

1 On July 25, 2007, the Defendant and Bosley were indicted for Conspiracy to Commit
2 Alien Smuggling. *See* Docket No. 1, Indictment. The Indictment alleged that the defendants
3 “did unlawfully, willfully, and knowingly combine, conspire, confederate and agree with each
4 other and with other persons both known and unknown to the Grand Jury, to commit . . . alien
5 smuggling for commercial advantage and financial gain in violation of Title 8, U.S.C. §
6 1324(a)(1)(A)(iii), and did commit overt acts in furtherance of said conspiracy and to achieve
7 the object thereof” *See* Docket No. 1.

8 On August 9, 2007, a plea agreement was extended to the Defendant. *See* Docket 70,
9 Exhs. B.1 and B.2. The Defendant apparently did not accept the plea and on December 21,
10 2007, he filed several motions – a Motion to Dismiss Indictment for Failure to State Offense, a
11 Motion to Suppress Statement, a Motion to Suppress, and an *In Limine* Motion to Exclude
12 404(b) Evidence. *See* Docket Nos. 28, 29, 30 and 31. On March 27, 2008, the court denied
13 these motions. *See* Docket No. 59.

14 On March 12, 2008, a Superseding Indictment was filed against the Defendant and
15 Bosley, charging again the one count of Conspiracy to Commit Alien Smuggling, and adding
16 three counts of Alien Smuggling. *See* Docket No. 49. Specifically, the United States Attorney
17 (“the Prosecutor”) alleged that the Defendant was paid to file I-94 forms in order to make it
18 appear that the nationals had departed Guam. This would allow the tourists to “over stay” on
19 Guam and work in Korean-owned nightclubs, bars and lounges. *See* Docket No. 49,
20 Superseding Indictment.

21 On April 18, 2008, the Defendant filed a Motion to Dismiss Superseding Indictment for
22 Prosecutorial Vindictiveness, arguing that it should be dismissed because it was filed to
23 penalize him for exercising his rights to reject the plea offer and to file pretrial motions. *See*
24 Docket No. 70. The Defendant argued that there was a presumption of prosecutorial
25 vindictiveness. *Id.*

26 On May 15, 2008, the court held a hearing on this motion and subsequently denied it on
27 September 12, 2008. *See* Docket Nos. 79 and 91. Defendant then sought reconsideration,
28 arguing that when the court denied the motion, it failed to address the second ground

1 supporting the motion (the Prosecutor penalizing Defendant for filing pretrial motions). *See*
2 Docket No. 94.

3 On November 25, 2008, the court held a hearing on the Defendant's reconsideration
4 motion. *See* Docket No. 106. Counsel for the Defendant argued the existence of "actual
5 vindictiveness" or at the very least a strong presumption of such, in light of the statements
6 made by the Assistant United States Attorney ("the Prosecutor") during the May 15, 2008
7 hearing. *See* Docket No. 109, p.6. The Defendant asserted that certain of the Prosecutor's
8 statements demonstrated that additional charges were indeed brought forth in the Superseding
9 Indictment because the Defendant exercised his right to file pretrial motions. Specifically, the
10 Defendant points to the following statements the Prosecutor made during the May 15, 2008
11 hearing:

12 No, it was the filing of his motions that made this government determine
13 to bring everything that it could to bear on the trial.

14 ...

15 You file motions in this court, and we start looking for more charges to
16 bring.

17 ...

18 But as a result of his filing motions, we began an investigation to see if
there were other charges that should and could be brought.

19 In theory, we could have gone ahead and tried this one [against the
20 Defendant], which involved just the undercover sting operation, and then
21 brought a separate charge concerning Ms. An and then two more separate
22 indictments for separate trial dates concerning the other two aliens But if
23 we're going to trial on this issue, we're not going to break this down into four
24 trials because that would be a huge burden on the court's resources, so we bring
25 everything that we have that we believe is provable in the superseding
26 indictment. But unquestionably, we are punishing him for filing those motions,
and that's the truth.

24 Docket No. 99, pp. 24, 27-28 (emphasis added). The Defendant seemed to argue that the
25 Prosecutor's statements constituted "new evidence" and thus reconsideration was proper.

26 During the November 25, 2008 hearing on the motion for reconsideration, the
27 Prosecutor argued that the statements in question were a paraphrasing of the United States
28 Supreme Court case of *Bordenkircher v. Hayes*, 434 U.S. 357 (1978). *See* Docket No. 109, pp.

1 41-42. In *Bordenkircher*, the Court held that if a defendant rejects a plea offer, it was
2 constitutional for a prosecutor to carry out a threat to reindict a defendant on more serious
3 charges. In the instant case, the Prosecutor explained that she was simply following
4 *Bordenkircher*. When the Defendant rejected the plea agreement, it meant that he was going to
5 trial. *See* Docket No. 109, p. 47. In short, she argued they were no longer in plea negotiations
6 and she was free to investigate whether additional charges could be brought.

7 According to the prosecutor's time line, she contacted defense counsel on October 31,
8 2007. Counsel indicated that he was unsure if they were going to trial. *Id.* at pp. 46-47. Then,
9 in December 21, 2007 and December 26, 2007, the Defendant filed several motions, which the
10 Prosecutor interpreted as a rejection of the plea offer. *Id.* at p. 47. To show the nonexistence
11 of vindictiveness on behalf of the Government, the Prosecutor pointed out that no new charges
12 were brought at that time. "[W]e did not bring a superseding indictment because there were no
13 new charges at that point." *Id.* at p. 47.

14 Agent Richard Flores ("Agent Flores") of Immigration and Customs Enforcement
15 testified at the November 25, 2008 hearing. Agent Flores testified, *inter alia*, that he did not
16 intend to continue investigating the Defendant while the plea offer was pending. Docket No.
17 109, p. 82. However, because the co-defendant Bosley had not been apprehended, the overall
18 investigation of the conspiracy continued. Agent Flores testified that he was actively trying to
19 find and identify tourists involved in the I-94 scam. *Id.* at pp. 64 and 81. It was during the
20 course of investigating these Korean nationals that he discovered further information about the
21 Defendant, which led to the additional charges being brought against the Defendant in the
22 Superseding Indictment.

23 In order to give context to her statements, the Prosecutor suggested that the court
24 continue the hearing so she could make arrangements with her office in preparing another
25 attorney who in turn could question her during the continued hearing. *See* Docket No. 109, pp.
26 86-87. The Prosecutor stated that she would notify the court as to a proposed hearing date.
27 However, rather than submitting a proposed hearing date, the Prosecutor filed a supplemental
28 memorandum and several exhibits on December 12, 2008. *See* Docket No. 113. The

1 memorandum reiterated the same arguments she made at the November 25, 2008 hearing. *Id.*
2 Additionally, the Prosecutor argued that there was no prosecutorial vindictiveness because the
3 Superseding Indictment did not result in harsher charges. *Id.*

4 On January 20, 2009, the Defendant objected to the memorandum and sought to strike
5 it. *See* Docket No. 114. The Defendant argued that under Rule 49 of the Federal Rules of
6 Criminal Procedure and Local Rule 7.1(d)(1)(A), the memorandum should have been served
7 fourteen days before the hearing. *See* Docket No. 114. The Defendant contends the court
8 should not consider the supplemental memorandum pursuant to Local Rule 7.1(f). *Id.*

9 A continued hearing on the motion to reconsider and a hearing on the motion to strike
10 were held on August 13, 2009 and October 7, 2009. *See* Docket Nos. 116 and 121. The court
11 subsequently denied the motion to strike and ordered the Defendant to respond to the
12 substantive issues raised in the Government's memorandum and declaration. *See* Docket No.
13 122. The Defendant filed a timely response, and the Government timely filed its reply.
14 *See* Docket Nos. 127 and 130.

15 **II. DISCUSSION**

16 **A. The Motion for Reconsideration**

17 "Reconsideration is appropriate if the district court (1) is presented with newly
18 discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or
19 (3) if there is an intervening change in controlling law." *Nunes v. Ashcroft*, 375 F.3d 805,
20 807-808 (9th Cir. 2004) (quoting *Sch. Dist. No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir.
21 1993), *cert. denied*, 512 U.S. 1236 (1994)). The Defendant urges the court to reconsider its
22 denial to dismiss for prosecutorial vindictiveness. Specifically, he argues that the court's order
23 denying the motion to dismiss apparently did not consider the vindictiveness in the
24 Prosecutor's statements made during the May 15, 2008 hearing. *See* Docket No. 94.

25 **B. Vindictive Prosecution**

26 "To establish a *prima facie* case of prosecutorial vindictiveness, a defendant must show
27 either direct evidence of actual vindictiveness or facts that warrant an appearance of such."
28 *Nunes v. Ramirez-Palmer*, 485 F.3d 432, 441 (9th Cir. 2007) (quoting *United States v.*

1 *Montoya*, 45 F.3d 1286, 1299 (9th Cir. 1995) (internal quotation marks and citation omitted)).

2 As explained by the Ninth Circuit:

3 [A defendant] may establish prosecutorial vindictiveness by producing direct
4 evidence of the prosecutor's punitive motivation towards [him or] her.
5 Alternatively, [he or she] she is entitled to a presumption of vindictiveness if
6 [he or] she can show that the [additional] charges “were filed because [he or
7 she] exercised a statutory, procedural, or constitutional right in circumstances
8 that give rise to an appearance of vindictiveness.”

7 *United States v. Jenkins*, 504 F.3d 694, 699 (9th Cir. 2007) (quoting *United States v. Gallegos-*
8 *Curiel*, 681 F.2d 1164, 1168 (9th Cir. 1982)).

9 **1. Actual vindictiveness**

10 A defendant may rely on “direct evidence of actual vindictiveness.” *United States v.*
11 *Lopez*, 474 F.3d 1208, 1211 (9th Cir. 2006) (quoting *United States v. Montoya*, 45 F.3d 1286,
12 1299 (9th Cir. 1995). “A finding of actual vindictiveness requires ‘direct’ evidence, such as
13 evidence of a statement by the prosecutor, which is available ‘only in a rare case.’” *United*
14 *States v. v. Johnson*, 171 F.3d 139, 140-41 (2d Cir. 1999) (quoting *United States v. Goodwin*,
15 457 U.S. 368, 380-81 & nn. 12-13, 384 & n. 19 (1982)); *King*, 126 F.3d at 397). To support a
16 finding of prosecutorial vindictiveness, the United States Supreme Court has suggested that “a
17 defendant might prove through objective evidence an improper prosecutorial motive.” *United*
18 *States v. Goodwin*, 457 U.S. 368, 380 n.12 (1982).

19 **2. Presumption of vindictiveness**

20 Alternatively, a defendant may assert the existence of vindictive prosecution by relying
21 on “facts that warrant an appearance of such” vindictiveness. *Nunes*, 485 F.3d at 441. As the
22 Ninth Circuit explained, if the defendant provides “[e]vidence indicating a realistic or
23 reasonable likelihood of vindictiveness” this “may give rise to a presumption of vindictiveness
24 on the government’s part.” *United States v. Garza-Juarez*, 992 F.2d 896, 906 (9th Cir. 1993).
25 In the majority of the cases discussing prosecutorial vindictiveness, additional charges were
26 brought when the defendant refused to accept a plea bargain or filed pre-trial motions. *See,*
27 *e.g., United States v. Noushfar*, 78 F.3d 1442 (9th Cir. 1996) (arguing additional charges were
28 brought because defendants refused to plead guilty and filed a motion to suppress); *Gallegos-*

1 *Curiel*, 681 F.2d 1164 (arguing that the felony indictment was filed because the defendant
2 pleaded not guilty to the initial misdemeanor charge); *United States v. Heldt*, 745 F.2d 1275,
3 1280 (9th Cir. 1984) (arguing that a “superseding indictment [was filed] in retaliation for [the
4 defendant’s] refusal to agree to a plea bargain”).

5 If a defendant is able to establish a presumption of vindictiveness, the burden then
6 shifts to the prosecution to show that “‘independent reasons or intervening circumstances
7 dispel the appearance of vindictiveness and justify its decisions.’” *Montoya*, 45 F.3d at 1299
8 (quoting *United States v. Hooton*, 662 F.2d 628, 634 (9th Cir. 1981)).

9 **3. The Prosecutor’s statements**

10 The Defendant argues that a review of the Prosecutor’s statements made during the
11 May 15, 2008 hearing prove that there was actual vindictive prosecution in the case at bar. As
12 noted above, the Prosecutor made the following statements during the May 15, 2008 hearing:

13 “[I]t was the filing of his motions that made this government determine to bring
14 everything that it could to bear on the trial.”

15 “You file motions in this court, and we start looking for more charges to bring.”

16 “[A]s a result of his filing motions, we began an investigation to see if there
17 were other charges that should and could be brought.”

18 “[U]nquestionably, we are punishing him for filing those motions, and that’s the truth.”

19 Docket No. 99, pp. 24, 27-28.

20 As discussed previously, the Prosecutor asserts she was only following the Supreme
21 Court’s holding in *Bordenkircher*. *Bordenkircher* held that a prosecutor is permitted to carry
22 out a threat, made during plea negotiations, to have a defendant re-indicted on more serious
23 charges if he or she rejected a plea offer and goes to trial. The Court reasoned that “in the
24 ‘give-and-take’ of plea bargaining, there is no such element of punishment or retaliation so
25 long as the accused is free to accept or reject the prosecution’s offer.” *Id.* at 363. A prosecutor
26 is free to “openly present[] the defendant with the unpleasant alternatives of forgoing trial or
27 facing charges on which he [is] plainly subject to prosecution.” *Id.* at 365. Furthermore, it has
28 been concluded by the Ninth Circuit that it does not offend due process for a prosecutor to

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1 threaten a defendant that his refusal to enter a guilty plea could lead to additional charges.
2 *Garza-Juarez*, 992 F.2d 896.

3 The Prosecutor would like this court to equate her May 15, 2008 statements of “filing
4 motions” with the words that the Defendant was “going to trial” – which the Prosecutor asserts
5 is permissible under *Bordenkircher*. This interpretation was raised in her filings, (*see* Docket
6 Nos. 104 and 113), as well as in court. The Prosecutor stated during the May 15, 2008 hearing,
7 that “[f]iling motions equals going to trial. One does not file motions unless they’re going to
8 trial. . . So filing motions and going to trial are considered the same thing.” Docket No. 99, p.
9 35-36. The Prosecutor then stated during the October 7, 2009 hearing: “The point is, is that I
10 use the words interchangeably. Because it’s a shorthand for ‘We’re going to go to trial.’”
11 Presumably the Prosecutor is arguing that if she believes the “defendant is going to trial” by
12 filing motions, she is free to bring additional charges under *Bordenkircher*.

13 The court may have been persuaded by the Prosecutor’s argument had she limited her
14 statements to those suggesting that if “[y]ou file motions [i.e. going to trial] in this court, . . .
15 we start looking for more charges to bring.” Docket No. 99, p. 24. However, the statements
16 made were not so limited and run far afoul of what is permissible under *Bordenkircher*. In
17 reference to filing the Superseding Indictment, the Prosecutor openly stated, “**unquestionably,**
18 **we are punishing him for filing those motions, and that’s the truth.**” Docket No. 99,p. 28
19 (emphasis added).

20 The Prosecutor “flatly disputes that vindictiveness was involved at all” in this case, and
21 maintains that “[t]here is no distinction between the ‘appearance of vindictiveness’ and ‘actual
22 vindictiveness’ for purposes of applying this doctrine.” Docket No. 130. The Prosecutor
23 argues that the doctrine is triggered when charges of increased severity are filed, or when the
24 possibility of a greater sentence is imposed, against a defendant. *See* Docket Nos. 113 and
25 130. And since the additional charges were not more severe than the original count and would
26 not subject the Defendant to a greater sentence, there is no vindictiveness, presumed or actual.

27 *Id.*

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1 Contrary to the Government’s assertion, both the Supreme Court and the Ninth Circuit
2 have made a distinction between “actual” and the “appearance” of vindictiveness.² In
3 *Goodwin*, the Supreme Court stated: “In declining to apply a presumption of vindictiveness,
4 we of course do not foreclose the possibility that an appropriate case might prove objectively
5 that the prosecutor’s charging decision was motivated by a desire to punish [the defendant] for
6 doing something that the law plainly allowed him to do.” 457 U.S. at 384. In addition, the
7 Ninth Circuit has stated:

8 Absent direct evidence of an expressed hostility or threat to the defendant for
9 having exercised a constitutional right, to establish a claim of vindictive
10 prosecution the defendant must make an initial showing that charges of
11 increased severity were filed because the accused exercised a statutory,
12 procedural, or constitutional right in circumstances that give rise to an
13 appearance of vindictiveness.

14 *Gallegos-Curiel*, 681 F.2d at 1168 (citations omitted).³ Again, a distinction is drawn between
15 cases where there is “direct evidence of an express hostility” and cases where a defendant
16 “must make an initial showing that charges of increased severity were filed because the
17 accused exercised a . . . right in circumstances that give rise to an appearance of
18 vindictiveness.” *Id.*

19 Based on Ninth Circuit authority, this court concludes that governmental action that
20 increases the severity of the charge or sentence is relevant when the court is faced with a case
21 of presumptive – not actual – prosecutorial vindictiveness.⁴ The case before the court is one of

22 ² The Defendant pointed out in his briefing that the Prosecutor relies on “presumed
23 vindictiveness cases which are distinguishable from the instant case, an actual vindictiveness
24 case.” Docket No. 127. The court notes that cases cited by the Prosecutor were indeed cases
25 wherein the defendants had argued there was a presumption of vindictiveness because the
26 prosecutor had filed additional charges that were more severe. *See* Docket No. 113. In light of
27 the analysis herein, this court agrees that the cases relied upon by the Prosecutor are
28 distinguishable.

³ In arguing its interpretation that new charges or a greater sentence are a necessary
predicate of prosecutorial vindictiveness, the Prosecutor omits the first clause of this quotation
which expressly refers to the alternative method of finding prosecutorial vindictiveness; that is,
“direct evidence of an express hostility.” *See* Docket No. 113.

⁴ Therefore, it is not necessary to address the arguments made by the parties as to the
increased severity of the charges and sentence. *See* Docket Nos. 113, 127, 130.

1 actual prosecutorial vindictiveness, arising from the statements made by the Prosecutor in
2 court.

3 Even if this court agreed with the Prosecutor that there is no distinction between cases
4 of presumptive vindictiveness with those of actual vindictiveness, the court would still find the
5 Government failed to meet its burden. The Prosecutor first argued in her brief that she was
6 simply inartful in the choice of her words (*see* Docket No. 113, Exh.1, p.4); however, later at
7 the hearing she disavowed that she had even made any statement suggesting that she was
8 seeking to punish the Defendant. During the October 7, 2009 hearing,⁵ the court queried
9 whether it was proper for a prosecutor to say that a defendant was being punished for filing a
10 motion.

11 The Court: But can you tell a defendant, defense counsel, that you are
12 punishing the defendant for filing motions by bringing additional
13 charges? Can you say that? Do you think a prosecutor is
14 allowed to say that?

15 Prosecutor: I've never – I've never – I don't – We don't practice that. It
16 never would have crossed my mind.

17 The Court: . . . But you said it!

18 Prosecutor: But that's not what I said.

19 The Court: That's what you said. I'm reading it. It's in black and white.

20 Prosecutor: You know, you know, I did not mean that. Because this guy was
21 going to go to trial and he was filing motions in the context of
22 going to go to trial. Therefore, we were looking for more
23 motions⁶ to bring. . . .

24 After a thorough review of the caselaw, this court recognizes that it is very rare for a
25 court to make a finding of actual vindictive prosecution. Even the Supreme Court opined that
26 such a case would rarely occur. The Court in *Goodwin* stated: "It is unrealistic to assume that
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28 ⁵ This hearing has not been transcribed in writing. Accordingly, the court reviewed the
court recording of the proceeding and, in part, memorializes it herein.

⁶ Despite the Prosecutor's reference to "motions," it seems clear that she intended to say
"charges."

1 a prosecutor’s probable response to such motions is to seek to penalize and to deter.” 457 U.S.
2 at 381. Despite the Supreme Court’s doubt that such a situation could arise, the Prosecutor
3 here specifically expressed her unquestionable intent to punish the Defendant for filing
4 motions, and based on her words, this court would be hard-pressed to reach a contrary
5 conclusion. It is clear that the Prosecutor’s words constitute objective and direct evidence of
6 actual prosecutorial vindictiveness, and thus, a violation of the Defendant’s due process rights.
7 “To punish a person because he has done what the law plainly allows him to do is a due
8 process violation of the most basic sort, and for an agent of the State to pursue a course of
9 action whose objective is to penalize a person’s reliance on his legal rights is ‘patently
10 unconstitutional.’” *Bordenkircher*, 434 U.S. at 363 (citation omitted) .

11 An Oregon trial judge in *State v. Halling*, 672 P.2d 1386 (Or. App. 1983) faced a
12 situation similar to the one here. In *Halling*, a deputy district attorney called defense counsel
13 and said: “Larry, I have a brilliant idea. I have just thought of a way to cause further evil to
14 poor Mr. Halling.” *Id.* at 1387. The prosecutor then said that “she intended to charge the
15 defendant with additional crimes unless he accepted her previous [plea] offer.” *Id.* After
16 making that comment, the prosecutor then filed two additional indictments against Mr. Halling.
17 The trial judge dismissed the two indictments for prosecutorial vindictiveness, and the Oregon
18 Court of Appeals affirmed. Finding the dismissal was proper, the appellate court stated:

19 As previously noted, the trial judge found that the additional charges against
20 defendant were brought in “reprisal” for defendant’s rejection of a plea bargain.
21 We agree with defendant that that is tantamount to a finding that “the
22 prosecutor’s charging decision was motivated by a desire to punish” defendant
23 for insisting on a jury trial.

24 *Id.* at 1388.

25 Again, this court recognizes that “‘retaliatory motivation’ may be difficult to prove in
26 any individual case.” *Michigan v. Payne*, 412 U.S. 47, 55 n.9 (1973) (quoting *North Carolina*
27 *v. Pearce*, 395 U.S. 711, 725 n.20 (1969)). Indeed, the Ninth Circuit has stated: “It is only
28 when prosecutorial actions stem from an animus toward the exercise of a defendant’s rights
that vindictive prosecution exists.” *Gallegos-Curiel*, 681 F.2d at 1169.

1 The case before the court is that rare case where there is an expressed “animus toward
2 the exercise of a defendant’s rights.” *Id.* The animus is evident in the Prosecutor’s separate
3 statements, which, taken as a whole, evince a “retaliatory motivation” and lead this court to the
4 inescapable conclusion that there was a deliberate intent to punish the Defendant for filing
5 motions. Without a doubt, it is impossible to argue otherwise. It cannot be questioned that
6 there was governmental action to penalize the Defendant. The Prosecutor here declared that
7 “unquestionably, we are punishing him for filing these motions, and that’s the truth.” Docket
8 No. 99, p. 28. The court believes the Prosecutor – that that is the truth. Accordingly, the court
9 finds that the Defendant’s due process rights were violated.

10 **C. Remedy for violation of due process rights**

11 The Defendant asserts that only dismissal of the entire case would remedy the due
12 process violation that resulted from the prosecutorial vindictiveness. *See* Docket No. 118. He
13 further argues that dismissal of only the Superseding Indictment would allow the Prosecutor to
14 proceed under the original indictment, which in essence, offers him no remedy at all.

15 The Prosecutor on the other hand, contends that dismissal of the Superseding
16 Indictment requires the court to proceed to trial on the original indictment. Moreover, the
17 Prosecutor argues that even if dismissal were granted, it should be granted without prejudice.
18 The Prosecutor insists that there was no due process, constitutional or statutory violation to
19 warrant dismissal with prejudice. *See* Docket No. 119.

20 “A district court may dismiss an indictment on the ground of outrageous government
21 conduct if the conduct amounts to a due process violation. If the conduct does not rise to the
22 level of a due process violation, the court may nonetheless dismiss under its supervisory
23 powers.” *United States v. Barrera-Moreno*, 951 F.2d 1089, 1091 (9th Cir. 1991) (citation
24 omitted). The Defendant contends that dismissal is appropriate under either theory.

25 “To violate due process, governmental conduct must be ‘so grossly shocking and so
26 outrageous as to violate the universal sense of justice.’ Due process is not violated unless the
27 conduct is attributable to and directed by the government.” *Id.* at 1092 (quoting *United States*
28 *v. Restrepo*, 930 F.2d 705, 712 (9th Cir. 1991)). The standard in *Barrera-Moreno* is met here.

1 The due process violation is certainly “attributable to and directed by the government” because
2 the statements were made by the Prosecutor representing the Government. Furthermore, it is
3 troubling that an agent of the Government would state that “unquestionably, we are punishing
4 [a defendant] for filing those motions, and that’s the truth.” Docket No. 99, p. 28. As noted
5 above, the Supreme Court in *Goodwin* doubted that such a situation could occur. Nevertheless,
6 it occurred in this case, and such conduct cannot be interpreted as anything short of outrageous.

7 The court finds that Defendant’s due process rights were violated because of the
8 retaliatory motive behind the filing of the Superseding Indictment.⁷ Accordingly, the court
9 concludes that dismissal of the Superseding Indictment is the appropriate remedy. This
10 decision is not made lightly. The court is well-aware that “in the absence of clear evidence to
11 the contrary, courts presume that [prosecutors] have properly discharged their official duties.”
12 *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (quoting *United States v. Chemical*
13 *Found., Inc.*, 272 U.S. 1, 14-15 (1926)).

14 In support of his argument for dismissal of the entire case, the Defendant cites *United*
15 *States v. Ruesga-Martinez*, 534 F.2d 1367, 1369 (9th Cir. 1976) where the Ninth Circuit
16 dismissed the indictment. In *Ruesga-Martinez*, the court found that after filing a complaint on
17 a misdemeanor, the government then charged the defendant with a two-count felony
18 indictment because the defendant had refused to sign a waiver of his right to be tried by a
19 district judge and the right that he might have had to a jury trial. Finding that the government
20 was unable to refute the presumption of vindictiveness, the Ninth Circuit dismissed the
21 indictment.

22 Unlike *Ruesga-Martinez*, there is both an original indictment and a superseding
23 indictment pending here. There has been no showing that as to the original indictment there
24 was any due process violation of the Defendant’s rights. “An original indictment remains
25 pending until it is dismissed or until double jeopardy or due process would forbid prosecution

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27 ⁷ In light of the court’s finding that there was a due process violation, it is not necessary
28 to consider whether dismissal is appropriate under the court’s supervisory powers.” See *United*
States v. Barrera-Moreno, 951 F.2d 1089, 1091 (9th Cir. 1991).

1 under it.” *United States v. Pacheco*, 912 F.2d 297, 305 (9th Cir. 1990). This ruling was
2 recently reiterated in *United States v. Hickey*, 580 F.2d 922 (9th Cir. 2009), where the court
3 held that “multiple indictments may simultaneously be pending against the same defendant in
4 the same case.” *Id.* at 929 (citing *United States v. Holm*, 550 F.2d 568, 569 (9th Cir. 1977)).
5 Therefore, “[b]ecause all of the indictments against a defendant remain pending unless
6 formally dismissed (at least until jeopardy attaches), the statute of limitations remains tolled
7 for all of the charges in prior indictments, even if subsequent indictments omit those charges.”
8 *Id.* at 930.

9 In this case, the Prosecutor has never dismissed the original indictment. Jeopardy has
10 not attached, and due process would not forbid prosecution under the original indictment. The
11 court finds that dismissal of the Superseding Indictment strikes the right balance between
12 protecting the Defendant’s ability to exercise his constitutional rights with the Government’s
13 mandate to aggressively prosecute crimes within the confines of the law.

14 **III. CONCLUSION**

15 The court finds that, taken cumulatively, the May 15, 2008 statements made by the
16 Prosecutor, including her assertion that “unquestionably, we are punishing him for filing these
17 motions,” (Docket No. 99, p. 28), are direct evidence of actual vindictiveness. *See Lopez*, 474
18 F.2d at 1211. The statements constitute “a due process violation of the most basic sort”
19 because they demonstrate that the “an agent of the State . . . pursue[d] a course of action whose
20 objective is to penalize a person’s reliance on his legal rights. *Bordenkircher*, 434 U.S. at 363.
21 These statements describe actual prosecutorial vindictiveness that was “patently
22 unconstitutional,” *id.*, and a violation of the Defendant’s due process rights. Accordingly, the
23 court grants reconsideration, and hereby dismisses the Superseding Indictment. Accordingly,
24 the court sets this matter for a status hearing on December 14, 2009 at 10:30 a.m. At that time,
25 the court will set this matter for trial; therefore, the parties should meet and confer as to a
26 possible trial date on the original indictment before the status hearing.

27 **SO ORDERED.**



28 /s/ Frances M. Tydingco-Gatewood
Chief Judge
Dated: Dec 08, 2009