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9 UNITED STATES DISTRICT COURT  
 10 EASTERN DISTRICT OF CALIFORNIA

11  
 12 UNITED STATES OF AMERICA,  
 13 Plaintiff,

14 v.

15 HARRISON ULRICH JACK; LO CHA THAO  
 aka Locha Thao; LO THAO, aka President Lo  
 16 Thao, aka Xia Lo Thao; YOUA TRUE VANG,  
 aka Joseph Youa Vang, aka Colonel Youa True  
 17 Vang; HUE VANG, aka Chue Hue Vang;  
 CHONG YANG THAO; SENG VUE; CHUE LO;  
 18 NHIA KAO VANG; DAVID VANG, aka Dang  
 Vang; JERRY YANG, aka Thao Nou Yang; and  
 19 THOMAS YANG, aka Pao Yang

20 Defendants.

Case No. 2:07-CR-0266 FCD

**DEFENDANT YOUA TRUE VANG'S  
 MOTION TO DISMISS FOR  
 PROSECUTORIAL MISCONDUCT  
 BEFORE THE GRAND JURY**

Judge: Hon. Frank C. Damrell, Jr.  
 Date: September 20, 2010  
 Time: 11:00 a.m.

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**NOTICE OF MOTION AND MOTION**

TO: BENJAMIN B. WAGNER, U.S. ATTORNEY, S. ROBERT TICE-RASKIN,  
ELLEN V. ENDRIZZI, AND JILL THOMAS, ASSISTANT U.S. ATTORNEYS:

PLEASE TAKE NOTICE that on September 20, 2010, at 11:00 a.m., or as soon thereafter as the matter may be heard, Defendant Youa True Vang, through counsel, will and hereby does move this Court, pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure, to dismiss the charges in the First Superseding Indictment against him for prosecutorial misconduct before the grand jury.

This Motion is based on this Notice of Motion; the attached Memorandum of Points and Authorities; the Declarations of Somnath Raj Chatterjee, Phong J. Yang, Youa True Vang, Fue Ricky Vang, and Nhia Lue Xiong and the exhibits attached to those Declarations; the files and records in this case; and any other evidence or argument that may properly be presented to the Court.

Defendant Youa True Vang respectfully requests an evidentiary hearing and estimates that the presentation of evidence and arguments will require approximately one day.

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**STATUTES**

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

The Court should dismiss the charges in the Superseding Indictment against defendant Youa True Vang because the government presented false and misleading testimony about him to the grand jury to obtain the indictment. The Superseding Indictment alleges that Youa True Vang conspired with other defendants to acquire weapons for an insurgency against the government of Laos. [REDACTED]

The government's sole grand jury witness, FBI Agent [REDACTED] [REDACTED] Agent [REDACTED] testimony was false. *Youa True Vang did not make this statement.* And, Agent [REDACTED] [REDACTED] Among other things: (1) [REDACTED] was not at the April 18 meeting; (2) the only agent who was at that meeting did not speak Hmong and could not have personally identified who made the statement; and (3) none of the government's evidence indicates that Youa True Vang made the statement.

Agent [REDACTED] [REDACTED] [REDACTED] This testimony was also false and misleading because Agent [REDACTED] [REDACTED]

Agent [REDACTED] [REDACTED] [REDACTED] [REDACTED]

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[REDACTED]

Because the indictment against Youa True Vang is based in substantial part on material perjury presented to the grand jury, it must be dismissed under the Due Process Clause of the Fifth Amendment. Dismissal is also appropriate under the Court’s supervisory powers based on the cumulative effect of the government’s misconduct before the grand jury, regardless of whether the Court finds perjury. Here, not only did the government present false testimony to the grand jury, it also misled the grand jury into believing that Agent [REDACTED] false testimony was based on his personal observations. And, the government failed to present exculpatory evidence suggesting a major conflict among some of the defendants. The cumulative effect of the government’s misconduct substantially influenced the grand jury’s decision to indict Youa True Vang or, at the very least, raises grave doubt that the decision to indict Youa True Vang was free from the substantial influence of such misconduct.

The Court should, therefore, dismiss the charges against Youa True Vang. In the alternative, Youa True Vang requests an evidentiary hearing at which he can present evidence demonstrating the falsity of Agent [REDACTED] testimony before the grand jury and examine the government agents responsible for that false testimony.

**II. FACTS**

This prosecution is based on an undercover sting operation orchestrated by the Alcohol Tobacco Firearms and Explosives Agency (“ATF”) and the Federal Bureau of Investigations

1 (“FBI”).<sup>1</sup> The government alleges that the defendants engaged in a conspiracy to acquire arms  
2 and supply them to insurgents in Laos to overthrow the government of Laos.<sup>2</sup>

3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]

14 **A. Agent [REDACTED] Falsely Testified [REDACTED] (Statement 1).**

15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]

19  
20 <sup>1</sup> See Declaration of Somnath Raj Chatterjee in Support of Defendant Youa True Vang’s Motion  
21 to Dismiss for Prosecutorial Misconduct before the Grand Jury (“Chatterjee Decl.”), Ex. A,  
22 Transcript of [REDACTED] Grand Jury Proceeding at 3, 6 [TarnEgl 085918, 085921].

23 <sup>2</sup> *Id.* at 3 [TarnEgl 085918].

24 <sup>3</sup> *See id.*

25 <sup>4</sup> *Id.* at 2 [TarnEgl 085917].

26 <sup>5</sup> *Id.* at 2-3 [TarnEgl 085917-18].

27 <sup>6</sup> *See id.* at 2-62 [TarnEgl 085917-77].

28 <sup>7</sup> *See id.*

<sup>8</sup> *See* Superseding Indictment at 1, filed on [REDACTED] [REDACTED]

<sup>9</sup> Chatterjee Decl., Ex. A, Transcript of [REDACTED] Grand Jury Proceeding at 30  
[TarnEgl 085945].



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[REDACTED]

[REDACTED] “Statement 1.” Nor did Agent [REDACTED] lead Youa True Vang to make any statement. Nor, [REDACTED] did Youa True Vang have any conversation with Lo Cha Thao about supplying arms to an insurgency in Laos.

Neither the government’s video nor transcripts of the April 18, 2007 meeting identify Youa True Vang as the speaker of Statement 1. The government has produced an audio-video recording that purports to show a meeting on April 18, 2007, when this statement was purportedly made, and has produced a transcript that includes the government’s translations of Hmong into

<sup>10</sup> *Id.* at 31 [TarnEgl 085946].  
<sup>11</sup> *Id.* at 32-33 [TarnEgl 085947-48] (emphasis added).

1 English. Statement 1 was made in Hmong in the middle of a conversation in Hmong. At the  
2 point in the video where the statement was made, the speaker was off-camera; he cannot be seen,  
3 but his voice can be heard.<sup>12</sup> The government's translated transcripts do not identify Youa  
4 True Vang — or any other individual — as the speaker of Statement 1.<sup>13</sup>

5 As verified in his declaration filed with this motion, Youa True Vang did not make  
6 Statement 1. After listening to the audio recording, two individuals who speak Hmong and are  
7 familiar with Youa True Vang's voice, have confirmed that Youa True Vang did not make that  
8 statement.<sup>14</sup>

9 Expert linguistic analysis of the audio recording also confirms that Youa True Vang was  
10 not the speaker of Statement 1 because Youa True Vang speaks a different dialect than the  
11 speaker of Statement 1.<sup>15</sup> The Hmong language has two main dialects: White Hmong and Green  
12 Hmong.<sup>16</sup> Statement 1 was made in White Hmong by a native White Hmong speaker.<sup>17</sup> Youa  
13 True Vang speaks in the Green Hmong dialect.<sup>18</sup> Although White Hmong and Green Hmong are  
14 mutually intelligible, they differ in pronunciation of certain consonants and vowels, have different  
15 tones for certain sounds, and use different words for certain items.<sup>19</sup> The difference between  
16 Green Hmong and White Hmong is analogous to the difference between an English speaker  
17 brought up and living in England and an English speaker brought up and living in the American  
18 South.<sup>20</sup> Given that Youa True Vang is a native Green Hmong speaker and the speaker of

19  
20 <sup>12</sup> See Expert Decl. of Phong J. Yang ("Yang Decl."), Ex. B, Video Clip of Minutes 23:38 to  
24:00 of "E-33 DVD-3.mpg"; see also Chatterjee Decl. ¶ 10.

21 <sup>13</sup> See Chatterjee Decl., Ex. B, Transcript of "Tarnished Eagle Meets" on April 18, 2007, at 25-26  
22 [TarnEgl 041955-56].

23 <sup>14</sup> See Declarations of Youa True Vang ¶¶ 3-4, Fue Ricky Vang ¶¶ 4-5, and Nhia Lue Xiong  
24 ¶¶ 4-5, filed concurrently herewith.

25 <sup>15</sup> Yang Decl. ¶¶ 7-15.

26 <sup>16</sup> *Id.* ¶ 3.

27 <sup>17</sup> *Id.* ¶¶ 9-11.

28 <sup>18</sup> *Id.* ¶¶ 7-8.

<sup>19</sup> *Id.* ¶ 4.

<sup>20</sup> *Id.* ¶ 5.

1 Statement 1 is a native White Hmong speaker, a linguistics expert has opined that it is extremely  
2 unlikely that Youa True Vang is the person who made Statement 1.<sup>21</sup>

3 The government, on the other hand, has produced no evidence that Agent [REDACTED] was  
4 present during the April 18 meeting. Agent [REDACTED] does not appear on the video of that meeting  
5 or on the government produced transcripts of the meeting. The government has produced no  
6 evidence that Agent [REDACTED] directly communicated with Youa True Vang at the April 18 meeting  
7 or at any time. And, there is no evidence that Agent [REDACTED] understood and spoke Hmong,  
8 whereas Statement 1 was made in and during a conversation in Hmong.

9 The government has refused to provide the basis for Agent [REDACTED] testimony. In  
10 response to Youa True Vang's counsel's request for the basis of Agent [REDACTED] testimony, the  
11 government initially pointed to a two-minute clip of the audio recording of the April 18  
12 meeting.<sup>22</sup> But the video clip does not show who made Statement 1.<sup>23</sup> When asked for  
13 clarification, the government stated that it is not required to tell the basis for Agent [REDACTED]  
14 testimony and added that "the agents worked with the linguists to determine speakers and content  
15 of the various recordings."<sup>24</sup> The government declined to explain further.<sup>25</sup> The government  
16 admitted, however, that it "did not rely on any expert analysis, [REDACTED], in  
17 reaching its conclusion as to voice identification."<sup>26</sup>

18 **B. Agent [REDACTED] Falsely Testified [REDACTED] (Statement 2).**  
19

20 During the grand jury proceedings, Agent [REDACTED]  
21 [REDACTED]

22 \_\_\_\_\_  
23 <sup>21</sup> *Id.* ¶¶ 7-15.

24 <sup>22</sup> Chatterjee Decl., Ex. C, Nov. 12, 2009 Discovery Request Letter at 1; Ex. D, Dec. 8, 2009  
25 Discovery Response Letter at 2.

26 <sup>23</sup> *See* Yang Decl., Ex. B, Video Clip of Minutes 23:38 to 24:00 of "E-33 DVD-3.mpg."

27 <sup>24</sup> Chatterjee Decl., Ex. E, Jan. 21, 2010 Discovery Request Letter at 1; Ex. G, Mar. 1, 2010  
28 Discovery Response Letter at 1-2.

<sup>25</sup> *Id.*, Ex. G, Mar. 1, 2010 Discovery Response Letter at 1-2.

<sup>26</sup> *Id.* at 2-3.

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[REDACTED]

[REDACTED]

This testimony was false and misleading because [REDACTED]

[REDACTED] In contrast,

Statement 2 referred to a *past war*, not what was needed at the time of the April 18 meeting or for any future action. A Hmong linguistics expert explains that this statement made during the April 18 meeting was made in the past tense.<sup>28</sup> In this statement, the speaker used a Lao phrase, “*kuey*,” which means “used to,” in order to show that the speaker was referring to a war that was fought in the past.<sup>29</sup> The remainder of the statement was all made in the context of the past tense. Any reference to “small arms” or “B-40” referred to arms used in a past war.<sup>30</sup>

<sup>27</sup> Chatterjee Decl., Ex. A, Transcript of [REDACTED] Grand Jury Proceeding at 32 [TarnEgl 085947].

<sup>28</sup> Yang Decl. ¶¶ 16-18.

<sup>29</sup> *Id.* ¶ 18.

<sup>30</sup> *Id.*

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**C. Agent [REDACTED] Provided False and Misleading Testimony [REDACTED]**

Agent [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

**D. The Remaining References to Youa True Vang During the Grand Jury Proceedings.**

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

<sup>31</sup> Chatterjee Decl., Ex. A, Transcript of [REDACTED] Grand Jury Proceeding at 49-50 [TarnEgl 085964-65].

<sup>32</sup> Government’s Opposition to Motion to Dismiss for Government Misconduct, filed on April 6, 2009, at 64 n.42 (admitting that such information was given by a Hmong/Lao interpreter to prosecutors including AUSA Ellen Endrizzi and ATF Agent Graham Barlowe) [Docket # 412].

<sup>33</sup> Chatterjee Decl., Ex. A, Transcript of [REDACTED] Grand Jury Proceeding at 10-11 [TarnEgl 085925-26].

<sup>34</sup> *Id.* at 6-7 [TarnEgl 085921-22].

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[REDACTED]

**III. ARGUMENT**

The government has a duty to act in good faith in prosecuting its citizens. *See, e.g., Berger v. United States*, 295 U.S. 78, 88 (1935) (“It is as much [a prosecutor’s] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.”). This duty is heightened in proceedings before the grand jury “where the prosecutor operates without the check of a judge or a trained legal adversary, and virtually immune from public scrutiny.” *United States v. Serubo*, 604 F.2d 807, 817 (3d Cir. 1979); *see also United States v. Basurto*, 497 F.2d 781, 785 (9th Cir. 1974). A prosecutor’s abuse of this special relationship with the grand jury poses enormous risks to a defendant, “[f]or while in theory a trial provides the defendant with a full opportunity to contest and disprove the charges against him, in practice, the handing up of an indictment will often have a devastating personal and professional impact that a later dismissal or acquittal can never undo.” *Serubo*, 604 F.2d at 817.

When the government fails to uphold its duty of good faith before the grand jury, the Court has power to dismiss the indictment under due process grounds as well as its supervisory powers. *See, e.g., Basurto*, 497 F.2d at 785-86; *see also United States v. Samango*, 607 F.2d 877,

<sup>35</sup> *Id.* at 18 [TarnEgl 085933].

<sup>36</sup> *Id.* at 18-20 [TarnEgl 085933-35].

<sup>37</sup> *Id.* at 54 [TarnEgl 085969]. Defendant Youa True Vang is concurrently moving to suppress statements that he purportedly made at the time of his arrest because any statements that he made at that time were obtained in violation of his constitutional rights under *Miranda v. Arizona* and were not voluntary.

1 884 (9th Cir. 1979); *United States v. Roberts*, 481 F. Supp. 1385, 1389 (C.D. Cal. 1980). The  
2 Superseding Indictment against Youa True Vang should be dismissed on both grounds.

3 **A. THE COURT SHOULD DISMISS THE SUPERSEDING INDICTMENT**  
4 **ON DUE PROCESS GROUNDS.**

5 In *United States v. Basurto*, 497 F.2d 781 (9th Cir. 1974), the Ninth Circuit held that a  
6 defendant's Fifth Amendment right to due process is violated when he is forced to stand trial on  
7 an indictment which the government knows is based in part on material perjury presented to the  
8 grand jury. *Id.* at 785. In *Basurto*, an unindicted co-conspirator who had testified before the  
9 grand jury about the defendants' involvement in a conspiracy admitted to the prosecutor prior to  
10 trial that his testimony was perjured. *Id.* at 784. The prosecutor informed defense counsel of the  
11 perjury, but did not notify the court or the grand jury. *Id.* In his opening statement at trial, the  
12 prosecutor acknowledged the perjured testimony before the grand jury, but sought to minimize its  
13 scope and importance. *Id.* The defendants were convicted after a jury trial. *Id.* The Ninth  
14 Circuit reversed, holding that:

15 [T]he *Due Process Clause of the Fifth Amendment* is violated when  
16 a defendant has to stand trial on an indictment which the  
17 government knows is based partially on perjured testimony, when  
18 the perjured testimony is material, and when jeopardy has not  
19 attached. Whenever the prosecutor learns of any perjury committed  
before the grand jury, he is under a duty to immediately inform the  
court and opposing counsel -- and, if the perjury may be material,  
also the grand jury -- in order that appropriate action may be taken.

20 *Id.* at 785-86.

21 *Basurto* based its holding on a "long line of [Supreme Court] cases which recognize the  
22 existence of a duty of good faith on the part of the prosecutor with respect to the court, the grand  
23 jury, and the defendant." *Id.* at 786. For example, in *Napue v. Illinois*, the Supreme Court stated  
24 that "'a conviction obtained through use of false evidence, known to be such by representatives of  
25 the State, must fall under the *Fourteenth Amendment*. The same result obtains when the State,  
26 although not soliciting false evidence, allows it to go uncorrected when it appears.'" *Basurto*,  
27 497 F.2d at 786 (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959)). The Ninth Circuit in  
28

1 *Basurto* extended the reasoning of *Napue* and other Supreme Court cases to the use of false  
2 testimony before the grand jury:

3 The Court held in *Napue* that the prosecution’s use of known false  
4 testimony at trial required a reversal of the petitioner’s conviction.  
5 The same result must obtain when the government allows a  
6 defendant to stand trial on an indictment which it knows to be based  
7 in part upon perjured testimony. The consequences to the  
8 defendant of perjured testimony given before the grand jury are no  
9 less severe than those of perjured testimony given at trial, and in  
10 fact may be more severe. The defendant has no effective means of  
11 cross-examining or rebutting perjured testimony given before the  
12 grand jury, as he might in court.

13 *Basurto*, 497 F.2d at 786. *Basurto* concluded that reversal of the defendants’ convictions was  
14 necessary because the prosecutor “did not take appropriate action to cure the indictment upon  
15 discovery of the perjured grand jury testimony.” *Id.* at 787.

16 Under *Basurto*, a prosecutor, who at any point during the prosecution of a case learns of  
17 material perjury before the grand jury, is required to return to the grand jury and seek a new  
18 indictment if jeopardy has not attached, or suffer the sanction of having the indictment dismissed.  
19 *See Basurto*, 497 F.2d at 785-87; *see also United States v. Goldman*, 451 F. Supp. 518 (S.D.N.Y.  
20 1978) (dismissing indictment where the prosecutor learned during trial that its chief witness had  
21 testified falsely before the grand jury).<sup>38</sup>

22 **1. The Superseding Indictment of Youa True Vang Was Based on  
23 Perjury Presented to the Grand Jury.**

24 **a. Agent [REDACTED]  
25 [REDACTED] Statement 1.**

26 [REDACTED]

27 [REDACTED]

28 [REDACTED]

<sup>38</sup> Although the witness in *Basurto* admitted that he had committed perjury before the grand jury, such direct evidence is not necessary to demonstrate that perjury has occurred. Perjury may be shown through circumstantial evidence alone. *See, e.g., United States v. Kelly*, 540 F.2d 990, 994 (9th Cir. 1976) (knowing falsity of testimony may be inferred from circumstantial evidence). Here, there is ample circumstantial evidence of perjury.



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[REDACTED]

*First*, Youa True Vang did not make Statement 1, as demonstrated by the overwhelming evidence. Youa True Vang and two witnesses familiar with his voice have testified that Youa True Vang did not make Statement 1.<sup>40</sup> A linguistics expert has testified that it is unlikely that Youa True Vang made Statement 1, which is made in White Hmong, whereas Youa True Vang speaks in Green Hmong.<sup>41</sup> As the difference between White Hmong and Green Hmong is analogous to the difference between a British accent and a Southern accent, a native speaker of Hmong would have been readily able to make the distinction.<sup>42</sup> The government on the other hand, has provided no basis to support Agent [REDACTED] testimony.

*Second*, Agent [REDACTED] knew that his testimony was false. He knew that he did not lead Youa True Vang to make Statement 1. Agent [REDACTED] was not at the April 18, 2007 meeting captured on video and he is not identified on the transcriptions of the meeting prepared by the government, although he gave the false impression to the grand jury that he was at the meeting. He never spoke with Youa True Vang, although he told the grand jury he did. And there is no indication that he understands or speaks Hmong.

Neither Agent [REDACTED] nor AUSA [REDACTED] had any legitimate basis to ascribe Statement 1 to Youa True Vang. Neither the government's single video nor its transcripts of the April 18, 2007, meeting identify any statements by Youa True Vang. Statement 1 was made in Hmong by a speaker off camera in the middle of a conversation in Hmong. The only government witness who was in the room when Statement 1 was made was the ATF undercover agent. The ATF agent, however, does not speak Hmong and would have had no legitimate basis to ascribe a

<sup>39</sup> Chatterjee Decl., Ex. A, Transcript of [REDACTED] Grand Jury Proceeding at 33 [TarnEgl 085948] ("Statement 1").  
<sup>40</sup> See Declarations of Youa True Vang ¶¶ 3-4, Fue Ricky Vang ¶¶ 4-5, and Nhia Lue Xiong ¶¶ 4-5, filed concurrently herewith.  
<sup>41</sup> Yang Decl. ¶¶ 7-15.  
<sup>42</sup> *Id.* ¶ 5.

1 Hmong statement to Youa True Vang. And, the government admitted that it used no expert  
2 analysis to identify Youa True Vang as the speaker.<sup>43</sup> Given the lack of any reasonable bases for  
3 Agent [REDACTED] to ascribe Statement 1 to Youa True Vang, he must have known that his testimony  
4 was false.

5 Moreover, Statement 1 was made in White Hmong while Statement 2 was made in Green  
6 Hmong.<sup>44</sup> Agent [REDACTED] however, [REDACTED] Youa True  
7 Vang could not have made both statements. Agent [REDACTED]  
8 [REDACTED] See, e.g., *United States v. Jaramillo*, 69  
9 F.3d 388, 390 (9th Cir. 1995) (under “inconsistent declarations” subsection of 18 U.S.C.  
10 § 1623(c), perjury is shown if witness “has made two irreconcilably contradictory declarations  
11 such that one of them is necessarily false”).

12 **b. Statement 2 attributed to Youa True Vang was falsely and**  
13 **misleadingly characterized.**

14 As to Statement 2, [REDACTED]  
15 [REDACTED]  
16 [REDACTED]

17 AUSA [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]

22 The government’s own translation makes clear that the speaker was discussing what arms were  
23 needed “[w]hen we went to war” (past tense), not what was needed at the time of the April 18

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25 <sup>43</sup> Chatterjee Decl., Ex. G, Mar. 1, 2010 Discovery Response Letter at 2-3.

26 <sup>44</sup> Yang Decl. ¶¶ 10, 16.

27 <sup>45</sup> Chatterjee Decl., Ex. A, Transcript of [REDACTED] Grand Jury Proceeding at 32  
28 [TarnEgl 085947].

<sup>46</sup> *Id.*, Ex. B, Transcript of “Tarnished Eagle Meets” on April 18, 2007, at 18 [TarnEgl 041948].

1 meeting.<sup>47</sup> Youa True Vang’s linguistics expert confirms that Statement 2 was made in the past  
2 tense and refers to equipment used in a past war.<sup>48</sup> Given that the government worked with its  
3 own linguists, the government would have known that this Hmong statement was made in the  
4 past tense. Agent ██████ testimony was knowingly false and misleading.

5 c. The government misled ██████  
6 ██████

7 ██████  
8 ██████  
9 ██████ ██████  
10 ██████  
11 ██████ Second, Agent ██████  
12 ██████  
13 ██████  
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15 ██████ ██████  
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19 ██████

20 <sup>47</sup> *Id.*

21 <sup>48</sup> Yang Decl. ¶¶ 16-18. The government concedes that a B-40 is a “Vietnam-era” device. *See*  
22 Chatterjee Decl., Ex. A, Transcript of ██████ Grand Jury Proceeding at 32  
[TarnEgl 085947].

23 <sup>49</sup> Chatterjee Decl., Ex. A, Transcript of ██████ 009 Grand Jury Proceeding at 49-50  
[TarnEgl 085964-65].

24 <sup>50</sup> Government’s Opposition to Motion to Dismiss for Government Misconduct, filed on April 6,  
25 2009, at 64 n.42 [Docket # 412].

26 <sup>51</sup> “It is the policy of the Department of Justice . . . that when a prosecutor conducting a grand  
27 jury inquiry is personally aware of substantial evidence that directly negates the guilt of a subject  
28 of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand  
jury before seeking an indictment against such a person.” United States Attorneys’ Manual  
§ 9-11.233.

1                   **2. The Perjury Was Material.**

2                   An indictment should be dismissed where the perjured testimony presented to the grand  
3 jury was material to the guilt or innocence of the accused. *See Basurto*, 497 F.2d at 785; *cf.*  
4 *United States v. Mohawk*, 20 F.3d 1480, 1483 n.2 (9th Cir. 1994) (finding that agent’s false  
5 testimony that defendant was wearing incriminating jacket at time of arrest was not material  
6 where “there was substantial additional evidence” presented to the grand jury including photos of  
7 defendant committing crime). The perjury in this case was material.

8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]

25 \_\_\_\_\_  
26 <sup>52</sup> Chatterjee Decl., Ex. A, Transcript of [REDACTED] Grand Jury Proceeding at 33  
[TarnEgl 085948].

27 <sup>53</sup> *Id.* at 32 [TarnEgl 085947]; *see also* Yang Decl. ¶ 18.

28 <sup>54</sup> *Id.* at 10-11 [TarnEgl 085925-26].

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2. [REDACTED]

[REDACTED]

**B. THE COURT SHOULD DISMISS THE SUPERSEDING INDICTMENT PURSUANT TO ITS SUPERVISORY POWERS.**

As an independent basis for dismissal, the Court should exercise its supervisory powers to dismiss the Superseding Indictment against Youa True Vang based on the cumulative effect of the government’s misconduct before the grand jury.

<sup>55</sup> *Id.* at 18-20 [TarnEgl 085933-35].

<sup>56</sup> *See id.*

<sup>57</sup> Chatterjee Decl., Ex. A, Transcript of [REDACTED] Grand Jury Proceeding at 54 [TarnEgl 085969].

1 “Although deliberate introduction of perjured testimony is perhaps the most flagrant  
 2 example of misconduct, other prosecutorial behavior, *even if unintentional*, can also cause  
 3 improper influence and usurpation of the grand jury’s role.” *United States v. Samango*, 607 F.2d  
 4 877, 882 (9th Cir. 1979) (emphasis added); *see also United States v. Hogan*, 712 F.2d 757, 762  
 5 (2d Cir. 1983) (finding that even though “factual misstatements in the agent’s testimony [before  
 6 the grand jury] may have been inadvertent, . . . the fact remains that the [defendants] were  
 7 prejudiced by the misstatements of important facts and the grand jury’s independent role was  
 8 impaired”). Even where prosecutorial misconduct is unintentional, a federal court may dismiss an  
 9 indictment pursuant to its supervisory powers where the “cumulative effect” of a prosecutor’s  
 10 misconduct produced a biased grand jury, depriving the accused of the “substantial right” to an  
 11 independent grand jury. *Samango*, 607 F.2d at 884. An indictment should be dismissed if the  
 12 prosecutorial misconduct “substantially influenced the grand jury’s decision to indict, or if there  
 13 is ‘grave doubt’ that the decision to indict was free from the substantial influence of such  
 14 violations.” *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (1988) (internal quotation  
 15 marks and citation omitted).

16 Here, the cumulative effect of the false and misleading statements and other misconduct  
 17 before the grand jury substantially influenced the decision to indict Youa True Vang, or at the  
 18 very least, raises “grave doubt” that the decision to indict was free from the substantial influence  
 19 of such misconduct.

20 **1. The False Testimony Improperly Influenced the Grand Jury.**

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 <sup>58</sup> As an example of the puffed up charges brought against Youa True Vang, the Superseding  
 28 Indictment alleges that Youa True Vang conspired to receive and possess Stinger missiles in  
 (Footnote continues on next page.)

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[REDACTED]

2. The Grand Jury Was Misled into Believing [REDACTED]

While, as a general rule, the government may present hearsay to the grand jury, it may not mislead the grand jury into believing that hearsay testimony is based on personal knowledge. *See, e.g., Samango*, 607 F.2d at 883-84; *see also Hogan*, 712 F.2d at 761 (government’s misleading use of hearsay “added a false aura of factual support to the government’s case and may well have deceived the grand jurors”).<sup>59</sup> In *Samango*, the Ninth Circuit affirmed the district court’s dismissal of the indictment where, among other things, a government agent who gave testimony to the grand jury “described aspects of the investigation that he was not involved with,” “reported events which he could not have observed,” and the “hearsay nature of his testimony would not necessarily be apparent to the grand jurors, who might have been misled into thinking [the agent] was describing his own observations.” *Id.* at 883. [REDACTED]

[REDACTED]

(Footnote continued from previous page.)

violation of 18 U.S.C. § 2332g, which carries a *minimum* of 25 years to life in prison. (Superseding Indictment at 23-24.) Yet, there was absolutely no evidence presented to the grand jury (or produced by the government to date) suggesting that Youa True Vang ever agreed or intended to acquire Stinger missiles or even saw or discussed them.

<sup>59</sup> Indeed, the United States Attorneys’ Manual states that “[e]ach United States Attorney should be assured that hearsay evidence presented to the grand jury will be presented on its merits so that the jurors are not misled into believing that the witness is giving his or her personal account.” United States Attorneys’ Manual § 9-11.232.

<sup>60</sup> Chatterjee Decl., Ex. A, Transcript of [REDACTED] Grand Jury Proceeding at 33 [TarnEgl 085948].

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[REDACTED]

**IV. CONCLUSION**

For the foregoing reasons, Defendant Youa True Vang respectfully requests that the Court dismiss the Superseding Indictment against him. In the alternative, at a minimum, the Court should order an evidentiary hearing where Youa True Vang can present additional evidence demonstrating the falsity of the testimony presented to the grand jury and examine the government agents — including FBI Agent [REDACTED], the undercover ATF agent, AUSA [REDACTED], and AUSA [REDACTED] — who were responsible for that false testimony.

Dated: May 20, 2010

Respectfully submitted,

MORRISON & FOERSTER LLP

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