IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	C.A. NO. 09-10038
	)	
Plaintiff-Appellee,	)	
	)	
	)	
vs.	)	D.C. NO. CR 07-00615-SOM
	)	(District of Hawai`i, Honolulu)
ANABEL VALENZUELA,	)	
	)	
Defendant-Appellant.	)	
	)	

APPELLANT'S OPENING BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

The Honorable Susan Oki Mollway,
Chief District Judge.

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JURISDICTIONAL STATEMENT

The United States District Court Hawai`i had original jurisdiction of this matter pursuant to 18 U.S.C. § 3231. This Court has jurisdiction to review Anabel Valenzuela's conviction and sentence under 28 U.S.C. § 1291. As to timeliness of the appeal, the district court filed the Judgment on January 9, 2009, and the Amended Judgment on January 15, 2009. [ER-I:12-26].[1] Valenzuela filed the Notice of Appeal on January 15, 2009. [ER-I:9]. Pursuant to Rule 4(b) of the Federal Rules of Appellate Procedure the appeal is timely.

ISSUES PRESENTED

A. As to Count 1, Insufficient Evidence Proved the Single Drug Conspiracy Charged, Instead Demonstrating Multiple Smaller Conspiracies.

B. As to Counts 1 and 3, the Court Constructively Amended the Indictment in its Instructions to the Jury, Which Allowed the Jury to Convict Valenzuela of Charges for Which She Did Not Receive Fair Notice.

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[1] As used here: "ER-I:" "ER-II:" "ER-III:" and "ER-VI:" refer to the four volumes of the Excerpts of Record; "CR" refers to the district court clerk's record, attached to the back of ER-IV; "PSR" refers to the Presentence Investigation Report filed in this Court under seal, pursuant to Circuit Rule 30-1.10.

C. The Prosecution's Misconduct Materially Affected Valenzuela's Ability to Receive a Fair Trial.

D. The Court Erroneously Permitted Terrence Chu to Testify as an Expert as to Methamphetamine Pricing, and Erroneously Admitted into Evidence the Government's Exhibit 66 Concerning the Same.

E. The Court Abused its Discretion in Imposing the Two-Level Sentencing Enhancement for Obstruction of Justice.

STATEMENT OF THE CASE

On July 2, 2008, the Government filed a four-count First Superseding Indictment against defendant-appellant Anabel Valenzuela and four codefendants, including her husband Benjamin Acuna and Eddy Olguin, her husband's cousin. [ER-IV:147-161]. The indictment alleged that both Valenzuela and Acuna were the "leaders, organizers and recruiters" of a vast methamphetamine distribution operation spanning Nevada and Hawai`i. [ER-IV:147-148]. Count 1 charged that Valenzuela knowingly participated in the conspiracy involving 4 codefendants and 18 named coconspirators to distribute 50 grams or more of methamphetamine from

at least 2000 until September 2005, in the District of Hawai`i and elsewhere, in violation of 21 U.S.C. § 846, § 841(a)(1) and § 841(b)(1)(A). [ER-IV:148-151]. If convicted under Count 1, Count 2 charged criminal forfeiture, including a sum of money equal to $8 million, pursuant to 21 U.S.C. § 841(a)(1), § 846 and § 853(p). [ER-IV:152-154].

Count 3 charged both Acuna and Valenzuela with conspiracy to money launder, in violation of 18 U.S.C. § 1956(a)(1)(A)(i) and § 1956(a)(1)(B)(i). [ER-IV: 155-158]. If convicted under Count 3, Count 4 charged criminal forfeiture of real properties and funds, pursuant to 18 U.S.C. § 982(a)(1). [ER-IV:158-161].

Among the pretrial motions filed by Valenzuela was a Motion to Change Venue from the District of Hawai`i to Nevada, which motion the court denied. [ER-VI:138-146, 162-172].

After a 13-day jury trial on September 2, 2008, the jury returned guilty verdicts against Valenzuela and Acuna on Counts 1 and 3. [ER-I:78-79; CR:327, 364]. After a one-day forfeiture trial on September 3, 2008, the jury returned verdicts on Counts 2 and 4 that including forfeiture of all assets listed, including money equal to $8 million. [ER-I:64-77; CR:388].

At sentencing on January 5, 2009, the court acknowledged the PSR, an applicable Guidelines offense level of 46, a criminal history category of I, a

mandatory minimum 10-year sentence under Count 1 and a Guidelines' sentence of life. [ER-I:36]. The court imposed a 384-month prison term for Count 1, and a concurrent 240-month term for Count 3. [ER-I:48-49, 54].

On January 15, 2009, the Court entered the "Amended Judgment in a Criminal Case", which included the prison terms and the monetary judgment of $8 million. [ER I: 12-18]. On August 14, 2009, the Court entered the "Final Order of Forfeiture", concerning various assets, including the sum of money equal to $8 million. [ER-I: 1-3]. This appeal has followed.

BAIL STATUS

Valenzuela, BOP No. 42565-048, is currently incarcerated at FCI Dublin, in Dublin, California. Her projected release date is October 14, 2035. She is currently 26 years old.

STATEMENT OF RELEVANT FACTS.

Investigation in this case began on September 13, 2005, when Hawai`i police arrested methamphetamine dealer Francis Honda. [ER-IV:46]. Honda cooperated and informed the police that two weeks before he had received 40 pounds of methamphetamine from Las Vegas resident Charles Ranney. [ER-

IV:47]. On September 16, 2005, Las Vegas police arrested Ranney who began cooperating in December 2005.

Ranney's cooperation led to the arrest on August 15, 2007, of his drug trafficking partner Sheri Bulacan. Las Vegas resident Bulacan also cooperated, at which point the investigation "switched gears" according to the Government's case agent Lawrence Peralta, and now focused on Las Vegas residents Valenzuela, Acuna and Olguin. [ER-IV:49].

On November 28, 2007, police arrested Valenzuela in Las Vegas. The chief evidence directly linking her to Count 1 was the trial testimony of Bulacan and Ranney, two veteran drug distributors whose trafficking in Las Vegas and Hawai`i dated back to 1992. Prior to this case, Valenzuela had no adult or juvenile convictions. [PSR ¶¶78-82]. Throughout Bulacan and Ranney's testimony they referred to Valenzuela, Acuna and Olguin as "the Mexicans" who allegedly supplied all the methamphetamine for the conspiracy in Count 1. [ER-III:2, 220].

A. Background: Valenzuela & Acuna.

Anabel Valenzuela. In 2000, when the conspiracy charged in Count 1 began, Valenzuela was a 17-year-old highschool student in Las Vegas. [PSR ¶¶84-85]. Born in Los Angeles and raised in Las Vegas, from the age of 13 she held part-time jobs, including an internship in the Human Resource Department at

the Stratosphere Hotel and Casino while a senior in highschool. [ER-II:96-97, 181-183; PSR ¶94]. In 2001 she graduated at the top of her class. [PSR ¶94].

Valenzuela and Acuna had known each since childhood, with both families originating from Durango, Mexico. [ER-II:93-95, 158]. On February 19, 2003, Valenzuela and Acuna married in Durango. [ER-II:94, 158-159]. They have two children, born in 2004 and 2006. [ER-II:94].

After highschool Valenzuela attended college for awhile while continuing to work at the Stratosphere until April 2002. [ER-II:97]. With a modest savings and assistance from her parents, she opening a clothing store called Seventeen Again. [ER-II:97-98]. In 2003 Valenzuela began working as a loan officer. [ER-II:99-100]. In March 2004 she earned a license to sell real estate in Nevada. [ER-II:100]. She also partnered with Olguin and opened a cell phone store called Sin City Wireless. [ER-II:125]. And in 2005 she partnered with Mauricio Bahena to create B & M Radio, which promoted rodeos. [ER-II:203-204].

Benjamin Acuna. Acuna was born in Durango, Mexico in 1977 and came to the U.S. with his family when he was 14. [ER-II:154-155]. He quit highschool to help support his family. [ER-II:156]. Acuna never secured U.S. citizenship and as a consequence was removed to Mexico on three occasions. [ER-II:173-174].

Since the age of 18 Acuna worked in the construction industry in Las

Vegas, but given his illegal status his earnings were paid in cash and "under the table". [ER-II:116, 176-177]. He never filed income tax returns and he had no bank accounts. [ER-II:172].

In 2002 Acuna he met Bulacan, who wanted to renovate her home. [ER-II:159-160]. During Acuna's inspection of her home, Bulacan asked him to get her an eightball of methamphetamine (2.5 grams, *see* ER-II:229), which drug was prevalent on construction sites where Acuna worked. [ER-II:162-165]. Acuna obtained the methamphetamine for Bulacan, hoping to secure the renovation project. [ER-II:162-165]. Bulacan paid Acuna a down payment of $2,500 to begin the renovation. [ER-II:165].

Before Acuna could begin the job, on May 8, 2002, the police raided an apartment in Las Vegas where Acuna was visiting and arrested him. [ER-II:166]. Eventually the case against Acuna was dismissed, but the Government deported him to Mexico on January 30, 2003. [ER-II:167].

After their marriage in Durango in February 2003, Valenzuela returned to Las Vegas to work. [ER-II:175]. Learning that she was pregnant, Acuna reentered the U.S. to join her in October 2003. [ER-II:169-170].

B. Offense Conduct.

1. Count 1, Conspiracy to Distribute Methamphetamine in Hawai`i,

2000 to September 2005.

Bulacan and Ranney were former Hawai`i residents who lived in Las Vegas. By the year 2000, both were already veteran drug traffickers; both were longtime drug addicts; both were addicted to gambling. [ER-III:95-95.1, 133, 195, 206, 230-231]. In 2000 Ranney partnered with Bulacan to distribute methamphetamine in Las Vegas. [ER-III:243].

In 2003 Bulacan and Ranney hatched a plan concerning the highly lucrative Hawai`i methamphetamine market, where Bulacan had been distributing since 1992. [ER-III:204]. They agreed to obtain methamphetamine in Las Vegas, ship it to Hawai`i, distribute it and each make $1 million within six months. [ER-III:139]. Both Bulacan and Ranney testified that Acuna was the source of the methamphetamine they distributed in Hawai`i. [ER-III:6-7, 192].

In late 2003 they launched their plan with Ranney moving to Hawai`i where he was in charge of all aspects of the operation, including receiving drug shipments, distribution, collection of proceeds and accounting. [ER-III:206-207]. The Bulacan/Ranney plan was a success, with each earning $1 million within six months. [ER-III:208]. Ranney returned to Las Vegas, but remained in charge of the Hawai`i operation. [ER-III:215, 217]. He also began running the Las Vegas end of the operation, including acquiring methamphetamine from suppliers. [ER-

III:227].

All told, the Government alleged that Valenzuela and Acuna were responsible for distributing 2,120 pounds of methamphetamine in Hawai`i, an amount reached based on the following shipments:

- 145 pounds from Ranney to his Hawai`i distributor Antonio Santos;
- 67 pounds from Ranney to his Hawai`i distributor Michael Winings;
- 33 pounds from Ranney to his Hawai`i distributor Francis Honda;
- 1875 pounds total from Bulacan's employees Ronald Shim and Joseph Chai to Ranney/Bulacan distributors in Hawai`i. [PSR ¶59].

2. Count 3, Conspiracy to Money Launder, 2000 to July 2006.

With her realtor's license, in 2004/2005 when the Las Vegas housing market was booming, Valenzuela began representing numerous clients. [ER-II:101-102, 185-186]. She testified, "I was doing well". [ER-II:101]. At minimum she closed one home per month, and during some months in 2005 she closed two or three homes per month. [ER-II:101]. Some commissions were paid by check, but she often split commissions with other brokers who paid her portion in cash. [ER-II:136].

Valenzuela herself entered the real estate market. With the assistance of her uncle, in August 2004 she arranged the purchase of a house at Enchanting Court

for her parents who could no longer afford the mortgage on their existing home and had a poor credit history. [ER-II:102-103]. To cover the mortgage, Valenzuela's father gave her monthly cash payments that she deposited in a bank account, then made the mortgage payment. [ER-II:105]. With the assistance of the same uncle, in November 2004 she purchased a house at Tuscadora Court with 100 percent financing, where she lived for a year then rented the house on a cash basis for $2,000 a month. [ER-II:107-109].

In February 2005 she purchased a house at Benicasim Court earning $100,000 in equity from the time she signed the sales agreement until closing. [ER-II:112]. In October 2005 she purchased a house at Midnight Cowboy Court. [ER-II:111].

By the end of 2005, Valenzuela's parents lived at Enchanting Court, Valenzuela and her family lived at Midnight Cowboy and she leased to renters the houses at Tuscadora and Benicasim Courts. [ER-II:113]. The rents were paid to her in cash that she deposited in her bank accounts, then sent in the mortgage payments. [ER-II:109, 112].

The Midnight Cowboy property became a poor investment given the monthly mortgage of $4,000 and the $900 electric bill. [ER-II:113]. Therefore, Valenzuela decided to sell the property and purchase the more affordable house at

Ringe Lane with assistance from her father-in-law Eduviges Martinez as she now had a poor credit rating given late mortgage payments. [ER-II:115].

SUMMARY OF ARGUMENTS

A. As to Count 1, Insufficient Evidence Proved the Single Drug Conspiracy Charged, Instead Demonstrating Multiple Smaller Conspiracies.

The Government failed to prove the single conspiracy set forth under Count 1 of the indictment, which issue is a question of sufficiency of the evidence. United States v. Fernandez, 388 F.3d 1199, 1226 (9th Cir.2004) *modified* 425 F.3d 1248 (9th Cir.2005). As developed fully *infra*, instead of the single conspiracy the trial evidence proved only the existence of multiple smaller conspiracies.

Should the Court find sufficient evidence to support the single conspiracy, however, then Valenzuela argues that at best the conspiracy represents a flawed wheel-shaped conspiracy, missing the required overall "rim" of agreement, knowledge and dependency amongst all of the wheel's spokes. *See* United States v. Kenny, 645 F.2d 1323, 1335 (9th Cir.), *cert. denied* 452 U.S. 970 (1981).

B. As to Counts 1 and 3, the Court Constructively Amended the Indictment in its Instructions to the Jury, Which Allowed the Jury to Convict Valenzuela of Charges for Which She Did Not Receive Fair

Notice.

The broadening of charges in an indictment, after a Grand Jury has voted on them, constitutes constructive amendment to the indictment in violation of the Fifth Amendment. "A constructive amendment mandates per se reversal, however, a variance warrants reversal only if the defendant's 'substantial rights' were affected." United States v. Bhagat, 436 F.3d 1140, 1145 (9th Cir.2006).

Here, the Grand Jury charged two specific conspiracies: under Count 1, to distribute methamphetamine; under Count 3, to money launder drug proceeds. As set forth *infra*, the jury instructions amended the indictment by permitting conviction under both counts for much broader conspiracies than those charged by the Grand Jury. In the alternative, Valenzuela argues that the trial evidence was at variance with the indictment.

C. The Prosecution's Misconduct Materially Affected Valenzuela's Ability to Receive a Fair Trial.

Prosecutors are precluded from offering "personal assurances of the veracity of Government witnesses." United States v. Sanchez, 176 F.3d 1214, 1224 (9th Cir.1999). Prosecutors are also precluded during cross-examination from making a defense witness testify concerning the credibility of another witness. Id. at 1219.

As argued *infra*, the Government engaged in numerous instances of improper vouching and improper cross-examination which, viewed in their totality, represent error that was plain, affected Valenzuela's substantial rights and seriously affected the fairness and integrity of her trial. United States v. Combs, 379 F.3d 564, 572 (9th Cir.2004).

D. The Court Erroneously Permitted Terrence Chu to Testify as an Expert as to Methamphetamine Pricing and Erroneously Admitted into Evidence the Government's Exhibit 66 Concerning the Same.

A court may admit specialized knowledge if it will assist the trier of fact to understand the evidence or to determine a fact in issue, provided the witness is qualified and the testimony is relevant and reliable. Fed. R. Evid. 702. Trial judges have the responsibility of acting as gatekeepers to exclude unreliable expert testimony. Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 589 (1993).

Under Count 2 the jury awarded $8 million. This staggering amount was based on the testimony of the Government's expert witness Terrence Chu concerning the value of the methamphetamine Valenzuela allegedly distributed. As argued *infra*, Chu's testimony was unreliable and the court failed its gatekeeping function under Daubert, which failure represents an abuse of discretion that cannot be considered harmless.

Valenzuela also argues that the admission of Exhibit 66 violated her right under the Confrontation Clause of the Sixth Amendment to cross-examine those who actually gathered the information and prepared Exhibit 66.

E. The Court Abused its Discretion in Imposing the Two-Level Sentencing Enhancement for Obstruction of Justice.

In her trial testimony, Valenzuela denied participation in the drug distribution conspiracy and the conspiracy to launder drug proceeds. At sentencing, the court imposed a two-level increase for obstruction justice based on perjury under U.S.S.G. § 3C1.1. Valenzuela argues *infra* that the court abused its discretion in doing so because it failed to point to specific, material and deliberate falsehoods in support of its vague finding that "the obstruction of justice enhancement is indeed supported by the record" [ER-I:36], as required by the Supreme Court in United States v. Dunnigan. 507 U.S. 87, 94 (1993).

ARGUMENTS

A. As to Count 1, Insufficient Evidence Proved the Single Drug Conspiracy Charged, Instead Demonstrating Multiple Smaller Conspiracies.

1. Standard of Review.

Whether a single conspiracy has been proven is a question of the sufficiency of the evidence. Fernandez, 388 F.3d at 1226. Valenzuela did not preserve this claim by moving for acquittal at the close of all the evidence [*see* ER-II:138-139], therefore the issue is reviewed for plain error. United States v. Delgado, 357 F.3d 1061, 1068 (9th Cir.2004). "Under plain-error review, reversal is permitted only when there is (1) error that is (2) plain, (3) affects substantial rights, and (4) "seriously affects the fairness, integrity, or public reputation of judicial proceedings." Johnson v. United States, 520 U.S. 461, 467 (1997) (*quoting* United States v. Olano, 507 U.S. 725, 732 (1993)).

2. Discussion.

a. The Evidence Proved Multiple Smaller Conspiracies.

The essential elements of a conspiracy are (1) an agreement to accomplish an illegal objective, (2) the commission of an overt act in furtherance of the conspiracy, and (3) the requisite intent necessary to commit the underlying offense. United States v. Thomas, 887 F.2d 1341, 1347 (9th Cir.1989). The government must prove each element of the conspiracy, and that the defendant is a member of the overall conspiracy charged in the indictment, or else he is not guilty at all. *See* United States v. Brown, 912 F.2d 1040, 1043 (9th Cir.1990).

The test for determining whether a single conspiracy, rather than multiple

smaller conspiracies, has been proven was outlined in Duran:

> "A single conspiracy can only be demonstrated by proof that an overall agreement existed among the conspirators. Furthermore, the evidence must show that each defendant knew, or had reason to know, ... that his benefits were probably dependent upon the success of the entire operation. Typically, the inference of an overall agreement is drawn from proof of a single objective, or from proof that the key participants and the method of operation remained constant throughout the conspiracy. The inference that a defendant had reason to believe that his benefits were dependent upon the success of the entire venture may be drawn from proof that the co-conspirators knew of each other's participation or actually benefitted from the activities of his co-conspirators."

United States v. Duran, 189 F.3d 1071, 1080 (9th Cir.1999), *cert. denied* 529 U.S. 1081 (2000)(internal citations, alterations and quotation marks omitted; ellipses in original). As well, courts examine, "the nature of the scheme; the identity of the participants; the quality, frequency, and duration of each conspirator's transactions; and the commonality of time and goals." United States v. Bibbero, 749 F.2d 581, 587 (9th Cir.1984), *cert. denied* 471 U.S. 1103 (1985). We turn to these five factors.

(1) The Nature of the Scheme.

Count 1 charged Valenzuela with knowingly participating in a single methamphetamine conspiracy from 2000 to September 2005, with the focus on distribution in Hawai`i. She allegedly entered this illegal agreement with the 4 codefendants as well as the 18 named coconspirators, including Bulacan and

Ranney. [ER-IV:148]. The purpose of this scheme was to distribute methamphetamine in the lucrative Hawai`i market. Under the Government's theory, Acuna and Valenzuela were responsible for supplying all the methamphetamine in the Count 1 conspiracy.

Examination of the record does not support this theory. At best the record shows multiple smaller conspiracies, which the Government itself acknowledged during closing: "there were many, many agreements among many different individuals to distribute and possess with intent to distribute methamphetamine." [ER-II:30].

(2) The Identity of the Participants.

The indictment identified Valenzuela as one of the leaders/organizers/recruiters of a vast methamphetamine conspiracy, along with 4 codefendants (Acuna, Olguin, Marlene Ogata and Wayne Kila) and 18 coconspirators (Bulacan, Ranney, Joeann Tavares, Joseph Chai, Ronald Shim, James Low, Dennis Tadio, Donald Dempsey, William "Puna" Caminos, Eric Shimomura, Brandon Suan, Brandon Yamamoto, Antonio Santos, Joannette Quintal, Guy Siaris, Francis Honda, Michael Winings and Bobbi Jean Asuncion). [ER-IV:147-148]. However, examination of these participants' identities shows multiple conspiracies, with two main branches. One stemmed from Bulacan, and

the second stemmed from Ranney.

Sheri Bulacan. Bulacan was a longtime methamphetamine addict with an "extreme" gambling problem according to her coconspirator Ronald Shim. [ER-III:185.1]. The record showed that from 1999 to 2007 she spent well over $8 million at just one Las Vegas casino, of the many that she frequented. [ER-III:40, 130, 186; ER IV:50].

Raised in Hawai`i, she moved to Las Vegas in 1992 where she began shipping methamphetamine back to Hawai`i because, "it's worth here [Hawai`i] is a lot greater". [ER-III:96-99]. In 1996 she moved to Hawai`i, imported methamphetamine from Las Vegas and sold it to Hawai`i distributors. [ER-III:99-101]. In May 1996, Hawai`i police arrested her for possession of methamphetamine, which case was dismissed in 1999. [ER-III:100-102].

Bulacan returned to Las Vegas where she immediately began trafficking methamphetamine again [ER-III:102], which she acquired from numerous sources. [ER-III:10, 11-14, 22-23, 102-106, 108-109, 113-116, 186]. For example, in 2000 Bulacan met the Las Vegas methamphetamine supplier Peter Moheatau, who provided multi-pound amounts and "we started talking more business." [ER-III:15-16, 105, 109]. With Moheatau, Bulacan personally transported multi-pound quantities of methamphetamine to Hawai`i, sold it to her distributors Joeann

Tavares and Bobby Jean Asuncion, then divided the profits with Moheatau. [ER-III:17].

Bulacan testified that she met Acuna in 2000 or 2001 and, with the exception one 10-pound purchase, Acuna was her sole source of methamphetamine distributed in Hawai`i during the Count 1 conspiracy. [ER-III:7].

Bulacan used a network of distributors and sub-distributors identified in Count 1. She employed in Las Vegas former Hawai`i residents Joseph Chai and Ronald Shim as drug packers, shippers and distributors. [ER-III:165, 182-183]. In Hawai`i she distributed through Joeann Tavares and Marlene Ogata, as well as Wayne Kila and Bobbi Jean Asuncion. Of those who testified for the Government (Asuncion, Chai, Shim, Tavares), none except Tavares knew of Valenzuela. [*See* Asuncion, ER-III:85; Chai, ER-III:167; Shim, ER-III:181].

Charles Ranney. Ranney was a former Hawai`i resident who moved to Las Vegas in 1996 and immediately began dealing methamphetamine, which he obtained from his brother-in-law Catalina Bautista. [ER-III:194-195, 206]. Ranney was a cocaine, marijuana and gambling addict, a known "thug" who was involved in car and identity theft, and he was a member of a Las Vegas gang. [ER-II:207; ER-III:155, 203, 221, 231].

In 1998 Ranney partnered with his cousin and coconspirator Michael Winings to distribute methamphetamine, selling to customers all over Las Vegas. [ER-III:203, 247]. Besides his brother-in-law Bautista, Ranney had numerous suppliers including Bulacan, who he knew from Hawai`i. [ER-III:195-196, 200, 243, 248-249].

He testified that he met Acuna through Bulacan in 2000 or 2001, and that he met Valenzuela after Acuna's arrest in May 2002, when she allegedly took over Acuna's methamphetamine distribution until Acuna returned to the U.S. [ER-III:193]. Like Bulacan, Ranney testified that Acuna was responsible for supplying most of the methamphetamine he and Bulacan distributed in Hawai`i. [ER-III:192, 196].

Ranney employed a distinct network of distributors and sub-distributors from Bulacan's network. He distributed to the following coconspirators identified in Count 1: Antonio Santos; Guy Siaris; William Caminos; Brandon Yamamoto; Brandon Suan; Eric Shimomura; his Las Vegas girlfriend Joannette Quintal; his cousin Winings. Guy Siaris sub-distributed to Francis Honda. None of the individuals in Ranney's distribution network who testified for the Government knew of Valenzuela. [*See* Winings, ER-IV:14; Caminos, ER-IV:33; Quintal, ER-IV:42; Honda, ER-IV:74].

(3) The Quality, Frequency and Duration of Each Conspirator's Transactions.

Examination of the quality, frequency and duration of each coconspirator's transactions further reveals that this case involved multiple conspiracies stemming from Bulacan and Ranney.

Bulacan testified that in 2003 she and Ranney ***alone*** met at her house in Las Vegas and planned the Hawai`i distribution operation, with the intention of utilizing their respective networks within the Hawai`i underworld. [ER-III:25, 139-139.1]. Ranney described his relationship with Bulacan as partners "50/50", without any mention of Valenzuela or Acuna. [ER-III:226]. Bulacan and Ranney ***alone*** developed the strategy of taking over the Hawai`i market by identifying the cost per ounce, then undercutting that price and flooding the market with a high volume of their lower cost methamphetamine. [ER-III:207]. They ***alone*** agreed upon the goal of earning $1 million apiece within six months, which goal they accomplished.[2] [ER-III:139.1, 208, 239]. Ranney even posed for a photograph while reclining in front of piles of drug money from the Hawai`i operation. [ER-III:232-233; ER-IV:82].

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[2] During cross-examination Bulacan agreed that this goal concerned *net profit*, i.e., that Ranney was to earn $1 million "for himself" and for her. [ER-III:25].

Ranney & His Networks. Between Bulacan and Ranney, Ranney was clearly the operation's engine, as well as its management wing. In the fall of 2003 he moved to Hawai`i to implement the plan. [ER-III:211-213]. At trial he testified that he knew the "different demographics" of the Hawai`i underworld, and "I knew it would take off if I moved to Hawai`i." [ER-III:139-139.1, 204-205]. With Bulacan shipping methamphetamine to him, Ranney oversaw the drugs' distribution, followed by collection and accounting of proceeds. [ER-III:206-211].

To infiltrate and conquer the Hawai`i market, Ranney relied upon distributors drawn from the ranks of his family and friends with whom – as the Government itself noted – he entered separate conspiracies. [ER-II:30]. According to Ranney, coconspirators Antonio Santos and Brandon Suan knew the Hawai'i methamphetamine market at the chicken fights; his cousin Winings knew the strip bars and clubs; Brandon Yamamoto knew the "game houses" and gangs. [ER-III:205-206].

Four of Ranney's eight distributors identified in Count 1 testified at the trial. Francis Honda testified that he bought drugs from different sources including Guy Siaris, a Ranney distributor. [ER-IV:67-68]. When Siaris left Hawai`i in 2004, Honda began dealing with Ranney's distributor Antonio Santos

and later directly with Ranney. [ER-IV:72].

Ranney's cousin Winings testified that Ranney recruited him to move to Hawai`i from Las Vegas in June/July 2004 to distribute methamphetamine. [ER-IV:9]. Once in Hawai`i, Ranney sent methamphetamine to Winings through the mail, along with specific pickup and distribution instructions. [ER-IV:10-13]. Winings collected and shipped payments through the mail to Ranney. [ER-IV:11-13].

William Caminos testified to meeting Ranney in 2003, at which time he began buying multi-pound amounts of methamphetamine through Ranney's distributors Antonio Santos, Winings and Brandon Yamamoto. [ER-IV:25-31]. Caminos initially delivered payment to Santos, but later shipped payments to Ranney or personally delivered it when Ranney was in Hawai`i. [ER-IV:30-31].

Joannette Quintal testified that she dated Ranney in Las Vegas, who recruited her to collect drug proceeds on a trip to Hawai`i. [ER-IV:37-42].

After six months in Hawai`i, Ranney moved back to Las Vegas around mid-2004, but he testified that he returned to Hawai`i "every two weeks" to deal with distribution and payment problems. [ER-III:215]. The distributors were "screwing up", meaning they "would be short money ... lollygag with the money, people robbing each other". [ER-III:215-217]. In a dramatic example, Ranney

returned to Hawai`i to deal with his cousin Winings who, in addition to becoming too "flashy" (wearing too much jewelry and spending too much money) had amassed drug debts. For this risky behavior, Bulacan was planning to have Winings murdered. [ER-III:250-251]. Ranney paid off of Winings' debt, then imposed punishment. Ranney testified that to get everyone in line, he beat Winings so badly Winings had to be hospitalized. [ER-III:157-158, 250-251].

In Las Vegas, Ranney managed new issues, with Bulacan herself falling behind on payments. [ER-III:227]. Therefore Ranney began dealing directly with "the Mexicans". [ER-III:227].

Further, Ranney began acting as the banking arm of the operation. He testified that, "I just use my money to most likely pay these guys, pay them because everybody else was going to have one debt. So I rather pay everybody else to keep this thing going and let everybody else owe me." [ER-III:156].

According to Tavares, with Ranney's arrest in September 2005, the large-scale, multi-pound methamphetamine distribution operation ended. [ER-III:58-59].

Bulacan & Her Networks. Bulacan had her own network of distributors, four of whom testified for the Government at the trial. Joeann Tavares testified that she moved to Las Vegas from Hawai`i in 1999, and met Bulacan in 2001 or

2002. [ER-III:60, 64]. Around 2002, Bulacan represented to Tavares that she was acquiring large amounts of methamphetamine from Acuna. [ER-III:55]. Tavares testified that: Bulacan was not making money selling drugs in Las Vegas; "[o]ver here [Hawai`i] is where you made the money"; Bulacan did not have connections in Hawai`i to distribute large amounts of drugs; Tavares did, claiming she knew "half the island". [ER-III:63-67].

Tavares returned to Hawai`i, distributed Bulacan's methamphetamine, collected proceeds for Bulacan, but also stole proceeds from Bulacan. [ER-III:56-57]. Tavares did not know Caminos and Honda, two of Ranney's Hawai`i distributors. [ER-III:65-66].

Bobbi Jean Asuncion testified that she knew Bulacan from highschool in Hawai`i. [ER-III:74]. During Bulacan's trip to Hawai`i in February 2002 to distribute methamphetamine from Moheatau, Asuncion met Bulacan in a hotel room (along with Moheatau, Marlene Ogata and Tavares) where she observed a multi-pound amount of methamphetamine. [ER-III:75-76]. Asuncion began distributing methamphetamine for Bulacan, which arrangement lasted for 11 months. [ER-III:18]. Bulacan mailed the drugs to Asuncion in Hawai`i, with Asuncion mailing proceeds back to Bulacan or personally delivering the proceeds when Bulacan came to Hawai`i. [ER-III:79-82, 84].

Joseph Chai and Ronald Shim were Bulacan's packers and distributors, and both testified for the Government. Chai worked for Bulacan from 2001 to 2003. After Chai, Shim packed and distributed in both Las Vegas and Hawai`i from 2003 to 2005. [ER-III:173-178.] Once or twice a month, Shim packed and shipped to Hawai`i boxes weighing 25 pounds [ER-III:177], with many addressed to Ranney. [ER-III:185]. Shim did not know the origin of the methamphetamine. [ER-III:178]. Shim also counted money that arrived at Bulacan's Las Vegas residence from Hawai`i. [ER-III:179-180].

Bulacan was also intimately involved with codefendant/coconspirator Marlene Ogata, who introduced Bulacan to coconspirator Wayne Kila in 2004 or 2005. [ER-III:4, 7].[3] Bulacan distributed substantial amounts through Kila who, it is believed, further distributed to coconspirators James Low, Dennis Tadio and Donald Dempsey.

(4) The Commonality of Time and Goals.

Examination of time and goals further demonstrates multiple conspiracies, rather than the single conspiracy in Count 1.

Time. Count 1 alleges that Valenzuela was a leader/organizer/recruiter for the Hawai`i-based conspiracy, in which she knowingly participated from at least

[3] Marlene Ogata did not testify at the trial.

2000 to September 2005. [ER-IV:147-148]. In 2000, however, Valenzuela was a 17-year-old highschool student. [ER-II:124, 181]. No evidence in the record ties her to this conspiracy in 2000.

As to Acuna's participation, Bulacan and Ranney's self-serving testimony concerning when they met him was vague and unreliable. Ranney testified that it was either 2000 or 2001. [ER-III:193]. Bulacan claimed that she might have met Acuna in 2001 or 2002, but "I'm not sure" and "I'm just giving dates. You're asking me to give you one; so I'm giving you one." [ER-III:19-20, 115]. She also testified: "I don't know the dates. I don't know the amounts. It's substantial amounts. I don't know how much times Benny [Acuna] came, but if I had to choose, I'm going with five years, once a month". [ER-III:44].

Both Bulacan and Ranney testified that they hatched their plan to take over the Hawai`i market in 2003, and that Acuna was their exclusive supplier. Review of the timeline shows otherwise. To begin with, Acuna was arrested in May 2002, incarcerated for eight months, then removed from the U.S. on January 30, 2003. [ER-II:174]. He did not return until October 2003. [ER-II:170]. It is hard to imagine Acuna planning, leading, recruiting for the the Count 1 conspiracy while in absentia in Mexico.

Ranney testified that Valenzuela stepped in as supplier during Acuna's

absence. [ER-III:234]. However, no evidence in the record directly links Valenzuela to the large amounts of methamphetamine purchased by Bulacan/Ranney during this period, including the 100-pounds purchased by Bulacan's distributor Wayne Kila sometime before November 2002. [ER-III:27-30].

As well, the record clearly shows that Bulacan/Ranney relied on other methamphetamine suppliers from 2000 to September 2005. In 2002 Bulacan purchased multi-pound amounts from Peter Moheatau that she distributed in Hawai`i, as seen in Bulacan, Asuncion and Tavares' testimony. [ER-III:17, 54, 75-76]. Bulacan also obtained methamphetamine from Madelyn Demorado, Joeann Tavares (who had numerous sources), Mike Cacho, Butch Bonafacio and "some other dude". [ER-III:10, 11-14, 22-23, 102-106, 186]. Concerning Mike Cacho, Ronald Shim testified that Mike Cacho "regularly" visited Bulacan's house, supporting the inference that Cacho was a significant source. [ER-III:186].

Ranney testified that his suppliers during the Count 1 conspiracy (2000 to September 2005) were Moheatau, "Solo", Bulacan and Acuna. [ER-III:195-196, 200, 243]. As well, his distributor Francis Honda alluded to Ranney's reliance on another supplier. Honda testified that in 2004 Ranney tried to sell him low quality, blue-burning methamphetamine, which Honda refused to purchase. [ER-

IV:71-72]. Ranney relied upon another source to provide a higher quality methamphetamine to Honda. [ER-IV:72]. Furthermore, Ranney himself testified that he acquired methamphetamine for the Hawai`i operation from "everybody, anybody I needed to get the dope from" [ER-III:227], not only Acuna/Valenzuela.

Goals. The initial goal of the Bulacan/Ranney operation was to make $1 million apiece in six months, which goal they succeeded in reaching. [ER-III:25, 208]. After Ranney returned to Las Vegas, the goal was to keep the operation profitable for as long as possible. [ER-III:156].

Bulacan's speculation during her trial testimony that Valenzuela and Acuna must have known about the Hawai`i operation given the one-week delay in making payments to them [ER-III:9, 141] does not withstand scrutiny. Nearly all the methamphetamine distribution in this case took place on a "fronting" basis wherein distributors obtained drugs on credit, then used proceeds to pay back the supplier. [*See* Honda, ER-IV:73, 75, 77; Winings, ER-IV:8; Caminos, ER-IV:27; Asuncion, ER-III:79; Bulacan, ER-III:24, 125]. A time-lag in payment was standard operating procedure in the drug trafficking underworld, and it is not evidence of Valenzuela's knowledge of the Bulacan/Ranney operation in Hawai`i.

Their alleged transactions with Acuna were cut-and-dry arrangements. Ranney testified to paying Acuna a range from $10,000 to $11,500 per pound.

[ER-III:240]. He never negotiated or disputed the price. [ER-III:240]. He received no discount for buying in bulk. [ER-IV:240]. Bulacan testified that there was little or no discussion with Acuna as to the terms of the sale. [ER-III:147]. Thus, the price they allegedly paid Acuna/Valenzuela never reflected the highly lucrative Hawai`i market wherein the methamphetamine was destined to be sold.

The Government presented no evidence showing that Valenzuela's income and assets reflected the multi-million-dollar returns from the Hawai`i market. In contrast, the record showed that Bulacan was swimming in drug money, gambling $8 million at just one casino out of the many that she frequented [ER-III:3], and Ranney testified that he lost "millions" at the casinos. [ER-III:231].

Ranney and Bulacan were "50/50" partners [ER-III:226], with no percentage of their net profits from the lucrative Hawai`i market going to Valenzuela/Acuna. Bulacan and Ranney jealously guarded the Hawai`i operation, expressly agreeing to keep "the Mexican[s]" out of Hawai`i for fear that they would "take over". [ER-III:152]. Bulacan directed Ranney to tell Acuna that, "we ain't getting that much money. Because, if they was to move into Hawai`i, they would push us out." [ER-III:153].

This case contrasts with the conspiracy discussed in Bibbero, which case involved a conspiracy to distribute marijuana. 749 F.2d 581. There the Court

found a single conspiracy based upon "consistency of key personnel and of method and type of operation" which militated against separating the smuggling operation into smaller, independent conspiracies. Id. at 587 (supporting citations omitted).

Here, the only "key personnel" throughout the 2000-2005 period were Bulacan and Ranney, who relied upon numerous suppliers, not only Acuna and Valenzuela. The record shows that the planning, implementation, recruitment and management of distributors, management of product and profit, and the success of the operation, rested in Bulacan and Ranney's hands alone. Ranney even bankrolled the operation at one point. [ER-III:156]. It is no surprise that the once the police arrested him in September 2005, the operation collapsed. [ER-III:58-59]. In contrast, nothing in the record demonstrated that Valenzuela or Acuna played such pivotal roles in the Count 1 conspiracy, let alone the leadership/organization/recruitment roles alleged in the indictment.

"[I]f the indictment alleges a single conspiracy, but the evidence at trial establishes only that there were multiple unrelated conspiracies, there is insufficient evidence to support the conviction on the crime charged, and the affected conviction must be reversed." Fernandez, 388 F.3d at 1226 -1227. Under plain error review, given this record Valenzuela submits that her conviction as

leader/organizer/recruiter who participated in a single, vast conspiracy from 2000 to September 2005 to distribute methamphetamine in Hawai`i was an error, and it was plain. At best the evidence showed multiple conspiracies stemming from the Bulacan/Ranney plan to dominate the Hawai'i methamphetamine market. At best the trial testimony indicated that Valenzuela and Acuna *may* have supplied some methamphetamine to Bulacan/Ranney in Las Vegas. However, Valenzuela and Acuna were clearly not the sole supplier of the Bulacan/Ranney operation. Further, she and Acuna were clearly not the "leaders, organizers and recruiters" of the operation. [*See* ER-IV:147].

Nothing in the evidence shows that Valenzuela was present during the planning and implementation of the Hawai`i operation, or even knew of the operation. Nothing in the evidence shows that she recruited members for the operation or assisted in the management of the operation. The coconspirators did not know of her. [*See* Chai, ER-III:167; Shim, ER-III:181; Asuncion, ER-III:85; Honda, ER-IV:74; Caminos, ER-IV:33; Quintal, ER-IV:42; Winings, ER-IV:14. She did not know of them. [ER-II:118-119]. Further, in contrast to Bulacan and Ranney who earned $1 million apiece in just six months, Valenzuela received none of the spectacular profits from the Hawai`i operation.

When a conviction is predicated on insufficient evidence, the last two

prongs of the four-prong Olano test – (3) affects substantial rights, and (4) "seriously affects the fairness, integrity, or public reputation of judicial proceedings" – will necessarily be satisfied. United States v. Cruz, 554 F.3d 840, 845 (9th Cir.2009). "A defendant's "substantial rights," as well as the "fairness" and "integrity" of the courts, are seriously affected when someone is sent to jail for a crime that, as a matter of law, he did not commit, or when the court, as a matter of law, has no jurisdiction to try him for the alleged offense." Id., *citing* Kotteakos v. United States, 328 U.S. 750, 776 (1946). As Justice Jackson warned in 1949, conspiracy is a crime that is so "elastic, sprawling and pervasive" that it must be limited to its terms otherwise it "constitutes a serious threat to fairness in our administration of justice." Krulewitch v. United States, 336 U.S. 440, 445-46 (1949) (Jackson, J., concurring).

This Court has reversed convictions where the evidence is insufficient to find that the defendant is a member of the single, overall conspiracy alleged. *E.g.,* United States v. Martin, 4 F.3d 757, 760 (9th Cir.1993)(in methamphetamine distribution conspiracy, evidence did not show defendant Martin's knowledge of and dependency on the overall conspiracy); United States v. Umagat, 998 F.2d 770, 773 (9th Cir.1993) (defendants "cannot be held criminally responsible for an overall conspiracy … of which they were ignorant and upon which their own

benefits did not depend"); Brown, 912 F.2d at 1044 (reversing conspiracy conviction because "not possible to justify a decision that [defendant] knew or depended upon [overall conspiracy], even though its success depended on him in part"). The Court should do the same here.

b. If a Single Conspiracy, Then it Is at Best a Flawed Wheel-Shaped Conspiracy Missing the Overall "Rim" of Agreement.

Should the Court find sufficient evidence to support the charge of a single conspiracy in Count 1, then Valenzuela argues that at best the single conspiracy represents a fundamentally flawed wheel-shaped conspiracy, missing the required overall "rim" of agreement, knowledge and dependency amongst all the wheel's spokes. *See* Kenny, 645 F.2d at 1335. At best the evidence showed Bulacan and Ranney at the hub of a wheel formation, with their numerous suppliers and distributors representing the various spokes to the wheel.

To establish the overall conspiracy, the Government must "supply proof that the spokes are bound by a rim." Id. In other words, the evidence must show that "there was one overall agreement among the various parties to perform various functions in order to carry out the objectives of the conspiracy." Martin, 4 F.3d at 760, *quoting* United States v. Kearney, 560 F.2d 1358, 1362 (9th Cir.), *cert. denied* 434 U.S. 971 (1977). "It is sufficient to show that each defendant knew or

had reason to know of the scope of the conspiracy and that each defendant had reason to believe that their own benefits were dependent upon the success of the entire venture." Kenny, 645 F.2d at 1335. The inference that a defendant had reason to believe that his benefits were dependent upon the success of the entire venture may be drawn from proof that the coconspirators knew of each other's participation or actually benefitted from the activities of his coconspirators. *See* United States v. Arbelaez, 719 F.2d 1453, 1459 (9th Cir.1983), *cert. denied* 467 U.S. 1255 (1984).

At best, the evidence indicated that Valenzuela represented a supply spoke in this wheel formation. But no other evidence demonstrated that she was connected to the wheel's rim. Neither Ranney's distributors who testified for the Government (Honda, Caminos, Winings and Quintal), nor Bulacan's (Asuncion, Shim and Chai), had ever heard of her. Tavares knew of Valenzuela and Acuna, but testified that Bulacan had more than one supplier, and Tavares herself had numerous suppliers.[4] [ER-III:59].

Furthermore, Valenzuela testified that she did not know the other named distributors in Count 1 except for Bulacan, Ranney, and Tavares. [ER-II:118-

[4] Similarly, Winings testified that it was common for people to have multiple sources, and that it would be uncommon to have only one source. [ER-IV:19].

119]. As to Bulacan, Valenzuela met her after Acuna's arrest in May 2002 when he asked her to call Bulacan concerning the home-renovation project; as to Ranney, he hired Valenzuela to assist in buying a house in Las Vegas; as to Tavares, Valenzuela purchased a car from her. [ER-II:119, 121, 120]. Valenzuela testified that she had no knowledge of Bulacan, Ranney and Tavares' drug distribution activities. [ER-II:119-123]. If her husband, Acuna, was distributing methamphetamine, she had no knowledge of it, and she denied any involvement in drug distribution. [ER-II:120, 124].

There was no evidence that Valenzuela and Acuna benefitted from the Bulacan/Ranney Hawai`i conspiracy. The "50/50" Bulacan/Ranney partnership shared none of its spectacular profits. [ER-III:226]. There is no indication that the price Bulacan/Ranney allegedly paid Acuna for methamphetamine reflected the inflated Hawai`i market where they distributed the drugs. *See* Martin, 4 F.3d at 760 (evidence of double-crossing, and that defendant did not benefit from coconspirators' separate actions proved that defendant was not a part of the overall conspiracy to distribute methamphetamine). Indeed, assuming for the sake of argument that Acuna/Valenzuela were the leaders/organizers/recruiters of the single Count 1 conspiracy, it is hard to imagine that they would not demand a significant percentage of the profits that Bulacan/Ranney earned in Hawai`i, or

adjust their selling price to reflect the same.

Furthermore, Bulacan and Ranney agreed to keep Valenzuela and Acuna – "the Mexicans" – out of the lucrative Hawai`i market. [ER-III:152-153]. To do so, they lied about their high financial returns, with Bulacan directing Ranney to tell Acuna that the Hawai`i operation was not profitable. [ER-III:153].

The Government failed to "supply proof that the spokes are bound by a rim." Kenny, 645 F.2d at 1335. If "nothing at all shows that [s]he knew of other transactions, or that [s]he knew there was any overall plan at all," then the single conspiracy conviction must be reversed. Brown, 912 F.2d at 1046.

B. As to Counts 1 and 3, the Court Constructively Amended the Indictment in its Instructions to the Jury, Which Allowed the Jury to Convict Valenzuela of Charges for Which She Did Not Receive Fair Notice.

1. Standard of Review.

Valenzuela did not object to the court's jury instructions as constructive amendments or material variances, therefore the Court reviews this argument for plain error. *See* United States v. Choy, 309 F.3d 602, 607 (9th Cir.2002).

2. Discussion.

"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. amend.V. "The grand jury clause of the Fifth Amendment is designed to ensure that criminal defendants have fair notice of the charges that they will face and the theories that the government will present at trial." United States v. Hartz, 458 F.3d 1011, 1022 (9th Cir.2006). "[A]fter 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); United States v. Hugs, 384 F.3d 762, 767 (9th Cir.2004), *cert. denied* 544 U.S. 933 (2005).

Here Valenzuela argues that the court constructively amended Count 1 and Count 3 through its instructions to the jury. "An amendment ... occurs when the charging terms of the indictment are altered, either literally or in effect, by the prosecutor or a court after the grand jury has last passed upon them." United States v. Von Stoll, 726 F.2d 584, 586 (9th Cir.1984). A variance, on the other hand, "occurs when the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment." Id. Although "[t]he line between a constructive amendment and a variance is at times difficult to draw," the difference is quite significant because a constructive amendment requires reversal, while a variance does not unless it prejudices the defendant's substantial rights. United States v. Adamson, 291 F.3d

606, 615 (9th Cir.2002).

a. As to Count 1.

(1) Constructive Amendment.

The indictment alleged that Valenzuela and Acuna "were leaders, organizers and recruiters for an organization involved in the distribution and possession, with intent to distribute, of methamphetamine in the District of Hawaii and elsewhere." [ER-IV:147-148]. Count 1 charged Valenzuela with a specific conspiracy as to time, location and the identity of the participants:

> "Beginning at a date unknown to the grand jury, but by at least 2000, and continuing up to and including September, 2005 in the District of Hawai`i and elsewhere, defendants BENJAMIN ACUNA, ANABEL VALENZUELA, EDDY OLGUIN, MARLENE OGATA and WAYNE KILA did knowingly and intentionally combine, conspire, confederate ***and agree with each other and with*** Sheri Bulacan, Charles Lee Ranney, Jr., Joeann Tavares, Joseph Chai, Ronald Shim, James Low, Dennis Tadio, Donald Dempsey, William "Puna" Caminos, Eric Shimomura, Brandon Suan, Brandon Yamamoto, Antonio Santos, Joannette Quintal, Guy Siaris, Francis Honda, Michael Winings and Bobbi Jean Asuncion, all charged elsewhere, and with others known and unknown to the grand jury, to distribute and possess, with intent to distribute, 50 grams or more of methamphetamine … ."

[ER-IV:148].[5]

The court instructed the jury that the Government had to prove each of the

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[5] As to all quoted material herein, unless otherwise noted ***bolded and italicized*** text has been added to emphasize the same.

following elements beyond a reasonable doubt:

> "First, beginning at a date unknown but at least 2000 and continuing up to and including September 2005, there was an agreement ***between two or more persons*** to distribute and to possess, with intent to distribute methamphetamine, a Schedule II controlled substance; and
>
> Second, a defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it."

[ER-II:12].

Valenzuela argues that this instruction fails the due process requirements under the Fifth Amendment. The Grand Jury charged her with a specific conspiracy in a number of respects; we focus here on location and participants. As to the latter, where the identity of coconspirators is key to determining the nature of the conspiracy, the jury instructions must specify the conspirators. *See, e.g.*, United States v. Keller, 916 F.2d 628, 634-36 (11th Cir.1990), *cert. denied* 499 U.S. 978 (1991)(where an indictment alleges only two participants in a conspiracy and no unnamed members, then instructions allowing conviction of conspiring with others constructively amended indictment).

Here, the identity of the codefendants is part of the conspiracy charged. Count 1 required a finding that "BENJAMIN ACUNA, ANABEL VALENZUELA, EDDY OLGUIN, MARLENE OGATA and WAYNE KILA did knowingly and intentionally combine, conspire, confederate and agree ***with each***

other". [ER-IV:148]. Further, the charge required a finding that Valenzuela and the codefendants conspired with each other ***"and with"*** the 18 named coconspirators. [ER-IV:148].

In contrast, the jury instruction broadened Count 1 and permitted a finding that Valenzuela joined a conspiracy between any "two or more persons", and not the conspiracy voted upon by the Grand Jury between the 4 identified codefendants and the 18 identified coconspirators. The instruction permitted the jury to convict Valenzuela for entering an illegal agreement with any person, whether identified or not in Count 1.

As to location, Count 1 charged Valenzuela with participating in a drug conspiracy in the District of Hawai`i. However, the instructions permitted the jury to convict Valenzuela for becoming a member of any conspiracy to distribute methamphetamine between 2000 and September 2005, whether it was located in Hawai`i, Las Vegas or elsewhere. The critical element of distribution within the District of Hawai`i was eliminated in the jury instructions. This was prejudicial. Assuming the jury found evidence of distribution on Valenzuela's part only in Las Vegas, under this instruction it still could have found her guilty of participating in the Hawai`i conspiracy charged under Count 1.

The changes to Count 1 constitute constructive amendments to the

indictment. "A constructive amendment mandates per se reversal". Bhagat, 436 F.3d at 1145.

(2) Variance.

Should the Court find no constructive amendment, in the alternative Valenzuela argues that the proof at trial created a variance of the indictment.

> "[I]f the indictment charges jointly tried defendants with participation in a single conspiracy, but the evidence reveals multiple, discrete conspiracies, such a variance of proof may be so prejudicial as to require reversal. Reversal is called for if the variance between the indictment and the proof affects the substantial rights of the parties. Thus the review of such a case involves two inquiries: was there a variance, and if so, was it prejudicial."

Kenny, 645 F.2d at 1334 (internal quotation marks and citations omitted).

Count 1 alleged that Valenzuela was a knowing participant in a single Hawai`i-based methamphetamine distribution conspiracy from 2000 to September 2005. Moreover, the indictment alleged that she was the leader, organizer and recruiter of the enterprise. The trial evidence showed, however, neither multiple smaller conspiracies, nor an incomplete 'wheel' formation conspiracy, as discussed under argument "A" *supra,* which arguments Valenzuela incorporates here as if set forth in full. Nothing in the Government's proof indicated that Valenzuela planned or organized the Hawai`i operation, controlled or directed it, recruited or managed it.

The variance was prejudicial because it permitted the jury to convict Valenzuela of the single conspiracy when the evidence showed multiple smaller conspiracies. As well, it permitted conviction when the evidence showed at best a wheel-shaped conspiracy in which Valenzuela knew nothing of the other conspirators, the overall plan and received none of the benefits of the overall operation.

b. As to Count 3.

(1) Constructive Amendment.

Count 3 charged Valenzuela in relevant part as follows:

> "Beginning at a date unknown to the grand jury, but by at least 2000, and continuing up to and including July, 2006 in the District of Hawaii and elsewhere, defendants BENJAMIN ACUNA and ANABEL VALENZUELA did knowingly and intentionally combine, conspire, confederate and agree ***with each other and with*** Sheri Bulacan, Charles Lee Ranney, Jr., Wayne Kila, Eddy Olguin, Joeann Tavares, Joseph Chai, Ronald Shim, James Low, Dennis Tadio, Donald Dempsey, William "Puna" Caminos, Eric Shimomura, Brandon Suan, Brandon Yamamoto, Antonio Santos, Joannette Quintal, Guy Siaris, Francis Honda, Michael Winings and Bobby Jean Asuncion, all charged elsewhere, and with others known and unknown to the grand jury, to commit an offense against the United States in violation of Title 18, United States Code, Section 1956 (h), to wit: money laundering, in violation of Title 18, United States Code, Sections 1956 (a)(1)(A)(i) and 1956 (a)(1)(B)(i). . . "

[ER-IV:155].

Count 3 identified three objectives of the conspiracy: "to conceal the

location of cash drug proceeds obtained from drug sales in Hawai`i, to disguise the true ownership of the drug proceeds and to transport the cash drug proceeds from Hawaii to BENJAMIN ACUNA and ANABEL VALENZUELA in Nevada." [ER-IV:156]. It also identified eight overt acts concerning Valenzuela's clothing store Seventeen Again, and her purchase of four houses, that furthered the conspiracy and affected the objectives. The jury had to find that Valenzuela "committed the following overt acts, among others":

> "1. On or about April 25, 2002, Anabel Valenzuela obtained, and/or caused to be obtained, a business license for 'Seventeen Again', 4416 E. Bonanza, Las Vegas, Nevada from the City of Las Vegas, Nevada Business License Division.
>
> 2. On or about August 16, 2004, Anabel Valenzuela purchased Bank of America cashier's check No. 001405806 in the amount of $5,312.33 using funds from her Bank of America account No. [ ]0968 to be used as part of the down payment to purchase the real property located at [ ] Enchanting Court in Las Vegas, Nevada.
>
> 3. On or about November 17, 2004, Anabel Valenzuela purchased Bank of America cashier's check No. 001514663 in the amount of $3626.12 using funds from her Bank of America account # [ ]0968 to be used as part of the down payment to purchase the real property located at [ ] Tuscadora Court in Las Vegas, Nevada.
>
> 4. On or about February 11, 2005, Anabel Valenzuela wrote personal check No. 1023 from her Bank of America account No. [ ]8219 in the amount of $5,000 to pay closing costs toward the purchase of the real property located at [ ] Benicasim Court in Las Vegas, Nevada.
>
> 5. On or about February 23, 2005, Anabel Valenzuela wrote personal

check # 1025 from her Bank of America account # [ ]8219 in the amount of $10,000 to be paid as part of the down payment and to pay closing costs to purchase the real property located at [ ] Midnight Cowboy in Las Vegas, Nevada.

6. On or about June 10, 2005, Anabel Valenzuela wrote personal check #1039 from her Bank of America account # [ ]8219 in the amount of $4,400 to be used as part of the down payment and to pay closing costs to purchase the real property located at [ ] Midnight Cowboy in Las Vegas, Nevada.

7. On or about October 25, 2005, Anabel Valenzuela purchased Bank of America cashier's check No. 001814746 using funds from her Bank of America account No. [ ]3602 in the amount of $60,921.59 to be used as part of the down payment and to pay closing costs to purchase the real property located at [ ] Midnight Cowboy in Las Vegas, Nevada.[6]

8. On or about July 25, 2006, Anabel Valenzuela obtained and/or caused to be obtained, a business license for "Seventeen Again", 725 W. Craig Road, Suite 134, North Las Vegas, Nevada from the City of North Las Vegas, Nevada Business License Division."

[ER-IV:156-158].

The court instructed the jury that the Government needed to prove beyond a reasonable doubt:

> "First that ***two or more persons,*** in some way or manner, came to a mutual agreement that they would conduct ***financial transactions*** with the proceeds of the conspiracy to distribute and possess with intent to distribute

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[6] The Government's Exhibit 205F shows that this check was not from Bank of America (BOA) account [ ]3602, but from BOA [ ]3581. [ER-IV: 83.1-83.3] The Government failed to prove that funds from BOA [ ]3602 were used as stated in the indictment.

> methamphetamine, as charged in count 1 of the First Superseding Indictment, with the intent to promote the carrying on of said unlawful activity or knowing that the transactions were designed in whole or in part to conceal or disguise the nature, location, source, ownership, or control of the proceeds of a specified unlawful activity; and
>
> Second, that the defendants became members of the conspiracy knowing of least one of its objectives and intending to help accomplish it."

[ER-II:17].

This instruction broadened Count 3 in four significant ways. First, Count 3 specified that both Acuna and Valenzuela had to be found guilty of conspiring to money launder with each other "and with" the 20 named coconspirators. The instruction eliminated the required finding that Valenzuela participated in the money laundering conspiracy with both Acuna and the 20 named coconspirators. It broadened the charge and permitted the jury to convict Valenzuela upon a finding that she became a member of the conspiracy to money launder with anyone, named or unnamed, in Count 3.

Second, the instruction permitted the jury to consider ***any financial transaction*** that could be linked with Count 1. In contrast, the overt acts the Grand Jury focused upon involved: three Bank of America (BOA) accounts ending in 0968, 8219 and 3602; three personal checks; three cashier's checks; Valenzuela use of these instruments to purchase the four named houses; Valenzuela's business

licenses for Seventeen Again.

Third and fourth, the instructions failed to include both the time and location variables, i.e. "by at least 2000, and continuing up to and including July, 2006 in the District of Hawaii and elsewhere". The instruction permitted the jury to convict Valenzuela for participating in any conspiracy to money launder in any location, during any time frame. The changes to Count 3 constitute constructive amendments to the indictment. "A constructive amendment mandates per se reversal". Bhagat, 436 F.3d at 1145.

(2) Variance.

In the alternative, Valenzuela argues that the Government's trial evidence was at variance with Count 3. To begin with, no evidence was shown of an agreement between Valenzuela and Acuna to money launder, and between Valenzuela/Acuna and the named coconspirators to money launder. Further, no evidence showed that the Count 3 conspiracy took place in the District of Hawai'i. All evidence presented concerned transactions that took place in Nevada.

As to those transactions, a chief focus of the Government's trial evidence was a comparison between Valenzuela's banking records and her reported income to the IRS, as seen in the Government's Exhibit 249A. [ER-IV:84; ER-II:195]. According to the Government's theory, Valenzuela's cash deposits and cash

expenditures into/from various bank accounts were excessive in comparison to her reported income. [*See* Exhibit 250, ER-IV:132]. The Government argued that bank records from 2002 to the end of 2006 showed a total of $890,802 in unexplained cash deposits and expenditures, which funds, according to the Government, came from methamphetamine distribution under Count 1. [*See* Exhibit 249A; ER-IV:84; ER-II:195].

The trial evidence included data from Washington Mutual Bank account # xx809-1 (Exhibit 249B), and BOA accounts xx3128 (Exhibit 249C), xx6143 (Exhibit 249E), xx3128 (Exhibit 249A), xx4019 (Exhibit 249A). [ER-IV:84, 85, 87, 106]. These accounts were not identified in Count 3 (only BOA accounts xx0968, xx8219 and xx3602 were identified), however, and therefore are at variance with the indictment.

Further, the evidence presented to the jury for both the identified and unidentified bank accounts in Count 3 included data concerning transactions **after** July 2006 and therefore outside the time perimeter of the Count 3 conspiracy. [*See* Exhibits 249C to 249G, ER-IV:87-118]. For example, as to BOA accounts xx8219, xx3128, xx0968 and xx3602, the Government alleged that Valenzuela paid $416,556.54 for housing down payments, mortgage payments and car payments which funds came from the alleged drug proceeds of Count 1. [Exhibits

251 & 251A, ER-IV:133-137]. However, at least $66,643.84, or 16 percent, of that total comes from expenditures made after July 2006. [*See* ER-II:200; Exhibits 251 & 251A, ER-IV:133-134].

Other variances are seen in the bank evidence for all the accounts, named and unnamed in Count 3. The evidence includes a myriad of transactions from 2002 to December 31, 2006, that are far beyond the scope of the three cashier's checks and three personal checks used to purchase Enchanting Court, Tuscadora Court, Benicasim Court and Midnight Cowboy Court. Furthermore, all the bank transactions were in Nevada, and not the District of Hawai`i.

Moreover the Government failed to prove that the cash deposits into accounts were proof of drug trafficking. Valenzuela testified to cash income from numerous sources: Acuna's income from construction work; realtor's fees paid in cash when she split the commission with other brokers; cash income from Seventeen Again; monthly rent in cash from the Tuscadora and Benicasim houses; cash payments from her father concerning Enchanting Court, where he lived. [ER-II:105, 108-109, 112, 116, 136].

Valenzuela acknowledged that she failed to keep funds separate for her businesses, that she co-mingled personal income with business and rental income, and she failed to report income. [*See* ER-II:125-133]. These failings, however,

did not transform legal income into laundered funds from illegal activity.

Valenzuela also acknowledged making the following cash expenditures: in 2004, $50,000 to Nevada attorney Robert Langford to represent Acuna in immigration proceedings; in May 2004, $28,000 to purchase a car; in 2006, $9,028 to purchase another car. Valenzuela never sought to conceal these payments. She testified that she knew cash transactions over $10,000 would be reported to the IRS and, nonetheless, made these cash payments because she had nothing to hide. [ER-II:116-117].

The Government's witness, IRS agent John Madinger, acknowledged that the $890,802 in cash deposits and expenditures did not take account of Acuna's cash earnings from construction work or cash rental income, both of which would represent legitimate income whether or not reported to the IRS. [ER-II:152]. He acknowledged that some people keep their money in cash at home because they mistrust banks. [ER-II:153]. Acuna kept his cash earnings in the home because he was an illegal alien, thrice removed to Mexico, with a wife and two young children in the U.S. that he had to support. [*See* ER-II:116].

We also note contradictions between the Government's evidence under Count 3 and the testimony of Bulacan, Ranney and Tavares. The Government's Exhibit 250, purporting to be a summary chart of Valenzuela's deposits and cash

expenditures versus reported income, alleged that in 2005 and 2006 she experienced two spikes in cash deposits and expenditures in her bank accounts, which it attributed to drug proceeds. [Exhibit 250, ER-IV:132; ER-II:199]. We contrast this allegation with Bulacan and Tavares' testimony that the Hawai`i distribution operation stopped with Ranney's arrest in September 2005. [ER-III:9.1, 57.1]. Assuming for the sake of argument that Valenzuela was a leader, organizer and recruiter for the Hawai`i operation, we would expect to see a corresponding drop in deposits and expenditures in 2005 and 2006. Instead we see the opposite, an increase. [*See* Exhibit 250; ER-IV:132].

Valenzuela offered a plausible, reasonable explanation, attributing the rise in income to the booming Las Vegas housing market and her earnings as a realtor; earnings from rental properties she had invested in; and Acuna's own earnings from working construction during the Las Vegas building boom. [ER-II:101-102, 109, 134-135].

As well, Bulacan and Ranney's testimony showed that their Hawai`i operation was in full swing in 2004, with each earning $1 million net profit within the first six months. Assuming for the sake of argument that Valenzuela was a leader, organizer and recruiter of the operation, we would expect to see a corresponding meteoric rise in income. While we see an increase, we see no

indication of the spectacular return in investment Bulacan and Ranney enjoyed. [*See* Exhibit 250, ER-IV:132].

The Government also introduced evidence of other transactions not identified in Count 3:

- Valenzuela's purchase in June 2006 of the Ringe Lane house [ER-IV:133];
- her purchase of six different vehicles from 2002 to 2006 [ER-IV:133];
- two large cash payments for the vehicles [ER-II;196-197];
- a large cash retainer to hire attorney Langford [ER-II:196].

This evidence was at variance with the allegations in Count 3. None were identified as transactions Valenzuela would have to defend herself against in Count 3. None occurred in Hawai`i. A number of the payments on the vehicles and on the houses, including Ringe Lane, occurred after July 2006. [*See* Exhibit 251A, ER-IV:134-137].

The trial evidence was at variance with the allegations in Count 3. Valenzuela submits that the variance was prejudicial because it permitted the jury to convict her of a conspiracy to money launder far beyond the perimeter of the crime set out with specificity under Count 3 of the indictment, in violation of the Fifth Amendment's Grand Jury Clause. U.S. Const. amend.V; *see* Adamson, 291 F.3d at 615.

c. Venue.

Valenzuela suffered prejudice in an additional way under both Counts 1 and 3. Here, as in United States v. Durades, 607 F.2d 818 (9th Cir.1979), the Government charged a narcotics distribution conspiracy spanning two separate states. Here, as in Durades, Valenzuela raised a timely objection when she moved to change the venue from Hawai`i to Nevada prior to commencement of the jury trial, which motion the court denied. [ER-IV:162, 172].

In Durades the Government charged a conspiracy spanning California and Illinois. This Court ruled that there was a variance between the single conspiracy charged and the evidence of dual conspiracies spanning separate states, since there was actually one drug conspiracy taking care of one state and another overlapping conspiracy servicing the other state. Id., at 820. The absence of proof of the single charged conspiracy infringed on Durades' constitutional right to trial in the district in which venue properly lay:

> "We now turn to the question whether the variance between the indictment and the proof infringed one of Durades' substantial rights, Viz. his interest in being tried only in a district where venue properly lay. We answer in the affirmative. (T)he law is that an overt act committed in the course of a conspiracy which occurs in a district gives rise to jurisdiction to prosecute the conspirators in that district. Had there been but one conspiracy, as the government claims, venue would have been proper in the Southern District of California because members of the Lugo-Gaxiola group committed overt acts there during the 1972-75 period. However, since there were actually

> two separate conspiracies, and since the government failed to prove that any overt act was committed in the Southern District of California after the Lugo-Rodriguez-Durades conspiracy came into existence in September 1975, venue did not lie there. By raising the venue issue at the proper time, Durades preserved his right to trial in a district where the crime was allegedly committed. U.S. Const. art. III, § 2; Id., amend. VI. Venue lay in the Central District of California, in the Northern District of Illinois, and perhaps elsewhere, but it did not lie in the Southern District of California. Accordingly, we REVERSE."

Id. (some internal citations, quotation marks and all footnotes omitted).

The same problem exists here. In Count 1 the Government charged a conspiracy to distribute methamphetamine spanning Hawai`i and Nevada. However, the trial evidence at best may have shown that Valenzuela participated in a different, smaller Nevada conspiracy. In Count 3 the Government charged a conspiracy to money launder spanning Hawai`i and Nevada. The trial evidence was restricted, however, to certain transactions, purchases and payments in Nevada.

The variance of Count 1's terms at trial permitted the jury to convict Valenzuela, even though she may have only been involved in overt acts in a smaller Nevada conspiracy. The variance of Count 3's terms at trial permitted the jury to convict Valenzuela, even though she was only involved in financial transactions in Nevada. The variances deprived Valenzuela of the same right as that at issue in Durades, her right to be tried in the district where the crimes were

allegedly committed. U.S. Const. Art. III, § 2; amend.VI.[7] Like Durades, reversal is required for this prejudicial variance that affected Valenzuela's substantial right.

C. The Prosecution's Misconduct Materially Affected Valenzuela's Right to Receive a Fair Trial.

1. Standard of Review.

Valenzuela did not raise this misconduct issue at trial, therefore the Court reviews for plain error. United States v. Necoechea, 986 F.2d 1273, 1276 (9th Cir.1993).

2. Discussion.

a. Improper Vouching.

"It is improper vouching for the prosecutor to offer personal assurances of the veracity of Government witnesses". Sanchez, 176 F.3d at 1224. "Vouching is especially problematic in cases where the credibility of the witness is crucial". United States v. Molina, 934 F.2d 1440, 1445 (9th Cir.1991). This is the case here

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[7] "The Trial of all Crimes ... shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed". U.S. Const. Art.II, § 2.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed..." U.S. Const. amend.VI.

where the key evidence linking Valenzuela to the Count 1 conspiracy was the testimony of Bulacan and Ranney.

Improper vouching typically occurs in two situations: (1) the prosecutor places the prestige of the Government behind a witness by expressing his or her personal belief in the veracity of the witness, or (2) the prosecutor indicates that information not presented to the jury supports the witness's testimony. United States v. Brooks, 508 F.3d 1205, 1209 (9th Cir.2007). Our Circuit has no bright-line rule about when vouching will result in reversal. Necoechea, 986 F.2d at 1278.

> "Rather, we consider a number of factors including: the form of vouching; how much the vouching implies that the prosecutor has extra-record knowledge of or the capacity to monitor the witness's truthfulness; any inference that the court is monitoring the witness's veracity; the degree of personal opinion asserted; the timing of the vouching; the extent to which the witness's credibility was attacked; the specificity and timing of a curative instruction; the importance of the witness's testimony and the vouching to the case overall. When reviewing for plain error, we then balance the seriousness of the vouching against the strength of the curative instruction and closeness of the case."

Id.

(1) Improper Vouching by Relying on Witnesses' Plea Agreements and Promises to be Truthful.

It is improper to allow the prosecution to elicit testimony on direct examination regarding the truthfulness requirement of a plea agreement:

> "Though [the witness's] references to her plea agreement do not "portray [the government] as a guarantor of truthfulness" [citation omitted] as directly as statements by the prosecutor himself, they suggest that [the witness], who might otherwise seem unreliable, has been compelled by the prosecutor's threats and the government's promises to reveal the bare truth. The implication, moreover, remains that the prosecutor can verify the witness's testimony and thereby enforce the truthfulness condition of its plea agreement."

United States v. Wallace, 848 F.2d 1464, 1474 (9th Cir.1988).

Here, the prosecution vouched for the credibility of all 10 of its cooperating witnesses by eliciting testimony concerning their cooperation plea agreements, their promises to truthfully testify, and the significant sentencing benefits each would enjoy as a result. This vouching occurred with Honda [ER-IV:63-65, 78-81]; Winings [ER-IV:3-7, 17]; Caminos [ER-IV:21-25]; Quintal [ER-IV:35-36]; Chai [ER-III:164, 166]; Shim [ER-III:170-172]; Ranney [ER-III:196-198]; Asuncion [ER-III:72-73]; Bulacan [ER-III:91-94]; Tavares [ER-III:50-53].

The vouching was particularly egregious as to Bulacan and Ranney. Bulacan entered a cooperation plea agreement in November 2007 in which she admitted to distributing 350 pounds of methamphetamine. [ER-III:31, 39]. She faced a Guidelines' range of 324 to 405 months (27 to 33 years); however, by cooperating she hoped to receive similar treatment to Caminos, who faced a

mandatory life term, but had recently been sentenced by Judge Mollway to 20 years in prison. [ER-III:31-32].

Bulacan acknowledged that: if she testified untruthfully her plea agreement would be "null and void"; the Government had discretion to move for a downward departure based on her testimony [ER-III:48]; regardless the Government's motion, it was up to her sentencing judge, Judge Mollway, to reduce her sentence. [ER-III:48-49]. This raised the implication to the jury that Bulacan would not dare lie in her testimony before Judge Mollway, because she wanted Judge Mollway to reduce her sentence.

In addition to angling for a reduction, Bulacan revealed during her testimony that she was being held in the prison's "SHU", or in isolation. [ER-III:35]. Bulacan found the SHU so deplorable that on January 18, 2008, she wrote to the prosecutor Mark Inciong, which letter was read to the jury. She wrote: "I promise you I will work for you. I will do whatever it is you need for me. * * * I don't know what it's going to take. I will do 100 percent for you." [ER-III:35-36]. She confirmed during her testimony that, "I'm trying to get out of the SHU, whatever it takes to get out of the SHU." [ER-III:36]. However, as a result of her complaints about the SHU, she testified that Inciong "made it worse" for her.

[ER-III:47]. This further raised the implication to the jury that Bulacan would not dare lie, otherwise confinement in the SHU would continue even longer.

Finally, Bulacan revealed that after her first day of testifying, and before her second day, Inciong met her and directed her to "to be more open, talk more openly". [ER-III:43]. Bulacan explained that she was supposed to testify that she purchased more than 350 pounds from Acuna:

> "... the 350 pounds. That I'm aware that it was more than that, don't -- I can't just say what's on the paperwork because, basically, I didn't want to -- I don't want to cop to more than what I'm going to be sentenced for. But he [Inciong] said I need to be more open, and that was it, basically.
>
> This is -- I mean my sentencing judge is Judge Mollway; so, you know, he just told me to be open. I wasn't coached. He's not telling me to say anything, just trying to get me to be more open..."

[ER-III:44]. This further raised the implication to the jury that Bulacan would not lie in front of either the prosecutor, or in front of Judge Mollway.

Concerning Ranney, he testified that he delayed cooperating with the Government for three months after his arrest because it would have put his family at risk from his drug suppliers, who he identified as Valenzuela and the codefendants. [ER-III:192].[8] Not only did the Government's inquiry vouch for

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[8] On cross-examination Ranney provided hearsay testimony that U.S. Marshals had notified him of a $100,000 contract to murder him. [ER-III:244-245].

Ranney's credibility by implying that he would not risk his family's safety by testifying untruthfully, but it also suggested to the jury that Valenzuela was involved other criminal activity, obstruction of justice by witness intimidation.

Concerning the cooperation provision of his plea agreement, Ranney testified: "I have to tell the truth about everything that I was involved in from the beginning with my drug conspiracy to all the way to the end." [ER-III:196-197]. With Ranney's sentence pending, the Government asked him the sentence he was facing, which was 30 years to life, and what he hoped to achieve in testifying. [ER-III:197-198]. Ranney responded: "as much downward departure as I can." [ER-III:198].

At the time of the trial in this case Ranney had testified at the trial of coconspirator Antonio Santos and, as a result, the Government had already filed a motion for a downward departure to reduce Ranney's sentence by nine and a half years. [ER-III:149]. After testifying in this trial Ranney "pray[ed]" that the Government would file a second motion for another downward departure. [ER-III:150]. He understood that ultimately it was up to the judge to grant or deny the motion. [ER-III:198].

Similarly, Tavares testified that she was relying on Judge Mollway to reduce her sentence. Her understanding of her cooperation agreement was, "I

come here, I tell the truth, and it's up to the judge whether or not I get a lesser sentence." [ER-II:208.][9]

(2) Improper Vouching During Closing Argument.

Determining witness credibility was the jury's province. During closing arguments, however, the Government repeatedly expressed its belief in Bulacan and Ranney's credibility:

- the two were "reliable" [ER-II:32];

- their "only shot to reduce their sentence from the very long ones they are looking at[,] is to truthfully provide substantial assistance: by naming their sources of supply" [ER-II:50];

- they would not "risk naming someone falsely as the source in order to get this reduced sentence[,] when they could get the reduced sentence by naming the true source". [ER-II:50].

As to Ranney alone, the Government pointing out that he had been in solitary confinement since his arrest and there was a murder contract on his life.

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[9] Eventually Judge Mollway sentenced Tavares to 80 months in prison (CR 07-00615-SOM-4), and Bulacan to 168 months. (CR 07-00552-SOM-01). Judge S. Michael Seabright sentenced Ranney to 132 months. (CR 06-00434-JMS-01).

[ER-II:77]. Therefore, the jury should believe him: "are you trying to tell me that somebody who he's not cooperating against has a bounty on him?" [ER-II:77]. This statement bolstered Ranney's credibility by suggesting that there could not be a "bounty" against him without his truthful cooperation.

The Government also vouched for the credibility of the other cooperating conspirators. It told the jury: "the Government's witnesses' memories are very good about the details in those things [drug deals]" [ER-II:44]; and the cooperating defendants had "all accepted responsibility. They've pled guilty. ***Something these three refuse to do***". [ER-II:86; *and see* ER-II:39 as to Aristoteles Acuna; ER-II:86 as to Luis Melendez]. As to the latter statement, the prosecutor impermissibly expressed an opinion concerning Valenzuela's guilt. Molina, 934 F.2d at 1444.

Concerning its witness Joseph Chai and a contested drug amount shipped to Hawai`i, the Government argued at closing, "I will bet my life that Joe Chai" testified to 15 shipments of 75 to 125 pounds each. [ER-II:81]. This statement was not only an instance of improper vouching, but an extraordinary example of the prosecutor impermissibly vouching for ***his own credibility***. United States v. Smith, 962 F.2d 923, 933-34 (9th Cir.1992).

Within this poisoned context, the Government then aimed its attack against Valenzuela: "who has the highest stake, who has the most motive to lie in this case. Obviously, no one will disagree it's the three defendants on trial here." [ER-II:52]. The Government characterized her testimony as only believable if "everyone else is lying, everyone but her", and then listed witnesses who had to be lying in order for the jury to believe Valenzuela. [ER-II:61].

(3) Improper Vouching by Reference to Facts Not in Evidence.

The prosecutor improperly vouched for its witnesses by suggesting that their testimony was supported by information not introduced as evidence. Sanchez, 176 F.3d at 1224. Reference to inculpatory evidence not produced at trial during closing argument is improper, and under harmless error analysis represents reversible error. Molina, 934 F.2d at 1446.

The Government argued during closing:

- "we know Mr. Acuna was the benefactor and the recipient of all this money [drug trafficking proceeds from Hawai`i]" [ER-II:37], **WHEREAS** no evidence or testimony showed that Acuna or Valenzuela enjoyed a percentage of the profits earned by Bulacan/Ranney in the inflated Hawai`i market;

- setting up a straw man, the Government argued that Acuna wanted the jury to believe that Bulacan had a vendetta against him because he absconded with the $2,500 down payment to renovate her home [ER-II:49], **WHEREAS** Acuna testified that Bulacan testified against him to reduce her sentence [ER-II:179-180];

- that Acuna invested untold funds from drug transactions in Mexico, "who knows how much money went down to Mexico on all these trips" [ER-II:55], **WHEREAS** no witness provided testimony concerning investments by Acuna or others in Mexico;

- because Valenzuela and Acuna were not drug users and did not spend money on drugs, the Government argued that they, "had even more money" than Bulacan [ER-II:85], **WHEREAS** none of the evidence indicated that Valenzuela/Acuna shared in the spectacular profits Bulacan and Ranney earned from the Hawai`i conspiracy [ER-III:40-41, 133; ER-IV:50];

- that the money laundering expert John Madinger was credible because "what these investigators operate on is evidence, not what ifs, what is possible, what might be" [ER-II:79]; **WHEREAS** Madinger testified as to methodologies ***generally*** used by drug traffickers to launder money and not about specific evidence in this case [*see* ER-II: 141-151; ER-IV:61];

- that Bulacan and Ranney "always paid on time" their drug sources and, therefore, were to be believed [ER-II:37], **WHEREAS** Ranney testified that Bulacan hid from her suppliers because she could not pay them, and that the Bulacan/Ranney operation was frequently short on money owed to suppliers. [ER-III:227, 238].

The Government also improperly vouched as to its witness Luis Melendez. It argued that Melendez, "corroborated exactly what Mr. Ranney, Ms. Bulacan, and the other cooperating defendants told you". [ER-II:40, 42]. However, Melendez provided no testimony whatsoever concerning the Bulacan/Ranney Hawai`i conspiracy and, moreover, had never heard of members of that conspiracy, including Bulacan and Ranney. [ER-III:162].

(4) Improper Vouching by Eliciting Law Enforcement Officers' Opinions as to Witnesses' Credibility, and Concerning Defendants' Guilt.

The Government, through its law enforcement witnesses, impermissibly provided their opinions concerning the veracity of other Government witnesses and, most egregiously, testified concerning the ultimate issue reserved for the jury – the defendants' guilt or innocence. Improper vouching includes eliciting law enforcement's officers' opinions as to witnesses' credibility. *See* Brooks, 508 F.3d at 1209. This occurred with the testimony Las Vegas police officer James G. Burns and witness Aristoteles Acuna, who allegedly told the police that his brother Benjamin was a drug dealer. [ER-III:70]. And it occurred with the case co-agent Lawrence Peralta of the Honolulu Police Department concerning the credibility of all the cooperating defendants. [ER-II;260].

Moreover, as to the ultimate issue of the guilt or innocence on Count 1, the Government elicited the following testimony from Peralta:

> "Q [H]as anybody above the three defendants on trial here -- and when I say "above," I mean above in the hierarchy of this drug conspiracy -- has anyone higher than the Acuna trio been identified?
>
> A No, they haven't.
>
> * * *
>
> Q In this and in any drug investigation that you are involved with, what is your ultimate goal?
>
> A Our ultimate goal is to arrest the very -- the source who's at the very top.

Q And at this point you indicated no one above the Acunas has been identified; correct?

A Correct."

[ER-II:253-254].

Over defendants' objection, IRS agent Madinger testified as the Government's money laundering expert. [ER-IV:55, 57-59]. In his rebuttal testimony, the Government spoon-fed responses to him in a series of rhetorical questions designed to elicit his opinion as to the ultimate issue of guilt or innocence:

"Q If numerous cash transactions take place ***that facilitate the distribution of methamphetamine from Las Vegas to Hawai`i***, what about these transactions would raise questions in your mind as to the money laundering statutes?

* * *

A That would be a -- an example of money that was being used to promote the ongoing criminal activity that was going from Hawai`i back to Las Vegas for the purpose of purchasing more narcotics or for facilitating their drug trafficking operation.

* * *

Q Now, in your expert opinion, ***if cash proceeds received from a drug trafficking business*** are deposited into bank accounts in the name of a business, do these financial transactions implicate the financial or the money laundering statutes?

A Yes, ma'am. * * * Because the -- the objective of the money launderer is to conceal or disguise the nature, ownership, or control of the funds. . . .

Q . . . ***if a member of a drug trafficking organization in your experience has no identifiable assets in his or her name but uses and exercises control over those assets purchased with illegal drug proceeds***, would that raise suspicions in your mind as to the money laundering statutes?

A Yes, ma'am. * * * That would appear to be an instance where the individual successfully concealed or disguised his interest or ownership or control of that property. . . . "

[ER-II:149-150].

(5) Improper Vouching by Denigrating the Defense and the Defendant.

The Government may not vouch by denigrating the defense as a sham. Sanchez, 176 F.3d at 1225. Here the Government littered its closing argument with derogatory comments that denigrated the defense effort:

- the "defense, they can explain away anything. They can come up with a story for anything" [ER-II:61-62];

- "Why are they going after character assassination against these people? It's to divert your attention, put anybody but their clients on trial." [ER-II:77-78];

- Valenzuela was so desperate that she would admit to commission of federal crimes, including tax evasion, mortgage fraud, immigration violations, "That's how desperate they are." [ER-II:78];

- defendants wanted "an apology" from the cooperating conspirators [ER-II:86], rather than respecting defendants' efforts at defending themselves from charges with potential life prison terms.

b. Improper Cross-examination.

It is improper for the prosecution to make a defense witness testify as to the credibility of another witness. Sanchez, 176 F.3d at 1219.

(1) Forcing Valenzuela to Call Prosecution Witnesses Liars.

"In a case where witness credibility was paramount, it was plain error for the court to allow the prosecutor to persist in asking witnesses to make improper comments upon the testimony of other witnesses." United States v. Geston, 299 F.3d 1130, 1136 -1137 (9th Cir.2002). Improper comments include questions that compel the defendant to offer opinions regarding the veracity of the government witnesses. Sanchez, 176 F.3d at 1220. "It is the jurors' responsibility to determine credibility by assessing the witnesses and witness testimony in light of their own

experience." United States v. Sanchez-Lima, 161 F.3d 545, 548 (9th Cir.1998)(citation omitted). In cross-examining Valenzuela, the prosecutor forced her to pit her credibility against that of Government witness Tavares [ER-II:135.1-135.2], and Nevada attorney Robert Langford, whom Valenzuela hired to help with Acuna's immigration status. [ER-II:137].

(2) Calling Valenzuela a Liar and Forcing Her to Call Herself a Liar.

At the end of the cross-examination of defense witness Eduardo Valenzuela (Valenzuela's father), the prosecutor asked him: "Is it you who taught your daughter to lie?" The Court sustained the objection. [ER-II:92].

Leveled ***just before*** Valenzuela testified, the question was actually a statement designed to destroy Valenzuela's credibility before she even took the stand. As such, it violated the rule that credibility be decided by the jury. Sanchez, 176 F.3d at 1224; Sanchez-Lima, 161 F.3d at 548. The prosecutor impermissibly expressed its opinion as to her guilt, as well as its belief in the credibility of its own witnesses. Id. Further, the statement was not harmless to Valenzuela's right to a fair trial, because it suggested to the jury that she was a liar before she even had a chance to defend herself and testify. Sanchez, 176 F.3d at 1223.

After direct examination, in which Valenzuela admitted lying on mortgage applications and income tax returns, the prosecutor commenced cross-examination by forcing Valenzuela to call herself "a documented liar". [ER-II:125-126]. Here, there was a significant danger that the jury would draw an impermissible inference that because Valenzuela had submitted fraudulent mortgage and tax documents and lied about it, she would lie concerning her knowledge and involvement in Counts 1 and 3.

These multiple instances of improper vouching, compounded by the improprieties during cross-examination, represent error in the form of prosecutorial misconduct, which error is plain. This error was certainly prejudicial, particularly under Count 1 where the chief evidence linking Valenzuela to the conspiracy was the Government's witnesses' credibility. Thus, the prosecutor's misconduct "affected the outcome of the district court proceedings" Olano, 507 U.S. at 734, and there was no amelioration by the court in the form of sufficient curative instructions. *See* Combs, 379 F.3d at 575.

The cumulative effect of this plain error violated due process, even if no single error rises to the level of a constitutional violation or would independently warrant reversal. Parle v. Runnels, 505 F.3d 922, 927 (9th Cir.2007). It violated due process because it "'so infected the trial with unfairness as to make the

resulting conviction a denial of due process.'" Darden v. Wainwright, 477 U.S. 168, 181 (1986) (*quoting* Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)). As such, the error seriously affected the fairness and integrity of her trial, and the Court must reverse her convictions under both Count 1 and Count 3.

D. The Court Erroneously Permitted Terrence Chu to Testify as an Expert Concerning Methamphetamine Pricing, and Erroneously Admitted into Evidence Exhibit 66 Concerning the Same.

1. Standard of Review.

This Court reviews the district court's decision to admit expert testimony for abuse of discretion. United States v. Reed, 575 F.3d 900, 922 (9th Cir.2009). The Court reviews Valenzuela's unpreserved challenge to admission of Exhibit 66 in violation of the Confrontation Clause of the Sixth Amendment for plain error. Johnson, 520 U.S. at 467.

2. Discussion.

a. Terrence Chu and Exhibit 66.

Federal Rule of Evidence 702 allows the court to admit specialized knowledge if it will assist the trier of fact to understand the evidence or to determine a fact in issue.

> "[A] witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

Fed.R.Evid. 702.

The Supreme Court has charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, Daubert, 509 U.S. at 589, with this gatekeeper function applying to all expert testimony, not just testimony based in science. Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 150 (1999).

Count 2 charged that if found guilty under Count 1, then Valenzuela must forfeit assets including $8 million, which amount allegedly represented the proceeds she earned from the drug distribution conspiracy. During the trial the court permitted the Government to introduce former FBI agent Terrence Chu as an expert on methamphetamine pricing and in support the $8 million forfeiture claim. Chu testified to having 10 years' experience as an FBI agent in which he investigated drug crimes, among others. [ER-II:210]. Valenzuela objected to Chu's testimony as an expert for lack of foundation [ER-II:218], which objection the court overruled based on Daubert and Kumho Tire. [ER-II:225].

As Chu began testifying, it was clear he was simply reading from the Government's Exhibit 66, a chart purporting to show the cost per pound of methamphetamine in 2000, 2005 and 2007 for Mexico, Las Vegas and Hawai`i. [ER-II:234-236; ER-IV:83]. Chu testified that the chart was accurate and consistent with the information he knew as a result of his FBI experience. [ER-II:236-237]. He admitted during voir dire, however, that he had not prepared the chart and did not know who had. [ER-II:237].

Valenzuela objected to Exhibit 66 on the grounds of relevance and lack of foundation, which objection the court overruled. [ER-II:237]. Chu went on the testify that the chart accurately reflected methamphetamine prices, including a jump in the price when the drug "move[d] from Mexico to the mainland to Hawai`i". [ER-II:238].

On cross-examination Chu admitted that his testimony was not based on his experience but upon Exhibit 66. He speculated that Exhibit 66 was prepared by analysts in the High Intensity Drug Trafficking Area (HIDTA) office, whose work – in turn – was based on DEA agents' reports.

> "Q [T]his HIDTA analyst, not you, has more knowledge or more expertise on the price per pound of methamphetamine; right?

A ... DEA agents are working the investigations. So I can't say the analyst is smarter at the prices.

Q But you're relying on this analyst's conclusions to come up with your conclusions today; right?

A I'm -- well, he's compiling the information provided to him and producing a report.

Q Now, he's compiling information coming in from a bunch of case agents and --

A Various, yes.

Q And you're not privy to all of these investigations that this HIDTA analyst is; right?

A No.

Q So again the true expert on the price of methamphetamine in Hawai`i is this HIDTA analyst; right?

A The compiling of the prices based on individual case agents' information.

Q Is that a yes?

A You could say yes."

[ER-II:248-249].

Chu admitted that he did not read the individual DEA agents' reports allegedly used by the HIDTA analyst to draft the chart. [ER-II:250-251]. As to the Mexico prices in Exhibit 66, Chu speculated that the source would be the DEA

attaché in Mexico City, but he had never worked in Mexico [ER-II:251], so he had no first-hand experience of pricing there. Finally, Chu admitted that his testimony merely recounted work done by others, for which he had no direct knowledge. [ER-II:251-252].

The trial court's gatekeeping function requires more than simply "taking the expert's word for it." *See* Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1319 (9th Cir.1995), *cert. denied* 516 U.S. 869 (1995) ("We've been presented with only the experts' qualifications, their conclusions and their assurances of reliability. Under Daubert, that's not enough."). But that is what happened here. Even though Chu had no relevant involvement in this case [ER-II:227, 246], the court let him testify as an expert on methamphetamine pricing based on his prior FBI experience.

Moreover, his testimony concerning methamphetamine pricing was based solely on Exhibit 66, a document of unknown origin and authorship, possibly prepared by a HIDTA analyst, but the record does not say this. He admitted to having no independent basis for knowing whether the pricing information in Exhibit 66 was accurate or not, particularly with respect to the Mexico prices. [ER-II:251-252].

"If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts." Fed.R.Evid. 702, Advisory Committee's Note (2000). That didn't happen here. Chu never explained how his experience as a former FBI agent somehow rendered Exhibit 66 reliable. His testimony was, therefore, unreliable and the court failed its gatekeeping function to exclude unreliable expert testimony (Daubert, 509 U.S. at 589, Kumho Tire, 526 U.S. at 150) which failure represents an abuse of discretion.

Further, the relevance and reliability of the Exhibit 66 is in doubt. To begin with, the authorship is unknown. Otherwise, the chart shows three sets of clusters of bars, with the clusters representing price ranges for methamphetamine in 2000, 2005 and 2007. [ER-IV:83]. Count 1 charges a conspiracy to distribute from 2002 September 2005. Therefore, the cluster of bars showing pricing for 2007 is irrelevant.

Other issues include:

1. as to the year 2000, the chart provides no Mexico price information;

2. the bars are supposed to represent price-ranges, but the representation is misleading and prejudicial. For example, the 2005 Hawai`i price-range is $18,000-$50,000, but the representative bar reflects only the highest price of $50,000.

The court's abuse of discretion was not harmless. The Government argued at closing during the forfeiture trial that the total weight of methamphetamine distributed under Count 1 was 2,087 pounds. [ER-II:2]. With the amount of methamphetamine established, the Government argued as to methamphetamine pricing:

> "[Y]ou also heard testimony from Special Agent Chu, who testified as an expert about the amounts of money that could be gotten for different pounds. And this is a chart that is in evidence. It's exhibit 66. And you can see there, if we take a very conservative calculation here – and although we have testimony from Sheri Bulacan and Charles Ranney that the defendants would get paid ten to $12,000 per pound of methamphetamine, if we go very conservative in this way and multiply the 2,000 pounds by, let's say, $4,000 that you could get for a pound of methamphetamine in Mexico, we come out with our $8 million money judgment."

[ER-II:2]. It is unclear how the Government arrived at the amount of $4000 per pound as the alleged profit Acuna/Valenzuela earned per pound. It ***is*** clear however, that the Government relied on Chu and Exhibit 66 in reaching its $8 million figure, which amount the jury awarded.

This Court is compelled to reverse a conviction "unless it is more probable than not that the error did not materially affect the verdict." United States v. Freeman, 498 F.3d 893, 901 (9th Cir.2007). Improperly admitted evidence is "not harmless" if it "more probably than not was the cause of the result reached." Mukhtar v. California State University, 299 F.3d 1053, 1066 (9th Cir.2002), *amended by* 319 F.3d 1073 (9th Cir.2003). Here, aside from Exhibit 66 and Chu's testimony, the Government provided no other evidence to support its claim of $8 million.

b. Exhibit 66.

The Sixth Amendment's Confrontation Clause is also implicated: "In all criminal prosecutions, the accused shall enjoy the right to ... be confronted with the witnesses against him". U.S. Const. amend.VI. The admission of Exhibit 66 denied Valenzuela her right to cross-examine those who actually gathered the information and prepared Exhibit 66.

In Crawford v. Washington, the Supreme Court held that out-of-court statements by witnesses that are testimonial are barred under the Confrontation Clause unless witnesses are unavailable and defendants had prior opportunity to cross-examine witnesses, regardless of whether such statements are deemed reliable by the court. 541 U.S. 36, 53-54 (2004). Exhibit 66 was an out-of-court

statement, testimonial in nature and admitted for the truth of the matter concerning the methamphetamine prices. [ER-IV:83]. It should have been barred since Valenzuela had no opportunity to cross-examine those who compiled the information and those who drafted the chart. Further, involvement of Government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse. Id. at 56 n.7. Exhibit 66 was specifically prepared by the Government for Chu's testimony as an expert.

"[W]hen inadmissible evidence used by an expert is admitted to illustrate and explain the expert's opinion, it is necessary for the district court to give a limiting instruction that the evidence is to be considered solely to evaluate the expert opinion and not as substantive evidence." United States v. 0.59 Acres of Land, 109 F.3d 1493, 1496 (9th Cir.1997). Here the court provided no limiting instruction.

Valenzuela did not object to Exhibit 66 on this Sixth Amendment ground, therefore the Court reviews for plain error. United States v. Jawara, 474 F.3d 565, 583 (9th Cir.2007). Under Crawford, admission of the chart without opportunity to cross-examine those who prepared the same represents error that is plain, and affects her substantial right to confrontation under the Sixth Amendment. The admission was prejudicial because Chu based his testimony upon it, and no other

evidence supported the $8 million forfeiture except for Chu's testimony and Exhibit 66. Thus, it cannot be said that admission of Exhibit 66 was harmless beyond a reasonable doubt. Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986); United States v. Nguyen, 565 F.3d 668, 675 (9th Cir.2009).

Because the $8 million forfeiture was premised upon a violation of constitutional magnitude, with no other evidence supporting the forfeiture, the forfeiture appears to be nothing less than a court-sanctioned taking and, as such, "seriously affects the fairness, integrity, or public reputation of judicial proceedings." Johnson, 520 U.S. at 467 (*quoting* Olano, 507 U.S. at 732). It must be vacated.

E. The Court Abused its Discretion in Imposing the Two-Level Sentencing Enhancement for Obstruction of Justice.

1. Standard of Review.

The Court reviews sentencing decisions for an abuse of discretion. United States v. Carty, 520 F.3d 984, 993 (9th Cir.2008) (en banc), *cert. denied*, --- U.S. ----, 128 S.Ct. 2491 (2008). It is procedural error, and thus an abuse of discretion, for a court to calculate the Guidelines range incorrectly. Id. We review for clear error the court's factual determination whether a defendant obstructed justice.

United States v. Garro, 517 F.3d 1163, 1171 (9th Cir.2008).

2. Discussion.

The Guidelines provide for a two-level increase in the offense level for willful obstruction of or attempt to obstruct justice "during the course of the investigation, prosecution, or sentencing of the instant offense." U.S.S.G. § 3C1.1. The obstruction must relate to either "(i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense." Id. The commentary to § 3C1.1 lists, as examples of obstruction of justice, perjury. *See* U.S.S.G. § 3C1.1 app. 4(b).

Perjury is defined as "giv[ing] false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory." Dunnigan, 507 U.S. at 94. Application of an enhancement based on perjury will be upheld where the court's findings encompass all of the factual predicates for a finding of perjury. *See* id. at 95.

Probation recommended a two-level increase based on perjury:

> "During the defendant's trial testimony, she denied distributing methamphetamine and laundering drug proceeds. These statements are considered "material" because, if believed, they would tend to influence or affect the issue under determination. Despite her testimony, the jury adjudged the defendant guilty as to Counts 1 and 3 of the First Superseding Indictment. Based on the defendant's materially false testimony, a 2-level increased is warranted."

[PSR ¶72].

At sentencing, after inviting argument on the obstruction issue (the Government rested on the PSR; Valenzuela rested on her papers), the court applied the two-level enhancement without making the required independent finding that Valenzuela had committed perjury. Adhering to Probation's recommendation, the court imposed the enhancement because: "... I'm the one who sat through the trial as the presiding judge, and I think the obstruction of justice enhancement is indeed supported by the record." [ER-I:36].

The court relied solely on the inconsistency between the verdict and Valenzuela's testimony. "This is precisely the result Dunnigan seeks to avoid." United States v. Monzon-Valenzuela, 186 F.3d 1181, 1184 (9th Cir.1999). While the court may make perfunctory findings, they must be "clearly supported by the record". Id.

Because the judge did not elaborate on how the enhancement was supported by the record, or why "[sitting] through the trial as the presiding judge" was sufficient independent basis to support a finding of willful perjury, it is impossible to discern whether the enhancement was based on permissible grounds. Since the court's factual determination was nonexistent, clear error occurred. Imposition of

the enhancement for nonexistent grounds represents abuse of discretion. This Court should vacate the sentence and remand. On remand, "it is preferable for a district court to address each element of the alleged perjury in a separate and clear finding." Dunnigan, 507 U.S. at 95.

CONCLUSION

Valenzuela respectfully requests that this Court reverse her conviction under Count 1 because it was not supported by sufficient evidence. In the alternative, she seeks reversal on the grounds of constructive amendment and/or variance. As to Count 3, she seeks reversal on the grounds of constructive amendment and/or variance. She also seeks reversal on both Counts 1 and 3 for prosecutorial misconduct, seen in the pervasive pattern of improper vouching and improper cross-examination.

As to Count 2, forfeiture, she seeks a decision vacating the $8 million award on the grounds that the Government's expert was not reliable, Exhibit 66 was both unreliable and irrelevant, and her Sixth Amendment Confrontation Clause right was violated. As to her sentence, she seeks a decision vacating the sentence and remanding because the court abused its discretion in imposing the two-level enhancement for obstruction of justice.

DATED: Wailuku Maui, Hawai`i, January 2, 2010.

/s/ Georgia K. McMillen
GEORGIA K. MCMILLEN
Attorney for Defendant-appellant

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28-4,29-2(c)(2) and (3), 32-2 or 32-4[1] **for Case Number 09-10038.**

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Signature of Attorney or
Unrepresented Litigant: /s/ Georgia K. McMillen

Date: January 02, 2010

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STATEMENT OF RELATED CASES

Counsel for Anabel Valenzuela is aware that the following cases pending in this Court that are related to this case:

United States v. Marlene Ogata, CA No. 09-10204;

United States v. Antonio Santos, CA No. 08-10395;

United States v. Eddy Olguin, CA No. 09-10091;

United States v. Benjamin Acuna, CA 09-10037.

DATED: Wailuku Maui, Hawai'i, January 2, 2010.

/s/ Georgia K. McMillen
GEORGIA K. MCMILLEN
Attorney for the Defendant-Appellant

C.A. NO. 09-10038

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