No. 13-2037

In The
United States Court of Appeals
for the Tenth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

RICK REESE, TERRI REESE, AND RYIN REESE,
Defendants-Appellees.

Appeal from the United States District Court for the District of New Mexico
District Court No. CR-11-2294
Robert C. Brack, United States District Judge

Brief of Appellees

Oral Argument is Requested

ROBERT J. GORENCE
GORENCE & OLIVEROS, P.C.

JASON BOWLES
BOWLES LAW FIRM

MICHAEL CONNELLY
U.S. JUSTICE FOUNDATION

July 11, 2013
*Attorney of Record

HERBERT W. TITUS*
ROBERT J. OLSON
WILLIAM J. OLSON
JOHN S. MILES
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C
370 Maple Avenue W., Suite 4
Vienna, VA 22180
(703) 356-5070

Counsel for Appellees

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There are no prior or related appeals.

RESTATEMENT OF THE ISSUE PRESENTED FOR REVIEW

The issue presented is whether, based on the whole record, the district court abused its discretion in granting defendants' motion for a new trial because the Government had "intentionally or negligently" suppressed favorable and material impeachment evidence, in violation of defendants' Fifth Amendment Due Process right and Sixth Amendment right of confrontation, as those guarantees have been applied in Giglio v. United States, 405 U.S. 150 (1972) and related cases.

RESTATEMENT OF THE CASE

On August 24, 2011, Rick Reese, his wife Terri Reese, and their two sons Ryin and Remington Reese, were named in a 30-count federal indictment. Count 1 charged them with a conspiracy to make "false statements in connection with the acquisition of firearms, contrary to 18 U.S.C. § 924(1)(A)," and to "smuggle goods from the United States, contrary to 18 U.S.C. § 544." I App. at 77-78.[1] In connection with this conspiracy charge, the four Reeses faced 27 additional counts. Counts 2 through 10 charged each of them, as identified, with violations of the

[1] Citations to "App." refer to the Appellant's Appendix, filed concurrently with its opening brief. *See* Govt. Br. at 1, n.1.

false statement statute. *Id.* at 85-86. Counts 11 through 28 charged them, as identified, with violations of the smuggling statute. *Id.* at 86-88. Finally, Counts 29 and 30 charged the four as co-conspirators engaged in money laundering. *Id.* at 88-90. Attached to the indictment were forfeiture allegations asserting that, upon conviction, certain firearms, ammunition, proceeds, and property were to be ordered forfeited to the United States. *Id.* at 90-96.

On August 30, 2011, Rick, Terri, Ryin and Remington[2] were arrested. *Id.* at 15 (Dckt. # 4). On September 2, 2011, the Government filed a motion for detention as to all four. *Id.* at 17 (Dckt. # 22). On September 6, 2011, 17-year-old Remington was ordered released on conditions, but Rick, Terri and Ryin were ordered detained. *Id.* at 18-19 (Dckt. ## 27-35). On September 20, 2011, in response to a motion to revoke the order to release (*id.* at 19 (Dckt. # 38)), Remington too was ordered detained. *Id.* at 21 (Dckt. # 53). On March 28, 2012, after several attempts to obtain her release, Terri was ordered released to a halfway house on $100,000 bond. *Id.* at 34 (Dckt. # 150). Several

[2] As the Government's Brief refers to the four Reeses by their first names, this brief will do so also. *See* Govt. Br., at 1, n.2.

further attempts to obtain the release of Rick, Ryin, and Remington were made before trial, but to no avail. *See id.* at 21-34 (Dckt. ## 54, 60, 95, 110, 111, 114, 121, 122, 123, 125, 129, 130, 131, 139, 140, 143, 145).

On July 16, 2012, 10 and one-half months after the Reeses had been taken into custody, the jury trial commenced. The trial concluded on August 1, 2012 with a jury verdict of acquittal on the conspiracy charge, on all but four of the nine false statement counts, and on all 18 smuggling counts. *See* II App. at 300-310. Additionally, the two money laundering conspiracy counts were dismissed by court order for want of evidence. *See id.* at 322-24.

Rick was convicted of Count 9 and Terri of Count 10 for having, on July 29, 2011, aided and abetted the making of a false statement about information required to be kept by a Federally Licensed Firearms Dealer ("FFL"), in violation of 18 U.S.C. §§ 2 and 924(a)(1)(A). I App. at 85-86 and XIII App. at 3031, l. 22 - 3032, l. 3. Ryin likewise was convicted of Counts 7 and 8 with respect to two other firearms transactions: one on June 15, 2011, and the other on July 7, 2011. *See*

I App. at 85-86 and XIII App. at 3031, ll. 16-21. Remington was acquitted of all charges. *See* II App. at 301, 305, 306-07, 308, 309 and 310 (Counts 1, 13, 16, 18, 21, 25 and 28). While Remington was released outright (XIII App. at 3039, l. 25 - 3040, l. 2), Rick and Ryin remained in jail.

On November 21, 2012, three months and 21 days after the jury verdict, "the Government filed a Sealed *Ex Parte* Motion for In Camera Review, asking the Court to review 126 pages of attachments *in camera* and rule *ex parte* that such information was not subject to disclosure to the defense as impeachment material." *See* II App. at 349-50.

On November 28, 2012, the district court "directed the Government to serve its seven-page motion on defense counsel and imposed the Government's requested limitations on Defendants and defense counsel." *See id.* at 350. *See also* III App. at 593. "On December 10, 2012, the Government filed a sealed notice of disclosure stating it had disclosed redacted copies of the 126 pages of material to defense counsel." II App. at 350. *See also* III App. at 595-96.

On December 5, 2012, Rick and Ryin "filed a Motion for Release from Custody on Conditions" pending sentencing, in which Terri joined. I App. at 65 (Dckt. # 375, 376). In support of this motion, defense counsel noted that the Government must have known about the *Giglio* issue "since at least the time of the verdict," and Rick and Ryin's continued incarceration risked their serving more time than appropriate under the sentencing guidelines. *See* Motion for Release on Conditions Pending Sentence in Appellees' Supplemental Appendix ("Supp. App.") at 1-2. On December 17, 2012, the Government filed its opposition. Supp. App. at 4-13.

On December 18, 2012, the district court held a hearing on the defense motion for release. After hearing from the defense and the prosecution on the merits, the court expressed its deep concern about the Government's "four month" delay which necessitated the defense motion. *See* XIV App. at 3062, ll. 6-17. In an attempt to explain the delay, the Government revealed in open court that the undisclosed impeachment material concerned Luna County New Mexico Deputy Sheriff Alan Batts, who had testified as a witness for the Government

at trial. *See* XIV App. at 3066, ll. 24-25; II App. 350. In response, defense counsel stated that another evidentiary hearing would be necessary, involving a contemplated defense motion for a new trial, and that Deputy Batts would be subpoenaed to testify "because if he knows [of the FBI investigation of his activities,] then he has a motive to temper his testimony to please the government...." XIV App. at 3077, ll. 6-18. Recognizing that the motion for release was dependent upon resolution of the defense's forthcoming motion for a new trial, the district court put off the motion for release until after the hearing on the motion for new trial. *See* XIV App. at 3074, l. 12 - 3079, l. 6.

On December 31, 2012, Rick, Terri, and Ryin filed a Motion for New Trial on the four counts of conviction contending, *inter alia*, "that their constitutional right to confront the law enforcement witness [Deputy Batts] was violated." III App. at 602. The Government argued against the motion, contending that the impeachment material was neither material nor admissible. *See* III App. at 615-23.

On January 28, 2013, the district court held an open evidentiary hearing on the defense motion for a new trial. II App. at 350. Among

those testifying at the hearing was Deputy Batts along with two FBI agents involved in the investigation of Deputy Batts' alleged criminal activities. *See Id.*

On February 1, 2013, the district court granted the defense motion for a new trial on the counts of conviction, determining that the Government had suppressed evidence, that such evidence was favorable to all three defendants, and that the evidence was material to the outcome. *See* II App. at 350-57. The Court concluded that "[i]mpeachment information about Deputy Batts, a key investigator and government witness, could have easily altered the outcome of the trial." *Id.* at 357. The district court also granted the motion for release of Rick and Ryin on conditions, noting that "[r]esolution of this matter has been unreasonably delayed by the Government." *Id.* at 357-58.

On March 4, 2013, the Government filed its timely Notice of Appeal to this Court.

RESTATEMENT OF THE FACTS

I. THE GOVERNMENT'S STATEMENT OF FACTS IS FLAWED.

In its Statement of Facts, the Government spends 28 of 36 pages rehearsing its version of what transpired between August 30, 2010, the date the investigation began into New Deal Shooting Sports and the Reese family, and August 1, 2012, the date of the jury verdict. *See* Govt. Br. at 5-32. The Government account of the testimony at trial reads as if the Reeses had been convicted on all counts, and were appealing their conviction. *See* Govt. Br. at 5-37. For example, on pages 11-22, the Government rehearses in great detail the six undercover operations sales transactions that occurred on April 20, May 19, May 27, June 15, July 7, and July 29, 2011. In their account, the Government implies that there was more than sufficient evidence to establish each crime as charged.

Yet, the Government omitted from its narrative other facts. For example, with respect to the May 19 transaction, it omitted the testimony of HSI Agent Ramirez who testified on cross-examination that Ryin did "exactly what the law requires" (VIII App. at 1755, ll. 14-

23), and therefore, he "didn't think Ryin Reese was engaging in criminal activity" on this date. *Id.* at 1757, ll. 17-19. The Government's account of the six transactions leaves the reader with the distinct impression that all of the testimony recounted therein led to the same result – guilty as charged. On the contrary, the jury returned a verdict of "not guilty" for the charges based upon the events of April 20, May 19 and May 27, 2011. *See* II App. at 287-88 (Counts 5 and 6), 289 (Count 16); 302 (Counts 5 and 6), 306 (Count 16). Compounding its error, in the Argument section of its brief, the Government explicitly states that "[t]he investigation involved six undercover operations .... The jurors viewed and listened to the videotapes and audiotapes of those operations ... and convicted the defendants based on that evidence."[3] Govt. Br. at 44.

The Reeses are not on retrial here. And the issue is not whether the evidence is sufficient to support the convictions of Rick, Terri, and Ryin. Rather the Government is the appellant. And the issue is whether the district court erred by granting the defense motion for a

[3] For a fuller discussion of the significance of this error to the Government's case, *see* Part II.A.2, *infra*.

new trial based upon the Government suppression of favorable and material *Giglio* impeachment materials.

Of course, some of the evidence introduced at trial is pertinent to the *Giglio* question. But the facts that the district court relied upon in granting a new trial involve whether the Government suppressed favorable and material evidence. To be sure, the Government recites in its Statement of Facts some of the facts upon which the district court relied (Govt. Br. at 33-37), but that brief recitation falls far short of explaining the full factual foundation upon which the district court based its decision.

II. THE GOVERNMENT SUPPRESSED POTENTIAL *GIGLIO* EVIDENCE.

A. The Government's November 2012 Motion for *In Camera* Review.

Nearly four months after the jury verdict, and on "the day before Thanksgiving and a four day court closure," (II App. at 349) the Government filed a "Sealed *Ex Parte* Motion for *In Camera* Review" ("*Ex Parte* Motion"), with 126 pages of attachments. The motion purported to advise the trial court of a potential *Giglio* problem, hoping

to persuade the district court not to conduct an adversary hearing on the question whether "certain information concerning government witness Luna County Sheriff's Office ("LCSO") Deputy Alan Batts [was] subject to disclosure to the defense." III App. at 467.

Instead, the district court issued an order directing the Government to serve its motion on the defense, noting specially that "the motion lacks any explanation as to how the trial prosecutors failed to discover the information before trial or why they waited almost four months to file their motion." *Id.* at 593. The *Ex Parte* Motion, signed by the two Assistant United States Attorneys ("AUSAs") who had tried the case, had simply stated that:

> Prior to Batts testifying, undersigned counsel requested any *Giglio* information from LCSO pertaining to Batts and was advised that none existed. Undersigned counsel was not aware of any other information, which might reflect negatively on Batts' credibility as a witness. [III App. at 467.]

As the district court would learn later, the *Ex Parte* Motion did not disclose that, prior to its filing, the undersigned AUSAs and other counsel in the U.S. Attorney's office were aware[4] that, prior to indicting

[4] *See* XIV App. at 3124, l. 7 - 3125, l. 6.

the Reeses in July or August 2011, AUSA Richard C. Williams had warned the AUSA management team supervising the Reese prosecution that there were "potential *Giglio* issues" respecting Deputy Batts. *See* XIV App. at 3104, l. 18 - 3105, l. 17; 3107, l. 4 - 3110, l. 2. The Government's motion also did not reveal to the district court that, prior to the filing of that motion, the U.S. Attorney's ethics officer, trial and supervisory counsel, and investigative agency counsel discussed whether there was a *Giglio* problem, and had agreed to inform the district court only that, prior to Batts' testifying at trial, the two AUSAs trying the case did not know of any potential Giglio problems.[5] *Id.* at 3070, l. 8 - 3071, l. 24.

Additionally, the Government's *Ex Parte* Motion did not fully cover the impeachable material on Batts in the 126 pages of attachments. The motion focused only on the Government's awareness of information that, prior to indictment, "Batts and other law enforcement officers in southwestern New Mexico ha[d] been involved

[5] Apparently, the standard procedure in this U.S. Attorney's office limited its *Giglio* inquiry to the government agency with which the witness is employed (*see* XIV App. at 3135, l. 2- 3137, l. 6), thus allowing trial counsel to avoid obtaining such knowledge from other law enforcement agencies.

in various criminal activities, including the misappropriation of suspects' assets, drug trafficking, and alien smuggling." III App. at 468. Moreover, the *Ex Parte* Motion did not reveal that in May 2012, two months before the Reese trial, AUSA Williams had been contacted by the FBI expressing "concern[] about Mr. Batts being on [a drug] task force" and that Williams had reported this by e-mail to the AUSA management team. *See* XVI App. at 3112, l. 6 - 3113, l. 9.

B. The Two Post-Conviction Hearings on Release and New Trial.

At the December 18, 2012 hearing on a defense motion for release of Rick and Ryin, the district judge stated that he was "bothered" by the "four-month period that we were all left in the dark about an issue that the government should have known about, if they didn't, six months ago[.]" XIV App. at 3062, ll. 6-11. Only because the court specifically demanded an "explanation as to how the trial prosecutors failed to discover the information before trial" was it given information of the details of the concealment. *Id.* at 3065, ll. 12-14.

On that date, in open court, James Tierney, the Chief of the Criminal Division of the United States Attorney's Office in Albuquerque, explained:

> Your honor, we do have a procedure in our office ... when ... we write a pros. memo, we attempt to list the witnesses on the front of the pros. memo. If the case is going to go to trial, the AUSAs are instructed to give the list to a supervisor, who then will review it and confer with other supervisors in the office. And if there's any indication that that witness may have *Giglio* issues, we will then formally request from the parent agency of the witness information contained in his personnel file that may affect his credibility as a witness.
>
> That procedure did not work in this case. [XIV App. at 3065, ll. 15-25.]

To the court's follow-up question — "what happened?"— Mr. Tierney responded: "The witness, Mr. Batts', name was not listed in the appropriate portion of the pros. memorandum, which was quite thick ... – his role as a witness was discussed in the body of the memorandum, but it was not listed in the correct place." XIV App. at 3066, l. 19, l. 24 - 3067, l. 3. Additionally, Mr. Tierney advised the court that the impeachment material did not appear in Mr. Batts' personnel file, but in another law enforcement agency's file and which

had not been reassigned to an AUSA after another AUSA had "left the office." *Id.* at 3068, ll. 1-8.

Having determined that the impeachment material had been in the U.S. Attorney's office for "several years" (*id.* at 3068, ll. 23-24), the court asked why one of the prosecuting AUSAs, Ms. Armijo, did not know this information, in light of the fact that she had been "the branch chief down here." *Id.* at 3068, l. 19 - 3069, l. 6. Mr. Tierney replied that it was because of the confidential nature of "law enforcement corruption cases." *Id.* at 3069, ll. 7-10. But, Mr. Tierney added, as soon as Ms. Armijo had been "informed after closing argument" of a potential *Giglio* problem, "Supervisory AUSA Richard Williams immediately requested the information from the investigative agency and instituted a search for ... our U.S. Attorney file." *Id.* at 3070, ll. 5-12. After the Criminal Division Chief conceded that "the government did not promptly file the information" (*id.* at 3072, ll. 5-6), the court admonished the prosecutors: "I certainly can't be satisfied with a system that produces such a result." *Id.* at 3074, ll. 14-15.

One month later, at the January 28, 2013 hearing on the defense motion for a new trial, AUSA Williams testified that he had "reviewed the pros. memo before the Indictment," and confirmed that "Mr. Batts' name was listed in [it]." *Id.* at 3105, ll. 11-17. *See also id.* at 3107, ll. 4-11. Additionally, AUSA Williams verified that, before indictment, he identified "potential *Giglio* issues" with respect to Mr. Batts and that he brought those issues to the awareness of "the management team in Las Cruces," including Mr. Castellano and Mr. Perez. *Id.* at 3109, l. 12 - 3110, l. 2.

AUSA Williams also acknowledged that in "approximately May of 2012," before trial, he sent an "e-mail relating to Batts" to the "management in the Las Cruces office" informing them that the FBI "was concerned about Mr. Batts being on the [drug] task force" in Deming. *Id.* at 3112, ll. 3-25. However, AUSA Williams conceded that he was unaware whether the management or the trial team reviewed the potential *Giglio* impeachment material. *See id.* at 3110, ll. 6-24; 3112, l. 3 - 3113, l. 16.

C. The Reese Pros. Memo and the FBI May 2012 E-Mail.

Aware that the pros. memo and e-mail would contain privileged "work product," but suspecting that the documents contained additional information relevant to the defense motion for a new trial, defense counsel requested that the pros. memo and e-mail "be sealed and provided in camera to the court" for *Giglio* review. *Id.* at 3113, l. 21 - 3114, l. 6. The court granted the request. *Id.* at 3115, ll. 5-8. *See also* II App. at 352 n.1.

After reviewing the two documents, the district court confirmed that AUSA Williams, in his May 30, 2012 e-mail, had "warned [AUSAs Castellano, Perez, and others] that they needed to consider [Batt's presence on the drug task force] to avoid *Giglio* problems." *Id.* at 352. Indeed, as noted by the district court:

> In the e-mail, Mr. Williams mentioned the name of another law enforcement officer who was the subject of the same investigation as Deputy Batts. After an AUSA in the Las Cruces Branch office failed to disclose information about the officer in an unrelated case, the Court granted the defendant a new trial. [*Id.* at 352, n.2.]

Additionally, the district court learned that twice more — on July 13 and July 19, 2012 — efforts were made by AUSA Williams to remove

Batts from the task force. *Id.* at 352-53. Nevertheless, on July 25, 2012, "the Government called Deputy Batts to testify on its behalf at trial." *Id.* at 353. In light of this, and other salient commissions and omissions, the district court concluded that "there is no doubt that the prosecution, intentionally or negligently, suppressed the evidence." *Id.* at 354.

III. THE GOVERNMENT MISSTATED THE *GIGLIO* CLAIM.

A. The November 2012 Motion for *In Camera* Review.

Although the *Ex Parte* Motion acknowledged that "[e]vidence affecting the credibility of government witnesses is a category of exculpatory information potentially within *Brady's* disclosure obligation" (III App. at 470), it readily assumed that the investigative report on Deputy Batts contained admissible evidence only if it met the strictures of Fed. R. Evid. 404(a), 608 and 609. *Id.* Applying Rule 608, the Government argued that "there has been no determination that Batts engaged in any misconduct, let alone any misconduct that involved untruthfulness." *Id.* at 471. Additionally, the Government contended that, even if the evidence were admissible under Rule 608,

"it would be excludable under Rule 403 because any probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, and considerations of undue delay and waste of time." III App. at 471.

Completely omitted from the *Ex Parte* Motion's *Giglio* analysis was the report's account of a critical telephone conversation that took place on May 5, 2008 between Deputy Batts and FBI agent Garry Brotan — one of the two agents investigating Batts' alleged criminal misconduct. *See* III App. at 474 and 556. According to the notes entered contemporaneously by agent Brotan, and in response to a telephone message to contact Batts, "[t]he writer [Brotan] along with SA Joe Acosta telephonically contacted Investigator Batts [who] advised that he had some information to pass onto the FBI" concerning some potential criminal activity by another Luna County law enforcement officer named Brookhouser who was referred to by name in the FBI original report. *See id.* at 474, 556-57. In the course of the conversation, Batts self-servingly "stated that he did not know anyone else at the FBI except for [Brotan] and was concerned that Batts had

built up a good reputation over the past 20 years and had nothing to hide." *Id.* at 557.

Although the Government mentioned this incident in its *Ex Parte* Motion (*id.* at 469), it was not until the 126-page redacted report attached to the *ex parte* motion was served on defense counsel that the May 2008 phone call was identified as the crucial event from which an actual *Giglio* claim would emerge.

At the December 18, 2012 hearing on the defense motion to release, defense counsel proffered:

> [I]n their response to the motion for release, [the Government] goes into some detail about talking about how it's going to be frivolous, in essence. I can only tell you that it's not 608 character evidence.... It has everything to do with essence of confrontation where a key witness in a case has a motive and bias to lie in favor of the government.... It is not a 608 evidentiary question.... Nothing to do with that at all. [XIV App. at 3049, ll. 17-20; 3050, ll. 6-15.]

B. The January 28, 2013 Hearing on the Motion for New Trial.

A month later, at the January 28, 2013 hearing on the defense motion for a new trial, FBI Special Agent Brotan testified that, since 2004, Deputy Batts had been the subject or target of a federal public corruption investigation involving law enforcement personnel in Luna

County. XIV App. at 3147, ll. 2-20. FBI Special Agent Joe Acosta testified that the investigation of Luna County, which he believed started in 2002, was still active. *See* XIV App. at 3176, ll. 1-13.

Agent Brotan testified that he spoke with Batts by telephone on May 5, 2008, and that Batts provided some information of criminal activity involving another Luna County law enforcement official. And Brotan testified that, in the course of the conversation, Batts stated that he, Batts, had a good reputation, and that he was not involved in any wrongdoing. XIV App. 3155, l. 4 - 3156, l. 21. "Right after the phone call" (XIV App. at 3186, ll. 9-11), Special Agent Acosta testified that the "FBI collectively" formed the opinion that Batts had been "tipped ... off" (XIV App. at 3185, ll. 19-24) "that the FBI was looking at him and some other officers." XIV App. at 3185, ll. 10-18.

On cross-examination, the Government made no effort to disturb the FBI assumption[6] that, by May 2008, Batts had "knowledge"[7] of the FBI Luna County public corruption investigation. *See* XIV App. at

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[6] *See* XIV App. at 3185, l. 25 - 3186, l. 6.

[7] XVI App. at 3186, ll. 7-8.

3195, l. 23 - 3197, l. 4. Instead, the Government relied solely on the testimony of Batts himself. On direct examination, Batts testified that (i) he had never "heard" that he was "the subject of a federal investigation,"[8] (ii) he did not "know" that he had been "surveilled by the FBI,"[9] and (iii) he was unaware of any FBI examination of his bank or phone records.[10] On cross, in response to the prosecutor's only question — whether Batts was "biased in any way such that your testimony may have been tainted in favor of the United States — Batts testified:

> No ma'am I told the truth. I raised my right hand, swore under God to tell the truth, and that's exactly what I did. [XIV App. at 3211, ll. 14-20.]

Remarkably, this testimony was elicited from Batts by the Government after Batts flatly denied ever placing a call to Special Agent Brotan:

> THE COURT: Deputy, I'm not clear. With regard to this ... telephone conversation, with Special Agent Garry Brotan?

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[8] *See* XIV App. at 3201, ll. 18-23.

[9] *See* XIV App. at 3205, ll. 15-17.

[10] *See* XIV App. at 3205, l. 18 - 3206, l. 14.

> THE WITNESS: Yes, sir.
> THE COURT: You're indicating that you don't recall. You've said that numerous times. I've got that.
> THE WITNESS: Right.
> THE COURT: But is it your testimony that it didn't happen or you just don't recall?
> THE WITNESS: He's stating that I called reporting another ... officer. That never happened. I don't ever recall calling Garry Brotan reporting something on another officer. He said I had recorded conversations with somebody and turned it over to the FBI? No sir. I never called Garry Brotan.... [XIV App. at 3210, ll. 6-20.]

IV. AFTER TRIAL THE GOVERNMENT ATTEMPTED TO MARGINALIZE BATTS AS A WITNESS.

A. The November 2012 Motion for *In Camera* Review.

In its sealed *Ex Parte* Motion, the Government claimed that "Batts' testimony was limited in scope to his contact with Terri Reese in August 2010 at New Deal Shooting Sports." III App. at 467. Entirely omitted was any meaningful description or analysis of the substance of Batts' testimony. Although the Government hinted at the prosecution's "closing arguments," it did so only to disclose the time when and place where AUSA's "Alfred Perez and Richard Williams heard that Batts had testified." III App. at 467-68.

In contrast with the paucity of information about Batts' testimony at trial, the Government gave a detailed account of Batts' suspected wrongful conduct, and devoted substantial analysis to its claim that the impeachment evidence was not only irrelevant, but would have been confusing if admitted at trial. *See* III App. at 468-72. Then, without addressing Batts' trial testimony, the Government presumptively asserted "that there is no reasonable probability that the investigation of Batts (and others) would have any impact on the outcome of the trial in this case." III App. at 472.

B. The Government's Response to the Defense Motion for New Trial.

It was not until January 10, 2013, that the Government finally addressed the substance of Batts' testimony, including what he said had transpired in August 2010 between him and Terri Reese. *See* III App. at 610-12, 614-15. Even then, the Government's narratives of Batts and Terri's testimony glossed over the August 2010 meeting between the two, just as the Government had done in its *Ex Parte* Motion.

What the Government avoids discussing is what Batts testified had happened at New Deal Sports on August 30, 2010, which is precisely what triggered the entire undercover investigation leading to the indictment of the Reeses. *See* IX App. at 2040, l. 18 - 2044, l. 13. Batts claimed that Terri told him that she was aware that rifles sold by New Deal had been "recovered or picked up in Mexico." IX App. at 2042, ll. 11-16. Terri Reese flatly denied that she had made any such statement. XII App. at 2770, ll. 14-19. Nonchalantly, the Government belittled Deputy Batts' testimony as "not crucial to the prosecution's case ... the **only** fact [being] disputed by the defense was the statement by Terri Reese to Dep. Batts that the Torres firearm was recovered in Mexico." III App. at 620 (emphasis added).

C. The Closing Arguments at Trial Tell a Different Story.

According to the prosecutors' closing arguments at trial, however, this supposedly inconsequential fact was key to the Government's argument that all of the Reeses were guilty, as charged. In his opening closing argument, AUSA Aaron Jordan contended:

> What were the objectives of this conspiracy? One ... which each and every defendant participated in, was to sell

> guns and ammunition, knowing that those items would be illegally smuggled to Mexico. The other was to sell guns to straw purchasers....
>
> Now, how did the defendants work together to violate the law? Well, one example is the trace report.... Terri receives this from the National Firearms Tracing Center. She talks to Allan Batts about it. There is conflicting testimony there. You decide who you believe to be credible. Allan Batts said, "Terri told me that that gun was recovered in Mexico." [XIII App. at 2912, ll. 5-9, 13-20.]

And in rebuttal closing, AUSA Maria Armijo similarly argued:

> There is your knowledge that these weapons are going to Mexico. There is your knowledge that it's a cartel member. There is your knowledge that this is not just puffing, this is not just barbershop talk. There is your knowledge.
>
> Go through the tapes and you, yourself, will see. And, again, look at what was told to Allen Batts, the full picture. [XIII App. at 2999, ll. 1-8.]

Indeed, Batts' testimony was referenced on two additional occasions in the closing arguments, prompting the district court to conclude in his order granting a new trial that "Deputy Batts' credibility was vitally important at trial." II App. at 356.

SUMMARY OF ARGUMENT

On November 21, 2012, nearly four months after Rick, Terri and Ryin Reese were convicted on just four counts of a 30-count indictment, the Government filed a sealed *ex parte* motion. The Government asked the district court to conduct an *in camera* review of an FBI report involving a federal criminal investigation into a New Mexico Luna County Deputy Sheriff, Alan Batts, who had been a witness for the Government in the Reeses' trial. The Government asked the court for a ruling that the Government had not violated its constitutional duty to disclose to the defense potential impeachment material, as required by Giglio v. United States.

The Government hoped to get a favorable ruling without an adversary hearing. The Government alleged to the court that Deputy Batts' testimony was "limited in scope." Next, the Government claimed that the prosecuting Assistant United States Attorneys were unaware of "any ... information which might reflect negatively on Batts' credibility as a witness." The Government asserted that such information that had only now come to their attention came "after the

conclusion of their trial." Finally, the Government claimed that the information about the criminal investigation of Batts, in any event, was inadmissible under the Federal Rules of Evidence.

The district court was unpersuaded. It ordered the Government to serve its motion on the defendants, and to furnish them with a redacted version of the FBI investigative report.

The court then held two hearings on this issue. The first was on December 18, 2013, in response to a defense motion for release. The second was on January 28, 2013, in response to a defense motion for a new trial.

During the hearings, the district court learned for the first time that the AUSA management team supervising the Reese prosecution had been advised, before trial, that there were "potential *Giglio* issues" about Deputy Batts. Additionally, the court discovered that two months before the Reese trial began, the U.S. Attorney's office had been informed of FBI concerns about Batts' testifying at trial. Both of these warnings had gone unheeded by the prosecution.

The district court found that "there is no doubt that the prosecution, intentionally or negligently, suppressed the evidence." The district court also held that the suppressed evidence was not "limited in scope," as the Government had claimed. Rather, "in relation to the record as a whole," the court found that impeaching Batts' testimony "would have put the entire investigation in a negative light." Additionally, the district court found Batts' "credibility [to be] vitally important at trial," since the prosecution "focused on the contradiction in the testimony of Deputy Batts and Terri Reese in closing arguments, calling into question Terri Reese's credibility."

Finally, through testimony given at the hearings, the district court learned that the most valuable evidence to impeach Batts was not his criminal conduct disclosed in the withheld reports, as the Government had claimed. Rather, the court learned that Batts had called an FBI agent on May 5, 2008, to report the criminal activities of a fellow deputy — with the telling caveat that he, Batts, was "not involved." Because of this, the district court found that "it may be inferred that [Batts] knew about the FBI investigation and he had a

motive to curry favor with the Government by embellishing his trial testimony."

When confronted about the telephone call, Batts claimed that it "never happened," even though the FBI agent had testified to the exact opposite, and even had made a "contemporaneous report" of the call. This, according to the court, "further impugned [Batts'] credibility."

Since "[m]otivation and bias [are] proper subjects for cross-examination," the district court ruled that the Government's suppression of the FBI report violated defendants' Sixth Amendment right "to be confronted with the witnesses against him."

Applying this Court's standard of review to these facts, the district court found that (1) the prosecution suppressed evidence, (2) the evidence was favorable to the defendant and (3) the evidence was material. On these grounds, the court granted the motion for new trial. On appeal, the Government has contended, however, that the "potential impeachment evidence ... was neither favorable nor material." The Government is mistaken.

Contrary to the Government's claim, Deputy Batts was a major prosecution witness at trial. Batts played a key role in establishing

before the jury the integrity of the undercover investigation, and ultimate prosecution of the Reese family. Batts' testimony — that Terri said she knew guns she sold were recovered in Mexico — directly contradicted Terri's, and impugned her credibility. In fact, at one point in closing argument, the prosecution told the jury to believe Deputy Batts — and to disbelieve Terri Reese. That same tactic would not have been possible had the defense been able to counter with the FBI report on Batts, and Batts' post-trial testimony denying the May 5, 2008 telephone call.

Moreover, it was Batts' disputed testimony that triggered the investigation and prosecution. It was this disputed testimony that was used by the prosecution in closing argument to prove beyond a reasonable doubt that Rick, Terri and Ryin Reese knew that the undercover firearms sales were straw purchases — a key element in the four counts of which they had been convicted.

Finally, the prosecution argued that the Reeses were guilty of a conspiracy to smuggle weapons into Mexico by means of straw purchases. The Government argued that the two charges – smuggling and straw purchases – were symbiotically connected, and stated in

closing argument that you could not have the one without the other. And according to the Government in its closing argument, it was Batts' testimony of what Terri told him that completed the "full picture," providing the only direct evidence that the Reeses had knowledge of the straw purchases.

As the trial court recognized, the prosecution's case was weak. II App. at 357. Had the defense been able to impeach Batts' testimony, there is a reasonable probability that the verdict would have been not guilty on all counts. Clearly, the Government's actions to suppress the evidence in this case have resulted in a verdict unworthy of confidence. The district court correctly applied the three-part *Giglio* standard to the evidence in this case, and his decision to grant a new trial was within his sound discretion. This Court should affirm the district court's order granting a new trial.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN GRANTING THE DEFENSE MOTION FOR A NEW TRIAL.

A. Standard of Review.

Although this Court "review[s] ... a *Brady* claim asserted in the context of a *Rule 33* motion for a new trial ... de novo," "any **factual findings [are] reviewed for clear error**." United States v. Torres, 569 F.3d 1277, 1281 (10th Cir. 2009) (emphasis added).

"The decision to grant (or deny) a motion for a new trial lies within the sound discretion of the district court.... We will therefore overturn that decision only if that court has **abused its discretion** by rendering a judgment that is 'arbitrary, capricious, whimsical, or manifestly unreasonable.'" United States v. Robinson, 39 F.3d 1115, 1116 (10th Cir. 1994) (emphasis added).

"In making our determination, we give due deference to the district court's evaluation of the salience and credibility of testimony, affidavits, and other evidence." *Id.* "We will not challenge that evaluation unless it finds no support in the record, deviates from the

appropriate legal standard, or follows from a plainly implausible, irrational, or erroneous reading of the record." *Id.*

B. The Standard Governing a Motion for a New Trial Based on the *Brady* Rule.

Before granting a new trial pursuant to a *Rule 33* motion on an alleged *Brady* or *Giglio* violation, the district court must find that, by a preponderance of the evidence, (i) the prosecution suppressed evidence; (ii) the evidence was favorable to the defendant, either because it was exculpatory or impeaching in nature; and (iii) the evidence was material. United States v. Ford, 550 F.3d 975, 981 (10th Cir. 2008).

The duty of the prosecutor under *Brady* not to suppress evidence favorable to the accused applies "irrespective of the good faith or bad faith of the prosecution." Kyles v. Whitley, 514 U.S. 419, 432 (1995).

"Impeachment evidence ... as well as exculpatory evidence, falls within the *Brady* rule. *See Giglio v. United States*, *405 U.S. 150, 154 (1972).* Such evidence is 'evidence favorable to an accused.'" United States v. Bagley, 473 U.S. 667, 676 (1985).

When reviewing materiality for *Brady* purposes, the Supreme Court admonishes "not to look for 'ample, independent evidence of guilt'

or 'evidence sufficient to support the [jury's] findings,'" but to "whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" Ford, 550 F.3d at 983.

C. The Government Has Invited this Court to Erroneously Apply the Standard of Review.

The Government asserts that, as a factual matter, "Deputy Batts was not an important witness, and his testimony did not relate in any way to the counts of conviction." *See* Govt. Br. at 39. Further, the Government contends that, as a matter of fact, Deputy Batts' testimony that, on August 30, 2010, Terri Reese told him that a firearm sold by New Deal Sports was "recovered" in Mexico "did not inculpate Rick or Ryin in any way[, but] only inculpated Terri with respect to the smuggling counts — counts on which Terri was acquitted." *See id.* Lastly, the Government contends that "the potential impeachment evidence [that Batts] tempered his trial testimony in favor of the government" was untrue "because Deputy Batts did not know [that he was under] investigation," and thus, as a matter of fact, "any cross-examination on this point would not have undermined his credibility."

See id. On the basis of these three factual assertions, the Government has argued that the defendants have failed to prove by a preponderance of the evidence that the Batts impeachment evidence was neither favorable nor material to the individual Reese convictions on counts 7, 8, 9, and 10 of a 30-count indictment. *See id.* at 38-40.

Not only is the Government factually mistaken, but it has erroneously applied the standard of review governing defendants' Giglio claim, submitting for this Court's *de novo* review factual findings of the district court which are subject to review only for clear error, and otherwise disregarding the rule that a motion for new trial lies within the sound discretion of the trial court. *See* Robinson, 39 F.3d at 1116.

II. THE DISTRICT COURT'S DECISION WAS WITHIN ITS SOUND DISCRETION, SUPPORTED FULLY BY THE FACTS IN THE RECORD AND IN COMPLIANCE WITH THE APPROPRIATE LEGAL STANDARDS.

A. Deputy Batts Was A Major Government Witness.

1. Deputy Batts Played a Key Role in Establishing Before the Jury the Integrity of the Investigation and Prosecution of the Reese Family.

In its Statement of Facts, the Government acknowledges that it was the August 30, 2010, conversation that Deputy Batts had with Terri Reese that triggered an HSI/ATF joint investigation into what appeared to be a possible firearms smuggling operation facilitated by straw purchases of firearms from the Reese family-operated New Deal Shooting Sports. *See* Govt. Br. at 5-11. Indeed, according to Batts' testimony at trial, it was Terri's statement that "one of the ... rifles that was sold [by New Deal] to [Penny] Torres had been recovered or picked up in Mexico" that prompted Batts to contact both HSI in that he "felt that the weapons were going back across the border" and ATF "because they were the ones in charge of firearms." *See* IX App. at 2042, ll. 11-16; 2043, l. 23 - 2044, l. 13.

As the Government acknowledges in its brief, "[b]ased on the information that Deputy Batts had learned from Terri, HSI and ATF opened a joint investigation of Penny Torres" (Govt. Br. at 7), which, in turn, sparked the HSI/ATF joint investigation into New Deal sales of firearms: HSI into smuggling arms across the Mexican border and ATF into "straw purchases." *See* IX App. at 2059, ll. 3-25; X App. at 2251, l. 9 - 2252, l. 4. The two investigations merged as a direct result of Deputy Batts having informed both agencies of the information that he claimed Terri had furnished to him in August 2010. *See* V App. at 996, l. 3 - 998, l. 4.

The testimonies of Batts, two HSI agents, and an ATF agent demonstrate that Batts played a major role in the initiation of the undercover operation conducted by the two federal agencies into firearms sales by New Deal. *See* Govt. Br. at 5-8. While Deputy Batts appeared, thereafter, not to be an "integral part of the investigation," his "entire participation consisted" of **far more** than what the Government calls a mere "fifteen-minute conversation in August 2010" with Terri Reese. *See* Govt. Br. at 44. Rather, Deputy Batts was

introduced by the Government to the jury as an experienced senior investigator, recently assigned to the "border drug operations task force," well-acquainted with the Reese family and their firearms business, holding them in high regard, with no apparent motive to misreport his August 2010 conversation with Terri. *See* IX App. at 2035, l. 3 - 2044, l. 17.

2. Deputy Batts Was a Key Witness in the Prosecutors' Effort to Prove Beyond a Reasonable Doubt that Rick, Terri and Ryin Knew that the Undercover Firearm Sales Were Straw Purchases.

The Government contends that Deputy Batts' testimony played no role in the "**six** undercover operations ... the jurors [having] viewed and listened to the videotapes and audiotapes of **those** operations, [seen] the 4473 forms filled out during **those** operations, and convicted the defendants on **that** evidence." *See* Govt. Br. at 44 (emphasis added). This is simply not true.

The six undercover operations occurred on April 20, 2011; May 19, 2011; May 27, 2011; June 15, 2011; July 7, 2011, and July 29, 2011.

See Govt. Br. at 11-22. Three of those operations did not result in convictions, much less produce such convictions on that evidence alone. The April operation concerned only the sale of ammunition, the purchase of which does not even require the completion of a 4473 form. *See* Govt. Br. at 11-13. Thus, the April operation did not give rise to any count charging aiding and abetting the filing of a false statement as to the actual purchaser. *See* I App. at 85-86. Instead, the April operation was the subject of Count 16, one of the smuggling counts. *See* I App. at 86-87. Even then, the count charged only Remington, not Rick, Ryin or Terri, with having violated 18 U.S.C. § 544. In any event the jury found Remington not guilty. XIII App. at 3032, ll. 19-21. The jury also found Ryin (the only Reese charged) not guilty on Counts 5 and 6 which were based upon the second and third undercover operations, dated May 19, 2011 and May 27, 2011. *See* XIII App. at 3031, ll. 10-15; I App. at 85-86.

As to the four counts of conviction, the Government points to nothing in the record to support its contention that the guilty verdicts can be attributed to the audio and video tapes alone, as the

Government Brief adamantly insists. *See* Govt. Br. at 44. Nor has the Government supplied any reason to believe that "[i]f the jury had disbelieved the entirety of Deputy Batts testimony, its verdicts would have been the same," as the Government Brief also asserts. *Id.* That certainly was not the view of the prosecuting AUSAs.

To shore up the Government's case that Rick, Terri, and Ryin were knowingly engaged in smuggling weapons to Mexico and aiding straw purchases to do so, AUSA Jordan in his closing argument invited the jury to "decide who you believe to be credible" — Batts or Terri. *See* XIII App. at 2912, ll. 5-18. Then, in answer to his own question, AUSA Jordan contended:

> Allan Batts said, "Terri told me that that gun was recovered in Mexico." Well, you know what, ladies and gentlemen? The fax doesn't say that, so how did Terri know? She knew darned good and well the gun was going to Mexico because she knew Roman took it there. [XIII App. at 2912, ll. 19-23.]

As the Government brief, itself, asserts, by late 2010 and early 2011, Roman had been identified as engaging in straw purchases as a means to smuggle firearms to Mexico. *See* Govt. Br. at 10. Picking up on this same theme, AUSA Armijo chastised Terri for not having more fully

informed Batts and the ATF of Roman's dealings with New Deal, including "when [Roman] brought in a woman to purchase a .50 cal?" XIII App. at 2996, ll. 2-5. According to AUSA Armijo, Terri's failure was "suspicious," giving rise to the inference that her alleged statement to Batts about New Deal firearms being found in Mexico was a cover-up, not a genuine concern for compliance with ATF regulations. *See* XIII App. at 2996, ll. 5-10.

Finally, AUSA Armijo summed up, arguing not only that "the tapes" proved "knowledge that these weapons are going to Mexico," but also that "what was told to Allen Batts, the full picture" demonstrated that the Reeses were operating New Deal in knowing disregard of ATF rules and regulations. XIII App. at 2999, ll. 1-12.

3. The Significance of Batts' Trial Testimony Cannot be Quantified.

In a valiant, but quixotic effort to trivialize Batts' testimony, the Government has attempted a mathematical *reductio ad absurdum*, contending that Batts' testimony "consumed only 21 pages ... of a trial transcript that spanned more than 2300 pages ... the ninth of sixteen

witnesses in the government's case-in-chief ... his testimony ... among the shortest." *See* Govt. Br. at 44.

Although Batts' testimony consumed just short of 1 percent of the trial transcript, references in the closing argument to Batts's testimony appeared on 5 of 38 pages, or 13 percent, of the prosecutors' closing arguments. Although Batts' was only one of 16 witnesses, the two prosecutors refer to Batts by name six times in the closing argument. But the importance of testimony has nothing to do with how many pages of transcript the witness consumes. As the district court below instructed the jury, "don't make any decisions simply because there were more witnesses on one side than on the other." *See* XIII App. at 2859, ll. 11-14.

B. Deputy Batts' Testimony Directly Related to the Knowledge Element of the Straw Purchase Counts of Conviction.

1. The Indictment Counts Charging the Aiding and Abetting of a False Statement About the Identity of the Purchaser Is Symbiotically Related to the Mexico Smuggling Charges.

The Government insists that Batts' testimony of what Terri told him about a New Deal firearm having been recovered or found in

Mexico "did not relate in any way to the counts of conviction." Govt. Br. at 39; *see also id.* at 53. Rather, the Government contends, Terri's statement to Batts "was relevant [only] to the smuggling counts, [having] no bearing on the counts of conviction — that is, whether the defendants aided and abetted the making of a false statement on a form 4473." Govt. Br. at 45; *see also id.* at 53. By seeking to divorce the four counts of conviction from the rest of the indictment, the Government totally disregards the symbiotic relationship between the smuggling and straw purchase counts as alleged in the indictment, as reflected in the jury instructions and, as emphasized in the closing argument of the prosecution.

(a) The Indictment.

First, each count of conviction for the filing of a false statement has a parallel count charging knowingly facilitating the smuggling of the firearm(s) out of the United States. *See* I App. at 85-88 (Counts 7 and 20, 21, and 22, dated June 15, 2011); (Counts 8 and 23, 24, and 25, dated July 7, 2011); and Counts 9 and 10 and Counts 26-28, July 29, 2011).

Second, Paragraphs 1 through 14 set forth in some detail the typical modus operandi of the Mexican Cartel, to employ persons to obtain firearms by means of straw purchases, where the person who pays for the firearm is not the actual buyer even though that purchaser falsely claims that he is, the better to conceal the name of the real purchaser, making it more difficult to trace the firearm back to the Cartel. I App. at 74-76.

Third, Count 1 of the indictment charged that Rick, Terri, Ryin, and Remington Reese "unlawfully, knowingly, and intentionally did combine, conspire, confederate and agree together and with each other and with others known and unknown ... to commit the following offenses against the United States: making false statements in connection with the acquisition of firearms, contrary to 18 U.S.C. § 924(a)(1)(A); and smuggling goods from the United States, contrary to 18 U.S.C. § 554." I App. at 77-78.

Fourth, the indictment alleged the "manner and means of the conspiracy" to be the "illegal acquisition of firearms and ammunition, and the smuggling and attempted smuggling of those firearms and ammunition from the United States to Mexico [and] knowingly

ma[king] false statements and representations in that Defendants executed ATF Forms 4473 (Firearms Transaction Records), representing that the individual executing each form was the actual purchaser of the firearm(s) when in fact that individual was buyer firearm(s) for others." *Id.*

Fifth, among the alleged 33 overt acts taken by the Reese family in furtherance of the conspiracy included the June 15, July 8, and July 29 firearm transactions, that were the subject of the four counts of conviction. *See* I App. at 83-84 (overt acts numbered 22 through 33).

(b) Jury Instructions.

These overt acts were, in turn, read by the judge to the jury in his instructions. *See* XIII App. at 2876, l. 12 - 2879, l. 10. This reading was followed immediately by a recitation of Counts 2 through 10, the subject of which was the knowing filing of false straw purchase statements, followed immediately by Counts 11 through 28, the subject of which was the knowing smuggling of firearms and ammunition to Mexico. *See* XIII App. at 2879, l. 13 - 2883, l. 17.

(c) Closing Argument.

Immediately after the judge's instructions, AUSA Jordan began his closing argument. At the outset of his presentation, he argued:

> Defendants knowingly sold guns to straw purchasers. Defendants knowingly sold guns and ammunition to a man who told them over and over again that he was going to take the guns sold at New Deal, the ammunition sold at New Deal, and smuggle those items to the cartels in Mexico. [XIII App. at 2891, ll. 20-25.]

After painstakingly taking the jury through the audio and visual taped evidence in relation to the offenses charged in Counts 2 through 28, AUSA Jordan concluded with Count 1, the conspiracy charge:

> What were the objectives of the conspiracy? One was ... to sell guns ammunition, knowing those items would be illegally smuggled to Mexico. The other was to sell guns to straw purchasers.... Come one, come all, straw purchaser, smuggler, otherwise.
>
> Now how did the defendants work together to violate the law? Well, one example is the trace report.... She talks to Allan Batts about it. There is conflicting testimony.... You decide who you believe to be credible.
>
> Allan Batts said "Terri told me that the gun was recovered in Mexico." [S]o how did Terri know? She knew darned good and well the gun was going to Mexico because she knew that Roman took it there. [XIII App. at 2912, ll. 5-23.]

And who is Roman? The man who the Government claimed to be the real purchaser of the firearms on June 17, July 7 and July 29, the dates

of the New Deal sales which were the subject of the four counts of conviction. XIII App. at 2896, l. 14 - 2899, l. 17; 2901, l. 18 - 2903, l. 20.

2. What Terri Reese Knew About the Nature of the Purchases in the Counts of Conviction Was Relevant as to What Rick and Ryin Knew.

The Government insists that "Deputy Batts' testimony did not inculpate Rick or Ryin in any way." Govt. Br. at 39. Insofar as the claim rests upon the Government's contention that Batts' testimony "only inculpated Terri with respect to the smuggling Counts — counts on which Terri was acquitted" (*id.*), the contention fails. As already pointed out above, the smuggling and straw purchase charges were so interrelated that they cannot be severed.

It appears, however, that the Government's argument rests on a different ground, namely, that "Deputy Batts' testimony ... did not implicate Rick or Ryin" because "[h]is testimony encompassed Rick and Ryin only when he testified that he had known the Reeses for many years, that they were 'very thorough' in completing their forms, that he was not aware of them ever fixing or not submitting multiple firearms forms, and that they were 'fair and honest.'" *See* Govt. Br. at 51. In

other words, the Government contends that what Batts claimed that Terri said about a New Deal firearm being found in Mexico had nothing whatsoever to do with Rick's and Ryin's activities at New Deal. There is no support in the record for this separation of Terri from her husband and son. Rather, the evidence is to the contrary.

In his closing argument, AUSA Jordan took full advantage of the Reese family closeness, and the intimacy of both the Reese household and their firearms business:

> [T]he business we're talking about in this case is not Wal-Mart. This is a family-operated store. Okay? These defendants lived and worked together every day. They talk. They communicate. They know what's going on with each other, with the store. They know what is going on even when they're in the store and when they're not present. [XIII App. at 2911, ll. 19-25.]

Rick testified that Terri was the store's "expert with paperwork," including the "4473s and acquisition and disposition books." XI App. at 2535, ll. 8-16 and 2537, l. 21- 2538, l. 4. *See also* XII App. at 2728, ll. 6-12. And it was pursuant to her paper work responsibilities that Terri contacted Batts in late August to review a "multiple handgun purchase form." *See* XII App. at 2768, l. 24 - 2769, l. 7. And it was on this

occasion that the disputed conversation occurred. XII App. at 2770, ll. 8-17.

If Terri made the statement attributed to her by Batts, then it would have been reasonable for a jury to infer that she would have shared the same information with he husband and sons. Terri testified that New Deal was a "family-run store. Everybody helped everyone." XII App. 2743, l. 25. All four Reeses were close personally, living and working on the same property. *See* XII App. at 2749, l. 6 - 2751, l. 20; 2752, l. 1 - 2755, l. 7; 2787, ll. 2-23. Terri was routinely involved in firearms and ammunition sales, making the FBI background check phone calls,[11] and helping to fill out the 4473s. XII App. at 2728, ll. 6-8. Indeed, Terri was personally involved in the filling out of the 4473s in each of the three firearm sales that were the subject of the four counts of conviction. *See* XII App. at 2767, l. 3 - 2768, l. 21; 2779, l. 21 - 2781, l. 13; 2782, l. 6 - 2785, l. 9.

As the district court instructed the jury:

> The law requires that you find the facts in accord with all the evidence in the case, both direct and circumstantial.

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[11] XII App. at 2743, ll. 19-21.

> [Y]ou are permitted to draw reasonable inferences from the testimony ..., inferences you feel are justified in the light of common experience. [XIII App. at 2857, ll. 2-4, 6-8.]

If the jury believed Terri told Batts that a New Deal firearm had been recovered in Mexico, as the prosecutor in his closing argument urged the jury to do (XIII App. at 2912, ll. 16-20), then it would have been perfectly reasonable for the jury to have inferred that Terri would have shared that information with Rick and Ryin, in light of the intimate nature of the family business. Thus, it is entirely reasonable to conclude that Batts' testimony also inculpated Rick and Ryin.

C. Deputy Batts Had A Motivation to Temper His Testimony to Favor The Government.

1. Deputy Batts Knew That He Was Being Investigated by the FBI.

As was the case post-trial in the district court, the Government on appeal insists that "the record shows ... Deputy Batts did not know about the [FBI] investigation" into Batts' alleged criminal activities involving the misappropriation of suspects' assets, drug trafficking and alien smuggling. *See* Govt. Br. at 48. The Government bases its

position solely upon one record fact — that "Deputy Batts denied any knowledge of the investigation." *See id.*

Remarkably, the Government completely ignores other salient facts that led the district court to conclude that Batts' testimony on this point was not credible. In its Memorandum and Order granting a new trial, the district court explained:

> The suppressed documents include an FBI report detailing a May 5, 2008 telephone conversation between Deputy Batts and Agent Brotan, where Deputy Batts related information about a Luna County law enforcement officer who was under investigation and Deputy Batts claimed he was not involved in misconduct. At the evidentiary hearing, Agent Brotan testified that the phone call occurred. Deputy Batts testified that no such phone call had ever occurred and he would have remembered making such a phone call. Agent Brotan's testimony is corroborated by his contemporaneous report. If Deputy Batts did make the phone call it may be inferred that he knew about the FBI investigation and he had a motive to curry favor with the Government by embellishing his trial testimony. The fact that Deputy Batts' testimony contradicted the testimony of Agent Brotan further impugned [Batts'] credibility. [II App. at 355-56.]

2. Impeaching Deputy Batts Would Have Helped the Defense.

The Government contends that, even if the defense had been armed with the suppressed FBI report, the Reeses would not have

wanted to impeach Deputy Batts because "impeaching Deputy Batts would not have helped their case [because] [t]he defendants wanted the jury to believe Deputy Batts, not to discredit him." *See* Govt. Br. at 48. This astonishing claim is based upon the absurd argument that the defense would have welcomed Batts' testimony on every point including the incriminating one -- "whether [Terri] told him that the gun sold to Penny was found in Mexico." *See id.* at 47-48.

Without access to the withheld FBI investigative report, the Reeses had only one weapon to counter Batts' false claim – Terri's denial. The fact that Batts had also said nice things about the Reeses and their business practices actually hurt the Reeses, rather than helped, because his overall testimony gave the jury the impression that Butts had no animus toward them.

It is, therefore, pure fantasy for the Government to contend that any defense strategy designed to impeach Batts by the FBI report would have been "undermined by [Batts'] testimony that he thought the Reeses were honest people and that Terri was being fully cooperative with him." *See* Govt. Br. at 49. Indeed, it is sheer presumption for the

Government to assert that "[a] jury would not believe that a government witness who spoke so highly of the defendants was slanting his testimony to curry favor with the government." *Id.* By withholding the FBI report, the Government foreclosed any opportunity for the jury to make that decision themselves. And it ill behooves the Government to substitute its opinion for that of the jury in this case.

3. Deputy Batts Cannot Be Shielded From Impeachment by the Government's Suppression of the FBI Report.

In a last-ditch effort to shred the impeachment evidence in the FBI report, the Government has contended that "[h]ad the defendant's questioned Deputy Batts about whether he knew of the FBI's investigation of him, he would have answered no, just as he did at the motion hearing." *See* Govt. Br. at 50. Standing alone, the Government asserts, that testimony "would have done little, if anything, to discredit him." *Id.* Moreover, the Government adds, the defense might not have been able to overcome the prosecutor's likely objections to the admissibility of a FBI "Agent Acosta's opinion that Deputy Batts knew of the investigation." *Id.*, n. 22.

However, it was not Agent Acosta's "opinion" upon which the district court relied to support its ruling that "it may be inferred that [Batts] knew about the FBI investigation." *See* II App. at 356. Rather, it was Agent Brotan's testimony that Batts had called Brotan, and Brotan's contemporary written report of that call, that undermined Batts' claim that no such phone call was made. *Id.* Brotan's rebuttal evidence would have been clearly admissible. In United States v. Magallanez, 408 F.3d 672, 680 (10th Cir. 2005), this Court "held that the government was properly allowed to call a rebuttal witness to contradict a false statement made by a witness on direct examination." *See* United States v. Velarde, 485 F.3d 553, 562 (10th Cir. 2007).

In any event, it is unbecoming for the Government now to "seek[] to minimize[] its error by arguing that the suppressed evidence would not have been admissible." II App. at 355. After all, as the district court below observed, "by withholding the evidence, the Government foreclosed the opportunity for the parties to litigate, and for the Court to determine, the admissibility of the evidence at trial." *Id.*

III. THE IMPEACHMENT INFORMATION SUPPRESSED BY THE GOVERNMENT WAS MATERIAL.

A. The Government's Misconduct Is Relevant.

In an effort to exclude from consideration by this Court the facts that led the district court to conclude that the Government wrongfully suppressed the *Giglio* material in this case, the Government claims that the suppression "is not at issue in this appeal." Govt. Br. at 42. However, this Court would be remiss if it did not weigh in the balance the district court's account of the failure of the United States Attorney's office to have discharged its duty of disclosure prior to trial. *See* II App. at 351-53. After all, the Supreme Court has ruled that "[t]he standard of materiality required to set aside a criminal conviction on *Brady* grounds varies with the specificity of the defendant's request and the conduct of the prosecutor." *See* United States v. Buchanan, 891 F.2d 1436, 1441 (10th Cir. 1989). While the evidence of the Government's suppression of impeachment information in this case does not rise to "the prosecutor's knowing use of perjured testimony," and its accompanying test of a "'reasonable likelihood that the false testimony could have affected' the verdict" (*id.*), the district court did find that

"there is no doubt that the prosecution, intentionally or negligently, suppressed the evidence." II App. at 354.

Although the decision is governed by the three factors of suppression, favorability, and materiality, the three are not wholly separate and insular categories. Overarching all three is the fact that "the United States Attorney is 'the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *See* Strickler v. Greene, 527 U.S. 263, 281 (1999). This is especially true when the motion for new trial is based upon the *Brady/Giglio* due process principle, the ultimate issue of which is whether the suppressed evidence put the whole case in such a light that it undermines confidence in the verdict. *See* Kyles v. Whitley, 514 U.S. 419, 434-35 (1995).

According to Rule 33, FRCrP, a motion for a new trial should be granted in the "interests of justice." Before Brady, the U.S. Court of Appeals for the Second Circuit ruled "that the negligent suppression of

material evidence by the Government entitles a defendant to a new trial." United States v. Consolidated Laundries Corp., 291 F.2d 563, 570-71 (2d Cir. 1961). After Brady, Judge Friendly of the Second Circuit ruled that the "negligence of the prosecutor in failing to make evidence available to the defense reduces the standard of materiality needed to require the granting of a new trial below the formulations applicable where no prosecutorial misconduct exists." *See* United States v. Miller, 411 F.2d 825, 832 (2d Cir. 1969). As Utah District Court Judge Jenkins once explained:

> [W]hen a material and important matter is intentionally or inadvertently withheld indeed[,] suppressed by the United States. The test in such an instance relates in part to the degree of culpability of the United States and a new trial, if granted, is granted not just in the interest of fairness to the defendant (the usual concern) but also for a second reason to provide incentive to the United States to refrain from the practice of intentionally withholding exculpatory matter from a defendant after request. [United States v. Meier, 484 F. Supp. 1129, 1131 (D. Utah 1980).]

After reviewing all of the evidence concerning the suppression of the FBI report, the district court found, as a matter of fact, that (i) "the information pertaining to Deputy Batts was on file in the United States Attorney's Office for nearly a decade before trial," and (ii) "[t]he direct

supervisor of trial counsel ... was informed and was repeatedly reminded, by a fellow supervising AUSA that his own office possessed *Giglio* information concerning Deputy Batts," but (iii) while "present at the hearing," the supervisor "did not testify." II App. at 353. "Left to wonder" whether the information and warnings went "unheeded" or "ignored," the district court unhesitatingly concluded that the prosecution was at fault for the "suppression of evidence" — "negligently" certainly, if not "(more darkly) ... intentionally." *Id*. at 353-54. Surely this finding, which the Government does not contest, bears on the ultimate materiality question whether, in the absence of the withheld evidence, the Reeses "received a fair trial, ... resulting in a verdict worthy of confidence." *See* Kyles, 514 U.S. at 434.

B. In Light of the Whole Record the Testimony Against the Reeses Was Underwhelming.

The Government found it strategic not only to downplay the Government's inexcusable conduct suppressing the FBI report, but also to ignore the overall weakness of the Government's case. To be sure, the Government acknowledges that the jury returned a verdict of not guilty on 24 counts of a 30-count indictment, two counts of which were

dismissed for want of evidence, but only grudgingly and briefly. *See* Govt. Br. at 2. Totally ignored is the district court's finding that "[o]bviously the jury did not believe this was a strong case." II App. at 357. Completely disregarded also is the district court's opinion, based on two Tenth Circuit opinions:

> "What might be considered insignificant evidence in a strong case might suffice to disturb an already questionable verdict." Torres, 569 F.3d at 1282 (quoting *United States v. Robinson*, 39 F.3d 1115, 1119 (10th Cir. 1994). [II App. at 357.]

Applying these precedents to this case, the district court noted the number of times that Batts was referred to by prosecutors in closing argument, and in particular their focus "on the contradiction in the testimony of Deputy Batts and Terri Reese ... calling into question Terri Reese's credibility." II App. at 357.

In an effort to refute this finding of the district court, the Government asserted that it had "presented strong evidence on the false statement counts[,] includ[ing] (a) audio and video recordings of them selling firearms and ammunition to undercover agents posing as straw purchasers and entering their information on the relevant forms

despite knowing that they were making the purchases for Roman, (b) the testimony of those undercover agents, and (c) the testimony of Roman." *See* Govt. Br. at 51-52. Conspicuously absent in this tendentious account is the undeniable fact that the jury returned not guilty verdicts on two of the five undercover purchases that were taped, and six out of ten of the false statement counts overall. *See* I App. at 85-86 and II App. at 301-304.

Oblivious to these weaknesses, the Government persists, asserting that Batts' testimony was "not material because of the 'overwhelming evidence' of the defendants' guilt," citing Moore v. Marr, 254 F.3d 1235, 1245 (10th Cir. 2001). *See* Govt. Br. at 52. But in Moore, the defendant was convicted on all counts of the indictment.[12] In the court below, the trial jury returned not guilty verdicts on all but four counts submitted to them. *See* II App. at 300-10. If the video and

[12] The Government would also have this Court rule against the Reeses, citing United States v. Bowie, 198 F. 3d 905 (D.C. Cir. 1999). But in Bowie, the court of appeals affirmed a district court's denial of a new trial on the ground that "even if the most effective cross-examination had convinced the jury that [the witness's testimony] was not to be trusted, the unimpeached testimony"of another witness to the same event "would remain to bolster ... and to convince...." *Id.*, 198 F.3d at 911-12. No one besides Batts himself testified that Terri told him that she knew that New Deal firearms had been recovered in Mexico.

audio evidence was so "overwhelming," and the testimony of the undercover agents and Roman so "believable," then why did the jury not find the Reeses guilty of the smuggling charges as well as the straw purchase charges, both of which were based on the same sales transactions that took place on June 15, July 7 and July 29? The reason is, as this Court found in United States v. Robinson, the "district court, in its order granting a new trial, recognized that the evidence introduced against Mr. Robinson at trial was hardly overwhelming." *Id.*, 39 F.3d at 1118.

C. Batts' Testimony Was Not Cumulative, But Essential to Corroborate the Testimony of a Government Informant.

Citing United States v. Cooper, 654 F.3d 1104, 1123 (10th Cir. 2011), the Government has attempted to establish that Batts' testimony was "largely cumulative," and therefore, any evidence impeaching that testimony would have been immaterial to the outcome. Govt. Br. at 52. In support, the Government noted that "[t]wo federal agents testified that Terri provided them with the same information **except** that she did not tell them that the gun had been recovered in

Mexico," and that "Terri herself corroborated Deputy Batts' testimony, **except** with respect to telling him that a firearm New Deal sold to Torres had been recovered in Mexico." *Id.* (emphasis added). Instead of demonstrating that the Batts statement was cumulative, these two record citations demonstrate that Batts' statement stood alone. The only evidence that the Government marshaled in support of its claim that Batts' statement was "cumulative" was that of Roman, the Government's informant, who "testified that Terri told him in August 2010 that one of the guns Penny brought was found in Mexico." *Id.* at 52-53. Surely the Government is not serious that Batts' statement, which was also made in August 2010, was no more than icing on Roman's cake.

Terri's alleged statement was elicited from Batts because he could be presented to the jury as an experienced law enforcement officer whose only part in the Reese investigation was to "contact[] HSI because [he] felt that the weapons were going back across the border." IX App. at 2044, ll. 5-16. Without Batts' testimony corroborating Terri's alleged August 2010 statement, the Government was stuck with

Roman, a member of the Mexican cartel, and a Government informant who, as a party to a plea agreement, was expecting to receive a number of benefits in exchange for his testimony against the Reeses. *See* VII App. at 1529, l. 25 - 1535, l. 15.

It is no wonder that, in his closing argument, AUSA Jordan chose to counter Terri's denial that she knew that New Deal firearms had been recovered in Mexico with Batts' testimony, not Roman's. *See* XIII App. at 2912, ll. 17-20. Only by suppressing the FBI Report with its damning information about Batts' corrupt activity could the Government have accomplished this feat. Not only would the report "enhance" the quality of impeachment evidence, it would have furnished the defense with the only impeachment evidence that it could use to counter Batts' testimony. Thus, the suppressed evidence was clearly material. *See* Cooper, 654 F.3d at 1120.

D. Batts' Testimony Was Essential to the Prosecution's Effort to Prove Criminal Knowledge Beyond a Reasonable Doubt.

To obtain Rick's, Terri's, and Ryin's convictions on the four straw purchases alleged in the indictment, the Government was obliged to

persuade the jury that, beyond a reasonable doubt, the Reese family member charged in each count personally knew that the actual purchaser of the specified firearm(s) was not the true purchaser. Only if it could prove such knowledge could the Government prove what it had alleged in Counts 2 through 10 that — by aiding and abetting the completion of an ATF Form 4473 that misrepresented the signer of the form as the real purchaser — the Reese family member charged knew that the representation on the form was false. *See* XIII App. at 2891, ll. 17-21 and 2893 l. 7 - 2894, l. 6.

According to the Government's brief, "[m]ost of the defendants' incriminating statements were made to Roman and also were captured on videotape." Govt. Br. at 43. Thus, the Government recites in great detail the evidence captured on tape. *See* Govt. Br. at 15-22. Yet, in its recitations, there is no direct evidence proving that Ryin, or Terri, or Rick knew that the purchaser was any one other than the person identified as the real purchaser on each of the completed 4473 Forms submitted to New Deal. Instead, the Government's taped evidence of

knowledge was entirely circumstantial, as demonstrated by the prosecution's closing arguments at trial.

In his closing argument, in order to prove that knowledge element against Ryin, AUSA Jordan relied primarily upon the video and audiotapes of each firearms transaction. *See* XIII App. at 2894, l. 18 - 2901, l. 17. With respect to the June 15, 2011 transaction that underpinned Ryin's conviction on Count 7 of the indictment, AUSA Jordan laid out a circumstantial case of knowledge. *See* XIII App. at 2896, l. 11 - 2897, l. 23. In like manner with respect to the video of the July 7, 2011 transaction underpinning Count 8 of the indictment, AUSA Jordan emphasized what Ryin did not say, drawing from Ryin's silence, to argue that in light of the context "[Ryin] doesn't want to look too guilty." *See* XIII App. at 2898, ll. 2-23.

To prove Rick's and Terri's knowledge that the person signing the ATF 4473 as the purchaser was not the actual purchaser in the sales transaction which was the subject of Counts 9 and 10, AUSA Jordan again relied upon the taped circumstantial evidence. XIII App. at 2901, ll. 18-20. AUSA Jordan urged the jury to find unbelievable what Terri

said about who the real purchaser was. *See* XIII App. at 2902, ll. 1-13. And he faulted Rick, not for what he said, but for what Rick failed to say,[13] inferring from Rick's actions and words caught on tape that Rick had no "problem" with the way the purchases had been "structured." *See* XIII App. at 2903, ll. 1-5.

In her rebuttal closing, AUSA Armijo brought the jury back to Deputy Batts' testimony, after having rehearsed the main points from the taped actions of Ryin, Terri and Rick actions with respect to the June 15, July 7, and July 29 firearms transactions:

> There is your knowledge that these weapons are going to Mexico. There is your knowledge that it's a cartel member. There is your knowledge that this is not just puffing, this is not just barbershop talk. There is your knowledge.
>
> Go through the tapes and you, yourself, will see. And, again, look at what was told to Allen Batts, the full picture. [XIII App. at 2999, ll. 1-8.]

According to the prosecution's own words, Deputy Batts' testimony about what Terri said was all that was needed to paint the rest of the picture reflected in the audio and video-taped evidence. On appeal, however, the Government has taken just the opposite position,

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[13] *See* XIII App. at 2902, ll. 16-25; 2903, ll. 8-15.

contending that "[t]he withheld impeachment evidence on Deputy Batts – a state officer who had nothing to do with the federal undercover operations for which the defendants were convicted – could not have undermined the government's entire case." *See* Govt. Br. at 43. The Government cannot have it both ways.

Further, the question of materiality does not depend upon whether the withheld impeachment evidence would "undermine the government's entire case." Rather, the question is whether " there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different ... sufficient to undermine confidence in the outcome." Torres, 569 F.3d at 1282. Or, as this Court has put it in United States v. Smith, 534 F.3d 1211, 1223 (10th Cir. 2008): "The critical question is whether the lack of impeachment evidence shakes our confidence in the guilty verdict."

The Government would have this Court believe that "Deputy Batts' testimony was unimportant – particularly with respect to the counts of conviction." *See* Govt. Br. at 54. However, at trial the Government fully believed that Deputy Batts' testimony was needed to

present to the jury the "full picture," not just with respect to the smuggling counts but with respect to all of the counts which required proof of guilty knowledge. *See* XIII App. at 2912, ll. 5-23 and 2999, ll. 1-12. After all, as AUSA Armijo argued before the jury, just because there was no "direct testimony to show knowledge," the circumstantial evidence was sufficient upon which to base a conviction. *See id*. at 2999, l. 13 - 3000, l. 19.

In a criminal case, the full picture is one that leaves no reasonable doubt. As the district judge noted in his order granting the defense motion for a new trial, "the jury did not believe this was a strong case[,] [having] acquitted the Defendants on 24 of the remaining 28 counts," the court having directed a verdict on Counts 29 and 30. II App. at 357. In light of the whole record, then, the district court had every reason to believe that "[impeachment information about Deputy Batts ... could have easily altered the outcome of the trial," to the level of "shaking [his] confidence in the guilty verdict." II App. at 357.

According to the *de novo* standard of review of this Circuit, the Batts testimony was both favorable and material to the defense. Thus,

it was well within the sound discretion of the district court to grant a new trial, having carefully evaluated the credibility of the testimony, and faithfully applied the appropriate legal standard to the whole record. *See* Robinson, 33 F.3d at 1116-19.

"While not entitled to a perfect trial," Rick, Terri, and Ryin Reese are "entitled to a fair trial." *See* United States v. McBride, 862 F.2d 1316, 1320 (8th Cir. 1988). "In the final analysis, the trial judge, not an appellate court reading a cold record, can best weigh the errors against the record as a whole to determine whether those errors in the conduct of the trial justify a new trial." *Id.*

CONCLUSION AND STATEMENT CONCERNING ORAL ARGUMENT

The district court's decision to grant the defense motion for a new trial should be affirmed, because the suppressed impeachment evidence was both favorable and material and because the decision to grant a new trial was within the sound discretion of the trial court.

Oral argument is warranted to distinguish between those issues that are subject to *de novo* review and those that are subject to clear error and, thereby, bring greater clarity to the scope of discretion of the

trial court in its grant of a new trial based on a violation of the Brady rule.

Respectfully submitted,

/s/

ROBERT J. GORENCE
GORENCE & OLIVEROS, P.C.
1305 Tijeras Avenue NW
Albuquerque, NM 87102
(505) 244-0214
gorence@gopcfirm.com
Attorney for Rick Reese

JASON BOWLES
BOWLES LAW FIRM
201 3rd Street NW
Suite 1370
Albuquerque, NM 87102
(505) 217-2680
Jason@bowlesandcrow.com
Attorney for Ryin Reese

HERBERT W. TITUS
ROBERT J. OLSON
WILLIAM J. OLSON
JOHN S. MILES
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com

MICHAEL CONNELLY
U.S. JUSTICE FOUNDATION
932 D Street, Suite 2
Ramona, CA 92065

Attorneys for Defendants-Appellees

July 11, 2013

BRIEF FORMAT CERTIFICATION

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c), I certify that this brief is proportionately spaced, has a typeface of 14 points or more, and contains 13,769 words.

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DATED this 11th day of July, 2013.

/s/
HERBERT W. TITUS
William J. Olson, P.C.
Attorney for Rick, Terri
and Ryin Reese

CERTIFICATE OF SERVICE AND DIGITAL SUBMISSION

I HEREBY CERTIFY that the foregoing Brief of Appellees was filed with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit through the CM/ECF system on this 11th day of July, 2013. I ALSO CERTIFY that Laura Fashing, attorney for the United States, and Robert Gorence, attorney for Rick Reese, and Jason Bowles, attorney for Ryin Reese, are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system. I ALSO CERTIFY that any required privacy redactions have been made, and that the hard copies being submitted to the clerk's office are exact copies of the electronic version. I FURTHER CERTIFY that the digital submission of this document has been scanned for viruses with scanning program Symantec Endpoint Protection, version 11.0.7300.1294, most recently updated on July 10, 2013, and according to the program, the file is free from viruses.

/s/
HERBERT W. TITUS
William J. Olson, P.C.
Attorney for Rick, Terri
and Ryin Reese