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8 Attorneys for Defendant
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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 UNITED STATES OF AMERICA,
14 Plaintiff,
15 v.
16 CYNTHIA JONES
17 Defendant.

Case No. 08-0887 MHP

NOTICE OF MOTION AND MOTION TO
STRIKE INFORMATION; MEMORANDUM
OF POINTS AND AUTHORITIES IN SUPPORT

Date: July 13, 2009
Time: 10:00 a.m.
Location: Courtroom No. 15

Before the Honorable Marilyn H. Patel
United States District Judge

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20 TO: JOSEPH P. RUSSONIELLO, UNITED STATES ATTORNEY and ANDREW P.
21 CAPUTO, ASSISTANT UNITED STATES ATTORNEY

22 PLEASE TAKE NOTICE that on July 13, 2009 at 10:00 a.m., or as soon thereafter as she
23 may be heard, defendant Cynthia Jones, by and through her counsel, will and does hereby move
24 this Court to enter an Order striking the information filed on April 17, 2009 pursuant to the Due
25 Process Clause of the Fifth Amendment.

26 **MOTION**

27 Cynthia Jones, by and through her counsel, moves this Court pursuant to the Due Process
28 Clause of the Fifth Amendment to the United States Constitution and all other applicable case

1 law and statutes for an Order striking the information alleging an alleged prior conviction
2 pursuant to 21 U.S.C. § 851. Clerk's Record 36. This motion is based on the instant notice of
3 motion and motion, the attached memorandum of points and authorities, the Declaration of Ethan
4 A. Balogh in Support of Motions filed June 12, 2009, and any and all other materials that may
5 come to this Court's attention at the time of the hearing on this motion.

6 Respectfully submitted,

7 COLEMAN & BALOGH LLP

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10 DATED: June 12, 2009

11 By: ETHAN A. BALOGH
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Attorneys for Defendant
CYNTHIA JONES

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MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

Pursuant to the official policy of the United States Attorney's Office for the Northern District of California, the government has filed an Information seeking a sentencing enhancement against Ms. Jones based on what it alleges is a final felony drug conviction. This alleged prior conviction is based upon Ms. Jones alleged personal possession of cocaine, and her subsequent diversion of that offense, in the Superior Court in and for the County of Marin. By this filing, the government seeks to increase from 10 years to 20 the mandatory minimum sentence Ms. Jones would face if convicted as charged.

The sole basis for this filing is Ms. Jones's refusal to waive her rights pursuant to the Fifth Amendment of the United States Constitution, and to provide a "full and complete" interview to law enforcement which the government may use against her at trial, should trial be had. The Due Process Clause, as interpreted by the Supreme Court of the United States and the United States Court of Appeals for the Ninth Circuit, makes clear that government's decision to increase charges against a defendant may not be based on the defendant's exercise of any constitutional right. Put another way, "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *United States v. Goodwin*, 457 U.S. 368, 372 (1982). Such decisions are referred to colloquially as "vindictive" and present improper bases for a prosecutor to pursue increase punishment. Based on the government's undeniable bases to increase the penalties Ms. Jones now faces, the Court should strike with prejudice the Information filed against Ms. Jones.

Considering the plainness of the violation presented here, the government will likely seek shelter from a narrow exception to the cases condemning vindictive prosecution: one that permits the government to make good on threats issued as part of plea negotiations. In short, this Court may not presume vindictiveness from the carrying out of threats made during "the give-and-take negotiation common in plea bargaining between the prosecution and defense." *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978). In this case, however, that narrow exception does not apply.

1 Never has the government has entered plea negotiations and never has it tendered any plea
2 agreement for Ms. Jones to accept or reject. To the contrary, the government's filing of the
3 information arises from its *precondition* to plea negotiations: the requirement that Ms. Jones
4 waive her Fifth Amendment rights prior to the government's assessment of any plea offer. That
5 condition is unlawful, and cannot support the government's filing in this case.

6 Because the government indisputably has sought to increase the penalties in this case
7 based on Ms. Jones's refusal to waive her Fifth Amendment rights, Ms. Jones has established
8 vindictiveness and a due process violation. Accordingly, the Court should strike and dismiss
9 with prejudice the improperly-motivated Information.

10 **II. Statement of Facts¹**

11 On April 11, 2008, Deneal Bobo approached a residence on Fell Street, San Francisco,
12 California.² Bobo's goal on that morning was to purchase cocaine from Wickett Morris, and to
13 capture this transaction on video and audio recordings at the behest of the Federal Bureau of
14 Investigation and San Francisco Police Department.³

15
16 ¹Ms. Jones sets forth the facts as she understands them to be alleged by the government,
17 and does not by this recitation concede them as true. Rather, Ms. Jones reserves the right to
18 challenge the government's presentation at trial, should one be had in this matter. To assist the
19 Court in evaluating these alleged facts, Ms. Jones presents herewith a copy of the DVD presented
20 in discovery that purports to reflect the crimes charged against Ms. Jones. Declaration of Ethan
A. Balogh Filed June 12, 2009 ("Balogh Decl.") Ex. A.

21 ²The two persons listed on the lease for this address are Anthony Jones and Anthony
22 Jones, Jr., Ms. Jones' older brother and nephew, respectively. Balogh Decl. ¶ 3. Ms. Jones is
23 informed and believes that the government alleges Morris to reside at two doors down, at a
separate Fell Street residence. Hereafter, she refers to the address ascribed to her as "the Fell
Street address" and the address ascribed to Morris as "the Morris address."

24 ³During 2008, Bobo worked with these agencies in similar circumstances, and he stands
25 as the primary prosecution witness in at least five other prosecutions. *United States v. Willis*, 08-
0884 VRW, *United States v. Malone*, 08-0885 MHP, *United States v. Sterling*, 08-0886 VRW,
26 *United States v. Pratt*, 08-0890 MMC, and *United States v. Dunn*, 08-0890 WHA. As of this
27 date, Ms. Jones has received limited discovery concerning other activities by Bobo and has
28 received no discovery about Bobo's criminal history or pending criminal exposure for past

(continued...)

1 Upon arriving at the Fell Street residence, Bobo knocked on the door and was permitted
2 entry into the residence's foyer by a person alleged to be Ms. Jones. After entering the residence,
3 Bobo remained at the base of the staircase while Ms. Jones sat a few steps above him. Ms. Jones
4 handed Bobo what appears to be photographs and the two chatted for several minutes.
5 According to the government, Bobo has been a friend of Ms. Jones for 15 years. Balogh Decl. ¶
6 3. Following this chat, the video reflects a knock at the door, at which point Bobo lets a man into
7 the residence. (Counsel understands and believes the government alleges this man to be Wickett
8 Morris, and refers to this person as Morris hereafter.) At that point, Bobo and Morris appear to
9 engage in an exchange of cash, at which point Bobo and Morris leave the residence together.
10 Counsel understands and believes the government alleges that Morris sold crack cocaine to Bobo
11 during this exchange.

12 On March 10, 2009, the case agent, Federal Bureau of Investigation Special Agent
13 Jonathan Dubin, executed a federal arrest warrant for Ms. Jones, and then transported her to
14 state-custody, where she was interviewed and booked into state custody. Balogh Decl. ¶ 5. The
15 next day, Dubin transported Ms. Jones into federal custody.

16 **III. Statement of the Case**

17 Seven months after this recorded activity, on December 9, 2008, a federal grand jury
18 handed up a one-count indictment against Morris alleging a violation of 21 U.S.C. § 841.
19 Clerk's Record ("CR") 1. The government arrested Morris pursuant to warrant on December 11,
20 2008, concurrent with searches of the Fell Street address and the Morris address made pursuant
21 to state-court warrants. Balogh Decl. ¶ 4. The search of the Fell Street address did not uncover
22 any contraband of any sort. *Id.*

23 Thereafter, Morris's case proceeded with arraignment and a detention hearing, followed
24 by a series of status conferences at which no motions were filed, heard or scheduled to be heard.
25 *See* CR 4, 5, 6, 7, 9, 13, 16, 19.

26 _____
27 ³(...continued)
28 criminal activities. Ms. Jones addresses her requests for this outstanding discovery in her Motion
to Enforce Brady, for Disclosure of Confidential Informants, and for Discovery, filed herewith.

1 On February 3, 2009, the government filed pursuant to 21 U.S.C. § 851 an Information
2 alleging that Morris had suffered a prior final felony drug conviction that subjected him to
3 enhanced sentencing, should he be convicted. CR 12.

4 On March 10, 2009, the government obtained and filed a Superseding Indictment in this
5 matter. CR 22. Therein, the government added Ms. Jones to the allegation previously lodged
6 against Morris, and added a conspiracy count naming Morris and Ms. Jones based on the same
7 transaction. *Id.* The government also added as Count Three an alleged prior narcotics possession
8 in which Morris is alleged to have acted alone, and which had previously been filed in state court
9 against Morris.

10 On March 11, 2009, the Court arraigned Ms. Jones on the Indictment, CR 23, and on
11 March 12, the undersigned accepted the appointment to serve as her counsel. CR 24.

12 At the March 13, 2009, the government issued a letter to Ms. Jones setting forth its
13 position on the case. Balogh Decl. Ex. B. In brief, the government (1) alleged that Ms. Jones
14 was subject to the filing of an Information pursuant to 21 U.S.C. § 851 due to alleged prior final
15 felony drug conviction, and (2) stated that it would forego filing any such information if Ms.
16 Jones met certain conditions. *Id.* The conditions the government required included (a)
17 submitting to pretrial detention, (b) not litigating the case in any way, and (c) pleading guilty
18 pursuant to a plea agreement. *Id.* The government warned “[i]n the event that any of these
19 conditions is not met, the government will file the 851 Information and will not dismiss it.” *Id.*

20 On March 19, 2009, the government clarified its position with respect to the filing of a
21 section 851 Information in this case. In that letter, the government continued to maintain that it
22 would forego filing the information should Ms. Jones enter a written plea agreement. Balogh
23 Decl. Ex. C. To this it added that (1) the only “plea agreement that the government would be
24 prepared to offer [Ms. Jones] would have to include her agreement to cooperate[,]” (2) for Ms.
25 Jones “to pursue a cooperation agreement, she [would] need to agree to be interviewed” by the
26 government and its agents first, and (3) following that interview, the government maintained the
27 discretion whether or not to present a plea agreement to Ms. Jones. *Id.*

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1 On March 23, 2009, Ms. Jones proceeded to a detention hearing before the Honorable
2 Edward M. Chen, United States Magistrate Judge. Judge Chen denied the government's petition
3 for detention, and found appropriate a combination of circumstances reasonably sufficient to
4 protect the community and to guarantee Ms. Jones's attendance at all court hearings. CR 28, 30,
5 31. At the conclusion of the hearing, government counsel informed Ms. Jones that the
6 government would not file the section 851 Information based on Ms. Jones's violation of the first
7 term of the March 13 letter by seeking pretrial release *if* Ms. Jones changed her mind prior to the
8 time she would be released from custody and agreed to remain in custody. Balogh Decl. ¶ 8.
9 (Pursuant to the Court's Order, Ms. Jones was to remain in custody until she could be released to
10 a residential treatment facility, which the parties anticipated would take a few days.)

11 On March 30, 2009, Ms. Jones was released from custody pursuant to the terms set by the
12 Court. On March 31, 2009, the government rescheduled the time for Ms. Jones to respond to its
13 requirements to April 2, 2009. Balogh Decl. ¶ 9.

14 On April 6, 2009, Ms. Jones informed the government that she declined to "agree to
15 pursue a cooperation agreement" under the terms set forth by the government. Balogh Decl. Ex.
16 G. On April 17, 2009, Ms. Jones addressed with the government her understanding that Morris
17 had offered to plead guilty and had requested that the government dismiss its allegations against
18 her as part of his plea agreement based on Ms. Jones's lack of culpability. Balogh Decl. Ex. I.
19 Ms. Jones noted her agreement with such a disposition, one which would obviate the
20 government's claimed need for "cooperation" from Ms. Jones.

21 Later that day, the government filed an Information seeking sentencing enhancements
22 against Ms. Jones based on an alleged prior final felony drug conviction. In a letter presented
23 that same day, the government informed Ms. Jones that the government's decision to file the
24 information on this date stemmed from the government's original deadline for Ms. Jones's
25 interview by the government's agents, which the government required on or before April 20.
26 Balogh Decl. Ex. J.

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IV. Argument

A. The Due Process Clause prohibits the government from seeking increased criminal penalties based on the defendant's exercise of her constitutional rights.

“A prosecutor violates due process when he seeks additional charges solely to punish a defendant for exercising a constitutional or statutory right.” *United States v. Gamez-Orduno*, 235 F.3d 453, 462 (9th Cir. 2000) citing *Bordenkircher*, 434 U.S. at 363. Or as put by the Supreme Court:

“To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort. In a series of cases beginning with *North Carolina v. Pearce* and culminating with *Bordenkircher v. Hays*, the Court has recognized this basic—and itself uncontroversial—principle. For while an individual certainly may be penalized for violating the law, [she] just as certainly may not be punished for exercising a protected statutory or constitutional right.”

Goodwin, 457 U.S. at 372 (internal quotation and citation omitted); *see also Bordenkircher*, 434 U.S. at 363 (“for an agent of the State to pursue a course of action whose objective is to penalize a person’s reliance on his legal rights is patently unconstitutional”).

Objections to this improper exercise of prosecutorial discretion are colloquially referred to as “vindictiveness claims.”⁴ *Gamez-Orduno*, 235 F.3d at 462. Where “the government increases the severity of the charges following a defendant’s exercise of a procedural right, the sequence of events give rise to an appearance of vindictiveness, shifting the burden to the government to prove that the decision to [proceed with increased charges] did not result from any vindictive motive.” *Motley*, 655 F.2d at 188 n.1. Absent proof that the increased charges were “justified by independent reasons or intervening circumstances which dispel the appearance of vindictiveness[,]” the increased charges must be dismissed. *Id.* at 188-90. The filing of sentence-enhancing informations are subject to this due process analysis. *Id.*; *Gamez-Orduno*, 235 F.3d at 463.

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⁴Although these claims are referred to as vindictive prosecution claims, to overcome a finding of vindictiveness, “[t]he government must point to objective factors, and not subjective good faith, to justify the increase in severity.” *United States v. Motley*, 655 F.2d 186, 190 (9th Cir. 1982).

1 To assess such a due process claim, the Court must first determine whether or not the
2 prosecution has acted in a vindictive fashion, *i.e.*, whether or not the prosecution increased the
3 charges based on the defendant's exercise of a constitutional or statutory right. *Blackledge v.*
4 *Perry*, 417 U.S. 21, 27-28 (1974). This showing may be made in two ways. *First*, the defendant
5 may "prove objectively that the prosecutor's charging decision was motivated by a desire to
6 punish [her] for doing something the law plainly allows." *Goodwin*, 457 U.S. at 384. *Second*,
7 because "[m]otives are complex and difficult to prove[.]" *id.* at 373, the defendant may
8 demonstrate that there exists "an appearance of vindictiveness." *Motley*, 655 F.2d at 188; *see*
9 *also United States v. Montoya*, 45 F.3d 1286, 199 (9th Cir. 1995) ("To establish a *prima facie*
10 case of prosecutorial vindictiveness, a defendant must show either direct evidence of actual
11 vindictiveness or facts that warrant an appearance of such."). Upon the presentation of either
12 showing, "[t]he burden then shifts to the prosecution to show that independent reasons or
13 intervening circumstances dispel the appearance of vindictiveness and justify its decisions."
14 *Nunes v. Palmer*, 485 F.3d 432, 442 (9th Cir. 2007) (internal quotation and citation omitted); *see*
15 *also Montoya*, 45 F.3d at 1299 (same).

16 In this case, there is no need to "presume" vindictiveness because the prosecution has
17 made it plain by stating expressly that the Information was filed in response to Ms. Jones's
18 refusal to waive her Fifth Amendment rights to remain silent as a requirement of assessing
19 whether it would provide a plea agreement. And because these bases have been laid bare, the
20 government will be unable to produce now "independent reasons or intervening circumstances
21 which dispel the appearance of vindictiveness." *Motley*, 655 F.2d at 188. Most directly, because
22 Ms. Jones has presented objective evidence demonstrating the prosecution's actions were solely
23 the direct result of her refusal to waive her Fifth Amendment rights, and that evidence is not in
24 dispute, she has established actual vindictiveness and established the Court's duty to strike the
25 improper information.

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1 **B. The government cannot avail itself of “the plea negotiations” exception set forth by**
2 ***Bordenkircher*.**

3 In *Bordenkircher*, the Supreme Court addressed whether it should presume vindictiveness
4 when a prosecutor carried out a threat made during plea negotiations to increase the charges if the
5 defendant refused to plead guilty. The Court decided that such conduct should not be presumed
6 vindictive. *Bordenkircher*, 434 U.S. at 363. This decision flowed directly from the Court’s
7 conclusion that the cases requiring the presumption of vindictiveness arose from “the State’s
8 unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right to
9 attack his original conviction—a situation very different from the give-and-take negotiation
10 common in plea bargaining between the prosecution and defense, which arguably possess
11 relatively equal bargaining power.” *Id.* (internal quotation and citation omitted). The Court
12 made plain the distinction at hand, in which it found that unlike a “course of action whose
13 objective is to penalize a person’s reliance on his legal rights [which] is patently
14 unconstitutional[,] . . . in the ‘give-and-take’ of plea bargaining, there is no such element of
15 punishment or retaliation so long as the accused is free to accept or reject the prosecution’s
16 offer.” *Id.* The government will likely seek refuge in *Bordenkircher* to maintain the improperly-
17 filed information against Ms. Jones. But there is no shelter there, for two reasons.

18 *First*, the undisputed evidence reflects that the government’s actions did not occur in plea
19 negotiations. There is was no plea offer to accept or reject. There was no “give-and-take.”
20 Rather, the government demanded that Ms. Jones waive her Fifth Amendment rights and to
21 submit to a full interview, after which the government would determine *whether* it would offer a
22 plea agreement, and if so, what terms it would include. Balogh Decl. Exs. B, C. Had Ms. Jones
23 ceded those rights and agreed fully, that would not have garnered anything in the “give-and-take”
24 other than the inchoate possibility that the government *might* later offer her a plea agreement.
25 These facts certainly do not fall within *Bordenkircher*’s exclusion of “plea negotiations” from
26 findings of presumed vindictiveness.

27 *Second*, *Bordenkircher* only exempted threats made in plea negotiations and thereafter
28 carried out from establishing a *presumption* of vindictiveness. *Goodwin*, 457 U.S. at 376-77. As

1 the Supreme Court explained in *Goodwin, Bordenkircher* established that a defendant could still
2 present evidence of *actual* vindictiveness to support the conclusion that the prosecution “upped
3 the ante” by seeking increased punishment based on the defendant’s exercise of a constitutional
4 right other than demanding a jury trial. *Id.* at 380-81; *see also id.* at 384 (“[i]n declining to apply
5 a presumption of vindictiveness, we of course do not foreclose the possibility that a defendant in
6 an appropriate case might prove objectively that the prosecutor’s charging decision was
7 motivated by a desire to punish [her] for doing something the law plainly allowed [her] to do.”)
8 Here, Ms. Jones has presented objective evidence that she has been punished for standing on her
9 Fifth Amendment rights, and this matter does not require any presumption to be applied. So too,
10 Ms. Jones never demanded any jury trial, and expressly asked the government to wait until the
11 lead defendant had counsel and to see how his case proceeded before making the precipitous
12 decision to file the section 851 Information in the absence of a Fifth Amendment waiver by Ms.
13 Jones. Balogh Decl. Ex. I. Even further, the lead defendant offered to plead guilty and asked the
14 government to dismiss its ill-conceived case against Ms. Jones based on her lack of culpability.
15 *Id.* Rather than proceed with negotiations with the lead defendant, the government “upped the
16 ante” by filing the information against Ms. Jones because she stood on her Fifth Amendment
17 rights and refused to waive them by April 20, the arbitrary deadline imposed by the government
18 one month earlier. Balogh Decl. Ex. J.

19 Each of these reasons will overcome the government’s attempt to excuse its vindictive
20 conduct in this matter as part of “plea negotiations.” Rather, because the record establishes
21 firmly the government’s improper motive, the Court should grant this motion and should strike
22 the Information and dismiss it with prejudice.

23 **V. Conclusion**

24 It is hard to imagine a case where vindictiveness has been shown so clearly, and where
25 the filing of a section 851 information is so inappropriate. When this case was originally
26 indicted, Ms. Jones was not even included. This made sense. Ms. Jones was not in any
27 conspiracy to distribute drugs nor did she participate in any drug deal. The government’s
28 assertions that she was present when Bobo consummated a transaction with his long-time friend

1 Morris will fall short of establishing culpability.

2 Ms. Jones's criminal history is far from recent and far from aggravating, and the alleged
3 prior stems from a simple possession of a personal use amount, a case in which she successfully
4 completed diversion and a case which ended with a dismissal with prejudice. Contrary to the
5 government's public justification of its policy—one aimed at "drug defendants with multiple
6 priors"—the pursuit of a 20 year sentence against Ms. Jones is categorically unjust and
7 disproportionate to the harm she is alleged to have committed. As the government has made
8 plain, it asserts that her alleged crime was to forward a telephone number requested by her
9 alleged friend, and then to stand idly by while Morris and Bobo completed an alleged transaction
10 in the foyer of her brother's residence. This is not the stuff of 20 year sentences.

11 All Ms. Jones has done since being indicted is to appear timely at all Court appearances
12 and to exhort the government to reconsider its demands that she waive her Fifth Amendment
13 rights and be interviewed, a *quid* the government required but for which it offered no *quo*. For
14 this refusal, the government has proceeded with its threats, without regard to its duty to ensure
15 fairness. It is for these reasons that this Court's strong voice is required.

16 For all of the reasons set forth herein, Ms. Jones respectfully moves this Court to strike
17 and to dismiss with prejudice the Information filed pursuant to 21 U.S.C. § 851 based on the
18 government's violation of her due process rights.

19 Respectfully submitted,

20 COLEMAN & BALOGH LLP

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23 DATED: June 12, 2009

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