.(R-1922, Trial Tr. 4/15/10, Vol 10, page 136, line 25; page 137, line 1).

Concerning Doug Burnett, Miller testified he heard Leonard "Dad" Moore,

Ronald Hatmaker and Joe Whiting discussing this issue.(R-1922, Trial Tr. 4/15/10, Vol 10, page 150, lines 10-14). According to Miller, Moore stated he did not like informants and "all he wanted to do was find out if it was true and who it was."(R-1922, Trial Tr. 4/15/10, Vol 10, page 150, lines 12-13). Later, in the fall of 2006, Moore, Whiting and Hatmaker met and determined Doug Burnett was the informant. (R-1922, Trial Tr. 4/15/10, Vol 10, page 152, lines 4-7). Miller stated Robert Burton found out Burnett was the informant and was very angry. Burton began looking for Burnett. (R-1922, Trial Tr. 4/15/10, Vol 10, page 155, lines 3-6).

Miller was present when the FBI raided the Detroit clubhouse. (R-1922, Trial Tr. 4/15/10, Vol 10, page 157, line 25; page 158; lines 1-7). A motorcycle in his possession was seized during the raid. Miller admitted he had altered the VIN number on the motorcycle. (R-1922, Trial Tr. 4/15/10, Vol 10, page 158, lines 20-25). Mr. Miller decided to cooperate with the FBI after discussing the motorcycle with agent Brzezinski. (R-1922, Trial Tr. 4/15/10, Vol 10, page 16, lines 11-24).

Gerald Peters grew up in southwest Detroit with members of the HMC. (R-1928, Trial Tr. 4/21/10, Vol 13, page 85, lines 8-16). Mr. Peters joined the HMC when he was 24 years old. (R-1928, Trial Tr. 4/21/10, Vol 13, page 87, lines 5-6). He became National President of the HMC in either 2003 or 2004. (R-1928, Trial Tr. 4/21/10, Vol 13, page 94, lines 6-7). He testified the ways in which the club made money was through parties, selling alcohol and fines. (R-1928, Trial Tr.

4/21/10, Vol 13, page 96, lines 10-14). He said the HMC did not regard itself as an outlaw motorcycle club. (R-1928, Trial Tr. 4/21/10, Vol 13, page 93, lines 13-15).

Mr. Peters contradicted Mr. Burton's testimony, stating it was Peters' understanding Gerald Deese stole drugs from Robert Burton. (R-1928, Trial Tr. 4/21/10, Vol 13, page 111, lines 19-20). Accordingly, Mr. Burton "had to teach him a lesson." (R-1928, Trial Tr. 4/21/10, Vol 13, page 111, lines 19-20). Additionally, Mr. Peters testified Mr. Burton informed him he wanted to kill Ruben Guzman for stealing money from him. (R-1928, Trial Tr. 4/21/10, Vol 13, page 13, lines 11-21). Peters also stated he helped Robert Burton count $450,000 on one occasion. (R-1928, Trial Tr. 4/21/10, Vol 13, page 161, line 25). Peters stated Burton "did his own thing." (R-1928, Trial Tr. 4/21/10, Vol 13, page 166, lines 18-19).

Peters testified he ordered HMC members to drive a truck through another motorcycle club's clubhouse. (R-1928, 4/21/10, Trial Tr. Vol 13, page 117, lines 13-16). Peters also discussed an attack on a member of the Black Pistons. (R-1928, 4/21/10, Trial Tr. Vol 13, page 119, lines 20-23).

Peters testified he received money for relocation purposes. (R-1928, Trial Tr. 4/21/10, Vol 13, page 137, lines 8-11). He was paid approximately $20,000. (R-1928, Trial Tr. 4/21/10, Vol 13, page 137, lines 8-11).

Louis Fitzner joined the HMC when he was 28 years old. (R-1932, Trial Tr,

4/27/10, Vol 16, page 23, lines 1-9). Fitzner described an occasion when HMC members were involved in an altercation with the Liberty Riders, another motorcycle club. In the midst of the fight, Mr. Fitzner took a vest from one of the Liberty Riders. (R-1932, Trial Tr., 4/27/10, Vol 16, page 40, lines 4-9). Fitzner stated Nagi was fighting next to Fitzner on this occasion, stating this fight took place in 2007 or 2008, when Nagi was incarcerated in the Milan Federal Detention Facility. (R-1932, Trial Tr., 4/27/10, Vol 16, page 76, lines 21-24). Additionally, Mr. Fitzner stated Nagi was with Mr. Fitzner in 2007 and 2008 doing drug transactions. (R-1932, Trial Tr., 4/27/10, Vol 16, page 33, lines 12-15). Mr. Fitzner later changed his testimony regarding dates on re-direct examination. (R-1932, Trial Tr., 4/27/10, Vol 16, page 136, lines 21-24).

Mr. Fitzner admitted he sold drugs in addition to various other "short-term jobs" he worked. (R-1932, Trial Tr., 4/27/10, Vol 16, page 41, line 4). Fitzner dealt marijuana. He stated he originally received his supply from Robert Flowers but then used Aref Nagi as a source. (R-1932, Trial Tr., 4/27/10, Vol 16, page 42, lines 22-24). Fitzner stated he only sold marijuana to members of the HMC "a few times. Not very often, though." ((R-1932, Trial Tr., 4/27/10, Vol 16, page 44, line 13). Fitzner testified he owed Nagi money. Fitzner claimed in order to pay off this debt, he stole a motorcycle from a bar in Toledo, Ohio in 2007. (R-1932, Trial Tr., 4/27/10, Vol 16, page 53, lines 17-25; page 54, lines 1-8). Fitzner talked about the

Myrtle Beach rally in 2006. He stated four motorcycles were unloaded from a U-Haul was brought back up from Myrtle Beach. (R-1932, Trial Tr., 4/27/10, Vol 16, page 58, lines 6-9). Mr. Fitzner testified Aref Nagi informed him about events transpired at the Wheat & Rye bar. (R-1932, Trial Tr., 4/27/10, Vol 16, page 62, lines 13-14).

Fitzner acknowledged he is a defendant on the indictment and stated the Government had not promised him anything for his cooperation. (R-1932, Trial Tr., 4/27/10, Vol 16, page 66, lines 21-24). He stated he was hoping for a lighter sentence. Fitzner was given $14,000 by the Government to relocate himself and his family and $1,000 on another occasion. (R-1932, Trial Tr., 4/27/10, Vol 16, page 67, line 19).

Nat Sanchez stated he joined the HMC to sell more drugs. (R-1934, Trial Tr. 4/29/10, Vol 17, page 21, lines 3-5). He sold cocaine to HMC members. (R-1934, Trial Tr. 4/29/10, Vol 17, page 24, lines 14-16). He saw other HMC members distribute cocaine. (R-1934, Trial Tr. 4/29/10, Vol 17, page 36, lines 10-12). The distribution of drugs was not for the HMC, and the HMC organization was not dealing drugs. (R-1934, Trial Tr. 4/29/10, Vol 17, page 75, lines 18-22; page 76, lines 18-24). Each person selling drugs was doing it for themselves. (R-1934, Trial Tr. 4/29/10, Vol 17, page 53, lines 18-24). Sanchez did not pay dues to the organization because he did not want to. (R-1934, Trial Tr. 4/29/10, Vol 17, page

83, line 21; page 84, lines 1-2).

Phil McDonald joined the HMC in October, 2003. (R-1938, Trial Tr. 5/11/2010, Vol 19, page 190, lines 6-7). He has held the position of Master Sergeant at Arms, Vice President and President of the Downriver Chapter of the HMC. (R-1938, Trial Tr. 5/11/2010, Vol 19, page 188, line 22). Mr. McDonald was involved in acts of violence. Specifically, he punched a member because he disrespected another member's wife. (R-1938, Trial Tr. 5/11/2010, Vol 19, page 193, lines 14-20). On one occasion, government witness Gerald Peters instructed McDonald to shoot anyone if they emerge from another motorcycle club's clubhouse. (R-1938, Trial Tr. 5/11/2010, Vol 19, page 194, lines 23-25; page 195, line 1).

Philip McDonald admitted to distributing steroids. (R-1938, Trial Tr. 5/11/2010, Vol 19, page 19218, lines 13-14). McDonald stated he did not see large drug deals take place in the HMC clubhouse. (R-1940 Trial Tr., 5/12/10, Vol 20, page 130, Lines 22-24).

Mr. McDonald stated he had a conversation with Anthony Viramontez about Doug Burnett as an informant. (R-1940 Trial Tr., 5/12/10, Vol 20, page 11, Lines 10-14). McDonald stated Mr. Viramontez wanted Mr. Burnett killed. (R-1940 Trial Tr., 5/12/10, Vol 20, page 11, Lines 21-23). Phil McDonald revealed Mr. Burnett was an informant to the McDonald told Joe Whiting Mr. Burnett had to be

killed. (R-1940 Trial Tr., 5/12/10, Vol 20, page 95, Lines 13-20). McDonald stated the FBI was building a case against the HMC, not individuals. (R-1940 Trial Tr., 5/12/10, Vol 20, page 67, Lines 20-21).

Daniel Sanchez was a member of the Spanish Cobras, a street gang in the city of Detroit, prior to joining the HMC. (R-1936, Trial Tr. 5/10/10, Vol 18, page 36, line 8). At one point, Sanchez reached the level of president of that organization. (R-1936, Trial Tr. 5/10/10, Vol 18, page 67, line 19). He joined the HMC in 1997. (R-1936, Trial Tr. 5/10/10, Vol 18, page 40, line 2-5). Without citing specific incidents, Sanchez stated he stabbed and shot people as part of HMC business. (R-1936, Trial Tr. 5/10/10, Vol 18, page 42, lines 14-23).

Mr. Sanchez contradicted Mr. Burton. He stated Burton wanted to kill Ruben Guzman. (R-1938, Trial Tr. 5/11/10, Vol 19, page 93, lines 21-24). Additionally, Sanchez testified Mr. Deese was sought after by Burton not because he stole shirts, but because he stole cocaine from Mr. Burton. (R-1936, Trial Tr. 5/10/10, Vol 18, page 96, lines 11-13). Sanchez stated Nagi offered to do marijuana business with him. (R-1936, Trial Tr. 5/10/10, Vol 18, page 76, lines 11-14).

Mr. Sanchez was not promised any deals by the Government for his testimony. (R-1936, Trial Tr. 5/10/10, Vol 18, page 90, lines 3-8). Mr. Sanchez was provided $16,000 by the Government. (R-1938, Trial Tr. 5/11/10, Vol 19, page 67,

line 19).

Tammy McAleer, a woman who was seated in the court, interrupted Daniel Sanchez on his first day of testimony by stating "they murdered my son ... He murdered my son." (R-1936, Trial Tr. 5/10/10, Vol 18, page 44, lines 4-13).

Paula Lutz was employed with the Michigan State Police. (R-1940, Trial Tr. 5/12/10, page 78, lines 9-10). Based upon information she received from the FBI, she stopped a car driven by Aaron Roberts. (R-1940, Trial Tr. 5/12/10, page 78, lines 20-25; page 79, line 1, lines 22-25; page 80, lines 9-10). Two Ziploc bags with marijuana were found. (R-1940, Trial Tr. 5/12/10, page 82, lines 13-18).

Aaron Roberts stated he was testifying to receive a better deal. (R-1942, Trial Tr. 5/13/10, Vol 21, page 39, lines 17-21). Mr. Roberts admitted to selling marijuana. (R-1942, Trial Tr. 5/13/10, Vol 21, page 43, line 20). Roberts alleged he sold drugs for Nagi. (R-1942, Trial Tr. 5/13/10, Vol 21, page 44, lines 18-20). Roberts was eventually kicked out of the HMC. (R-1942, Trial Tr. 5/13/10, Vol 21, page 53, lines 20-21). It was supposed to cost him $1,000 to leave the club but he never paid that amount. (R-1942, Trial Tr. 5/13/10, Vol 21, page 53, lines 20-21).

Mr. Wisner is an enforcement specialist for the cars program with the Department of Transportation. (R-1570, Trial Tr. 4/26/10, Vol 15, page 152, lines 22-25; page 153, lines 1-6). Mr. Wisner stated some of the defendants had motorcycles without VIN Numbers on the bikes but Aref Nagi was not one of the

defendants. (R-1570, Trial Tr. 4/26/10, Vol 15, page 163, lines 5-12).

Monika Zuk met Nagi in 2002. (R-1938, Trial Tr. 5/11/10, Vol 19, page 125, line 21). She testified a motorcycle was stored in her garage. . (R-1938, Trial Tr. 5/11/10, Vol 19, page 138, line 1). She later came to believe the motorcycles stored in her garage were stolen. . (R-1938, Trial Tr., 5/11/10, Vol 19, page 138, lines 13-19).

WHEAT AND RYE INCIDENT

Alan Kirchoff is the individual who was allegedly attacked in the Wheat and Rye bar. He testified he did not remember who attacked him on the night in question. (R-1916, Trial Tr. 4/12/10, Vol 7, page 10, lines 11-13). He testified he did not recall calling 911 after he was allegedly attacked. (R-1916, Trial Tr. 4/12/10, Vol 7, page 12, lines 4-12). Mr. Kirchoff testified he was extremely intoxicated that night. (R-1916, Trial Tr.. 4/12/10, Vol 7, page 21, lines 23). When asked, he stated he had no recollection of Aref Nagi or Michael Cicchetti. (R-1916, Trial Tr. 4/12/10, Vol 7, page 20, lines 15-16; page 21, lines 15-19).

Officer Kevin Locklear is employed by the Allen Park Police Department. (R-1916, Trial Tr. 4/12/10, Vol 7, page 63, line 11). He arrived at Wheat and Rye bar on the date of the alleged assault of Alan Kirchoff. (R-1916, Trial Tr. 4/12/10, Vol 7, page 63, lines 17-18). Officer Locklear was able to identify Alan Kirchoff. (R-1916, Trial Tr. 4/12/10, Vol 7, page 64, lines 9-10). Locklear testified on the

night of the incident, Kirchoff identified Erick Manners as the person who fired gun. (R-1916, Trial Tr. 4/12/10, Vol 7, page 64, lines 21-22).

Steven Samborski is an Officer for Allen Park Police Department. (R-1916, Trial Tr. 4/12/10, Vol 7, page 23, line 19). He also responded to call at the Wheat and Rye bar. (R-1916, Trial Tr. 4/12/10, Vol 7, page 24, lines 2-10). Officer Samborski stopped a black pickup truck at the scene. Two males and a female exited the truck. (R-1916, Trial Tr. 4/12/10, Vol 7, page 25, lines 7-22). A Glock pistol was found. (R-1916, Trial Tr. 4/12/10, Vol 7, page 26, line 11). Neither Nagi nor Mr. Cicchetti was placed under arrest. (R-1916, Trial Tr. 4/12/10, Vol 7, page 33, lines 22-23).

Michael Falkner is a Detective Sergeant for the Allen Park Police Department. He investigated the discharge of a firearm at the Wheat and Rye bar. (R-1916, Trial Tr. 4/12/10, Vol 7, page 40, lines 3-17). He reviewed a 9-11 call by Allan Kirchoff. (R-1916, Trial Tr. 4/12/10, Vol 7, page 41, lines 7-15). Kirchoff reported he was attacked by Erick Manners. (R-1916, Trial Tr. 4/12/10, Vol 7, pages 42 and 43, line 25, line 1). Detective Sergeant Falkner also examined the Wheat and Rye bar. (R-1916, Trial Tr. 4/12/10, Vol 7, page 43 – 44, lines 16-2, page 44). He was able to retrieve two bullets shot into the ceiling and determined the bullets were not fired from the Glock found with Nagi and Mr. Cicchetti. (R-1916, Trial Tr. 4/12/10, Vol 7, page 44, lines 11-25).

CONDUCT UNRELATED TO NAGI

Diane Okroy testified individuals alleged to be members of the HMC attacked her husband on March 27, 2004. None of the Defendants in this matter were alleged to have participated in this attack. (R-1930, Trial Tr. 4/22/10, Vol 14, page 62, lines 11-13).

Mr. Banas stated he was a part of the attack of Diane Okroy's husband. (R-1930, Trial Tr. 4/22/10, Vol 14, page 70, lines 18-24). He was subsequently arrested. (R-1930, Trial Tr. 4/22/10, Vol 14, page 70, lines 18-24). According to Banas, Government witness Gerald Peters was the President of the HMC when the attack took place and ordered the attack. (R-1930, Trial Tr. 4/22/10, Vol 14, page 76, lines 7-15). Charles Walker testified about an altercation was in with Leonard Moore, Jr. (R-1942, Trial Tr. 5/13/2010, Vol 21, page 73, lines 22-25). He was not sure if the other individuals with Mr. Moore were members of the HMC. (R-1942, Trial Tr. 5/13/2010, Vol 21, page 71, line 25; page 72, lines 1-2). None of the people on trial alleged to have been involved in the altercation.

Donald Megdanoff testified he resides in Detroit, Michigan. (R-1942, Trial Tr. 5/13/2010, Vol 21, page 79, line 18). Mr. Megdanoff's nephew is Charles Walker. (R-1942, Trial Tr. 5/13/2010, Vol 21, page 80, lines 13-14). Megdanoff stated his nephew came to his uncle's house, which was near the location of the altercation Mr. Walker had been involved in on April 14, 2006. (R-1942, Trial Tr.

5/13/2010, Vol 21, page 80, lines 22-25; page 81, lines 1-3). Mr. Megdanoff stated his house was fired upon that evening. (R-1942, Trial Tr. 5/13/2010, Vol 21, page 85, line 10). Mr. Megdanoff did not state any of the individuals on trial were involved in any way with the shooting.

Michael Wallace testified he stole vehicles and took them to Courtesy Transfer, Incorporated. (R-1570, Trial Tr. 4/26/10, Vol 15, page 135, lines 23-25; page 136, lines 6-8). Randy Adams, a member of the HMC but not on trial, assisted Mr. Wallace in stealing cars. (R-1570, Trial Tr. 4/26/10, Vol 15, page 136, lines 9-11). Wallace testified Mr. Adams, Damian Wilson and an unknown male stole a truck and intended to use it to burn down a rival gang's headquarters. (R-1570, Trial Tr. 4/26/10, Vol 15, page 140, lines 16-23). Nagi was not alleged to have been involved in that activity.

JUROR EXCUSED

On April 14, 2010 a Juror was excused. The district court stated the juror was dismissed because he or she had an "attenuated relationship" to one of the defendants. (R-1920, Trial Tr. 4/14/10, Vol 9, page 4, lines 11-21). The district court stated information had been passed to the unknown defendant in question but the juror was not aware of this. (R-1920, Trial Tr. 4/14/10, Vol 9, page 4, lines 17-19).

LEGAL ANALYSIS

A. NAGI WAS CONVICTED WITH INSUFFICIENT EVIDENCE

1. Standard Of Review

This court reviews *de novo* the sufficiency of the evidence to sustain a conviction. United States v. Gibson, 896 F.2d 206, 209 (6th Cir.1990). Evidence is sufficient to sustain a conviction if "after viewing the evidence in the light most favorable to the prosecution, and after giving the government the benefit of all inferences that could reasonably be drawn from the testimony, any rational trier of fact could find the elements of the crime beyond a reasonable doubt." See also United States v. Copeland, 321 F.3d 582, 600 (6th Cir. 2003); United States v. M/G Transp. Servs., Inc., 173 F.3d 584, 589 (6th Cir.1999) (citing Jackson v. Virginia, 443 U.S. 307, 319 (1979). In examining claims of insufficient evidence, this court does not "weigh the evidence presented, consider the credibility of witnesses, or substitute [its] judgment for that of the jury." Id. at 588-89. United States v. Driver, 535 F3d 424, 428-429; United States v. Hughes, 895 F.2d 1135, 1140 (6th Cir. 1990).

2. Insufficient Evidence Was Presented at Trial to Convict Nagi of a Violation of the RICO Statute

Nagi was charged in a Second Superseding Indictment with substantive and conspiracy RICO charges in violation of 18 U.S.C. §§ 1962(c), 1962(d) and 1963(a). To state a claim under RICO, the Government must sufficiently allege: (1)

the existence of an enterprise which affects interstate or foreign commerce; (2) the Defendants' association with the enterprise; (3) the defendants' participation in the conduct of the enterprise's affairs; and (4) the participation of the Defendants through a pattern of racketeering activity. United States v. Sinito, 723 F.2d 1250, 1260 (6th Cir. 1983).

a. Enterprise Requirement of RICO

The RICO statute defines an "enterprise" to "include[ ] any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4).

Several cases further delineate the contours of the "enterprise" element. In United States v. Turkette, 452 U.S. 576 (1981), the United States Supreme Court stated:

> The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct.... [This element] is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.

Id. at 583, 101 S.Ct. 2524 (emphases added). The Seventh Circuit has elaborated as follows:

> The hallmark of an enterprise is structure.... [T]here must be some structure, to distinguish an enterprise from a mere conspiracy, but there need not be much. A RICO enterprise is an ongoing structure of persons associated through time, joined in purpose, and organized in a

> manner amenable to hierarchical or consensual decision-making. The continuity of an informal enterprise and the differentiation among roles can provide the requisite structure to prove the element of enterprise.

United States v. Rogers, 89 F.3d 1326, 1337 (7th Cir.1996) (citations and quotation marks omitted).

The Turkette Court alluded that proof of a pattern of racketeering activity could also be used to show the existence of an enterprise. Turkette, 452 U.S. at 583 ("While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other."). This Honorable Court has adopted such a reading of Turkette:

> We agree that Turkette requires the government to prove both the existence of an "enterprise" and a "pattern of racketeering activity." We do not, however, read Turkette to hold that proof of these separate elements be distinct and independent, as long as the proof offered is sufficient to satisfy both elements.

See also, United States v. Robertson, 514 US 669 (1995); United States v. Johnson, 440 F.3d 832, 841 (6th Cir., 2006) citing United States v. Quaoud, 777 F.2d 1105, 1115 (6th Cir.1985).

The recent Outlaw Motorcycle Club prosecution illustrates this Honorable Court's handling of enterprises for purposes of RICO. In United States v. Driver, 535 F.3d 424 (6th Cir. 2008), the Defendant challenged the sufficiency of the evidence of his RICO conviction. Evidence was presented that Outlaw members

discussed the club's involvement at "'bosses' meetings" and proceeds from the drug trade financed members' financial obligations to the club. Such evidence was sufficient to establish the existence of an enterprise.

Alternatively, this Honorable Court held the Government did not sufficiently prove the existence of a drug conspiracy in a case where disparate drug dealers were engaged in the drug trade. United States v. Gibbs, 128 F.3d 408 (6th Cir. 1999). In Gibbs, 41 members of the Short North Posse, a group allegedly formed in 1989 in and around the Columbus, Ohio area, were charged in a 185-count indictment. The Government alleged the group actively prevented others not in North Shore Posse from selling drugs. The Defendants appealed their convictions for drug trafficking and conspiracy on the grounds the drug dealers were not a gang and each "sold their drugs independently of one another, choosing their own locations, price points and working hours." Id. at 420.

> [T]he government's evidence proved simply that these defendants independently sold a lot of drugs. Some bought from each other. Others, though acting independently, associated with each other. Nowhere do we see evidence that any specific defendant agreed to participate in the conspiracy to exclude outsiders so as to further the drug sales of insiders." Id. at 423.

At most, the Government revealed a series of individuals who not only dealt drugs but were also in competition with each of the other drug dealers, not an interrelated drug organization operated by the HMC. The witnesses who testified

they dealt drugs were consistent about one thing: each of them sold drugs for themselves, not for the HMC. Doug Burnett sold drugs for Robert Burton prior to becoming a member of the HMC. (R-1912, Trial Tr., 4/7/10, Vol 5, page 139, lines 9-13). In fact, Mr. Burnett considered the organization the "Burton Operation." (R-1912, Trial Tr. 4/7/10, Vol 5, page 44, lines 7-15). Robert Burton stated the individuals who sold drugs for him "would be selling it for their self, but they got it from me and sold it to whoever they wanted to." (R-1916, Trial Tr., 4/12/10, Vol 7, page 169, lines 19-21). Burton testified he collected his own drug money, not members of the HMC. (R-1916, Trial Tr. 4/12/10, Vol 7, page 169, lines 22-24). Burton cemented his position by stating selling drugs was his deal, and no one else's. (R-1916, Trial Tr. 4/12/10, Vol 7, page 95, lines 19-21). Gerald Peters confirmed this when he agreed Burton ran his own drug organization without any partners. (R-1928, Trial Tr. 4/21/10, Vol 13, page 161, lines 4-6; page 166, lines 16-20). Similar to Robert Burton, Government witness Nat Sanchez dealt drugs. He, too, was candid in stating the distribution of drugs was for his own personal gain, not for the HMC nor anyone involved with the HMC. (R-1934, Trial Tr. 4/29/10, Vol 17, page 75, lines 16-25; page 76, lines 1-13). Any proceeds from drug sales Sanchez kept and did not provide any to the HMC. Philip McDonald also admitted to dealing drugs. McDonald distributed steroids. (R-1938, Trial Tr. 5/11/10, Vol 19, page 218, lines 11-12). McDonald stated he did not see large

drug deals taking place in the HMC clubhouse. (R-1940, Trial Tr. 5/12/10, Vol 20, page 130, lines 22-24).

Like the North Shore Posse, the Government's evidence proved some members of the HMC sold drugs but it was not the organized effort proved in the Outlaw Motorcycle Club cases. The Government did not provide any proof any drug proceeds went to the HMC, meetings were held by an HMC committee approving or sanctioning drug trade by the HMC through its members. In fact, Trial Exhibit 216A, the Highwayman Constitution specifically prohibited drug dealing.

b. Pattern Requirement Of RICO

A pattern of racketeering activity requires a minimum of two predicate acts. See 18 U.S.C. § 1961(5). In order to establish any two predicate acts establishes a pattern of racketeering activity, the Government must satisfy the "continuity plus relationship" test, which requires proof of "(1) a relationship between the predicate acts and (2) the threat of continued activity." United States v. Fowler, 535 F.3d 408 (6th Cir. 2008), citing Snowden v. Lexmark International Inc., 237 F.3d 620, 622 (6th Cir, 2001). Defendants at trial attacked the premise of relationships through the testimony of the Government's own witnesses as well as HMC Club Rules which were inconsistent with the continuity and relationship requirement.

This Honorable Court has held this "relationship or relatedness" requirement

can be satisfied by proof: "(1) the defendant was enabled to commit the offense solely by virtue of his position in the enterprise; or (2) the offense was related to the activities of the enterprise." United States v. Corrado, 227 F.3d 543, 554 (6th Cir.2000) (quoting United States v. Locascio, 6 F.3d 924, 943 (2d Cir.1993)). Thus, the "predicate acts do not necessarily need to be directly interrelated; they must, however, be connected to the affairs and operations of the criminal enterprise." Id. United States v. Garland, 320 Fed. Appx. 295, 298-299 (6th Cir. 2008).

In light of the argument above, this was a case involving disparate persons committing disparate crimes unrelated to the functioning of the HMC. The Government failed to establish Nagi engaged in a pattern of activity sufficient to support a RICO conviction.

3. Evidence of Possessing Stolen Motorcycles Was Insufficient to Sustain a Jury Verdict On Racketeering Act Eight, Count 15 and Count 16

The Second Superseding Indictment alleges Nagi, along with others, "knowingly, intentionally, and unlawfully receive, possess, and store" motorcycles allegedly stolen from the State of South Carolina. Nagi was convicted of Transporting and Receiving Stolen Vehicles, a violation of 18 U.S.C. § 2313; Conspiracy to Transport Stolen Property in Interstate Commerce is a violation of 18 U.S.C. §§ 2312 and 371; and Count 16, Conspiracy to Alter or Remove VIN Numbers, a violation of 18 U.S.C. §§ 511 and 371.

The only testimony linking Nagi to an allegedly stolen motorcycle from South Carolina was testimony from Louis Fitzner. Mr. Fitzner stated he saw Nagi with a red motorcycle with flames on it. (R-1932, Trial Tr. 4/27/10, Vol 16, page 58, lines 6-9). No physical evidence was provided linking Nagi with a stolen motorcycle.

4. The Government Failed To Provide Sufficient Evidence to Establish the Elements of Aiding and Abetting

This Honorable Court has held to sustain a conviction under 18 USC § 924(c) of aiding and abetting, the Government must prove " the defendant, as the accomplice, *associated and participated* in the use of the firearm in connection with the underlying . . . crime." United States v Gardner, 488 F.3d 700, 712 (6th Cir. 2007); *citing* United States v. Franklin, 415 F.3d 537, 554-55 (6th Cir. 2005) (*citing* Rattigan v. United States, 151 F.3d 551, 558 (6th Cir. 1998) (citations omitted)). *See also* United States v. Morrow, 977 F.2d 222, 231 (6th Cir. 1992). In order to meet its burden, the Government may show the defendant both knew the principal was armed and acted with the intent to assist or influence the commission of the underlying predicate crime. Franklin, 415 F.3d at 554-55.

A conviction of aiding and abetting a §924(c) violation must not stand if it is not proven the Defendant knew a gun will be used or carried in relation to the underlying crime. United States v Giraldo, 80 F.3d 667, 676 (2nd Cir. 1996); *citing* Wright v United States, 182 F.3d 458 (6th Cir. 1999). Additionally, a conviction for

the use of a firearm in violation of §924(c) must also fail if the conviction is predicated on a theory the Defendant aided and abetted the use of the firearm but there is no proof the Defendant engaged in some form of activity that directly *facilitated or encouraged* the use of the principal's firearm. Id. There must also be proof the defendant performed some affirmative act relating to that firearm. Id. Nagi submits the government must establish more than the defendant knew one of his co-conspirators carried a firearm; rather, "there must also be proof that the defendant performed some affirmative act relating to that firearm." Wright, *supra.* at 465; *citing* Giraldo, 80 F.3d at 676; Rattigan, 151 F.3d at 558. (Emphasis added). The principles in Wright were further refined by this Honorable Court in Rattigan, *supra.* This Court held the Government must show the defendant *participated*, rather than simply being present as a knowing spectator; the crime would not have transpired without the presence of the defendant. Id. at 558.

No evidence was presented to establish Nagi specifically knew Mr. Manners was going to be present at the Wheat N' Rye or to be carrying a weapon that day. Prior to Nagi's closing arguments in this case, the Government and undersigned counsel agreed on the record "... unless Cicchetti and Nagi were inside the Wheat & Rye that they can't be convicted of that count. So they're not being charged for the conduct outside, they're only being charged for the[ir] conduct inside, if they [the jurors] believe that they were inside, okay, and so I'm going to say that, and so

that you hear that, but that we agree." (R-1964, Trial Tr., 5/26/10, Vol 27, page 4, lines 17-25). The Government provided no evidence Nagi provided Manners with a gun; Nagi saw Mr. Manners in possession of a gun before or during the event; or Nagi in any way encouraged, aided, or assisted Manners in the sudden and unexpected brandishing or firing of the gun in the Wheat N' Rye. The element of knowledge is critically missing. *See* United States v. Winston, 687 F.2d 832, 835 (6th Cir. 1982).

B. VARIANCE

1. Standard of Review

Generally, a defendant's claim that there was a prejudicial variance between the terms charged and evidence presented is reviewed de novo. United States v. Warman, 578 F. 3d. 320, 341 (6th Cir. 2009).

2. The Government Improperly Introduced Evidence At Trial Inconsistent With The Indictment.

Nagi contends there was a fatal variance that occurred in light of the inconsistent evidence with the indictment; as well as the jury charge administered by the district court to the jury. The defendants jointly moved the district court arguing the district court allowed the government a prejudicial variance from the second superseding indictment as a result of conflicting evidence between the proof and charges in the indictment. (R-1525). The district court ruled there was no variance between the indictment and trial evidence. (R-1584, page 23).

Typically, "[a] variance occurs when the charging terms of the indictment are unchanged, but the evidence at trial proves facts materially different from those alleged in the indictment." United States v. Solorio, 337 F. 3d. 580, 589 (6th Cir. 2003). See also, United States v. Bearden, 274 F. 3d. 1031, 1039 (6th Cir. 2001) (internal quotation marks and brackets omitted). Not every variation between indictment and proof at trial, constitutes reversible error. Only the kind that creates a "substantial likelihood that a defendant, like the defendants here, may have been convicted of an offense other than that charged by the Grand Jury require reversal." United States v. Feinman, 930 F. 2d 495 (6th Cir. 1991).

Within the context of a conspiracy, reversible error as a result of variance is appropriate only if a defendant demonstrates he was prejudiced by such variance; and further the indictment alleged one conspiracy, but the evidence can reasonably be construed only as supporting multiple conspiracies.

Consequently, before these defendants can obtain reversal of their convictions on variance grounds, they must "(1) demonstrate the variance, and (2) show the variance affected a substantial right." Warman, *supra*, 578 F. 2d at 341. Under this analytical posture, "the principal considerations are the existence of a common goal, the nature of the scheme, and the overlapping of the participants in various dealings." Id. (*quoting*, United States v. Smith, 320 F. 3d 647, 652 (6th Cir. 2003).

The indictment introduced the HMC as regional organization with several individual chapters, a hierarchical structure and constitution, and the "HMC", a criminal organization, principally operating in the Detroit, Michigan area, engaged in a litany of federal law violations, so constituted the "enterprise." (R-997, pages 5-6). It was said the HMC (the criminal enterprise), by itself and through its members, committed crimes aimed at enriching itself and protecting itself. (R-997, page 7).

The HMC was a defendant in this case, as alluded to by the government in declaring it a criminal organization directly benefitting from the actions of its members. The HMC was indeed named the "enterprise." The proof at trial totally absolved the HMC of any criminal culpability. The government stated the HMC was not a criminal organization, and it was not illegal to join the HMC, an organization it originally charged as a criminal enterprise. This is contrary to the allegations in the indictments, and the evidence submitted to the Grand Jury.

The indictment charged one drug conspiracy couched underneath the canopy of the HMC. The indictment specifically charged the HMC as being a criminal organization at the "hub" of the conspiracies. The government introduced evidence of several independent conspiracies and individual drug transactions. Midway through the trial the terms of the indictment were altered when the government declared the HMC was not a criminal organization.

The defendants were convicted of an offense other than the specific charge in the indictment returned by the Grand Jury, and as further supported by the governments evidence before the Grand Jury at the time. Though the district court held the defendants failed to show prejudicial variance because "[t]he facts adduced at trial were not materially different from those alleged in the indictment," (R-1584, footnote 2, citing Solorio, supra, 337 F.3d at 589), the facts belies the Judge's reasoning.

Because the government charged the HMC as a criminal organization the evidence at trial the HMC was a legitimate and legal entity amounted to a fatal variance, requiring reversal of the convictions.

3. The District Court's Erroneous Instructions Also Resulted In Fatal Variance

The district court, in clear contravention of the indictment and the government's opening, instructed the Jury the HMC is not on trial here. Membership in the HMC was not in of itself illegal.

As modified, the court expressed the enterprise as charged, was a criminal organization that evolved out of the HMC, and not the HMC itself. The court went on to state that trial evidence established a large number of the Detroit area HMC members bound together and formed an on-going organization functioning as a continuing unit for the common purpose of achieving the objectives of the enterprise. (R-1584, footnote 2, citing Solorio, supra, 337 F.3d at 589). Clearly,

this opinion by the district court underscores the claim of fatal variance because the court not only altered the indictment, it essentially charged an offense the indictment did not charge. The court held the enterprise was a criminal organization that "evolved out of the HMC; not the HMC; though the indictment charged the HMC, as well as its members as being the criminal organization. Further, the indictment introduced the HMC as the enterprise, not an independent entity woven out of the HMC cloth. Such distinction by the court, which is diametrically opposed to the charging terms of the indictment constituted a variance. Consistent with the standard for "fatal variance," the charging terms of the indictment remained unchanged; but the evidence of the HMC's criminal culpability and liability dramatically changed.

Under the prongs of the charged conspiracy, removing the HMC as a co-conspirator "(1) demonstrate[d] the variance, and (2) show[ed] that the variance affected [the defendants'] substantial rights." Warman, 578 F. 3d at 341. The variance modified any allegations of a common goal, the nature of the alleged schemes, and the overlapping of the participants in various dealings. United States v. Hughes, 505 F. 3d 578, 787 (6th Cir. 2001). (*quoting*, United States v. Smith, 320 F. 3d 647, 652 (6th Cir. 2003). All are "[t]he principal considerations," within the context of a conspiracy. Id.

Nagi was prejudiced by both the government's proof as well as the court's admonishments to the jury. As a consequence, Nagi's theory was dealt a substantial blow.

C. REMAND IS REQUIRED BECAUSE OF THE ERRONEOUS CONSTRUCTIVE AMENDMENT OF THE INDICTMENT

1. Standard of Review

The question of whether an amendment (or a variance) occurred is reviewed de novo. United States v. Budd, 496 F. 3d. 517, 521 (6th Cir. 2007)(citing, United States v. Prince, 214 F. 3d 740, 756 (6th Cir. 2000).

2. Constructive Amendment of the Second Superseding Indictment

The Fifth Amendment ensures a defendant be tried only on the charges contained in an indictment returned by a Grand Jury. It states "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."(U.S. Const. Amendment V).

Constructive amendment of an indictment is per se violation of the Grand Jury clause of the Fifth Amendment "that requires reversal even without a showing of prejudice to the defendant." United States v. Wozniak, 126 F 3d 105, 109-10 (2nd Cir. 1997). Similarly, this Court discussed constructive amendment in United States v. Beeler, 587 F. 2d 340, 342 (6th Cir. 1978). The Beeler court held "liberal or constructive change in the terms of the indictment is per se prejudicial," and results in reversal.

The Supreme Court has made it clear after an indictment has been returned its charges may not be broadened through amendment except by the Grand Jury itself." Stirone v. United States, 361 U.S. 212, 215-16 (1960). The Stirone Court reversed a court substituting "the charging part of an indictment to suit its own notions," or "what the Grand Jury would probably have made it." Id., 361 U.S. at 216.

To allow this would render the great importance to the indictment by a Grand Jury secured by the constitution as a pre requisite to a prisoner's trial for a crime "frittered away until its value is almost destroyed." Id, citing Ex Parte Bain, 121 U.S. 1, 10 (1887) (overruled on other grounds). The court said once "[t]he indictment was changed it was no longer the indictment of the Grand Jury who presented it." Stirone, *supra*, 361 U.S. at 217. Trial of a defendant on charges other than those made in the indictment cannot be permitted by the court. Id, *quoting* United States v. Norris, 281 U.S. 619, 622 (1930).

The fundamental principle underpinning Stirone and her unbroken line of cases has been the staple in the Sixth Circuit. This circuit has since held:

> "[a] constructive amendment results when the terms of an indictment are in effect altered by the presentation of evidence and Jury instructions which so modify essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than the one charged in the indictment." Accord, Budd, 496 F. 3d at 521. *See also*, United States v. Smith, 320 F. 3d 647, 656 (6th Cir. 2003) (citing United

States v. Stirone, 361 U.S. 212 (1960).

Consistent with this reasoning, the court further analyzed both "actual" and "constructive" amendments. The court categorically declared no fundamental distinction of significance existed between both that undermines the onerous impact, or both are per se prejudicial and reversible error. Budd, *supra* at 521, *citing* United States v. Prince, 214 F. 3d at 757. This Honorable court has also distinguished constructive amendment from variance may by reason and effect become constructive amendment. United States v. Hynes, 467 F. 3d 951, 962 (6th Cir. 2006).

Every indication was given by the government the HMC was a criminal organization, and as an entity, constituted the enterprise along with its members, as defined by 18 U.S.C. § 1961(4).

At the heart of the RICO conspiracy and Racketeering Acts is the HMC, which the government sought extensive trial evidence of its structure, constitution and objectives to substantiate its theory of the charged enterprise. It is undeniable the HMC was treated like a defendant in this case and was the hub that held the spokes of the RICO charges together. Absolving the HMC of criminality as both the court and the government did not only constructively amend the indictment, it effectively dealt a fatal blow to the jury's ability to fairly consider the RICO charges for Nagi.

The indictment charged the HMC as a criminal organization that received taxes, or special assessments, as well as receive contributions from the proceeds of illegal activities such as controlled substance trafficking and stolen properties. The HMC, was also charged with acts of threats, murder, robbery, and other illegal acts. The indictment specifically charged members "[g]ave stolen property and controlled substances [to HMC] as payment for back dues and penalties." (R-997, Second Superseding Indictment, paragraphs 8-11). No evidence was introduced at trial to substantiate the HMC itself being given stolen property and/or controlled substances, nor was any evidence presented the HMC or its members directed any one to commit any illegal activity on behalf of the HMC.

Instead, contrary to the indictment, both the government and the district court instructed the Jury otherwise. To their credit, the government not only informed the Jury the HMC was not on trial or culpable, it presented evidence to this end. In doing so, the government amended the indictment. The court repeatedly said: "[t]he evidence showed that the enterprise was a criminal organization that evolved out of the 'HMC' it was not the HMC." (R-1584, footnote 1.)

During Jury selection of this case, the trial Judge informed the potential Jurors: Court: "this case is about the Highwaymen Motorcycle Club, sometimes referred to as the HMC. (R-2106, Trial Tr. 4/1/10, Vol 1, page 21, lines 20-21).

The court went on to instruct them that: Court: "The government alleges that the HMC is a criminal organization whose members and associates engaged in acts and threats ..." (Emphasis added.)(R-2106, Trial Tr. 4/1/10, Vol 1, page 21, lines 2-10).

The court, like the government, repeatedly informed the Jury the HMC was not on trial, and that it was not illegal to join the HMC. In fact both the court and the government instructed the Jury the HMC was not a criminal organization. The Jury could have reasonably understood this to mean two enterprises existed independently.

As discussed above in part II, and again reiterated here, the indictment specifically charged the HMC in this case, not a legal entity as instructed. Nor did the indictment(s) charge two distinct enterprises. Both the government's evidence and the judge's instructions to the Jury altered this. The indictment was constructively amended and therefore is per se prejudicial. The allegations and proof did not measure against the obvious requirements the defendants be informed definitively of the charges to avert surprises and to equally protect against another prosecution for the same offense. Berger v. United States, 295 U.S. 78, 82 (1935).

The Jury was left to convict on the ground the separate independent activities were interrelated as one unit that evolved out of the HMC, when in fact the HMC as charged in the indictment was the alleged hub of the criminal activities.

D. THE GOVERNMENT FAILED TO PROVIDE DEFENSE COUNSEL WITH AN ADEQUATE OPPORTUNITY TO CROSS-EXAMINE DANIEL SANCHEZ, RESULTING IN A VIOLATION OF NAGI'S SIXTH AMENDMENT RIGHTS

1. Standard of Review

Alleged violations of the Confrontation Clause of the Sixth Amendment are reviewed de novo but are subject to a harmless error analysis. United States v. Bell, 367 F.3d 452, 465 (5th Cir. 2004). If there is no Sixth Amendment violation this Honorable Court reviews whether the district court abused its discretion by limiting cross-examination. United States v. Restivo, 8 F.3d 274, 278 (5th Cir. 1993).

2. Analysis of Sixth Amendment Violations

The prosecutor must disclose to the defense all evidence "favorable to the accused" and "material either to guilt or punishment." Brady v. Maryland, 373 U.S. 1983 (1963), Strickler v. Green, 527 U.S. 263 (1999). In Giglio v. United States, the Supreme Court extended the dictates of Brady to encompass evidence impeaching the credibility of witnesses. 405 U.S. 150 (1972). This has been further refined to include, not only evidence that was in the direct possession of the prosecutor, but also that is in the possession of his or her investigative agents, Kyles v. Whitley, 514 U.S. 419 (1995).

The Sixth Amendment guarantees the right to confront witnesses and cross-examination has been the traditional and most powerful tool for confrontation.

United States v. McClesky, 228 F.3d 640, 643 (6th Cir. 2000). The central concern of the confrontation clause is to ensure the reliability of evidence by subjecting it to testing in the context of adversary proceedings before the trier of fact. Maryland v. Cray, 497 U.S. 836, 845 (1990).

This issue was presented to the trial court in the Appellant's Motion for New Trial. (R-1525). There is a three-part test must be met for reversal based upon prosecutorial misconduct. First, the evidence must be favorable to the accused, either because it is exculpatory or because it is impeaching; second, the evidence must have been suppressed by the State, either willfully or inadvertently; and, third, prejudice must have ensued.

Government witness Douglas Burnett admitted the Government paid for his expenses and he had the expectancy he would be given a bonus at the conclusion of the case. It is unclear how much he expected to receive upon the convictions in this case, but he understood regardless of whether there were convictions he was going to receive additional monies.

Although Brady disclosures had been requested, counsel was not advised of this very important information prior to trial. Payment was made as a part of a program sponsored by the Justice Department; but it is unclear to what extent Government counsel was aware. The dictates of Kyles require timely disclosure. The information was obviously material to the defense. The Attorney General's

Guidelines Regarding the Use of Confidential Informants states "under no circumstances shall any payments to a CI be contingent upon the conviction or punishment of any individual."[7] The prejudicial lack of disclosure of payment information was exacerbated by the Government's requirement of secrecy related to their critical witnesses. Not only was defense counsel unaware of the identities of many of the witnesses, defense counsel also had no knowledge any of the witnesses had been paid for their testimony by the Government until cross-examination.

Counsel is aware of the requirements of 18 USC § 3500 but believes the disclosure of impeaching information in a timely fashion transcends the statute. Grand Jury and witness statements of the most important of their witnesses, at the Government's request, were not presented until just prior to trial. At that time Defendants were literally inundated with thousands of pages to organize, analyze and absorb on the eve of trial. The advanced knowledge of this information would have allowed for the preparation of pretrial motions to dismiss, which could not have been filed based on the Government's non-disclosure.

The witnesses in this matter were encouraged to provide uncorroborated testimony of a historical nature, leaving the Appellants with the near-impossible task of proving a negative. For example, Agent Wozniak testified he did not

[7] Department of Justice Guidelines Regarding the Use of Confidential Informants, January 8, 2001, at (See Section III B(2).)

observe Doug Burnett actually make the controlled purchase in Nagi's restaurant nor his car. Neither of these transactions were transactions Nagi was present for. (R-1926, Trial Tr. 4/20/10, Vol 12, page 113, lines 16-23; page 114, line 12).

The Confrontation Clause guarantees a criminal defendant the right to cross-examine the witnesses against him. *See* Davis v. Alaska, 415 U.S. 308, 315 (1974). Indeed, it "is the principal means by which the believability of a witness and the truth of his testimony are tested." Id. at 316. The right to cross-examination is "particularly important when the witness is critical to the prosecution's case." United States v. Mizell, 88 F.3d 288, 293 (5th Cir. 1996). "[T]he cross-examiner is … permitted to delve into the witness' story to test the witness' perceptions and memory, [and] … has traditionally been allowed to impeach, i.e., discredit, the witness." Davis, 415 U.S. at 316.

The Court entertained an *in limine* motion by the Government relating redacted material in Mr. Sanchez's Kastigar debriefing pertaining to at least one homicide. Counsel suggested this issue involved exposing the witnesses' *motivation*; and to the extent the defense was not allowed to go into the witnesses deal, they were denied their right to confront and cross-examine the witness against them as guaranteed by the Sixth Amendment confrontation clause. *See* Davis, *supra*. Indeed, it "is the principal means by which the believability (not just credibility) of a witness and the truth of his testimony are tested." Id. at 316.

Nagi sought to be able to explore the deal whether Mr. Sanchez was allowed to avoid a potential life sentence in exchange for his cooperation. The jury had a right to know the Government was willing to go as far as to allow an admitted murderer to get immunity from prosecution in exchange for his testimony. *See* United States v. Jimenez, 464 F.3d 555 (5th Cir. 2006).

The disturbance of Tammy McAleer during Daniel Sanchez's testimony underscores the import of defense counsel to be permitted to investigate the motive of Mr. Sanchez. Mr. Sanchez's motive seems to have arisen from a plea agreement relating to a homicide investigation. Ms. McAleer appeared at trial and caused a disturbance. . Counsel for Nagi moved for a mistrial on this ground but the motion was denied. Nagi had no involvement in her appearance or outburst.

E. THE TRIAL COURT ERRED IN ITS RATIONALE FOR THE PRISON SENTENCE IT IMPOSED UPON NAGI

1. Standard of Review.

Review of the district court's interpretation of the Sentence guidelines is de novo. Any review of factual findings by the district court is reviewed for clear error. United States v. Corrado, 304 F.3d 593, 607 (6th Cir., 2002). Nagi's pre-sentence investigation report is attached in a separate record pursuant to this Court's practice and procedure.

2. Relevant Conduct Inappropriately Attributed to Nagi

Relevant conduct is computed to include "acts or omissions" committed or aided by the defendant; and all "reasonably foreseeable acts and omissions of others in furtherance of the joint undertaken criminal activity. U.S.S.G. § 1B1.3(1)(A) & (B). Proof of relevant conduct must be "supported by some minimum indicium of reliability beyond mere allegation." United States v. Smith, 975 F2d 1225, 1242 (6th Cir. 1992).

The Presentence Report included all fifteen predicate acts to calculate a sentence. Counsel for Nagi objected to the guidelines computations. Nagi was neither charged with nor proven to be involved in many of these predicate acts.

Sentencing was initially held on January 11, 2011 for Nagi. Preliminary arguments were held on that date. The district court entered an opinion and order addressing relevant conduct for Nagi. (R-1723, Opinion Addressing Relevant Conduct for Purposes of Calculating Base Offense Level for Defendant Nagi's Count II RICO Conspiracy Conviction). Subsequently, a hearing was held on January 24, 2011 to complete the evaluation of the guidelines. This was one of dozens of sentencings which have taken place since that time for other co-defendants. At that time, the district court recited the factors it considered in fashioning a punishment. The PSR made a determination Nagi's Criminal History was I, and his Total Offense Level was 44. The district court calculated the guideline level for each group of offenses and then proceeded to determine the

multiple count adjustment.

She found Nagi's Offense Level to be as follows: reciting Count I was a 20 year offense, and addressing thereafter Act 2 of Count I, the conspiracy to murder Gerald Deese, basic guidelines at level 33 with a four-level leadership enhancement to level 37; Act 3, Count I, the extortion of Anthony Barton, was calculated at level 24; Act 4, Count I, the robbery of Steven Peet, adjusted offense level is 36; Group 4 relating to stolen vehicles, adjusted offense level of 28; Group 5, the drug counts, adopted the offense level of 36; Group 6, conspiracy to commit the murder of Doug Burnett, the district court refused to attribute an offer of anything pecuniary and the enhancement for obstruction of justice. The base offense level for that group was thereby reduced to level 37; Group 7, the mandatory 10 year consecutive, for assault with a dangerous weapon in aid of racketeering, was reduced to level 37.

This reduced the grouping to four units which then calculated to the offense level to 41, with a guideline range of 324 – 405 months. (R-1744, Sentencing Hearing Transcript, pages 15-18). As a result, on Counts 1, 2, 7, 15, 16, 19 and 31 the district court sentenced Nagi to the custody of the Bureau of Prisons to 240 months on Count 1; 324 months on Count 2; 240 months on Count 7; 120 months on Count 15; 60 months on Count 16; and 324 months on Count 19 all to be served concurrently. On Count 31, 120 months consecutive to all other counts. (R-1744,

Sent Hrg 1/24/11, pages 18-21; R-1763, Judgment of Conviction).

Testimony at trial was fairly consistent as to the individuality of the actors in the HMC. Witnesses Robert Burton, Doug Burnett, Nat Sanchez, Daniel Sanchez and Phil McDonald all testified whatever actions they operated independent from the HMC as it related to the drug trade. The district court failed to explain how any of the actions attributed to Nagi "were part of the same course of conduct or common scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3. United States v. Bullock, 454 F.3d 637 (7th Cir., 2006). Mr. Burton testified he was in the drug business for himself. He did not have HMC members collect money for him and he did not deal drugs for the HMC. Mr. Burton stated the attack on Mr. Deese was a surprise as he had not notified the individuals he was with he was going to attack Mr. Deese. Nagi was not present at the time of the event. Similarly, there was no evidence presented Nagi had any involvement with the extortion of Anthony Barton or the armed robbery of Steve Peet. The district court's imposition of sentencing enhancements to Nagi was inappropriate and must fail. Nagi respectfully requests, due to the district court's grouping errors and assignment of enhancements for conduct that was: committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant as described in USSG 1B1.3(a)(1)(A) and reasonably foreseeable in section (B), was inappropriate. These acts referred to above were neither known nor participated in

by Nagi, nor were they reasonably foreseeable in the time frame of his involvement with the conspiracy. The matter should be remanded for resentencing. While the district court espoused the language of 18 U.S.C. § 3553 for the record that she shall impose a sentence sufficient, but not greater than necessary to comply with the purposes of the statute, she did not in any sense take into consideration any ameliorative arguments in crafting her sentence.

F. THE TRIAL COURT ERRED IN DENYING NAGI'S MOTION TO SUPPRESS AND BY DENYING HIM AN EVIDENTIARY HEARING PURSUANT TO FRANKS V. DELAWARE

Nagi moved to suppress the telephone calls intercepted by the federal government. On March 1, 2010 the district court published an opinion and order denying Defendant Nagi's Motion to Suppress as well as his request for an evidentiary hearing. (R-1299). The district court denied Defendant's motion on grounds of minimization and necessity as well as the sealing orders were not contemporaneous with the sealing of the orders as required by 18 U.S.C. § 2510, *et seq*. At trial the wiretap evidence was a significant portion of the evidence against Nagi and others.

1. Minimization

An evidentiary hearing was necessary because the investigating agents exhibited a high disregard for Nagi and others' privacy rights and failed to do all they reasonably could to avoid unnecessary intrusions. U.S. v. Rice, 478 F.3d 704

(6th Cir., 2006).

Phone Number: (313) 220-2500				
Wiretap Order	Calls	# Minimized	# Alleged Criminal Calls	% Minimized
October 2005				
Ten Day Report	2546	105	81	4.12%
Twenty Day Report	2995	61	238	2.04%
Thirty Day Report	2136	83	64	3.89%
Total	7677	249	383	3.24%
December 2005				
Ten Day Report	2815	79	140	2.81%
Twenty Day Report	2296	68	132	2.96%
Thirty Day Report	2419	94	115	3.89%
Total	7530	241	387	3.20%
March, 2006				
Ten Day Report	1767	25	56	1.41%
Twenty Day Report	1632	63	76	3.86%
Thirty Day Report	2135	109	157	5.11%
Total	5534	197	289	3.56%
April 2006				
Ten Day Report	3022	98	233	3.24%
Twenty Day Report	1456	42	119	2.88%
Thirty Day Report	4478	140	352	3.13%
Total	8956	280	704	3.13%
Grand Total	22167	726	1376	3.28%

Figure A. - Results from Title III Orders, number of calls, number of calls minimized, number of calls with allegedly criminal activity and percentage of calls minimized.

It does not appear as if minimization consistent with the statute and case law took place. Statistically, although counsel is without complete information about the (313) 220-2500 number, the percentages for alleged criminal activity ran at the

rate of approximately 5%, for the ten, twenty and thirty day reports for the wiretaps. Shockingly, approximately 3% of all of the calls were minimized.

The government's minimization procedures were not objectively reasonable. Totally innocent conversations were recorded in their totality. These conversations are personal and do not relate to targets of the investigation. They involve conversations between friends, family and attorneys. They were not spot-checked and were not reasonably minimized. There were significant numbers of conversations relating to innocuous things and were mere gossip. These conversations cannot be reasonably inferred to have anything to do with the charged conduct.

2. Necessity

While it is recognized electronic surveillance may be utilized when necessary to ferret out serious crimes, it should only be allowed when assurances are made that citizens are not subjected to unreasonable and unnecessary intrusions into their privacy. United States v. Giordano, 416 U.S. 505, 526-527 (1974). The use of electronic interception of private conversations may only be conducted after court authorization based upon the government's strict compliance with strict predicate requirements.

The government bears the burden to comply with the necessity requirement of 18 USC § 2518(1)(c), requiring each application for electronic surveillance to

include a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear unlikely to succeed if tried, or to be too dangerous. Mirroring this standard, 18 USC § 2518(3)(c) provides that the issuing judge shall determine whether "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." The necessity requirement in this case was ignored by the Government and given short shrift by the trial court.

The necessity requirement as specifically "placed in the statute to ensure a wiretap 'is not resorted to in situations where traditional investigative techniques would suffice to expose the crime.'" United States v. Alfano, 838 F.2d 158, 163 (1988), quoting United States v. Kahn, 415 U.S. 143, 153 n. 12 (1974). The necessity requirement ensures "wiretaps are not to be used thoughtlessly or in a dragnet fashion." Alfano, 838 F.2d at 163.

The necessity requirement is pivotal to the mandate established by Congress concerning the regulation of electronic surveillance. This Honorable Court must closely scrutinize Nagi's challenge for non-compliance. The Supreme Court recognized this scrutiny as a critical component to judicial review of governmental conduct. *See* Dalia v. United States, 441 U.S. 238 (1979). "[T]he plain effect of the detailed restriction of Sec. 2518 is to guarantee that wiretapping or bugging occurs only when there is a genuine need for it and only to the extent that it is

needed." Id.

The government did not overcome the statutory presumption against granting a wiretap application by showing necessity. Giordano, 416 U.S. At 515; United States v. Ippolito, 774 F.2d 1482, 1486 (9th Cir., 1985); United States v. Bailey, 607 F.2d 237, 241, n. 11 (9th Cir., 1979) *cert. Denied sub. nom* Whitney v. United States, 445 U.S. 934 (1980). Where the government fails to comply with its duty to demonstrate necessity, suppression of wiretap evidence is the appropriate remedy. 18 U.S.C. § 2515; Giordano, 416 U.S. At 527.

Agent Brzezinski stated in his affidavit Nagi resides in a location that is densely populated and has heavy foot traffic, thus allegedly rendering it difficult to effectively conduct surveillance.[8] The affidavit does not mention which address was being considered for physical surveillance. This argument is belied by the fact surveillance was conducted on at least two occasions involving marijuana transactions attributed to Nagi. The affidavit does not specify any particular impediments to surveillance of the residential location.

The affidavit in support of the October Wiretap surprisingly acknowledges the fact the government already has informants who were working for them, which undercuts the necessity argument. This belies the assertion that physical surveillance was unworkable. The affidavits indicated surveillance of Nagi's

[8] See Affidavit by Edward Brzezinski, December 8, 2005, pages 51 and 52, paragraph 104.

residence "may preclude further contact between confidential sources and NAGI, thus creating a possibility the subjects will discontinue discussing criminal activity being conducted on the Target Telephone." Further, he states physical surveillance "will not produce the direct evidence necessary to bring this case to prosecution." Both 2129 Boldt in Dearborn, Michigan and 36245 Florane in Westland, Michigan are located in suburban subdivisions. The assertion is inconsistent with Government testimony at a bond review hearing. After the Indictment, and while the trial was pending, the Government placed a van within 100 feet of Nagi's restaurant where they were able to conduct a surveillance and obtain photographs for mid-afternoon until the evening hours without being detected. This is technology that has been available to the Government for decades. The statute and case law construing the case law make a distinction between unwillingness and inability.

Similarly, concerning Nagi's businesses, the affiant said he also did not believe surveillance would "produce direct evidence necessary to bring this case to prosecution." To support this position, Agent Brzezenski alleged the Nagi engaged in counter-surveillance by simply driving over the posted speed limit while going to another location.[9] There is no substance to the claim Nagi engaged in counter-surveillance at his home or business.

[9] See Affidavit of Edward Brzezinski, dated September 7, 2005, page 45, paragraph 76.

There is no indication an agent used methods such as trash pulls or other surveillance methods were used in either the suburban location residential locations, businesses or the HMC club house. The affiant did not utilize controlled buys or undercover agents to the same degree as has been used with Robert Burton and Anthony Viramontez. The latter case is one in which the allegations of violence were significantly more pronounced than in the instant matter. In that case, government informants wore body recorders and made consensual recorded calls to the defendants during the investigation of this matter.

3. Sealing Information

Title III provides specific instructions regarding the manner in which applications are to be sealed and stored. 18 U.S.C. § 2518(8)(b) and the manner and timing in which recordings are sealed and stored after monitoring has ceased. 18 U.S.C. § 2518(8)(a).

> [I]mmediately upon the expiration of the period of the order or extensions thereof such recordings shall be made available to the judge issuing such order and sealed under his directions.

Courts have strictly interpreted the relevant statutory provisions. Immediately, as used in the statute, is understood as meaning within one or two days. United States v. Wilkinson, 53 F.3d 757, 759 (6th Cir., 1995). The purpose of the sealing requirement is to protect the authenticity and reliability of the taped recording and to limit the government's opportunity to alter

the recordings. United States v. Ojeda Rios, 495 U.S. 257, 263 (1990).

It does not suffice that the government explain why the delay occurred and then demonstrate the tapes are authentic. Id. at 264. Indeed, such a reading of § 2518(8)(a) would substantially nullify the sealing provisions safeguards against tampering, and would disregard Congressional intent. Id. Thus, the government would have had to bear the burden of proving the tapes integrity was not compromised during the delay. Proof of non-tampering cannot be "a substitute for a satisfactory explanation" of the failure to comply with the immediacy requirement in § 2518(8)(a). Id. at 264-265.

This was a multi-jurisdictional investigation involving federal, state and local law enforcement agencies. In the agent's representations there was a failure to disclose the involvement of DRANO, SONIC, the Michigan State Police who have been selling drugs for years. This case involves the alleged buying and selling of drugs. It is not a matter of convenience that dictates whether or not a wiretap should be authorized.

The Supreme Court in Ojeda Rios has made it clear suppression and exclusion should be ordered where delivery has been delayed or statutory provisions were violated in some other way. Id. at 260. The government was given extensive discovery in this matter. Counsel submits the sealing orders should have beeen disclosed in a timely fashion prior.

4. Franks v. Delaware

In Franks v. Delaware, 438 U.S. 154 (1978), the Supreme Court held if an affiant "knowingly and intentionally, or with reckless disregard for the truth" includes a false statement in a search warrant affidavit, this will under certain circumstances invalidate the warrant. The Franks analysis has been applied to the "other procedures" showing to demonstrate necessity required by 18 U.S.C. 2518(1)(c) and 3(c). *See also* Ippolito, 774 F.2d at 1485-1487; United States v. Simpson, 813 F.2d 1462 (9th Cir., 1987), *cert denied* 484 U.S. 898, *appeal after remand* 927 F.2d 1088 (9th Cir., 1991).

In Franks, the Supreme Court held a defendant would be entitled to an evidentiary hearing if an attack is more "than just conclusory and ... supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof." Franks, 438 U.S. at 171-172.

Nagi raised multiple issues that should have satisfied the requirements of Franks.

F. CONCLUSION

For the reasons set forth above, Nagi respectfully requests this Honorable Court reverse the district court's denial of Nagi's Motion for New Trial or, in the alternative, remand the matter back to the district court for a new trial.

alternative, remand the matter back to the district court for a new trial.

For purposes of this appeal, Nagi incorporates by reference and adopts the arguments made by co-appellants in their briefs as they may relate to and apply to Nagi.

Respectfully submitted,

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Dated: May 24, 2012

CERTIFICATE OF COMPLIANCE

I certify that this Brief contains 13,999 words of Times New Roman 14 point type.

/s/ James C. Thomas
James C. Thomas

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2012 I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to all parties of record:

/s/ James C. Thomas
James C. Thomas

DESIGNATION OF RECORD ON APPEAL

Docket Number	Description of Entry
R-3	Indictment
R-198	Superseding Indictment
R-997	Second Superseding Indictment
R-1299	Order Denying Motion to Suppress
R-1525	Joint Motion for Leave to File Excess Pages; Joint Motion for Rule 29 and Rule 33 Relief
R-1570	Jury Trial Transcript, April 26, 2010, vol. 15
R-1584	Order Denying Motion for Rule 29 and Rule 33 Relief
R-1701	Sentencing Memorandum
R-1729	Supplemental Sentencing Memorandum
R-1744	Transcript of Sentencing Hearing, January 24, 2011, vol. 2
R-1763	Judgment as to Aref Nagi
R-1764	Notice of Appeal by Aref Nagi
R-1912	Jury Trial Transcript, April 7, 2010, vol. 5
R-1914	Jury Trial Transcript, April 8, 2010, vol. 6
R-1916	Jury Trial Transcript, April 12, 2010, vol. 7
R-1918	Jury Trial Transcript, April 13, 2010, vol. 8
R-1920	Jury Trial Transcript, April 14, 2010, vol. 9
R-1922	Jury Trial Transcript, April 15, 2010, vol. 10
R-1926	Jury Trial Transcript, April 20, 2010, vol. 12
R-1928	Jury Trial Transcript, April 21, 2010, vol. 13
R-1930	Jury Trial Transcript, April 22, 2010, vol. 14
R-1932	Jury Trial Transcript, April 27, 2010, vol. 16
R-1934	Jury Trial Transcript, April 29, 2010, vol. 17
R-1936	Jury Trial Transcript, May 10, 2010, vol. 18
R-1938	Jury Trial Transcript, May 11, 2010, vol. 19
R-1940	Jury Trial Transcript, May 12, 2010, vol. 20
R-1942	Jury Trial Transcript, May 13, 2010, vol. 21
R-1964	Jury Trial Transcript, May 26, 2010, vol. 27
R-2106	Jury Trial Transcript, April 1, 2010, vol. 1
R-2289	Order of Dismissal as to Daniel Sanchez
R-2296	Order of Dismissal as to Aaron Roberts