WILLIAM M. NARUS
Acting United States Attorney
District of Oregon

STEVEN D. CLYMER
Special Attorney
MICHAEL J. HEYMAN
United States Attorney
District of Alaska
Federal Building & U.S. Courthouse
222 West Seventh Avenue, #9, Room 253
Anchorage, Alaska 99513-7567
Telephone: (907) 271-1523
Email: steven.d.clymer@usdoj.gov
Email: michael.heyman@usdoj.gov

Attorneys for United States of America

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA v. NATHAN MICHAEL KEAYS, Defendant.	Case No. 3:20-CR-00085-GMS-MMS-2 Government's Response to Defense Supplemental Motion for New Trial; Declarations; Exhibits

The United States of America, by and through its counsel of record, responds to and opposes defendant Nathan Michael Keays's supplemental motion under Rules 25(b) and 33(b)(2) of the Federal Rules of Criminal Procedure to vacate his conviction and for a new trial. Dkt. #385.

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A. Introduction

Defendant Nathan Michael Keays condemns former District Judge Joshua M. Kindred and attacks the credibility of Assistant United States Attorneys Karen E. Vandergaw and Andrew James Klugman, all to persuade this Court to overturn a jury's verdict holding Keays responsible for successfully conspiring to defraud ConocoPhillips for over $3 million. Granting Keays the windfall of a new trial is not a proper response to either Kindred's wrongdoing or evidence that these AUSAs were deceitful. Simply put, Keays has not shown that Kindred had an obligation to recuse or that he (Keays) otherwise is entitled to a new trial.

First, Kindred's undisclosed personal relationship with AUSA Vandergaw, although disturbing, did not require Kindred's recusal. Vandergaw was not a member of the *Keays* prosecution team. She was merely a government "filter attorney"—screening potentially privileged material from the trial prosecutors—and completed this task long before the *Keays* case was reassigned to Kindred. After that reassignment, Vandergaw remained isolated from the prosecution. She thereafter performed only two minor tasks related to her earlier filtering work, neither of which involved appearances in or contact with the court. There is no evidence that Kindred knew or reasonably could have been expected to know of Vandergaw's limited role.

Second, AUSA Klugman's involvement as one of two government trial attorneys in Keays's prosecution while in a romantic relationship with Vandergaw did not require

Kindred's recusal. There is no evidence that Kindred's relationship with Klugman was anything but professional. Further, Vandergaw and Klugman deny both that Vandergaw acted as a conduit of information between Kindred and Klugman or that they discussed the prosecution. Even if evidence discredits Vandergaw's and Klugman's credibility, casting doubt on denials that they communicated about case-related matters, this does not prove that such communication occurred.

Third, evidence that Kindred, Vandergaw, and Klugman have not been truthful is not a proper ground to overturn a jury verdict when there is no allegation, much less evidence, that any falsehood by any of them involved or affected Keays's case.

Fourth, Keays's novel assertion that he is entitled to a new trial based solely on Kindred's out-of-court misconduct without regard to whether it related to Keays's case finds no support in the law. The defense position would require overturning the criminal conviction or civil judgment in every case assigned to Kindred during his four-year tenure as a federal judge. Further, it would encourage defendants in other cases to mount personal attacks on federal judges and create an incentive for disgruntled litigants to investigate and seek discovery about judges' personal, out-of-court conduct.

Even if Kindred had erred by not recusing himself under 18 U.S.C. § 455(a), the error was harmless. There is no evidence of a risk of pro-government bias in Keays's case or that Keays's substantial rights were adversely affected.

Keays's further argument—that he is entitled to a new trial because this Court as a

"successor judge" under Fed. R. Crim. P. 25(b), did not observe the trial testimony and thus cannot properly evaluate Keays's dual claims that co-defendant Wright's testimony was necessary for conviction and the jury should have disbelieved him—is meritless. Keays's effort to disqualify this Court runs afoul of both Ninth Circuit authority and common sense. Jury verdicts should not be discarded merely because the judge who presided at trial no longer is available.

B. Offense Conduct[1]

Beginning in 2005, Nathan Michael Keays was a police officer with the Anchorage Police Department. Keays also was a former classmate of codefendant Forrest Nicholas Wright. Wright was a Senior Drilling and Wells Planner with ConocoPhillips Alaska ["Conoco"] from January 2012 until December 2019.[2] In that position, Wright had authority to approve orders for materials and services up to $1 million.

Keays and Wright both owned businesses. Keays owned Eco Edge Armoring, LLC ["Eco Edge"], a foam insulation business. Wright owned Spectrum Consulting Services ["Spectrum"].

From approximately February 2019 until December 2019, Wright and Keays falsely represented to Conoco that Eco Edge was an experienced gas and oil industry

[1] The information in this section comes from the final presentence investigation report ["PSR"], filed on September 23, 2024. Dkt. #323.

[2] ConocoPhillips is a large oil producer involved in exploration and development in Alaska. *See* https://alaska.conocophillips.com/who-we-are/.

company, including by falsely portraying Eco Edge as such on its website. In addition, Wright sent technical emails from his personal email account to Keays' personal email account with instructions for Keays to copy and paste the information into messages that Keays then sent from Eco Edge's business email account to Wright's official Conoco email account. These messages, which Wright could show to co-workers at Conoco, also made Eco Edge appear to be an oil and gas company.

Beginning in February 2019, Wright arranged for Eco Edge to be approved as a vendor for Conoco. Keays then created fraudulent invoices and false time sheets for six non-existent employees and, through Eco Edge, submitted these fraudulent invoices to Conoco, seeking payment for services that were not performed and materials that were not provided. In all, Keays submitted 29 fraudulent Eco Edge invoices to Conoco demanding payment of a total of $3,248,400. Wright represented to Conoco employees that the materials described in the invoices were accounted for and instructed them to approve the fraudulent invoices. Conoco paid Eco Edge approximately $3,087,720 between April 2019 and October 2019. Keays transferred approximately 50% of the proceeds of this fraud scheme to a Spectrum account that Wright controlled.

With his half of the fraudulent proceeds, totaling approximately $1,436,632.75, Keays purchased two properties, paid off a car loan and credit card bill, and transferred the remainder of his portion from Eco Edge's account to his personal bank account.

C. Procedural History

On September 18, 2020, a federal grand jury in Alaska returned an indictment charging Wright and Keays in Count One with conspiracy to commit wire fraud, in violation of 18 U.S.C. §§ 1343 and 1349; in Counts Two through Twelve with wire fraud, in violation of 18 U.S.C. § 1343; in Count Eighteen with conspiracy to engage in monetary transactions in criminally derived property, in violation of 18 U.S.C. §§ 1956(h) and 1957; and in Counts Nineteen through Twenty Nine with engaging in monetary transactions in criminally derived property, in violation of 18 U.S.C. § 1957(a).[3] Dkt. #8. The case was assigned to District Judge Timothy M. Burgess. Dkt. #20.

On March 31, 2021, Wright pleaded guilty before Magistrate Judge Deborah Smith pursuant to a plea agreement to all 34 counts in the indictment. Dkt. #54. On April 20, 2021, Judge Burgess adopted and accepted the magistrate's report and recommendation that Wright's guilty plea be accepted. Dkt. #64.

On November 28, 2022, the *Keays* case was reassigned to then-District Judge Kindred. Dkt. #142. On January 9, 2024, AUSA Klugman entered his appearance. Dkt. #177.

Trial as to Keays began on March 25, 2024. Dkt. #250. AUSA Michel Heyman, who had been assigned to the case since December 2020, was lead government counsel;

[3] Other counts in the indictment charged Wright alone with a different fraud scheme and associated illegal monetary transactions.

AUSA Klugman also represented the government. On April 11, 2024, after eleven days of trial, including deliberations, the jury returned guilty verdicts against Keays on all counts. Dkt. #286, #292.

On April 25, 2024, Keays filed a timely new trial motion. Dkt. #296. On April 26, 2024, Keays corrected errors in the new trial motion. Dkt. #298. On May 2, 2024, the government responded to and opposed Keays's new trial motion. Dkt. #300.

On July 3, 2024, Judge Kindred submitted a letter of resignation, which was received on July 5, 2024, and effective on July 8, 2024.[4] Keays's case was reassigned, first to District of Alaska Chief Judge Sharon L. Gleason, Dkt. #305, then to Judge Ralph R. Beistline, Dkt. #310, and, on August 7, 2024, to this Court. Dkt. #318.

On August 21, 2024, this Court granted Keays's unopposed motion to stay post-verdict proceedings to enable Keays to supplement his post-verdict motions. Dkt. #322. Keays's supplemental motion for a new trial followed. Dkt. #385.

D. Facts Relevant to Keays's Claims

1. Kindred's Misconduct and the Ninth Circuit Judicial Council's Order

In November 2022, the United States Attorney's Office for the District of Alaska ["USAO"] reported to Chief Judge Gleason allegations of Judge Kindred's misconduct involving three female attorneys: a former-law-clerk-turned AUSA, AUSA Vandergaw,

[4] *See* https://www.akd.uscourts.gov/sites/akd/files/Press%20Release%20-%20Kindred%20Resignation%2007.05.24.pdf.

and a local defense attorney.[5] Vogel declaration at ¶¶ 4-12; Tucker declaration at ¶ 3.[6] Chief Judge Gleason and then-United States Attorney S. Lane Tucker informed Chief Judge Mary H. Murguia of the Court of Appeals for the Ninth Circuit about the allegations. Tucker declaration at ¶ 4. Chief Judge Murguia thereafter "directed a limited inquiry under Rule 5 of the Rules for Judicial-Conduct and Judicial-Disability ("JC&D") Proceedings." *In Re Judicial Misconduct*, Case No. 22-90121 (9th Cir. May 23, 2024) at p. 2.[7]

On December 27, 2022, having determined "that there was probable cause to believe that misconduct had occurred," Chief Judge Murguia "identified a misconduct complaint against Judge Kindred pursuant to 28 U.S.C. § 351(b) and JC&D Rule 5(a)." *Id.* On February 23, 2023, after Judge Kindred denied misconduct, Chief Judge Murguia "appointed a Special Committee to investigate the allegations in the complaint and report its findings and recommendations to the Judicial Council." *Id.* at p. 3. The Special Committee interviewed 21 people, including Judge Kindred, and reviewed documents, including over 700 pages of text messages. *Id.* at p. 4. The Special Committee provided

[5] The events that led to the USAO's report to Chief Judge Gleason are not relevant to Keays's claims and thus are not described here. They are described in the government's response to a new trial motion in *United States v. Spayd*, Case No. 19-CR-111-MAH-MMS, Dkt #469 (publicly filed), #471 (sealed) at pp. 18-23. *See also* Vogel declaration at ¶¶ 3, 4, 7-10.

[6] Exhibits referenced in declarations are not attached to this response. Government exhibits cited in this response refer to those attached to the response, not to those referenced in the declarations.

[7] Available at https://cdn.ca9.uscourts.gov/datastore/ce9/2024/22-ted%20News%20Release%20&%20Order%20and%20Certification.pdf.

its report and recommendations to Judge Kindred on March 1, 2024, and to the Judicial Council on March 4, 2024. *Id.* at p. 9.[8]

On April 5, 2024, Judge Kindred appeared before the Judicial Council and answered questions under oath. *Id.* at p. 11. When confronted with evidence, Judge Kindred admitted that he had lied to the Special Committee about certain matters and "[a]s to other details, he maintained that he could not recall, despite the Special Committee's extensive evidence and his clear memories of other events during that same period." *Id.* at pp. 12-13.

On May 23, 2024, the Judicial Council issued an order finding that Judge Kindred had "created a hostile work environment for his law clerks"; had "an inappropriately sexualized relationship with one of his law clerks during her clerkship and shortly after her clerkship while she practiced as an Assistant United States Attorney in the District of Alaska"; and "lied to the Chief Judge [of the Court of Appeals for the Ninth Circuit], the Special Committee and the [Judicial] Council" throughout the proceedings leading up to the order. *Id.* at p. 1.

The Judicial Council's order explains that:

> Judge Kindred created a hostile chambers environment for his law clerks. Judge Kindred appeared to have no filter as to the topics he would discuss

[8] The Special Committee's 105-page report was supplemented by 1,039 pages of exhibits. *Id.* at p. 1. The government has not been given access to the report or exhibits. *See* 28 U.S.C. § 360(a) (providing that, subject to exceptions, "all papers, documents, and records of proceedings related to [judicial misconduct] investigations conducted under this chapter shall be confidential and shall not be disclosed by any person . . . .").

> with the clerks. He discussed his past dating life, his romantic preferences, his sex life, the law clerks' boyfriends and dating lives, his divorce, his interest in and communications with potential romantic or sexual partners, and his disparaging opinions of his colleagues.

Id. at p. 4.

Much of the order described Kindred's relationship with a former law clerk (who was not identified by name) and Kindred's encounters with her on October 3 and 7, 2022, shortly after she began working as an AUSA in the USAO. *Id.* at pp. 5-8. There is no allegation or evidence that this former law clerk was involved in Keays's case, either as a law clerk[9] or as an AUSA.[10]

The Judicial Council's order also mentions an unnamed "local attorney [with whom Kindred] exchanged flirtatious text messages." *Id.* at p. 21, n.17; *see also id.* at p. 16 ("He received sexually suggestive text messages from a local attorney who regularly appeared before him, which he also discussed with his law clerks."); p. 18 (explaining that law clerk reported that "Judge Kindred would discuss his romantic or sexual interest in a local attorney"). There is no allegation or evidence that this local attorney was involved in Keays's case.

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[9] The law clerk's clerkship with Judge Kindred ended on September 23, 2022, before the *Keays* case was reassigned to Judge Kindred on November 28, 2022.

[10] *See* News Release, United States Court of Appeals for the Ninth Circuit, Judicial Conduct and Disability Complaint Number 22-90121, July 8, 2024 ("The former law clerk did not appear on any case before Judge Kindred while she was employed as an Assistant United States Attorney."), available at https://cdn.ca9.uscourts.gov/datastore/ce9/2024/22-90121%20News%20Release%20&%20Order%20and%20Certification.pdf.

The Judicial Council's order refers to a "more senior AUSA" from whom Kindred received nude photographs and with whom he flirted. *Id.* at p. 16 ("Judge Kindred received nude photographs from another, more senior AUSA who practiced before him, and then Judge Kindred discussed those photographs with his law clerk."); p. 21, n.17 ("Judge Kindred received nude photographs from a separate, more senior AUSA, with whom he had a flirtatious rapport."); p. 24 ("Despite evidence to the contrary, Judge Kindred told the Committee that he neither engaged in a flirtation with a separate, more senior AUSA, nor received nude photographs from her. He admitted to both in response to questioning by the Council.")' p. 25 ("At the Judicial Council meeting, confronted again with that contemporaneous evidence, he performed an about-face, stating that he received nude photographs from that senior AUSA and that some flirtation occurred."). The government has identified this "senior AUSA" as Karen Vandergaw. *See United States v. Burk*, Case No. 3:19-cr-00117-JLR, Dkt. #574 at p. 5, ¶ 12 ("The senior AUSA described in the Judicial Council's report [sic] is AUSA Vandergaw . . . .").

2. The Kindred-Vandergaw Relationship

As the government has described in other cases, Kindred and AUSA Vandergaw appear to have developed a friendship as early as in 2020 when using an athletic facility inside the federal courthouse. *United States v. Fesler*, Case No. 20-CR-00095-MAH-MMS, Doc. #188 at p. 2; Doc. #185 at pp. 5-6, ¶ 11. In early December 2021, Vandergaw sent nude photographs of herself to Kindred through "Signal," an encrypted messaging

application. *Burk*, Case No. 19-CR-0117-JLR, Doc. #574 at pp. 4-5; ¶¶ 11, 12. Vandergaw and Kindred also exchanged sexually explicit Signal messages. *Fesler*, Doc. #185 at p. 5, ¶ 10. Vandergaw maintains that Kindred sent her naked pictures of himself as well. DEX 8 at p. 3.[11]

In November 2022, when the USAO reported allegations to Chief Judge Gleason concerning Judge Kindred, including that Kindred had received nude photographs from Vandergaw, it requested that post-indictment cases assigned to Kindred be reassigned to other judges if Vandergaw (or other specified attorneys) had entered an appearance. Vogel declaration at ¶ 12. These reassignments began on November 15, 2022. *Id.* at ¶ 14.

On January 27, 2023, a Department of Justice ["DOJ"] component sent a letter to United States Attorney Tucker explaining that it had received "allegations concerning . . . Karen Vandergaw . . . that, if true, may potentially implicate her professional responsibility obligations" and accordingly had initiated an inquiry. GEX A.[12] It requested that Vandergaw "prepare a written response describing in detail the nature of the relationship, if any, she has with the Honorable Joshua M. Kindred of the United States District Court for the District of Alaska." *Id.* Tucker forwarded this letter to Vandergaw. GEX B. After

[11] Defense exhibits are designated by "DEX" and the exhibit number. Government exhibits are designated by "GEX" and the exhibit letter.

[12] Certain DOJ components have authority to conduct confidential investigations of allegations of serious misconduct by AUSAs. *See* Justice Manual § 1-4.200, *et seq*. There are DOJ reporting requirements for "allegations that non-Department attorneys or judges have committed misconduct." *See id.* at § 1-4.340.

receiving the letter, Vandergaw suggested to Kindred that they switch from using the Signal messaging application for their text communications to a similar application called "Telegram." DEX 8 at p. 5; DEX 9 at p. 165.[13]

On February 20, 2023, Vandergaw responded to the letter. She denied ever having "a romantic, intimate, or close personal relationship with Judge Kindred." DEX 7 at p. 4. She described their relationship as "courteous, but professional." *Id.* After considering Vandergaw's response and other evidence, the DOJ component "determined that further investigation is unlikely to result in a finding of professional misconduct" and "closed its inquiry." GEX C. It notified United States Attorney Tucker and Vandergaw of this decision. *Id.*

On August 1, 2024, after the Ninth Circuit published its order in *In Re Judicial Misconduct,* Case No. 22-90121, which included references to the "more senior AUSA" who had sent Kindred nude photographs, the DOJ component notified Vandergaw that it had "reason to believe that you may be the 'more senior AUSA' referenced in the Order." GEX D. As a result, it "reopened its inquiry into the nature of your relationship with then Judge Kindred" and requested additional information from her about the relationship. *Id.*

On August 9, 2024, Vandergaw responded to this letter. She explained that although her interactions with Kindred were "at first were cordial and professional, they devolved

[13] Vandergaw later claimed that she did this "hoping that he just wouldn't do it and then we wouldn't talk anymore, but I was too afraid to be, like, that direct with him." DEX 9 at pp. 165-66.

into an abusive and manipulative relationship." DEX 8 at p. 1. Vandergaw now admitted exchanging nude photographs and text messages about sexual matters with Kindred, claiming that she did this at his insistence, having felt "pressured to appease Judge Kindred given his inherent position of power and authority over me as a federal judge, his ability to influence decisions in the U.S. Attorney's Office, and his influence over my future." *Id.* at pp. 2-3. Vandergaw explained that "I did not disclose the information included in this letter in my original February 20, 2023 response because I was afraid of what Judge Kindred would do if he found out." *Id.* at p. 7.

During an interview on August 27, 2024, Vandergaw stated that her last contact with Kindred was in the winter of 2023 going into 2024 when she encountered him in the federal courthouse. Vandergaw explained that "he said he had heard that [she] was getting divorced, and he told [her] that he hadn't dated anyone since he got divorced and he'd waited a year and he thought he was starting – he's, like, ready to date again and that he only wanted to date someone who had also been divorced." DEX 9 at pp. 52-54.

3. The Kindred-Klugman Relationship

Kindred and Klugman both once worked as assistant district attorneys in the Anchorage District Attorney's Office. Their tenures there overlapped for "less than a year" before Kindred left that office in 2013. DEX 5 at p. 12. Kindred was in the violent crime unit and became its supervisor; Klugman was a new attorney in the misdemeanor crimes unit. *Id.* They had "very limited interaction." *Id.* They did not socialize. *Id.* at pp. 12-

13. Klugman had no contact with Kindred between Kindred's departure from the District Attorney's Office (in 2013) and Kindred's ascension to the federal bench (in 2020). *Id.* at p. 14. Klugman never had a personal relationship with Kindred. *Id.* at p. 15; Klugman declaration at ¶ 5. Klugman could recall only one brief out-of-court encounter with Kindred after Kindred became a judge. It occurred when Klugman and Vandergaw spoke with Kindred and his law clerk at a bench-bar event in summer 2021. DEX 5 at p. 15. The law clerk did most of the talking and it was directed toward Vandergaw. *Id.* at pp. 15-16.

4. The Vandergaw-Klugman Relationship

Vandergaw and Klugman first met when she was an attorney with the Alaska state public defender agency and represented people whom Klugman prosecuted as a district attorney. *Id.* at 17. Vandergaw began working in the USAO in September 2018. Vandergaw declaration at ¶ 1. Klugman began there in February 2019. Klugman declaration at ¶ 1. Vandergaw and Klugman worked on matters together in the USAO. DEX 5 at pp. 20-21; DEX 6 at pp. 211-12. They became friends and socialized, including by having drinks and meals together. DEX 5 at p. 18. Occasionally, Vandergaw and her husband socialized with Klugman and his live-in fiancé. DEX 5 at p. 19; DEX 6 at pp. 210-11. Vandergaw and Klugman also socialized with USAO colleagues. DEX 5 at p. 19;

DEX 6 at pp. 209-10. Vandergaw was one of Klugman's closest friends in the USAO. DEX 6 at p. 20.

Klugman denied knowing about Vandergaw's personal relationship with Judge Kindred before publication on July 8, 2024, of the Judicial Council's order. He acknowledged only that he had learned of hearsay rumors that Vandergaw had sent nude photographs to Kindred. Klugman declaration at ¶ 3; DEX 5 at pp. 25-44.

On December 22, 2022, it was announced that Klugman would become the USAO's Criminal Chief on February 10, 2023. Klugman declaration at ¶ 2; Tucker declaration at ¶ 10; DEX 5 at pp. 26-27. Vandergaw was one of the AUSAs whom Klugman supervised as Criminal Chief. Vogel declaration at ¶ 22; DEX 6 at pp. 212-14. Klugman remained Criminal Chief until he was demoted on December 15, 2023. Tucker declaration at ¶ 10; DEX 5 at p. 138.

While Klugman was Criminal Chief, Vandergaw lived with her then-husband and their young son. DEX 5 at p. 139; DEX 6 at pp. 7-8. Until around late September 2023, Klugman cohabitated with his then-fiancé. DEX 5 at p. 139. Beginning in the summer of 2022, and continuing throughout Klugman's tenure as Criminal Chief, Vandergaw and Klugman planned and/or took five multi-day, out-of-town trips together, four of which were related to their federal employment, raising concerns in the USAO because of Klugman's status as one of Vandergaw's supervisors.

In June 2023, they both travelled to the DOJ National Advocacy Center ["NAC"] in Columbia, South Carolina, for a forensic evidence course. They stayed in the same NAC hotel facility and socialized while there, including with only each other. DEX 5 at pp. 126-27; DEX 6 at pp. 214-16. In July 2023, they travelled to Huntsville, Alabama to serve as instructors in a Bureau of Alcohol, Tobacco, and Firearms training course, and again stayed in the same hotel and socialized together. DEX 5 at pp. 127-28; DEX 6 at pp. 216-18; GEX E at pp. 110-31.[14]

In late July 2023, First Assistant United States Attorney Kathryn Vogel learned of concerns in the USAO that AUSA Klugman was involved in a romantic or unusually close personal relationship with AUSA Vandergaw. Vogel declaration at ¶ 22. There was concern that Klugman, as Criminal Chief, was showing favoritism toward Vandergaw. *Id.* DOJ policy requires "any supervisor/manager having supervisory or management responsibilities who finds himself or herself in a romantic or intimate relationship with a subordinate employee must promptly notify his or her next-line supervisor."[15] Vogel told Klugman about rumors of favoritism, explained the policy addressing relationships with subordinates, and admonished Klugman regarding appearances of impropriety and favoritism. Vogel declaration at ¶ 23. Klugman told her that he understood the policy. *Id.*

[14] Citations to the page numbers in GEX E refer to the original pagination.

[15] United States Attorneys' Policies and Procedures, 1-4.200.001, Version 1.0 (November 2, 2018), at p. 5, available at https://usanet.usa.doj.gov/usaps/Library/1-4.200.001_archived_07-06-2021.pdf.

He did not report having a romantic relationship with Vandergaw. *Id.* In August or September 2023, United States Attorney Tucker asked Klugman if he was in a romantic or intimate relationship with AUSA Vandergaw. AUSA Klugman denied being in such a relationship. *Id.* at ¶ 24; Tucker declaration at ¶ 12.[16]

In September 2023, Klugman travelled to Seattle for an appellate oral argument. DEX 5 at pp. 129-30; DEX 6 at pp. 218-19, 225-26; GEX E at pp. 171-72. Vandergaw took annual leave and accompanied him. DEX 5 at p. 129; DEX 6 at p. 221. They shared a hotel suite and later claimed they slept in separate beds. DEX 5 at pp. 129-31; DEX 6 at pp. 223-24; GEX E at pp. 171-97. Neither told colleagues that Vandergaw had accompanied Klugman on this overnight trip. DEX 5 at pp. 132-35; DEX 6 at pp. 222-23, 228.

Shortly after this Seattle trip, in late September 2023, Klugman terminated his engagement and temporarily moved out of the residence he shared with his fiancé until she could relocate. DEX 5 at p. 135; DEX 6 at p. 231. Soon thereafter, Vandergaw told her husband that she wanted to end their marriage. DEX 5 at pp. 136-37; DEX 6 at p. 9-11, 231. Vandergaw and Klugman had discussed with each other their respective plans to terminate their relationships. DEX 5 at p. 137.

[16] First Assistant Vogel and United States Attorney Tucker described Klugman, while he was the Criminal Chief, as having urged promotion of Vandergaw to be the Deputy Criminal Chief. DEX 3 p. 64; DEX 4 at p. 44. Klugman denied this. DEX 5 at p. 125-26.

In early October 2023, Vandergaw and Klugman arranged to vacation together in Hawaii in late December and early January, where they would share a studio condo. DEX 5 at p. 140; GEX E at pp. 256-63.[17] In November 2023, they both arranged to travel to the NAC in January to teach for a week at a basic trial advocacy course. DEX 5 at p. 138.

In or about November, Klugman offered to share his home with Vandergaw and her son after she moved out of the house where she lived with her husband and until she could find another place to live. Vandergaw decided to do this rather than explore other options. GEX E at pp. 243-49.[18] In late December 2023, shortly after Klugman's tenure as Criminal Chief ended on December 15, 2023, Vandergaw moved out of the residence she shared with her husband and son and moved into Klugman's residence. DEX 5 at pp. 140-41; DEX 6 at p. 10.

When interviewed in December 2024, Vandergaw and Klugman both insisted that their relationship was platonic, not romantic, until they arrived in Hawaii in late December 2023, the day after they had begun cohabitating at Klugman's residence. DEX 5 at p. 141; DEX 6 at pp. 232-33.

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[17] In an interview, Klugman described the condo they had booked as a "one-bedroom." GEX E at p. 256. In fact, it was a studio. GEX F. When booking, Klugman described their Hawaii trip as a "honeymoon." *Id*.

[18] In early December 2023, while Klugman still was Criminal Chief, he reported to First Assistant Vogel that AUSA Vandergaw and her son would be moving in with him. When Vogel asked if he was in a "close personal relationship" with Vandergaw that triggered a reporting obligation under DOJ policy because Klugman was Vandergaw's supervisor, Klugman told her that he and Vandergaw were "just friends." DEX 3 at p. 145.

Vandergaw denied discussing with Judge Kindred her relationship, cohabitation, or travel with Klugman. DEX 6 at p. 233. Vandergaw denied serving as a conduit of information between Kindred and Klugman. *Id*. at p. 234. Similarly, Klugman denied discussing with Kindred his relationship, cohabitation, or travel with Vandergaw. DEX 5 at p. 141. Klugman denied passing to or receiving from Kindred case related information through Vandergaw. *Id.* at p. 142.

5. Opinions About Vandergaw's and Klugman's Credibility

During an interview, S. Lane Tucker, who was United States Attorney for the District of Alaska from April 5, 2022, to February 8, 2025, stated that Vandergaw had "zero" credibility. DEX 4 at p. 37. She later elaborated: "I wouldn't trust her to do anything. I don't think she's honest." *Id.* at p. 49. Tucker later explained that her opinion of Vandergaw's credibility was informed by inconsistency between her two statements about her relationship with Kindred, meaning Vandergaw's statements dated February 20, 2023, and August 9, 2024, *see* pages 15-16, *supra*, and between the first statement and the Judicial Council's order. Tucker declaration at ¶ 14. Vogel, who served as First Assistant United States Attorney, stated: "I think [Vandergaw is] a liar." DEX 3 at p. 75.

Tucker opined that Klugman is "not truthful . . . and does not have candor." DEX 4 at p. 28. Tucker later explained that her opinion was informed by her interaction with Klugman when he was Criminal Chief, during which she believed that he was "not forthcoming . . . about case related matters and his relationship with AUSA Vandergaw."

Tucker declaration at ¶ 15. Vogel explained that she worried about Klugman's honesty and "would not put it past him to be dishonest." DEX 3 at p. 165.[19]

6. Vandergaw's Involvement in the Investigation and Prosecution of Keays

a. Before the *Keays* Case Was Reassigned to Kindred

In early May 2020, Vandergaw was tasked to filter e-mail messages that had been seized from Keays during an investigation. GEX G. This was to keep from the prosecution team communications that potentially were protected by the attorney-client privilege. DEX 6 at pp. 34-36; Vandergaw declaration at ¶¶ 2-3; Heyman declaration at ¶ 3. Vandergaw completed review of the e-mail messages by the summer of 2020. DEX 6 at p. 37; GEX G. This was before Keays was indicted, which occurred in September 2020.

Vandergaw also was tasked to do a filter review of Keays's Anchorage Police Department personnel file to determine if it contained compelled statements. DEX 6 at p. 38; GEX G; Vandergaw declaration at ¶ 4. She finished that review on about February 16, 2021. DEX 6 at p. 39; GEX H; Vandergaw declaration at ¶ 7. At that time, the *Wright*/*Keays* case still was assigned to Judge Burgess.

b. After the *Keays* Case Was Reassigned to Kindred

After the *Keays* case was reassigned to Judge Kindred in November 2022, and as trial neared, a question arose as to whether filtered e-mail messages had been produced to

[19] Vandergaw and Klugman are on administrative leave. Neither is representing the United States in litigation. DOJ is evaluating this matter for disciplinary action as to both consistent with applicable law and Department policy.

defense counsel in discovery. DEX 6 at p. 68. Vandergaw was unable to locate a record of such production, so she produced them on February 1, 2024. *Id.*; GEX I; Vandergaw declaration at ¶ 9. In addition, Vandergaw discovered that a small number of potentially privileged e-mail messages had not been segregated in a USAO electronic data management system accessible by the prosecution team. Vandergaw segregated these messages and determined that the trial prosecutors had no recollection of having reviewed them. DEX 6 at pp. 73-79; Vandergaw declaration at ¶ 10. On March 4, 2024, Vandergaw notified defense counsel about the failure to segregate the filtered materials, that the trial team did not recall viewing them, and that remedial steps had been taken. *Id.* at pp. 77; GEX J, K; Vandergaw declaration at ¶ 10. Keays's counsel did not respond to Vandergaw's letter or raise any claims related to the potentially privileged information. DEX 6 at p. 81; Vandergaw declaration at ¶ 11.

Vandergaw did not file a notice of appearance in *Keays* or represent the United States in court and neither party notified the district court that filtering work had been done. DEX 6 at p. 82. Vandergaw did not discuss any of her filter work or the *Keays* case with Kindred. *Id.* at pp. 71, 85. She was not in communication with Kindred at that time. *Id.* at p. 89.

Within the USAO, Vandergaw and her colleagues took steps to isolate her from the *Keays* prosecution because she had been the filter AUSA. Vandergaw declaration at ¶ 6. For example, Vandergaw was the USAO Acting Senior Litigation Counsel and, in that

capacity, generally was responsible for assisting other AUSAs in fulfilling their disclosure obligations regarding possible impeachment information concerning law enforcement witnesses under *United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991). DEX 6 at pp. 50-52; Vandergaw declaration at ¶ 13. But, because Vandergaw had done filter work, a different AUSA performed this *Henthorn* role for the *Keays* prosecution. DEX 6 at pp. 53-54, 62; Vandergaw declaration at ¶ 14. In fact, on November 1, 2023, AUSA Klugman, who then was Criminal Chief, sent a message ensuring that Vandergaw would refrain from this involvement because of her previous work as the filter AUSA. DEX 6 at pp. 62-63; GEX L. On that same day, Vandergaw notified AUSA Heyman, one of the *Keays* trial attorneys, that she was "screened off . . . this Giglio and Henthorn inquiry due to my involvement in a filter review process." DEX 6 at pp. 63-64; GEX M. On March 1, 2024, Vandergaw sent a message to a supervisor to remind him that she was "filtered off from this case." DEX 6 at p. 67; GEX N. Similarly, in a February 1, 2024 message to two supervisors, Vandergaw explained that she would not attend a pretrial litigation support meeting because she had done "a few filter reviews for this case [*Keays*]" and wanted to "remain walled off." DEX 6 at pp. 81-83; GEX O.

Vandergaw was living with Klugman during the *Keays* trial. DEX 6 at p. 86. Because of her role as the filter attorney, she refrained from discussing the case with Klugman. *Id.*; Vandergaw declaration at ¶ 17. Had she not been the filter attorney, it would have been normal for her to have discussed the case with Klugman. DEX 6 at 86-

87. Other than communications about filtering, they did not discuss the case during the time Klugman was assigned to it. *Id.* at p. 88. Vandergaw provided no advice, guidance, suggestions, or any input about the Keays prosecution other than with respect to matters related to her filtering of potentially privileged materials. Heyman declaration at ¶ 14; Klugman declaration at ¶ 10.

Vandergaw did not recall attending the *Keays* trial. Vandergaw declaration at ¶ 16. She thought that she "may have popped in." DEX 6 at p. 86. She was out of town for part of the trial. *Id.* at p. 88. She had no recollection of approaching counsel table during trial. *Id.* at p. 89. AUSA Heyman had no recollection of Vandergaw attending trial. Heyman declaration at ¶ 15. Neither did AUSA Klugman. Klugman declaration at ¶ 10.

E. Governing Law

1. Federal Rule of Criminal Procedure 25: Judicial Disability

"After a verdict or finding of guilty, any judge regularly sitting in or assigned to a court may complete the court's duties if the judge who presided at trial cannot perform those duties because of absence, death, sickness, or other disability." Fed. R. Crim. P. 25(b)(1). "The successor judge may grant a new trial if satisfied that (A) a judge other than the one who presided at the trial cannot perform the post-trial duties; or (B) a new trial is necessary for some other reason." *Id.* at (b)(2). A defendant seeking a new trial from a successor judge under Rule 25 must meet the requirements of Fed. R. Crim. P. 33. *United*

States v. Rashid, No. CRIM. 93-264, 2009 WL 82477, at *1 (E.D. Pa. Jan. 12, 2009), *aff'd*, 375 Fed. App'x 199 (3d Cir. 2010).

2. Federal Rule of Criminal Procedure 33: New Trial

"Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). A new trial "should be granted only in exceptional cases in which the evidence preponderates heavily against the verdict." *United States v. Pimentel*, 654 F.2d 538, 545 (9th Cir. 1981) (internal quotation marks and citation omitted); *see also United States v. Del Toro-Barboza*, 673 F.3d 1136, 1153 (9th Cir. 2012) (explaining that courts "will only grant the [new trial] motion in exceptional circumstances in which the evidence weighs heavily against the verdict"). "The burden of establishing that a new trial is warranted rests with the moving party." *United States v. Berckmann*, No. CR 17-00710 SOM, 2018 WL 5778396, at *2 (D. Haw. Nov. 2, 2018), *aff'd*, 817 Fed. App'x 494 (9th Cir. 2020), and *aff'd*, 971 F.3d 999 (9th Cir. 2020). This burden is "heavy." *I.N.S. v. Abudu*, 485 U.S. 94, 110 (1988).

3. Judicial Recusal

a. 18 U.S.C. § 455(a)

"Any . . . judge . . . of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). "The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the

appearance of impropriety whenever possible." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865 (1988).

"The test under § 455(a) is whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *F.J. Hanshaw Enterprises, Inc. v. Emerald River Dev., Inc.*, 244 F.3d 1128, 1144 (9th Cir. 2001) (internal quotation marks and citations omitted). "The "reasonable person" is not someone who is 'hypersensitive or unduly suspicious,' but rather is a 'well-informed, thoughtful observer.'" *United States v. Holland*, 519 F.3d 909, 913 (9th Cir. 2008) (citation omitted). "The standard must not be so broadly construed that it becomes, in effect, presumptive, so that recusal is mandated upon the merest unsubstantiated suggestion of personal bias or prejudice." *Id.*

"Scienter is not an element of a violation of § 455(a). The judge's lack of knowledge of a disqualifying circumstance may bear on the question of remedy, but it does not eliminate the risk that 'his impartiality might reasonably be questioned' by other persons." *Liljeberg*, 486 U.S. at 859 (quoting 28 U.S.C. § 455(a)). *Liljeberg* tempered this objective approach by explaining that "[u]nder section 455(a), therefore, recusal is required even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case *if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge*." 486 U.S. at 860–61 (emphasis added) (internal quotation marks and citation omitted) *see also United States v. Richey*, 924 F.2d 857, 869 n.9 (9th Cir. 1991)

("As long as the public could reasonably believe that the judge is aware of these circumstances, the statute is applicable.").

"Disqualification under § 455(a) is necessarily fact-driven and may turn on subtleties in the particular case." *United States v. Carey*, 929 F.3d 1092, 1104 (9th Cir. 2019) (quoting *Holland*, 519 F.3d at 913). This requires that courts conduct "an independent examination of the unique facts and circumstances of the particular claim at issue." *Holland*, 519 F.3d at 913 (internal quotation marks and citation omitted).

b. The Fourteenth Amendment Due Process Clause

"[M]ost matters relating to judicial disqualification did not rise to a constitutional level." *Fed. Trade Comm'n v. Cement Inst.*, 333 U.S. 683, 702 (1948); *see also Tumey v. State of Ohio*, 273 U.S. 510, 523 (1927) ("All questions of judicial qualification may not involve constitutional validity."). "The Due Process Clause demarks only the outer boundaries of judicial disqualifications." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986). Accordingly, "[t]he Supreme Court has recognized only a few circumstances in which an appearance of bias necessitates recusal to ensure due process of law." *Greenway v. Schriro*, 653 F.3d 790, 806 (9th Cir. 2011). "[C]onduct violative of section 455 may not constitute a due process deficiency." *United States v. Couch*, 896 F.2d 78, 81 (5th Cir. 1990).

The Supreme Court has relied on the Fourteenth Amendment Due Process Clause in only a handful of state cases involving egregious threats of judicial bias or self-interest,

and where federal statutory recusal provisions were not applicable. And "[t]ypically, the Supreme Court has only mandated recusal where a judge has a direct, personal, or substantial connection to the outcome of a case or to its parties." *In re Complaint of Jud. Misconduct*, 816 F.3d 1266, 1267 (9th Cir. 2016).

For example, in *Tumey v. State of Ohio*, 273 U.S. 510 (1927), the Supreme Court held that it violated due process when a judge, there the village mayor who had jurisdiction to adjudicate alleged Prohibition violations, "ha[d] a direct personal pecuniary interest in convicting the defendant who came before him for trial, in the $12 of costs imposed in his behalf, which he would not have received if the defendant had been acquitted." *Id.* at 441.

In *In re Murchison*, 349 U.S. 133 (1955), the Supreme Court, explaining that "no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome," *id.* at 136, found it violated due process for a judge who had issued orders to show cause why certain witnesses should not be held in contempt to also preside over criminal contempt proceedings against them, *id.* at 139.

In *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009), the Court found a due process violation when an appellate judge whose recent election campaign had received extraordinary financial support from a litigant appealing from a $50 million judgment repeatedly refused to recuse himself and twice cast a deciding vote to overturn the judgment. *Id.* at 872. The *Caperton* Court stressed that its "decision . . . addresse[d] an extraordinary situation where the Constitution requires recusal" and that only "extreme

cases are more likely to cross constitutional limits." *Id.* at 887.

In *Williams v. Pennsylvania*, 579 U.S. 1 (2016), the Supreme Court held that due process required the Chief Justice of the Pennsylvania Supreme Court to recuse himself from appellate proceedings arising from a criminal defendant's collateral attack on a death sentence alleging prosecutorial misconduct where the Chief Justice, 26 years earlier, had been the district attorney who had given approval to seek the death penalty in that case. *Id.* at 11. In doing so, the *Williams* Court explained that "[t]his Court's precedents set forth an objective standard that requires recusal when the likelihood of bias on the part of the judge is too high to be constitutionally tolerable." *Id.* at p. 4 (internal quotation and citations omitted).

F. Argument

1. Kindred Was Not Required to Recuse Himself from Keays's Case and His Misconduct Does Not Require a New Trial.

a. AUSA Vandergaw's Involvement Only as a Filter Attorney in the *Keays* Prosecution, Most of Which Preceded Kindred's Assignment and None of Which Involved Interaction with the Court, Did Not Require Kindred's Recusal.

Had Vandergaw been government counsel of record, her undisclosed relationship with Kindred would have required his recusal from *Keays*. *See, e.g.*, *United States v. Murphy*, 768 F.2d 1518, 1538 (7th Cir. 1985) (explaining that when the association [between an attorney representing a party and the presiding judge] exceeds what might reasonably be expected in light of the associational activities of an ordinary judge . . . the

unusual aspects of a social relation may give rise to a reasonable question about the judge's impartiality") (internal quotation marks and parenthetical with citation omitted). But Vandergaw never filed an entry of appearance, was not involved in court proceedings, and did not interact with the court. She was not involved in the prosecution and was not part of the prosecution team. She only served as a filter attorney. And all her filtering work—done internally within the USAO—was completed over 18 months before the *Keays* case was reassigned to Kindred.

After that reassignment, Vandergaw performed only two minor tasks arising from her earlier filtering work. First, because of uncertainty whether the government previously had provided to the defense in discovery a handful of the potentially privileged documents, Vandergaw produced these documents to Keays's counsel. Second, upon discovery that these filtered documents had not been segregated from USAO information systems accessible to the trial team, Vandergaw did so, determined whether the trial team had been exposed to the documents, and notified defense counsel in writing of her efforts. None of this resulted in litigation or involved Vandergaw appearing before or interacting with Judge Kindred.

Because there is no evidence that Kindred knew about or reasonably could have been expected to know about *any* of Vandergaw's minimal involvement, almost all of which was completed long before the *Keays* case was reassigned to him, it cannot have required his recusal. *See Liljeberg*, 486 U.S. at 860–61 (explaining that a judge's recusal

obligation under 18 U.S.C. § 455(a) can be based on facts unknown to the judge only "if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge"); *see also Richey*, 924 F.2d at 869 n.9 ("*As long as the public could reasonably believe that the judge is aware of these circumstances*, the statute is applicable.") (emphasis added).

Finally, Keays cannot gain a new trial on the mere possibility that Vandergaw attended the *Keays* trial as a spectator. Such attendance alone could not have required Kindred's recusal and, in any event, Keays, who bears the burden here, *Berckmann*, 2018 WL 5778396, at *2, has not established that Vandergaw ever came to court to watch. *See* Dkt. #385 at p. 16 (conceding that Keays "cannot say when AUSA Vandergaw observed Mr. Keays' trial"). As noted above, AUSAs Vandergaw, Klugman, and Heyman have no recollection of Vandergaw having attended trial. Evidence that Vandergaw and Klugman are not credible does Keays no good; it does not show that Vandergaw attended trial.

Keays's reliance on *United States v. Hernandez-Zamora*, District of Alaska Case No. 3:21-cr-00062-MAH-MMS, Dkt. #385 at p. 21, a Kindred-affected case in which a reviewing court vacated a trial conviction and granted a new trial, is misplaced. In *Hernandez-Zamora*, the court found that Kindred had an obligation to recuse under 18 U.S.C. § 455(a) due to his undisclosed personal relationship with AUSA Vandergaw, who "introduced herself to defense counsel on the second day of trial, was present in the courtroom throughout trial, spoke to the AUSAs assigned to the matter, and assisted the

AUSAs with trial." *Id.*, Dkt. #406 at p. 10.[20] Under those circumstances, an objective observer could conclude that Vandergaw was an active member of the *Hernandez-Zamora* prosecution team even if she had not formally entered an appearance. Here, there was no basis for an objective observer to reach the same conclusion. Even before the case was assigned to Kindred, Vandergaw was prohibited from "provid[ing] advice, guidance, or suggestions to the team of AUSAs and law enforcement officials responsible for the investigation and prosecution, either directly or indirectly through another person." Heyman declaration at p. 1, ¶ 3. And, more significantly, Vandergaw's involvement after Kindred became presiding judge consisted only of two minor tasks performed entirely outside of court.[21]

b. Klugman's Involvement as Government Counsel and His Relationship with Vandergaw Did Not Require Kindred's Recusal.

AUSA Klugman did not have a personal relationship with Kindred that would have required Kindred's recusal based on Klugman's role as one of the prosecuting attorneys in *Keays*. Keays does not argue otherwise. Instead, Keays suggests that Klugman's relationship with Vandergaw, coupled with Vandergaw's undisclosed relationship with

[20] The AUSA with whom Kindred had the undisclosed personal relationship was not identified by name in the publicly filed copy of the district court's decision in *Hernandez-Zamora*. The government acknowledges that it was Vandergaw.

[21] Keays asserts, without support, that "the extent of [Vandergaw's] involvement [in Keays's case] cannot be determined." Dkt. #385 at p. 21. This is not accurate. The limits imposed on Vandergaw's involvement are thoroughly documented in this response, in interviews, and in declarations. *See, e.g.*, DEX 6; GEX L, M, N, and O; and Heyman declaration.

Kindred, somehow combined to create a recusal obligation. Dkt. #385 at p. 22. This speculative notion does not withstand scrutiny.

There is no evidence that Vandergaw and Klugman discussed with each other anything about the *Keays* case beyond that required by Vandergaw's role as a filter AUSA. Nor is there evidence that Vandergaw passed case-related information between Klugman and Kindred. In fact, as noted above, both Vandergaw and Klugman denied doing this. *See* page 22, *supra*. Even if there is reason to question their credibility, as is discussed below, evidence that Vandergaw and Klugman are not credible does not prove that any improper case-related communications occurred. Keays, who bears the burden here, has not established that Vandergaw served as a conduit of information between Judge Kindred and AUSA Klugman.

Nor is it logical to conclude that the fact of Klugman's romantic relationship with Vandergaw—they admittedly were romantically involved and cohabitating no later than January 2024 and throughout the *Keays* trial—would have influenced Kindred's case-related decisions, even had he known about their relationship (which Keays has not shown). On March 1, 2024, Kindred received a copy of the report of the Special Committee detailing the outcome of its investigation. This was before Kindred ruled on the parties' *in limine* motions in *Keays* on March 19, 2024, Dkt. #236, and April 10, 2024, Dkt. #281, and before trial began on March 25, 2024, Dkt. #250. Accordingly, Kindred well knew before making these rulings and before trial began that the die had been cast with respect to the

misconduct allegations against him. And Kindred well knew that the Ninth Circuit, not the USAO, would impose sanctions for his conduct. Any attempt to curry favor with Vandergaw, any other AUSA, or the USAO generally by ruling in the government's favor in Keays's case would do him no good in the investigation of his misconduct.

c. Evidence That Kindred, Vandergaw, and Klugman Were Untruthful About Matters Unrelated to Keays's Prosecution is Not a Basis for a New Trial.

Keays argues that he is entitled to a new trial because of evidence that Kindred, Vandergaw, and Klugman all have made false statements. Dkt. #385 at p. 22. The government does not dispute that there is evidence of such falsehoods. Indeed, it readily produced this evidence to defense counsel and has acknowledged its existence in this response. *See* pages 11-12, 15-16, 18-23, *supra*.[22]

But there is no evidence that Kindred, Vandergaw, or Klugman were dishonest *in connection with the prosecution of Keays* or that any falsehoods prejudiced Keays or influenced his case. The falsehood related to undisclosed personal relationships, not to the *Keays* case. And, ultimately, the jury relied on evidence concerning Keays's own conduct and governing law when it convicted Keays, not any false statements by the trial judge or

[22] In summary, Kindred admitted lying to the Special Committee and the Judicial Council; Vandergaw falsely described a purely professional relationship with Kindred in her initial statement to DOJ and falsely denied a romantic one; Vandergaw and Klugman denied being in a romantic relationship with each other in the summer and fall of 2023 despite compelling evidence to the contrary; Klugman's claim that he did not urge Vandergaw's promotion was contradicted by his supervisors; and the former United States Attorney and First Assistant United States Attorney expressed unflattering opinions about Vandergaw's and Klugman's characters for truthfulness.

either of these AUSAs that had nothing to do with this case. There is no authority known to government counsel for a criminal defendant to receive a windfall in the form of a new trial under these circumstances with no connection between his prosecution and the falsehoods, no showing of prejudice, and no reason to believe the jury's determination of guilt is infirm. Nor does this evidence of dishonesty show that there was a risk of Kindred being partial toward the government, which is required for recusal. Misconduct and dishonestly by Kindred, Vandergaw, and Klugman has been and still is being addressed in other fora. Kindred was forced to resign and still may be impeached; Vandergaw and Klugman are on administrative leave and evaluation of disciplinary action is ongoing. These measures make sense; a windfall for Keays does not.

d. Kindred's Misconduct Unrelated to *Keays* Did Not Require Recusal and Does Not Entitle Keays to a New Trial.

Keays claims that Kindred's overall misconduct, as documented in the Judicial Council's order, including falsehoods during the Ninth Circuit's investigation, requires a new trial. Dkt. #385 at pp. 19-20. Keays focuses on Kindred's "complete lack of judgment or respect for the integrity of the judicial process," *id*. at p. 19," and his "demonstrated lack of judgment and integrity," *id*. at p. 21. But the authority upon which Keays relies, 18 U.S.C. § 455(a) and the Due Process Clause, *id.* at pp. 19-20, and described in detail above at pages 27-31, addressees recusal arising from reasonable concern about judicial *impartiality in a particular case*, not judicial *misconduct*. *See In re Complaint of Jud. Misconduct*, 816 F.3d 1266, 1267 (9th Cir. 2016) ("Typically, the Supreme Court has only

mandated recusal where a judge has a direct, personal, or substantial connection to the outcome of a case or to its parties."). Keays never explains how Kindred's misconduct threatened partiality toward the government in his case. Nor does he identify any legal authority for the proposition that judicial misconduct unrelated to a particular case requires either recusal from or a new trial in that case.

Although Keays refers to the Ninth Circuit's "open investigation into his misconduct with employees of the U.S. Attorney's Office," Dkt. #385 at p. 19, the Special Committee's investigation did not involve the USAO. It was conducted in response to a misconduct complaint alleging that Kindred: "(1) created a hostile work environment for one or more judicial employees by subjecting them to regular discussions about his personal life, including conversations of a sexual nature, and ostracized a judicial employee who raised concerns about this behavior; (2) engaged in unwanted physical sexual conduct with a former judicial employee and engaged in unwanted verbal sexual conduct with that employee both during and after her clerkship; and (3) told individuals with knowledge of his potential misconduct to remain silent." *In Re Judicial Misconduct*, Case No. 22-90121 at pp. 2-3. It is true that one of Kindred's former clerks, who was at the heart of the investigation, became an AUSA after her clerkship ended, but she was a *victim* of Kindred's misconduct, and was not involved in Keays's case, either as a law clerk or as an AUSA. And, although the Judicial Council's order refers in several passages to Kindred's involvement with AUSA Vandergaw, identified as the "more senior AUSA," the Ninth

Circuit was concerned about Kindred's conduct, not Vandergaw's. And, in any event, Vandergaw's role in Keays's case was minimal and outside the scope of the prosecution, as described above, and did not involve Kindred, who likely was unaware that over a year and a half before the case was reassigned to him, Vandergaw had filtered potentially privileged materials as part of an internal USAO practice.

Keays's position—that Kindred's misconduct unrelated to Keays's own case requires overturning the jury's verdict and vacating his conviction—likely would require overturning criminal convictions and civil judgments in every case over which Kindred presided as a federal judge. This is because it appears that Kindred was engaged in misconduct throughout his tenure as a federal judge. *See In Re Judicial Misconduct*, Case No. 22-90121, p. 19 (finding in response to a complaint that Chief Judge Murgia identified in November 2022, that Kindred, who became a federal judge on February 18, 2020, had engaged in misconduct "over a span of approximately two and a half years"). But this blanket reasoning is inconsistent with the authority described above at page 29, holding that a recusal decision requires case-by-case consideration of facts and circumstances. *Carey*, 929 F.3d at 1104; *Holland*, 519 F.3d at 913.

To support his contention that Kindred's misconduct requires a new trial, Keays quotes a reference in the Ninth Circuit Judicial Council's order to Kindred's misconduct causing the public to question Kindred's "honesty, integrity, impartiality, temperament, and fitness to serve as a judge." Dkt. #385 at pp. 11, 13. But federal courts do not issue

advisory opinions, *see e.g.*, *North Carolina v. Rice*, 404 U.S. 244, 246 (1971), and there is no reason to believe that the Judicial Council meant to predetermine without consideration of facts and circumstances every challenge to the outcome in every case assigned to Kindred. Notably, the plaintiff in *Silverton Mountain Guides LLC v. U.S. Forest Serv.*, No. 3:22-CV-00048-SLG, 2025 WL 715842 (D. Alaska Feb. 21, 2025), who moved to overturn a judgment under Fed. R. Civ. P. 60(b) because Kindred did not recuse himself, also relied on passages in the Judicial Council's Order addressing concerns about Kindred's impartiality, Case No. 3:22-cv-00048-SLG, Dkt. #113 at pp. 2-3, 7, 10, 11, 19, but District of Alaska Chief Judge Gleason recognized that she, not the Judicial Council, had both authority and responsibility to determine whether Kindred's recusal was required in the case before her, and concluded that recusal it was not merited. 2025 WL 715842 at *4. This Court likewise should exercise its independent judgment and assess this case on its facts rather than a sweeping condemnation of Kindred's conduct.

2. Any Error in Kindred's Failure to Recuse Was Harmless.

a. Governing Law

Even where a defendant presents a meritorious claim that a district judge violated 18 U.S.C. § 455(a) by a failure to recuse, relief should be denied if the error is harmless.

United States v. Arnpriester, 37 F.3d 466, 468 (9th Cir. 1994); *United States v. Van Griffin*, 874 F.2d 634, 637 (9th Cir. 1989).[23]

The proper approach for determining whether a failure-to-recuse error in a criminal case is harmless is uncertain. In *Liljeberg*, 486 U.S. 847, a litigant in a civil case moved to vacate judgment pursuant to Fed. R. Civ. P. 60(b) based on an alleged erroneous failure to recuse under 18 U.S.C. § 455(a). The Supreme Court determined that there was error but explained that "[a] conclusion that a statutory violation occurred does not, however, end our inquiry." *Id.* at 862. The Court explained "that in determining whether a judgment should be vacated for a violation of § 455(a), it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process." *Id.* at 864.

But, in criminal cases, harmless error analysis is governed by Fed. R. Crim. P. 52(a), which provides that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." As the Supreme Court has explained, "Rule 52 is, in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions." *Bank of Nova Scotia v. United States*, 487 U.S. 250,

[23] In contrast, it appears that a failure to recuse that violates due process is not subject to harmless error analysis. *Greenway*, *supra*, 653 F.3d at 805.

255 (1988). Accordingly, in criminal cases, unlike civil cases, Rule 52(a), which demands that a federal court "must disregard" errors that do not affect substantial rights, applies.

Despite this, two Circuits, without recognition of a conflict with Rule 52(a), have assumed that the *Liljeberg* three-factor test controls in criminal cases. *See, e.g.*, *United States v. Orr*, 969 F.3d 732, 741 (7th Cir. 2020); *United States v. O'Keefe*, 128 F.3d 885, 892 (5th Cir. 1997). But the only thorough judicial analysis of the proper harmless error approach in criminal cases casts doubt on whether the *Liljeberg* factors apply. *United States v. O'Keefe*, 169 F.3d 281, 285 (5th Cir. 1999) (Dennis, J., dissenting) ("It may be cogently argued that *Liljeberg* does not create a special harmless error test at all . . . and certainly does not require or contemplate that . . . . those three equitable considerations, be applied in criminal cases.").

The Ninth Circuit has not addressed whether Rule 52(a) or the *Liljeberg* factors control in criminal failure-to-recuse cases. The government contends that the standard described in Fed. R. Crim. P 52(a) applies in criminal cases, not the *Liljeberg* factors. It asks that this Court rule accordingly.

b. Any Violation of 18 U.S.C. § 455(a) In Keays's Case Was Harmless Under Either Harmless Error Approach.

Even if this Court were to find that Kindred was required to recuse himself, whether because of his undisclosed relationship with Vandergaw despite her absence from the prosecution team and limited role; Klugman's role as government counsel coupled with his romantic relationship with Vandergaw; falsehoods by Kindred, Vandergaw, and Klugman

unrelated to Keays's case; or Kindred's misconduct as described in the Judicial Council order, the error would be harmless under either the Rule 52(a) standard or the *Liljeberg* three factor approach. This is because there is no more than a speculative connection between any claim of error and the *Keays* case itself. In other words, Keays has not explained how his case or its outcome was or could have been affected by any violation of 18 U.S.C. § 455(a).[24] Accordingly, he has not shown that "[a]ny error, defect, irregularity, or variance" has "affect[e]" his "substantial rights," as Rule 52(a) requires to avoid a harmless error determination.

Keays fares no better under the *Liljeberg* factors. Instructive here is a trio of cases arising from an analogous scandal involving case-related *ex parte* communications between a district court judge (and former federal prosecutor) and federal prosecutors, which communications prompted a misconduct investigation by a Special Committee and a Judicial Council reprimand of the judge. *United States v. Williams*, 949 F.3d 1056 (7th Cir. 2020); *United States v. Simon*, No. 2:16-CR-20077-SLD, 2023 WL 2725959 (C.D. Ill. Mar. 30, 2023); and *United States v. Gmoser*, No. 14-CR-20048-JES, 2020 WL 4756774 (C.D. Ill. Aug. 17, 2020), *aff'd*, 30 F.4th 646 (7th Cir. 2022).

[24] The various recusal errors that Keays alleges, whether considered individually or in combination, do not demonstrate an intolerably high threat of bias necessary to establish a violation of due process. *See, e.g.*, *In re Hartford Litig. Cases*, 642 Fed. App'x 733, 735 (9th Cir. 2016) (explaining that "unsubstantiated suggestions" of bias are insufficient to establish a due process violation).

In each case, a reviewing court applied the *Liljeberg* factors and determined that the judge's violations of 18 U.S.C. § 455(a) were harmless error. As part of the factor-by-factor analysis, discussed below, one critical fact supporting the harmless error findings was that the defendants seeking relief failed to identify discretionary decisions that the judge made during their trials (or, in one case, *Simon*, when denying suppression and recusal motions and sentencing the defendant) that another judge would have decided differently. *See United States v. Gmoser*, 30 F. 4th 646, 648 (7th Cir. 2022) ("Gmoser has not pointed to any other discretionary decision that a different trial judge might have handled differently."); *see also id.* ("*Williams* holds that, in the absence of a contestable discretionary choice, the district court's judgment stands."). The same is true here. Although Keays identifies two trial rulings with which he disagrees—Kindred's exclusion of evidence that Conoco recovered from Keays some of the stolen funds and his decision to give the jury a "deliberate ignorance" instruction, Dkt. #385 at pp. 7-9—both rulings were required by law and thus not discretionary. That Keays repaid some of the money he and Wright stole from Conoco after he was sued, had assets legally restrained, had his residence and storage units searched, and had been notified that he was under federal criminal investigation, Dkt. #271 at pp. 2-4, is not relevant to show that he lacked guilty knowledge, Fed. R. Evid. 401. It thus was inadmissible as a matter of law. Fed. R. Evid. 402. Because trial evidence supported a deliberate ignorance instruction and the requested instruction was a correct statement of the law, Dkt. #300 at pp. 5-8, the district court was

bound to give it. *See, e.g.*, *Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002) ("A party is entitled to an instruction about his or her theory of the case if it is supported by law and has foundation in the evidence."). Accordingly, Keays has not shown that Kindred made a discretionary decision that another federal judge might have handled differently.

As for the *Liljeberg* factors more generally:

Risk of injustice to the parties: Because Keays has not shown or even attempted to show actual bias or prejudice, the *Liljeberg* "risk of injustice to the parties" factor, 486 U.S. at 864, does not help him. *See Williams*, 949 F.3d at 1064 (finding that first *Liljeberg* factor favored the prosecution because "Williams [does not] argue that any particular ruling was prejudicial"); *Simon*, 2023 WL 2725959, at **10-11; *see also Silverton Mountain Guides LLC*, 2025 WL 715842, at *5 (no "risk of injustice" where "SMG has not shown how Judge Kindred's improper relationships with AUSAs who were unrelated to SMG's litigation and his lying about those relationship hindered SMG's ability to fully litigate its claims").

Further, vacating Keays's conviction and requiring retrial would prejudice the government, the crime victim, the witnesses, and the community. "A jury found [Keays] guilty, and [Keays] has not questioned the jury's impartiality." *Williams*, 949 F.3d at 1064. That "[t]he government would likely spend valuable time and money to retry this case thereby diverting resources from other cases," *id.* at 1065, also weighs against granting Keays a new trial. *See also Gmoser*, 2020 WL 4756774, at *14.

Risk that the denial of relief will produce injustice in other cases: Similarly, the *Liljeberg* "risk that the denial of relief will produce injustice in other cases" factor, 486 U.S. at 864, disfavors Keays given that the unique circumstances here are unlikely to be repeated, especially with the Judicial Council's misconduct finding and Kindred's resignation. *See Williams*, 949 F.3d at 1065 (where Special Committee and Judicial Council did an investigation into federal judge's *ex parte* communications with United States Attorney's Office and the subject judge was reprimanded and changed his practice, "helping reduce any future problems," the second *Liljeberg* factor "leans towards denying Williams's requested relief"); *see also Silverton Mountain Guides LLC*, 2025 WL 715842, at *5 (risk of injustice inquiry favors government where "vacating this case may have the deleterious effect of litigants attempting to relitigate all of Judge Kindred's closed civil cases in which the USAO represented a party regardless of any actual conflict of interest between the AUSAs who participated in the case and Judge Kindred").

Risk of undermining the confidence in the judicial process: Finally, denying Keays's new trial motion will not "risk of undermining the public's confidence in the judicial process." *Liljeberg*, 486 U.S. at 864. As explained above, there is no evidence that Vandergaw played any role in the *Keays* prosecution (other than as a filter attorney) or that she served as a conduit between Kindred and Klugman. Further, Keays offers no evidence of actual bias favoring the government or disfavoring him. *See Silverton Mountain Guides* LLC, 2025 WL 715842, at *6 (finding "no risk of undermining public

confidence" where party alleging harm from failure to recuse "provided no extrajudicial facts indicating that Judge Kindred was partial or biased against SMG in this particular case"). If anything, *granting* Keays a new trial would risk undermining the public's confidence in the court system, given his conviction by jury trial for serious offenses. *See Williams*, 949 F.3d at 1065 ("Here, the fact that Williams was convicted by a jury of his peers is significant."); *id.* at 1066 (explaining that "overturning a jury verdict based purely on the appearance of bias creates a risk that the public will lose confidence in the judicial process").

For all these reasons, even if Keays had been able to establish one or more grounds for recusal under 18 U.S.C. § 455(a) (which he has not), and even if this Court were to determine whether the error was harmless by applying the *Liljeberg* factors instead of Rule 52(a), Keays's new trial motion would fail.

3. Keays's Claim that He is Entitled to a New Trial Merely Because Kindred Resigned and This Court, as Successor, Did Not Observe Witness Testimony, is Meritless.

In his initial new trial motion, Keays did not dispute that he and his company were instrumental in the scheme to defraud Conoco. Dkt. #296 at pp. 2-3. Rather, he contended that Wright, who was the scheme's mastermind, was the only government witness to

establish Keays's guilty knowledge and that Wright was not worthy of belief. *Id.* at pp. 3-6.[25]

Now, in his supplemental new trial motion, Keays further argues that because this Court, as a "substitute judge" under Fed. R. Crim. P. 25, did not observe Wright's demeanor when he testified, and thus must "rule on the preexisting motion for a new trial based solely on a cold reading of the trial record," Dkt. #385 at 23, "[a] fair adjudication of the arguments in Mr. Keays' preexisting motion for a new trial would be impossible," *id.* at p. 24. Accordingly, Keays maintains that this Court simply should vacate Keays's conviction and grant a new trial under Fed. R. Crim. P. 33. *Id.*

This is a remarkable proposition. Keays asks this Court to overturn a jury verdict merely because Kindred has resigned and based on his (Keays's) bald assertions that Wright's credibility was necessary for conviction and that Wright's testimony was not believable. This Court should reject this contention for several reasons.

Most significantly, Keays's argument is contrary to controlling law. The Ninth Circuit recently explained that "we have held that a successor judge can resolve credibility issues on a defendant's motion for a new trial, even without seeing the witnesses testify." *United States v. Cloud*, No. 22-30173, 2024 WL 49808, at *2 (9th Cir. Jan. 4, 2024) (citing

[25] In its response to Keays's initial new trial motion, the government disputed this. It explained, among other things, that "the evidence of [Keays's] guilt in no way depends on Wright's testimony. Dkt. #300 at p. 2. The response described other trial evidence showing Keays's knowing participation in the charged fraud and money laundering schemes and conspiracies. *Id.* at pp. 2-4.

Carbo v. United States, 314 F.2d 718, 749-50 (9th Cir. 1963)). Although a successor judge will not have observed the demeanor of trial witnesses, "[c]redibility determinations involve more than an observation of witness demeanor, encompassing instead 'the over-all evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence.'" *Id.* (quoting *Carbo*, 314 F.2d at 749).

Further, before filing his supplemental motion, Keays did not take steps necessary to provide this Court with trial evidence required to consider Keays's new trial claims. Specifically, until June 30, 2025, Keays did not order the official reporter's transcripts from trial. Only some partial transcripts presently are available, those of opening statements, Dkt. #258 (defense opening); Dkt. #259 (government opening), and the cross and redirect examinations of co-defendant Wright, Dkt. #266 (cross-examination); #268 (cross-examination); #283 (cross-examination); #267 (redirect examination). These partial transcripts alone are insufficient for the Court to assess the merits of either Keays's initial new trial claims (which the government continues to oppose), including that a new trial is required because Wright's trial testimony was both unreliable and central to the government's case; or his supplemental claim, that this Court, as a successor judge, must simply accept at face value Keays's challenge to Wright's credibility and grant a new trial.[26]

[26] To assist the Court in resolving both Keays's initial new trial claim, Dkt. 296, and his supplemental claim, the government has ordered official trial transcripts. Dkt. #388 to #397. The defense now has done so as well. Dkt. #402 to #411.

In any event, the available record, although limited, refutes Keays's twin claims that (a) Wright's trial testimony was the only evidence of Keays's guilty knowledge and (b) his testimony was so badly discredited as to undermine the jury's verdict and require retrial. First, contrary to Keays's claim that Wright was the lone witness who testified about Keays's guilty knowledge, the government has explained that "the evidence of the defendant's guilt in no way depends on Wright's testimony." Dkt. #300 at p 2. According to the government's response to Keays's initial new trial motion:

> In particular, the evidence shows—completely independently of Wright's testimony—that Wright scripted emails for Keays to send to ConocoPhillips; that Keays copied those emails, which included specific and materially false statements about the preparation Keays had done and the good and services he could and would provide; that Keays changed his website to claim that it provided oilfield services that he knew it did and could not; that Keays submitted dozens of invoices claiming that he (not Forrest Wright or Spectrum Consulting) had provided those goods and services while knowing that he had not; that, despite doing no work at all Keays accepted millions of dollars in payments for those invoices, part of which he paid to Wright and part of which he converted to his own purposes; that, when ConocoPhillips started challenging the invoices, Keays lied to Linda Barnett during a recorded telephone conversation and then created and submitted fictitious timesheets for nonexistent employees who had never actually done work; and that Keays deleted most of the incriminating emails from his account and took down his website when it became clear that the scheme had been detected.

Id. at pp. 2-3.

"Although these incriminating facts are consistent with Wright's testimony, he is not the source of them. Rather, they were established by other witnesses and documentary evidence: emails, electronic communications, and financial records." *Id.* at p. 3. Keays

did not reply to the government's response and never has shown that these assertions in the government's response about the existence of independent incriminating evidence are inaccurate.

The presentence investigation report, relying on the government's discovery and trial evidence, also describes this independent incriminating evidence. PSR, Dkt. #323 at pp. 5-6 at ¶¶ 7-12. Although Keays complained that "[t]he factual section [in the presentence investigation report] appears to draw exclusively from the charging document(s) and/or Government's evidence, and makes no reference to other relevant trial evidence," PSR Addendum at p. 1, he did not dispute the accuracy of the description of the evidence, which came from testimonial and documentary sources other than Wright, that incriminated Keays. Even had the jury disbelieved Wright's testimony about Keays's knowledge of the scheme, it reasonably could have concluded from this independent evidence that Keays acted with guilty knowledge.

Further, even had Wright's testimony been the only proof of Keays's guilty knowledge, there is no reason for this Court (or any reviewing court) to reject the jury's verdict. In contrast to the incriminating evidence described above—which corroborated Wright's testimony that Keays knew of the fraud scheme—there was no defense evidence contradicting Wright. Although Keays asserts that he was "unaware of Mr. Wright's intent to defraud ConocoPhillips," Dkt. #385 at p. 8; that Keays "believed that . . . Mr. Wright's company, Spectrum Consulting, was acting as a subcontractor to provide the supplies and

perform the labor," *id.*; and was "unaware that Spectrum Consulting was not, in fact, providing the contracted goods and services," *id.* at p. 9, Keays neither testified at trial as to his purported lack of knowledge nor presented any defense witnesses to refute Wright's testimony that Keays was a knowing and willing participant in the fraud scheme.[27]

Ultimately, Keays's claim that he is entitled to a new trial is based solely on his contention that Wright's testimony was not worthy of belief. Keays describes Wright's "pathological lying" and explains that Wright lied to federal agents; that he abused drugs and alcohol, impairing memory; that Wright's cooperation agreement provided a motive to curry favor with the government; and that Wright lied to Keays, his own wife, and his father-in-law to further the fraud scheme. Dkt. #385 at pp. 9-10. In addition, according to

[27] Codefendant Wright acknowledged on cross-examination that at the outset Keays was unaware of the fraud scheme, but also maintained that Keays became fully aware of and involved in the scheme as it progressed. *See, e.g.*, Dkt. #266 at p. 18 (explaining that when he was interviewed by the FBI, "I made it very clear that Mr. Keays and I were the only ones that were part of any of the fraud"); Dkt. #268 at pp. 30 (describing Keays as making up the names and social security numbers of fictitious employees as part of fraud scheme); 32 (testifying that Keays knew that "material to be billed [to ConocoPhillips] did not exist"); 34 (explaining that although he (Wright) at "first did [keep from Keays the fact that the material did not exist], that's how the whole thing evolved because once he found out it didn't exist, it was essentially, for lack of a better term, it was game on at that point"); 48 ("And [Keays] was very well aware that wasn't true very soon after."); 68 (denying that he kept from Keays "the fact that the material did not exist"); 101 (adopting passages in plea agreement that incriminated Keays); 103-06 (confirming that Keays knew that invoices sent to ConocoPhillips were fraudulent and that Keays knowingly conspired); 146-47 (Keays "was aware of what we were doing."); 147 explaining that although Keays was at first hesitant about the scheme "[i]t didn't take long for him to see the dollar signs in what we could accomplish"); 148 (agreeing that Keays was "in on it"); Dkt. #283 at pp. 31 (describing providing a persuasive number of hours to Keays so Keays could bill ConocoPhillips for Keays's "nonexistent employees"); 100 (explaining that "Mr. Keays 100 percent knew that there was false information" in application submitted to ConocoPhillips for Keays's business to be a vendor).

Keays, there was trial "testimony by witnesses as well as the Government's own investigating agent that Forrest Wright is not trustworthy." *Id.* at p. 10.

Although a new trial can be granted "in exceptional cases in which the evidence preponderates heavily against the verdict," *Pimentel*, 654 F.2d at 545, there is nothing "exceptional" about the circumstances here. Wright was a cooperating accomplice with "impeachment baggage" who testified against his partner in crime at trial. This is routine. There is no reason to believe that the trial jury, which heard three days of cross-examination of Wright, was unable to reliably measure Wright's credibility along with other evidence presented to it. Keays does not allege that the jury received insufficient or erroneous instructions about its obligation to assess witness credibility. *See* Dkt. #291 at pp. 11-12 (instruction re witness credibility), 13 (instruction re Wright's credibility as an accomplice). Based on its assessment, and its consideration of all the evidence, the jury convicted Wright.

"It is not the courts' place to substitute our evaluations for those of the jurors." *Union Oil Co. of California v. Terrible Herbst, Inc.*, 331 F.3d 735, 743 (9th Cir. 2003) (reversing district court's grant of new trial in a civil case). Wright's testimony that Keays knew about the fraud scheme when he participated in it made perfect sense. A person with an innocent state of mind would not have altered his company's website to make it appear that it was involved in that business when it was not; sent fabricated e-mail messages to a corporate victim to misleadingly suggest that his company had expertise when it did not;

submit fabricated invoices for non-existent materials that never were provided and imaginary work performed by fictitious employees with fictitious social security numbers; or receive and divide with an accomplice millions of unearned dollars.

G. Conclusion

For the reasons stated above, the Court should deny Keays's supplemental new trial motion. There was no violation of either 18 U.S.C. § 455(a) or due process, and in any event, any error was harmless. Further Keays's claim that this Court must overturn the jury verdict's because it erroneously failed to reject Wright's testimony is meritless.

RESPECTFULLY SUBMITTED June 30, 2025, at Anchorage, Alaska.

WILLIAM M. NARUS
Acting United States Attorney for the District of Oregon

Steven D. Clymer
Special Attorney
Acting Under Authority Conferred by 28 U.S.C. § 515
United States Department of Justice

CERTIFICATE OF SERVICE
I hereby certify that on June 30, 2025, a true and correct copy of the foregoing was served electronically on defense counsel.

United States Attorney's Office