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1997-98 Moot Court

No. 97-100

IN THE
SUPREME COURT OF
THE UNITED STATES
OF AMERICA

October Term 1997

VALLI M. MOSER,

Petitioner,

v.

STATE OF CHAOS.

Respondent.

On Writ of Certiorari to the United States Court
of Appeals for the Fourteenth Circuit

Petitioner's Brief

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1 She had never been involved with the local or federal authorities
2 in any manner. Her ex-husband, James Jordan, Jr., was the Chief
3 Executive Officer of a local corporation founded by his father.

4 In the spring of 1992, Jordan was attempting to refinance a
5 mortgage on his property with a private bank in the city of
6 Pandemonium. Moser became involved with that transaction because
7 her name was still listed on the existing mortgage. Problems arose
8 in refinancing the property because Jordan had an outstanding tax
9 liability to the IRS. The debt was incurred subsequent to Moser's
10 separation from Jordan and did not involve her in any way, but the
11 bank would not process the loan until the debt was paid, and held
12 Moser jointly liable for her ex-husband's mortgage.

13 The debt was thought to be approximately \$11,000, but actually
14 turned out to be \$21,000, which Jordan could not pay. In fact,
15 Moser's ex-husband was the target of an IRS investigation for
16 filing fraudulent tax returns. He was aware of his status as a
17 suspect; but neglected to inform Moser and simply stalled the
18 refinancing proceedings.

19 To take care of what she believed to be her ex-husband's
20 entire tax problem and to limit interaction with him, Moser decided
21 to contact the IRS herself. Brian Best was the IRS Collections
22 Manager in Eau Cloudy, from March 1990 to February 1994. Moser had
23 met Best previously, in late 1991, in her capacity as a realtor. In
24 December 1991, Best approached Moser about selling his father's
25 rather large suburban home, but eventually he elected to market the
26 house through another realtor.

27 In June 1992, Moser approached Best at a social gathering.
28 Moser asked about Best's success in selling his father's property.

1 Best stated that the realtor he hired had failed to procure
2 satisfactory bids. Moser sympathized, relating her troubles with
3 her ex-husband's tax debt. Best then suggested two options to take
4 care of her ex-husband's tax debt: "abatement through reasonable
5 cause" and "offer in compromise."

6 Between June and August 1992, several conversations passed
7 between Moser and Best in relation to Jordan's \$21,000 tax debt. On
8 July 14, 1992, Moser met with Best in his office and offered to
9 sell Best's property at no cost. Moser also asked Best, during
10 their meeting on July 14, if he would accept the original \$11,000
11 liability to settle her ex-husband's tax debt. Best believed this
12 offer was a bribe, but said nothing to Moser. He reported the
13 details of the meeting to IRS Inspector John Idleberg, who
14 instructed Best to tape record all future conversations with Moser,
15 so they could "get" the "charming little realtor."

16 A proper court order was obtained for the wiretapping. Then,
17 unbeknownst to Moser, telephone conversations between her and Best
18 were recorded on July 15, July 31, August 4 and August 6, 1992.

19 On the morning of August 27, 1992, Inspectors John Idleberg
20 and Thomas Irvin of the IRS visited Moser at her home in Eau
21 Cloudy. The inspectors told Moser they wanted to ask her a few
22 questions regarding a "tax issue." Having read in the newspaper of
23 Jordan's status as the target of a widespread IRS investigation
24 regarding his business practices, Moser let the inspectors in to
25 interview her. The interview was professional and formal, except
26 that Moser was attired in a bathrobe and declined the opportunity
27 to change her clothes.

28 Inspector Idleberg stated that they merely wanted to ask Moser

1 a few questions regarding the money her ex-husband owed the IRS.
2 Moser asked the inspectors if she should consult an attorney, and
3 the inspectors stated that she was free to obtain an attorney if
4 she desired. The inspectors then informed Moser that she was
5 obligated to answer their questions truthfully and a false answer
6 could have "potential consequences."

7 The inspectors then asked Moser to describe her last contact
8 with the IRS. She told the inspectors that her ex-husband was
9 refinancing a mortgage and since she was named on some of the
10 property, she had merely contacted the bank find out what she
11 needed to do. She said that the bank informed her that her ex-
12 husband's tax debt had to be resolved before the bank loan could be
13 completed. To expedite the loan process and minimize her dealings
14 with her ex-husband, Moser stated that she had contacted the IRS to
15 obtain information regarding the procedures for resolving the tax
16 debt. Moser was asked if she knew the amount of taxes owed by her
17 husband to the IRS. Since she was not sure of the actual amount she
18 answered, "no".

19 The inspectors then asked Moser if she knew an IRS manager by
20 the name of Brian Best. Moser responded that she did not know
21 anyone by that name specifically, but stated that her husband had
22 given her a check to drop off at the IRS office, and that she gave
23 the check to "a gentleman, who may have been the manager." When
24 asked if she knew Best in her capacity as a realtor, Moser said
25 "no, I do not think so." Then asked if there were any discussions
26 of her ex-husband's tax debt between her and Best. Moser again
27 answered in the negative. The inspectors then asked if she was
28 aware of any efforts to "cut a deal" with the IRS and Best to have

1 Jordan's taxes reduced. Since she honestly believed that her
2 discussions were completely legal offers to compromise, Moser again
3 responded, "no."

4 The interview lasted approximately forty minutes. Moser did
5 not volunteer to the inspectors any information for which they did
6 not directly ask. However, then the inspectors suggested a
7 different version of her story, the one offered by Best. Given an
8 opportunity to change the information she had provided, Moser
9 expressed her discomfort with the interview, and it was terminated.
10 Moser did not change her answers; she simply asked the inspectors
11 to leave.

12 On September 19, 1992. Moser was charged with two counts of
13 bribery and one count of making false statements to federal agents.

14 SUMMARY OF ARGUMENT

15 This Court should reverse Ms. Moser's conviction for several
16 reasons. First, congress never intended § 1001 to be used to
17 prosecute individuals sitting at home in their bathrobes uttering
18 exculpatory denials. Second, § 1001, when applied without
19 restriction, violates the Fifth Amendment. Third, Ms. Moser's
20 responses to the IRS agents were not "statements" within the
21 meaning of § 1001. Fourth, the responses were not material to a
22 Government function. Finally, the exculpatory no doctrine states
23 that Ms. Moser cannot be convicted under the facts in this case.

24 ARGUMENT

25 **I. CONGRESS NEVER INTENDED MERE EXCULPATORY DENIALS TO BE WITHIN** 26 **THE PURVIEW OF § 1001.**

27 At issue in this case is 18 U.S.C. § 1001 which reads:
28 Whoever, in any matter within the jurisdiction of any

1 department or agency of the United States knowingly and
2 willfully falsifies, conceals or covers up by any trick,
3 scheme, or device a material fact, or makes any false,
4 fictitious or fraudulent statements or representations, or
5 makes or uses any false writing or document knowing the same
6 to contain any false, fictitious or fraudulent statement or
7 entry, shall be fined not more than \$10,000 or imprisoned not
8 more than five years, or both.

9
10 18 U.S.C.S. § 1001 (1997).

11 Originally a false claims statute, the first version of § 1001
12 was established in 1863 in response to the growing number of frauds
13 perpetrated against the government. Hubbard v. United States, 514
14 U.S. 695, 704-05 (1995). The statute, the Act of Mar. 2, 1863, ch.
15 67, 12 Stat. 696 ("1863 Act"), made it a crime for anyone to lodge
16 monetary claims against the United States government with knowledge
17 that the claims were "false, fictitious, or fraudulent." Hubbard at
18 704. Though false statements were also prohibited, the 1863 Act
19 severely limited the class of illegal statements to those made "for
20 the purpose of obtaining, or aiding in obtaining, the approval or
21 payment of [a false] claim." Id. at 705. Benign exculpatory denials
22 of guilt, or any other false statements were exempt from this law
23 if they were not made for the defined purpose.

24 The false statements provision of the 1863 Act remained
25 essentially unchanged for 55 years until, in 1918, Congress amended
26 the statute as follows:

27 Whoever, for the purpose of obtaining or aiding to obtain
28 the payment or approval of [a false] claim, or for the purpose
29 and with the intent of cheating and swindling or defrauding
30 the Government of the United States, or any department
31 thereof, or any corporation in which the United States of
32 America is a stockholder, shall knowingly and willfully
33 falsify or conceal or cover up by any trick, scheme, or device
34 a material fact, or make or cause to be made any false or
35 fraudulent statements or representations, or make or use or
36 cause to be made or used any false bill, receipt, voucher,
37 roll, account, claim, certificate, affidavit, or deposition,

1 knowing the same to contain any fraudulent or fictitious
2 statement or entry [shall be punished].

3 Act of Oct. 23, 1918, ch. 194, 40 Stat. 1015-1016 (1918 ~~Act~~).

4 Although the exact purpose of the functional differences
5 codified in this new wording is somewhat nebulous, the meaning of
6 the statute is clear enough; seemingly only those who bilk the
7 Government out of money are targeted. The Supreme Court agreed that
8 the purpose of the law continued to be the prevention of financial
9 loss to the Government; "[g]iven the continuing focus on financial
10 frauds against the Government, the 1918 Act did not alter the
11 fundamental character of the false claims statute". Hubbard at 705.

12 The 1918 Act became the modern incarnation of § 1001 when, in
13 1934 at the request of the Secretary of the Interior, Congress
14 modified the statute to address the problem of "hot oil frauds".
15 United States v. Gilliland, 312 U.S. 86, 90 (1941). These frauds
16 involved petroleum producers falsifying shipping documents by
17 stating that their in-state oil wells were producing a certain
18 amount of oil, when in fact they were producing less oil and
19 supplementing it with contraband oil purchased from out of state.
20 Id. at 94-95.

21 In further discussions on the purpose for the amendment of the
22 statute, Senator King stated:

23 It transpires that there is no law which will permit
24 prosecution of persons for destroying Government property,
25 beacon lights, and things of that kind. There is nothing which
26 permits us to make an investigation and prosecute persons who
27 are engaged in the "kick-back" practice. They make false
returns, claiming that they have paid certain amounts to their
employees, when they have not done so. This bill just amends
the law so as to give the Federal Government authority to deal
with that class of cases.

28 78 CONG. REC. 11,270 (1934) (statement of Rep. King).

1 Even a loose reading of these words supports the conclusion
2 that Congress was seeking a way to deal with a certain class of
3 fraudulent schemes which were causing frustrating financial
4 hemorrhaging. This is exactly what the 9th Circuit observed in their
5 decision in United States v. Bedore, 455 F.2d 1109, 1110 (9th Cir.
6 1972); "We hold that Congress did not intend section 1001 to apply
7 to [Bedore] giving a false name...because his response was not within
8 the class of false statements that section 1001 was designed to
9 proscribe." The Court in Bedore ruled that giving a false name to a
10 FBI agent was not punishable under § 1001 because "[t]he statute
11 was not intended to embrace oral, unsworn statements, unrelated to
12 any claim of the declarant to a privilege from the United States or
13 to a claim against the United States..." Bedore, 455 F.2d at 1111.

14 It has been argued that the broad wording of the current
15 statute lends credence to the belief that if Congress had wanted to
16 limit the reach of the law, it would have. For reasons discussed in
17 §§ II. & V., *infra*, this argument is unpersuasive and contrary to
18 recent Supreme Court holdings and, in a nutshell, the limiting
19 power of the Fifth Amendment obviated the need for any such
20 restrictive language.

21 Indeed, the wording of the modern § 1001 is broad and
22 inclusive. The inclusion of six "anys" in a single sentence makes
23 it impossible to conclude otherwise. As the Supreme Court has
24 noted, the plain meaning of these words must be strictly adhered to
25 unless such application is "demonstrably at odds with the
26 intentions of the drafters." United States v. Ron Pair Enters, 489
27 U.S. 235, 242 (1989). Put another way, a literal construction of a
28 statute is not to be resorted to when it would bring about "absurd

1 consequences, or flagrant injustices...or produce results not
2 intended by Congress." Sorrells v. United States, 287 U.S. 435,
3 446 (1932). The facts in this case clearly fall into such a
4 category.

5 The history of § 1001 compels the conclusion that Congress
6 intended the statute to apply only to those who economically
7 defraud the Government with fraudulent statements and "hot oil"
8 schemes. The use of this law to prosecute a woman in her bathrobe
9 sitting in her living room talking to two IRS agents who purported
10 to be inquiring about her ex-husband's tax debt is a truly
11 offensive perversion of justice. Ms. Moser had no financial
12 interest in her husband's tax situation, and her statements could
13 not, in even the most abstract context, cause any pecuniary
14 Governmental loss. As such, it is obvious that § 1001 was never
15 intended to apply to a case such as this and Ms. Moser's conviction
16 must be reversed.

17 **II. MS. MOSER'S CONVICTION CANNOT STAND BECAUSE SUCH A BROAD**
18 **APPLICATION OF § 1001 VIOLATES THE FIFTH AMENDMENT PROTECTION**
19 **AGAINST SELF INCRIMINATION.**

20 The Fifth Amendment mandates that no person "shall be
21 compelled in any criminal case to be a witness against himself."
22 U.S. CONST. amend. V (1997). The effect of these words has been
23 defined as clearly prohibiting the use of a person's statements as
24 evidence against him in certain situations. Miranda v. Arizona, 384
25 U.S. 436 (1966). Miranda requires that suspects be advised of their
26 right to remain silent, among other things, before any statements
27 they make may be used against them. Id. at 498.

28 Applying this constitutional restriction to the prosecution of

1 § 1001 cases, the Fifth Circuit noted that "[u]ndoubtedly the
2 judicial gloss put on § 1001...originates at least in part from
3 latent distaste for an application of the statute that is
4 uncomfortably close to the Fifth Amendment." United States v.
5 Lambert, 501 F.2d 943, 946 n.4 (5th Cir. 1974). This sentiment is
6 further reflected in United States v. Stark, 131 F.Supp. 190, 207
7 (D. Md. 1955), a decision in which Judge Chestnut noted that in
8 light of the Fifth Amendment, prosecuting cases such as the one at
9 bar under § 1001 "seems inconsistent with this great bulwark of
10 individual liberty."

11 While many IRS investigations may not meet the conditions
12 necessary to trigger the mandatory issuance of Miranda warnings, it
13 is nevertheless the policy of the IRS to advise subjects of
14 interrogation of these rights. Internal Revenue Manual § 9384.2 at
15 9-226.4 (1989). The two inspectors in this case violated this
16 policy and intentionally misled Ms. Moser to believe that her only
17 choices were to answer their questions, admit her "guilt", or lie.

18 This is exactly the "harsh trilemma" discussed by Giles E.
19 Birch in his insightful article *False Statements to Federal Agents:*
20 *Induced Lies and the Exculpatory No*, 57 U. Chi. L.Rev. 1273 (1990).
21 Mr. Birch remarks that "[a] statute that creates such a trilemma
22 punishes suspects for refusing to admit their guilt." Id. at 1276.
23 Mr. Birch has accurately observed that by carefully avoiding
24 situations where Miranda warning would become mandatory,
25 investigators can trick suspects into violating § 1001; "[n]ot only
26 do...suspects face a trilemma, but most of them fail to realize it,
27 making it nearly certain that they will lie. The near-certainty
28 that suspects will lie allows investigators to set up violations

1 that they fully expect to occur." Id. at 1277.

2 Such is the case here. Prior to visiting Ms. Moser, IRS
3 Inspector John Idleberg stated that he wanted to "get" the
4 "charming little realtor". He and Inspector Thomas Irvin told Ms.
5 Moser that they wanted to ask her questions about her ex-husband's
6 taxes. In reality the inspectors were only interested in evidence
7 for use against Ms. Moser. By concealing the true purpose of their
8 visit, the agents made it less likely that Ms. Moser would realize
9 the gravity of her predicament or the importance of obtaining legal
10 representation.

11 In Bryson v. United States, 396 U.S. 64, 72 (1969), the Court
12 observed that in an investigation "[a] citizen may decline to
13 answer the question, or answer it honestly, but he cannot with
14 impunity knowingly and willfully answer with a falsehood." In any
15 other instance, this statement may be Constitutionally tolerable,
16 but in a § 1001 prosecution, a suspect can not safely avail himself
17 of even these limited options.

18 In the more recent case of Jenkins v. Anderson, 447 U.S. 231
19 (1980), the Supreme Court contradicted the practical application of
20 the Bryson view, holding that a suspect who refuses to answer
21 questions may later be impeached with his silence. Under the Bryson
22 rule, a suspect may not lie with impunity, and under the Jenkins
23 rule a suspect may not remain silent for fear of having his silence
24 used against him. What then is a suspect to do? As aptly noted by
25 the Jenkins court "[i]t can be argued that a person facing arrest
26 will not remain silent if his failure to speak later can be used to
27 impeach him." Id. at 236.

28 Thus, investigators find themselves in a win-win-win

1 situation. If a suspect remains silent, this may be used against
2 him. If he should confess his guilt, his fate is sealed. If he
3 should give a false statement, a § 1001 prosecution will be laying
4 in wait for him. It appears that Mr. Birch's harsh trilemma is in
5 fact a very real issue that must be resolved.

6 In Chaffin v. Stynchombe, 412 U.S. 17, 32 (1973) (quoting
7 McGautha v. California, 402 U.S. 183 (1971)), the Court reasoned
8 that when a suspect faces such unappetizing options he "may have a
9 right, even of constitutional dimensions, to follow whichever
10 course he chooses, [but] the Constitution does not by that token
11 always forbid requiring him to choose." The Court indicated that
12 such a Constitutional issue is to be reconciled with "the threshold
13 question [of] whether compelling the election impairs to an
14 appreciable extent any of the policies behind the rights involved."
15 Id.

16 Rights such as those granted by the Fifth Amendment are
17 absolutely fundamental to the American way of life. As John Hancock
18 and the other founders of this nation put it, these rights are both
19 "self-evident" and "unalienable". THE DECLARATION OF INDEPENDENCE
20 para. 2 (U.S. 1776). The Appreciable extent[?] of the policies
21 behind these rights could not be more obvious. To quote Judge
22 Chesnut:

23 It seems quite inconsistent with our fundamental concepts of
24 due process in the administration of criminal justice to abandon
25 charges of bribery and perjury against the defendants, and then
26 as a different separate substantive criminal offense under
section 1001. The clear purpose of the section was to operate
as a shield for defense rather than as a sword for attack.

27 Stark, 131 F.Supp. at 207. *good*

28

1 To force a suspect into a trilemma such as that posited by Mr.
2 Birch and experienced by Ms. Moser is unequivocally
3 unconstitutional in that to do so violates the Fifth Amendment
4 rights of the subject. As this is exactly the case in the facts at
5 hand, the Constitution requires that Ms. Moser's conviction be
6 reversed.

7 **III. MS. MOSER IS NOT GUILTY OF VIOLATING § 1001 BECAUSE HER**
8 **RESPONSES WERE NOT "STATEMENTS" WITHIN THE MEANING OF § 1001.**

9 There are five elements to a § 1001 offense: "(1) the
10 defendant made a statement; (2) that it [was] false or fraudulent;
11 (3) and material; (4) made knowingly and willingly; (5) and within
12 the jurisdiction of a federal agency." United States v. Chandler,
13 752 F.2d 1148, 1150 (6th Cir. 1985). Appellant contends that under
14 the facts of this case, her responses "No," and "I don't think so,"
15 do not legally constitute "statements" within the meaning of §
16 1001. This view is well supported by the courts.

17 In Stark, 131 F.Supp. 190, the defendant was a contractor
18 involved in the construction of projects financed by the Federal
19 Housing Authority ("FHA"). Upon being contacted by FBI agents
20 investigating allegations that Stark had bribed a certain FHA
21 inspector, Stark was informed of his constitutional rights after
22 which he took an oath swearing the truthfulness of his answers. Id.
23 at 193.

24 After Stark gave answers which were allegedly false he was
25 indicted and convicted under § 1001. He appealed on the grounds
26 that his responses were not "'statements' within the meaning of
27 section 1001...." Id. at 194. In evaluating the merit of Stark's
28 claim, the District Court remarked:

1 [w]ith regard to the nature and character of the 'statement'
2 here involved it is to be noted (1) that it was not in writing;
3 (2) it purported to have been given under oath; (3) it did not
4 relate to any claim by or on behalf of the defendants against
5 the United States or any department or agency thereof; (4) it
6 was not made by the defendants to obtain or retain any official
7 position or employment in any agency or department of the
8 government and (5) possibly more importantly, was not initiated
9 or volunteered by the defendants but was only an answer given
10 in response to a particular inquiry.

11 Id. at 198.

12 Under these conditions Judge Chesnut found that Stark's
13 responses were not 'statements'; "the use of the word 'statement'
14 does not fairly apply to the kind of statement involved in this
15 case where the defendants did not volunteer any statement or
16 representation for the purpose of making [a] claim upon or inducing
17 improper action by the government against others." Id. at 206.

18 This view finds support in United States v. Davey, 155 F.Supp.
19 175 (D.C.S.D.N.Y. 1957). There, the defendant was not under oath
20 while being informally interviewed by FBI agents who asked him if
21 he knew certain individuals. Davey, 155 F.Supp. at 177. His
22 responses were limited to "'no' or some equivalent denial." Id.

23 Judge Bootle reversed Davey's conviction, finding that
24 "[w]hether or not a simple 'no' is a statement from the standpoint
25 of grammar and syntax, I do not construe it to be a statement
26 within the contemplation of Section 1001." Id.

27 Subsequently, the Court in Paternostro v. United States, 311
28 F.2d 298, 301 (5th Cir. 1962) was asked to determine whether more
extensive denials of guilt to an IRS agent were "'statements'
within the meaning of that word as it appears in § 1001." Relying
heavily on both Stark and Davey, the Court found that Paternostro's
"answers were mere negative responses to questions propounded to

1 him by an investigating agent during a question and answer
2 conference, not initiated by the appellant. We conclude that the
3 court erred in failing to dismiss [the § 1001 charge]..."
4 Paternostro, 311 F.2d at 305.

5 The facts of this case strongly mirror the important issues
6 noted in Stark, Davey, and Paternostro. Ms. Moser was not under
7 oath, did not volunteer anything more than mere denials in response
8 to the agents questions, did not have any claim at issue against
9 the United States, and she certainly did not initiate the
10 investigatory meeting with the IRS. Her responses, "No," and "I
11 don't think so," clearly were not 'statements' within the meaning
12 of § 1001. Accordingly, the courts below erred in allowing her
13 conviction to stand.

14 **IV. MS. MOSER DID NOT VIOLATE § 1001 BECAUSE HER RESPONSES WERE NOT**
15 **MATERIAL.**

16 The Court in Chandler clearly stated that before any statement
17 can violate § 1001, it must first be material to the underlying
18 investigation. Chandler, 752 F.2d at 1150. The test for materiality
19 comes from United States v. Van Horn, 789 F.2d 1492 (11th Cir.
20 1986); "[a] statement is material for the purposes of section 1001
21 if it has a 'natural tendency to influence, or be capable of
22 affecting or influencing, a governmental function.' [] The
23 statements need not have exerted actual influence, so long as it
24 [sic] had the capacity to do so." (Citations omitted).

25 In United States v. Medina de Perez, 799 F.2d 540, 546 (9th
26 Cir. 1986), the Ninth Circuit, in deciding to adopt the
27 "exculpatory no" doctrine, discussed in § V. *infra*, commented on
28 the capacity of mere denials to influence governmental functions:

1 [A] competent government investigator will anticipate that
2 the defendant will make exculpatory statements. A defendant
3 who meets this expectation cannot possibly pervert the
4 investigator's police function. We presume that a thorough
5 agent would continue vigorous investigation of all leads until
6 he personally is satisfied that he has obtained the truth.

7 Applying this reasoning to the facts at hand produces a clear
8 result. Ms. Moser's words had no capacity whatsoever to influence a
9 governmental function. The IRS investigators wanted her to either
10 admit her guilt or lie; the outcome being the same in either case.
11 They did not believe her statements, they fully expected her to
12 deny her guilt, they never relied on her responses to the detriment
13 of the IRS or any other governmental agency, and since they had
14 previously wiretapped her phone and recorded her conversations with
15 the individual in question, the answers to their questions were
16 known to them before they ever asked Ms. Moser. These are the
17 facts. They are compelling, undisputed and incontrovertible. Ms.
18 Moser's responses were immaterial to any governmental function, and
19 they cannot support a prosecution under § 1001.

20 **V. UNDER THE "EXCULPATORY NO" DOCTRINE MOSER'S STATEMENTS DO NOT**
21 **VIOLATE § 1001.**

22 For all of the reasons discussed above, the courts in this
23 country have understandably been disturbed by the far-reaching
24 effects of a literal reading of § 1001; "[i]f...section 1001 [was]
25 read literally, virtually any false statement, sworn or unsworn,
26 written or oral, made to a Government employee could be penalized
27 as a felony." Bedore, 455 F.2d at 1110.

28 To bring some uniformity to the application of this law, the
judiciary has created certain tests which are designed to combine
all the various restrictions which have been read into § 1001 by

1 earlier cases. Beginning in Paternostro and carrying through more
2 recent cases such as Medina de Perez, the courts have recognized
3 the exculpatory no doctrine as a defense to § 1001. Citing Medina
4 de Perez, the court in United States v. Cogdell, 844 F.2d 179, 183
5 (4th Cir. 1988) identified the five elements of the doctrine:

- 6 [A] false statement does not violate section 1001 when:
- 7 (1) it was not made in pursuit of a claim to a privilege or
8 a claim against the government;
 - 9 (2) it was made in response to inquiries initiated by a
10 federal agency or department;
 - 11 (3) it did not pervert the basic functions entrusted by law
12 to the agency;
 - 13 (4) it was made in the context of an investigation rather
14 than of a routine exercise of administrative
15 responsibility;
 - 16 (5) it was made in a situation in which a truthful answer
17 would have incriminated the declarant.

18 In Cogdell, the appellant was convicted of lying to Secret
19 Service agents who were investigating her for fraudulently
20 obtaining a replacement income tax refund check after cashing the
21 original check. Cogdell, 844 F.2d at 180-81. Appellant denied
22 cashing both checks and was charged under § 1001. Id.

23 The Court applied the test to the facts and reversed the
24 conviction finding that Ms. Cogdell's statements were within the
25 exculpatory no doctrine. Similar results have been reached by the
26 1st Circuit in United States v. Chevoor, 526 F.2d 178 (1st Cir.
27 1975), the 7th Circuit in United States v. King, 613 F.2d 670 (7th
28 Cir. 1980), the 8th Circuit in United States v. Taylor, 907 F.2d 801
(8th Cir. 1990), the 9th Circuit in Medina de Perez, 799 F.2d at
545, the 10th Circuit in United States v. Fitzgibbon, 619 F.2d 874
(10th Cir. 1980), and the 11th Circuit in United States v. Tabor,
788 F.2d 714 (11th Cir. 1986). The majority of the remaining
Circuits have never heard cases which they felt presented

1 appropriate facts to decide whether or not to accept the doctrine.

2 Applying the exculpatory no doctrine to the facts of this
3 case, it is clear that Ms. Moser's conviction must be reversed.
4 First, Ms. Moser had no claim whatsoever against the IRS or any
5 governmental agency. She was involved with the IRS simply as a
6 result of her name being on the mortgage to a property owned by her
7 ex-husband. Ms. Moser never stood to benefit from this fact, and
8 she only wished to help her ex-husband so she might have her name
9 completely remove from his financial records.

10 The Government conceded at trial that the IRS agents in
11 question initiated the contact with Ms. Moser, and that the IRS is
12 a federal agency. Therefore, the second prong of the doctrine is
13 clearly satisfied.

14 Third, for the reasons discussed in § IV. *supra*, Ms. Moser's
15 words could not have in any way perverted the functions of the IRS.
16 The agents questioning Ms. Moser knew the answers to the questions
17 they were asking beforehand. They only sought incriminating
18 information from her, and they did so under false pretenses. While
19 her responses may have frustrated the agents in this respect, such
20 actions are not within the basic functions of the IRS, and in fact
21 they are contrary to IRS policies.

22 The Government conceded at trial that the fourth prong of the
23 test is satisfied here in that the agents investigating Ms. Moser
24 were acting in the context of an investigation.

25 Finally, although Ms. Moser was acquitted of the underlying
26 bribery charges, the actions of the investigators clearly shows
27 that they sought incriminating statements from her to be used in a
28 subsequent criminal prosecution. In obtaining a court ordered

1 wiretap of Ms. Moser's phone, the agents attested before a
2 magistrate that they had probable cause to believe that she was
3 guilty of criminal activity. Though the jury chose to believe that
4 Ms. Moser was seeking a legal offer in compromise, they could have
5 found otherwise. See ¶2723, U.S. Master Tax Guide (1997). It stands
6 to reason that if Ms. Moser had answered differently, she may have
7 incriminated herself.

8 It is clear that the facts of this case meet each prong of the
9 exculpatory no doctrine. As a matter of law, Ms. Moser cannot be
10 convicted under § 1001 for the responses she gave under the facts
11 in this case.

12 **CONCLUSION**

13 The lower courts in this case committed an error of law in
14 failing to grant Petitioner's motion to dismiss. For all of the
15 foregoing reasons, this Court should grant this motion and reverse
16 her conviction under 18 U.S.C. § 1001.

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22 Dated: March 21, 1998

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24 Respectfully Submitted,

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26 
27 David Scott Gingras

28 Attorney for Petitioner