APPLICATION FOR NOMINATION TO THE ELEVENTH JUDICIAL CIRCUIT COURT

(Please attach additional pages as needed to respond fully to questions.)

DATE: March 14, 2013 Florida Bar No.: 0028065

GENERAL: Social Security No.: [redacted]

1. Name Robert J. Luck E-mail: RobLuck317@gmail.com

   Date Admitted to Practice in Florida: 2006

   Date Admitted to Practice in other States: 2008 (Alabama)

2. State current employer and title, including professional position and any public or judicial office.

   United States Attorney's Office for the Southern District of Florida, Assistant United States Attorney, Deputy Chief of the Major Crimes Section

3. Business address: James Lawrence King Federal Building, 99 Northeast Fourth Street

   City Miami County Miami-Dade State FL ZIP 33132

   Telephone (305) 961-9031 FAX (305) 530-7971

4. Residential address: [redacted]

   City [redacted]

   Since 2009 Telephone [redacted]

5. Place of birth: South Miami Hospital

   Date of birth: [redacted] Age: 33

6a. Length of residence in State of Florida: 28 years (1979--1997; 1999--2000; 2001--2004; 2005--2006; 2008--Present)

6b. Are you a registered voter? ☒ Yes ☐ No

   If so, in what county are you registered? Miami-Dade

7. Marital status: Married

   If married: Spouse's name [redacted]

   Date of marriage

   Spouse's occupation

   If ever divorced give for each marriage name(s) of spouse(s), current address for each former spouse, date and place of divorce, court and case number for each divorce.

   Not applicable.

8. Children

Name(s)	*Age(s)*	*Occupation(s)*	*Residential address(es)*
[redacted]			

9. Military Service (including Reserves)

Service	*Branch*	*Highest Rank*	*Dates*

Rank at time of discharge _____ Type of discharge _____

Awards or citations _____

HEALTH:

10. [redacted]

11a. [redacted]

11b. [redacted]

12a.

12b.

13.

14.

15. [redacted]

16.

17.

EDUCATION:

18a. Secondary schools, colleges and law schools attended.

Schools	*Class Standing*	*Dates of Attendance*	*Degree*
George Washington University	Not applicable	1997--1999	Not applicable
Broward Community College	Not applicable	1998	Not applicable
University of Florida	Highest Honors	1999--2000	Bachelor of Arts in Economics
University of Florida Levin College of Law	Magna Cum Laude (top 10)	2001--2004	Juris Doctor

18b. List and describe academic scholarships earned, honor societies or other awards.
Book Awards (highest grade in class) in Criminal Law, Constitutional Law, White Collar Crime, and Florida Administrative Law

Cypen Scholarship (academic scholarship awarded after the first year of law school)

Editor in Chief, Florida Law Review (journal of legal scholarship)

Florida Law Revew's Frank J. Maloney Award (for outstanding contribution as a first year member of the Review)

Member, University of Florida Board of Masters (student government's supreme court)

Member, Florida Blue Key (service society at the University of Florida)

Florida Bright Futures Scholarship (undergraduate scholarship at the University of Florida based on high school grades and SAT scores)

Presidential Academic Scholarship (undergraduate scholarship at George Washington University based on high school grades and SAT scores)

NON-LEGAL EMPLOYMENT:

19. List all previous full-time non-legal jobs or positions held since 21 in chronological order and briefly describe them.

Date	*Position*	*Employer*	*Address*
2000--2001	Legislative Correspondent	Senators Paul Coverdell and Jon Kyl	730 Hart Senate Office Building, Washington, D.C. 20510

PROFESSIONAL ADMISSIONS:

20. List all courts (including state bar admissions) and administrative bodies having special admission requirements to which you have ever been admitted to practice, giving the dates of admission, and if applicable, state whether you have been suspended or resigned.

Court or Administrative Body *Date of Admission*

Florida (2006); United States Court of Appeals for the Eleventh Circuit (2007); Alabama (2008)

LAW PRACTICE: (If you are a sitting judge, answer questions 21 through 26 with reference to the years before you became a judge.)

21. State the names, dates and addresses for all firms with which you have been associated in practice, governmental agencies or private business organizations by which you have been employed, periods you have practiced as a sole practitioner, law clerkships and other prior employment:

Position	*Name of Firm*	*Address*	*Dates*
Summer Associate	Kluger Peretz Kaplan & Berlin	201 South Biscayne Boulevard, Suite 1700, Miami, Florida 33131	2002
Summer Associate	Boies, Schiller &	401 East Las Olas	2003

	Flexner	Boulevard, Suite 1200, Fort Lauderdale, Florida 33301	
Law Clerk/Staff Attorney	Judge Ed Carnes, United States Court of Appeals for the Eleventh Circuit	One Church Street, Montgomery, Alabama 36104	2004--2005; 2006--2008
Law Clerk/Associate	Greenberg Traurig	333 Southeast 2d Avenue, Suite 4400, Miami, Florida 33131	2005--2006
Assistant United States Attorney	U.S. Attorney's Office for the Southern District of Florida	99 Northeast Fourth Street, Miami, Florida 33132	2008--Present

22. Describe the general nature of your current practice including any certifications which you possess; additionally, if your practice is substantially different from your prior practice or if you are not now practicing law, give details of prior practice. Describe your typical clients or former clients and the problems for which they sought your services.

For the last five years, I have worked as a federal prosecutor in the U.S. Attorney's Office in Miami. Right now, I am a deputy chief (first-line supervisor) in the Major Crimes Section of the Office, which handles smaller-scale narcotics, firearms, violent crime, and fraud cases. Before that, I was in the Economic Crimes Section, specifically assigned first to the Medicare Fraud Strike Force and then to the Securities and Investment Fraud Initiative. As part of the Economic Crimes Section, I investigated and prosecuted doctors, nurses, public employees, and company owners for paying kickbacks and defrauding the Medicare system, and accountants, chief executive officers of public companies, and businessmen for embezzling, manipulating the stock market, and running Ponzi schemes. Before my time in the U.S. Attorney's Office, I worked primarily on civil and criminal appeals as a law clerk for Judge Carnes and as an employee of the Greenberg Traurig law firm.

23. What percentage of your appearance in courts in the last five years or last five years of practice (include the dates) was in:

Court		Area of Practice	
Federal Appellate	10 %	Civil	10 %
Federal Trial	90 %	Criminal	90 %
Federal Other	____ %	Family	____ %
State Appellate	____ %	Probate	____ %
State Trial	____ %	Other	____ %
State Administrative	____ %		

State Other	_____ %			
	_____ %			
TOTAL	100 %		TOTAL	100 %

24. In your lifetime, how many (number) of the cases you have tried to verdict or judgment were:

Jury? 19 Non-jury? _____

Arbitration? _____ Administrative Bodies? _____

25. Within the last ten years, have you ever been formally reprimanded, sanctioned, demoted, disciplined, placed on probation, suspended or terminated by an employer or tribunal before which you have appeared? If so, please state the circumstances under which such action was taken, the date(s) such action was taken, the name(s) of any persons who took such action, and the background and resolution of such action.

No.

26. In the last ten years, have you failed to meet any deadline imposed by court order or received notice that you have not complied with substantive requirements of any business or contractual arrangement? If so, please explain in full.

No.

(Questions 27 through 30 are optional for sitting judges who have served 5 years or more.)

27a. For your last 6 cases, which were tried to verdict before a jury or arbitration panel or tried to judgment before a judge, list the names and telephone numbers of trial counsel on all sides and court case numbers (include appellate cases).

United States v. Niko Thompson, Eleventh Circuit Case No. 10-13653. For the United States, Gera Peoples ((305) 961-9314) and I. For Mr. Thompson, John Bergendahl ((305) 536-2168).

United States v. Douglas Newton, Southern District of Florida Case No. 11-60150-CR-Cooke. For the United States, H. Ron Davidson ((305) 961-9405) and I. For Mr. Newton, Miguel Caridad ((305) 533-4191).

United States v. Odalys Fernandez and Kelvin Soto, Southern District of Florida Case No. 12-20230-CR-Ungaro. For the United States, Daniel Bernstein ((305) 961-9169) and I. For Ms. Fernandez, Clay Kaeiser ((305) 548-4888) and Silvia Burgoa ((305) 858-3221). For Mr. Soto, Charles White ((305) 914-0160).

United States v. Isachi Gil, Eleventh Circuit Case No. 11-14736. I represented the United States. For Ms. Gil, Andres Quintero ((305) 444-3744).

United States v. Allen Pacquette, Southern District of Florida Case No. 12-20832-CR-Moreno. For the United States, Alexandra Hui ((305) 961-9066) and I. For Mr. Pacquette, Sam Randall ((305) 533-4176) and Helaine Batoff ((305) 533-4175).

United States v. Dominck Jagne, Southern District of Florida Case No. 12-20545-CR-

Martinez. For the United States, Benjamin Coats ((305) 961-9198) and I. For Mr. Jagne, Christy O'Connor ((305) 533-4184) and Aimee Ferrer ((305) 533-4182).

27b. For your last 6 cases, which were settled in mediation or settled without mediation or trial, list the names and telephone numbers of trial counsel on all sides and court case numbers (include appellate cases).

Not applicable.

27c. During the last five years, how frequently have you appeared at administrative hearings?
0 average times per month

27d. During the last five years, how frequently have you appeared in Court?
15 to 20 average times per month

27e. During the last five years, if your practice was substantially personal injury, what percentage of your work was in representation of plaintiffs? _____%
Defendants? _____%

28. If during any prior period you have appeared in court with greater frequency than during the last five years, indicate the period during which this was so and give for such prior periods a succinct statement of the part you played in the litigation, numbers of cases and whether jury or non-jury.

Not applicable.

29. For the cases you have tried to award in arbitration, during each of the past five years, indicate whether you were sole, associate or chief counsel. Give citations of any reported cases.

Not applicable.

30. List and describe the six most significant cases which you personally litigated giving case style, number and citation to reported decisions, if any. Identify your client and describe the nature of your participation in the case and the reason you believe it to be significant. Give the name of the court and judge, the date tried and names of other attorneys involved.

United States v. Crecencio Hernandez, Southern District of Florida Case No. 08-21054-CR-Zloch. I was counsel for the United States. Pat Hunt represented Mr. Hernandez. There was no trial; Mr. Hernandez pleaded guilty. Mr. Hernandez, as the captain of an old, rickety fishing boat, attempted to smuggle dozens of Dominican nationals into the United States illegally. As the boat approached Miami, Mr. Hernandez ran the boat aground on a sand bar and the boat tipped over. Six of the passengers couldn't swim and drowned as a result. This was one of the worst alien smuggling tragedies of the last five years.

United States v. Lydia Menocal and Ofelia Macia, Southern District of Florida Case No. 10-20116-CR-Ungaro. I was co-counsel for the United States with Roy Altman. Manny Gonzalez represented Ms. Menocal; Juan Carrera represented Ms. Macia. There was no trial; Ms. Menocal and Ms. Macia pleaded guilty. Ms. Menocal and Ms. Macia owned and operated Florida Language Institute, a language school in Miami authorized to approve student visas for foreign nationals studying in the United States. Ms. Menocal signed off on hundreds of forms approving student visas for foreign nationals without requiring that they attend class, subverting post-September 11 rules that were put in place to prevent manipulation of the student visa program by terrorists. At the time of the indictment, this was the largest student visa fraud case ever, and was mentioned by the Assistant Secretary for Homeland Security in testimony before the House of Representatives.

United States v. Junior Sylvin et al., Southern District of Florida Case No. 09-20264-CR-King. I was co-counsel for the United States with Russ Koonin. Robyn Blake, Michael Smith, Greg Samms, David Donet, Jeff Weinkle, Scott Sakin, Jan Smith, and Barry Greff represented the defendants. Junior Sylvin was the head of a gang that terrorized the Little Haiti neighborhood for years. Sylvin and three of his gang members were convicted at trial (May 2010) for running a drug trafficking organization. Another three pleaded guilty before trial. One was acquitted and another is still at large.

United States v. Rene De Los Rios, Southern District of Florida Case No. 10-20527-CR-Lenard. I was co-counsel for the United States with Joe Beemsterboer. Jose Quinon represented Dr. De Los Rios. Dr. De Los Rios was the medical director at two HIV infusion clinics that billed Medicare. Dr. De Los Rios prescribed expensive medications that he knew his patients did not need and were not receiving. As a result, Medicare was fraudulently billed $50 million. Dr. De Los Rios was convicted at trial (April 2011). He was sentenced to twenty years in prison, the second longest sentence ever for a doctor committing Medicare fraud in Miami.

United States v. Raul Diaz-Perera and Yenky Sanchez, Southern District of Florida Case

No. 11-20049-CR-Altonaga. I was co-counsel for the United States with Adam Schwartz. Marty Feigenbaum represented Mr. Sanchez; Robert Abreu represented Mr. Diaz-Perera. Mr. Diaz-Perera was a former manager at the Department of Children and Families, and supervised Mr. Sanchez . The two of them stole and sold the Medicare numbers of hundreds of DCF clients in order to facilitate a Medicare fraud scheme. Mr. Diaz-Perera pleaded guilty. Mr. Sanchez was convicted at trial (September 2011).

United States v. Juan Carlos Rodriguez, Southern District of Florida Case No. 12-20148-CR-Dimitrouleas. I was counsel for the United States. Lane Abraham represented Mr. Rodriguez. Mr. Rodriguez was an accountant who set up an investment company, MDN Financial. Mr. Rodriguez solicited his accounting clients, and their friends and family, to give him money to invest in stocks and bonds. Instead of investing the money, however, Mr. Rodriguez operated MDN Financial as a Ponzi scheme, using the money from new clients to pay back older clients, and pocketing the rest for himself. More than forty of his clients lost money, many their life savings, and were devastated when the scheme fell apart. Mr. Rodriguez pleaded guilty, and was sentenced above the sentencing guidelines to 84 months imprisonment. The case is being profiled by the CNBC television program, "American Greed."

31. Attach at least one example of legal writing which you personally wrote. If you have not personally written any legal documents recently, you may attach writing for which you had substantial responsibility. Please describe your degree of involvement in preparing the writing you attached.

I am attaching two examples. The first one, the fact and argument sections of an appellate brief, was written entirely by me but with some organizational suggestions by two colleagues. The second one, a memorandum of law, was written entirely by me.

PRIOR JUDICIAL EXPERIENCE OR PUBLIC OFFICE:

32a. Have you ever held judicial office or been a candidate for judicial office? If so, state the court(s) involved and the dates of service or dates of candidacy.

No.

32b. List any prior quasi-judicial service:

Dates	*Name of Agency*	*Position Held*

Types of issues heard:

32c. Have you ever held or been a candidate for any other public office? If so, state the office, location and dates of service or candidacy.

No.

32d. If you have had prior judicial or quasi-judicial experience,

(i) List the names, phone numbers and addresses of six attorneys who appeared

before you on matters of substance.

(ii) Describe the approximate number and nature of the cases you have handled during your judicial or quasi-judicial tenure.

(iii) List citations of any opinions which have been published.

(iv) List citations or styles and describe the five most significant cases you have tried or heard. Identify the parties, describe the cases and tell why you believe them to be significant. Give dates tried and names of attorneys involved.

(v) Has a complaint about you ever been made to the Judicial Qualifications Commission? If so, give date, describe complaint, whether or not there was a finding of probable cause, whether or not you have appeared before the Commission, and its resolution.

(vi) Have you ever held an attorney in contempt? If so, for each instance state name of attorney, approximate date and circumstances.

(vii) If you are a quasi-judicial officer (ALJ, Magistrate, General Master), have you ever been disciplined or reprimanded by a sitting judge? If so, describe.

BUSINESS INVOLVEMENT:

33a. If you are now an officer, director or otherwise engaged in the management of any business enterprise, state the name of such enterprise, the nature of the business, the nature of your duties, and whether you intend to resign such position immediately upon your appointment or election to judicial office.

Not applicable.

33b. Since being admitted to the Bar, have you ever been engaged in any occupation, business or profession other than the practice of law? If so, give details, including dates.

During the Fall of 2007 and Spring of 2008, I was an adjunct professor at Alabama State University.

33c. State whether during the past five years you have received any fees or compensation of any kind, other than for legal services rendered, from any business enterprise, institution, organization, or association of any kind. If so, identify the source of such compensation, the nature of the business enterprise, institution, organization or association involved and the dates such compensation was paid and the amounts.

As an adjunct professor at Alabama State University, each of the two semesters I

worked there I was paid between $2000 and $3000.

POSSIBLE BIAS OR PREJUDICE:

34. The Commission is interested in knowing if there are certain types of cases, groups of entities, or extended relationships or associations which would limit the cases for which you could sit as the presiding judge. Please list all types or classifications of cases or litigants for which you as a general proposition believe it would be difficult for you to sit as the presiding judge. Indicate the reason for each situation as to why you believe you might be in conflict. If you have prior judicial experience, describe the types of cases from which you have recused yourself.

None.

MISCELLANEOUS:

35a. Have you ever been convicted of a felony or a first degree misdemeanor?

Yes _____ No __X__ If "Yes" what charges? _____

Where convicted? _____ Date of Conviction: _____

35b. Have you pled nolo contendere or pled guilty to a crime which is a felony or a first degree misdemeanor?

Yes _____ No __X__ If "Yes" what charges? _____

Where convicted? _____ Date of Conviction: _____

35c. Have you ever had the adjudication of guilt withheld for a crime which is a felony or a first degree misdemeanor?

Yes _____ No __X__ If "Yes" what charges? _____

Where convicted? _____ Date of Conviction: _____

36a. Have you ever been sued by a client? If so, give particulars including name of client, date suit filed, court, case number and disposition.

No.

36b. Has any lawsuit to your knowledge been filed alleging malpractice as a result of action or inaction on your part?

No.

36c. Have you or your professional liability insurance carrier ever settled a claim against you for professional malpractice? If so, give particulars, including the amounts involved.

No.

37a. Have you ever filed a personal petition in bankruptcy or has a petition in bankruptcy been filed against you?

No.

37b. Have you ever owned more than 25% of the issued and outstanding shares or acted as an officer or director of any corporation by which or against which a petition in bankruptcy has been filed? If so, give name of corporation, your relationship to it and date and caption of petition.

No.

38. Have you ever been a party to a lawsuit either as a plaintiff or as a defendant? If so, please supply the jurisdiction/county in which the lawsuit was filed, style, case number, nature of the lawsuit, whether you were Plaintiff or Defendant and its disposition.

Robert Luck and Amica Mutual Insurance Company vs. B&L Service Company and Saint Saintvil, Broward County Court Case No. COSO03008174. I was the nominal plaintiff in a subrogation action by my insurance company against the defendant who hit my car. The case settled on the eve of trial.

39. Has there ever been a finding of probable cause or other citation issued against you or are you presently under investigation for a breach of ethics or unprofessional conduct by any court, administrative agency, bar association, or other professional group. If so, give the particulars.

No.

40. To your knowledge within the last ten years, have any of your current or former co-workers, subordinates, supervisors, customers or clients ever filed a formal complaint or formal accusation of misconduct against you with any regulatory or investigatory agency, or with your employer? If so, please state the date(s) of such formal complaint or formal accusation(s), the specific formal complaint or formal accusation(s) made, and the background and resolution of such action(s). (Any complaint filed with JQC, refer to 32d(v).

No.

41. Are you currently the subject of an investigation which could result in civil, administrative or criminal action against you? If yes, please state the nature of the investigation, the agency conducting the investigation and the expected completion date of the investigation.

No.

42. In the past ten years, have you been subject to or threatened with eviction proceedings? If yes, please explain.

No.

43a. Have you filed all past tax returns as required by federal, state, local and other government authorities?

Yes ☒ No ☐ If no, please explain. _____

43b. Have you ever paid a tax penalty?

Yes ☐ No ☒ If yes, please explain what and why. _____

43c. Has a tax lien ever been filed against you? If so, by whom, when, where and why?

No.

HONORS AND PUBLICATIONS:

44. If you have published any books or articles, list them, giving citations and dates.

Robert J. Luck & Michael L. Seigel, The Facts and Only the Facts, in Race to Injustice: Lessons Learned From the Duke Lacrosse Rape Case 3--26 (Michael L. Seigel ed., 2009)

Robert J. Luck, The Bad Habits of Legal Writers, and Why Young Lawyers Should Avoid Them, Young Lawyer, August 2008

45. List any honors, prizes or awards you have received. Give dates.

Director's Recognition, Federal Bureau of Investigation, September 2011, for outstanding prosecution skills and assistance to the FBI

Integrity Award, U.S. Department of Health and Human Services, Office of Inspector General, April 2012, for support for the mission of fighting health care fraud in South Florida

Award for Truly Exceptional Achievement & Merit, United States Attorney's Office, January 2013, for work with Investor Fraud Summit

46. List and describe any speeches or lectures you have given.

U.S. Attorney's Office representative at Key Largo Middle School Career Day (May 2009)

Lecturer at the National Advocacy Center on Heath Care Identity Theft Issues (May 2012)

Panelist at the Southern District of Florida Bench and Bar Conference on Health Care Fraud Issues (April 2012)

Panelist at the Southeast Regional Investor Fraud Summit (October 2012)

47. Do you have a Martindale-Hubbell rating? Yes ☐ If so, what is it?___No ☒

PROFESSIONAL AND OTHER ACTIVITIES:

48a. List all bar associations and professional societies of which you are a member and give the titles and dates of any office which you may have held in such groups and committees to which you belonged.

Committee to Organize the Bench and Bar Conference for the Southern District of Florida, appointed by Chief Judge Moreno, March 2011—May 2012

48b. List, in a fully identifiable fashion, all organizations, other than those identified in response to question No. 48(a), of which you have been a member since graduating from law school, including the titles and dates of any offices which you have held in each such organization.

Hugh Maddox Inn of Court, Montgomery, Alabama

Federal Bar Association, Montgomery, Alabama Chapter

48c. List your hobbies or other vocational interests.

Spending time with my children; following South Florida and Florida Gator sports teams; reading biographies

48d. Do you now or have you ever belonged to any club or organization that in practice or policy restricts (or restricted during the time of your membership) its membership on the basis of race, religion, national origin or sex? If so, detail the name and nature of the club(s) or organization(s), relevant policies and practices and whether you intend to continue as a member if you are selected to serve on the bench.

No.

48e. Describe any pro bono legal work you have done. Give dates.

In 2006 I, along with many others, helped research for and edit the Cuban American Bar Association's amicus curiae brief submitted to the en banc Eleventh Circuit Court of Appeals in United States v. Campa (the Cuban spies case).

For the last two years I have been a volunteer judge for the University of Miami School of Law's moot court for first year Appellate Advocacy students.

SUPPLEMENTAL INFORMATION:

49a. Have you attended any continuing legal education programs during the past five years? If so, in what substantive areas?

Yes. Legal ethics, trial advocacy and criminal sentencing.

49b. Have you taught any courses on law or lectured at bar association conferences, law school forums, or continuing legal education programs? If so, in what substantive areas?

Yes. Business law, health care fraud, investment fraud.

50. Describe any additional education or other experience you have which could assist you in holding judicial office.

While it doesn't show up on a resume for most law-related positions, in my working life I have waited tables, bagged groceries, processed traffic tickets in a court clerk's office, and licked envelopes as an intern. And in every one of those jobs, I have worked hard, had a good attitude, and gotten along well with customers/patrons/colleagues. I am not too-good or above any job, and I understand the importance of treating people with dignity and respect. I have carried those lessons with me as a lawyer and prosecutor, and I would as a judge too.

51. Explain the particular potential contribution you believe your selection would bring to this position.

There are five things I would contribute to the circuit court bench. First, a commitment to public service: Almost my entire working career has been dedicated to serving the public, and specifically the South Florida community. For me, being a judge is not a capstone to a long career or a way to gracefully retire from day-to-day practice. Instead, being a judge is part of my commitment to serve and better our community through the study and practice of law.

Second, I will bring youth and vigor to the bench. Being a judge is not a nine to five job. An effective judge is one who resolves disputes and tries cases without unnecessary delay. I am in my working prime and will bring the same hours, preparedness, and ethic

that I have since graduating law school to being a judge.

Third, like my father before me, I was born in Miami-Dade County and have lived here almost my entire life. I am part of the community, and share its hopes and fears. I have been a victim of its crimes, and a beneficiary of its warmth and opportunities. I will take that sense of compassion and need for justice with me to the bench.

Fourth, I've been fortunate throughout my career to have been exposed to a wide range of substantive law, and not just one or two civil or criminal niches. At the Greenberg Traurig firm, and then at my clerkship, Florida land use, real estate, contract, and tort issues came across my desk. And for the last five years, I've handled just about every kind of felony matter, including fraud, narcotics, gun, and violent crime cases. I will bring this with me to the Miami-Dade County circuit court bench, which hears any and all of these in a single day.

Fifth, I am not afraid to try cases. I have had trials that went on for months, and I have had trials that were no longer than a couple of days. I've had trials with thousands of pages of exhibits and others with only a handful of them. As a judge, where a case is ripe for trial, I will not put off for another day what can be done now, no matter how complicated the case is or how long the trial will take.

52. If you have previously submitted a questionnaire or application to this or any other judicial nominating commission, please give the name of the commission and the approximate date of submission.

Not applicable.

53. Give any other information you feel would be helpful to the Commission in evaluating your application.

REFERENCES:

54. List the names, addresses and telephone numbers of ten persons who are in a position to comment on your qualifications for judicial position and of whom inquiry may be made by the Commission.

Judge Edward E. Carnes

Chief Judge Federico A. Moreno,

Judge Ursula Ungaro

U.S. Attorney Wifredo A. Ferrer,

Dean R. Alexander Acosta

Jeffrey H. Sloman,

Joan Silverstein

Randy A. Hummel,

Daniel Bernstein

Ryan K. Stumphauzer

CERTIFICATE

I have read the foregoing questions carefully and have answered them truthfully, fully and completely. I hereby waive notice by and authorize The Florida Bar or any of its committees, educational and other institutions, the Judicial Qualifications Commission, the Florida Board of Bar Examiners or any judicial or professional disciplinary or supervisory body or commission, any references furnished by me, employers, business and professional associates, all governmental agencies and instrumentalities and all consumer and credit reporting agencies to release to the respective Judicial Nominating Commission and Office of the Governor any information, files, records or credit reports requested by the commission in connection with any consideration of me as possible nominee for appointment to judicial office. Information relating to any Florida Bar disciplinary proceedings is to be made available in accordance with Rule 3-7.1(l), Rules Regulating The Florida Bar. I recognize and agree that, pursuant to the Florida Constitution and the Uniform Rules of this commission, the contents of this questionnaire and other information received from or concerning me, and all interviews and proceedings of the commission, except for deliberations by the commission, shall be open to the public.

Further, I stipulate I have read, and understand the requirements of the Florida Code of Judicial Conduct.

Dated this 14th day of March, 2013.

Robert Cudd
Printed Name

Signature

(Pursuant to Section 119.071(4)(d)(1), F.S.), . . . *The home addresses and telephone numbers of justices of the Supreme Court, district court of appeal judges, circuit court judges, and county court judges; the home addresses, telephone numbers, and places of employment of the spouses and children of justices and judges; and the names and locations of schools and day care facilities attended by the children of justices and judges are exempt from the provisions of subsection (1), dealing with public records.*

FINANCIAL HISTORY

In lieu of answering the questions on this page, you may attach copies of your completed Federal Income Tax Returns for the preceding three (3) years. Those income tax returns should include returns from a professional association. If you answer the questions on this page, you do not have to file copies of your tax returns.

1. State the amount of gross income you have earned, or losses you have incurred (before deducting expenses and taxes) from the practice of law for the preceding three-year period. This income figure should be stated on a year to year basis and include year to date information, and salary, if the nature of your employment is in a legal field.

   See attached tax returns.

2. State the amount of net income you have earned, or losses you have incurred (after deducting expenses but not taxes) from the practice of law for the preceding three-year period. This income figure should be stated on a year to year basis and include year to date information, and salary, if the nature of your employment is in a legal field.

3. State the gross amount of income or losses incurred (before deducting expenses or taxes) you have earned in the preceding three years on a year by year basis from all sources other than the practice of law, and generally describe the source of such income or losses.

4. State the amount of net income you have earned or losses incurred (after deducting expenses) from sources other than the practice of law for the preceding three-year period on a year by year basis, and generally describe the sources of such income or losses.

JUDICIAL APPLICATION DATA RECORD

The judicial application shall include a separate page asking applicants to identify their race, ethnicity and gender. Completion of this page shall be optional, and the page shall include an explanation that the information is requested for data collection purposes in order to assess and promote diversity in the judiciary. The chair of the Commission shall forward all such completed pages, along with the names of the nominees to the JNC Coordinator in the Governor's Office (pursuant to JNC Uniform Rule of Procedure).

(Please Type or Print)

Date: March 14, 2013

JNC Submitting To: Eleventh Circuit Judicial Nominating Commission

Name (please print): Robert J. Luck

Current Occupation: Assistant United States Attorney

Telephone Number: (305) 961-9031 Attorney No.: 0028065

Gender (check one): ☒ Male ☐ Female

Ethnic Origin (check one):
- ☒ White, non Hispanic
- ☐ Hispanic
- ☐ Black
- ☐ American Indian/Alaskan Native
- ☐ Asian/Pacific Islander

County of Residence: Miami-Dade

FLORIDA DEPARTMENT OF LAW ENFORCEMENT

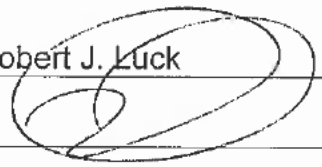
DISCLOSURE PURSUANT TO THE
FAIR CREDIT REPORTING ACT (FCRA)

The Florida Department of Law Enforcement (FDLE) may obtain one or more consumer reports, including but not limited to credit reports, about you, for employment purposes as defined by the Fair Credit Reporting Act, including for determinations related to initial employment, reassignment, promotion, or other employment-related actions.

CONSUMER'S AUTHORIZATION FOR FDLE
TO OBTAIN CONSUMER REPORT(S)

I have read and understand the above Disclosure. I authorize the Florida Department of Law Enforcement (FDLE) to obtain one or more consumer reports on me, for employment purposes, as described in the above Disclosure.

Printed Name of Applicant: Robert J. Luck

Signature of Applicant: 

Date: March 14, 2013

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 11-14736-BB

United States of America,

Appellee,

- versus -

Isachi Gil,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES

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Statement of the Issues

1. Whether there was sufficient evidence to support Gil's convictions.

2. Whether the district court erred in failing to strike the testimony of government witness Mercedes Puche.

3. Whether the district court erred in admitting into evidence records from eleven home health agencies and Florida's SunPass toll system.

4. Whether the district court erred in finding that the government did not intimidate defense witnesses Antolin Maury and Ariel Linares.

5. Whether the district court erred in admitting into evidence the judgment of conviction of Adela Quintero pursuant to Federal Rule of Evidence 806.[1]

Statement of the Case and Facts

1. Medicare and Home Health Care Agencies

"Medicare is a federal health insurance program that provides low cost health care to those that are 65 years and older . . . ." (DE194:28.) The Medicare program is separated into different parts; among other things, Part A covers the cost of inpatient medical needs, like hospital and home health care services. (DE194:28.)

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[1] The government reordered the issues in its brief.

Home health care is provided by Medicare when a beneficiary "has some type of a condition that they need a nurse to come to their home and provide care to them." (DE194:29.) For example, a Medicare beneficiary may get home health care if he or she needs a nurse "to come and administer medications" and "injections like a diabetic patient that needs insulin injections." (DE194:30.)

Medicare, however, does not pay for a nurse to come to every beneficiary's home. The purpose of the home health care program is to avoid paying for around-the-clock medical services, like at a hospital, for a patient who only needs to see a nurse once or twice a day. (DE194:29.) From Medicare's perspective, it is less expensive to have a beneficiary who needs limited services stay at home, with a nurse visiting periodically, then to have the beneficiary stay at a hospital for days on end.

There are, however, strict requirements for Medicare beneficiaries to qualify for home health services: (1) the beneficiary must have a medical need for a nurse to visit the beneficiary's home; (2) the beneficiary must be under the care of a physician who prescribes home health services; (3) the physician, in coordination with the home health agency, must establish a "plan of care" describing what service the agency is going to provide to the beneficiary; and (4) the beneficiary must be "homebound." (DE194:29.)

In other words, the Medicare beneficiary must be suffering from something that requires nursing services, like diabetes, or must need regular injections or intravenous medication. (DE194:30.) And the beneficiary must be homebound such that he or she "has a condition that it makes it difficult for them to leave the home," that is, to leave the home "requires quite an effort on them physically." (DE194:30–31.) On the other hand, Medicare beneficiaries that can drive and "do their own grocery shopping or those types of things" are not homebound. If any of these requirements are missing—if the Medicare beneficiary does not have a medical need for nursing care or is not homebound—then Medicare will not pay for home health care. (DE194:30–31.)

Together, it is the doctor and the nurse at the home health agency that determine whether a beneficiary meets the requirements for in-home care. First, a doctor will give a beneficiary a prescription for home health care. (DE194:31, 33.) Then, a nurse will visit the patient and fill out an assessment of the patient's well-being called an OASIS form. (DE194:33.) The assessment conducted by the nurse "is a comprehensive head to toe, like a lengthy physical." (DE194:33) The nurse who fills out the OASIS form will look at the beneficiary's vision, cardio status, respiratory status, and ask the beneficiary questions about how he or she gets dressed every day, the ability to walk, and feed oneself. (DE194:33) The

purpose of this head-to-toe OASIS assessment is to determine the beneficiary's in-home medical needs, the services that will be provided (if any), and whether the beneficiary needs an aide to "come into the home to assist with the bathing" and dressing. (DE194:33–34.) The completed OASIS form is then sent to state and federal regulators for recordkeeping. (DE194:78–79.)

If, after the OASIS assessment, it is determined that the beneficiary has a medical need for the services and is homebound, then the home health agency will send out one of its nurses to perform services, and bill Medicare. (DE194:40–41.) For a diabetic beneficiary, the nurse will visit the beneficiary two, three, or even four times a day depending on what the doctor prescribed. (DE194:41.)

2. A Typical Home Health Visit

For a diabetic beneficiary who qualifies for home health services, here's how a typical in-home visit works:

> The nurse is going to go in and assess the patient, ask them how they are feeling, ask them how their nutrition is, because it is very important for a diabetic to be eating properly.
>
> [The nurse] will also be completing and checking [the beneficiary's] blood sugar, you know, using a machine to make sure that the blood sugar isn't too high or too low. If it is too high, obiously the patient will need a shot. If it is too low, then the nurse may not administer that medication, might need to call a physician depending on what the level is, but then administer the shot.

(DE194:41.) The nurse, in addition to the physical examination, will also fill out a number of documents for each in-home visit with the beneficiary: "nursing notes"; the "weekly visit log"; and the "daily blood sugar insulin log." (DE194:41–47.)

The nursing notes describe the condition of the beneficiary during the visit, document his or her vital signs and symptoms and medical complaints, and explain the treatments that the nurse provided on that visit. (DE194:42–43.) The weekly visit log records the date and exact time that the nurse began the visit with the beneficiary, and when the visit ended. (DE194:45–46.) On the daily blood sugar insulin log, the nurse documents the date, time, and number of insulin units that the beneficiary received, the beneficiary's blood sugar at the time the shot was received, and on what part of the body the beneficiary was injected (arm, stomach, leg, etc.).[2] (DE194:47.)

The in-home visits, in sum, take a lot of time to perform. (DE189:11–15.) The nurse has to: drive to the beneficiary's home, often during rush hour; knock on the door and wait for the beneficiary to answer, which can take a while because of his or her condition; bring to the visit all the equipment needed to run tests and inject the beneficiary; take the beneficiary's vital signs; make all the equipment

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[2] This last part is important to avoid over-injecting in one spot on the beneficiary's body and causing an infection. (DE194:48.)

sterile in order to conduct the examination and inject the patient properly; draw the insulin out of the bottle; find the appropriate injection site; wait a little bit after the injection to make sure the beneficiary responded appropriately; discuss with the beneficiary how to inject without help so that one day he or she will not need in-home care; fill out the nursing notes, and weekly log, and insulin log; make sure all of the information on the notes is accurate because another nurse seeing the beneficiary will have to rely on them; and then drive to the next beneficiary's home. (DE189:12–15).

Given all this work, and the time it takes to see and treat a beneficiary properly, one of the defendant's nurse-witnesses testified that no more than 16 or 17 visits could be conducted in a single day. (DE223:181–83.)

3. Ideal Home Health Care, Megamed Home Health Care, and Isachi Gil

Between March 2007 and July 2009, Ideal Home Health and Megamed Home Health Care were two home health companies that billed Medicare for home health services provided to beneficiaries. (DE194:55–64; GX1; GX2.) The defendant, Isachi Gil, was a nurse who was paid by both companies to conduct visits at beneficiaries' homes. (GX15; GX33; GX34; GX35.)[3]

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[3] Ideal and Megamed actually paid the defendant's company, Gil Nursing Services.

Ideal and Megamed billed Medicare for in-home nursing visits for the following beneficiaries: Mercedes Puche; Inocencio Baro Galvez; Jose Cuan; Luis Garcia; and Teresa Rodriguez. (DE194:57–64; GX1; GX 2.) For some of the in-home nursing visits for these Medicare beneficiaries, Gil completed the OASIS forms, nursing notes, weekly logs, and daily blood sugar insulin logs indicating that the beneficiaries qualified for home health services and that Gil had injected them with insulin. (GX 3–GX12.) These beneficiaries, however, did not qualify for in-home nursing services (they were not diabetic, and not homebound), and Gil did not inject them with insulin as she said on the nursing notes and weekly logs and daily blood sugar insulin logs.

4. [redacted] (Counts One, Three, Nine, and Ten)

Gil did not inject beneficiary [redacted] with insulin and did not visit [redacted] home, as she represented to Ideal on her nursing notes, and weekly logs, and daily blood sugar insulin logs, for the following reasons. First, [redacted] was not diabetic. (DE182:138.) Her blood sugar results from May through October 2008—143 and 149—were not consistent with the higher blood results reported by Gil on [redacted] nursing notes and daily blood sugar insulin logs from the same time period. (DE:182:133–37.) Moreover, in December 2008, when [redacted] was hospitalized to treat abdominal

pain and shortness of breath, she took a medication, Solumedrol, that has the effect of raising a patient's blood sugar upwards of 300. (DE182:138; DE183:68–69.) [redacted] who did not take any insulin for the two weeks she was in the hospital (GX30),[4] had blood sugar readings well below 300. Her blood sugar was 119, 89, 128 and 96, which would have been medically impossible if [redacted] was a diabetic requiring three-times-a-day insulin injections. (DE182:141–43; DE183:68–89.)

Second, for many of the dates that Gil signed on [redacted] nursing notes and weekly logs and daily blood sugar insulin logs that Gil was conducting visits and injecting [redacted] with insulin, Gil was actually in Panama. In other words, Gil was out of town when she reported to Ideal, the home health company, and Ideal reported to Medicare, that she was visiting [redacted] home in Miami-Dade County and injecting her with insulin. On 45 different days, Gil signed nursing notes and daily blood sugar insulin logs stating that she visited [redacted] when in fact she was in Panama, according to her passport and Immigration and Customs Enforcement records. (GX41.)

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[4] While [redacted] was in the hospital, neither she nor her family mentioned that she was diabetic or taking insulin three-times-a-day. (DE182:138–41; DE183:65, 69.)

Third, during the Spring 2008 semester (January to April), Gil took a nursing course at Florida International University during the same days and times that she was reporting to Ideal that Gil was conducting nursing visits at [redacted] home and injecting her with insulin. (GX36; GX4; DE187:58.) Gil received an "A" in the nursing course, and missed no more than two classes. (DE187:58–59.) On 3 days, Gil reported to Ideal that she was visiting [redacted] home and injecting her with insulin while simultaneously attending class at FIU. (GX46.)

Fourth, during Summer 2008, Gil, as part of her nursing classes, had an internship with a local doctor three days a week at the same times and dates she was reporting to Ideal that she was conducting nursing visits at [redacted] home and injecting her with insulin. (GX36; DE187:119; GX4.) The clinical rotation internship was for nine weeks from May through July 2008, three days a week, for eight hours each day. (GX36; DE187121–23.) On 24 days, Gil reported on the nursing paperwork that she was at [redacted] home when she was actually at her internship. (GX44.)

5. [redacted] (Counts Two, Four, Eleven, and Twelve)

Gil did not inject beneficiary [redacted] with insulin and did not visit [redacted] home, as she represented to Ideal on her nursing notes, and weekly

logs, and daily blood sugar insulin logs, for the following reasons. First, [redacted] was not homebound, and therefore did not qualify for home health services from a nurse. She was able to groom herself without help; dress herself; bathe herself; go to the bathroom by herself; walk by herself; feed herself; launder her clothes; and shop for herself. (DE194:91–96.) When Gil was her nurse, [redacted] would walk up and down the three flights of stairs to her apartment, and walk or take the bus by herself to her son's apartment and to the doctor's office. (DE194:100–01; DE186:72.)

Second, [redacted] was not diabetic. She never complained to her treating physician about any of the symptoms typically associated with diabetes. (DE186:63–65.) Moreover, [redacted] blood and urine tests from 2006, 2007, 2008, and 2009—the same time that Gil was assigned as [redacted] nurse—show that she did not have diabetes and did not need twice daily insulin injections. (DE186:66–69.)

Third, Gil never injected [redacted] with insulin. (DE186:98–99.) Gil came to [redacted] home once a week and asked [redacted] to sign all the entries on the weekly log for the entire week, on that one day. (DE186:97.)

Fourth, for many of the dates that Gil signed on [redacted] nursing notes and weekly logs and daily blood sugar insulin logs that Gil was conducting visits

and injecting [redacted] with insulin, Gil was actually in Panama, the Domincan Republic, and Mexico. On 53 different days, Gil signed nursing notes and daily blood sugar insulin logs stating that she visited [redacted] when in fact she was in Panama, the Domincan Republic, and Mexico, according to her passport and ICE records. (GX41.)

Fifth, during the Summer and Fall 2007 and Spring 2008 (May 2007 through April 2008), Gil took nursing classes at FIU during the same days and times that she reported to Ideal that she visited [redacted] home and injected her with insulin. (GX36; GX3; DE187:54, 58, 86–87.) Gil attended these classes on a regular basis, missing no more than two during the Fall 2007 and Spring 2008 semesters. (DE187:54–59, 88–91.) On 19 different days, Gil reported to Ideal that she was visiting [redacted] home and injecting her with insulin when she was actually attending classes. (GX45; GX46.)

Sixth, during the Summer 2008 semester, Gil had an internship with a local doctor while she was reporting to Ideal that Gil was conducting nursing visits at [redacted] home and injecting her with insulin. (GX36; DE187:119; GX3.) On 12 days, Gil reported on the nursing notes and daily blood sugar insulin logs that she was at [redacted] home when she was actually at her internship. (GX44.)

Seventh, Gil made nursing visits to the homes of other Medicare beneficiaries while she was reporting to Ideal that she was conducting nursing visits at [redacted] home and injecting her with insulin. (GX3; GX11; GX50; GX26.) Between April 2007 and July 2009, Gil was paid by thirteen separate home health companies for conducting nursing services, sometimes working for seven companies at the same time. (GX47; GX49; DE182:60–71.) And she would submit paperwork to Ideal and Megamed showing that she had injected a beneficiary with insulin when in fact she was conducting a nursing visit with another beneficiary at the same time. For example, on February 21, 2009, at the same time, between 3:00 p.m. and 3:30 p.m., Gil signed nursing notes representing that she was visiting Ideal beneficiary [redacted] Megamed beneficiary [redacted] (GX3:IG05089; GX11:IG12522; GX50; GX 26.) Gil signed the nursing notes for the same three patients for the same times (always around 3:00 pm) on February 23, 2008, February 25, 2008, and February 27, 2008. (GX 26.)

Eighth, Gil was driving in her car when she was reporting to Ideal that she was conducting nursing visits at [redacted] home and injecting her with insulin. From 2004 through 2011, Gil had a SunPass transponder that paid electronically the tolls on the roads in Florida. (DE183:76–84; GX54.) The transponder

recorded the date and time that the vehicle passed through the toll. (DE183:77; GX54.) On 49 different days, Gil's SunPass transponder went through Florida tolls at the exact time that Gil wrote on the nursing notes and weekly logs and daily blood sugar insulin logs that she was injecting [redacted] with insulin. (GX54A; DE183:93–98.)

6. [redacted] (Counts Seven and Eight)

Gil did not inject beneficiary [redacted] with insulin and did not visit [redacted] home, as she represented to Ideal on her nursing notes, and weekly logs, and daily blood sugar insulin logs, for the following reasons. First, for many of the dates that Gil signed on [redacted] nursing paperwork that Gil was conducting visits and injecting [redacted] with insulin, Gil was actually out of the country. For example, on November 16, 2008, Gil signed nursing notes, and completed entries on the weekly log and daily blood sugar insulin log, showing that she had conducted a nursing visit at [redacted] ome and injected him with insulin while she was actually in Panama. (GX5:IG00689–90, IG00697–98; GX17; GX18; GX41.)

Second, Gil was conducting nursing visits in the homes of other Medicare beneficiaries while she was reporting to Ideal that she visited [redacted] home and injected him with insulin. (GX5; GX11; GX13; GX50; GX26.) For example,

on the morning of February 21, 2009, between 6:45 a.m. to 7:24 a.m., at the same time Gil claimed to be conducting a nursing visit with [redacted] Gil signed nursing notes representing that she was at the home of Megamed beneficiary [redacted] (GX5:IG01073; GX11:12522.) That afternoon, between 3:43 p.m. and 4:30 p.m., while Gil claimed to be conducting a nursing visit with [redacted] Gil signed nursing notes representing that she was at the homes of two other Medicare beneficiaries: Megamed client [redacted] and CareFlorida client [redacted] (GX5:IG010173; GX13:IG12989–90; GX50.) This happened on at least three other days, where Gil was in the homes of one or more other beneficiaries when she represented to Ideal that she injected [redacted] with insulin. (GX26.)

7. [redacted] **(Count Thirteen)**

Gil did not inject beneficiary Teresa Rodriguez with insulin and did not visit [redacted] home, as she represented to Ideal on her nursing notes, and weekly logs, and daily blood sugar insulin logs. For example, on January 9, 2009, Gil completed a detailed thirteen page OASIS recertification form representing that [redacted] was still homebound and in need of home service. (GX7:IG02119–31.) The OASIS form asked Gil to observe and assess [redacted] pain symptoms, heart functions, and ability to dress, bathe, and go to

the bathroom by herself (among other things), and to analyze her findings. (GX7:IG02119–31.) Gil, however, was not at [redacted] home that day; she was in Panama. (GX17; GX18; GX41.)

There were other days that Gil signed nursing notes representing that she conducted a nursing visit at [redacted] home and injected her with insulin, when in fact Gil was out of town. On January 18 and 19, 2009, Gil said she had visited [redacted] when in fact she was in Panama and Mexico, according to her passport and ICE records. (GX7:IG02277–78; GX17; GX18; GX41.)

8. [redacted] (Count Six)

Gil did not inject beneficiary [redacted] with insulin and did not visit [redacted] home, as she represented to Megamed on her nursing notes, and weekly logs, and daily blood sugar insulin logs, for the following reasons. First, [redacted] was not homebound, and did not qualify for home health services from a nurse. In 2009, when Gil was his nurse, [redacted] almost always injected himself with insulin, and he told Gil that he had injected himself with insulin. (DE161:46–47, 52.)[5] [redacted] was able to go to the store by himself and drive

[5] There were three or four exceptions when Gil injected [redacted] with insulin. (DE161:52)

without help, and he told Gil this as well. (DE161:52–53.) [redacted] was able to dress himself, bathe himself, and walk without help. (DE161:53–54.)

Second, while Gil represented on the nursing paperwork that she had conducted nursing visits at [redacted] home and injected him with insulin twice a day, every day (GX12:IG12620–753), in fact Gil came to Mr. Garcia's home only two times per week. (DE161:51.) Gil was never at [redacted] home two times each day; Gil never came there in the evening, as she represented on the nursing notes. (DE161:51–52.) Gil would give [redacted] a blank copy of the weekly log for him to sign for the entire week. (DE161:49–51.)

Third, for some of the days that Gil signed [redacted] nursing notes and weekly logs and daily blood sugar insulin logs that Gil was conducting visits and injecting [redacted] with insulin, Gil was actually in Panama. On 6 different days, Gil signed nursing notes and daily blood sugar insulin logs stating that she visited [redacted] when in fact she was in Panama, according to her passport and ICE records. (GX41.)

Fourth, Gil was conducting nursing visits in the homes of other Medicare beneficiaries at the same time that she was reporting to Megamed that she was conducting nursing visits at [redacted] home and injecting him with insulin. (GX12; GX6; GX50; GX26.) For example, on the morning of February 21, 2009,

between 7:34 a.m. and 8:22 a.m., while Gil claimed to be conducting a nursing visit with [redacted] Gil signed nursing notes representing that she was at the home of CareFlorida beneficiary [redacted] (GX12:IG12749–50; GX50.) That afternoon, between 5:51 p.m. and 7:00 p.m., while Gil claimed to be conducting a nursing visit with [redacted] Gil signed nursing notes representing that she was at the home of Ideal beneficiary [redacted] (GX12:IG12749–50; GX6:IG02767–68.) This happened on three other days, where Gil was in the home of another beneficiary when she represented to Megamed that Gil was injecting [redacted] with insulin. (GX26.)

Sixth, Gil was driving in her car at the same time she was reporting to Megamed that she was conducting nursing visits at [redacted] home and injecting him with insulin. On 10 different days, Gil's SunPass transponder went through Florida tolls at the exact time that Gil wrote on the nursing notes and weekly logs and daily blood sugar insulin logs that she was at [redacted] home on a nursing visit. (GX54A; DE183:93–98.)

9. <u>The Indictment</u>

The grand jury returned a superseding indictment against Gil on February 15, 2011, charging her in counts one and three with committing health care fraud, in violation of 18 U.S.C. § 1347, as part of the $20,600 and $21,810 bills that

Ideal sent Medicare for [redacted] home health services. (DE63:5–7.) In counts two and four, Gil was charged with committing health care fraud as part of the $14,600 bills that Ideal sent Medicare for [redacted] home health services. (DE63:5–8.) In count six, Gil was charged with committing health care fraud as part of the $14,630 bill that Megamed sent Medicare for [redacted] home health services. (DE63:5–8.)[6]

For counts seven through thirteen, Gil was charged with making false statements on the nursing paperwork for [redacted] and [redacted] when Gil was out of town. (DE63:8–12.) And in count fourteen, Gil was charged with making a false statement to the FBI when she said that she personally cared for [redacted] on December 19, 2009, when Gil was out of town. (DE63:13.)

10. <u>The Verdict and Sentence</u>

The trial concluded after eleven days. (DE193; DE184.) The jury found Gil guilty of counts one through four and six through thirteen—all of the health care fraud and making false statements on health care documents charges—and not guilty of count fourteen—the § 1001 false statement charge. (DE168.) The

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[6] Count five was dismissed before trial. (DE87.)

district court sentenced Gil to 43 months imprisonment for each count, to run concurrently. (DE217:43–44.)

Argument

I. The Government Presented Sufficient Evidence That Gil Committed Health Care Fraud And Made False Statements On Health Care Related Documents.

As to her challenge to the sufficiency of the evidence, Gil argues that there was a missing link in the government's case. Gil contends that the government assumed that whenever she filled out the nursing notes and daily blood sugar insulin logs, "she was representing that she was the individual who actually performed the patient visit." (BlueBr.:24.) However, Gil explains, her signature on the nursing notes and daily blood sugar insulin logs "merely represent[ed] that service [was] rendered to a patient and that the individual who signs the form is the person who completed the form, not necessarily the person who provided the service." (BlueBr.:24.) In essence, Gil is arguing about materiality: it is not important who signs the nursing notes and daily blood sugar insulin logs as long as health care services were provided to the beneficiaries by someone.

The evidence does not bear this out. [redacted] an employee at Medicare's Florida subcontractor, Safeguard Services, testified that if Medicare knew that the nurse who signed the nursing paperwork was not the one who actually provided

the service, Medicare would reject the claim for reimbursement. (DE194:25–26, 44.) [redacted] a nurse herself, explained that it is important for Medicare to know from the paperwork who provided the home health services to the beneficiary because Medicare would need to interview the nurse if there were any inconsistencies in the medical records, the OASIS assessment, and after interviewing the beneficiary. (DE194:27, 43–44, 49–50.) Without knowing which nurse conducted the visit with the beneficiary, Medicare could neither audit nor investigate claims for reimbursement. (DE194:44, 49.)

In any event, Gil ignores the most important evidence that her signature on the nursing paperwork meant that she was the one who performed the nursing visit: her own admission. Gil told FBI Special Agent Mark McCormick that when she signed the nursing paperwork it meant that she had personally visited those beneficiaries, had tested their blood sugar as indicated on the paperwork, and injected them with insulin. (DE182:30–31.)

In addition to Gil's statement about what her signature on the home health documents means, [redacted] the Medicare subcontractor, testified that when a nurse signs the OASIS form, nursing notes, and daily blood sugar logs, it means that nurse "assessed the patient" and "made the visit." (DE194:25–26, 39, 43, 49.) Moreover, [redacted] the head of the masters nursing program at FIU, and

one of Gil's professors, testified that it is a "fundamental principle of taking notes and direct care delivery" that "the [nursing] note is the documentation of what you actually did when you were giving care, so you should be writing only what you've done." (DE187:51–53, 64.) [redacted] another of Gil's FIU professors, testified that it is unethical and a violation of licensure and certification standards for a nurse to sign medical records for services that the nurse did not herself provide. (DE187:83–85, 92–93.) [redacted] a Cornell-trained endocrinologist, testified that when a medical professional signs a record, it is an attestation that the signor provided the medical services. (DE182:145.) Finally, Gil's own witness, a nurse named [redacted] who worked at Palmetto Hospital, testified that at her job if she signs her name to the nursing notes it means that she performed the work; she would never sign for someone else's work. (DE183:36–39.)

Gil then takes it one step further, arguing that because she was just signing her name to the nursing paperwork she did not know whether the documents were false, that is, whether the nursing services had not been provided. Because she believed that she was accurately reflecting the services that had been provided to the beneficiaries, Gil argues, she "could not possibly have had, nor was ever shown at trial [] to have had, the requisite criminal intent in preparing the subject

medical form documents necessary to lawfully sustain [the] convictions." (BlueBr.:28–29.) Contends Gil: "in order to support convictions for Counts 7 through 13, the Government should have presented evidence proving that (1) the services represented in those forms were never provided (by anyone), and (2) that Defendant knew those services were never rendered and still completed the forms." (BlueBr.:33.)

Gil overstates the government's burden. The government had to present evidence showing only that Gil knowingly made a false writing or document used in connection with the delivery of health care services. (DE170:21.)[7] Even assuming Gil's heightened burden is the right one the government presented evidence that no health care services were provided to the beneficiaries by any nurse, and Gil knew it.

For example, [redacted] (the beneficiary at issue in count six of the superseding indictment) testified that Gil had him sign the home health paperwork multiple times on one day; the rest of the document was blank. (DE161:50–51.) Gil only visited [redacted] twice a week (DE161:51), instead of the fourteen-times-a-week she was representing to Megamed. [redacted] injected himself with

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[7] Gil had no objection to the instruction listing the elements for the § 1035 false statements related to heath care fraud charge.

insulin almost every day, and he told Gil this (DE161:51–52), even though Gil represented to Megamed she injected [redacted] with insulin.

Likewise, an expert testified that [redacted] (the beneficiary at issue in counts one, three, nine, and ten) was not diabetic and was not receiving insulin injections (DE182:143–44), despite the scores of nursing paperwork showing that Gil injected [redacted] with insulin. [redacted] blood sugar levels, taken by an independent medical professional, were not consistent with the blood readings that Gil claimed to be taking every day, twice a day, for the beneficiary. (DE182:135–37.)

Finally, Gil argues that the "underlying criminal convictions for the same conduct" under the health care fraud statute, §1347, and the health care false statement statute, §1035, violated her "constitutional right not to be criminally punished twice for the same alleged offense." (BlueBr.:34–35.) Gil, in other words, contends that her convictions for both health care fraud and false statements related to health care documents violate her rights against being put in jeopardy twice for the same criminal conduct, as articulated by the Supreme Court in Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180 (1932).

In Blockburger, the Supreme Court explained that "where the same act or transaction constitutes a violation of two distinct statutory provisions," cumulative

punishment may not be imposed unless "each provision requires proof of an additional fact which the other does not." Id. at 304, 52 S. Ct. at 182. The focus of the Blockburger test is "on the statutory elements of the offense. If each requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes." Albernaz v. United States, 450 U.S. 333, 338, 101 S. Ct. 1137, 1142 (1981).

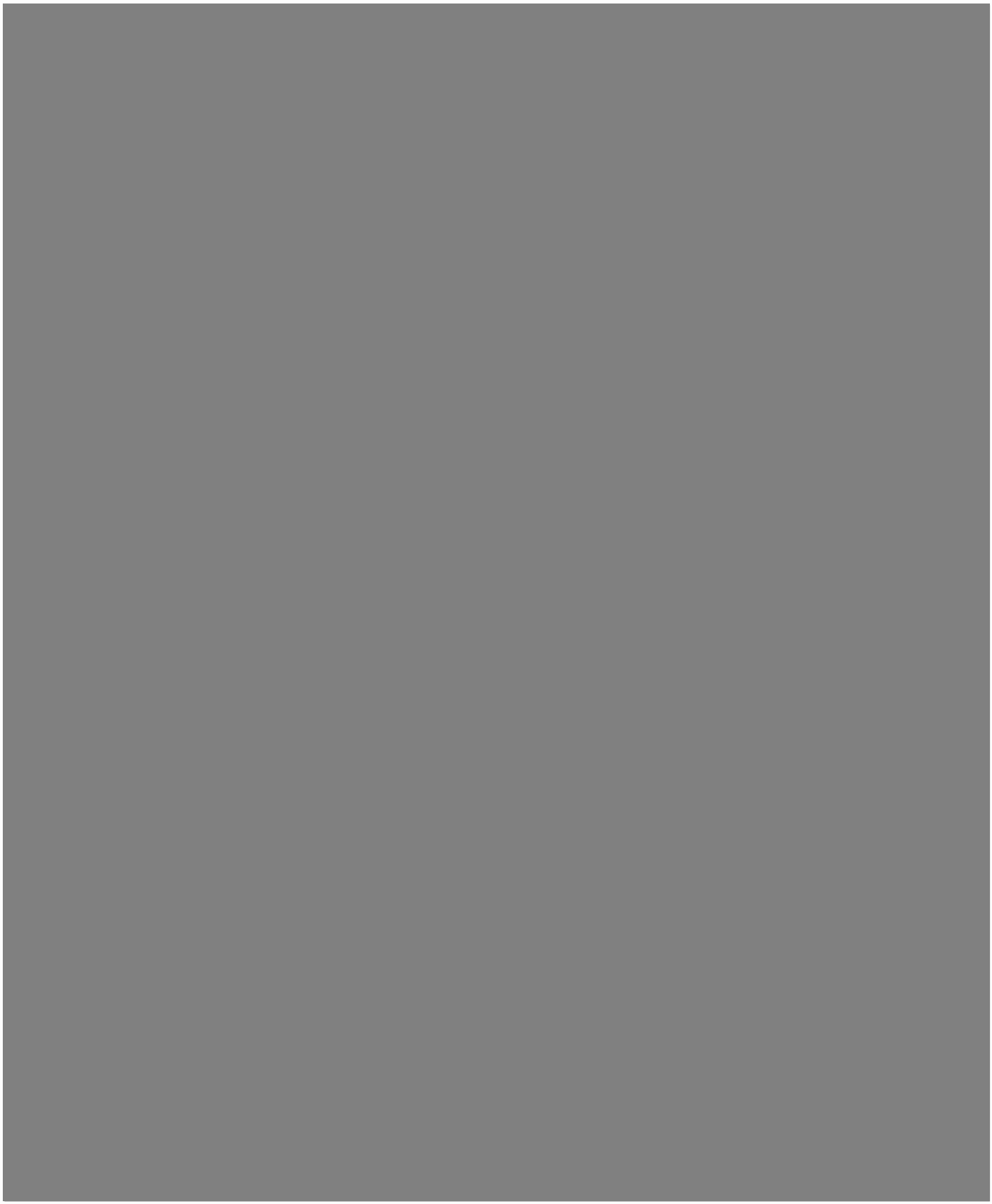
Here, the two statutes that Gil was convicted of violating do not share the same elements; in Blockburger terms, the health care fraud statute requires proof of a fact that the false statement statute does not, and visa versa. Compare 18 U.S.C. § 1347, with id. § 1035; (DE170:16, 21.) The elements are not the same. One statute prohibits a scheme or artifice or a false representation (in whatever form), while the other prohibits a false writing or document made or used by the defendant. One statute sets intent to defraud as the mens rea requirement, while the other requires only willful creation of the false document and knowledge that it is false.

II. The District Court Did Not Err In Refusing To Strike The Testimony Of [redacted] e And [redacted]

Gil next argues that the district court erred by not striking the recordings and testimony of [redacted] Gil contends that the Court

allowed the "knowing use of false evidence," and thereby denied Gil due process, when it denied Gil's motion to strike [redacted] testimony after [redacted] admitted to lying during part of her direct testimony and fabricating the recording with a cooperating witness, [redacted] (BlueBr.:13–18.) (During the trial, Gil never moved to strike any of [redacted] testimony. The first time this is mentioned is in her initial brief.) Gil is wrong on the facts and the law.

[redacted]



The district court reserved ruling on Gil's motions, and asked the parties to present authority on whether the Court should strike the recording, entire testimony, or both. (DE186:59–60.)[9]

The district court took up Gil's motions again at the end of the government's case. After hearing argument from the parties (DE191:4–6, 18–21, 26–31), the court decided to strike the recording and asked the parties to draft an appropriate jury instruction. However, the court denied Gil's motion to strike entire testimony, and to dismiss the indictment. (DE191:34–35.)

---

[8] Gil later put the motion in writing. (DE156.)

[9] The court also found, and Gil agreed, that the government was not involved in presenting fraudulent evidence and testimony. (DE186:55, 59–60.)

At the end of the trial, along with the standard instructions on the credibility of witnesses, inconsistent statements, and accomplice testimony (DE170:6–7, 11), the jury was given the following special instructions:

> The recording of [redacted] along with the transcript of that recording, Government Exhibits 22 and 23, have been stricken from the record and are therefore not in evidence. I instruct you not to consider Government Exhibits 22 and 23 as part of your deliberations.
>
> You may consider that the evidence was fabricated in assessing the credibility of the fabricating witness, [redacted]
>
> You have heard testimony in this case from Government witness, [redacted] whom admitted discarding the patient folder located at her house.
>
> You may consider a witness' destruction of evidence in this case when assessing that witness' credibility.

(DE170:8–9.)

Before getting to Gil's argument, some misstatements in her initial brief need to be cleared up:

- Gil refers to the "Government's use of deliberately fabricated evidence" and "the knowing use of false evidence." (BlueBr.:13–14.) In fact, during the trial, Gil stated time and again that "I don't believe for a second that either [of the government attorneys] would intentionally participate in presenting fraudulent evidence before this Court." (DE186:55, 59; DE191:30.) The

district court also found that it did not believe that the prosecutors "or any member of the prosecution team actively put forth any evidence or testimony that they knew to be fraudulent, false, perjurious, concocted, any of those things . . . ." (DE191:33.) There is nothing to indicate, and Gil does not argue, that the district court's finding was clearly erroneous.

- Gil suggests that the district court did no more than "give a standard jury instruction on the issue of credibility" in response to [redacted] testimony. (BlueBr.:17.) In fact, the district court gave the pattern jury instruction on credibility, and then gave the jury instructions on fabricated evidence, spoliation of evidence, inconsistent statements, and immunized witnesses. (DE170:6, 8–9, 11.)
- Gil writes that the government introduced the recording of [redacted] and [redacted] "over defense objection." (BlueBr.:14.) In fact, Gil stipulated that the government would introduce the recording of [redacted] during the goverment's case in chief. (DE194:150–51.)
- Gil writes that "the Government opposed Defendant's post testimonial motions to strike . . . the fabricated video recording evidence previously admitted by the Government through witness [redacted]" (BlueBr.:15.) The govenment did not oppose the motion to strike the tape, at any time.

Immediately after [redacted] testified, the government told the district court that "we're going to figure out what we want to do with this." (DE186:54.) Later, when the district court held a hearing on Gil's motion to strike, the government did not oppose striking the recording. (DE191:19) ("Striking the tape and transcript would be of no moment to the Government.")

The Puche Recording: The district court granted Gil's motion to strike the [redacted] recording, government exhibits 22 and 23. (DE191:34.) In her brief, Gil complains that the district court did not strike the recording immediately after [redacted] testified, and instead waited days later to do it. (BlueBr.:16.) The lapse in time "allow[ed] the clearly tainted evidence to take root in the jury's consideration of the evidence in the case." (BlueBr.:16)

This argument has two problems. First, the district court instructed the jury "not to consider Government Exhibits 22 and 23 as part of your deliberations" (DE170:8), and the law presumes that juries follow the court's instructions. United States v. Townsend, 630 F.3d 1003, 1014 (11th Cir. 2011) ("We presume that juries follow the instructions that they are given, which means that the jury did find that Townsend altered, destroyed, mutilated, or concealed the original file.") (citing Francis v. Franklin, 471 U.S. 307, 324 n. 9, 105 S. Ct. 1965, 1976 n. 9 (1985) ("[W]e adhere to the crucial assumption underlying our constitutional

system of trial by jury that jurors carefully follow instructions.")). Gil has not explained, and has not cited any law addressing, why the circumstances of this case changes the presumption on jurors following instructions.

Second, immediately after [redacted] testified (and the recording was admitted into evidence), the district court asked the parties to "present authority" on what the court should do in response to Gil's various motions to strike evidence and testimony and declare a mistrial. (DE186:59.) "Get me some law," the district court explained. (DE186:59.) That was on May 12, 2011. On May 18, 2011, Gil filed a written motion providing the district court with case law supporting its motion to strike the recording, testimony, and to dismiss the counts of the indictment related to [redacted] (DE156.) The delay in striking the recording, in other words, was Gil's. As soon as Gil filed her motion with the case law, the court took it up and struck the recording. (DE191:34.)

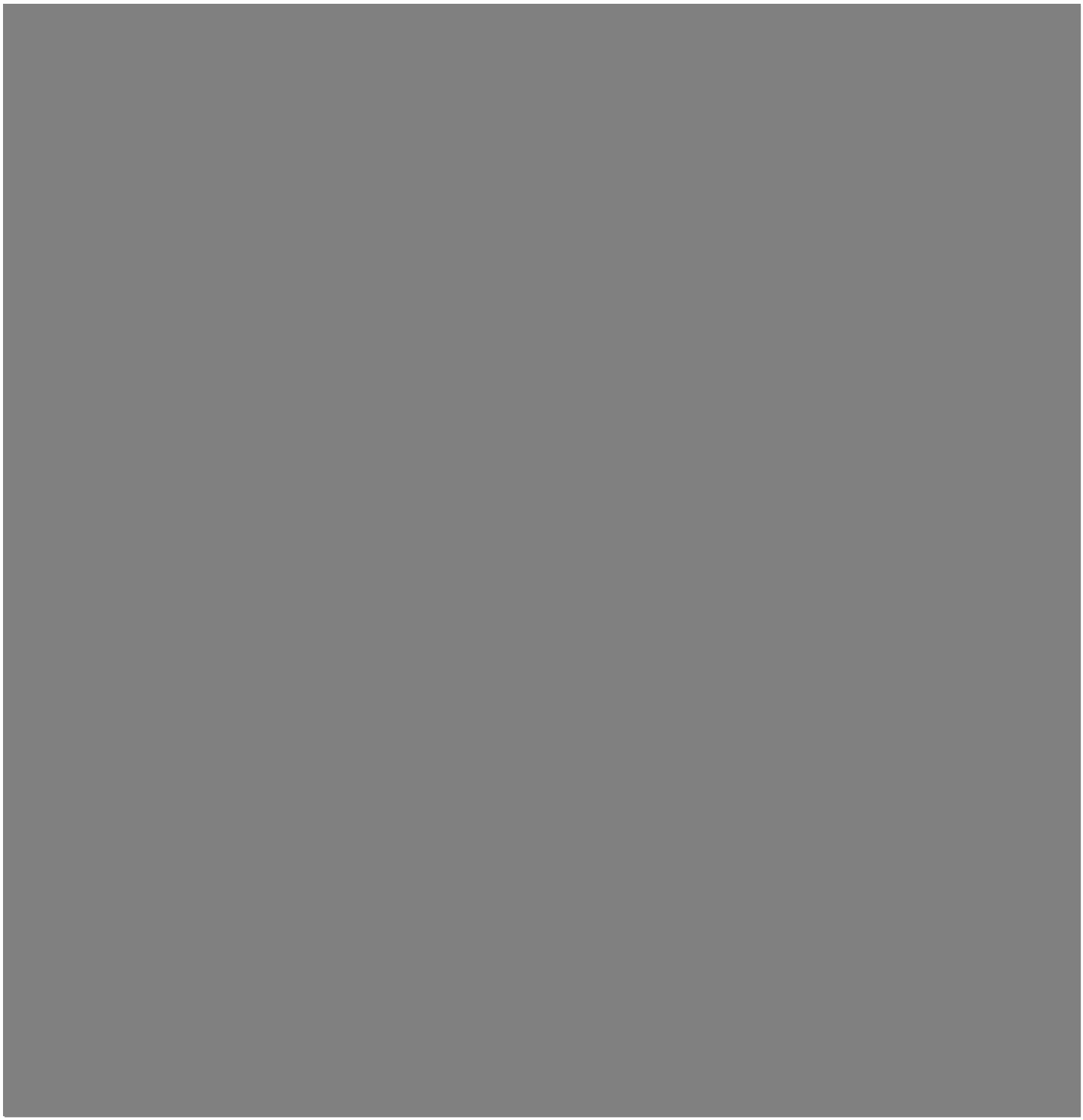
[redacted] Testimony. Gil argues that because [redacted] admitted during cross examination "to have given perjured testimony before the grand jury and at [Gil]'s trial on direct examination by the Government," the district court erred in not striking her testimony along with the recording. (BlueBr.:15.) Gil continues: "By allowing the jury to consider perjured testimony in reaching a verdict, which is improper in and of itself, notwithstanding a jury instruction relating to the

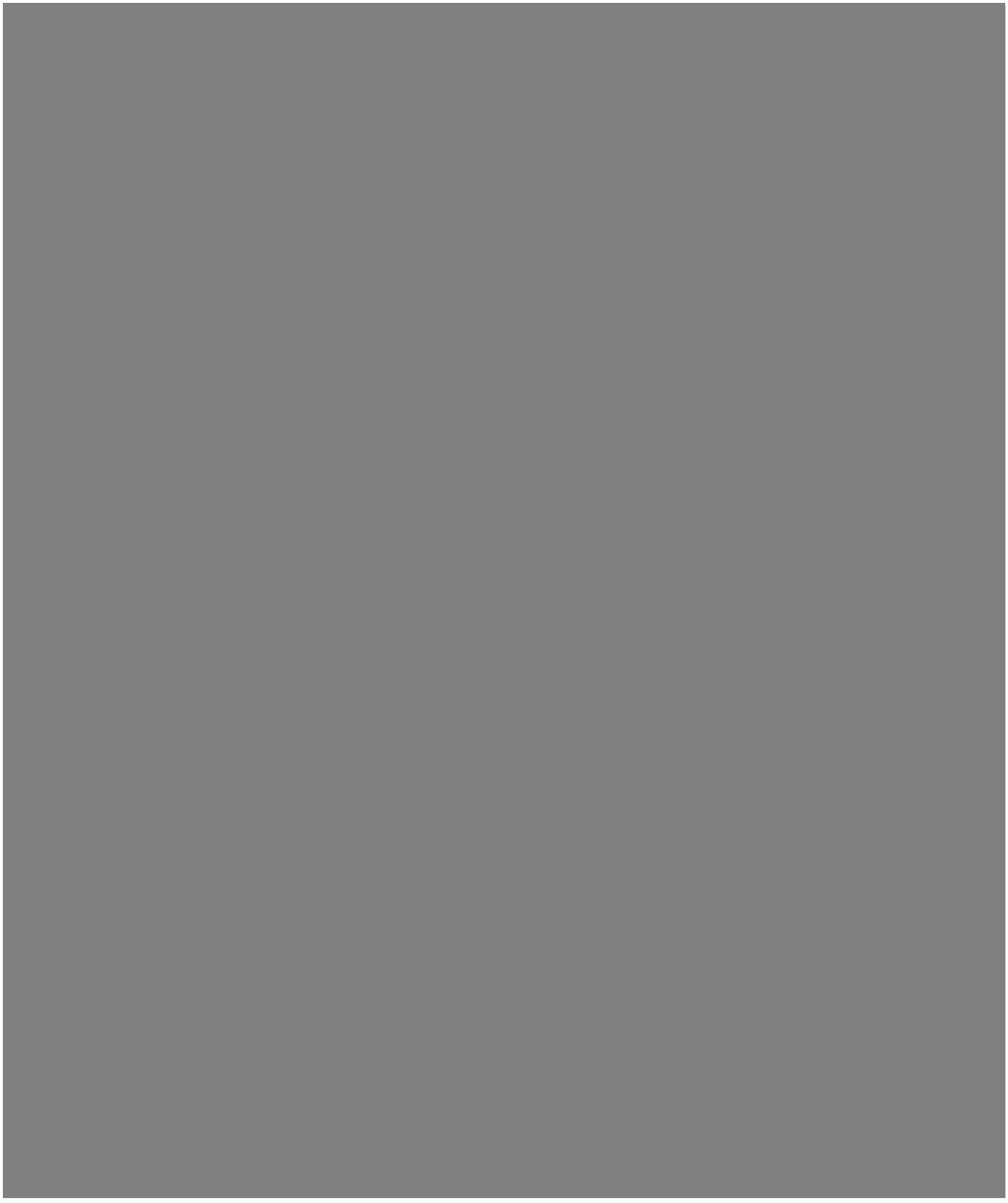
witness' credibility, the court implicitly gave a stamp of approval as to that evidence . . . ." (BlueBr.:22.)

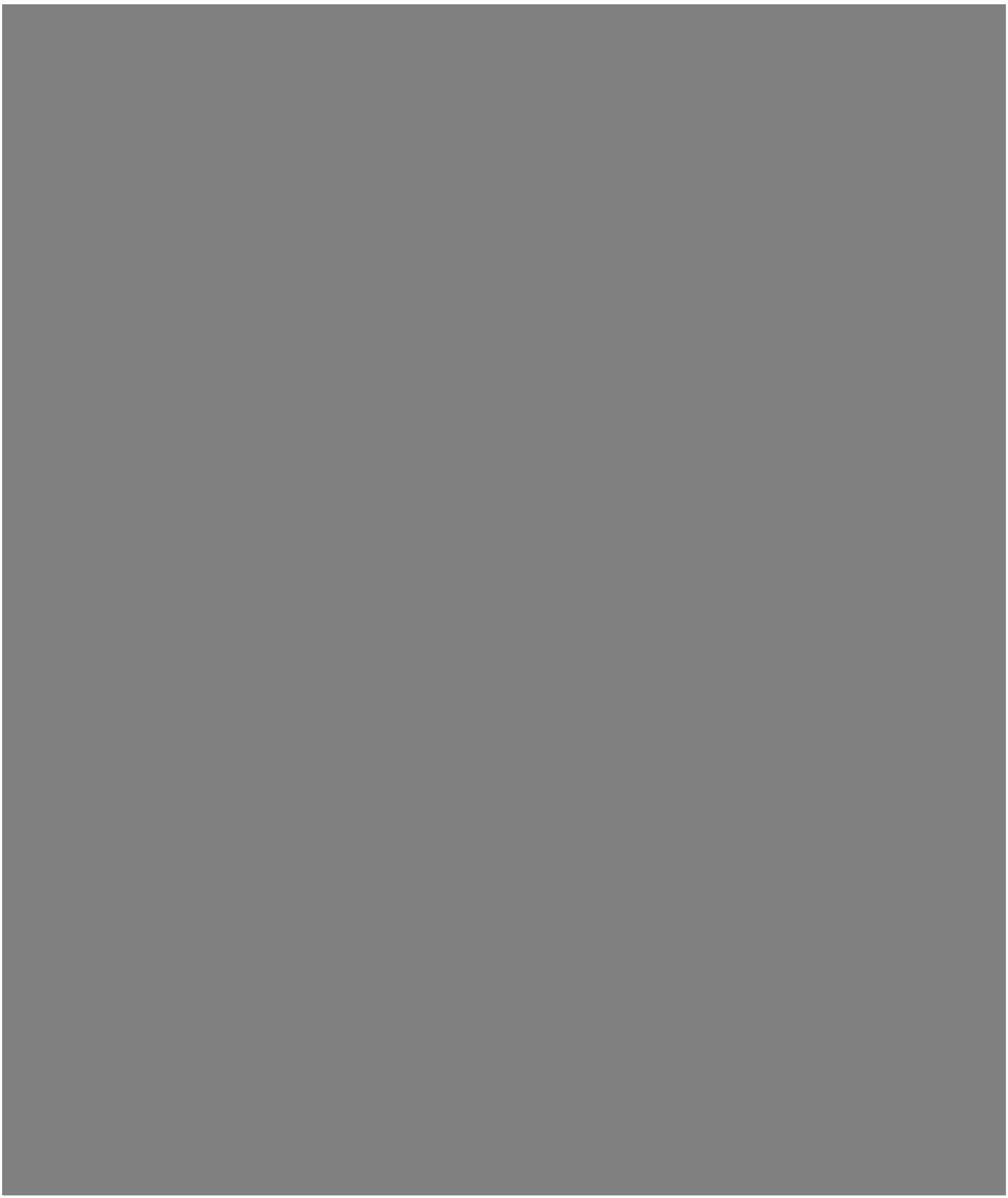
Every day in court juries are faced with witnesses who change their testimony. The very purpose of cross examination, the "greatest legal engine ever invented for the discovery of truth," California v. Green, 399 U.S. 149, 158, 90 S. Ct. 1930, 1935 (1970) (quotation omitted), is to expose testimony believed to be untruthful so the jury can assess a witness' credibility, and reach a vedict. For that reason, the pattern jury instructions provide that in deciding whether "to believe what each witness had to say," the jury "may believe or disbelieve any witness, in whole or in part." Eleventh Circuit Pattern Jury Instructions (Criminal), Basic Instruction No. 5 (2010). If the jury never had to face a witness that changed their testimony on the stand, then there would be no need for cross examination and no need for instructions on how to assess a witness' credibility.

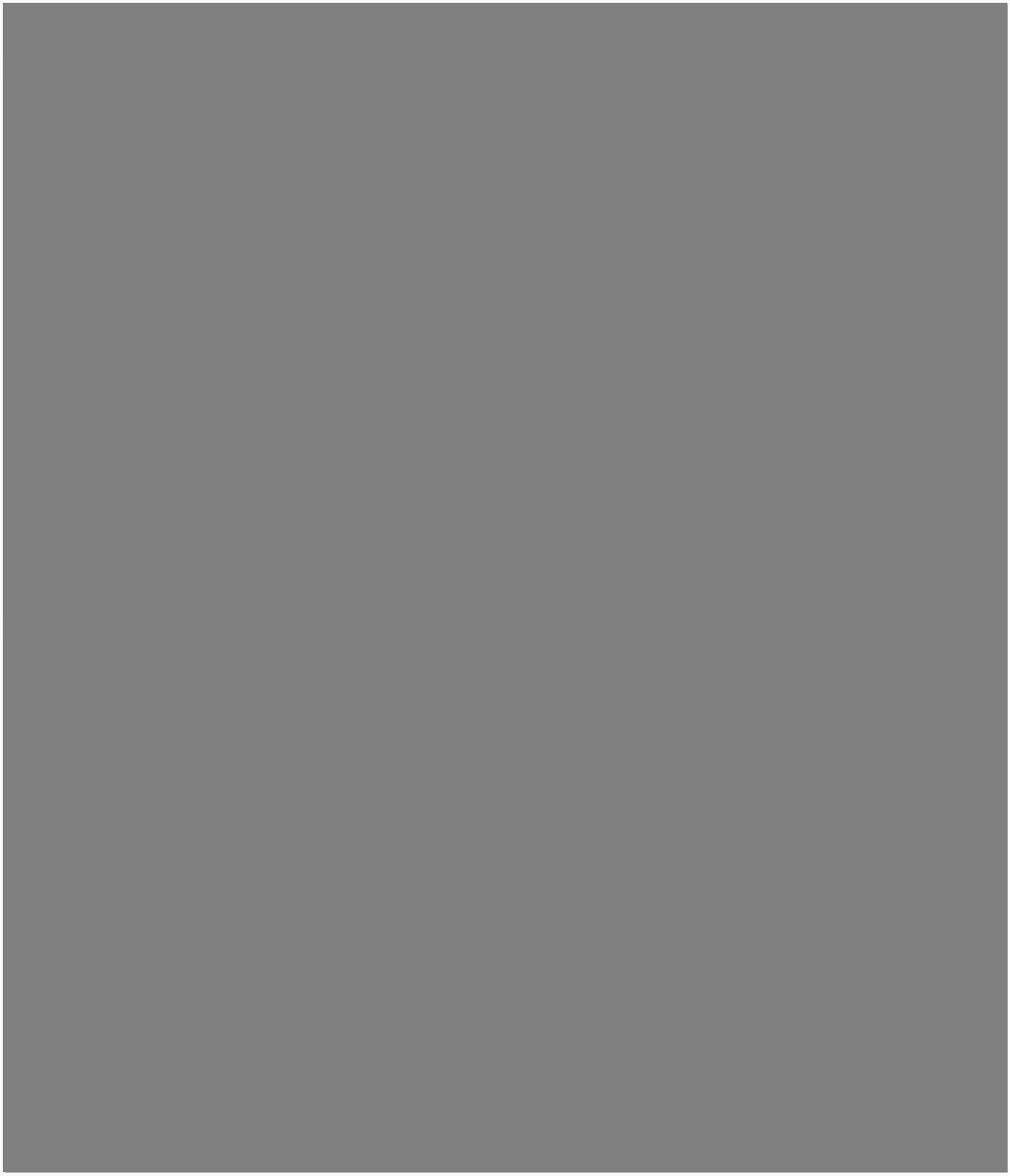
For example, in United States v. Jones, 557 F.2d 1237 (8th Cir. 1977), the defendant's ex-girlfriend, a government witness, admitted to lying during her direct testimony. Id. at 1238–39. The Eighth Circuit concluded that it was not error for the district court to decline to strike the ex-girlfriend's testimony because "[h]er lies were obvious to the jury and the defense was given an ample opportunity to cross-examine [her] as to her credibility." Id. at 1239. In other

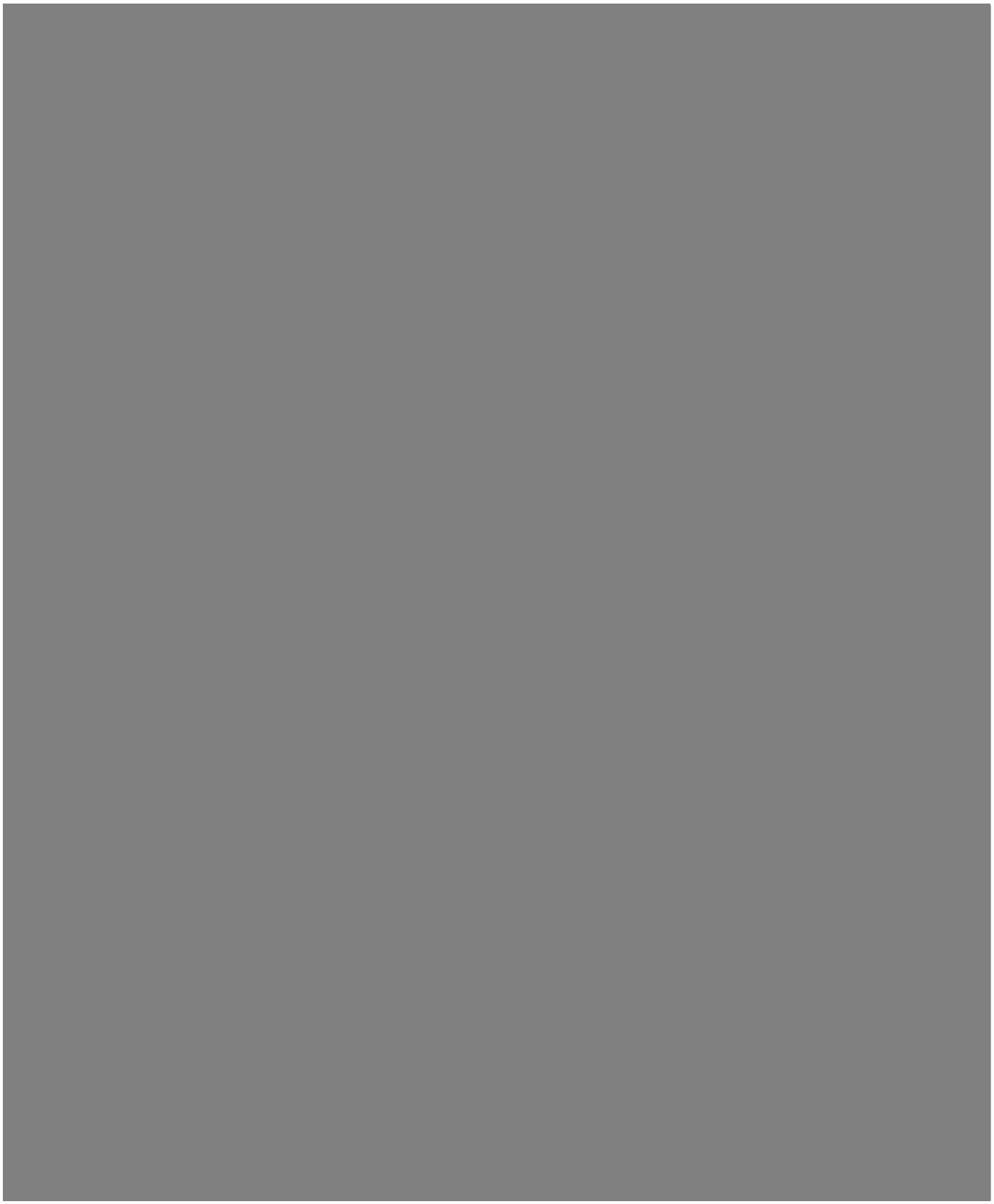
words, there was nothing to strike because the fact that the witness lied was exposed to the jury.

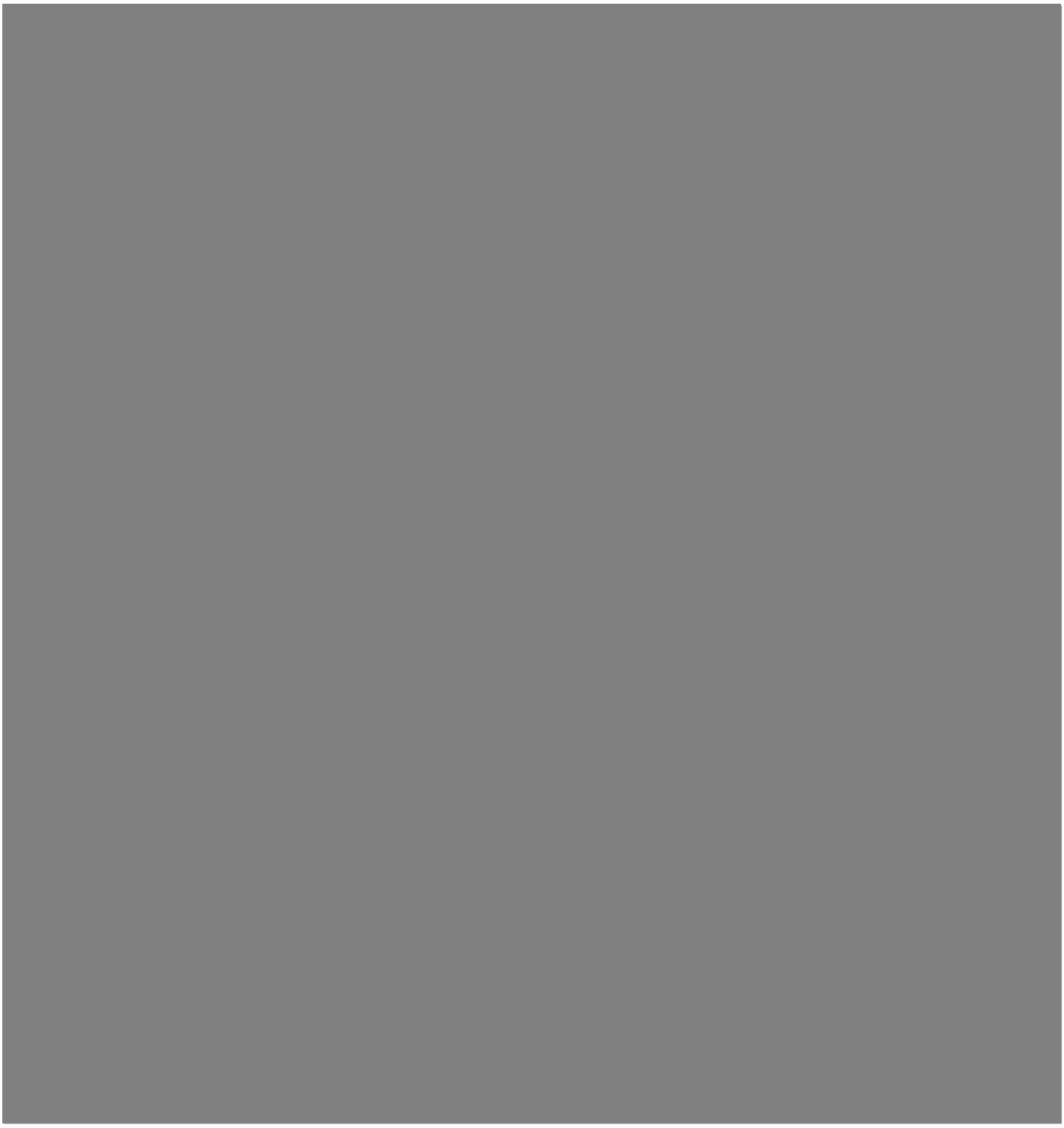












III. The District Court Did Not Err In Any Of Its Evidentiary Rulings.

Gil contends that the district court erred in admitting the following three exhibits into evidence: (1) records from eleven home health companies (not including Ideal and Megamed) showing that Gil was employed by the companies and her hourly rate (GX49; GX50); (2) a summary chart of the average number of in-home visits Gil was paid to conduct between April 2007 and July 2009 (GX47); and (3) records from SunPass for Gil's toll transponder from March 2007 through May 2009 (GX54). (BlueBr.:35–44.) Gil argues that individually and together these errors impacted the verdict.

Records from Eleven Other Home Health Companies. Gil argues that the government violated Federal Rule of Criminal Procedure 16 and the district court's standing discovery order when the government turned over during the trial records that Gil was paid by eleven other home health companies at the same time she was working at Ideal and Megamed. (BlueBr.:36–39.) Rule 16 and the standing discovery order provide that the goverment must permit the defendant to inspect and copy all documents within the government's control that the government intends to use during its case in chief. Fed. R. Crim. P. 16(a)(1)(E)(ii).

There is no Rule 16 issue in this case—there was no late discovery—because the government did not have the records from the eleven other companies until the fourth or fifth day of the trial, when the home health companies complied with the government's trial subpoenas. (DE182:11; DE187:141, 144.) The records were not in the government's control until then so there was nothing to turn over. As soon as the government received the records, the government provided them to Gil.

The cases cited by Gil show that there was no discovery violation here. In those cases, the government had the evidence in its control before trial and did not turn it over to the defendant. United States v. Camargo-Vergara, 57 F.3d 993, 998 (11th Cir. 1995) (government agent testified at trial about the defendant's statement that was not disclosed prior to trial pursuant to Rule 16); United States v. Noe, 821 F.2d 604, 606 (11th Cir. 1987) (the government introduced a tape recording of the defendant that was not produced prior to trial); United States v. Rodriguez, 799 F.2d 649, 651–52 (11th Cir. 1986) (government did not produce in discovery a wallet that agents took from the defendant at the time of his arrest). Here, on the other hand, the government never withheld from Gil the records from the eleven home health companies; as soon as the government received them, so did Gil.

Gil, moreover, was not prejudiced by the introduction of the records from the eleven other home health companies. From May 12 or 13, 2011, when Gil received the records (DE182:11), until May 23, 2011, when Gil rested her case (DE183:59), she had ten or eleven days to prepare a defense. Gil made good use of the ten days. She cross examined the government witness, an FBI agent, who testified about the records from the eleven other home health companies. (DE182:109.) Gil called a Medicare beneficiary from one of the eleven other home health agencies who testified that Gil injected her with insulin. (DE188:4–10.) And in closing argument, Gil argued that the government's analysis of the records was flawed and inaccurate. (DE184:33–36.) She was able to get before the jury her version of what the records meant without a delay in the trial.

Gil argues alternatively that even if there was no discovery violation, the records should have been excluded pursuant to Federal Rule of Evidence 403. The records from the other companies, Gil says, allowed the jury to conclude that she had made more than $435,000, and provided an inaccurate picture of the amount of work she did during that time. (BlueBr.:39–40.)

Excluding evidence under Rule 403 "is an extraordinary remedy which the district court should invoke sparingly." United States v. Tinoco, 304 F.3d 1088,

1120 (11th Cir. 2002) (quotation and citation omitted). When evaluating a district court's ruling under Rule 403, therefore, this Court views "the evidence in the light most favorable to admission, maximizing its probative value and minimizing its undue prejudicial impact." United States v. Bradberry, 466 F.3d 1249, 1253 (11th Cir. 2006). In fact, this Court will find an abuse of discretion under Rule 403 only if the district court's admission of challenged evidence "is unsupportable when the evidence is viewed in the light most supportive of the decision." Id.

Gil did not raise a Rule 403 objection to the records from the eleven home health companies during the trial. (DE182:9–20.) Even if she had, there was no Rule 403 prejudice problem because the government was not permitted to introduce Gil's bank records showing that she had made almost half a million dollars working for thirteen home health companies within a 31 month period. Gil successfully excluded the bank records from coming into evidence, and the district court ordered the government not to discuss how much Gil made during the time period alleged in the indictment. (DE193:3–23; DE187:140–89.) The jury never heard about Gil's income during this time. As for any false impression created by the home health records, Gil was able to put her own spin on the records by cross examining the FBI agent who testified about the records, introducing her own witness, and arguing in closing that the government's assumptions were flawed.

This dimishes any concern about admitting the records. See United States v. Richardson, 233 F.3d 1285, 1294 (11th Cir. 2000) ("Furthermore, where the defense has the opportunity to cross-examine a witness concerning the disputed issue and to present its own version of the case, the likelihood of any error in admitting summary evidence diminishes." (quotation omitted)).

Summary Charts. Gil complains that the district court erred in admitting summary charts because "the Government's case revolved around the presentation" of them. "Therefore," Gil says, she "was subject to a trial by charts . . . ." (BlueBr.:41.)

The government introduced eight summary charts in its case in chief: exhibits 34 and 35 (summary of the checks Gil received from Ideal and Megamed); exhibit 41 (summary of Gil's travel records); exhibits 44, 45, and 46 (summaries of the FIU documents); exhibit 26 (summary of days where Gil saw more than one patient at the same time); and exhibit 47 (summary of the average number of visits Gil conducted during the time period in the indictment). Gil did not object to the admission into evidence of the first six on that list. (DE182:34, 36–37, 47.) The only chart that Gil discusses in her brief is government exhibit 47, the chart summarizing the number of daily visits that Gil was paid by Ideal, Megamed, and the eleven other home health companies.

As for government exhibit 47, Gil argues that it was error to admit the chart into evidence because it was prepared using Gil's bank records, which were excluded from the trial. To the extent this was error, it was invited by Gil. Gil moved to exclude her bank records because she did not want the jury to see that as a home health nurse she had made almost half a million dollars in less than three years. (DE193:3–23; DE187:140–89.) The district court agreed, however, that the government could present to the jury evidence from the payroll records of the thirteen home health companies to show Gil was being paid for more visits than she could have conducted in one day, especially given her foreign travel and nursing school commitments. (DE187:158–65.) The district court gave Gil a choice: (a) the government could present this evidence in the form of a summary chart and without the bank records showing that Gil had made $435,000; or (b) the government could present all the underlying records, including the bank records, which would show the amount of money that Gil had received during the scheme. (DE187:165–66.) When asked, "You want all the bank records in?," Gil responded, "Absolutely not. . . ." (DE187:165–66.) Gil cannot complain now that government exhibit 47 was admitted without all the underlying documents when she was the one that asked that her bank records be excluded. United States v. Love, 449 F.3d 1154, 1157 (11th Cir. 2006) ("It is a cardinal rule of appellate

review that a party may not challenge as error a ruling or other trial proceeding invited by that party.").

In any event, the summary chart rule, Federal Rule of Evidence 1006, does not require that the underlying records supporting the chart be given to the jury during its deliberations. Rule 1006 requires only that the government "make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place." Fed. R. Evid. 1006; see also United States v. Lezcano, 296 F. App'x 800, 808 (11th Cir. 2008) ("Although the documents underlying a summary exhibit must be made available to the defendant for examination, Rule 1006 leaves it to the district court's discretion whether the proponent of the summary must produce the underlying documents in the courtroom."). Here, Gil had a copy of her own bank records and the records from the eleven home health companies.

In its rebuttal case, in order to impeach the evidence that Gil never missed a visit at the Medicare beneficiaries' homes, the government introduced records from Gil's SunPass transponder showing that the transponder was passing through toll roads at the same time Gil wrote on the nursing notes that she was at the homes of [redacted]nd others. (GX54; GX54A; GX54B; GX54C; GX54D; GX54E; GX54F; GX54G.) The government received the SunPass records during the trial. (DE183:58.)

Gil argues that the district court erred in admitting the SunPass records because the government did not turn them over until its rebuttal case. Like with the records from the eleven home health companies, Gil contends that failing to turn them over earlier violated Rule 16 and the standing discovery order. (BlueBr.:43–44.)

For documents that the government will seek to introduce at trial, Rule 16 (and the standing discovery order) provides that the defendant must be given access to them only if "the government intends to use the item in its case-in-chief." Fed. R. Crim. P. 16(a)(1)(E)(ii). Rule 16 says nothing about turning over documents that will be used in its rebuttal case to impeach defense witnesses. Documents and other evidence introduced in the rebuttal case are not subject to the Rule 16 discovery requirements, and do not have to be turned over to the

defendant in advance. See United States v. Frazier, 387 F.3d 1244, 1269 (11th Cir. 2004) (en banc) ("Our case law establishes that, consistent with the plain language of the Rule, the government's presentation of rebuttal testimony without prior notice does not violate Rule 16, since the Rule's notice requirements apply only to the government's case-in-chief."); United States v. Delia, 944 F.2d 1010, 1018 (2d Cir. 1991) ("We know of no legal principle that requires the prosecution to disclose its proposed rebuttal evidence to the defendant, to help him decide whether to pursue a particular contention."); United States v. Barth, No. 92-10465, 1993 WL 300608, at *2 (9th Cir. Aug. 5, 1993) ("This circuit has previously held that Rule 16(a)(1)(C) does not apply to exclude government rebuttal exhibits under these circumstances.").

Gil also contends that introducing the SunPass records during the rebuttal case "precluded [her] from a meaningful opportunity to present information or evidence to truly counter the evidence as presented by the Government." (BlueBr.:44.) This is not true. During her cross examination of the two witness who testified about the SunPass records, Gil established that the transponder could be moved from car to car, and just because the transponder went through a toll did not mean that Gil was driving the car at that time. (DE183:88–91, 105–12.) Gil also established during her cross examination that in at least one instance the

transponder was used while she was out of town. (DE183:109–11.) From that, Gil argued during her closing that the SunPass records as presented by the government were "misleading." (DE184:20.) Gil, in other words, was able to counter the assumptions in the SunPass records and present her arguments to the jury. There was no prejudice to Gil.

* * *

[redacted]

IV. The Government Did Not Intimidate Gil's Witnesses.

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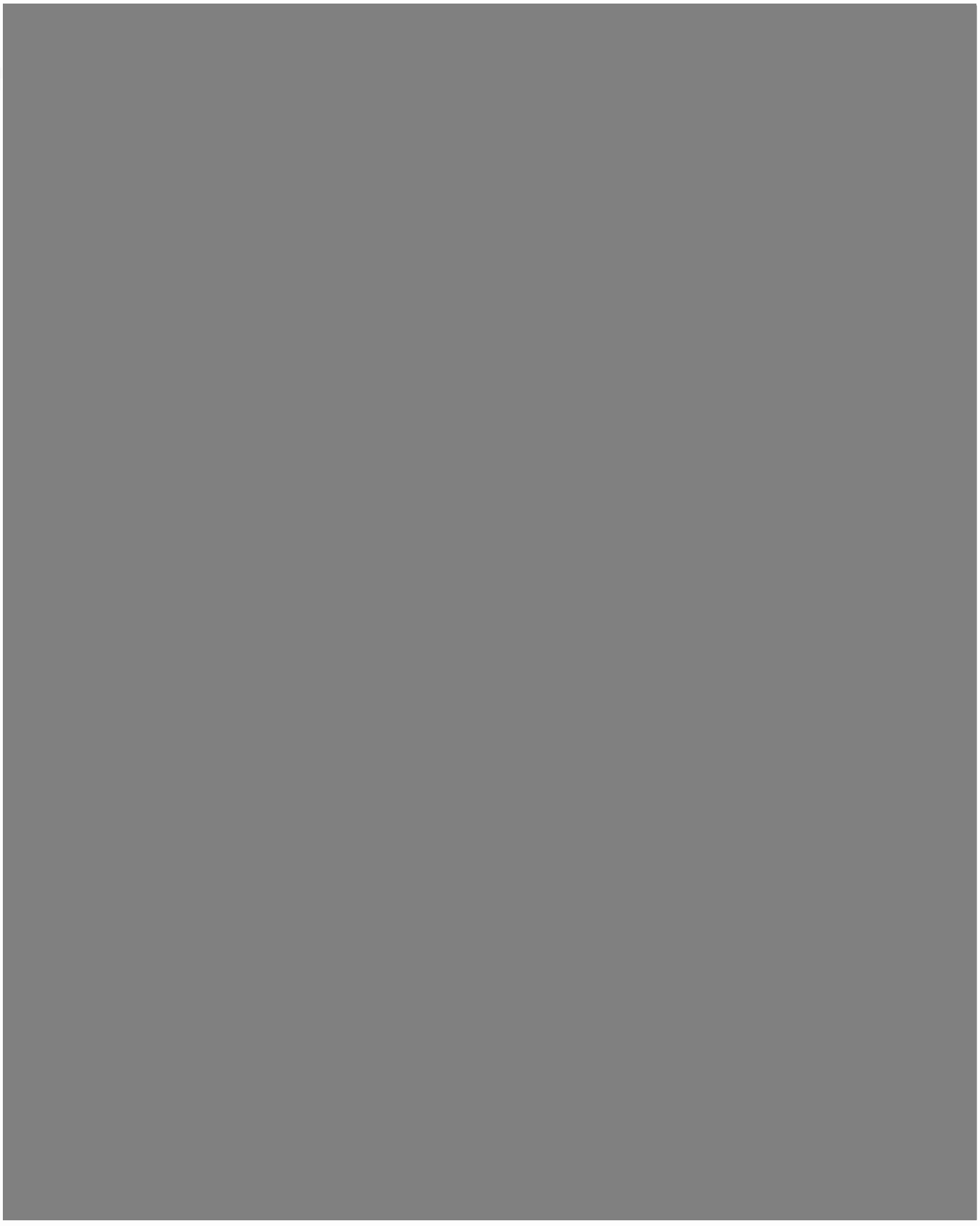
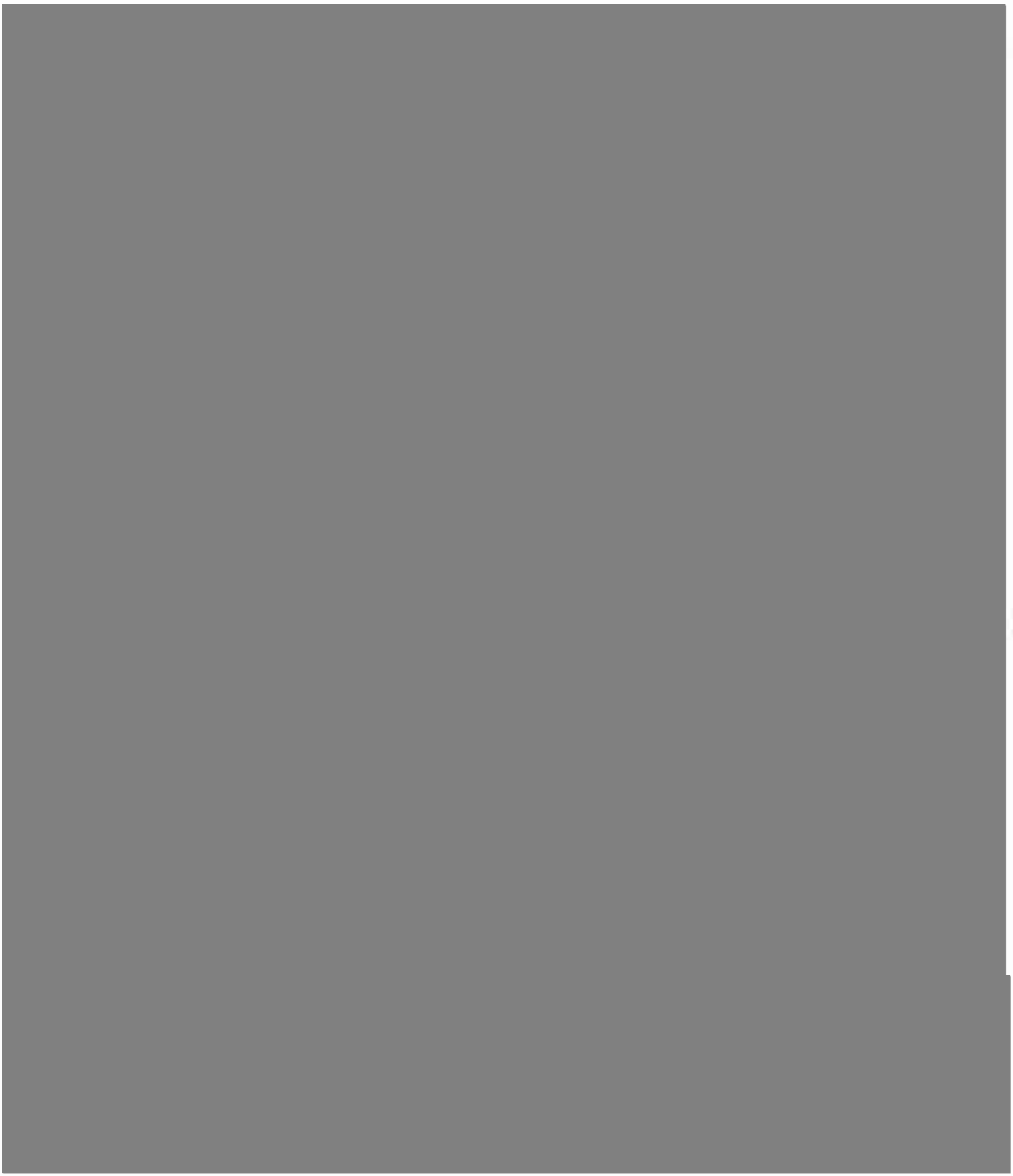
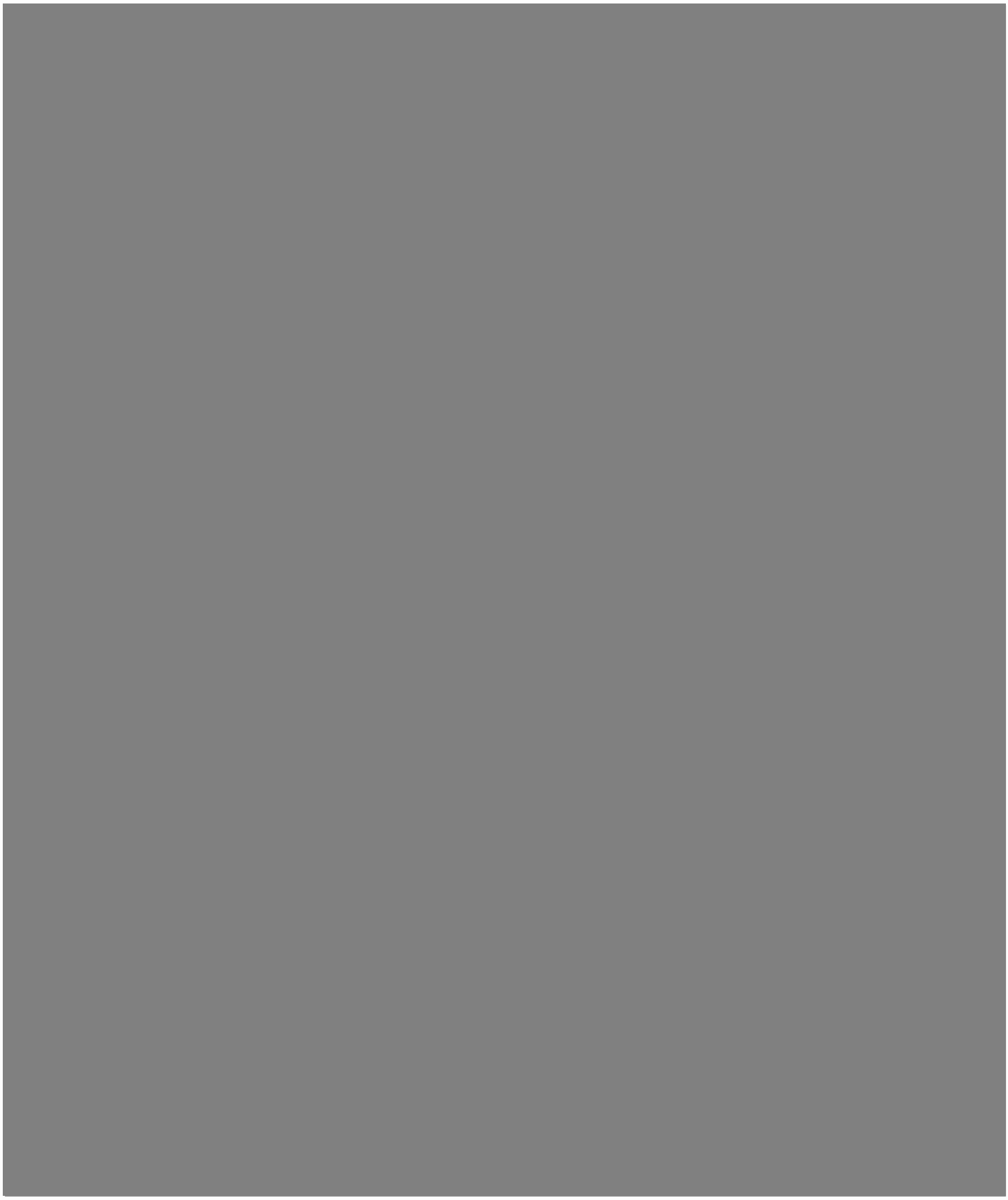


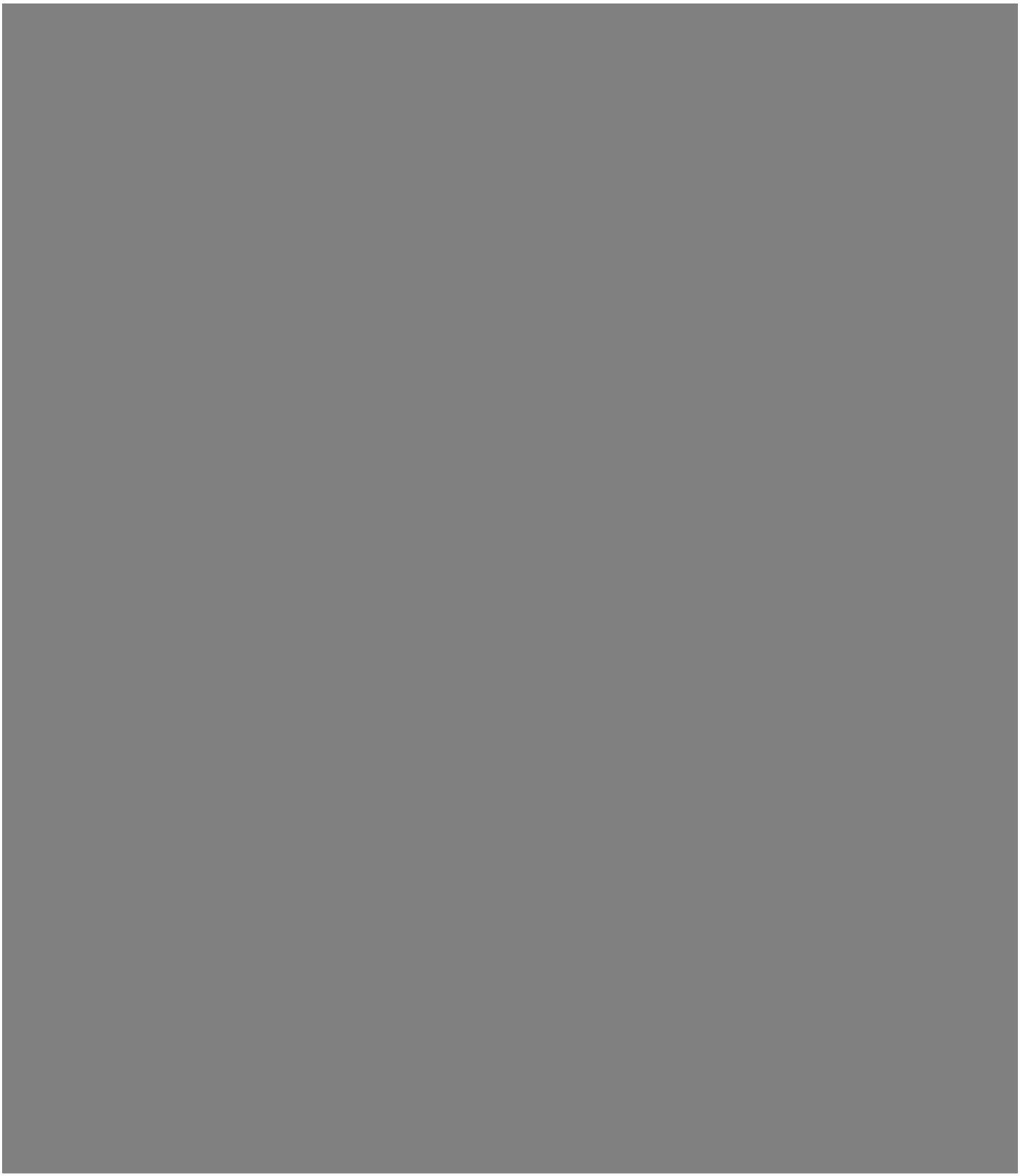


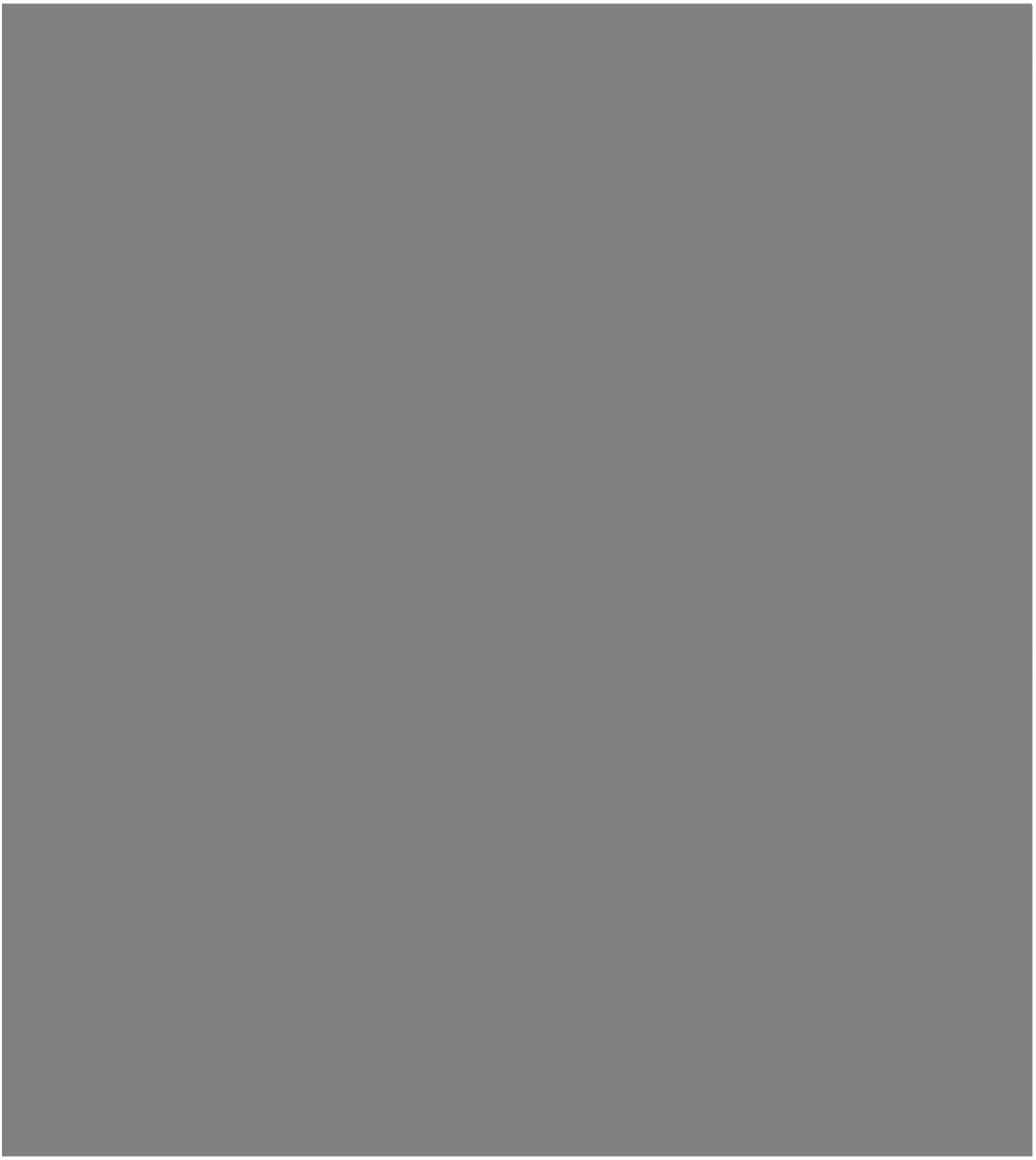
Based on the government's proffer, and its review of the facts in Gil's motion for an evidentiary hearing, the court found:

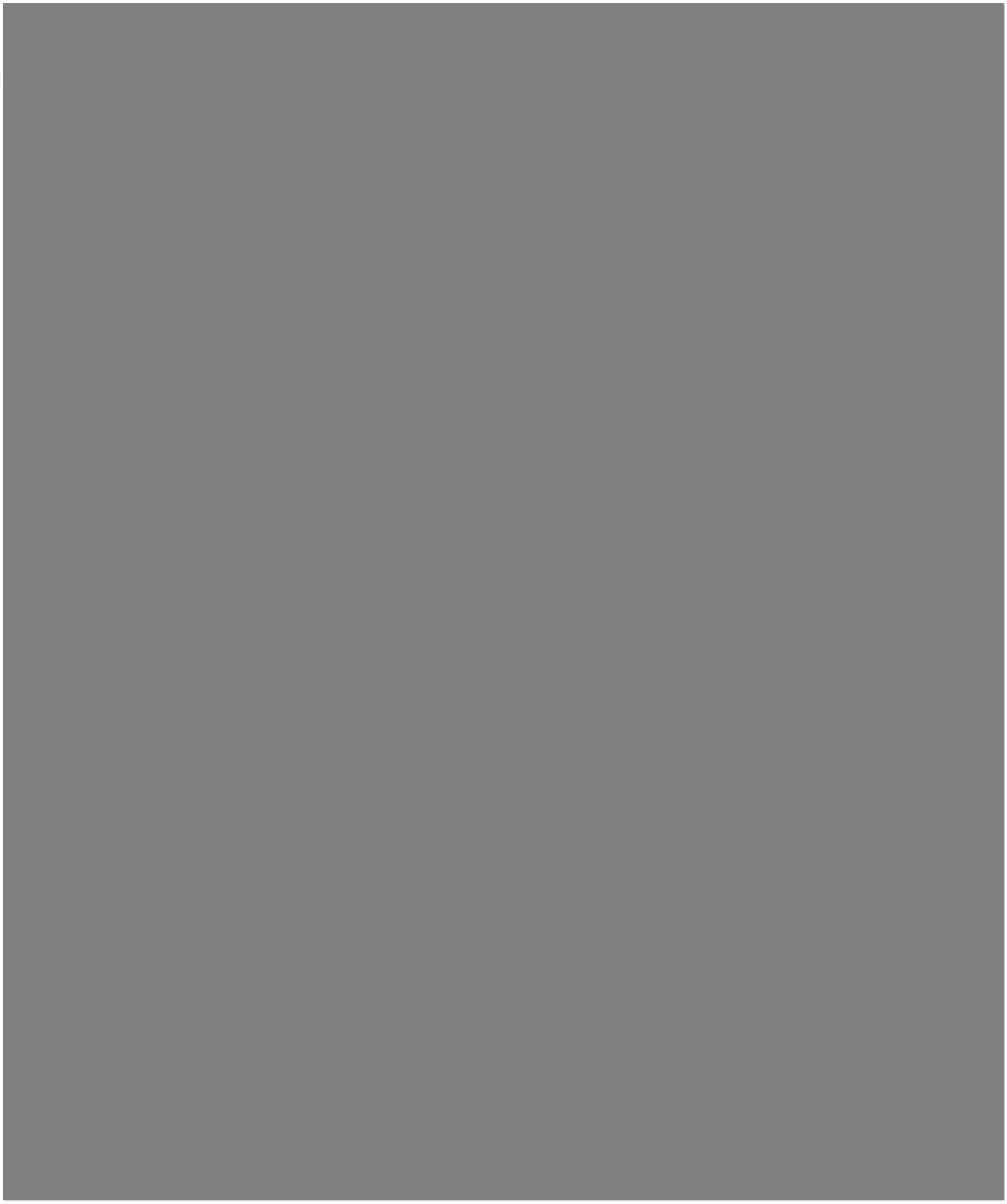
> The government may have knowledge of an individual, may think that an individual is involved in criminal activity, but has no duty [to inform they are a target] until that person decides that they are going to come into court and take an oath that they may be subjecting themselves to further criminal activity, and that's what is happening here. . . . The protection lies with the witness, not with the defendant.
>
> The issue is whether in giving the defendant this protection has the government somehow impacted the defendant's right to a fair trial. And under the facts of this case I don't believe the government has.
>
> Could it have been done with a little bit more finesse? Yes. But I don't think it is done out of an intent to deprive Miss Gil of her right to call witnesses.

(DE183:21.)









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V. The District Court Did Not Err In Admitting Into Evidence Adela Quintero's Conviction.

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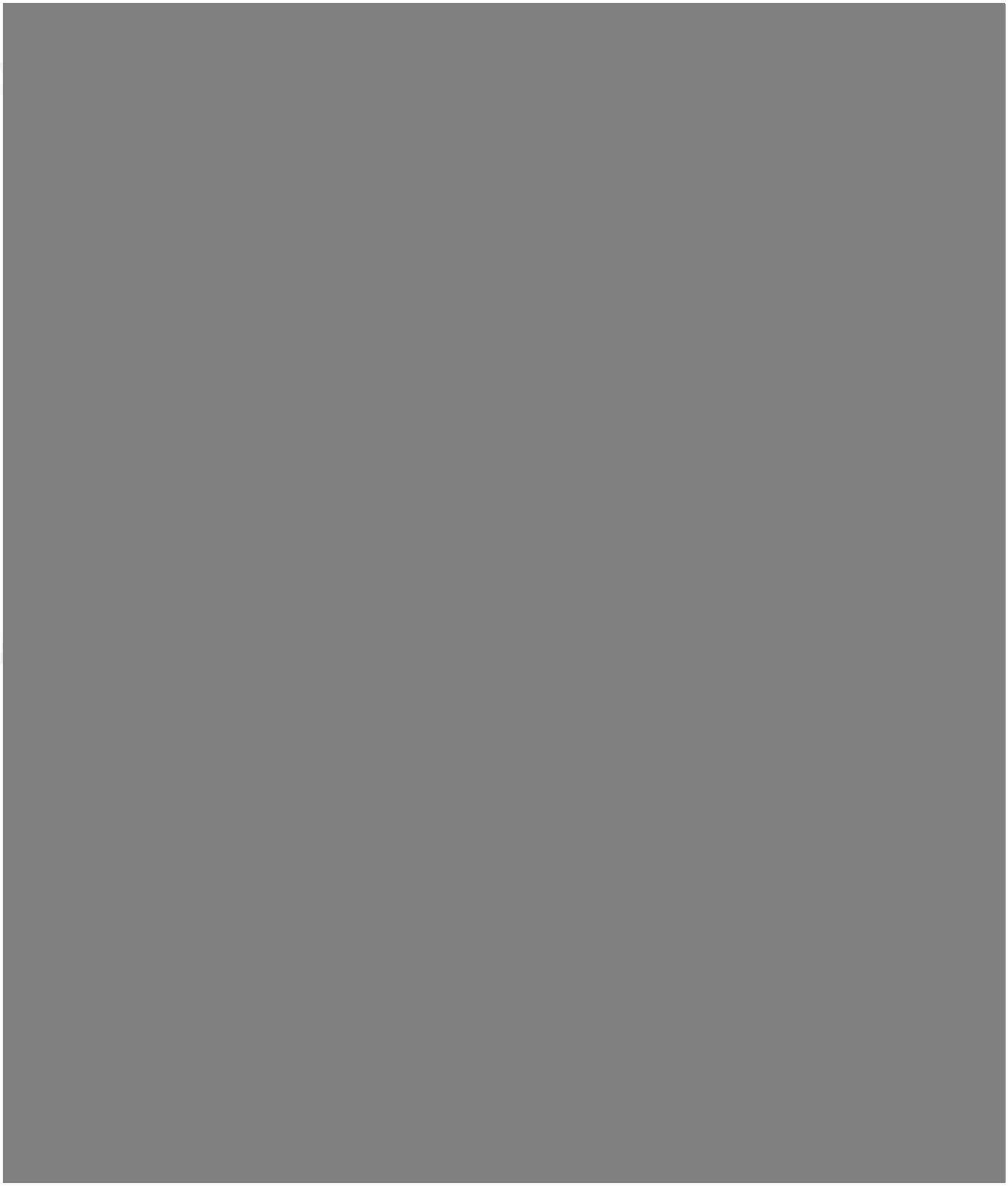

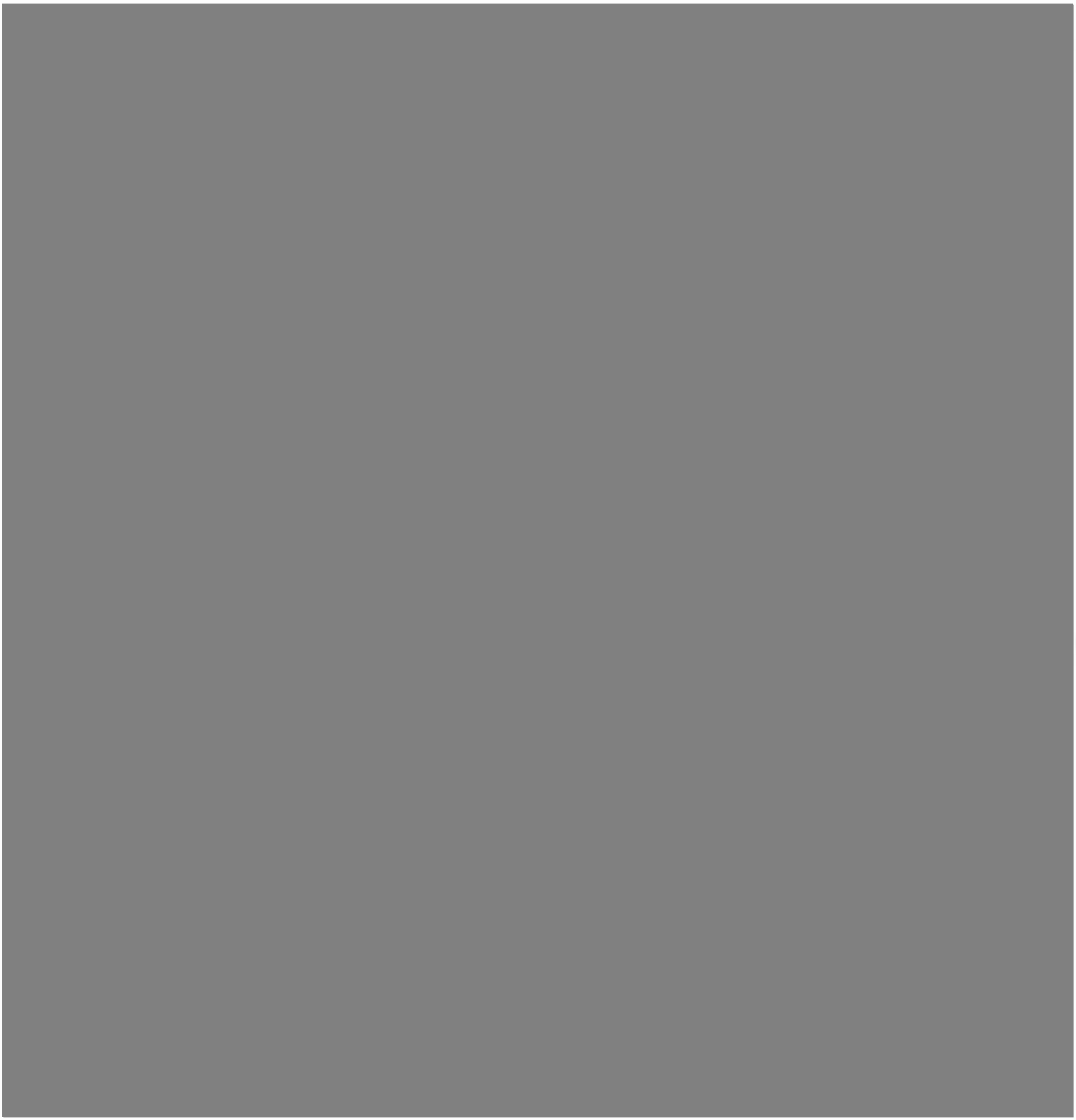

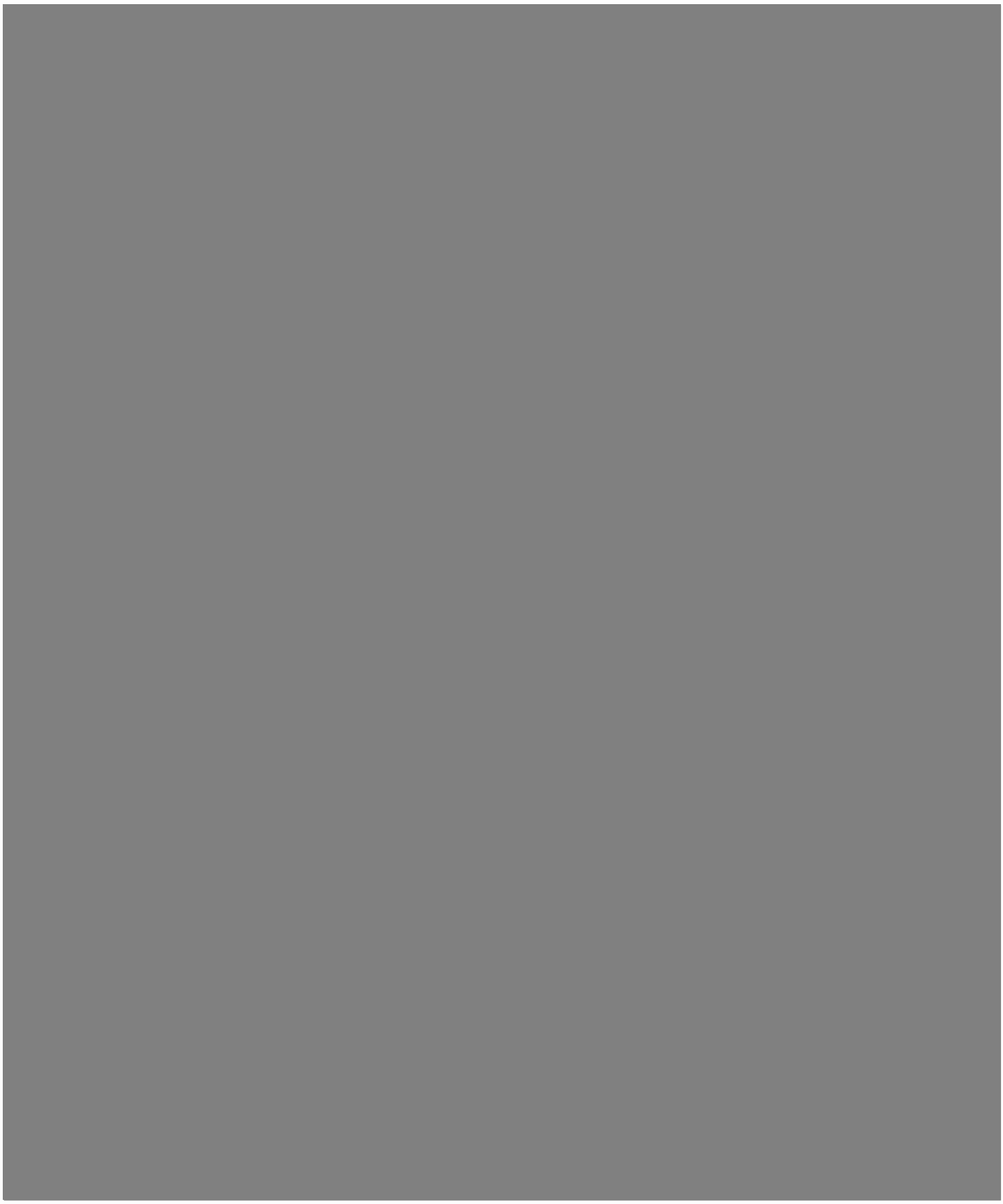

Respectfully submitted,

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Of Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 09-20462-CR-GOLD/MCALILEY

UNITED STATES OF AMERICA	)
	)
v.	)
	)
JUAN GONZALEZ and	)
WILMER QUESADA-RAMOS	)
	)
Defendants.	)
	)

GOVERNMENT'S MEMORANDUM OF LAW
REGARDING JUROR CONTACT WITH EMBER THE DOG

The Court asked the parties to brief the issue of whether one of the jurors expressed bias in a statement she made to a dog as she walked into the jury room, and if so, whether the defendants were prejudiced by it. After reviewing the case law, the government believes that there was no bias and no prejudice.

I. A Brief Summary of the Facts.

Early in the morning of the third day of trial, January 21, 2010, Captain Ross Holt and his canine partner, Ember, were sitting outside the courtroom waiting to be called as the first witness for that day's testimony. As the captain and his dog were waiting, a woman who the captain thought may have been a juror came up to Ember, patted her on the head and said, "We heard that you did a good job." The woman then walked off. Captain Holt told counsel for the government, and counsel for the government promptly told counsel for the defendants. Captain Holt went on to testify; Ember stayed outside the courtroom.

Counsel for the defendants moved the Court to excuse the juror (assuming it was a juror) who talked to the dog. The Court ordered that the parties brief whether the woman's statement to Ember

expressed bias, and prejudiced the defendants.

II. Brief Summary of the Law.

"It is well established that the Sixth Amendment affords every defendant the right to be tried by 'an impartial jury,' and that premature discussions by jurors can impinge upon that right." United States v. Edwards, 696 F.2d 1277, 1282 (11th Cir. 1983). To determine whether the impartial jury right has been violated by juror misconduct, "[t]he test is whether or not the misconduct prejudiced the defendant to the extent that he has not receieved a fair trial." United States v. Klee, 494 F.2d 394, 396 (9th Cir. 1974). "The judge's decision whether to interrogate the jury about juror misconduct is within his sound discretion, especially when the alleged prejudice results from statements made by the jurors themselves, and not from media publicity or other outside influences." Grooms v. Wainwright, 610 F.2d 344, 347 (5th Cir. 1980). The following cases set out the outer limits of jury statements that do not show bias or prejudice the defendant.

In Grooms, for example, on the second day of the four day trial, the defendant's mother overheard one of the jurors say to four other jurors: "As far as I'm concerned, (from) what I heard already he's guilty." Id. at 346 (alteration in original). The former Fifth Circuit explained that this statement by the juror "at the conclusion of the prosecution's case and before the defendant presents any evidence does not reflect serious prejudice, but only an objective evaluation of the evidence presented to date in the trial." Id. at 347. The Court explained that the trial judge "did not abuse his discretion or violate Grooms' due process rights when he denied Grooms' motion" for a new trial based on the juror's statement about the defendant's guilt. Id.

Likewise, in Klee, one of the jurors swore out an affidavit stating that "eleven of the fourteen jurors (including alternates) discussed the case during recesses and that nine of the jurors expressed

premature opinions about [the defendant's] guilt." Klee, 494 F.2d at 395. The Ninth Circuit explained that "not every incident of juror misconduct requires a new trial." Id. at 396. "The juror's affidavit," the court said, "does not assert that any of the jurors relied upon any evidence outside of the record in reaching their verdict, nor does it assert that any of the jurors actually decided upon the defendant's guilt before the case was submitted to them." Id. at 396. The court continued:

> The trial judge carefully examined the affidavit's allegations and ruled that even if everything in the affidavit were true a new trial was not required. Though the judge expressed his disapproval of such juror conduct, he commented that 'the question is whether such conduct prejudiced defendant's right to a fair trial by an impartial jury.'

Id. The Ninth Circuit held that "[i]t was not error to deny [the defendant's] the motion for a new trial" based on the affidavit. Id.

Finally, in United States v. Hendrix, 549 F.2d 1225 (9th Cir. 1977), one of the jurors was alleged to have said, before voir dire: "[W]e just had a case where a policewoman was tried for selling narcotics and the damn Judge let her go. And she was absolutely guilty. And I am here to see that they put some of these people away. These Judges are absolutely too lenient and they are letting too many people run around." Id. at 1227. The Ninth Circuit found that the juror's "alleged statement does not refer to [the defendant] or to his prosecution. Rather, she was speaking of another, already completed prosecution." Id. at 1229. The court continued:

> Also, [the juror's] assertion that "she was here to see that they put some of these people away" is unclear because of the ambiguity inherent in the word these. [The defendant] argues that she was referring to all criminally accused. Taking the statement in context, however, it appears much more likely that she was referring to those who are "absolutely guilty." Obviously, a desire to convict the absolutely guilty is not inconsistent with a juror's duties.
>
> > FN4. The record tends to indicate that the trial judge took Mrs. Hendrix' and her mother's affidavits at face value and denied Hendrix' new trial motion on the ground that there was an inadequate

showing of prejudice.

* * *

> And we adhere to the view that "When twelve jurors sit down to deliberate upon their solemn duty of pronouncing innocence or guilt upon a fellow human each exposes his own particular views of the evidence to the sound judgment of all with the result that tangential views have little chance of survival and practically none of getting eleven approving votes."
>
> Finally, the nature of the alleged bias is different both in degree and kind from that which the courts have traditionally viewed as involving a high risk of prejudice.
>
> > This is not a case that involves "any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury," . . . nor does it involve the influence of the press upon the jury.
>
> On the basis of these considerations, we are not convinced that [the defendant] was denied his right to a trial by an impartial jury. Any juror misconduct or bias did not prejudice [the defendant] to the extent that he did not receive a fair trial.

Id. at 1229–30 (citations omitted).

III. The Law As Applied to These Facts.

The statement made by the woman to Ember says nothing about prejudging the defendants' guilt. Unlike the statements made by jurors in Grooms, and Klee, and Hendrix, the statement in this case doesn't even approach the level of premature statements about guilt or the state of the evidence. Even in those extreme cases, where the juror has all but said that he or she believes the defendant to be guilty at that point in the proceedings, the courts of appeals do not find that the defendant is prejudiced because the jurors swear that they will have an open mind and will listen to all the evidence. The only statements that rise to the level of prejudice are those where the juror says that she "actually decided upon the defendant's guilt before the case was submitted." We didn't have that in Grooms, and Klee, and Hendrix, and we don't have anything close to that here.

The Grooms case is particularly instructive. There, as here, a juror expressed an opinion based on what she heard. In Grooms, the opinion expressed by the juror was much closer to the line—saying that she thought the defendant was guilty. Here, by contrast, the opinion expressed by the woman who spoke to Ember had nothing to do with what she thought about the guilt or innocence of the defendant, or even what she thought of the evidence. Rather, the statement was only that she had heard that Ember did a good job. To the extent this reflects at all on what the woman thought of Ember, the statement was made before Captain Holt had testified, before he had been cross examined, before the conclusion of the government's case, and before the defendants put on their case. Like in Grooms, anything said by a juror about the state of the evidence "at the conclusion of the prosecution's case and before the defendant presents any evidence does not reflect serious prejudice, but only an objective evaluation of the evidence presented to date in the trial." There is nothing prejudicial to the defendant about that.

Moreover, we should not lose sight of the context of the statement made by the woman to Ember. There was only a brief encounter between the juror and Ember. As three Supreme Court justices have said, "a mere 'brief encounter,' by chance, with the jury would not generally contravene due process principles." Gonzales v. Beto, 92 S. Ct. 1503, 1505 (1972) (summary reversal) (concurring opinion of Stewart, J., joined by Douglas and Marshall, JJ.) (citing Turner v. Louisiana, 379 U.S. 466, 473 (1965)). "[C]ertain chance contacts between witnesses and jury members, while passing in the hall or crowded together in an elevator, are often inevitable." Id. That's exactly what he have here.

Also, the statement by the woman was made to a dog, not to a witness in the case. Ember was not a witness in the trial. Indeed, at the defendants' request, he was kept outside of the

courtroom. The only issue for the jury with regard to Captain Holt's testimony was his credibility in handling Ember and interpreting her alert. The woman's comment to Ember said nothing about these two crucial issues for the defense—indeed, Ember could have done a "good job," but Captain Holt may not have and the defendants had ample opporunity to examine him on that. The woman's comment doesn't speak to the actual witness before them, Captain Holt.

In the end, the statement by the woman to Ember is really nothing more than a dog lover going up to a cute dog, patting him on the head, and saying, "good dog." Dogs, like babies, can be irresistable; people feel compelled to go up to them, pat or touch them, and say something nice like, "good job" or "she's so cute." That's all we're dealing with here. A person seeing a dog in the hallway, going up to it, petting Ember, and saying something nice. It isn't cause for prejudice to the defendants and it isn't cause to excuse the juror. The woman, to the extent she's a juror, swore that she could be fair and would have an open mind in considering all the evidence. "[J]urors are presumed to have performed their official duties faithfully." Hendrix, 549 F.2d at 1230. Given that much more questionable statements have been held by the courts of appeals to have not been prejudicial to the defendants, nothing about what the woman said to Ember should shake the presumption.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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SERVICE LIST

United States v. Gonzalez
Case No. 09-20462-CR-Gold
United States District Court, Southern District of Florida

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