

1 DENA MARIE YOUNG  
State Bar No. 215344  
2 LAW OFFICES OF DENA MARIE YOUNG  
2751 4<sup>th</sup> Street PMB #136  
3 Santa Rosa, CA 95405  
Telephone (707) 528-9479  
4 Email: dmyounglaw@gmail.com

5 Attorney for Defendant  
DEVON WENGER

6 UNITED STATES DISTRICT COURT  
7  
8 NORTHERN DISTRICT OF CALIFORNIA  
9  
10 OAKLAND DIVISION

11 UNITED STATES OF AMERICA,  
Plaintiff,  
12 v.  
13 DEVON WENGER,  
14 Defendant.

No. 4:23-cr-00268 JSW

**DEFENDANT’S MOTION FOR JUDGMENT OF  
ACQUITTAL (FRCP 29); MOTION FOR NEW  
TRIAL (FRCP 33)**

Date: June 24, 2025  
Time: 1:00 p.m  
Court: Hon. Jeffrey S. White

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16  
17  
18 TO: PATRICK D. ROBBINS, Acting United States Attorney, and Eric Cheng, Ajay  
Krishnamurthy and Alethea Sargent, Assistant United States Attorneys:

19  
20 PLEASE TAKE NOTICE that the defendant DEVON WENGER, by and through his attorney,  
21 Dena Marie Young, at the above date and time or as soon as possible thereafter, moves this Court for  
22 Court for entry of judgment of acquittal all counts of the Indictment. He further moves for a new trial  
23 on all counts.

24 This motion is based on the following memorandum of points and authorities, attached  
25 declarations, the constitution of the United States, all relevant statutory authority and case law, and such  
26 argument as the Court will entertain at the motion hearing.  
27  
28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 On April 30, 2025, defendant DEVON WENGER was convicted following a jury trial of  
3 conspiracy to distribute anabolic steroids in violation of 18 U.S.C. §§846, 841(a)(1) and (b)(1)(E)(i) and  
4 destruction, alteration and falsification of records in federal investigations in violation of 18 U.S.C. §  
5 1519.

6 A motion for judgment of acquittal was orally made on April 29, 2025, at the close of the  
7 prosecution’s evidence which was effectively the end of the case as the defense presented no additional  
8 evidence. Said motion was denied by this Court.

9 Pursuant to Federal Rule of Criminal Procedure 29, Mr. Wenger now hereby submits this  
10 memorandum of points and authorities in support of the motion previously made and specifically moves  
11 for a judgment of acquittal on all counts of the Indictment on the grounds that the evidence adduced at  
12 trial was insufficient to convict him. Additionally, Mr. Wenger moves for a new trial on all counts on  
13 the grounds that the prosecutor elicited false testimony as to key pieces of evidence and that there were  
14 substantial irregularities in the handling of the jury verdict which cast doubt on the integrity and validity  
15 of the entire process.

16  
17 **STATEMENT OF FACTS**

18 **I. The Indictment**

19 The Indictment returned on August 16, 2023, charged Mr. Wenger with conspiracy to distribute  
20 anabolic steroids in violation of 18 U.S.C. §§846, 841(a)(1) and (b)(1)(E)(i) [Count One] and  
21 destruction, alteration and falsification of records in federal investigations in violation of 18 U.S.C. §  
22 1519. [Count Four].<sup>1</sup>

23  
24 **II. The Evidence at Trial**

25 The government presented the testimony of cooperating witness Daniel Harris and through  
26 Harris’ interpretation of Venmo records that Mr. Wenger purchased steroids from him on two occasions.

27  
28 <sup>1</sup> Co-defendant Daniel Harris pled guilty to three charges relating to anabolic steroids and to  
unrelated fraud charges. Harris testified against Mr. Wenger pursuant to a cooperation agreement.

1 Harris was also permitted to offer his interpretation that text messages of Mr. Wenger related to the use  
2 of steroids over objection.

3 Brendan Mahoney also testified, despite the fact that he contacted Harris directly regarding  
4 steroids, that he made arrangements to obtain steroids only through Mr. Wenger. No transaction ever  
5 took place, presumably because the government intercepted the package in which the steroids were  
6 allegedly shipped.

7 A postal inspector testified that the package in question was intercepted at the Richmond Post  
8 Office. He was unable to provide tracking information for the package. The box admitted was 11.25”  
9 X 8.5” X 5.5”<sup>2</sup> and weighed slightly more than two pounds. (Exhibit 15).

10 The government put on testimony through Darryl Holcombe that DEXT agents had access to Mr.  
11 Wenger’s phone for only a few minutes, yet the DEXT notes showed that they had manipulated the  
12 phone for more than an hour. All of this was done BEFORE Mr. Wenger’s phone was preserved. No  
13 one who actually obtained Mr. Wenger’s phone directly from him was called to testify, so it cannot be  
14 known whether the phone was handled by other agents as well.

15 Finally, the government relied on the expert testimony of Darryl Holcombe who repeatedly  
16 reprocessed data from Wenger’s phone, comparing various databases to determine what had been  
17 deleted from Mr. Wenger’s phone. He was unable to determine when the text messages and contacts  
18 had been deleted. However, he was asked to testify that a particular SIGNAL message had been deleted  
19 during the time between the FBI contact with Mr. Wenger and his tuning over the phone. This was  
20 based on the timing of a message notification. [Exhibit 69]. While the jury had the actual exhibit, the  
21 testimony that the message was deleted during this time frame was false based on improper adjustment  
22 from UTC time. The government not only failed to correct this testimony, they relied on it in closing  
23 argument.<sup>3</sup>

24 The government did not seek access to Mr. Wenger’s iCloud account or even seek to preserve it.  
25 This is important because the phone extraction showed that the phone backed up to iCloud less than 12

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26  
27 <sup>2</sup> As further evidence that the package has been altered, in the search warrant issued for the  
package, the box was described as measuring approximately 8.8 inches by 5.2 inches by 5.8 inches.

28 <sup>3</sup> This opinion testimony was not disclosed as part of Holcombe’s expert disclosure, so counsel  
was not able to adequately respond to it under the pressures of trial.

1 hours before the extraction. Comparison with the iCloud would have shown when things were deleted  
2 and would also have disclosed the manipulation of the phone by agents.

3 The defense put on no additional evidence, instead relying on cross-examination of the  
4 government's witnesses whose testimony has evolved over time and multiple interviews.

5  
6 **III. The FOIA Request on the Package**

7 Mr. Wenger's mother made a FOIA request regarding this package. Unfortunately, the results  
8 were not available to counsel in time to address them at trial. The FOIA return for that package showed  
9 the tracking information that was omitted by the postal inspector. It also showed that the package  
10 weighed 1.0625 pounds when it was mailed which is not consistent with the box presented at trial. (See  
11 Declaration of Counsel re: FOIA Request).

12  
13 **IV. The Verdict**

14 On April 30, the jury announced that it had reached a verdict sometime around noon. Rather  
15 than take the verdict, the Court provided the jury with lunch.

16 When the parties returned to take the verdict, the jury was coming into the courtroom  
17 unattended. There were numerous government agents and US Attorneys having a conversation next to  
18 the jury box.

19 The courtroom deputy went to get the judge but came back to say the court needed additional  
20 time. The jury returned to their room.

21 In the next 15-20 minutes, the courtroom deputies had a whispered conversation about the  
22 verdict and how fast it changed. A custody marshal entered the courtroom, had a discussion with a  
23 courtroom deputy, then left again. The bailiff assigned to the jury had a conversation both inside and  
24 outside of the court room with the court security officers.

25 It appeared that preparations were underway to remand Mr. Wenger.

26 When the jury was finally brought out, their mood was angry and hostile in contrast to their  
27 earlier demeanor. The large group of federal agents left the courtroom.

28 The envelope containing the verdict form was handed to the judge unsealed and open.

1 The jury returned a unanimous verdict of guilty as to both counts of the Indictment.  
2 [See Attached Declarations of Counsel, STG and DCW].

3  
4 **ARGUMENT**

5 **I.**

6 **Motion for Judgment of Acquittal (FRCP 29)**

7 **A. Legal Standard**

8 Sufficiency of the evidence is satisfied if “after viewing the evidence in the light most favorable  
9 to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond  
10 a reasonable doubt.” *United States v. Tisor*, 96 F.3d 370, 379 (9th Cir. 1996) (italics omitted) (quoting  
11 *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *United States v. Hernandez-Quintania*, 874 F.3d 1123,  
12 1125–26 (9th Cir. 2017).

13  
14 **B. Analysis re: Conspiracy**

15 The charge of conspiracy to distribute anabolic steroids requires proof that there was an  
16 agreement between two or more persons to distribute anabolic steroids and that the defendant joined the  
17 agreement knowing of its purpose and intending to accomplish that purpose. See 9<sup>th</sup> Circuit Pattern  
18 Instructions 11.1.

19 The evidence when taken in the light most favorable to the government shows that Mahoney  
20 agreed to buy steroids from Harris for his own use. This is not an agreement to distribute, merely a  
21 buyer – seller relationship as there is no evidence Mahoney intended to redistribute the steroids.  
22 Therefore, Mr. Wenger’s offer to pick up and deliver whatever Mahoney was buying was not an  
23 agreement to redistribute. Rather, it was nothing more than a favor to a friend. The testimony that  
24 Harris and Mahoney did not have each other’s contact information was contradicted by the fact of phone  
25 calls between the two. Logic and common sense suggest that payment and delivery arrangements would  
26 be made when the product was received. This would be consistent with Harris’ practices as evidenced  
27 in his Proton mail. (Exhibit 36). The government’s whole theory of the case is a stretch. The evidence  
28 does not support a conspiracy to distribute.

1 The government’s case relies on incomplete and inaccurate reconstruction of text messages  
2 cobbled together from multiple sources and interpreted for the jury by a witness who needs to please the  
3 government in order to benefit from his cooperation deal.

4 The government’s case also relies on a “package” appears to have been altered to match up with  
5 Harris’ order listed in the Proton Mail account. (Exhibit 36). According to the tracking information  
6 received as part of a FOIA request,<sup>4</sup> the package weighed 1.0625 pounds when mailed. Somehow, it  
7 weighed more than 2 pounds when it was “intercepted” in the Richmond post office. It is telling that the  
8 postal inspector could not (or would not) produce the tracking information. The only reasonable  
9 inference is that the package was altered by the agents involved to coincide with the “order.” Given the  
10 size of the box “received,” in comparison to the original weight, it is likely that this box was not the  
11 original package but a replacement to fit the government’s narrative. (See Declaration of Counsel re:  
12 FOIA).<sup>5</sup>

13 The evidence taken as a whole is not sufficient to show that Mr. Wenger was involved in a  
14 conspiracy to distribute anabolic steroids.

15  
16 C. Analysis re: Destruction of Records in Federal Investigations

17 As the jury was instructed, the elements of this charge are:

- 18 1) The defendant knowingly altered, destroyed, concealed, or falsified a record, document, or  
19 tangible object;  
20 2) the defendant acted with the intent to impede, obstruct, or influence an actual or  
21 contemplated investigation of a matter within the jurisdiction of any department or agency of  
22 the United States.

23 See 9<sup>th</sup> Circuit Model Instruction 19.4

24 This jury instruction also came with a number of disclaimers which appear to make it easier for  
25 the government to prove its case. This Court added :

26 \_\_\_\_\_  
27 <sup>4</sup> Unfortunately, counsel did not receive this information in time to make use of it at trial.

28 <sup>5</sup> This package was also critical to obtaining the search warrant for Mr. Wenger’s phone. This is  
yet another piece of evidence that appears to have been altered or manipulated in some way, like the  
agent -created “anonymous” letters.

1 The government is not required to prove that the defendant knew about a pending federal  
2 investigation or intended to obstruct a specific federal investigation, but the government  
3 is required to prove beyond a reasonable doubt that the matter or investigation at issue  
4 was within the federal government's jurisdiction.

5 From the model instruction the Court also included:

6 The government need not prove that the defendant's sole or even primary intention was  
7 to obstruct justice so long as the government proves beyond a reasonable doubt that one  
8 of the defendant's intentions was to obstruct justice. The defendant's intention to obstruct  
9 justice must be substantial.

10 The government must prove all elements of the offense beyond a reasonable doubt. *In re*  
11 *Winship*, 397 U.S. 358, 364 (1970). A jury instruction that reduces the government's burden of proof  
12 (e.g. proving *mens rea* beyond a reasonable doubt) contradicts the presumption of innocence and  
13 therefore violated due process. *Cool v. United States* 409 U.S.100, 104 (1972); See also *Schultz v.*  
14 *Tilton*, 659 F. 3d 941, 943, (9<sup>th</sup> Cir. 2011).

15 Taken as a whole, the instructions given to this jury leave the impression that a defendant does  
16 not have to know about a federal investigation or even that the matter was within federal jurisdiction.  
17 Absent proof of this knowledge, it would be hard to show what, if anything, that the defendant had any  
18 intent to obstruct. Thus, this instruction improperly reduces the government's burden of proof.

19 In this case, the evidence fails to show that it was Mr. Wenger who altered or destroyed the  
20 records in his phone. The expert and computer forensics could not tell when the messages and contacts  
21 were deleted. The computer forensics, themselves altered data by stripping away some of the contents  
22 and context of the messages. The testimony showed that agents had a substantial amount of time to alter  
23 the contents of Mr. Wenger's phone before and during the manual search which preceded any effort to  
24 preserve the contents.

25 Absent proof of when the messages were deleted, the government cannot establish who deleted  
26 the messages, let alone why. In order to compensate for this failure, the government deliberately elicited  
27 false testimony regarding the timing of the deletion of a particular SIGNAL message. The government  
28 had Holcombe testify that a SIGNAL message was deleted during the time after first contact by the FBI

1 and Wenger turning over his phone. That is a manipulation of the evidence based on erroneous  
2 adjustment from UTC time. In fact, the message would have been deleted the night before. (See  
3 Exhibit 69). The government relied on this in closing argument to show that Mr. Wenger deleted the  
4 contents of his phone despite evidence that the agents manipulated the phone and its contents for more  
5 than an hour before the phone was sent for imaging. The government failed to disclose this proposed  
6 opinion testimony regarding the timing of the deletion of SIGNAL messages, which gave the defense no  
7 true opportunity to catch the problem and correct it.

8 Similarly, the government failed to disclose that its expert would opine that contact information  
9 for Harris and Mahoney and the Venmo relationship between Harris and Wenger was deleted from  
10 Wenger's phone. Had that information been timely disclosed, counsel would have been able to show  
11 that those things were not, in fact, deleted by Mr. Wenger, but are all still present in his phone account to  
12 this day.

13 Further, the government knew from the forensic extraction that the phone had been backed up to  
14 iCloud less than 12 hours before the phone was seized. Yet, the government did not request that the  
15 iCloud data be preserved and did not seek to obtain this information despite relying on iCloud data for  
16 other phones. Given that it would have been important to the government's case to establish the timing  
17 of the deletions, the only reasonable inference is that the government knew that comparison to the recent  
18 backup would show that the data had been altered, deleted and destroyed while the phone was in the  
19 hands of the agents, rather than by Mr. Wenger.

20 This evidence is, again, manipulated by the government to suit its theory of the case. It is not  
21 reliable and is not sufficient to support the jury's verdict.

## 22 23 II.

### 24 Motion for New Trial (FRCP 33)

#### 25 A. Legal Standard

26 Under Fed. R. Crim. P. 33, a court "may vacate any judgment and grant a new trial if the interest  
27 of justice so requires." As a motion for a new trial is directed to the discretion of the judge when the  
28 'interest of justice so requires,' *United States v. Moses*, 496 F.3d 984, 987 (9th. Cir. 2007). "A district

1 court's power to grant a motion for a new trial is much broader than its power to grant a motion for  
2 judgment of acquittal," *United States v. Alston*, 974 F.2d 1206, 1211 (9th Cir. 1992).

3 A motion for a new trial under Rule 33 may be granted for failure to give proper jury  
4 instructions when the error affects the defendant's substantial rights. See Fed. R. Crim. P. 52(a). An  
5 error in a jury instruction is harmless only if it is "clear beyond a reasonable doubt that a rational jury  
6 would have found the defendant guilty absent the error." *Neder v. United States*, 527 U.S. 1, 18 (1999).

7  
8 B. Irregularities in the Handling of the Jury and Its Verdict Cast Doubt on the Reliability  
9 of the Jury Process

10 Federal Rule of Criminal Procedure 31(a) states that the jury must return its verdict to a judge in  
11 open court.

12 "In a criminal case, any private communication, contact, or tampering directly or indirectly, with  
13 a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed  
14 presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and  
15 directions of the court made during the trial, with full knowledge of the parties." *Remmer v. United*  
16 *States*, 327 U.S. 227, 229 (1954) (Internal Citations omitted.) The burden is on the government to  
17 establish that any such contact with the juror was harmless to the defendant. *Ibid.* "The Supreme Court  
18 has not established a bright-line test for determining what constitutes a possibly prejudicial 'external'  
19 influence on a jury. . . . an external contact need not amount to a 'communication' to trigger some  
20 judicial inquiry into possible prejudice." See *Tarango v. McDaniel*, 837 F. 3d 936, 945-946 (9<sup>th</sup> Cir.  
21 2016) . The defendant need only demonstrate a credible risk of prejudice, thus the presumption of  
22 prejudice to the defendant's Sixth Amendment and due process rights may arise even when the record  
23 does not disclose what actually transpired or whether the incidents that did occur may have been  
24 harmless. See *Godoy v. Spearman*, 861 F.3d 956, 968 (9th Cir. 2017), citing *Remmer, supra* at 229.

25 It is clear that the verdict was obtained by the Court privately before the verdict was taken in  
26 open court. This procedure violated Rule 31(a).

27 The taking of the verdict was also tainted by other procedural irregularities. First, the  
28 announcement of the jury verdict was delayed, supposedly so the jury could eat lunch. When the

1 defense returned to the court room for the verdict, the jury was coming into the courtroom unattended by  
2 either courtroom deputy or the bailiff. There were numerous government agents and US Attorneys  
3 having a conversation next to the jury box. Press representatives were also in the courtroom. It is  
4 impossible to know what the jury saw or heard.

5 The courtroom deputy went to get the judge but came back to say the court needed additional  
6 time. The jury returned to their room.

7 The atmosphere in the courtroom changed over the next 15-20 minutes. The courtroom deputies  
8 had a whispered conversation about the verdict and how fast it changed. A custody marshal entered the  
9 courtroom, had a discussion with a courtroom deputy, then left again. The bailiff assigned to the jury  
10 had a conversation both inside and outside of the court room with the court security officers. Despite the  
11 fact that no verdict had been announced, it appeared that preparations were underway to remand Mr.  
12 Wenger into custody.

13 When the jury was finally brought out, their mood was angry and hostile in contrast to their  
14 earlier demeanor. The large group of federal agents left the courtroom and did not return for the reading  
15 of the verdict, suggesting they had already been told what was coming.

16 The envelope containing the verdict form was handed to the judge unsealed and flapping open.  
17 Clearly the Court obtained the verdict outside of the presence of the parties, or at least without the  
18 presence of Mr. Wenger and his counsel in violation of Rule 31.

19 The jury returned a unanimous verdict of guilty as to both counts of the Indictment, but more  
20 than an hour elapsed between the time the jury initially announced that it had a verdict and the time that  
21 the Court actually took the verdict on the record. Numerous federal agents were present in close  
22 proximity to the jury box when the jury was initially brought out. The press was present in the  
23 courtroom. The jurors were left unattended in the courtroom during that time. Neither the courtroom  
24 deputies nor the assigned bailiff were paying any attention to them. The judge must have had some *ex*  
25 *parte* contact with the jury in order to obtain the verdict in advance of its reading in open court as there  
26 was at least enough time to phone the marshals regarding custody of Mr. Wenger. As a result, it is  
27 unclear what influences the jury was subjected to during that extended time, and whether the verdict  
28 ultimately stated was unaffected by such influences. The clear change in demeanor between the first

1 and second times the jury was brought out suggests otherwise.

2 Such procedural irregularities raise questions as to the integrity of the jury verdict and deny Mr.  
3 Wenger due process and the Sixth Amendment right to a fair trial.

4  
5 C. Manipulation of Evidence by the Government Denied Mr. Wenger a Fair Trial

6 A prosecutor's knowing use of false testimony to secure a conviction violates due process rights  
7 under the U.S. Constitution See *Jones v. Ryan*, 691 F.3d 1093, 1102 (9<sup>th</sup> Cir. 2012). This principle is  
8 rooted in the Fifth and Fourteenth Amendments, which guarantee due process of law. Specifically, the  
9 government is prohibited from presenting statements or inferences it knows to be false or has strong  
10 reason to doubt. *U.S. v. Reyes*, 660 F.3d 454, 462 (9<sup>th</sup> Cir. 2011). A prosecutor violates a defendant's  
11 due process rights by eliciting or failing to correct false testimony *United States v. Holmes*, 129 F.4th  
12 636, 662 (9<sup>th</sup> Cir. 2025).

13 As discussed above, the government altered or manipulated key pieces of evidence and elicited  
14 false testimony. The government failed to fully disclose the opinions of its expert so as to prevent  
15 defense counsel from having the ability to address it in a timely manner. These tactics also denied Mr.  
16 Wenger his right to a fair trial.

17  
18 **IV.**

19 **CONCLUSION**

20 For the foregoing reasons, Mr. Wenger respectfully requests that this Court grant his motions for  
21 judgement of acquittal on both counts of the Indictment or order a new trial.

22  
23 Dated: May 14, 2025

Respectfully Submitted,

24  
25 /s/ Dena Marie Young  
DENA MARIE YOUNG

26  
27 Attorney for Defendant  
DEVON WENGER