UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

United States of America,	:	
	:	Docket Numbers
Appellee,	:	18-3168
	:	18-2953
v.	:	
	:	
George Georgiou,	:	
	:	
Petitioner.	:	
	:	

PETITIONER'S REPLY BRIEF IN SUPPORT OF APPLICATION FOR A CERTIFICATE OF APPEALABILITY

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PRELIMINARY STATEMENT

Pending before the Court is an *Application for a Certificate of Appealability* (COA) filed by Appellant, George Georgiou on July 6, 2019. It will be cited as *App*.

Mr. Georgiou was the Petitioner below and will be referred to as such in this *Reply Brief*.

The government filed a *Response* on December 16, 2019. It will be referred to as *Government's Response*, and will be cited as *GR*.

All other citation conventions used in the *Application* are used herein.

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Introduction

Petitioner has applied for a COA on eight *Napue*, five *Brady*, three ineffective assistance of counsel claims, the denial of four categories of discovery necessary to "fully develop" his claims, and the denial of appointment of counsel pursuant to an initial and infirm waiver.

After initially declining to respond to the *Application*, the government filed its 153-page *Response*, much of which is taken up with *ad hominem* and unfounded attacks on Petitioner's credibility.[1] But, the sheer size of the *Government's Response* to Petitioner's 90-page *Application*, strongly suggests that there is much to debate in this case, and that a COA is therefore appropriate.

Despite its size, most of the government's arguments are non-responsive and hinge on repeated and unfounded claims of procedural default, erroneous legal standards, and excerpts from the *DCO*, a *verbatim* adoption of the government's submission. Many of Petitioner's arguments have gone completely unaddressed or have been improperly recast.

The government mocks Georgiou's "kitchen sink" approach (*GR*, 4) ignoring the size and scope of the due process violations in this case. It seeks to trivialize these violations by stating that "thousands of pages of discovery [were] provided by

[1] Petitioner predicted this attack. *App.*, 8. He replies to it in the next section.

the government pretrial," yet "there was a small amount of information that the defendant did not possess." *GR*, 3. This quantitative approach conflicts with the relevant law. The multiple *Brady* and *Napue* violations discussed in the *Application* easily match or surpass the prejudice thresholds articulated in *Dennis v. Sec'y, Pa., Dep't of Corr.,* 834 F.3d 263, 310 (3d Cir. 2016) (en banc), and *Haskell v. Superintendent,* 866 F.3d 139, 152 (3d Cir. 2017), and certainly present debatable points, meriting COA.

Mindful of the size of the pleadings already before the Court, Petitioner replies to the government's most egregious misstatements or incorrect arguments.

Contrary to the Government's Arguments, Petitioner Did not Lie at Trial or During the §2255 Proceedings

Attacks on Petitioner's character are sprinkled liberally throughout the *Response*. The government actually proposes that the Court "not [even] entertain" the Constitutional violations presented, because Petitioner supposedly lied at trial and at the §2255 proceedings. *GR*, 14, n.4. Not only are these allegations irrelevant to the legal issues presented,[2] the government fails to even substantiate them.

Petitioner did not Lie at Trial. At trial, Petitioner testified that Waltzer defrauded him of $6 million using an IRS ruse, and that after suspecting he had been conned, Petitioner began investigating and pursuing Waltzer in hope of redress.

[2] This Court has held that such arguments are irrelevant. *Pazden v. Maruer*, 424 F.3d 303, 317, n.6 (3d Cir. 2005).

Waltzer exploited Petitioner's pursuit by drawing him deeper into the sting, with promises to deliver the IRS documents and to repay the $6 million

In it trial closing, the government accused Petitioner of lying when he testified to these facts. Tr. 2/9/2010, 94-95, 102. However, Waltzer finally admitted at the §2255-hearing that Georgiou was chasing him for IRS documents. Tr. 9/25/2017, 196. The government fails to address this fact.

When Petitioner pointed out in his Rule 59(e) motion, ECF-583-2, 11, that the *DCO* failed to address this omission, the government's response, ECF-588, 17, misconstrued this as a sentencing claim. The Court summarily denied the Rule 59(e) motion with no analysis. ECF-592.

Andreas Augland. The government also contends that "Andreas Augland" does not exist. *GR*, 8, n.3. The government offers zero proof other than the inference that Augland never testified. There was no such finding by the jury, nor did the government ask for one. Yet, the prosecution has been preoccupied with this accusation since trial. There, the government had an FBI computer expert, Agent Justin Price, confirm that Augland emails emanated from one of Petitioner's many office computers. The analyst did not say Augland does not exist. Neither could he tell who sent the emails, or whether parties had spoken by phone to relay messages. All Agent Price would say is that emails were sent under that name from a certain computer. Tr., 2/14/2010, 112-113. It was the prosecution who spun this into a frenzy

through a rebuttal witness after Petitioner testified. That witness, Alex Barrotti, was interviewed by the FBI. He specifically told the Agents that he had never heard the name Andreas Augland before. Tr., 2/8/2010, 306; 2/9/2010, 49. Suddenly, after receiving a non-prosecution agreement, he vividly recalled a conversation where Petitioner told him Augland did not exist. Tr. 2/9/2010, 35, 42. The government has never argued that Augland had any relevance to the case, or what motive Georgiou would have for such *nom de plume.* But it sounds furtive, and because all of Augland's emails emanated from Petitioner's laptop, Augland must not exist.

However, the government is less than forthright, providing no details for a reason. As raised during the §2255 proceedings, Georgiou uncovered that the government had in its pretrial possession Augland emails obtained independently from the Bahamas Securities Commission, having nothing to do with Petitioner's computer. *See,* ECF-307, 65, Ex. 17. The prosecutors never told the jury about those.

Jeff Bellamy. The government argues that Petitioner asked another prisoner, Jeff Bellamy, to lie for him at the §2255 hearing. *GR*, 126 n.28. Unbeknownst to Petitioner, Bellamy was a USAO informant. A few weeks prior to the §2255-hearing, Petitioner was "coincidentally" moved to Bellamy's floor at the FDC, where Bellamy offered information about Kevin Waltzer, with whom he was previously housed. Petitioner memorialized the particulars in an affidavit and asked his stand-by counsel to contact Bellamy's attorney. Based on appearances at the time,

Petitioner named Bellamy as a prospective witness. ECF-408. The government did not object, ECF-427, because this was an apparent set-up. The USAO arranged for Bellamy to appear at the §2255 hearing; Petitioner had not called him. To persuade the Court to proceed, the prosecutor represented that Bellamy "is currently on trial in a case that he is testifying in and he was available yesterday and today, so we would ask that he go next, so we make sure we get him on." Tr. 9/19/2017, 137. Petitioner moved to halt Bellamy's testimony and call his next witness. *Id.* 139-40. The government objected. The Court sustained, compelling the testimony. Bellamy then asserted he was offered money by Petitioner to lie about Waltzer, with no corroborative evidence. The government then elicited that Bellamy was obligated to testify "truthfully" under his plea agreement. *Id.* at 147-148.

Post-hearing investigation revealed that Bellamy was not scheduled to testify in another case that week. To the contrary, Bellamy had previously testified in another case, but had been caught lying. *U.S. v. Khalil Smith,* 2018 WL 3459869 at *9 (July 18, 2018) (Judge Goldberg describing "the Bellamy disclosures," in which the government failed to disclose that he was a long-term paid government informant). Consequently, the government had to give written notice to the second group of *Khalil Smith* defendants that Bellamy would not be testifying in their trial. All of this preceded the §2255-hearing.

Petitioner filed multiple motions addressing these events, each of which were denied without comment. ECF-581, 583, 619, 630.

The Government's Procedural Default Arguments are not Supported and its Proposed Standard of Review is Inapplicable

The *DCO* erroneously found a number of the *Brady* and *Napue* claims to be procedurally defaulted. Based on these erroneous default findings, the Court then applied an erroneous and higher standard of review -- an "actual prejudice" analysis – to these claims. The government's §2255 closing brief was the source of the flawed approach, ECF-557, 65 (*quoting United States v. Frady*, 456 U.S. 152, 170 (1982)).[3] The government continues to reiterate this incorrect standard. *GR*, 26. Petitioner explicitly argued that the *Frady* standard above was misapplied, *App.* 47, which the government has left unrefuted.

Frady's cause and prejudice framework applies to "collateral relief based on trial errors," 456 U.S. 167-168, requiring an "actual and substantial" showing of prejudice pertaining to a jury instruction. *Id.* 170. This Court has abrogated the analogous *Brecht* "actual prejudice" standard for false testimony claims in habeas. *Haskell,* 866 F.3d at 148-151. Thus, *Brady* and *Napue* have their own standards. The Court cited the Brady materiality standard, *DCO*, 52, 139, but then relied on *Frady* to conflate trial error claims with the *Brady* claims. *See DCO*, 22, 23, 38;

[3] The DCO's incorrect *Napue* analysis in particular was taken *verbatim* from the government. (*Compare, DCO*-570, 135-138, 148-154 *with* ECF-557, 68-71, 85-91).

see also 134: "To establish prejudice, a petitioner must not merely show that there were errors that created a possibility of prejudice, but that the errors 'worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions. *Holland v. Horn*, 519 F.3d 107, 112 (3d Cir., 2008), *quoting Frady*")).

All of the *Brady* and *Napue* violations briefed for COA stem from evidence either suppressed at trial or false evidence that was not corrected at trial. None of these due process violations were uncovered, or could have been uncovered, until the §2255-proceedings. Therefore, there could be no procedural default because the uncovered information, or the falsity of the trial evidence, was not disclosed to Petitioner at trial. However, the government does not explain how false trial testimony not uncovered until the §2255-proceedings can be procedurally defaulted. There is no defense diligence prong to *Napue* or *Brady*, *Dennis*, 834 F.3d at 293, and the government provides no authority to the contrary.

Despite these obvious flaws, the government credits the *DCO*'s citation of *Haskell*: "The court's opinion as a whole makes clear both that it applied the correct standard, and that under any standard, the defendant could not show prejudice." *GR.* 29, n. 8. This is not so. As shown in the *COA Application* and emphasized below, prejudice under the appropriate standard is met.

This Court has made clear that it is the prosecutor's duty to correct false testimony. *Haskell,* 866 F.3d at 145-146, 152. Also, "[I]t is the responsibility of the prosecutor" to ensure that "the due process requirements enunciated in *Napue*" are satisfied, *Giglio v. U.S.,* 405 U.S. 150, 154–55 (1972). Nor does the government address Petitioner's argument that the prosecution's duty to correct can be cured only where the defense is aware of the false testimony but knowingly ignores it.[4]

Erroneous Cumulative Prejudice Analysis

The *DCO* stated, "Georgiou's claim fails because there is no likelihood that the cumulative impact of the alleged errors 'had a substantial and injurious effect or influence' on the jury's verdict." *DCO*, 180. This is again the *Brecht* "actual prejudice" standard abrogated in *Haskell.*

In reaching this flawed result, the *DCO* misapplied *Collins v. Sec'y of Pa. Dep't of Corr.,* 742 F.3d 528, 542 (3d Cir. 2014). *Collins* was a section 2254 case in which the cumulative prejudice claim was unexhausted. It also misapplied *Morris v. Pa.,* 2017 WL 345626, at *12 (E.D. Pa. Jan. 24, 2017), a case in which

[4] *See, Hayes v. Brown,* 399 F.3d 972, 981 (9th Cir. 2005) (en banc) ("*Napue*, by its terms, addresses the presentation of false evidence, not just subornation of perjury."); *U.S. v. Harris,* 498 F.2d 1164, 1169 (3d Cir. 1974) ("We do not believe...that the prosecution's duty to disclose false testimony by one of its witnesses is to be narrowly and technically limited to those situations where the prosecutor knows that the witness is guilty of the crime of perjury."). In at least some factual circumstances, it may be nonsensical to hold otherwise. See *Hayes,* 399 F.3d at 980-81 (rejecting the State's contention that "it is constitutionally permissible for it knowingly to present false evidence to a jury in order to obtain a conviction, as long as the witness used to transmit the false information is kept unaware of the truth").

none of the claims amounted to "error" and there was nothing to cumulate. Moreover, these "individual errors" were not *Brady* or *Napue* violations. *Id.* The government offers no authority or analysis for its dismissive wave that Petitioner's claims fail "collectively." *GR*, 58. Indeed, it is a longstanding feature of due process claims, like those sounding in *Brady* or *Napue*, that prejudice/materiality is assessed cumulatively. *Kyles v. Whitley*, 514 U.S. 419, 436 (1995) (the materiality of withheld evidence must be "considered collectively, not item by item").

A. The Substantive *Napue* Claims[5]

Petitioner does not have to prove that the government "suborned perjury" to obtain COA and relief, as the *Government Response* repeatedly advances. The government's attempt to manufacture a higher threshold is not based on the law.

Petitioner was denied due process so long as "the prosecution's case include[d] perjured testimony and the prosecution knew, **or should have known**, of the perjury … [or] when the government, although not soliciting false evidence, allows it to go uncorrected when it appears at trial. … the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Haskell*, 866 F.3d at 149. "It is 'irrelevant' whether the defense knew

[5] The lettering and numbering conventions used in the following discussion of claims related to *Napue*, *Brady*, ineffective assistance of counsel; discovery violations and the right to counsel issue, follow those used in the *Application.*

about the false testimony and failed to object or cross-examine the witness, because defendants 'cannot waive the freestanding ethical and constitutional obligation of the prosecutor … to protect the integrity of the court and the criminal justice system.'" *Sivak v. Hardison*, 658 F.3d 898, 909 (9th Cir. 2011); *United States v. LaPage*, 231 F.3d 488, 492 (9th Cir. 2000).[6] These fundamental principles have been lost on the government, as shown.

1. Waltzer Lied that There was a "Year Gap" of no Government Contacts

The government asserts that Waltzer was somehow truthful when testifying he had **no contacts** with the government between June 2006 to June 2007, notwithstanding the suppressed interviews showing Waltzer was informing with the FBI during that time. *GR*, 17.

[6] *See also Cheeks v. Gaete,* 571 F.3d 680, 685 (7th Cir. 2009) ("testimony need not have been knowingly false (and hence perjury) to succeed on such a claim; rather, a prosecutor's knowing use of false testimony is enough to infringe upon the defendant's right to due process."); *U.S. v. Freeman,* 650 F.3d 673, 680 (7th Cir. 2011) (A valid *Napue* claim "includes 'half-truths' and vague statements that could be true in a limited, literal sense but give a false impression to the jury."); *Jackson v. Brown,* 513 F.3d 1057, 1075 (9th Cir. 2008) ("If the prosecutor has the duty to investigate and disclose favorable evidence known only to the police, he 'should know' when a witness testifies falsely about such evidence."); *U.S. v. Foster,* 874 F.2d 491, 495 (8th Cir. 1988) (defense counsel's knowledge of false testimony "is of no consequence" under *Napue* and a new trial is required where "the prosecutor breache[s] her duty to correct the falsehoods"); *Soto v. Ryan,* 760 F.3d 947, 968 (9th Cir. 2014) ("To correct false testimony given by its witnesses, even when the defense knows the testimony was false[.]"; *accord U.S. v. Gale,* 314 F.3d 1, 4 (D.C. Cir. 2003); *U.S. v. LaPage,* 231 F.3d 488, 492 (9th Cir. 2000) (prosecutor may not "knowingly present lies to a jury and then sit idly by while opposing counsel struggles to contain this pollution of the trial").

This clear falsity was never addressed in the *DCO*, because the government improperly recast the claim, as it attempts to do so here again, to whether Waltzer "**actively cooperate[d]** with the government beginning in June 2007." *GR*, 22. Neither the *DCO* nor the government addressed Waltzer's lies that his trips to the Middle East just before proffering at the USAO were not part of his cooperation, *App.*, 61; Tr. 1/29/10, at 87-88 (Waltzer denying that this was part of his cooperation).

The government concedes "Waltzer's failure to testify concerning his 2006 contacts with the FBI," *GR*, 24, but excused the falsity in "context." However, the government's attempt at contextualizing this falsehood fails when one considers that moments before his "year gap" falsity, Waltzer testified that he had **no contact** with "federal agents" until June 2007. Tr. 1/28/2010, 97 ("the first time you actually sit down and speak to federal agents as part of your cooperation, is June 6, 2007, does that sound right?"). This cannot be reconciled with is §2255 testimony that he was "dealing with the FBI" in 2006 and early 2007. Tr. 9/25/2017, 118-119. This has also gone unaddressed by the Court and government.

Waltzer's motive to lie should be obvious. The suppressed interviews show that Waltzer proactively approached the FBI in 2006 with the intent to deceive, offering ostensible intelligence to lead the FBI away from the $45 million he stole. There is no dispute that the prosecution team vouched for Waltzer as reformed and

always truthful with the government,[7] but this would have been exposed as a sham had the jury learned Waltzer was deceiving the FBI in 2006. It is hard to imagine a jury finding Waltzer honest and truthful, if it knew he stole $45 million, brazenly strolled into the FBI, concealed those thefts, and represented himself as a "legitimate" businessman. *See App.*, 17-21. These arguments have not been addressed in either the *DCO* or in the *Government's Response.*

Finally, the government encourages this Court to accept a prosecutorial euphemism: that Waltzer was merely being "cooperative" over the sworn testimony of Waltzer's own lawyer at the 2255-hearing that Waltzer was "cooperating with the FBI [in 2006]." *GR*, 23 n.6. Whatever difference there was between "being cooperative" and being engaged in a formal cooperation agreement was a jury question, the government's parsing notwithstanding. The law is clear: the AUSAs "should have known" that their star informant (with whom they worked hand-in-glove for 3 years) was informing with the Philadelphia FBI in 2006. *Haskell,* 866 F.3d at 146. In any event, it is undisputed that Agent Joanson from the Philadelphia FBI, and member of the prosecution trial team, did know about the contacts during the one-year gap. Tr. 11/15/2017, 156, 228. Further, Waltzer's sentencing

[7] *See* UA Charlie, Tr. 1/26/2010, 46, "the FBI would not allow a cooperator to continue his criminal activity. He would be arrested, and he would be prosecuted."; Waltzer, *id.*, 217 ("I decided to change my life and come clean and to discuss what I had done and also starting working for the government, I wanted to be the best possible cooperator I could; Agent Joanson, Tr. 11/16/2017, 37 ("Kevin, we found him to be incredibly truthful. …").

memorandum (same AUSAs) is replete with references to his 2006 efforts with the government. ECF-307, Ex #1; AUSA Cohen confirming, Tr. 9/18/2017, 209-215, 292-293.

2. Waltzer Lied that He took his Instructions "Solely" From the FBI

The government recirculates the non-responsive ruling that it scripted below: that "Waltzer never testified that he did not receive guidance from the AUSAs." *GR*, 27. This was never Petitioner's contention. The claim is that Waltzer lied that he took his undercover instructions "solely" from the FBI, which the government has not addressed.

Contrary to the government's contention, *GR*, 26-27, this claim is not procedurally defaulted. The government did not concede that the trial prosecutors provided Waltzer with undercover instructions until filing its §2255 Response; *App*., 21, *citing* ECF-322, 78. Following this revelation, the Court agreed to make this claim a part of the §2255 hearing. ECF-397. Nor has the government addressed the pretrial and post-trial misrepresentations that such contacts "did not exist," assuring disclosure of all "oral instructions." *See App*., 21 n.9.

The AUSA's communications with Waltzer were buried inside his thousands of cellular calls. Waltzer's text messages were suppressed. The defense was misinformed that all witness statements were produced, and his trial testimony was

that he only took instructions from the FBI. Given all of these facts, the government cannot burden shift to the defense to ferret out the falsity.

The District Court ruled that due to the post-conviction disclosure of the contacts between Waltzer and trial prosecutors, those prosecutors were necessary fact witnesses for the §2255-hearing, and – in accordance with the witness-advocate rule – disqualified them from representing the government at the hearing. Those same principles should have applied at trial. Instead, the AUSAs advocated as unsworn witnesses, arguing to the jury about facts at issue and in dispute from a position of first-hand knowledge, with the defense or jury unaware of their undisclosed involvement with Waltzer.

The government contends, and the Court found, that the hundreds of instructions and text messages were "ministerial" and "proper." However, those communications have never been disclosed, never reviewed by the District Court, and the witness was never confronted with them. Many of those occurred "one-on-one" without Agents present. Tr. 9/18/2017, 220, 255, 258; Tr. 9/26/2017, 61; Waltzer, Tr. 9/25/2017, 183-184, 186, 221-224 (AUSAs Cohen and Lappen; and Waltzer, respectively, confirming the same).

Even the District Court showed dismay at the hearing when Waltzer's trial testimony was revisited: "the word 'solely' is in there?" Tr. 9/18/2017, 283. The §2255 testimony confirmed the contacts were not "ministerial." Waltzer Tr.

9/25/2017, 186 (discussed **"facts"** with the AUSAs while undercover); Attorney Delinsky Tr. 9/18/2017, 144 (AUSAs discussed **"factual information"** with Waltzer while undercover). Petitioner was entitled to those communications to "develop fully" his claim and for the hearing examinations. *See App.*, 84; *Han Tak Lee v. Glunt,* 667 F.3d 397 (3d Cir. 2012).

3. Waltzer Lied that the "United States Government" Instructed Him to Lure Georgiou with Legitimate Capital from the Middle East

Once again, the government sidesteps and recasts Waltzer's false testimony. It did the same in the District Court, scripting an untenable procedural default argument which the *DCO* adopted *verbatim* (*Compare,* ECF-557, 69, 87 *with DCO*, 136, 151*).* The issue is not whether Georgiou knew Waltzer had dealings in the Middle East, or whether Waltzer's business dealings there were criminal, and not what cross examination defense counsel could have performed. Rather, Waltzer's under-oath-lies are the focus of this *Napue* claim.

The government elides when it asserts Georgiou "was aware of the evidence [pertaining to the Middle East] on which he [now] relies." *GR*, 30. As with each of these claims, the false testimony was not exposed until Waltzer explicitly contradicted his trial testimony during the §2255 hearing, admitting that (i) he acted on his own during the undercover operation; (ii) he was not instructed by any member of the prosecution team to trigger the test trade; and (iii) he unilaterally

lured Georgiou with legitimate capital from the Middle East without order or instruction from the "United States Government." Waltzer, Tr. 9/25/17, 231 ("I believe that was me" who came up with this idea); *App.*, 23-26.

The trial recordings posed a simple question: Why would Waltzer need to lure Petitioner with legitimate capital from the Middle East if Mr. Georgiou was a predisposed stock manipulator? If two drug traffickers historically dealt in cocaine, and one of them decided to inform on the other by making secret recordings for the government, the informant would not be instructed to repeatedly offer his partner **legitimate** dealings to fund their operations. The discussions would be centered around profiting from cocaine or other illegal activity. Waltzer explicitly testified that his dealings in the Middle East were actually "legitimate," not code for illegal activity. Tr. 9/25/17, 231. An entire two-hour meeting with Petitioner, with Waltzer wired, was based on the lure that the "Royal Desmond family" from "Dubai" was going to provide Waltzer with "a few hundred million [to manage] out of the gate." Gov.Tr. Recording Ex. #402, 7/9/2007, 5:34 pm; Waltzer, Tr. 1/29/10, 91-92, 107-108.

At trial, Waltzer had no good answer to this question when confronted, so he lied: "I was following the instructions or advice of the United States Government," *Id.* 138. The lies were never corrected, giving Waltzer's rogue efforts the government's imprimatur, thus falsely insulating the integrity of his actions.

The government has made up the erroneous procedural default argument; failed to address Waltzer's false testimony or the fact that all three FBI Agents confirmed under oath that they did not instruct Waltzer to use the Middle East subterfuge, and ignored how the prosecution team must have known Waltzer was rogue, but did nothing to stop him.

4. Waltzer Lied About "Soaking up the [Neutron] Float"

Waltzer's testified that he was "soaking up the [Neutron] float," which means taking in all of the free trading shares that are out there ... getting control over all the shares." Tr. 1/26/2010, 233; *id.* 238-230 ("I would go in there, I would do it, I would hold it," from the very "beginning of the scam" [June 2004] at Georgiou's direction.). This was the foundation of the government's prosecution, for which Petitioner received 20 of his 25-year sentence.

However, the data shows Waltzer was lying when he testified that he was "soaking up the float" and losing money as Petitioner's dupe. The government has not countered the data nor addressed Waltzer's related lies.

Instead, the government argues the claim is procedurally defaulted because the defense possessed the raw data now used to show the false testimony but did not raise it on direct appeal. And because the claim is defaulted, the government contends Petitioner must meet the higher prejudice standard incorporated in the

"cause and prejudice" rules for overcoming a procedural default. As noted above, the *Frady* standard does not apply here.

Where the defense does not uncover, and the prosecution fails to correct false testimony, there is a *Napue* violation. "A lie is a lie…and if it is any way relevant to the case, [the prosecutor] has the responsibility and duty to correct what he knows to be false and elicit the truth." *Napue*, 360 U.S. at 269. The prosecution may not sit back while the defense attempts to uncover perjury, but rather must affirmatively "correct" it. *Id.* at 270. Not one word in *Haskell* shifts the burden to the defense. "[W]hen the state has corrupted the truth-seeking function of the trial by knowingly presenting or failing to correct perjured testimony, the threat to a defendant's right to due process is at its apex." *Haskell*, 866 F.3d at 152.

It is true that the defense had the SEC trading data pretrial (*Gov. Tr. Ex*. 302; *App*., Ex. J). However, this is not a *Brady* claim and the defense's possession of the data does not relieve the prosecution of its duty to correct.

The government provides no authority that Waltzer can lie without correction. Yet the government says that Petitioner's §2255 challenge is procedurally defaulted merely because defense counsel possessed raw data that requires to expose the false testimony. The government does not even argue defense counsel knew of the falsity, but that mere possession of raw data shifts the burden to the defense to expose the lies or raise the violation sooner.

Next, the government incorrectly asserts that counsel used the SEC data during his trial examination. *GR*, 33-34. However, those examinations were conducted using SEC expert Koster's summary charts, and not the data that is the subject of this *Napue* claim. In fact, the underlying data was never used to examine Waltzer or Koster and never submitted to the jury.

The government argues "Georgiou could not have changed the jury's view of the evidence by further cross-examining Waltzer on his trading in Neutron." *GR*, 34. This argument does not come close to addressing the "*Giglio/Napue* 'materiality' standard [which] is equivalent to the harmless-error standard in *Chapman v. California*, 386 U.S. 18, 24 (1967) (requiring the prosecution to prove that a constitutional error was harmless beyond a reasonable doubt). *Haskell*, 866 F.3d at 147-148.

The government also attempts to recast the government's trial presentation, "... based on the record as a whole...it did not matter whether Waltzer at any particular time was buying or selling Neutron. … Whether Waltzer was a 'net seller' in the aggregate in Neutron as Georgiou claims is beside the point." *GR*, 35.

This revisionist view of its trial theory, completely contradicts Waltzer's trial portrayal as Petitioner's co-conspirator whose job it was to "soak up the float." He testified that his role was to "buy, buy, buy [] follow[ing Georgiou's] every word", Tr. 1/29/2010, 56-57, not "sell, sell, sell" (as the evidence now shows). The

government even elicited from Waltzer the "importan[ce]" of his "participation in the scheme [was] to be holding rather than selling..." Tr. 1/27/2010, 85.

The government's other counterpoints are either empty narration, or are misleading and riddled with error, actually buttressing that Waltzer testified falsely. The government states, "These trading records are devastating for Georgiou. Exhibit J shows massive amounts of buying and selling by Georgiou's co-conspirators, including Waltzer, in Neutron. They completely reflect the stock manipulation scheme proven at trial." *GR*, 36. This is meaningless hyperbole and non-responsive. By this reasoning, the mere buying and selling of shares by many investors (none of whom were charged), is evidence of a criminal enterprise. Petitioner was the only person indicted, and Waltzer the star and only witness to testify having alleged involvement in any conspiracy. This argument proves nothing.

The government also states: "Exhibit 302 also reflects that from the end of May 2004 through April 2007, Waltzer purchased a total 2,168,386 shares of Neutron in dozens of separate trades for $4,583,562. Def. Exh. J, 33. That evidence is entirely consistent with Waltzer's testimony that he was buying stock at Georgiou's direction on 'many, many, many occasions... helping him soak up the float.' Tr. 1/26/10, 233, 238-39 (quoted in Georgiou's Mot. 26)." *GR*, 36.

This supposedly proves Waltzer was buying, and thus not lying, but the government omits all of the sales (and much more). In order for Waltzer to be "soaking up the float" he has to be buying and **holding**, which is precisely what he told the jury he was doing, so much so that he "lost $800,000." Tr. 1/27/2010, 15; *id.*, 55 ("holding a lot"); *id.*, 85 ("holding a boat load).

"Soaking up the float" is not selling, and certainly not selling far more than purchased, which is what the data actually reflects. *App.*, Ex. J, pg. 35, shows that Waltzer sold 1,712,241 shares for $3,847,780. To this, 375,000 more shares must be added, which Waltzer privately sold for $819,000 (*App.*-28*)* (unrefuted by the government), totaling 2,087,241 shares sold for $4,666,780.

The government fails to account for 250,000 shares Waltzer bought in May 2004 (for $500,000), before ever meeting Petitioner.[8] This reduces Waltzer's buying during the alleged conspiracy (June 2004 to May 2007) to 1,918,386 shares (2,168,386 less 250,000) for a cost of $4,083,562. *See,* ECF-556-1, 112-117. The net result is Waltzer actually generated $583,218 from the time he met Petitioner.

[8] Waltzer's May 2004 Neutron purchases were made during his criminal dealings with Brett Salter. Waltzer and his attorney told the FBI about Salter and his securities fraud during the suppressed 2006 interviews, but concealed Waltzer's complicity (confessed to at Petitioner's trial). *App.*-49. Salter died while Waltzer was informing with the FBI: http://nationalpost.remembering.ca/obituary/brett-salter-1065385542. Had the government corrected Waltzer's false testimony about Neutron, the jury would have heard defense argument (foreclosed by the suppression of the FBI interviews) that Waltzer falsely implicated Petitioner as Salter's replacement, explaining why the Neutron trading data cannot be reconciled with Waltzer's testimony.

That is not "soaking up the float." Waltzer was lying, and the numbers tip significantly further in Petitioner's favor if one factors in that Waltzer traded while informing with the FBI in 2006 and 2007. The government has not countered these tabulations which demonstrate Waltzer's lies.

The government's recasting of the trial is erroneous:

> Georgiou says that Waltzer lied when he said he "bought" 365,000 shares of Neutron in December 2004. Mot. 28. However, Waltzer did not say that. Rather, he testified that as set forth in his email communication with Georgiou, "I have 365,000 shares of Neutron . . . . I'm demonstrating how many shares of stock that I have to him." Mot. 26-27. Georgiou's manipulation of the record knows no bounds. Based upon the records relied upon by Georgiou, Waltzer owned 265,000 shares in December 2004. Def. Exhibit J, 31-33. The fact that Waltzer told Georgiou he owned 365,000 shares does not begin to suggest Waltzer was lying to the jury about engaging in trading activity at Georgiou's direction.

GR, 38. In other words, the government argues it is mere semantics, not falsity, that by December 2004, Waltzer bought and was holding 265,000 shares at Georgiou's direction, rather than 365,000 shares. This is not remotely accurate. As stated, Waltzer purchased 250,000 shares in May 2004, **before ever meeting Petitioner.** (Tr. 1/26/2010, 226; Tr. 1/28/2010, 140; Tr. 1/29/2010, 14) (Waltzer confirming); Tr. 9/26/2017, 127 (AUSA Lappen unable to recall that Waltzer's May 2004 purchases preceded Georgiou).

A single page confirms Waltzer was lying. *App.* Ex J, pg. 31 shows Waltzer's total purchases from June 2004 through to February 2005 totaled 10,000 shares (less

than $19,000), all bought on a single day (November 19, 2004). That is not 365,000 or 265,000 shares bought and held by December 2004 at Georgiou's direction. Waltzer was actually absent from the market during that entire period, not "soaking up the float." Waltzer testified that, "the whole beginning of the scam, I was just buying stock...helping him soak up the float...helping him to create an artificial market for the stock, an artificial market that did not exist", Tr. 1/26/10, 238-239. He testified on cross-examination that by September 2004, Petitioner "is offering me...two hundred thousand free trading shares of Neutron for all the buying I am helping him and his partners to soak up the float. Tr. 1/29/2010, 56-57.[9] The data shows, however, that from the time that Waltzer met Petitioner until September 2004, Waltzer bought **zero** stock.

Next, the government argues that Waltzer's lie pertaining to his sale of July 8, 2005, was:

> [M]uch ado about nothing and points to evidence that further demonstrates that Waltzer was telling the truth about his scheme with Georgiou.

GR, 40-41. This generalization is again no response at all. The issue is whether, when Waltzer emailed Petitioner on July 8, 2005, that there is a "seller that is not me...", this was testimony of conspiratorial efforts to "soak up the float." The answer is "yes," and yet, Ex. J, pg. 33 irrefutably shows that Waltzer was the seller on that day,

[9] Waltzer never received any free trading Neutron shares.

liquidating 100,000 shares. The prosecution's failure to correct the falsity prevented Petitioner from showing that Waltzer was deceiving Petitioner at the time, not conspiring, and was willing to lie about it to the jury.

Waltzer falsely testified that he "lost $800,000" on Neutron purchases. The government responds:

> Georgiou likewise cannot advance his theory of relief by accusing Waltzer of lying when Waltzer testified that he lost $800,000 in Neutron. Georgiou concedes that the summary trading records show losses of $735,000. Mot. 28. It is immaterial and consistent with evidence of Georgiou's guilt that Waltzer also engaged in a private sale of $475,000 in Neutron stock – which he sold to a Georgiou co-conspirator as part of the manipulation scheme.

GR, 39.[10] This argument is irrelevant to whether Waltzer lied that he "lost $800,000." As demonstrated above, Waltzer actually generated $583,000 from the time he met Petitioner. The SEC transaction data totals a $735,000 loss but omits the $819,000 of additional proceeds Waltzer received by wire transfers – the government has failed to address the second wire transfer for $344,000; *App.* Ex. K. The government argues that this $819,000 should be excluded as "immaterial" (*GR*, 39). This is nonsensical. Waltzer never lost -- he profited. It was the prosecutor's duty to

[10] This irrelevant response also shows how ridiculous Waltzer's stories became, testifying he would be killed if he sold, yet, the data now shows that is exactly what Waltzer was doing, while never reporting any supposed threats to the FBI during the suppressed 2006 interviews. The government offers no citation to Waltzer's testimony that he wanted to "make money" because that related to Avicena, in the context of robbing Georgiou of $6 million, not Neutron. *See,* Tr. 1/28/2010, 119, 130, 143, 165, 217.

correct that lie, not the defense burden to expose the falsity from wire transfers buried amongst hundreds of thousands of pages. Waltzer had motive to lie. He wanted the jury to believe he "lost $800,000" to conform to the falsity of frenetically "soaking up the float" at Georgiou's command. It was a web of lies, with the prejudice compounded by Agents testifying that the Neutron emails "corroborated" Waltzer. UA Charlie, Tr. 1/26/10, 143-144; Agent Joanson, Tr. 2/2/10, 242. The AUSAs then closed to the jury that, "you don't have to just take Kevin Waltzer at his word...the [Neutron] emails support it." Tr. 2/9/10, 109.

Any dispute over material facts required an evidentiary hearing, accepting the truth of Petitioner's factual allegations. *U.S. v. Tolliver*, 800 F.3d 138, 141 (3d Cir. 2015). Notably, the government repeatedly objected to a Securities expert providing an analysis of the data for the §2255-hearing. ECF.*486; 527; 530; 532*. The government is unable to show that Petitioner's arithmetic is wrong – it is not.

Again, to deny relief, the District Court undertook no independent analysis, simply copying and pasting from the government. *Compare DCO* at 136, 151 *with,* ECF-557, 70, 88.

5. Waltzer and Agent Joanson Testified Falsely that Waltzer Possessed the Recording Device at All Times

Waltzer and Agent Joanson each testified falsely that Waltzer possessed the recording device at all times. These falsities were extensive, explicit, unequivocal, and uncorrected before the jury.

The government again posits its incorrect procedural default argument. As with the other claims, it was not until the government's §2255 response, where it admitted for the first time that Waltzer "may not have had the [recording] device" from August 30, 2008 to September 4, 2008 (during the "test trade,") that the government's *Napue* violation came to light. *See App.*-33 (*citing* ECF-322, 90). Despite this fact, the government continues to argue procedural default by improperly engrafting a nonexistent defense burden to uncover the lies before direct appeal, notwithstanding the prosecution never corrected the false testimony, and while relevant evidence of the lies remains concealed.

In fact, the defense was provided some (but not all) ambiguous custody reports which seemed to reflect gaps in the time of possession. *See App*. 65-66 (addressing missing reports). This is precisely why the witnesses were confronted on the issue at trial, but they testified falsely that Waltzer possessed the equipment at all times. The defense and jury were then stuck with those lies, which the prosecution failed to correct.

The government uses its failure to correct the false testimony as a shield: "Fatal to Georgiou's claim ... the government provided [] in pretrial discovery the FBI reports that would support his theory that Waltzer did not possess the device during the relevant period." *GR*, 44. Yet, AUSA Cohen testified that even he could not decipher the reports. Tr. 9/18/17, 233. During the §2255 hearing Agent Joanson

revealed for the first time that there were not enough FBI recording-devices to go around at the time, so informants sometimes went without. Tr. 11/15/17, 253-254.

This previously withheld information could have been used to impeach the witnesses or contradict the unequivocal testimony that Waltzer was **always** in possession of the recorder. Furthermore, Waltzer and Joanson changed their story at the §2255 hearing; that Waltzer possessed equipment "above 90 percent" of the time. Tr. 9/25/17, 207. This shows that their trial testimony that he "always" had the device was false. And, this falsity was material. If, as represented, Waltzer made over 1,000 undercover recordings, *GR*, 43, but only had equipment 90% of the time, one hundred calls (or more) may have gone unrecorded. There is a fundamental difference between Waltzer covertly choosing to not record where he may get caught, *GR*, 45, and the government being aware he is without equipment, affording Waltzer the perfect opportunity to manipulate his targets.

The government tries to have it both ways. On one hand, it argues that the District Court correctly denied the *Napue* claim, because Georgiou did not actually prove Waltzer was without recording equipment, *GR*, 48; *DCO*, 46-48, while on the other, effectively confirming Waltzer was without equipment. *GR*, 44-45: "These reports show [] that the FBI picked up the recording device from Waltzer on August 30 and dropped off a device on September 4 … there may have been times that he did not have the device in his possession for various possible reasons, including the

brief unavailability of a new device to replace the one that the FBI was retrieving from him."

This is gamesmanship. If the government is now conceding (as it ethically must) that Waltzer was without equipment at times, then the conviction was ill-gotten with false testimony that he "always" possessed it. The government cannot cure the falsities with continued insistence that "perhaps [Waltzer did not have the device], when the device was swapped out and another device was not immediately available to replace it." *GR*, 46. At trial, Waltzer expressly denied that this was the case, without correction.[11]

The government also argues that defense counsel confirmed at the §2255-hearing that he was aware Waltzer was without equipment, but strategically chose not to make that argument. *GR*, 49. The exact opposite is true. Tr. 9/19/2017, 136 (Pasano stating: "If [Waltzer] doesn't have equipment and George has conversations

[11] The denial was as follows:

> [Defense]: And then periodically the agents would come and take the machine away from you, right?
>
> [Waltzer]: What would happen always [in] every case is that I would go and report to the FBI in their offices and the machine was swapped out.
>
> Q: And sometimes you even left without a machine and they gave you a new machine later?
>
> A: No.

Tr. 1/29/2010, 35.

with him and [Waltzer] doesn't tell the government about it, then that would have been another area that I would have attacked, and, ultimately, it goes to discredit the government's sting in general."; Tr. 1/26/2010, 110 (Pasano explicitly confronting UA Charlie who denied that agents took the device from Waltzer during the purchase of Northern Ethanol shares). There was no correction, followed by Waltzer and Agent Joanson's false testimony that Waltzer "always" possessed the equipment.

This *Napue* claim is not of "minimal significance," and cannot now be ignored. *GR*, 46, 49. It has consumed hundreds of pages of testimony and briefing. Georgiou told the government from day one that Waltzer was lying about these events. Tr. 2/4/2010, 213. Pretrial motions argued the government manufactured the "test trade" by turning a blind eye to Waltzer's rogue artifice. ECF-75, Hr.Tr. at ECF-91. The jury then heard diametrically opposed narratives: the government vouched for Waltzer by espousing the integrity of its bribery sting, and the importance of the "test" trade; and the defense vociferously argued Waltzer was rogue and lying.

Chain of Custody Logs. These logs will show that Agent Joanson memorialized that the recording devices were malfunctioning during the time of the test trade, while at trial he said that they had failed only once, long before. Tr. 2/2/2010, 105, 245. Assuming that the logs show what Petitioner believes they will, this is another instance of uncorrected false testimony.

The government proposes that this Court can review the logs *in* camera, *GR*, 115, n. 27. It remains completely unclear and puzzling why the government has steadfastly fought Petitioner over access to these logs, when the exact same documents were provided to defendants in other litigation, *albeit* under seal.[12] In any event, Petitioner would take the government up on this offer and would welcome the review of these documents by this Court, upon notice to the parties.

The government continues to attempt to shift the burden to Petitioner and argue default. *GR*, 52 (Petitioner raised the claim belatedly and never introduced the logs below). This argument blames Petitioner for not introducing the logs during examinations, which the government suppressed and whose existence the government denied to the Court. *See also GR*, 116 (arguing that the logs are not part of the record below because Petitioner did not raise the issue until after denial of the 2255 motion.) Petitioner filed his §2255-closing brief on March 5, 2018, explicitly detailing the suppressed logs. ECF-556-1, 85-87. Petitioner's email to the government demanding production was March 13, 2018, *GR*, 117, and the District Court's §2255-denial was June 19, 2018.

[12] U.S. v. Montano, 13-cr-082 (E.D. Pa.)

6. The Prosecution Team Knew Waltzer Lied about Targets and Related Facts

Petitioner has argued that the government failed to disclose Waltzer's falsehoods related to the Cendant fraud. This lie is seen by comparing what Waltzer told the government in its June 6, 2007 proffer about Christian Penta's role in this fraud, and the government's concession before a different district court judge that was inconsistent with what Waltzer told them about Penta. *App*., 38-40.

The government has failed to counter a single fact or argument pled in relationship to this discrepancy. *GR*, 52-57. Instead, it argues that Petitioner has misinterpreted the transcript of Penta's sentencing and his June 6, 2007 proffer. The government's argument again ignores that such interpretations of the record are jury questions -- **after** the questioned "evidence" was corrected.

7. Waltzer's Plea Agreement

This claim turns on whether this Court agrees that reasonable jurists could debate whether Waltzer testified falsely. There can be no procedural default where the falsities were not uncovered until the §2255-proceedings. Waltzer's plea agreement was presented to the jury alongside his testimony that he must tell the truth. Tr. 1/26/2010, 194, 225; Tr. 2/2/2010, 243-244. The prosecution then argued in closing that, "[Waltzer is] required to tell the truth under the agreement and as you heard he has a lot to lose if he lies. His obligation is to tell the truth." Tr. 2/9/10, 104-105.

The government knew or should have known that Waltzer testified falsely, failed to correct him, and then used his plea agreement as false evidence of contractual veracity.

8. False Evidence of "Match Trades"

The government concedes the *DCO* failed to analyze this false evidence claim in the *Napue* context (only under "ineffectiveness"), *GR*, 58, and, "did not allow further exploration of this issue at the §2255-hearing." *GR*, 61. The government offers no rebuttal to the raw data presented. Instead, it makes another procedural default argument, again ignoring the prosecutor's duty to correct false evidence. Raw data does not shift the burden to the defense.

The government argues its trial presentation was not false just because "the trades between the conspirators did not occur at precisely the same time." *GR*, 62. To the contrary, that is precisely why it is false, and that response is an effective admission that the times did not "match." In the slide analyzed at trial (#25 of Gov. Tr. Ex. 305), the trades were not seconds apart -- there were hours separating them. Yet, the government provides no explanation how buyers and sellers could have coordinated manipulation if they were not counter parties. Koster's testimony that "it's how the market works" also does not answer this question. Tr. 2/3/2010, 111. Waltzer's purchases take place between noon and 1:00 p.m., while Brezzi sold near 4 p.m. The data is unchallenged and unassailable. That there was a market maker "in

the middle" (as the government states, *GR*, 107) goes without saying. The question is, for what purpose and in what capacity, and for what duration between executions? "A market maker is a broker-dealer that holds itself out in the inter-dealer market as being ready to purchase and sell that security for its own account on a regular and continuous basis." *SEC v. First Jersey Securities,* 101 F.3d 1450, 1469 (2d Cir. 1996); *Georgiou,* 777 F.3d at n.7. The government is fully aware that "the traditional understanding in securities law is that a [market maker] acts as a 'principal' when trading for its own account as distinguished from acting as an agent for a customer." *In re Bank of N. Y. Mellon Corp. Forex Transactions Litig.,* 921 F. Supp. 2d 56, 83 (S.D.N.Y. 2013). Also, Rule 10b-10 requires "that the broker or dealer disclose the date, time, and price of the transaction; the broker's or dealer's role as either agent or principal; and other information based on whether the broker or dealer is an agent or principal." *Press v. Chem. Inv. Servs. Corp.,* 166 F.3d 529, 534 (2d Cir. 1999). As such, the government knew or should have known, for every trade presented to Petitioner's jury, whether the market maker was acting as principal or agent, but never differentiated.

At best for the government there is a dispute of material facts, with the District Court failing to hold a hearing after accepting the truth of Georgiou's factual allegations. The claim should have been adjudicated under the *Napue*/ *Haskell* standard.

B. The *Brady* Violations

1. Waltzer's Suppressed 2006-2007 "Year Gap" Interviews with the FBI

The government spends 15 pages offering commentary without addressing the contents of the suppressed interviews or their materiality. *GR*, at 66-82. The selected excerpts from the *DCO*'s findings of fact were written by the government, used by the Court, *verbatim*, and now are recycled to this Court (*compare DCO*, 95-*119 with* ECF-557, 13-43). The government has failed to address the following materiality arguments presented by Petitioner, leaving them uncontested:

- Waltzer's suppressed informant sessions in 2006 and 2007 affect six of nine charged Counts, encompassing a large swath of the alleged conspiracy (Counts 1-3, 6-8). *App.*-51;
- each wire fraud count (#6, 7, 8) is a predicate act email from January to March 2007, exchanged between Waltzer and Georgiou while Waltzer was informing with the FBI. Those emails stood to be dismissed pretrial as predicate-acts or rejected by the jury for failing to satisfy all substantial elements of wire fraud beyond a reasonable doubt, had it been known Waltzer was informing with the FBI at the time. *App.*-56;
- there is no way of knowing which overt act the jury unanimously agreed to for each Count, and whether the overt act would have been tainted

in the eyes of the jury had it been disclosed that Waltzer was informing with the FBI at the time. *App*.-55-56;

- the defense would have been entitled to a theory of defense jury instruction under *U.S. v. Friedman,* 658 F.3d 342, 352-53 (3d Cir. 2011), that Waltzer's mental state was that of a government informant from June 2006 onwards, rather than June 2007 as given under *Sears v. U.S.*, 343 F.2d 139, 143 (5th Cir. 1965). This stood to negate the scienter element for numerous counts, over-acts and trades. *App*.-55;
- Waltzer presented himself to the FBI as a "legitimate" businessman. *App.*-20, 49;
- Georgiou's good faith presentation stood to be accepted as a "complete defense," but for the suppression (*see* jury instruction, Tr. 2/12/2010, 45-46). *App*.-53-56;
- the suppression deprived Georgiou the opportunity to challenge Waltzer's *mens rea* from June 2006 to June 2007 as a matter of law, and to confront Waltzer with the concealed records. *U.S. v. Garner,* 915 F.3d 167,170 (3d Cir. 2019). *App.*-59;
- Extensive *Brady* caselaw finding materiality for suppression of similar or lesser severity, including Circuit precedent under *Dennis*, 834 F.3d at 293;

- pretrial discovery misrepresentations to the defense; closing argument to the jury that all evidence was disclosed; and misrepresentations to the Court of Appeals that no evidence was suppressed; *App.*-21, n.9; *App.*-6-8 & n.3;
- trial counsel's testimony as to the exculpatory use he would have made of the information. *App.*-51-53.

The government's few counter arguments are unpersuasive. It posits Waltzer was truthful (a) proactively approached the FBI offering information without disclosing his $45 million thefts; (b) told the FBI about securities frauds involving Brett Salter, without disclosing Waltzer's complicity; (c) presented himself as a "legitimate" businessman; (d) failed to tell the FBI he was under psychiatric care and a cocaine addict; and, (e) hinted at "tax problems" without disclosing it was a global money laundering scheme under investigation by the IRS-CID. *GR*, 72-76.

Waltzer's veracity was obviously a jury question to be decided after disclosure and examination of Waltzer's material omissions and falsities to the FBI. Reasonable jurists could certainly debate if Waltzer was "honest" with the FBI in 2006. Elsewhere, this Court has held "It is not for us to weigh the evidence or to determine the credibility of the witnesses." *U.S. v. Voigt,* 89 F.3d 1050, 1080 (3d Cir); *U.S. v. Brennan,* 326 F.3d 176, 191 (3d Cir. 2003) ("The determination of witness credibility is the province of the jury;" *Kansas v. Ventris,* 556 U.S. 586, 594 (2009) ("Our legal system…is built on the premise that it is the province of the jury to weigh the

credibility of competing witnesses ….”). Thus, it was for the jury to decide whether Waltzer failing to name Georgiou to the FBI in 2006, raising him as a “later invention,” rose to reasonable doubt. *See Dennis*, 834 F.3d at 300 (citing *Slutzker* v. Johnson, 393 F.3d 373, 387 (3d Cir. 2004) (suppression of conflicting reports material where one named the accused and the other did not)).

The government’s “overwhelming evidence” argument is backwards looking, failing to analyze how the “extensive evidence,” *Georgiou*, 777 F.3d at 141 (trades, emails, recordings, wire transfers, *etc.*), may have been seen through the lens of voluminous data and records subject to different examination and interpretation. The perceived strength of that evidence (at the time) was never considered in view of the mountain of suppressed evidence and false testimony revealed in the §2255 proceedings.

Withheld evidence that would have affected the “preparation or presentation of the defendant’s case” or “the course that the defense” could have pursued, is material. *U.S. v. Bagley,* 473 U.S. 667, 683 (1985). Neither the District Court nor the government has provided an analysis of which evidence is so overwhelming or why it is. Neither have they explained how that evidence would have looked alongside a record with the false evidence corrected and the suppressed evidence revealed. *See, Carter v. Rafferty,* 826 F.2d 1299 (3d Cir. 1987) (affirming relief for *Brady* violation where government asserted “overwhelming evidence”); *Breakiron*

v. Horn, 642 F.3d 126, 133 (3d Cir. 2011) (*Brady* violation required reversal of the entire conviction).

2. Waltzer's Suppressed Interviews After He Proffered with the USAO

The government argues that it justifiably withheld interviews and portions of interviews Waltzer had with the government, on "national security" grounds. *GR*, 83. The *DCO* declared the evidence "not discoverable." *GR*, 84. However, the Classified Information Procedures Act (CIPA), 18 U.S.C. app. 3, §§ 1-16, is designed "to harmonize a defendant's right to a fair trial with the government's right to protect classified information." *U.S. v. Sedaghaty,* 728 F.3d 885, 903 (9th Cir. 2013). As this Court has noted, "CIPA was enacted to reduce the amount of classified information divulged by requiring pre-trial hearings to determine the relevance of the evidence." *U.S. v. Pitt,* 193 F.3d 751 n.4 (3d Cir. 1999); *Pennsylvania v. Ritchie,* 480 U.S. 39, 60 (1987). There were no such proceedings in this case because the government took it upon itself not to disclose the interviews.

The AUSAs "laughed about" Waltzer's information, Tr. 9/26/2017, 104, and the prosecutor stated uncertainty at the §2255 hearing whether it was even "officially national security," information. Tr. 9/18/2017, 86. Thus, it strains credulity to now excuse the suppression by arguing the information was of such national security importance, that it had to be kept secret (in violation of *Brady*). More likely is that

Waltzer's stories were so outrageous, the prosecution team did not want the defense and the jury to know about them.

Indeed, as the Court knows from direct appeal, Waltzer was suffering from a variety of mental-health issues. Had there been disclosure of the "national security" information, along with Waltzer's undisclosed interviews (including descriptions of rogue regimes, Iranian plots; terrorists Sheiks, and forty metric tons of cash on pallets), the jury may well have also "laughed about" Waltzer's stories, asking, "why would people in the Middle East be giving terrorist information to a Jew in Yardley?" Tr. 9/26/17, 104. Waltzer testified at the §2255-hearing: "[the AUSA] just told me that he didn't believe that somebody from New York in my capacity and the world of business that I was in … would provide the government with credible national security information. We didn't get along. He hated my guts." Tr. 9/25/17, 179. The defense and jury were entitled to this information.

Finally, the *DCO*, 58, did not view this evidence cumulatively as required.

3. Christian Penta's Sentencing Transcript

The GR shifts the burden again, blaming Georgiou for not uncovering the suppressed Penta transcript before Waltzer and the AUSAs testified at the §2255-hearing. The suppression foreclosed examination of Penta as a witness. Petitioner refers the Court to the arguments presented above in regard to *Napue* claim six.

4. The Farber Memorandum

The government does not address the contents of the suppressed Andrew Farber memorandum. This evidence too was suppressed through the §2255 hearing, not uncovered until after Waltzer and the AUSAs testified, foreclosing examination and fact-finding, rendering the Rule 59(e) summary dismissal erroneous. ECF-592.

Yet, a plain reading supports the view that Waltzer was manufacturing "Mickey Mouse" crimes to inculpate innocent people. Allegations by a law-abiding target, Farber (an attorney no less), that Waltzer was committing undercover misconduct required disclosure under *Brady*. *DiSimone v. Phillips,* 461 F.3d 181, 195 (2d Cir. 2006) ("If there were questions about the reliability of the [impeaching] information, it was the prerogative of the defendant and his counsel – and not of the prosecution – to exercise judgment in determining whether the defendant should make use of it.").

The Farber memorandum would have bolstered the defense theory that Waltzer – a "master con guy" as pronounced by Judge Savage, *App.,* n.12 – was wrongfully inculpating targets, including Petitioner. Had there been no suppression, the jury would have had a credible showing, including sworn testimony from Attorney Farber, from which to infer Waltzer's misconduct. To the extent the government admits Waltzer was authorized to deploy such methods against Andrew Farber, this makes the evidence more material, not less, affording Petitioner an

"attack [on] the reliability of the investigation ... discrediting ... [] the police methods employed in assembling the case." *Kyles*, 514 U.S. 466, 449, n.19.[13]

The government belittles as "fanciful" the nexus between Attorney Farber reporting Waltzer's misconduct on August 29, 2008 and Waltzer being stripped of recording equipment on August 30, 2008, but offers no alternative explanation why Waltzer was empty handed on the eve of the "test trade," which the government spent 15 months planning. *GR*, 90. This was all for the jury to consider after hearing all relevant evidence, testimony, and available inferences from the defense.

5. The USAO Suppressed Evidence that Waltzer was Without Recording Equipment

The government concedes that the "Chain-of-Custody-302s" were excluded from the §2255 hearing, *GR*, 91 (but, omitting the government's objection as the reason). Those reports show that Waltzer was without recording equipment many times while undercover, not just the few days of the "test trade." The government presents another untenable argument: that the evidence it suppressed and objected to should not be considered for COA because it was never addressed at the hearing, and yet, "the district court properly concluded Waltzer did not lie about his possession of the device." *GR*, 91-92. This Catch-22 logic should not fool this Court.

[13] Repeated emphasis that "every one of [Waltzer's 25 charged targets] pleaded guilty, except for Georgiou," *GR*, 89, n.20, is misleading. Waltzer testified he provided information on 100 public citizens. Tr. 1/26/2010, 217. That completely changes Waltzer's ratio of identifying actual criminals.

Concealment of the distinct "Chain of Custody Logs" was prejudicial, facilitating the false trial testimony that Waltzer always had the recording device. As addressed in *Napue* Claim five, the suppressed materials included Agent Joanson's handwritten notes, evincing that the prosecution team was aware that Waltzer was without the equipment.

Similarly, with regard to the **James Hall** records (*App*., 66-69) the government once again relies on the District Court's findings that it wrote. (*Compare DCO* at 170-171, *with* ECF- 557, 109-110). There was no proof at the §2255 hearing that defense counsel was aware of the Hall evidence, nor is it likely that it was. First, the government's §2255 response never claimed the defense was aware. ECF-322, 93-97. In fact, days before trial, the defense requested that very evidence. *Ltr.* January 15, 2010, at 3 (attached to ECF-232, Ex. L). The government responded that it produced everything required, with "no legal basis" for more. *Ltr.* January 8, 2010, ECF-232, Ex. M.

Unsatisfied, the defense filed a discovery motion. ECF-109. At the hearing (1/19/2010), the AUSA explicitly represented that the government had disclosed everything. *See. Tr.* 1/19/2010, ECF-109. It was the theory of defense that Waltzer failed to record calls and manipulated evidence. It makes no sense that Attorney Recker was aware that Attorney Flannery (Hall's counsel) possessed the very evidence needed but failed to obtain and use it. Tellingly, the government never

asked Attorney Pasano at the §2255-hearing to confirm AUSA Lappen's "vague recollection" that the defense was aware of the Hall information.

Petitioner's Decision to Testify. Petitioner has argued that but for the government's failure to correct and the suppression of exculpatory evidence, he would not have testified. *App.*, 57. The government responds that it is "factually incredible and legally unavailing" that Georgiou would not have testified. *GR*, 81 n.19. However, the government does not even attempt to address the prosecutor's concession at the §2255-hearing that "only Mr. Georgiou knows whether he would have decided to testify if all that information was there..." Tr. 9/19/17, 121, and, fails to distinguish this case from *U.S. v. Pelullo,* 173 F.3d 131 (3d Cir. 1999) (holding that it is the government's burden to prove that Petitioner would not have testified).

C. Three Instances of Ineffective Assistance of Counsel

The District Court did not permit a hearing on these claims of ineffective assistance of counsel.

1. The Summary Charts were "not Evidence"

A jury is always instructed that the indictment and statements and arguments of the lawyers are "not evidence." *Edwards v. City of Phila.*, 860 F.2d 568, 575 (3d Cir. 1988). The summary charts at issue are similar. They were argument – illustrative pictures and pedagogical devices propounded by the prosecution. *See* Tr. 2/9/2010, 108, 112, 113, 114, 119, 120, 121, 122, 137 (government's closing); *id.* at

204 (government asserting that they constituted "undisputed proof" of criminal intent).

Far from a seeking a curative or limiting instruction, defense counsel stood idle as the District Court affirmatively instructed the jury that it could consider the demonstrative aids as "evidence." Tr. 2/12/10, 13.

The government repeats its erroneous argument from below: that the summary charts "reflected only objective facts...[and] did not include any commentary from Koster." ECF-322, 110; *GR*, 100. This collapses under Koster's own testimony, confirming the charts amalgamated his "selections," "judgments," "opinions," "analysis," and "conclusions," Tr. 2/3/2010, 68-69, 70-72, 73, 79, 81-82, 84, opining on Petitioner's "intent." *Id.* 32 (admitting he included the trades "relevant" to him for the "circumstances of [his] analysis."). *Id.* 115 (He "chose the words" to describe events). *Id.* 138 ("infer[ing]" what occurred based on his "assumptions."). *Id.* 150 (He "associated" the undercover recordings with the trading activity). *Id.* 159 (based on his "opinions" of those recordings "paraphras[ing] what I understood [Georgiou's] words to mean" when "interpreting" them.). *Id.* 160. ("I have heard the tapes [] and [the charts are] my summary of what I heard on the tapes.").[14]

[14] There were 1800 combined trading days for Neutron and Avicena during the period of Koster`s "analysis." He featured 26 instances of supposed "marking the close" (almost all Waltzer trades), representing less than 1.5% of days where one of the ten "key" accounts were the last trade of the day.

In similar circumstances, the Second Circuit rejected argument of overwhelming evidence, vacating the defendant's conviction under plain error review where graphical charts were used to bolster testimony. *U.S. v. Groysman,* 766 F.3d 147, 156 (2d Cir. 2014). Koster's testimony confirms the charts were not "simply consolidated data from other admissible documents [that] ran basic calculations on that data [but rather, were] based on the preparer's own assumptions and subjective choices about what data is relevant." *U.S. v. Lynch,* 735 Fed. Appx. 780, 787 (3d Cir. 2018) (non-precedential).[15]

2. Counsel was Ineffective for Failing to Use the SEC Data and Sales to Show Waltzer was Lying

The government erroneously asserts that Georgiou failed to raise this claim below. *GR*, 103. To the contrary, this claim was expressly raised, ECF-307, 64, and the government explicitly responded twice to it, ECF-322, 111, n.42; ECF-557, 139.

S.E.C. v. Wilson, 2009 WL 2381954 (D.Conn. July 31, 2009), is instructive. In *Wilson*, the court found that "marking the close" on 37 out of 700 trading days, during a 3-year alleged scheme, or roughly 5% of the time was attributable to "chance." 2009 WL 2381954 (D.Conn. July 31, 2009). The court further found that, absent evidence about order entry times or whether those orders were properly classified as "limit" or "market" orders, the SEC's case was not proof of wrongdoing. Beyond that, the court concluded that, where the Commission claimed a nexus, analysis of telephone calls required analysis for all the days that calls occurred without trades. The court additionally observed that the "matched trades claim was even thinner," where "the witness did not [] explain why he believed they were matched." As a result, the SEC could not satisfy its burden that such a matched trade claim was "justified to a degree that could satisyf a reasonable person."

[15] *See also U.S. v. Ferguson,* 653 F.3d 61, 75-76 (2d Cir. 2011) (vacating five convictions because graphical charts affected substantial rights, having attributed the share price decline to the alleged criminal conduct, when other market forces existed).

3. Counsel Ineffectiveness for Failing to Use the Raw Data to Demonstrate the Falsity of Koster's Match-Trade

The data underpinning this claim is uncontested. It demonstrates that trades presented to the jury did not "match." The issue is not whether there was any cross-examination on the issue of trades not matching (as asserted in the *DCO* and *GR*). Nor is this issue resolved by the fact of the conviction. The issue is that counsel examined without the raw data, which was the only way to empirically prove the error and falsity. At the very least, it creates a dispute of material fact, which means that the District Court failed to hold a §2255 hearing or accept the truth of the factual allegations. The government posits that if Koster was confronted with the data, "[he] would have explained that even if the trades did not occur between the co- conspirators at precisely the same time, they still traded with each other, possibly with a market maker in the middle of the transaction." *GR*-107. Tellingly, this speculative, if not misleading, response offers no explanation how it is exactly that trades occurring at materially different times can still match. They cannot. As briefed in *Napue* claim #8, *supra,* incorporated here, market makers can act as counter-party principal, taking market risk for their own account, or, as agent. The government never differentiated those roles in Georgiou's case, conflating the distinction by deliberately excluding the trade times from the illustrative charts and testimony. Tr. 2/3/10, 93 (Koster confirming omissions). The data shows that the

trades presented were often hours apart, with the buyer (Waltzer) and seller (Brezzi) (Slide #25) never counter parties, because the market maker took ownership as principal. Counsel's failure to use the raw data afforded the government a false presentation that the trades "matched," and, by extension, were criminally coordinated by the alleged co-conspirators.

D. Prejudicial Denial of Discovery

The government has not rebutted the multiple instances in which Petitioner's right to discovery and evidence per *Han Tak Lee v. Glunt,* 667 F.3d 397 (3d Cir. 2012), was abridged. Petitioner refers the Court to the arguments made with respect to *Napue* claims #1, 2, and 5, and *Brady* claims #1 and 5.

E. Denial of Counsel

The government continues to support its "one and done" position on Petitioner's pre-hearing request for a reasonable time to obtain counsel of choice and fails to provide any reasonable explanation why this request was not granted. *GR*, 138.

In *Pazden v. Mauer,* 424 F.3d 303, 316 (3d Cir. 2005), this Court reversed after determining that "[Pazden] was bowing to the inevitable … [when] affirmatively waiving his right to counsel," with the decision to proceed *pro se* little more than (as Pazden characterized) the choice between the "lesser of two evils." *Id.* 317. There, the district judge would not provide prospective counsel "opportunity

to review the discovery, to do a proper investigation." *Id.* 309. This Court said "[a] defendant will not normally be deemed to have waived the right to counsel by reluctantly agreeing to proceed pro se under circumstances where it may appear that there is no choice." *U.S. v. Salemo*, 61 F.3d 214, 221 (3d Cir. 1995).

The government offers no authority supporting that assertion that it was "necessary and proper" *GR*, 138, to force Petitioner to make a "once and done" decision at the colloquy whether to accept counsel. Instead, it says that this course was necessary because, "At the time of the appointment of counsel hearing, the government and the district court had already litigated a trial, extensive post-trial motions, and an appeal with Georgiou. It was clear after years of litigation with Georgiou that he would use any means at his disposal to delay and manipulate the proceedings. … The government and, most importantly, the district court, needed to ensure that Georgiou would not take advantage of this current situation to create additional delay and inefficiency." *GR*, 125, 126*;*

Pazden, however, rejected this exact rationale:

> Appellees argue that Pazden's claim of selecting the lesser of the two evils by appearing *pro se* is plainly a ruse - **an attempt to build a record by an arrogant, highly intelligent, but morally bankrupt, criminal who throughout this trial tried to manipulate and deceive the trial Court**. … That argument is, of course, **neither relevant to our inquiry, nor does it qualify as legal argument**. Rather, it is a **gratuitous ad hominem attack that detracts** from the persuasiveness of the government's argument as well as the professionalism of its presentation. We should not have to remind officers of the court that such personal comments have little place in an appellate brief.

> Moreover, even if the thrust of what the government is apparently trying to convey was appropriate, it would still be irrelevant. We remind the appellees that we have previously noted that even well-founded suspicions of intentional delay and manipulative tactics can provide no substitute for the inquiries necessary to protect a defendant's constitutional rights.

Padzen, 424 F.3d at 317, n. 16 (internal citations and quotation marks omitted).

Moreover, the government's alleged concern about delay that permeates its response to this claim is addressed by *Padzen*: "even well-founded suspicions of intentional delay and manipulative tactics can provide no substitute for the inquiries necessary to protect a defendant's constitutional rights" *Id.* Thus, while Petitioner certainly disputes the government's unwarranted cauterization of Petitioner's intentions in requesting a reasonable continuance to secure counsel of choice, the validity of those concerns is of no moment, per *Padzen*.

The government's assertion that Petitioner never requested counsel before or during the 2255-hearing is wrong. *GR*, 130-133. In fact, Petitioner filed a motion two months before the hearing addressing the then-recent and new Waltzer disclosures. That document (ECF-392) shows Petitioner was considering his course in view of the disclosures, including: "The full impact of those disclosures upon the proceedings is still being assessed … Petitioner and the Government have many issues in dispute as a result of these disclosures, including, but not limited to, Petitioner's need for additional time to fully process and understand the effects of

the new evidence … and, as a result of the recent disclosures, Petitioner may also need legal counsel to argue conflicts of interest, falsities upon the Court, and to fully assess impact to the Constitutional claims raised."

Further, even the one-and-done construct allowed for a change of mind based on changed circumstances. Tr. 4/17/2017, 13-14. Contrary to the government's assertion that no such new conditions existed (*GR*, 140), Petitioner's *Motion* invoked such changed circumstances, based on the motion and Petitioner's subsequent motion for a hearing to address counsel. *See App.*, 87.

CONCLUSION

For all of the above reasons, the *Application* and based on the full record of this case, a COA should issue on each of the above claims.

Respectfully Submitted,

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Certificate of Service

I, Michael Wiseman, hereby certify that on this 21st day of February 2020 I served a copy of the foregoing upon the following persons by filing the same with this Court's ECF Filing System:

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/s/ Michael Wiseman

Michael Wiseman