

Exhibit A

No. 08-10450

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

TAMMY THOMAS,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES AS APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA
NO. CR 06-00803 SI

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2. Each answer was material because it was capable of influencing the grand jury in its decision-making process

As the evidence established, each of defendant's answers to the statements set forth in the charged counts were material to the on-going grand jury investigation. "Case law has established very broad parameters for the definition of materiality." *United States v. Dipp*, 581 F.2d 1323, 1329 (9th Cir. 1978). A statement is material, if "it has a natural tendency to influence, or was capable of influencing, the decision of the decision-making body to which it was addressed." *United States v. Leon-Reyes*, 177 F.3d 816, 820 (9th Cir. 1999). To be material a false statement need only be "relevant to any subsidiary issue under consideration." *See McKenna*, 327 F.3d at 389 (citation omitted). The government need not prove that the perjured testimony actually influenced the relevant decision-making body. *Id.*

Here, the facts make plain that each of defendant's three false statements were capable of influencing the grand jury in their decision-making process and thus were material. The BALCO investigation involved allegations, among others, of illegal steroid distribution. ER:780, 783, 786-787. The evidence indicated that the illegal steroid distributed by BALCO, known as "the clear," was supplied by Arnold. ER:806-809, 827-828. The evidence further suggested that one athlete – defendant – had a connection to both BALCO (based on the seizure of her positive norbolethone test at BALCO: ER:819-820) and Arnold (based on

his e-mail to Conte in which he said he knew the girl “snagged” for norbolethone). ER:831-833. It was because of the “unique” information that defendant possessed that she was subpoenaed to testify before the grand jury. ER:835-836, 838, 845. Indeed, at the time she appeared before the grand jury, she was not a “target,” but rather a potentially “very valuable” witness because the evidence indicated that she had received her drugs directly from the manufacturer – Arnold. ER:835.

Defendant claims that “no trial testimony supported the government’s claimed theory of materiality: that Ms. Thomas’s answers themselves caused a deficit of evidence precluding adding Arnold to the BALCO indictment.” AOB 34. The record shows otherwise. As SA Novitzky specifically testified, as a result of defendant’s false statements to the grand jury, the credibility of seized documents and other witness testimony was called into question because her statements were “inconsistent” with other evidence. ER:843, 1052-1053. Further, because of her “inconsistent” testimony, the agents “lost . . . the opportunity to have the one witness with direct knowledge and direct contact with Patrick Arnold in the early stages of this investigation.” ER:844. The impact was that Arnold was not included in the original BALCO conspiracy indictment because the case agent did not have “the necessary evidence” to recommend charges against Arnold (ER:847), and so the investigation as to him continued (*id.*), and Arnold was not indicted until almost two years after the original BALCO co-conspirators were