No. ________

In The

Supreme Court of the United States

DAVID BOYER PRINCE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

ANDREW PARNES
Counsel of Record
671 First Avenue North
P.O. Box 5988
Ketchum, Idaho 83340
Phone (208) 726-1010
aparnes@mindspring.com

Attorney for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. Whether a Defendant is denied his Constitutional rights to present a defense and due process of law when the Government and the Court refuse to provide use immunity to an essential defense witness without providing sufficient justification.

2. Whether a trial court errs by allowing a non-immunized defense witness to make a blanket assertion of a Fifth Amendment privilege outside the presence of the jury.

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OPINION BELOW

The decision of the Ninth Circuit Court of Appeals was issued on May 21, 2013 and is unpublished. A copy of the opinion is found in pages 1-5 of the Appendix to this petition.

JURISDICTION

This Court has jurisdiction over this petition for a writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., Amend. VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . .

U.S. Const., Amend. XIV: . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF RELEVANT FACTS

Mr. Prince was tried by a jury on seven counts of wire fraud, allegedly occurring on specific dates between August 30, 2005 and May 26, 2006, in violation of 18 U.S.C. § 1343. At the conclusion of trial, the

jury returned guilty verdicts on five counts but failed to reach a verdict on two counts which the Government then dismissed at sentencing. The charges concerned allegedly misleading representations regarding a loan fund which caused participants to wire money to the fund.

The sole defense was that Mr. Prince had a good faith belief in the information and representations provided to him by his partner Dr. Lance Lee and that Mr. Prince's statements to the participants in the fund were based solely upon Lee's advice. At trial, Mr. Prince testified, but his attempt to have Lee called as his critical and essential witness for the good faith defense was thwarted when Lee took the Fifth Amendment and both the Government and the Court refused to provide Lee use immunity.

Mr. Prince became interested in options trading in the late 1990's. He attended a series of seminars called Optionetics paying over five thousand dollars for the seminars. He then traded on his own but was "not very successful," tending to lose his money. Despite his own record, he believed that skilled traders could make significant returns in the options market.

Mr. Prince first met Lee, a wealthy and respected professional, in the mid 1990's. Lee was involved in the church community of which Mr. Prince was a member. Lee informed Prince that Lee had two doctoral degrees, one each from Harvard and Columbia Universities. In 2005, Mr. Prince and Lee met and discussed developing a hedge fund. Lee informed

Prince that for the past several years he had been involved in a high-tech venture that had raised approximately ten million dollars.

Lee informed Prince that Lee's friend Billy Choi, was a successful options trader who had been trading for over ten years with no significant losses; was making returns in the neighborhood of two to three hundred percent a year; and recently was getting returns as high as 25% a month. Lee said Choi had at least ten million dollars in his own trading account and further informed Prince that Choi would back up any losses that might be sustained in trades by bringing over funds from his own account if necessary.

Mr. Prince was interested in Choi's results and asked Lee to provide him Choi's trade history for a five-year period. Lee never provided the records to Prince, but Prince trusted and believed in Lee because of Lee's academic and professional background and reputation in the Christian community and because Prince had known Lee personally for approximately 10 years prior to the establishment of the fund.

Solely based upon Lee's representations and in association with Lee, Mr. Prince established a business, The Leopard Fund, which offered loans with the funds traded by Choi. Mr. Prince drafted the website materials for the loan fund, prepared Securities and Exchange Commission documents and handled communications. He and Lee, together, determined the distributions to the lenders on a monthly basis.

Prince personally invested $15,000 by borrowing on his credit cards, and Lee invested $150,000, thereby strengthening Prince's confidence in the business.

Based on Lee's representations about Choi, the Fund "guaranteed" the return of principal – the guarantee based on the record of the trader and the assets of the company. Prince believed the guarantee was legitimate based on Lee's statements made to him prior to establishing the Fund. The participants in the Fund were also informed that the return would be up to 5% a month. As a result of the statements and materials on the website, participants forwarded monies in varying amounts to the Leopard Fund. A number of participants received their funds back plus profits or interest, while some received part of the principal back, and others suffered significant losses.

Mr. Prince testified that after the business was established, Lee continued to be intimately involved in the fund, reviewing and overseeing the website content and other work that Prince did. Choi had no direct role in running the business; he only made the option trades in the trading account. During the fall of 2005, the fund made money and was able to pay the lenders a 5% monthly return on their principal. The fund made significant profits through February 2006, but experienced a large trading loss in March, 2006. The fund rebounded with successful trades in April and May, but then sustained a loss of almost $600,000 in two trades on May 22, 2006. By the end of May, 2006, the Fund assets were less than $100,000 and the Fund owed principal payments to

the lenders of almost nine hundred thousand dollars. Evan then, Mr. Prince continued to believe that Choi would either recover the loss in trades or transfer funds from Choi's account as Lee had promised, and the enterprise could still be successful. After the May loss from the trading account, Prince placed another $45,000 of his own monies into the fund in June 2006. Nevertheless the fund collapsed and no more trades were made after July 2006.

REASONS FOR GRANTING THE WRIT

I. A Defendant is denied his Constitutional rights to present a defense and due process of law when the Government and the Court refuse to provide use immunity to an essential defense witness without providing sufficient justification.

While the tension between the Fifth Amendment right of a witness to assert the privilege and refuse to testify as a defense witness and the Sixth Amendment right of a defendant to present a defense has long been recognized, this Court has never resolved the important and recurring question of how to balance these competing constitutional rights in order to afford a defendant his right to Due Process and a Fair Trial.

The Government has significant power in prosecuting cases against criminal defendants. The Government can initiate and conduct investigations, convene and direct a grand jury, and, under the current status of the law, exercise almost unfettered discretion regarding the grant of immunity to witnesses in criminal cases. Against the power of the Government, the Constitution and the Courts provide a defendant the means to prevent injustices from occurring thereby correcting the otherwise great power imbalance between the Government and a single defendant.

Thus, the Sixth Amendment has been held to guarantee the accused the right to present a defense. *See Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) ("Few rights are more fundamental than that of an accused to present witnesses in his own defense."). More specifically, a defendant must have "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984). However, this right cannot be enforced unless it includes not only the right to compel the attendance of a witness but also the right to present the witness's testimony to the jury. *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987) ("Our cases establish, at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence *that might influence the determination of guilt.*", citing *Chambers v. Mississippi*, *supra*; *Cool v. United States*, 409 U.S. 100 (1972) (*per curiam*); *Washington v. Texas*, 388

U.S. 14 (1967). *Cf. Webb v. Texas*, 409 U.S. 95 (1972) (*per curiam*) (decision based on Due Process Clause) (emphasis added)).

Nevertheless, when a duly subpoenaed witness asserts a Fifth Amendment privilege, the defendant has no ability to force or guarantee that the testimony will be heard by the jury. By contrast, the Government has absolute power to grant the witness immunity and *force* that witness to testify unless the witness is willing to face incarceration.[1] Unless the Court intervenes by either requiring the Government to grant a defense witness immunity or by itself granting immunity, the jury will never hear the defense testimony, which in many instances, such as this case, contains information essential to the accused's defense.

In this case, Mr. Prince's sole defense was his good faith belief in the information supplied by Lance Lee; however, the jury never learned that the actual information was even provided to Mr. Prince, except through his own uncorroborated testimony. Lee thus possessed the essential components of Mr. Prince's defense, but Lee was kept from testifying because the Government refused to grant him even use immunity,

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[1] The Government routinely grants its own witnesses immunity in order to obtain their testimony and this power is reinforced by the United States Sentencing Guidelines which provide substantial benefits to defendants willing to assist the Government. *See* USSG § 5K1.1.

pursuant to *Kastigar v. United States*, 406 U.S. 441 (1972).

Despite the common occurrence of a defendant's needing the testimony of a witness who may have a valid Fifth Amendment privilege, this Court has not established the guidance necessary for lower courts throughout the country on how to apply a set of rules in a consistent fashion. *See Woods v. Adams*, 631 F. Supp. 2d 1261, 1284 (C.D.Cal. 2009) citing *Davis v. Straub*, 430 F.3d 281, 287-88 (6th Cir. 2005) (Supreme Court holdings do not clearly establish how to resolve conflict between witness's Fifth Amendment privilege and defendant's Sixth Amendment right to present a defense).

Recently, the Third Circuit held that a court has no right to grant use immunity to a defense witness under any circumstances. *United States v. Quinn*, 2013 WL 4504647 (3d Cir. 2013), decided August 14, 2013, overruling *Government of the Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir. 1980). However, the Third Circuit continued to uphold its five-part test to determine if the Government's refusal to grant immunity to a defense witness violated Due Process. To prevail, a defendant must demonstrate: [1] immunity is properly sought in the district court; [2] the defense witness is available to testify; [3] the proffered testimony is clearly exculpatory; [4] the testimony is essential; and [5] there are no strong governmental interests which countervail against a grant of immunity. If these tests are met, the remedy is to have

the Government immunize the witness or dismiss the case.

However, other circuits require that the defendant must prove that the Government acted with a deliberate attempt to distort the fact-finding process in order to find a Due Process violation. *See, e.g.*, *Blissett v. Lefevre*, 924 F.2d 434, 442 (2d Cir. 1991); *United States v. Angiulo*, 897 F.2d 1169, 1192 (1st Cir. 1990); *United States v. Frans*, 697 F.2d 188, 191 (7th Cir. 1983).

The Ninth Circuit has established yet another test, looking not solely at the Government's "purpose" in denying immunity, but the "effect" such a denial has on the fact-finding process. *United States v. Straub*, 538 F.3d 1147 (9th Cir. 2008). A defendant must show that the fact-finding process was "distorted." *See* Appendix at 2. However, the Ninth Circuit has limited this approach to the "selective denial of use immunity." *Id*. at 1148, 1166.[2]

Of course, without knowing with certainty how the witness would have testified it is almost impossible to meet the Ninth Circuit "distortion" standard. For example, in this case, it is likely that Lee would

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[2] In this case, the Government did immunize a potential Government witness, but chose not to call this witness in their case-in-chief. When defense counsel called the witness, the witness acknowledged that he only testified pursuant to the immunity grant and the Government proceeded to obtain extensive testimony against the defendant during cross-examination of the witness.

have testified truthfully, under a grant of use immunity, about the information he provided to the defendant concerning the option trader's history of success and the rate of return. Lee also could have provided critical corroboration for the personal guarantee made by the trader in case of trading losses. Instead, the Government was able to keep this witness from the jury merely by refusing to grant him use immunity at a time when there was no indication that the Government was seeking to indict him and, in fact, had not done so when almost five years had passed since the last participant had wired monies to the fund. The Government, in the end, did not indict Lee and the statute of limitations for him expired a mere three months after Mr. Prince's trial.

This kind of factual and legal conflict between the Fifth and Sixth Amendments must be addressed. By hearing this case and establishing the parameters for consideration of this important conflict, this Court will resolve this issue for the trial courts across the country which face this oft recurring issue.

II. A trial court errs by allowing a non-immunized defense witness to make a blanket assertion of a Fifth Amendment privilege outside the presence of the jury.

Lee appeared at trial outside the presence of the jury and asserted a blanket Fifth Amendment privilege, asserting that he would refuse to answer any

question other than providing his name.[3] *See* Appendix at 7. This Court has never resolved the question of whether a witness can make such a blanket claim outside the presence of the jury.

A witness cannot establish that the danger is "real and probable" by a blanket assertion because "the witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself – his say-so does not of itself establish the hazard of incrimination." *Hoffman v. United States*, 341 U.S. 479, 486 (1951). Rather, the witness should take the stand and give "a responsive answer to the question or an explanation of why it cannot be answered" without self-incrimination. *Id.* at 487.

Here, Lee would not have been called "solely" to assert the privilege in front of the jury. *Cf. Bowles v. United States*, 439 F.2d 536 (1971) and *United States v. Licavoli*, 604 F.2d 613 (9th Cir. 1979). By accepting Lee's blanket waiver outside the presence of the jury and shielding Lee from the jury, the court denied Mr. Prince his right to have Lee answer valid questions not covered by any privilege. The jury was entitled to see that Lee existed and that there were questions which could have been answered without the assertion of a valid Fifth Amendment privilege.

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[3] Lee even refused to answer a question about his educational background, which in no way could have subjected him to prosecution.

Nor did the trial court provide a "neutralizing" or "missing witness" instruction to the jury which might have explained to the jury why Lee was not a witness in the case as opposed to letting the jury simply presume that Mr. Prince did not attempt to call him as a witness either because Lee did not exist or would have contradicted Mr. Prince's testimony. In the case where a witness has asserted a Fifth Amendment privilege and not been granted immunity, the Ninth Circuit has held that no such instruction is warranted because neither side caused the witness's absence. *United States v. Brutzman*, 731 F.2d 1449 (9th Cir. 1984). In contrast, the Tenth Circuit in an identical situation, approved a "neutralizing" instruction. *See United States v. Martin*, 526 F.2d 485 (10th Cir. 1975).[4]

If the Government is able to deny immunity to a defense witness without some protections afforded the defendant, the balance of power between the Government and the defendant is left unchecked by the Courts. The requirements that the witness be barred from asserting a blanket claim of privilege, that the witness answer non-privileged questions in front of the jury or that the jury be informed of why the

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[4] The instruction read: "There has been testimony in this case about an informant named Samuel Hudson. As a result of a hearing held outside the presence of the jury, the Court has determined that Mr. Hudson is not available to be called as a witness by either side in this case. The jury may not draw any inference from the fact that Samuel Hudson did not appear as a witness in this case." *Martin*, 526 F.2d at 486-87.

witness does not testify are critical to preventing the Government's abuse of its power to grant immunity.

Because none of these protections were afforded Mr. Prince, this Court should accept this case and thereafter reverse his conviction and sentence.

CONCLUSION

For the foregoing reasons, it is requested that this Court grant a writ of certiorari.

Respectfully submitted,

ANDREW PARNES
Counsel of Record
671 First Avenue North
P.O. Box 5988
Ketchum, Idaho 83340

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DAVID BOYER PRINCE, Defendant-Appellant.	No. 12-10077 D.C. No. 3:10-cr-00153-CRB-1 MEMORANDUM* (Filed May 20, 2013)

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, District Judge, Presiding

Argued and Submitted May 14, 2013
San Francisco, California

Before: CLIFTON and BEA, Circuit Judges, and DUFFY, Senior District Judge.**

David Boyer Prince appeals his jury conviction and sentence imposed for five counts of wire fraud. His convictions stem from his involvement with three investment entities: MJE Invest!, Dawnstar Alliance, and the Leopard Fund. He was sentenced to eighty-four

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Kevin Thomas Duffy, United States District Judge for the Southern District of New York, sitting by designation.

months imprisonment. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

1. Prince challenges the admission into evidence of a heavily redacted cease and desist order from the Texas State Securities Board. Even if the district court abused its discretion in admitting the order, any error was harmless in light of the overwhelming evidence against Prince. *See United States v. Romero*, 282 F.3d 683, 688 (9th Cir. 2002) ("If we conclude that a Rule 404(b) violation occurred, we reverse only if the error was not harmless.").

2. Prince challenges the district court's denial of his motion to compel use immunity for a potential defense witness, Dr. Lance Lee. Dr. Lee appeared at Prince's trial and, outside the presence of the jury, invoked his Fifth Amendment right against self-incrimination. In general, a defendant is not entitled to compel the government to grant use immunity to potential defense witnesses who invoke their right against self-incrimination. *See United States v. Brutzman*, 731 F.2d 1449, 1451-52 (9th Cir. 1984), *overruled on other grounds by United States v. Charmley*, 764 F.2d 675, 677 n.1 (9th Cir. 1985). In order to show that due process requires the district court to compel use immunity, a criminal defendant must show that "(1) the testimony was relevant; and (2) the government distorted the judicial fact-finding process by denying immunity." *United States v. Young*, 86 F.3d 944, 947 (9th Cir. 1996). Prince has failed to show that the government distorted the fact-finding process by denying immunity.

The district court did not err in allowing Dr. Lee to invoke his Fifth Amendment privilege outside of the presence of the jury. Under *United States v. Licavoli*, 604 F.2d 613, 624 (9th Cir. 1979), defendants may not call people as witnesses "for the sole purpose of compelling them to invoke their Fifth Amendment privilege in front of the jury." Nor did the district court err in refusing to give one of the "missing witness" instructions proposed by Prince. "Where a witness' unavailability results from an invocation of the privilege against self-incrimination, the witness is unavailable to both parties, and the court's refusal to give an absent witness instruction is proper." *Brutzman*, 731 F.2d at 1454.

3. Prince challenges the district court's failure to strike references to "Ponzi schemes" during the government's closing argument and rebuttal, despite the court's earlier ruling that the government could not use the phrase "Ponzi scheme" during an expert witness's testimony or opening statements. Because the defense failed to object to these references at trial, we review for plain error. These fleeting references, even if they were in error, were not plain error within the meaning of *United States v. Olano*, 507 U.S. 725, 736 (1993).

4. The district court, in enumerating the elements of wire fraud, erroneously stated that the *defendant* had to prove each of the elements of the offense beyond a reasonable doubt. "In reviewing jury instructions, the relevant inquiry is whether the instructions as a whole are misleading or inadequate

to guide the jury's deliberation." *United States v. Garcia-Rivera*, 353 F.3d 788, 792 (9th Cir. 2003) (internal quotation omitted). The district court's one misstatement in Prince's case was not sufficient to render the instructions as a whole misleading or inadequate.

5. Prince challenges the district court's refusal to award a two-level reduction for acceptance of responsibility pursuant to United States Sentencing Guidelines § 3E1.1. "When a defendant chooses to put the government to its burden of proof at trial, a downward adjustment for acceptance of responsibility should be rare." *United States v. Weiland*, 420 F.3d 1062, 1080 (9th Cir. 2005) (internal quotations marks omitted). The district court did not err in refusing to award the two-level reduction when Prince went to trial and denied he possessed the requisite intent to defraud, a key element of wire fraud.

6. Prince challenges the district court's reliance on his status as an attorney as one of the 18 U.S.C. § 3553(a) factors to impose an upward sentencing variance, even though the district court declined to apply the two-level enhancement for abusing a position of trust as a result of his status as a lawyer. The district court did not abuse its discretion in considering Prince's status as a lawyer as one of the § 3553(a) factors, especially because several victim-investors

testified that Prince's status as an attorney played a role in their decision to invest funds with the Leopard Fund.

AFFIRMED.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE
CHARLES R. BREYER

UNITED STATES OF AMERICA,	)	NO. CR 10-0153 CRB
PLAINTIFF,	)	WEDNESDAY SEPTEMBER 21, 2011
VS.	)	SAN FRANCISCO, CALIFORNIA
DAVID BOYER PRINCE,	)	[VOLUME 4
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REPORTER'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFF:
MELINDA L. HAAG
UNITED STATES ATTORNEY
150 ALMADEN BOULEVARD, SUITE 900
SAN JOSE, CALIFORNIA 95113
BY: JOSEPH FAZIOLI
ALLISON MARSTON DANNER
ASSISTANT UNITED STATES ATTORNEYS

FOR DEFENDANT:
NOLAN, ARMSTRONG & BARTON, LLP
600 UNIVERSITY AVENUE
PALO ALTO, CALIFORNIA 94301
BY: DANIEL LEE BARTON, ESQUIRE
PATRICK MCKENNA, ESQUIRE

* * *

[Outside the Presence of the Jury]

[786] LOREN DANIEL LEE,

CALLED AS A WITNESS FOR THE DEFENDANT HEREIN, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

THE WITNESS: I DO, SIR.

THE COURT: HAVE A SEAT. WOULD YOU GIVE YOUR NAME [787] AGAIN AND SPELL YOUR NAME FOR THE RECORD?

THE WITNESS: YES, YOUR HONOR. LOREN DANIEL LEE, L-O-R-E-N, D-A-N-I-E-L, LAST NAME LEE, L-E-E.

THE COURT: THANK YOU. GO AHEAD.

DIRECT EXAMINATION

BY MR. BARTON

Q MR. LEE, CAN YOU DESCRIBE YOUR – DR. LEE, CAN YOU DESCRIBE YOUR EDUCATIONAL BACKGROUND?

A COUNSEL, WITH GREATEST RESPECT, I DECLINE TO ANSWER THE QUESTION BASED ON MY INVOKING OF MY FIFTH AMENDMENT RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

Q DO YOU KNOW DAVID PRINCE?

A COUNSEL, I DECLINE TO ANSWER THE QUESTION BASED UPON MY INVOKING OF THE

FIFTH AMENDMENT, MY FIFTH AMENDMENT RIGHTS UNDER THE CONSTITUTION.

Q DO YOU KNOW CHRIS HUDSON?

A I DECLINE TO ANSWER THIS AND ALL OTHER QUESTIONS BASED UPON MY CONSTITUTIONAL RIGHTS OF THE FIFTH AMENDMENT.

Q ARE YOU AN OFFICER OF DAWNSTAR ALLIANCE?

A I DECLINE TO ANSWER THIS QUESTION BASED UPON THE INVOCATION OF MY RIGHTS UNDER THE A FIFTH AMENDMENT.

Q WERE YOU THE FUND MANAGER FOR THE LEOPARD FUND?

A I DECLINE TO ANSWER THIS QUESTION ON THE BASIS OF THE FIFTH AMENDMENT, COUNSEL.

Q DO YOU KNOW A GENTLEMAN NAMED BILLY CHOI?

[788] A I DECLINE TO ANSWER THIS QUESTION AND ALL OTHERS BASED UPON MY INVOCATION OF MY RIGHTS UNDER THE FIFTH AMENDMENT, COUNSEL.

Q IF I WERE TO CONTINUE TO ASK YOU QUESTIONS THAT RELATE TO DAVID PRINCE, THE LEOPARD FUND, DAWNSTAR ALLIANCE, MJE INVEST!, PEOPLE WHO INVESTED IN MJE

INVEST!, WOULD YOU CONTINUE TO INVOKE YOUR FIFTH AMENDMENT RIGHTS?

A THAT IS CORRECT, COUNSEL.

MR. BARTON: I HAVE NO FURTHER QUESTIONS.

THE COURT: OKAY.

MR. FAZIOLI: NO QUESTIONS, YOUR HONOR.

* * *