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RICHARD AYVAZYAN

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

RICHARD AYVAZYAN,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent.

)
) Case No.: 2:22-cv-8915
)
) [CR No. 2:20-cr-579-SVW]
)
) **PETITIONER'S REPLY IN**
) **SUPPORT OF MOTION TO**
) **VACATE, SET ASIDE, OR**
) **CORRECT SENTENCE UNDER**
) **28 U.S.C. § 2255**
)
) Hon. Stephen V. Wilson
)
) Hearing Date: March 6, 2023
) Time: 1:30 p.m.

I. INTRODUCTION

The government’s opposition advocates for a circular reasoning in which every single one of Petitioner’s contentions is “meritless” because “the Court remarked on numerous occasions following a nine-day trial and a two-day *Kastigar* hearing [that] the evidence against defendant was overwhelming.” Gov. Opp’n to Mot. to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (“Opp’n”) at 6, Dkt. 6 (citing ECF 874 at 83; 84). The government’s circular reasoning depends on the assumption that the Court’s ruling is inviolable. Such assumption would preclude the possibility that a sentence could be “imposed in violation of the Constitution or laws of the United States, . . . that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack,” thus eviscerating 28 U.S.C. § 2255. This Court must not adopt the government’s proposed reasoning.

The government states that Mr. Ayvazyan “must demonstrate that the alleged errors “not merely . . . created a *possibility* of prejudice, but that [the errors] worked to [his] *actual* and substantial disadvantage, infecting [his] entire [proceedings] with error of constitutional dimensions.” Opp’n at 5 (citing *United States v. Braswell*, 501 F.3d 1147, 1150 (9th Cir. 2007) (quoting *United States v. Frady*, 456 U.S. 152, 170 (1982))). This is precisely what Petitioner argued in his opening

1 motion.

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3 It is not every day that a government case is built upon avowedly tainted
4 evidence, such as here. The government conducted an unlawful search and seizure
5 and compelled statements from Petitioner which led to documentary evidence from
6 an unconstitutionally seized phone – a text chain in which Petitioner and
7 co-defendant Tamara Dadyan allegedly discussed the conspiracy, the “mirror
8 image” of which was eventually curated into what came to be known as the
9 government’s “star witness” at trial: Government Exhibit 10 (“GEX 10”). *See* Dkt.
10 823, Gov’t. Exhibit A to Ahn Decl.; Dkt. 813 (July 29, 2021 Kastigar Hr’g Tr.) *at*
11 196.

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15 The taint can be traced back all the way to the October 19, 2020 Miami
16 airport FBI-directed “customs” inspection, which yielded a treasure trove of tainted
17 evidence for the government’s review. The exposure from that point forward is not
18 in dispute:

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- On October 20, 2020, after instructing Customs and Border Protection (CBP) to initiate a secondary inspection of Petitioner and his wife, information was conveyed to Agent Palmerton from Customs and Border Protection (CBP). *See* Dkt. 813 (July 29, 2021 Kastigar Hr’g Tr.) *at* 11-18. However, his review is undocumented. *Id.*
 - DOJ Trial Attorney Fenton also received information on October 20, 2021.

1 See Dkt. 813 (July 28, 2021 Kastigar Hr’g Tr.) at 87 (“Q: So the October 20th
2 ... airport stop. You received information [on] approximately October 20th
3 about some of the contents on the Miami phones orally; correct? A: Yes.”).

- 4 ● On November 13, 2020, Agent Palmerton reviewed the seized Miami phones
5 for approximately two hours and took 65 photographs of the phones and their
6 contents. *See* Dkt. 813 (July 29, 2021 Kastigar Hr’g Tr.) at 15-17; Kastigar
7 Ex. 1 at 23. His review is undocumented. *Id.* at 11-18.
- 8 ● On February 2, 2021, Agent Palmerton received 141 photographs from CBP,
9 which included photographs of text messages from Mr. Ayvazyan. *Id.* at 21;
10 *Kastigar Ex. 2* at 140. The prosecution team received the 141 photos on
11 February 2, 2021. Dkt. 813 (July 28, 2021 Kastigar Hr’g Tr.) at 156-57,
12 203-204, 239-240; *Kastigar Ex. 2* at 111.
- 13 ● On February 11, 12, and 19, 2021, the Cellebrite data extractions from three
14 key Miami smartphones, including the “Iuliia Zhadko” phone (an alias of
15 Richard Ayvazyan), were released and reviewed. *See* Dkt. 813 (July 28, 2021
16 Kastigar Hr’g Tr.) at 29-40, 71-87. 918 pages of text messages were extracted
17 from the Zhadko phone (phone “1B123”). Dkt. 813 (July 29, 2021 *Kastigar*
18 Hr’g Tr.) at 32.
- 19 ● Of particular interest to the government were text messages between
20 Petitioner and Tamara Dadyan discussing PPP or EIDL loan applications.
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1 These text messages and responses from the Dadyan phone (phone “1B21”)
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3 were exported into PDF format for review. Dkt. 813 (July 29, 2021 Kastigar
4 Hr’g Tr.) at 31-35; *Kastigar Ex. 19* (Ex. O to Palmerton Decl. at 391, 474,
5 561).
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- 7 ● On March 9, 2021, the government filed a superseding indictment.
- 8 ● On April 27, 2021, Agent Palmerton sent 918 pages of text messages
9 excerpted from the Zhadko phone to trial attorney Fenton. Dkt. 813 (July 29,
10 2021 Kastigar Hr’g Tr.) at 39-39.
11
- 12 ● The Tamara Dadyan phone was seized from Dadyan’s Weddington residence
13 on November 5, 2020. Dkt. 813 (July 29, 2021 Kastigar Hr’g Tr.) at 18-19.
14 However, the government did not review the contents of the Dadyan phone
15 until May 2021. *Id.* They realize they are seeing the “mirror image” of the text
16 messages they extracted from Petitioner’s phone in November. *Id.* at 19-21.
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- 18 ● On May 7, 2021, AUSA Catherine Ahn, the author of GEX 10, is assigned to
19 the case. Dkt. 813 (July 29, 2021 Kastigar Hr’g Tr.) at 67. She reviewed text
20 messages from the Dadyan phone (1B21); Agent Palmerton selected the text
21 messages and uploaded them to the government’s file share system. *Id.* at 70
22 to 71. Ms. Ahn then took this information and created Government Exhibit
23 10. *Id.* at 79. Agent Palmerton – who had reviewed the Zhadko phone
24 containing the mirror image of the text messages on the Dadyan phone –
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provided the precursor to Government Exhibit 10.

- In June 2021, the government used a subset of Petitioner’s unlawfully seized text messages at trial as part of Government Exhibit 10. Dkt. 813 (July 29, 2021 *Kastigar* Hr’g Tr.) at 35-36. As predicted by Ms. Ahn in her May 11, 2021 email, the text messages became the government’s “star witness” at trial. Dkt. 823, Gov’t. Exhibit A to Ahn Decl.
- DOJ Trial Attorney Fenton recalls reviewing all three Cellebrite files, including the contents of Petitioner’s “Zhadko” phone. Dkt. 813 (July 28, 2021 *Kastigar* Hr’g Tr.) at 38. However, he does not “specifically recall” the specific images and documents he reviewed. *Id.* at 38, 53, 63, 73, 92, 118, 158, 2013, 225; *Kastigar* Exhibit 31 (Fenton Decl.) at 29 (“I do not have a specific recollection of the information that I saw.”).
- Despite months and months of robust exposure to patently tainted evidence, the government cannot prove it did not use tainted evidence because, by its own admission, it had no appreciation of the taint. The government cannot prove GEX 10 is untainted because it does not “specifically recall” what was reviewed.

II. ARGUMENT

A. Petitioner’s claims are not procedurally defaulted

Normally a petitioner who fails to raise his § 2255 claims on direct appeal

1 must demonstrate cause and prejudice to overcome the procedural default. “The
2 general rule in federal habeas cases is that a defendant who fails to raise a claim on
3 direct appeal is barred from raising the claim on collateral review.” *Sanchez-Llamas*
4 *v. Oregon*, 548 U.S. 331, 350-51 (2006); *United States v. Ratigan*, 351 F.3d 957,
5 962 (9th Cir. 2003) (“A § 2255 movant procedurally defaults his claims by not
6 raising them on direct appeal and not showing cause and prejudice or actual
7 innocence in response to the default.”). There is, however, “an exception if a
8 defendant can demonstrate both ‘cause’ for not raising the claim at trial, and
9 ‘prejudice’ from not having done so.” *Sanchez-Llamas*, 548 U.S. at 351. A
10 defendant who fails to show cause and prejudice can obtain review by
11 demonstrating “that the constitutional error . . . has probably resulted in the
12 conviction of one who is actually innocent.” *Bousley v. United States*, 523 U.S. 614,
13 623 (1998).

14 “In procedural default cases, the cause standard requires the petitioner to
15 show that some objective factor external to the defense impeded counsel’s efforts to
16 raise the claim [on direct appeal].” *McCleskey v. Zant*, 499 U.S. 467, 493 (1991).
17 “If a petitioner succeeds in showing cause, the prejudice prong of the test requires
18 demonstrating ‘not merely that the errors at . . . trial created a *possibility* of
19 prejudice, but that they worked to his *actual* and substantial disadvantage, infecting
20 his entire trial with error of constitutional dimensions.’” *United States v. Braswell*,

501 F.3d 1147, 1150 (9th Cir. 2007) (emphasis in original) (quoting *United States v. Frady*, 456 U.S. 152, 170 (1982)).

A defendant filing a 28 U.S.C. § 2255 motion can also overcome procedural default based on failure to file a direct appeal by demonstrating “structural errors” – that is, errors that affect the framework within which the trial proceeds and defy analysis by harmless-error standards. “[S]ome errors should not be deemed harmless beyond a reasonable doubt.” *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017). “These errors came to be known as structural errors.” *Id.* at 1907-08 (citing *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991)). “The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial. Thus, the defining feature of a structural error is that it ‘affect[s] the framework within which the trial proceeds,’ rather than being ‘simply an error in the trial process itself.’” *Id.* (quoting *Fulminante*, 499 U.S. 279 at 310). “For the same reason, a structural error ‘def[ies] analysis by harmless error standards.’” *Id.* (quoting *Fulminante*, 499 U.S. 279 at 309).

Here, it is undisputed that Petitioner did not file a direct appeal. An objective factor external to the defense impeded counsel’s efforts to raise the claim on direct appeal as Petitioner was not residing within the jurisdiction of the United States.

As to prejudice, the errors raised in Petitioner’s motion concern constitutional

1 violations that worked to his “actual and substantial disadvantage.” As set forth in
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3 Petitioner’s opening motion and herein, the unlawfully executed FBI-directed
4 customs search and tainted evidence derived therefrom “infected” Petitioner’s
5 entire trial with “error of constitutional dimensions.” The government *cannot* prove
6 it did not use tainted evidence in this case. The *Kastigar* issue is an issue of
7 constitutional dimensions. *See Kastigar v. United States*, 406 U.S. 441, 444-45
8 (1972) (“[T]he power to compel testimony is not absolute. There are a number of
9 exemptions from the testimonial duty, the most important of which is the Fifth
10 Amendment privilege against compulsory self-incrimination. The privilege reflects
11 a complex of our fundamental values and aspirations, and marks an important
12 advance in the development of our liberty. It can be asserted in any proceeding,
13 civil or criminal, administrative or judicial, investigatory or adjudicatory; and it
14 protects against any disclosures that the witness reasonably believes could be used
15 in a criminal prosecution or could lead to other evidence that might be so used. This
16 Court has been zealous to safeguard the values that underlie the privilege.”).

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22 The *Kastigar* taint in this case is not harmless by any measure. Among other
23 things, the illegal search and seizure directed by Agent Palmerton *was* the precursor
24 to the government’s “star witness,” GEX 10. Petitioner’s unlawfully seized phone
25 contained the “mirror image” of the text messages from the Dadyan phone (1B21)
26 that was obtained via the search warrant on the Weddington Street residence.
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1 AUSA Ahn took the text messages selected by Agent Palmerton – who had been
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3 seeped in tainted evidence since October 2020 – and created GEX 10, a
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5 reverse-engineered exhibit containing the text messages that were seized at the
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7 Miami airport. The fact that these text messages also existed in “mirror image”
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9 form on the Dadyan phone does not “purge” the taint. The Dadyan “mirror image”
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11 is not a “legitimate independent source” – it was not reviewed until May 2021, eons
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13 after the text messages from Petitioner’s Miami phone had already been extracted,
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15 exported and reviewed. In sum, Petitioner’s Fifth Amendment privilege against
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17 compulsory self-incrimination was blatantly violated, and the violation worked to
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19 his actual and substantial disadvantage.

15 This blatant constitutional violation was also a “structural error” in that, rather
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17 than being “simply an error in the trial process itself,” it affected the *entire*
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19 framework of the trial. In essence, Petitioner’s smartphone, unlawfully seized by
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21 coerced statements during *incommunicado* interrogation, spoke for him, against his
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23 will, at trial *and* sentencing. In support of the admittedly exemplary sentencing, the
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25 Court relied not on Petitioner’s testimony, but on the *text messages* from his phone.
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27 See Dkt. 1166 (minutes); 1154 (transcript) (“He says, for example, in the text
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messages . . . ”). Petitioner’s “own words” were really just GEX 10,
reverse-engineered at the 11th hour as texts “from” Dadyan’s phone. As such,
Petitioner’s claims are not procedurally defaulted.

B. Petitioner's Fourth Amendment claim is not "meritless"

The government makes the perfunctory argument that Petitioner's Fourth Amendment claim is "meritless." First, it claims that "Defendant does not seriously dispute that the Court correctly applied Eleventh Circuit law instead of Ninth Circuit law." This is false on the face of the pleadings. In his opening motion, Petitioner argued that the Court erroneously applied Eleventh Circuit law even though, if it was one circuit's law, it should be the Ninth Circuit, "because that's where the search was directed from." The government makes no substantive argument as to why a "customs inspection" directed by an FBI agent from California should be controlled by the customs jurisprudence of the situs. In fact, the Court granted Petitioner's Fifth Amendment *Miranda* motion and suppressed the evidence from Defendants' phones based on a threshold determination that the interrogation was *criminal* in nature. *See* Dkt. 296. Therefore, 9th Circuit criminal law jurisprudence should have controlled the criminal aspect of the Fourth Amendment claim.

Moreover, the government's contention that Defendant may not raise a Fourth Amendment challenge in a § 2255 motion is without merit. While *Stone v. Powell* established a *general rule* that the exclusionary rule should not be applied in state criminal proceedings where a defendant has had a full and fair opportunity to litigate their Fourth Amendment claim, a critical exception to this rule applies in

1 this case: when the police or government officials engage in bad faith or deliberate
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3 conduct that violated the defendant's Fourth Amendment rights, the exclusionary
4 rule still applies.

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6 In his opening motion, Petitioner went to great lengths to detail the bad-faith
7 circumstances warranting deterrence in this case. CBP agents' violation of their
8 own regulations and policies apply regardless of the "situs of the search." CBP,
9 working in concert with the prosecutors in this case, conducted a series of searches
10 of private smartphones over the course of almost four hours, lied about the purpose
11 of their search, violated CBP policy by executing the search without the travelers
12 present, and clearly violated 19 C.F.R. § 162.21. Bad faith constitutional violations
13 are *per se* egregious. *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1449 n.5 (9th Cir.
14 1994) ("Federal courts cannot countenance deliberate violations of basic
15 constitutional rights. To do so would violate our judicial oath to uphold the
16 Constitution of the United States.").

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18 Moreover, whether the Court correctly applied Eleventh Circuit law instead of
19 Ninth Circuit law is not a decisive factor here because CBP regulations have
20 extraterritorial application and apply beyond the boundaries of a particular
21 jurisdiction. Petitioner's phone was seized by CBP. Part 162 of Chapter I of Title
22 19 of the Code of Federal Regulations Customs sets forth the rules which regulate
23 U.S. Customs and Border Protection's Inspection, Search, and Seizure powers. 19

1 C.F.R. § 162.21 of Subpart C, “Seizures,” provides that “Property may be seized, if
2 available, by any Customs officer *who has reasonable cause to believe that any law*
3 *or regulation enforced by Customs and Border Protection or Immigration and*
4 *Customs Enforcement has been violated*, by reason of which the property has
5 become subject to seizure or forfeiture.” 19 C.F.R. § 162.21. Loan fraud is not a
6 “law or regulation enforced by Customs and Border Protection.” *United States v.*
7 *Touset*, 890 F.3d 1227 (11th Cir. 2018) involved the “importation of contraband,”
8 specifically, child pornography. It has no application in this case. Therefore, the
9 government’s “meritless” claim is meritless.
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14 **C. Petitioner’s discovery order claim is not meritless**

15 Citing *United States v. Timmreck*, 441 U.S. 780, 783-784 (1979), the
16 government argues that “procedural rulings” do not provide a basis for review
17 pursuant to § 2255.
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19 *Timmreck* dealt with a “technical violation” of a rule without a showing of
20 prejudice. Here, the government’s dumping of data related to this alleged
21 overarching conspiracy and continued production after the close of discovery
22 violated the Court’s Discovery Order and operated as an extension of the search
23 warrant that ultimately provided the key evidence at trial. Moreover, the Court’s
24 rulings were erroneous because they failed to take into account the prosecution’s
25 “bad faith” and “deliberate” conduct in this regard. Therefore, the continued
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1 production of discovery after the Court’s March 15, 2021 deadline prejudiced
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3 Petitioner.

4 **D. Petitioner’s GEX 10 claim is far from meritless**

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6 In its opposition, the government reduces Petitioner’s GEX 10 claim to
7 asserting that the government improperly used notes from their agents’ review of
8 tainted text messages from 1B123 to identify which of co-defendant Tamara
9 Dadyan’s two lawfully seized cell phones (“1B21” or “1B130”) to ask the filter
10 team to prioritize.
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13 As set forth in the opening motion and above, Petitioner’s GEX 10 claim has
14 far greater import. On May 7, 2021, AUSA Catherine Ahn, the author of GEX 10,
15 was assigned to the case. Dkt. 813 (July 29, 2021 Kastigar Hr’g Tr.) at 67. She
16 reviewed text messages from 1B21; Agent Palmerton *selected* the text messages
17 and uploaded them to the government’s file share system. *Id.* at 70 to 71. Ms. Ahn
18 then took this information and created Government Exhibit 10. *Id.* at 79. Agent
19 Palmerton – who had reviewed the Zhadko phone containing the mirror image of
20 the text messages on the Dadyan phone – provided the precursor to Government
21 Exhibit 10. At trial, the government used a subset of Petitioner’s unlawfully seized
22 text messages as part of Government Exhibit 10. Dkt. 813 (July 29, 2021 Kastigar
23 Hr’g Tr.) at 35-36. As predicted by Ms. Ahn in her May 11 email, the text messages
24 became the government’s “star witness” at trial. Dkt. 823, Gov’t. Exhibit A to Ahn
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Decl. They spoke for Petitioner against his will and in violation of his fundamental right against self-incrimination. Therefore, Petitioner's GEX 10 claim is not meritless.

E. Petitioner's filter team claim is not meritless

The government states the filter team functioned lawfully because it "actually produced to defendant the potentially privileged documents that the filter team had segregated as a result of its review."

The government conveniently fails to address the elephant in the room: that the filter team failed entirely to filter away the taint and instead allowed it to spread like ink. The government argues that it could have found the loans through other sources. But whether the government had other reason to suspect that some of these loans might be fraudulent is irrelevant, because their derivation was, in fact, from the tainted information, not untainted information. *See Kastigar*, 406 U.S. at 461-62 (government's "heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources standard requires proving that evidence" (emphasis added)); *United States v. Crowson*, 828 F.2d 1427, 1429 (9th Cir. 1987) ("[T]he government may still use the evidence derived from compelled testimony if it meets its burden of showing that the evidence it intends to present is derived from a prior, independent source;" *United States v. Montoya*, 45 F.3d 1286, 1295 (9th Cir. 1995) (holding that government carried burden by "establish[ing]

1 that the indictment rested entirely on sources independent of Montoya’s immunized
2 testimony”).

3
4 The prosecution team in the instant case purportedly used a filter team. *See*
5 Dkt. 813, Kastigar hearing transcript, at 25-25; 136; 192; 213-214. However,
6 government testimony proves that the taint from Petitioner’s unlawfully seized
7 phone was hardly “filtered.” Agent Palmerton testified that the Cellebrite reports
8 from the digital devices from the Miami seizure were released to him from the filter
9 team on February 23, 2021. *Id.* at 25. Agent Palmerton reviewed phone 1B123
10 which was registered to Zhadko, and the other was 1B126, which was registered to
11 a Victoria Kauichko, approximately once per week from February 24 and April 27
12 2021. *Id.* at 26-27. He exported what he thought were relevant text messages into a
13 PDF format. *Id.* at 27. IRS Criminal Investigation Special Agent Geoffrey Clark
14 “never spoke with the filter team.” *Id.* at 136. Prior to April 27, 2021, no one
15 provided Agent Clark with information from *any other other phones* besides the
16 Miami phones. *Id.* Agent Clark reviewed the Tamara Dadyan phone, of which the
17 Zhadko phone contained the mirror image, but as of April 26, 2021, that phone had
18 *not* been released from the filter team to the government team. *Id.* at 136-137. In
19 other words, the Tamara Dadyan phone was not purged of the taint of the Zhadko
20 phone – Petitioner’s phone. In sum, the testimony demonstrates that no tainted
21 information was filtered in any meaningful way. There was no judicial review
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1 before any tainted materials could be released to the prosecution team. Petitioner's
2 Fifth Amendment rights were clearly violated.
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4 **F. Petitioner's claim based on his sentence is not meritless**

5 The government argues that Petitioner's claim should be dismissed because
6 allegations that a sentence within the statutory maximum is excessive are not
7 ordinarily grounds for relief under § 2255, including allegations based on purported
8 sentencing disparities. However, "not ordinarily" does not constitute a bar. *See*
9 *Campo v. United States*, No. 89-56273, 1990 U.S. App. LEXIS 21325, at *3 (9th
10 Cir. Dec. 6, 1990) (assuming that Campo raised a cognizable constitutional claim
11 under § 2255 but finding that ten-year sentence imposed was within the statutory
12 maximum and was not an unreasonable exercise of discretion).
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14 Therefore, the Court should consider Petitioner's sentencing claim.
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16 **G. Petitioner's claim based on the timing of the *Kastigar* hearing is not**
17 **meritless**
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19 The government contends that Petitioner's claim should be dismissed because
20 it "does not implicate a constitutional right because "there is no constitutional right
21 to plea bargain.'" Yet while there may not be a "constitutional right to plea
22 bargain," there is a basic due process right to be given all of the information
23 necessary to make a knowing and intelligent decision about *whether* to plea
24 bargain.
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1 Here, it is clear from the record that the decision to engage in – or not to
2 engage in plea negotiations – with Mr. Ayvazyan was based at least in part on
3 exposure to tainted evidence and not the belief that the evidence against him was
4 “overwhelming.” The possibility of a plea bargain was discussed in telephone calls
5 that occurred on May 13, 2021 involving Ms. Ahn, Mr. Paetty and Mr. Fenton. Dkt.
6 813 (July 29, 2021 Kastigar Hr’g Tr.) at 83. Ultimately, the government decided not
7 to proceed any further with discussions about a potential plea bargain with Mr.
8 Ayvazyan, supposedly due to a policy “when there is pending misconduct
9 motions.” *Id.* at 86. This is the same period in which Ms. Ahn joined the
10 prosecution and identified the potential “star witness” in the case: Petitioner’s text
11 messages.
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14 “The standard for a [certificate of appealability] is lenient.” *Hayward v.*
15 *Marshall*, 603 F.3d 546, 553 (9th Cir. 2010). A petitioner “need only show that
16 reasonable jurists could debate the district court’s resolution or that the issues are
17 adequate to deserve encouragement to proceed further. This showing requires
18 something more than the absence of frivolity, but something less than a merits
19 determination.” The standard is met when “reasonable jurists could debate whether
20 (or, for that matter, agree that) the petition should have been resolved in a different
21 manner.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Obtaining a certificate of
22 appealability “does not require a showing that the appeal will succeed,” and “a
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1 court of appeals should not decline the application . . . merely because it believes
2 the applicant will not demonstrate an entitlement to relief.” *Cockrell*, 537 U.S. at
3 337.
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5 Here, should the Court deny Petitioner’s motion to vacate, set aside, or correct
6 his sentence pursuant to 28 U.S.C. § 2255, it would be bound to recognize that
7 Petitioner’s motion presents complex issues that are “adequate to deserve
8 encouragement to proceed further,” *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003),
9 and grant a certificate of appealability pursuant to 28 U.S.C. § 2253(c). Petitioner
10 here makes a “substantial showing of the denial of a constitutional right.”
11 §2253(c)(2). To obtain a certificate of appealability, Petitioner need only show that
12 the district court’s resolution of the constitutional issues set forth herein is
13 “debatable;” it is not necessary to establish that the appeal will succeed.
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18 There can be no doubt that the issues raised in Petitioner’s motion implicate
19 fundamental constitutional rights. At a minimum, the Fifth Amendment right
20 against compulsory self-incrimination and the Fourth Amendment right against
21 unreasonable searches and seizures are clearly at issue and properly raised.
22 Therefore, the Court should grant a certificate of appealability pursuant to 28
23 U.S.C. § 2253(c).
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26 **III. CONCLUSION**

27 For the reasons set forth above, Petitioner’s sentence was “imposed in
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1 violation of the Constitution or laws of the United States.” Pursuant to 28 U.S.C. §
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3 2255, “[u]nless the motion and the files and records of the case conclusively show
4 that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing
5 thereon, determine the issues and make findings of fact and conclusions of law with
6 respect thereto.” 28 U.S.C. § 2255(b). Here, Petitioner has alleged cognizable
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8 claims that are supported by the record. Therefore, the Court should vacate the
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10 conviction or promptly schedule this matter for an evidentiary hearing.

11 Dated: February 24, 2023

Respectfully submitted,

12 /s/ Carlo Brooks

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CERTIFICATE OF SERVICE

I certify that I served a copy of this document and its attachments on the Court and all parties by filing this document with the Clerk of the Court through the CM/ECF system, which will provide electronic notice and an electronic link to this document to all counsel of record.

DATED: February 24, 2023

Respectfully submitted,

/s/ Carlo Brooks
Carlo Brooks, Esq

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