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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROLAND C. COLTON,

Defendant.

Case No.: 06 CR 2252 W

**DEFENDANT'S NOTICE OF MOTION
AND MOTION TO DISMISS AND/OR
STRIKE:**

**1. AS TO COUNTS 1, 2 & 7 OF THE
INDICTMENT, ANY CHARGES
AND/OR REFERENCE RELATING TO
LAGUNA NIGUEL PROPERTY;**

**2. COUNT 4 OF THE INDICTMENT
IN ITS ENTIRETY.**

DATE: January 21, 2009

TIME: 9:00 a.m.

CTRM: 7

JUDGE: Hon. Thomas J. Whelan

TO: KAREN P. HEWITT, UNITED STATES ATTORNEY OF THE UNITED STATES OF
AMERICA AND ASSISTANT UNITED STATES ATTORNEYS ERIC J. BESTE AND
VALERIE H. CHU:

PLEASE TAKE NOTICE THAT Defendant Roland C. Colton will bring a Motion to
Dismiss and/or Strike any Charges and/or Reference to Laguna Niguel Property as to Counts 1, 2 and
7 of the Indictment, and to Dismiss Count 4 of the Indictment in its Entirety on January 21, 2009,
at 9:00 a.m., in the Courtroom of the Honorable Thomas J. Whelan, United States District Judge,
located at the United States Courthouse, 940 Front Street, Courtroom 7, Third Floor, San Diego,
California.

MOTION

By this Motion, Defendant Roland C. Colton moves to Dismiss and/or Strike any Charges and/or Reference to Laguna Niguel Property as to Counts 1, 2 and 7 of the Indictment, and to Dismiss Count 4 of the Indictment in its Entirety based upon the recent California Appellate Case of *Brooks v. Robinson* 2008 DJDAR 18376 (Cal. Ct. of Appeals, 4th Appel. Distr., Div. 2, Filed December 16, 2008) and other California and Federal authority.

This Motion is based upon the attached Memorandum of Points and Authorities; the complete files and records of this action; and such other matters and arguments as may come before the Court, including the oral argument relating to this Motion.

Dated: January 15, 2009

Respectfully submitted,

/s/ Roland C. Colton

ROLAND C. COLTON

Attorney in pro per for Defendant Roland C. Colton

1 **MEMORANDUM OF POINTS & AUTHORITIES**

2

3 **I. INTRODUCTION**

4 This motion focuses on charges set forth in the indictment that relate to the Laguna Niguel
5 Property, which is a single-family residence located at 59 Asilomar Road, Laguna Niguel, in Orange
6 County, California, that is owned by Dr. Nahid Birjandi, the wife of Defendant Roland C. Colton.

7 In the indictment, the government claims that Mr. Colton criminally failed to disclose his
8 interest in the Laguna Niguel Property and further offered false testimony regarding said property.
9 Counts 1 and 2 of the Indictment allege that Mr. Colton failed to disclose “equitable title and
10 community property interests and other interests in which he held rights and powers exercisable for
11 his own benefit, in real and personal property located in ... *Laguna Niguel, California...*” Count 4
12 of the Indictment alleges that Mr. Colton offered false and material testimony regarding the down
13 payment of the Laguna Niguel Property. Count 7 of the Indictment alleges that Mr. Colton “did
14 knowingly and fraudulently conceal property belonging to the estate from creditors and the
15 bankruptcy trustee.” (although no specific reference is made to the Laguna Niguel Property therein,
16 it may be implied by reference to the other Counts in the Indictment.)

17 The holding of the Court in the recent California Appellate Case of *Brooks v. Robinson* 2008
18 DJDAR 18376 (Cal. Ct. of Appeals, 4th Appel. Distr., Div. 2, Filed December 16, 2008)
19 **conclusively establishes that Mr. Colton did not, nor could he have had, any community or**
20 **other equitable interest in the Laguna Niguel Property as a matter of law.** Consequently, he
21 cannot be charged with having concealed property that he did not have an interest in. In addition,
22 any questions relating to the down payment of the Laguna Niguel Property cannot be material,
23 inasmuch as Mr. Colton could not have had any ownership interest in said property, and therefore
24 County 4 cannot form the basis for a false oath due to lack of materiality. Count 4 is further
25 defective, in that the question that forms the basis for the Count is fundamentally ambiguous, as a
26 matter of law.

27 Accordingly, any reference to the Laguna Niguel Property and/or any financial contributions
28 made by Mr. Colton relating thereto, should be prohibited during the course of the trial.

II. BACKGROUND

The government claims that Mr. Colton contributed some portion of the down payment that was used to purchase the Orange County Residence. The government further claims that Mr. Colton contributed some portion of the funds used to make payments on the residence, payment of property taxes, etc.

The undisputed facts are that the Laguna Niguel Property was acquired on September 17, 1998 by “Nahid Birjandi, an unmarried woman.” (See Exhibit “B” to Declaration of Roland C. Colton in Support of Motion to Dismiss and/or Strike portions of the Indictment. “Colton Decl.”) The couple then married on June 18, 1999. Mr. Colton filed his bankruptcy on October 11, 2001, more than three years after the property was acquired.

There has never been an agreement entered into between Mr. Colton and his wife regarding a change of ownership of the Laguna Niguel Property. In fact, Mr. Colton signed a Declaration on October 8, 2002, filed October 17, 2002 (approximately one year after the bankruptcy petition was filed) in the Bankruptcy Adversary Proceeding No. 02-90045-M7), a copy of which is attached as Exhibit “B” to Colton Decl., stating:

3. I do not now, nor have I at any time, had a legal or equitable interest in the residential property commonly known as 59 Asilomar Road, Laguna Niguel, California (the “Residence”).

4. Prior to June 18, 1999, — the date of my marriage to Nahid Birjandi (“Nahid”) — I never had a legal entitlement to occupy or possess the Residence.

5. At the time of our marriage, Nahid was the fee owner of the residence. At the moment of our marriage, it was her separate property as distinguished from community property. To the best of my knowledge, information and belief, it remains her separate property to this date.

Dr. Birjandi’s also signed a Declaration dated October 8, 2002 filed in the same Adversary Proceedings (attached as Exhibit “D” to Colton Decl.) stating:

2. On or about September 17, 1998, the escrow for my purchase of my current residence closed, and I became the owner of that property, which is the single family residence located at 59 Asilomar Road, Laguna Niguel, California (“My Home”).

3. I was not married at the time that I acquired My Home.

1 ...

2 5. On June 18, 1999, I married Roland C. Colton ("Roland")

3 6. By the time that I married Roland, I had learned that any property that I had,
4 including My Home, that I owned before I got married, was my sole and separate property,
5 and would continue to be my sole property after my marriage. My marriage to Roland was
6 my second marriage, and the fact that assets going into the marriage would remain my
separate property was important for me and my future financial security.

7 7. Since the time that I married Roland, I have never intended to convert any of
8 my separate property into community property. I have not, and would not, sign any form of
9 document if I thought or understood that the purpose or effect of that document would have
10 been to change any of my separate property into community property. To the best of my
11 knowledge I have never signed any such document.

12 Dr. Birjandi has remained as the sole owner of the Laguna Niguel Property since the purchase
13 of the property more than ten years ago.

14 III. DISCUSSION

15 **A. MR. COLTON CAN ONLY BE CONVICTED OF A FALSE STATEMENT WITH** 16 **RESPECT TO LAGUNA NIGUEL PROPERTY IF IT CAN BE SHOWN THAT HE** **POSSESSED AN OWNERSHIP INTEREST IN IT AT THE TIME THE PETITION** **WAS FILED.**

17 Counts 1 and 2 of the Indictment state, *inter alia*, that Mr. Colton knowingly made a false
18 statement when he stated in his voluntary petition that he had no legal, equitable, or future interest
19 in real property, including property owned as community property in Laguna Niguel, California, at
20 the time that he filed his Chapter 7 bankruptcy petition. Portions of Count 7, by implication, can be
21 construed to also charge Mr. Colton with the concealment of the Laguna Niguel Property. If, as a
22 matter of law, Mr. Colton had no interest in the Laguna Niguel Property, then he cannot be accused
23 of having made a false declaration or statement regarding his failure to disclose some ownership
24 interest in said property. As noted below, **as a matter of law**, Mr. Colton had no interest in the
25 Laguna Niguel Property. Consequently, he cannot be convicted of any crime regarding failure to
26 disclose said property.

B. AS A MATTER OF LAW, MR. COLTON DID NOT HAVE ANY INTEREST IN THE LAGUNA NIGUEL PROPERTY AT THE TIME HE FILED BANKRUPTCY.

The above cited case of *Brooks v. Robinson* 2008 DJDAR 18376 (Cal. Ct. of Appeals, 4th Appel. Distr., Div. 2, Filed December 16, 2008) is controlling on the fact situation herein.¹ The relevant facts in the *Brooks* case are as follows. Michael Brooks and Annikkawa Robinson were married in 1997. In October 2000, a residence was purchased in San Bernardino (“Property”). The money for the down payment was paid from Brooks’s earnings. Robinson did not contribute any money. Their real estate agent recommended that title be taken solely in Robinson’s name because it would be easier to obtain financing for the purchase. Brooks agreed. Although married, title was taken by Robinson as “a Single Woman.” (*Id.*, a p. 18376)

In February 2005, Brooks and Robinson separated. Robinson moved out and Brooks continued to live on the Property with their seven-year old son. At the time of separation, the Property was “in foreclosure.” Robinson contacted ECG, a company in the business of purchasing distressed properties. According to Brooks, a meeting was held where representatives of ECG, Brooks and Robinson were present. During the meeting, Brooks indicated that he wanted to refinance the house. He was told that ECG didn’t do refinances, they purchased homes. He told ECG that the Property was community property and he refused to sell. Shortly before Brooks filed a petition for dissolution of their marriage, Robinson sold the property to ECG. Brooks then filed a “Complaint in Joinder” against ECG for a declaration that the property was community property and requesting that the transaction be set aside because he had not joined in the conveyance. The issues raised by the complaint for joinder were bifurcated from the family court proceedings and tried to the court. The trial court rejected Brook’s claims and entered judgment for ECG. The trial court’s decision was affirmed by the Appellate Court. *Id.*

The Appellate Court noted (at pp. 18380-18381):

The form of title presumption affects the burden of proof. *In re Marriage of Haines* (1995) 33 Cal. App. 4th 277, at 292 & fn 11; cf. *In re Marriage of Ashodian* (1979) 96 Cal. App. 3d 43, 47.) That is, the party asserting that title is other than as stated in the deed (here, Brooks) has the burden of proving that fact by clear and convincing evidence. (*In re*

1. For ease in reference, a copy of the *Brooks* case is attached as Exhibit “A” to Colton Decl.

1 *Marriage of Weaver* (1990) 224 Cal. App. 3d 478, 486-487; *Haines, supra*, at p. 297; Evid.
 2 Code, §662.) The presumption can be overcome only by evidence of an agreement or
 3 understanding between the parties that the title reflected in the deed is not what the parties
 4 intended. (*In re Marriage of Lucas* (1980) 27 Cal. 3d 808, at 813; *In re Marriage of*
 5 *Munguia* (1983) 146 Cal. App. 3d 853, 860.) Significantly, “the presumption cannot be
 6 overcome solely by tracing the funds used to purchase the property, nor by testimony of an
 7 intention not disclosed to the grantee at the time of the execution of the conveyance.” (*In re*
 8 *Marriage of Broderick* (1989) 209 Cal. App. 3d 489, at 496; see also *Gudelj v. Gudelj* (1953)
 41 Cal. 2d 202, 212, *Lucas, supra*, at p. 813.) Nor can the presumption be rebutted by
 evidence that title was taken in a particular manner merely to obtain a loan. (Cf. *In re*
Marriage of Kahan (1985) 174 Cal. App. 3d 63, at 69 [when title was taken by spouses as
 joint tenants to obtain loan, property was presumptively held in joint tenancy].)

9 To overcome the form of title presumption, the evidence of a contrary agreement or
 understanding must be “clear and convincing.” (Evid. Code, §6621 cf. *In re Marriage of*
 10 *Weaver, supra*, 224 Cal. App. 3d at p. 486.) This standard requires evidence that is “‘so clear
 11 as to leave no substantial doubt’ [and] ‘sufficiently strong to command the unhesitating
 assent of every reasonable mind.’” (*In re Marriage of Weaver, supra*, at p. 487.

12 The Appellate Court then proceeded to apply the authorities and statutes to the case at hand:

13 We now apply the principles here. With Brooks’s knowledge and agreement, title
 14 to the Property was taken solely in Robinson’s name. The affirmative act of specifying that
 15 title be held in that manner removed the property from the general presumption of
 16 community property and made the Property presumptively Robinson’s separate property.
 Brooks could rebut this presumption by clear and convincing evidence of an agreement or
 17 understanding between him and Robinson that the Property was to be held as community
 property (or as his separate property). ...

18 Nor does other evidence in the record support an existence of the requisite
 19 understanding or agreement. Brooks testified that the money used for down payment toward
 20 the purchase price came from his employment earnings and that Robinson did not contribute
 21 money toward the purchase. As stated above, however, the form of title presumption cannot
 22 be overcome by simply tracing the source of funds used to purchase the property. He further
 testified that he believed the Property belonged to him and Robinson. Such a unilateral
 23 belief, however, is likewise insufficient to establish the existence of an agreement or
 understanding between the spouses as to ownership of Property. There is no evidence that
 Robinson held a similar understanding regarding ownership of the Property. ...

24 Brooks is not helped by his testimony that the purpose of taking title in Robinson’s
 25 name was to facilitate financing for the Property. This merely explains why Brooks was
 26 willing to allow Robinson to have sole title to the Property. Having a reason for allowing
 title to be taken solely in Robinson’s name does not diminish the inference that the parties
 27 intended the Property to be Robinson’s separate property. Indeed, it supports the conclusion
 that the form of title was not inadvertent, but rather that the parties expressly intended such
 28 a result.

1 The court also rejected Brooks's claim that the court's reasoning was based upon a
2 transmutation of community property:

3 "A 'transmutation' is an *interspousal* transaction or agreement that works to change the
4 character of property the parties' *already own*. By contrast, the *initial acquisition* of property from
5 a third person does *not* constitute a transmutation and thus is not subject to the [Family Code section
6 852, subdivision (a)] transmutation requirements [citation]." (Hogoboom & King, Cal. Practice
7 Guide: Family Law, *supra*, ¶ 8:471.1, p. 8-129.) Here, the Property was acquired in Robinson's
8 name in a transaction with a third person, not through an interspousal transaction. There is nothing
9 in the record to suggest that Brooks and Robinson ever made any agreement to thereafter change the
10 character of the Property.

11 If we assume that the government's allegations are true: to wit, that Mr. Colton paid some
12 portion of the down payment and/or contributed some portion of funds used to pay the monthly
13 mortgage, etc., absent an agreement between Dr. Birjandi and Mr. Colton to vest some ownership
14 in Mr. Colton's name (which evidence does not exist and has been specifically refuted by both of
15 them in their sworn testimony), Mr. Colton cannot have any ownership in the Laguna Niguel
16 Property, as a matter of law, according to the holding in *Brooks*.

17 There is no possible characterization of the undisputed facts set forth above, that the
18 government can make that would cause Mr. Colton to have had any ownership interest whatsoever
19 in the Laguna Niguel Property at the time that he filed bankruptcy.

20 **C. SINCE MR. COLTON DID NOT HAVE ANY OWNERSHIP INTEREST IN THE**
21 **LAGUNA NIGUEL PROPERTY, AS A MATTER OF LAW, ANY STATEMENT HE**
22 **MADE REGARD SAID PROPERTY IS NOT MATERIAL.**

23 Count 4 of the Indictment charges Mr. Colton with lying about contributing a portion of the
24 down payment with respect to the Laguna Niguel Property. A false statement must be made with
25 respect to a material fact. *United States v. Donnell*, 539 F.2d 1233, 1237 (9th Cir.), *cert. denied*, 429
26 U.S. 960 (1976).

27 Since Mr. Colton could not have had ownership of the Laguna Niguel Property, it was
28 completely immaterial as to whether he provided some down payment for the property more than
three years before he filed his bankruptcy petition. The Trustee's purpose in asking the question, and
as adopted by the government, was to inquire as to whether Mr. Colton might have some ownership
interest, either community property, equitable, or otherwise, in the Laguna Niguel Property, by virtue

1 of having paid some portion of the down payment.

2 **D. THE QUESTION REFERRED TO IN COUNT 4 IS ALSO AMBIGUOUS AS A**
 3 **MATTER OF LAW.**

4 A charge of false testimony cannot rest on a defendant's responses to ambiguous questions.
 5 *Bronston v. United States*, 409 U.S. 352, 362 (1973). "Precise questioning is imperative as a
 6 predicate for the offense of perjury." *Ibid*. Nor is the jury permitted to guess at what meaning a
 7 defendant may have ascribed to such a question. *United States v. Martellano*, 675 F. 2d 940, 946
 8 (7th Cir. 1982). The responsibility for framing the inquiry rests clearly and directly with the
 9 prosecutor. *United States v. Tonelli*, 588 F. 2d 194, 198 (3d Cir. 1978).

10 In its Trial Brief, the government alleges that Dr. Birjandi received part of the down payment
 11 for her residence from a bank loan from Pioneer Citizens Bank of Nevada. The government further
 12 alleges that a corporation controlled by Mr. Colton provided collateral for the loan. *If we assume*
 13 *that the government's facts are true*, then the Question contained in Count 4 is fundamentally
 14 ambiguous for several reasons. First of all, the question asked Mr. Colton: "Did **you** contribute
 15 anything towards the down payment of the property." The term "you" is ambiguous. The term
 16 "contribute" is ambiguous. The term "anything" is also ambiguous.

17 Who does the term "you" refer to. Does it refer to Mr. Colton? Does it refer to Pioneer
 18 Citizens Bank of Nevada? Does it refer to a corporation allegedly controlled by Mr. Colton? If it
 19 only refers to Mr. Colton, then Mr. Colton answered truthfully based upon a reasonable interpretation
 20 of the question, assuming the governments allegations are true. Clearly, the term "you" in the
 21 question could have been reasonably construed by Mr. Colton to refer only to himself, not to Pioneer
 22 Citizens Bank of Nevada or a corporation allegedly controlled by him. A corporation has its own
 23 separate legal existence, whether it is controlled by an individual or not.

24 The term "contribute" is also ambiguous. According to the government, the money that Dr.
 25 Birjandi received for a portion of the down payment came from Pioneer Citizens Bank of Nevada
 26 by virtue of a loan. Didn't Pioneer Citizens Bank of Nevada "contribute" the down payment?
 27 Moreover, if a corporation provided collateral for the loan, does that mean that the corporation
 28 "contributed" a portion of the down payment? It can reasonably argued that the corporation did not

1 contribute anything towards the down payment, but only provided some type of credit enhancement
 2 for the loan. If the corporation that allegedly provided the collateral for a loan is controlled by an
 3 individual, can that individual be construed to have “contributed” the down payment? Wouldn’t it
 4 be more accurate to say that the bank provided the funds directly to Dr. Birjandi for the down
 5 payment by loaning her the money, and that the corporation (and possibly the individual) assisted
 6 Dr. Birjandi in obtaining the loan, assuming the governments allegations are true.

7 The term “anything” is terribly overbroad and extremely ambiguous. What is meant by that
 8 term in the context of the question? Mr. Colton testified previously in the 2004 examination that he
 9 assisted Dr. Birjandi in the negotiation and purchase of her residence.

10 The above question is so inherently ambiguous that the Court should declare the related
 11 response insufficient to support a false testimony conviction as a matter of law. *See, e.g., United*
 12 *States v. Sainz*, 772 F. 2d 559, 564 (9th Cir. 1985) (holding that question incorporating the word
 13 “procedure” was fatally ambiguous when used by prosecutor during investigation of corruption in
 14 INS because term could refer to entire procedure of admitting automobiles across border or to some
 15 individual step in that procedure); *United States v. Lattimore*, 127 F. Supp. 405, 406 (D.D.C. 1995)
 16 (seminal case holding fundamentally ambiguous question during McCarthy hearing asking whether
 17 defendant was a “follower of the Communist line.”)

18 Furthermore, because a fundamentally vague question is legally insufficient to support a false
 19 testimony conviction, it is properly subject to challenge by means of a pre-trial motion to dismiss.
 20 *United States v. Serafini*, 167 F. 3d 812 (3d Cir. 1999); *United States v. Naegle*, 341 B.R. 349
 21 (D.D.C. 2006); *United States v. Caputo*, 288 F. Supp. 2d 912, 922-23 (N.D. Ill. 2003). Where such
 22 a challenge is sustained, the proper remedy is to dismiss or strike the flawed question or answer from
 23 the indictment. *Serafini*, 167 F. 3d at 824.

24 **1. The term “you” has been deemed fundamentally ambiguous.**

25 In *United States v. Lighte*, 782 F. 2d 367, 375 (2d Cir. 1986), the appellate court reversed a
 26 conviction based on fundamental ambiguity where the prosecutor used the pronoun “you” to refer
 27 to defendant in a series of questions but did not clarify when he was referring to the defendant in
 28 capacity as trustee and when he was referring to the defendant in individual capacity.

1 **2. A term subject to more than one interpretation may be fundamentally**
 2 **ambiguous.**

3 In *Tonelli, supra*, 577 F. 2d at 199-200, questioning whether defendant “handled” certain
 4 pension funds was deemed fundamentally ambiguous where handling could mean touching the check
 5 or effecting the transaction, and it was the prosecutor’s responsibility to clarify which question he
 6 was asking. Just as in *Tonelli*, the term “contribute” could mean several different things.

7
 8 **IV. CONCLUSION**

9 It is clear from the holding in *Brooks, supra*, that Mr. Colton did not have any ownership
 10 interest whatsoever in the Laguna Niguel Property, as a matter of law. Mr. Colton cannot be charged
 11 with criminally failing to disclose ownership of property he didn’t own, as a matter of law.
 12 Therefore, those portions of the Count that relate to the Laguna Niguel Property must be stricken
 13 and/or dismissed.

14 Since Mr. Colton could not have had ownership of the Laguna Niguel Property, it was
 15 completely immaterial as to whether he provided some down payment for the property more than
 16 three years before he filed his bankruptcy petition. Furthermore, there are fundamental ambiguities
 17 in the question that render it fatal for purposes of a perjury or false oath charge. Accordingly, Count
 18 4 of the Indictment should be dismissed.

19 Dated: January 15, 2009

Respectfully submitted,

21 /s/ Roland C. Colton

22 ROLAND C. COLTON

23 Attorney in pro per for Defendant Roland C. Colton
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PROOF OF SERVICE

I, Roland C. Colton, am over eighteen years old. My business address is located at 28202 Cabot Road, Suite 300, Laguna Niguel, CA. 92677.

On January 15, 2009, I have caused service of **DEFENDANT'S NOTICE OF MOTION AND MOTION TO DISMISS AND/OR STRIKE (PORTIONS OF THE INDICTMENT)** by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them:

Eric J. Beste, Eric.Beste@usdoj.gov,

Valerie H. Chu, Valerie.Chu@usdoj.gov.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 15, 2009.

/s/ Roland C. Colton
ROLAND C. COLTON
