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 APPLICATION FOR A CERTIFICATE OF APPEALABILITY
AND
CONSOLIDATED BRIEF IN SUPPORT

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Dated: Philadelphia, Pennsylvania
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PRELIMINARY STATEMENT

On October 30, 2018, this Court granted Petitioner's *pro se Motion to Consolidate* two appeals: number 18-3168 challenging the District Court's denial of his *2255 Motion*, and number 18-2953 challenging the Court's denial of appointed counsel at various stages of the 2255 proceedings. This application addresses Petitioner's entitlement to a COA and includes the procedural question of whether the Court erred in its refusal to appoint counsel after Petitioner's initial declination of the Court's offer to appoint an attorney for the evidentiary hearing.

George Georgiou was the Petitioner below. He will be referred to herein as Petitioner.

Appellee, the United States of America, was the Respondent below, and will be referred to as the government.

Documents filed in the District Court will be identified by the court's Electronic Filing System, *e.g.* ECF, by the number placed on the document by the filer. Some critical documents are attached as an Appendix and will be referred to by the Exhibit numbers assigned.

The District Court's *Memorandum Opinion* denying the 2255 Motion, *United States v. Georgiou*, 09-88 (E.D. Pa. June 19, 2018), is not published. It is available at ECF-570. It will be referred to as District Court Opinion and cited as *DCO*, followed by a page number from the slip version contained on PACER.

This Court issued a prior precedential opinion on Petitioner's direct appeal. *United States v. Georgiou*, 777 F.3d 125 (3d Cir. 2015).

Transcripts of proceedings in the District Court will be cited as Tr., followed by a date and page reference.

All other citations follow standard form. All emphasis is supplied unless otherwise noted.

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INTRODUCTION

Counsel for Petitioner files this *Application for a Certificate of Appealability*, presenting five claims meriting appellate review:

A) eight instances of false testimony and false evidence, in violation of *Napue v. Illinois*, 360 U.S. 264 (1959);

B) five prosecution failures to disclose evidence, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963);

C) three claims of trial counsel's ineffectiveness;

D) four instances where the District Court refused essential discovery; and,

E) the District Court's refusal to appoint counsel following an initial waiver that was itself based on an infirm colloquy.

The prosecution against Petitioner had two parts. **First**, from June 2004 to June 2007, Petitioner allegedly conspired with Kevin Waltzer (and others, none of whom testified), to manipulate the share price of two publicly traded companies, "Neutron" and "Avicena." **Second**, from June 2007 to September 2008, Waltzer worked as a government cooperator pursuant to a formal agreement, making secret recordings of Petitioner, endeavoring to have him bribe an undercover Agent ("Charlie") to buy shares of Hydrogen Hybrid ("HYHY"), and "Northern Ethanol." The prosecution alleged that Petitioner reached an agreement with Charlie in August 2008, and then wire-transferred $5,000 for a September 3, 2008 "test trade."

At trial, the government presented Waltzer as a reformed truth teller who was strictly supervised by experienced FBI Agents while undercover. Waltzer had previously stolen $45 million from insurance settlement pools.[1] The defense and jury's limited understanding was that in June 2006, IRS-CID Agents visited Waltzer to investigate suspicious money transfers. Waltzer lied to the Agents to buy time (*DCO*-97), engaged counsel to review his affairs, and after receiving subpoenas for bank records in March 2007, appeared at the U.S. Attorney's Office (USAO) in June 2007 to confess and cooperate. Waltzer was then formally engaged to work undercover. He made 1200 secret recordings in over a dozen sting operations, resulting in 25 convictions. He targeted his insurance fraud underlings, and proactively set up numerous new, securities fraud bribery stings. Petitioner was the only target known to proceed to trial. There, Waltzer testified at length that he was manipulating market prices at Petitioner's direction, to "soak up the float," and that Petitioner sent the $5,000 as a bribe for Charlie.

The defense argued that Waltzer defrauded Petitioner of $6 million using an IRS ruse, causing the companies to collapse. That is when Petitioner suspected Waltzer's wrongdoing, demanding proof that the $6 million was actually used to pay

[1]Petitioner had no involvement in Walter's insurance frauds. Tr. 2/2/2010 (confirmed by FBI).

Waltzer's supposed IRS back-taxes.[2] The government's first sting against Petitioner in August 2007 (involving Avicena) failed and was aborted, Tr. 1/26/2010, 31, 87, 89. A year later, the second sting against Petitioner was also "getting ready to shut down. [Thus], Mr. Waltzer has got a problem, he has never delivered George." Tr. 2/09/2010, 149-150 (defense summation). This led to Waltzer committing a last-ditch deception, tricking Petitioner into believing he had to send $5,000 to Waltzer's lawyers for outstanding fees, in order to obtain the putative IRS documents, Tr. 2/8/2010, 56. While Waltzer admitted that he lied to Petitioner using an IRS scam, Tr. 1/29/2010, 86, 106, he held firm that the $5,000 was a bribe for the "test trade." The defense was adamant that Waltzer was lying -- a rogue informant who triggered the "test trade" on his own, after having failed to record exculpating calls which would have proven Petitioner's account. As the prosecution later stated, "[o]bviously the jury credited Mr. Waltzer." ECF-243, 7.

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[2]The message from Petitioner to Waltzer during the undercover operation, that precipitated Waltzer's testimony at the hearing confirming Petitioner was chasing him over an IRS ruse, was:

> First of all I am sorry that you resent making $5,000,000 on my back and I lose $25,000,000. Second, certain parties have accused me of being in collusion with you and do not believe that you used the proceeds of the avgo sales to pay IRS to avoid serious sanction and bankruptcy I have of course told them they are crazy It would be of great help to me if you would please send me the confirm that the $$ went from your lawyer to the IRS in full as represented so I can at least plug another hole."

ECF-307, 23-25; Def.Tr.Ex. 260, msg# 118/166; 07/22/08.

There were three facts the government could not refute at trial:

1) Waltzer actually obtained the $6 million, which the government never recovered, and, as revealed during the 2255 proceedings, this occurred while Waltzer was informing with the FBI in 2006 and early 2007, Tr. 9/25/2017, 202;

2) Petitioner sold no stock as part of any "test trade," thereby, generating no proceeds from which a $5,000 bribe would logically flow; Tr. 1/25/2010, 48 (Defense Opening); Tr. 1/26/2010, 123-124, 165 (Charlie unaware of who sold the shares); Tr. 2/08/2010, 36-40 (Petitioner); and,

3) Inexplicably, there were no government recordings made between August 30, 2008 to September 3, 2008, during the days of the "test trade," Tr. 2/02/2010, 198-99 (FBI Agent Joanson confirming).

Faced with this plausible defense narrative, the prosecution sought to extinguish reasonable doubt by having Waltzer testify that he never acted on his own during the undercover operation, instead, followed very "specific instructions" given "solely" by the Agents, Tr. 1/26/2010, 223-224; 1/28/2010, 19-20, 22; that it was the United States Government who authorized Waltzer's subterfuge to use legitimate capital from the Middle East to lure Petitioner, *id.*; and, that Waltzer possessed the recording device at all times, having recorded all calls, especially during the test trade, Tr. 1/29/2010, 35, 138.

Government witnesses also vouched for Waltzer's truthfulness and propriety as a cooperator, emphasizing that per his plea agreement, he was required to tell the truth. Tr. 2/2/2010, 243-244. Finally, the prosecutors attacked Petitioner as the one who was lying, having told a "fictional tale of chasing some phantom IRS documents from Kevin Waltzer"... a "fairy tale," "something that is incredible that you cannot believe"... "what an incredible lie he is telling...", Tr. 2/09/2010, 95. *DCO*-34-35; Tr. 2/08/2010, 93, 110, 148, 213 (Petitioner on cross being asked to prove a negative in the absence of recordings; "only testimony we have with regard to IRS conversations is yours?").

However, nearly 10 years later, the 2255 proceedings exposed material falsities in the government's case, including, failure to disclose that Waltzer was informing with the FBI in 2006 and early 2007, at the very time he and Petitioner were allegedly conspiring. These revelations conflict with the timing of numerous overt acts, substantive counts of the Indictment, all three predicate act emails of the wire fraud counts, and securities trades presented to the jury.

Waltzer made a series of admissions at the 2255 hearing, including:

- that Georgiou was indeed chasing him over an IRS fraud, Tr. 9/25/2017, 196 ("you are asking me to provide you with documentation so that the IRS claims that I'm making to you are correct, and I'm answering you and telling you that of course I cannot provide you with documentation because its attorney-client privilege").

- "Nobody" from the prosecution team instructed Waltzer to trigger the test trade, effectively confirming defense claims that Waltzer acted on his own; *Id*., 221;

- No one from the government authorized Waltzer's subterfuge of inducing Georgiou with legitimate sources of capital from the Middle East -- Waltzer acted on his own. *Id.*, 231; and,

- Joanson confirming Waltzer was making his recordings from Florida, unsupervised, while agents were in Pennsylvania, Tr. 11/15/2017, 250

These revelations show material inaccuracies in the government's case, placing it "in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995).

The 2255 proceedings revealed a trove of evidence and records withheld from the defense at trial, including:[3]

[3] These withheld documents are attached as Exhibits A to E. Indeed, this pattern of admitting and disclosing what it had to about Waltzer, while denying and withholding what it could, was at the heart of the government's presentation on direct appeal. To defeat Petitioner's direct appeal *Brady* claim related to Waltzer's long psychiatric history and use of psychotropic medications, the government represented that:

- It 'produced all of the evidence in its possession that was impeaching of Waltzer, including...evidence [] of his cooperation with the government...and all of his statements to law enforcement," No.10-4747, 12/13/13, 31;

- It "provided complete information about Waltzer's statements to the FBI...," *Id.* 48;

- It "advised Georgiou about Waltzer's additional cooperation, and did not withhold any *Brady* material in connection with those cases," *Id*., n. 7;

- [Georgiou] "offers nothing but speculation that the government withheld *Brady* material concerning Waltzer's initial cooperation...," *Id*.

- It "did not suppress any relevant evidence about Waltzer, *Id.*,

(1) interview statements of Waltzer informing to the FBI in 2006 and 2007, during the period of the alleged conspiracy (Exhibit A);

(2) interview statements from the period Waltzer was proffering with the government, including undocumented instructions and meetings he was having with the prosecution team (Exhibit B);

(3) An August 29, 2008 IRS interview of Attorney Andrew Farber (a Waltzer target), attended by AUSA Lappen and Joanson, where Attorney Farber reported Waltzer attempting to have him commit crimes by filing false class-action claims. Significantly, the date supports that Waltzer was stripped of the recording device for this misconduct, explaining why Waltzer was without equipment during the "test trade" on September 3, 2008. See, ECF-556-1, 77-84; (Exhibit C)

(4) sentencing memorandum and records for James Hall, showing that Waltzer failed to record calls and other committed misconduct in that sting operation (Exhibit D);

(5) The sentencing transcript of Waltzer target, Christian Penta, which demonstrates the government was always aware that Waltzer could and did lie about targets and related facts, but presented otherwise to the jury (Exhibit E);

The government also withheld chain of custody envelopes/logs for the recording device Waltzer was using, demonstrating that Waltzer was without recording equipment during the "test trade." The logs also memorialize

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- Contrary to Georgiou's repeated allegations, the government "did not suppress anything," *Id.* 30.

Relying on these now-irreconcilable representations, this Court declined oral argument on the *Brady* claims and ultimately denied them.

"malfunction" of the device between the days of the "test trade" and the $5,000 wire transfer. This evidence was disclosed in another case under a Protective Order (*U.S. v. Montano*, 13-cr-082), but never to Petitioner's defense.

The government also conceded that the trial prosecutors acted in the dual role as Waltzer's handlers during the undercover operation, giving Waltzer instructions, at times without law enforcement present, but failed to disclose those facts or communications to the defense, including related emails, text messages, and fact-based rough notes, all of which remain withheld, notwithstanding these topics were approved within the scope of the evidentiary hearing.

At trial, the prosecution told the jury that "everything was turned over to the defense...," Tr. 2/9/2010, 203. This was untrue. A comparison of the undisclosed information with the trial record, now reveals the eight *Napue* and five *Brady* violations used to obtain the conviction.

The government and the Court have used every opportunity to impugn Petitioner, but the violations outlined herein are patent and obvious on their face, without the need to rely on Petitioner's credibility to appreciate that he has been denied due process, and a fair trial.

Equally troubling is the manner in which the Constitutional violations were treated by the Court. By Ordering both sides to file simultaneous post-hearing briefs (at the government's urging), the Court's denial (while lengthy at 185 pages),

reflected wide swaths written by the Government, and adopted wholesale by the Court. This approach resulted in the Court failing to address key arguments, often using off-point, non-sequitur reasoning.

The United States Securities and Exchange Commission (SEC) generated raw data listing all of Waltzer's stock transactions and provided this data to both sides before trial. That data was never presented to the jury, and never used by defense counsel to cross examine Waltzer or the SEC analyst. Yet, that SEC data plainly demonstrates that Waltzer testified falsely when interpreting the Neutron emails about his "soaking up the float" at Petitioner's direction (for which Petitioner received 20 of his 25-year sentence). The Court excluded this claim from the hearing, as well as an ineffectiveness claim related to the jury's consideration of "summary charts" of the raw SEC data – charts that should never have gone to the jury as "evidence."

The *DCO* repeatedly recast and failed to analyze the false testimony for each of the *Napue* claims. When it did review these claims, it failed to assess whether there "any reasonable likelihood" that the false testimony "could have affected the judgment of the jury." *Haskell v. Superintendent*, 866 F.3d 139 (3d Cir. 2017).[4]

[4] Although it cited *Haskell*, *DCO*-149, the Court failed to apply the proper standard of review for false testimony claims.

With respect to the multiple *Brady* claims, the Court failed to apply this Court's precedent finding materiality when the withheld evidence caused "alterations in defense preparation and cross-examination." *Dennis v. Secretary*, 834 F.3d 263, 311 (3d Cir. 2016). Instead, the Court inserted the Government's writings, word for word: "Georgiou…failed to establish that the defense could have used this [withheld] information in any helpful manner." *DCO*-147. It made this finding despite trial counsel's lengthy testimony showing how the withheld evidence was material to the defense. Tr. 9/19/17, 89.

STANDARD GOVERNING ISSUANCE OF A COA

Petitioner meets the standards for received a COA. Under 28 U.S.C. §2253 and F.R.App.P. 22(b), a habeas petitioner who wishes to appeal from a final order of a district court denying his petition, must obtain a COA for each claim he wishes to appeal. To obtain a COA, §2253 requires the applicant make "a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2).

In *Miller-El v. Cockrell*, the Court summarized the standard: "An Petitioner must show that reasonable jurists could debate whether (or for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further… [A] COA does **not** require a showing that the appeal will succeed. Accordingly, a court of

appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief." 537 U.S. 322, 336 (2003).

Petitioner submits that the District Court's resolution of the claims presented herein are debatable among reasonable jurists, and COA should issue each of them.

RELEVANT PROCEDURAL HISTORY

Petitioner was convicted following a 13-day jury trial, on nine counts, including conspiracy to commit securities fraud, substantive counts of securities fraud, and wire fraud. 15 U.S.C. §§78j(b), 78ff; 18 U.S.C. §§2, 371, 1343, 1349. ECF-135 (verdict). Petitioner's bail was revoked after the February 12, 2010 verdict.

On November 19, 2010, the Court imposed a 300-month term of incarceration, of which 60 months would run concurrent on eight of nine counts, with a consecutive 240-month sentence for Count 2 (the "Neutron manipulation"). It also Ordered over $55 million in restitution and $26 million in forfeiture (ECF-227).[5]

[5] Appeals of the forfeiture and restitution Orders are pending in this Court at Case Nos. 18-2498 and 18-2762.

On direct appeal, following post-judgment *Brady* litigation, this Court affirmed. *United States v. Georgiou*, 777 F.3d 125 (3d Cir., Jan.20, 2015), *cert. denied*, 136 S.Ct. 401 (Nov. 2, 2015) (No-14-535).[6]

Petitioner timely filed *a pro se* 2255 *Petition* on January 26, 2017 (ECF-307, with Exhibits 1-18). The Government filed its *Response* on April 3, 2017 (ECF-322), revealing, for the first time, that Waltzer was informing with the FBI in 2006. *Id.*, 46. It further revealed for the first time that the trial prosecutors participated in the undercover operation. *Id.*, 67-81. On April 14, 2017, Petitioner made the first of multiple discovery requests. ECF-327.

On April 17, 2017, Petitioner appeared before the Court to be informed that an evidentiary hearing would be held. Petitioner was denied time to engage counsel of choice but was told by the Court that it would be his only opportunity to have counsel appointed. Petitioner declined appointment following a colloquy. Assistant

[6] A number of *amicus curiae* briefs in support of the grant of *certiorari* were filed owing to the Panel's ruling that engrafted a "diligence" requirement to Petitioner's *Brady v. Maryland*, 373 U.S. 83 (1963) claim; *see Georgiou*, 777 F.3d at 140 ("*Brady* does not oblige the government to provide defendants with evidence that they could obtain from other sources by exercising reasonable diligence." (Internal citations and quotation marks omitted). *Amici* briefs included those filed by former Attorney General Michael B. Mukasey, and former United States Solicitor General Seth Waxman, on behalf of Former Federal Prosecutors and Former Senior Justice Department and Government Officials.

This Court's imposition of a diligence prong to *Brady*, was undercut by *Dennis v. Superintendent,* 834 F.3d 263, 90 (2016). Accordingly, Petitioner asks that the Court, in conducting a cumulative analysis of suppressed and false evidence, include the materials that were subject of the direct appeal.

Federal Public Defender Arianna Freeman was appointed as standby counsel. Tr. 4/17/2017, 27.

On May 26, 2017, the Government filed an omnibus discovery response to Petitioner's first round of requests, ECF-361, expanding on some of its prior 2255 disclosures, but otherwise refusing production. In June 2017, Petitioner finally received redacted FBI reports of Waltzer's sessions from 2006 and 2007. These were added to the record. ECF numbers 376, 377, 381, 404.

On June 22, 2017, Petitioner filed his *2255 Reply*, ECF-380. On June 30, 2017 the Government filed a *Sur-Reply*, ECF-383. That day, the Government also provided Petitioner with previously undisclosed excerpts from the notes and records of IRS-CID Agent Kauffman, a member of the Waltzer prosecution team, ECF-385, revealing for the first time that the US Attorney's Office (USAO) was involved in the Waltzer investigation in 2006. All subsequent efforts to obtain the records or production of a Vaughn Index (ECF-388, 389, 409), were denied. ECF-402. The Court put aside the records for appellate review. ECF-433.

On July 12, 2017, Petitioner filed a motion requesting that the Court revisit Petitioner's waiver of counsel because of the numerous disclosures. ECF-392. On July 14, 2017, the government agreed that Petitioner's appointment of counsel concerns should be addressed. ECF-398.

On July 14, 2017, Petitioner also filed a motion to compel disclosures related to Waltzer's possession of the recording device. ECF-396. The government responded that no such evidence existed. ECF-417, 3, 6. This was not true (discussed below). On July 14, 2017, the Court ordered a "limited evidentiary hearing," based on the scope proposed by the Government. ECF-397.

On July 19, 2017, the parties appeared before the Court for the status conference. There, Petitioner addressed numerous new disclosures, changed circumstances, and government misrepresentations. The Court did not address the issue of appointment of counsel, which was not raised. No further colloquy was held. The Court authorized Petitioner to file for further discovery.

On September 7, 2017, Petitioner filed a motion requesting an extension of time to prepare for the hearing, noting new disclosures from the government, ECF-442. The government objected, ECF-447. The Court denied Petitioner's request for additional time to prepare. ECF-451.

The hearing was conducted on September 18, 19, 25, 26, November 15, 16, and December 1, 2017. Nineteen witnesses testified.

During this period, Petitioner uncovered interview reports of another Waltzer target, Attorney Andrew Farber, which were not previously disclosed. There, Farber informed the government that Waltzer was trying to induce him to file false

insurance claims. Waltzer, and the two trial prosecutors, Cohen and Lappen, had already testified by this point in the hearing.

On December 29, 2017 Petitioner filed a motion requesting a status conference, seeking appointment of counsel, recall of witnesses, and appointment of an SEC expert. ECF-527. At the conference, held on January 12, 2018, the Court summarily denied appointment of counsel. On January 17, 2018, Petitioner sought reconsideration of the denial of appointment of counsel, ECF-533, which was again denied. ECF-535. On February 14, 2018, Petitioner again sought appointment of counsel, ECF-546, and was again denied. ECF-547.

On March 5, 2018, Petitioner and the government simultaneously filed closing briefs. ECF-556, 557. On June 19, 2018, the Court denied 2255 relief, without a COA.

On June 20, 2018, Petitioner again sought appointment of counsel, ECF-573, which was again denied, ECF-576.

On July 27, 2018, Petitioner filed a timely Rule 59(e) *Motion for Reconsideration*, including new due process-related claims based on materials discovered after close of the hearing. ECF-583.

The Court denied the Rule 59(e) Motion on August 6, 2018, without analysis ECF-592. On August 6, 2018, Petitioner sought to address prosecutorial misconduct

of withholding evidence from the hearing, and the false testimony given as a result. ECF-581, 593. The motions were denied. ECF-600, ECF-612.

Timely Notices of Appeal were filed on August 31, 2018, ECF-603, and September 27, 2018, ECF-615, challenging the denial of appointment of counsel, and the denial of 2255 relief, respectively.

On December 17, 2018, the undersigned entered his appearance. Following extensions of time to permit counsel a chance to grabble with this extraordinarily large record, this COA application follows.

CLAIMS WORTHY OF A COA

A. The False Testimony and Evidence Claims

Petitioner's convictions were obtained through the prosecution's failure to correct false testimony at trial, which they knew or should have known was false, thereby, denying his right to due process of law.

Due process forbids prosecutorial presentation of evidence that it knows, or should know to be false, and requires the prosecution to correct such false evidence when it has been presented. *Haskell v. Superintendent*, 866 F.3d 139, 145-146 (2017) (*citing Napue* v. *Illinois*, 360 U.S. 264 (1959); *Giglio v. United States*, 405 U.S. 150, 154 (1972)). Thus, relief on a false evidence claim is required "if there is **any reasonable likelihood that the false testimony could have affected the judgment of the jury**." *Haskell*, *id.*, at 146. This standard applies even if the

questionable evidence "goes only to a witness's credibility rather than the defendant's guilt." *Id.* It is the government's obligation to correct such false testimony or evidence. *US v. Harris*, 498 F.2d 1164, 1169 (3d Cir. 1974).

Therefore, a false evidence/due process claim has four elements: 1) false evidence was presented; 2) the government knew or should have known the evidence was false; 3) the false evidence not corrected; and, 4) there is a reasonable likelihood that the perjured testimony could have affected the judgment of the jury. *Id.*, at 146, *citing Lambert v. Blackwell*, 387 F.3d 210, 242 (3d Cir. 2004). As shown, Petitioner meets the four-prong test, and, at a minimum, deserves COA on these claims.

1. Waltzer Lied that there was a "One-Year-Gap" of No Contacts with the Government

Waltzer testified falsely that he had no contacts with the government, between June 2006 to June 2007 – the one-year-gap.

At trial Waltzer was asked about his actions and the events which occurred during this period. He claimed he was working with his lawyers on analyzing his affairs, but otherwise, no references to his informing with the FBI were included. Tr., 1/26/2010, 212-213. This testimony created a false impression.

On cross-examination, this impression evolved into an outright lie:

> You have a year from after Agent Kauffman walks out of your office [in June 2006] with the promise that you will [get] back [to him] in a week before you decide to start talking to the government, do I have my math right?

He responded, "Yes, that's correct. There was a year gap in that period, yes." Tr., 1/28/2010, 144.

Waltzer's withheld interviews with the FBI in 2006 and early 2007 (Exhibit A), demonstrably prove that this testimony was false, and the falsity was never corrected before the jury: Waltzer interviews with the FBI on October 26, 30, November 9, 2006; Waltzer's attorney teleconference with the FBI on November 28, 2006; and February 15, 2007 interview with the FBI and Department of Commerce. These contacts were acknowledged by the Court. *DCO*-99-100.

The government withheld other evidence which would prove this testimony was false, including, Waltzer's attorney contacts with the IRS in 2006; a meeting with US Attorney Patrick Meehan in late summer 2006;[7] notes of Department of

[7] As discovery unfolded in the 2255 proceedings, it was revealed that Waltzer's first known effort at cooperation occurred during the "year-gap," when his then-attorney, Delinsky, met with then-US Attorney Patrick Meehan. Attending that meeting with Delinsky on behalf of Waltzer, was a member of Delinsky's law firm, former Pennsylvania Attorney General Leroy R. Zimmerman. There is no known memorialization of that meeting, but as described by Delinsky, it took place in late summer or early fall of 2006. Per Delinsky, the purpose of the meeting was to alert Meehan that his client had information related to the "war on terror." There is significant evidence showing that the Meehan-Delinsky-Zimmerman meeting was motivated by Waltzer's desire to curry favor with the government. First, Delinsky brought with him to the meeting former Attorney General Zimmerman, who had no other involvement with the case, and no possible reason for attending, except to take advantage of his "personal relationship" with Meehan. Second, Delinsky admitted that going to Meehan, even without a formal proffer agreement, "was in Mr. Walter's interest." Of course, Waltzer's "interest," as used in context, certainly related to his burgeoning need to attempt to obtain favor from his future prosecutor. Third, Waltzer was more express about his interest in providing this information to the government, even before he began to officially cooperate: "In the back of my mind I was viewing it [*i.e.* provision of the information to the FBI in 2006-2007] and hoping that it was some sort of insurance policy because I had not yet decided whether or not I was going to come forward to tell the government about my class actions frauds." Tr. 9/25/2017, 66.

Commerce Agent Dugan, memorializing an "anticipated undercover meeting" involving Waltzer in February 2007; and, Waltzer's attorney's communications with the USAO in April and May 2007.[8]

Agent Joanson, a member of the prosecution team, had knowledge of Waltzer's informant sessions with the FBI in 2006 and early 2007. He testified at the evidentiary hearing that "I should have [told the trial prosecutors] and I didn't... I forgot." Tr., 11/15/2017, 156, 228.

Waltzer's other testimony pertaining to the timing of his contacts also created a false impression. Tr. 1/28/2010, 97 (answering affirmatively to the question: "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?). Once the government conceded to withholding Waltzer's FBI informant sessions, even they described them as a period of "**limited cooperation**," ECF-322, 50, which also undercut the Court's finding that Waltzer was a mere "citizen" during this time period.

Waltzer's Attorney, Steven Delinsky, testified at the hearing that "Waltzer was cooperating with the FBI [in 2006]"; turning over documents "during Waltzer's cooperation with the FBI [in 2006]," and that Waltzer "cooperated" with the FBI in

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This meeting, and the reasons for it, gut the District Court's finding that the government was treating Waltzer as an ordinary citizen and not as an informant. *DCO*-101 ("The FBI considered Waltzer as a citizen who was providing information"); at 102 (same).

[8] This additional withheld evidence is attached as Exhibits F, G, H and I, respectively.

2006, with and without Delinsky present. Tr. 9/18/2017, 98, 103, 109. Former US Attorney, Peter Vaira, testified at the hearing that he was engaged in late 2006 for the purpose of taking Waltzer "to the US Attorney [to] cooperate...rather than go to trial having been contacted explicitly for Waltzer's cooperation." Tr. 11/15/2017, 5, 23.

These facts cannot be reconciled with the Court's ruling that Waltzer was truthful at trial. *DCO*-149-150. To reach this unfounded conclusion, the Court recast Petitioner's claim and never actually analyzed Waltzer's false testimony that he had **no contacts** with the government during the "year-gap."

By recasting Petitioner's claim, it never actually analyzed Waltzer's false testimony, and never addressed Petitioner's materiality arguments, thereby, never applying the correct standard of review – instead force-fitting an insupportable conclusion.

Waltzer had motive to lie about the "year-gap" because he deceived the FBI during his 2006 and 2007 interviews, having represented himself as a legitimate businessman, when, in fact, he had stolen $40 million at the time. (*See* Section (B)(1), below regarding the *Brady* implications). Neither he, nor the government had an interest in alerting the jury to these sordid details. This information would have conflicted with the prosecution's trial assurances that Waltzer was a reformed truth-teller, who had always been truthful with the government. Tr. 1/26/2010, 24

(undercover agent "Charlie": "once he came to the attention of the FBI, Kevin Waltzer, for his criminal activity, he was required to tell the prosecutors and the FBI about the extent of all of his criminal activity, and he did."). This was unquestionably false.

2. Waltzer did not Receive Undercover Instructions "Solely" from the FBI

Waltzer testified falsely that he was receiving his undercover instructions "solely" from his FBI-handlers, thereby, concealing the first-hand role of the trial prosecutors in the undercover operation. Tr. 1/28/2010, 18 ("I was acting at the direction of the FBI"); at 19 ("I am only acting at the direction of the FBI. I don't make any decisions myself"); at 22 ("I was solely acting at the direction of the FBI"); at 23, 38 (same).

The Government's *2255-Response* revealed that the trial prosecutors did instruct Waltzer during the undercover operation.[9] ECF-322, at 78 ("so he would know what to tell Georgiou [including] the services Charlie offered, how much stock he could buy, where they would next meet or speak on the telephone, and other matters"). The government defended its failure to disclose. *Id*. 80: ("experienced

[9] Pretrial defense discovery letters (ECF-208, Ex. M; ECF-232, Ex. B, C, I, J, K, L, M; Defense Letters dated October 22, 2009 at 5; and, January 5, 2010, at 8, 21) specifically asked for the identities of all personnel who were interacting with Waltzer and the details of their communications. Further, a discovery hearing was held days before trial. There, the prosecution represented with respect to this type of communications, "the defense is seeking to compel things that don't exist...we don't have anything else, we have given them what we have." Tr. 1/19/2010, 9, 13.

defense counsel were well aware so there was no reason for the government to specifically advise the defense that the AUSAs had contacts with Waltzer or spoke with Waltzer on the telephone").

At the 2255 hearing, trial prosecutor Cohen testified that he provided instructions to Waltzer during the undercover operation, and that those instructions were sometimes, "one-on-one," without an agent present), Tr. 9/18/2017, 220, 255, 258, 266, 277. Trial prosecutor Lappen also testified that he had "one-on-one conversations" with Waltzer while he was undercover. Tr. 9/26/2017, 61.

Waltzer also admitted that these contacts with the prosecutors occurred "many times" to discuss "facts." Tr. 9/25/2017, 183-184, 186; *id.*, 221-224 (he exchanged "dozens" of text messages with Cohen); *id*. 224, (he was "sure" that he also exchanged text messages with Lappen). The *DCO* ignored this testimony, resorting to: "Waltzer never said [at trial] that the AUSAs did not participate in guiding him in the undercover operation." *DCO*-135. Moreover, the Court applied the wrong standard of review for a *Napue* claim: "Georgiou cannot establish prejudice because he fails to demonstrate that this claim worked to his actual and substantial disadvantage infecting his entire trial with error of constitutional dimensions." *Id.*[10]

[10] The Court also held that Petitioner did not suffer prejudice, because he cannot prove that the AUSAs told Waltzer to do anything improper. This was irrelevant because *Napue* does not require such a showing. It was also an extraordinary finding inasmuch as the Court refused to provide to Petitioner the emails, text messages and notes at issue, all of which remain undisclosed. The Court's refusal to permit discovery of this information provides another basis for remand. *See* Section D, below.

3. Waltzer used Unauthorized Subterfuge, and Lied About it to the Jury

Waltzer testified falsely that he did not use his discretion during the undercover operation, acting only on explicit instructions given to him by his FBI-handlers, including that it was the government who instructed him to use legitimate sources of capital from the Middle East to lure Petitioner. Tr. 1/26/2010, 218-219 (took his instructions from the FBI); 223-224 ("I had specific parameters which I was supposed to work under, and I was working in undercover operations. So I was given specific instruction...I really followed the instructions I was given."); Tr. 1/28/2010, 19-20 ("I am only acting at the direction of the FBI. I don't make any decisions like that myself.").

The government wanted the jury to believe that Waltzer was not acting on his own, with credible Agents calling the shots, thus allaying any concern that this confessed criminal and fraudster was not unilaterally manipulating targets to suit his needs.[11]

Defense counsel challenged this account, asking Waltzer, for instance, to explain why he would use legitimate sources of capital from the Middle East to lure Petitioner, if Georgiou was a predisposed stock manipulator? Tr. 1/29/2010, 91-92, 107-108; 138 (Q: "And even in that March 10th call we just played talked about the

[11] As discussed below, with respect to the Farber Report, Waltzer was doing just that.

Middle East, right? A: "I was following the instructions or advice of the United States Government.").

But Waltzer was lying. At the evidentiary hearing he revealed that he was, in fact, acting on his own when he utilized this unauthorized subterfuge. Tr. 9/25/2017, 231. Each of Waltzer's FBI-handlers have confirmed that they did not give Waltzer instructions to use legitimate capital from the Middle East to bait Georgiou during the sting. Tr. 9/19/2017, 188 (Agent Riley "did not tell [Waltzer] what to say"); Tr. 11/16/2017, 48 (Joanson did not give Waltzer instruction to pitch Georgiou that he had legitimate capital from the Middle East); Tr. 1/26/2010, 45-46 (undercover Agent "Charlie" "wasn't involved with what [Waltzer] was instructed to say with respect to the Middle East").

Waltzer was caught in another lie when he testified at the hearing that nobody instructed him to trigger the test trade. Tr. 9/25/2017, 221. This contradicted his trial testimony that he only ever acted on specific instructions from the agents.

The exculpatory inferences of these falsities are patent. Part of Petitioner's trial defense was that Waltzer was rogue. The prosecution team had to have known the falsity of these instances of Walter going rouge, as they listened to the recordings at the time. Yet, they neither stopped him, nor corrected these falsities.[12]

[12]In the sentencing transcript of another Waltzer target, Deborah Rice, District Judge Savage urged the government to "act with more caution when they are acting with some scheming guy like Waltzer telling them, I believe somebody…was guilty. You are dealing with one of the master

The Court again adopted the government's proposed findings regarding Walter's use of the Mid-East subterfuge, and again, the finding was not relevant to the actual issue presented and was wrong:

> Georgiou was aware, prior to trial, that Waltzer had business dealings in the Middle East. If Georgiou believed Waltzer was lying about the legitimacy of the business dealings, he could have cross-examined him on that point or raised some other claim. More importantly, it is irrelevant whether the government instructed Waltzer to mention those dealings, or whether Waltzer merely mentioned the dealings in the course of conversation. There is no evidence that Waltzer's business dealings in the Middle East were criminal, and they had nothing to do with Georgiou's case. Georgiou could not have impeached Waltzer with this pointless line of attack and could not have used this to overcome the overwhelming evidence of guilt. Because Georgiou's claim is lacking in merit, he cannot establish prejudice. This *Napue* claim is procedurally defaulted.

DCO at 136, 151. Petitioner did not procedurally default this claim arising from the lie, because the lie was not discovered until the 2255 hearing. And, the issue was not whether Georgiou knew Waltzer had dealings in the Middle East, or whether those dealings were criminal, but rather, did the government authorize Waltzer to use the ruse of legitimate capital from the Middle East to lure Georgiou?

Further, the Court did not address Walter's hearing concession that "nobody" told him to trigger the test trade.

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con guys."). ECF-583,-1, Ex. 1 (Rice transcript at 32). Petitioner was not aware of this transcript pre-trial and did not acquire it until after the close of the hearing. Yet, this transcript dovetailed with Petitioner's trial defense that Walter engaged in unauthorized subterfuge to lure Petitioner.

Waltzer lied to insulate the investigation by claiming he did not act on his own, but strictly followed explicit instructions from the Agents. The Court's ruling that it was the defense obligation to demonstrate the falsity of this evidence, as the prosecution failed in its duty to correct it, is not the law of *Napue*; *US v. Harris*, 498 F.2d 1164, 1169 (3d Cir. 1974).

4. Waltzer Lied About "Soaking up the Float" at Petitioner's Direction

A large portion of Waltzer's trial testimony was devoted to the alleged Neutron manipulation, spanning from June 2004 to June 2007. Waltzer began his direct examination by asserting that Georgiou had asked him to join in "soaking up the float," which means buying "all the free trading shares that are out there...getting control over all the shares." Tr. 1/26/2010, 233; 238-239 ("I engaged in buying at his direction on many, many, many occasions...I was just buying stock, averaging down my price at his direction, helping him to 'soak up the float.'").

The Government had Waltzer interpret emails exchanged with Petitioner, starting with Gov. Ex 1:

> Q: And at this point, by December of 2004, had you been doing the buying at his direction that you testified to before?
>
> A: Yeah. And as you can see, I have a lot of shares in the stock.
>
> Q: So you say in the email, "I have 365,000 shares of Neutron as of the close of business last evening"…can you explain to the jury what you're communicating to [ ] George Georgiou here.

> A: Well, I'm demonstrating how many shares of stock that I have to him. And I'm asking him if--when I can sell the stock.

Id. 244.

Waltzer also interpreted an email from January 2005, Gov. Ex 2:

> [I]n the preceding day or days before this date I was instructed by George and asked by George to buy stock and told that he would buy it back from me several days later. What you are seeing here is he is saying we are ready to buy your stock back.

Tr. 1/27/2010, 4.

Waltzer testified that he made so many conspiratorial purchases at Georgiou's direction, that he "lost $800,000" when left saddled with the stock bought in the scheme. Tr. 1/26/2010, 238; Tr. 1/27/2010, 159.

When defense counsel confronted Waltzer about those "losses," while asking about emails from September 2004 (Def.Tr.Ex. 4), Waltzer testified:

> Georgiou leading up to this point [September 2004] is offering me a lot of things, including two hundred thousand free trading shares of Neutron for all the buying I am helping him and his partners do to "soak up the float."...What defines my relationship with Mr. Georgiou for '04 to '07 is a stock manipulation scheme...

Tr. 1/29/2010, 56-57.

However, records from the SEC (Gov.Tr.Ex. 302) categorically prove that Waltzer was lying about "soaking up the float." Exhibit 302 is a spread-sheet prepared by the SEC, listing all of Waltzer's buys and sells of Neutron stock during

the relevant period.[13] It shows that from June 2004 (when Waltzer and Georgiou first met) to September 2004, Waltzer purchased **zero** shares. Waltzer's testimony that he was buying and holding stock at Georgiou's direction, to "soak up the float," was false. In fact, for the first nine months – through February 2005 -- Waltzer purchased only 10,000 shares on November 19, 2004. There were no 365,000 shares bought in December 2004; there were no purchases in December 2004, or January 2005, whatsoever, showing that Waltzer was not buying stock "in the preceding days" to the January 2005 email. The data shows that for the first 13 months since meeting Georgiou (270 trading days), Waltzer purchased on only 4 days (November 19, 2004; March 1 & 28, 2005; and April 1, 2005, totaling less than $37,000 ($18,000 net of sales).

Moreover, Waltzer never "lost $800,000"; he actually profited nearly $100,000. Page 35 of the SEC's summary data shows Waltzer lost $735,000, however, that calculation failed to include $819,000 Waltzer received from private transfers of Neutron stock. See Exhibit K attached, which was contained in ECF-307, Exhibit 4.

[13] This data (attached as Exhibit J) was produced just before trial, but never used by either side in any analysis or examination of Waltzer or the SEC analyst Daniel Koster and was never submitted to the jury. All of Waltzer's transactions are shown at pages 31-35, in chronological order.

Performing arithmetic, the SEC data shows that for year 2 of the alleged "conspiracy" (June 2005 to May 2006), Waltzer net-liquidated 138,000 shares, and for year 3 (June 2006 to May 2007), he net-sold an additional 69,000 shares.

There were additional uncorrected lies regarding his stock purchases. The government asked Waltzer to explain a July 8, 2005 email (Gov.Tr.Ex. 4), where he wrote to Georgiou: "I'm trying to buy stock and they won't let me, there is a seller that is not me, please try and go in there and buy some stock with me if possible.") Waltzer explained that this was Georgiou instructing him to buy stock. Tr. 1/27/2010, 9-10. On cross-examination he stated: "I had a conversation with George where he gave me standing orders to go and buy stock...he had so overloaded my accounts with the buying that he was having me do that my accounts were in serious jeopardy...I specifically remember this." Tr. 1/28/2010, 152, 161-162.

However, the SEC data shows that on July 8, 2005, Waltzer was the unknown seller, having liquidated 100,000 shares that day.

The government asked Waltzer about a November 30, 2005 email (Gov.Tr.Ex. 8), expressing cash flow difficulties: "George would have me go in and buy stock and it got to the point where there was so much being bought that I couldn't afford to pay for it in my accounts"). Tr. 1/27/2010, 15-16; Tr. 1/28/2010, 162.

But the SEC data shows that by November 30, 2005, Waltzer had liquidated a total of 181,000 shares from the time he met Georgiou in June 2004, through November 2005.

When asked about December 2005 emails, Gov.Tr.Ex. 10, Waltzer said: "I just did all this [and] helped [Georgiou] out...[as] part of a stock manipulation scheme...I have almost four hundred thousand shares, I've worked very hard with him to accumulate the stock, get the stock up..." Tr. 1/26/2010, 246; 1/27/2010, 21.

Again, the SEC data shows that Waltzer did not own 400,000 shares -- he had not "accumulated" any stock to "get the stock up."

Finally, Waltzer testified about emails from January 11, 2007, Gov.Tr.Ex. 24 and explained his "understanding of why it is so important for you to be holding the shares rather than selling them?":

> Because he takes tallies...and if I am selling into the marketplace, that is that many more shares that him and his group have to buy in order to take it higher or keep it stable.

Tr. 1/27/2010, 86-87.

Again, Waltzer was lying. By January 2007, he was not holding any stock bought since meeting Georgiou. He had actually sold nearly 200,000 shares, and, as is now known, was interviewing with the FBI at the time.

Not only were Waltzer's falsities uncorrected before the jury, the government had its agent-witnesses vouch that the emails "corroborated" Waltzer. Tr.

1/26/2010, 143-144 ("Charlie" testifying that Waltzer's interpretation of the emails were corroborated); Tr. 2/3/2010, 55 (SEC analyst Koster testifying that all overt acts in the Indictment were "correct"; Tr.2/2/2010, 242 (Joanson testifying that Waltzer's interpretation of emails was corroborated); and, Tr. 2/9/2010, 109 (government closing argument, same).

Petitioner's *2255 Reply* (ECF-380, 20-21), provided the Court with a month-by-month tabulation of Waltzer's transactions, using the SEC data, so that that there could be no doubt that Waltzer was not buying when he said he was, was not "soaking up the float," and, that he was selling over the 3-year period. Nevertheless, the Court excluded the Neutron false testimony claim, and the corresponding ineffectiveness component from the hearing. ECF-397. The Court also refused to provide a securities expert for the hearing. ECF-486, 527, 530, 532. The Court then foreclosed Petitioner from using the SEC data at the hearing, with comments demonstrating that the SEC data was never even reviewed or analyzed, Tr. 9/26/2010, 130-132, and precluded even examination of SEC analyst Koster using the data. Tr. 11/16/2017, 70-123.

The Court's habeas denial never analyzed this false testimony. Instead, it made a series of sweeping, generalized statements, adopted *verbatim* from the government's submission, including questioning whether Petitioner's chart (ECF 380, 20-21) was accurate, without pointing out any actual flaws in it. It used the

wrong standard of review to deny relief, of other "incriminating evidence," rather, whether there was "any reasonable likelihood that the false testimony could have affected the judgment of the jury." *DCO*, 73, n.50; 136; 151-152.

5. Waltzer did not Possess the Recording Device Throughout the Undercover Operation

Waltzer testified falsely that he possessed the recording device at all times. The government withheld evidence to the contrary which it continues to withhold, that would conclusively demonstrate the falsity of this testimony.

Waltzer testified that he had the device "twenty-four-seven." Tr. 1/29/2010, 35-36 ("there was never a moment between July 5th of 2007 and September 17th of 2008 when [he was without a recording device]...I had the device every day, every hour, twenty-four-seven. Maybe, maybe there was one twenty-four-hour period or one forty-eight-hour period when I was instructed to go dark and not accept phone calls, maybe.").

Waltzer expressly testified he had the device during the "test trade," and recorded all calls. Tr. 1/29/2010, 40; 171-173 ("I'm telling you that I taped every conversation especially at this point [during the test trade] … if there is not a taped conversation then there is not a conversation…absolute fact…I'm telling you that I tape every conversation"). Joanson then testified that Waltzer "**always** had [recording] equipment…so he was **always** in a position to record conversations." Tr. 2/2/2010, 100, 105.

Petitioner raised a *Napue* violation, asserting this testimony from Waltzer and Joanson was false, linking the inexplicable missing recordings of the "test trade" (and other times), to Waltzer not being in possession of the recording equipment. ECF-307, 45-47; ECF-380, 44-48.

In its *2255-Response* the government made another first-time admission. ECF-322, at 90 ("the government recognizes that there may have been a few, brief unrecorded phone calls between Georgiou and Waltzer from August 30 through September 4 [the period of the "test trade"]...as part of the process of retrieving recording devices from Waltzer and replacing them with new ones, Waltzer may not have had the [recording] device at that time..."). However, the government failed to offer any explanation for how the test-trade was not recorded, "The government does not have any new information for Georgiou on the recording device seven years after the trial...there is no further information...on Waltzer's possession [of the recording device]." ECF-417 at 3, 6. This was false.

In his 2255-testimony, Waltzer said he could not recall whether he possessed the device at all times, or if he had it during the test trade. Tr. 9/25/2017, 206 ("There were times where hey, there's an equipment malfunction, stand down for five days, don't make a -- you know, don't call anybody, go on vac -- do whatever, you know [he had the device]...above 90% of the time.) *Id.*, 207.

At the 2255 hearing each member of the prosecution indicated that they were not sure whether Waltzer possessed the device at all times. Tr. 9/26/2017, 107 (Lappen "no idea"); Tr. 9/18/2017, 230, 246 (Cohen); Tr. 9/19/2017, 199 (Agent Riley) (all same).

But, Joanson had more to offer, testifying:

> There might have been instances where if we got the equipment off of [Waltzer] and we didn't have replacement equipment -- because back then, believe it or not, we didn't have a plentiful supply of these recording devices. They were very, very expensive. And if other agents or--there were a lot of--if the operational tempo of the office was high, there may be a bunch of them being used where we would not have a device to refresh him until the weekend or the Monday. So there are scenarios where that could have happened, yes.
>
> I don't know why we would have taken [recording] equipment away from [Waltzer on August 30, 2008]...I don't have any specific knowledge...I don't know why we would have taken equipment away from him. He --99 -- 95 percent of the time, he had equipment on him...

Tr. 11/15/2017, 253-254;11/16/2017, 27.

Despite the above, the Court denied relief on this claim:

> Georgiou's entire argument is based upon the premise that Waltzer did not have the recording device during the test trade time period. However, it has never been proven that Waltzer, in fact, did not possess the recording device during the relevant period.
>
> We acknowledge the difficult task that Georgiou has in order to show that Waltzer did not, in fact, possess the recording device during the relevant time period; however, such a showing is pivotal because it forms the premise of his claim.

> Without establishing that Waltzer did not possess the recording device during the test trade time period, Georgiou cannot make the requisite showing that Waltzer committed perjury.

DCO-46-48. In reality, the "task" was not "difficult," and is met by a preponderance of the evidence. *See Ortega v. Duncan*, 333 F.3d 102, 106 (2d Cir. 2003).

The Court failed to address the differences between the trial and hearing testimony and ignored Waltzer's admission that he acted on his own. Waltzer's revelation was material, for it squared precisely with the theory of defense. *E.g.* Tr. 1/25/2010, 48. The materiality of Waltzer's admission was solidified by Charlie's hearing testimony. Tr. 9/26/2017, 49 ("I would not have been the individual to give -- I could have been involved during the transaction, but the case agents would have been responsible for having given the authorization to do that."); *id.*, 54 ("FBI determines when we do these test trades, not cooperating witnesses.")

Previously withheld evidence supports that Waltzer was stripped of the recording device for misconduct, explaining why he was without equipment.

Farber Report. On August 29, 2008 (on the eve of the test trade period) Attorney Andrew Farber, a Waltzer target, interviewed with Lappen and Joanson. The ensuing IRS Memo was **not** provided to Petitioner but was disclosed in other cases. Petitioner received it from a lawyer for another of Waltzer's target in October

2017. This occurred **after** the testimony of Waltzer, Lappen, and Cohen.[14] The report is proof that Waltzer engaged in the type of undercover misconduct of which Petitioner complained at trial – attempting to set-up otherwise innocent people.

Farber was the innocent law partner of Waltzer target Deborah Rice. The Farber Report was startling inasmuch, and as observed by Judge Savage who presided over a host of Waltzer-cases, Waltzer was endeavoring to inculpate otherwise innocent persons:

> During the meeting [Attorney Farber recounted that] Waltzer stated the he has an insider at the claims administrator, Heffler, and that they can start to file additional claims. Waltzer further advised him that these new claims were going to be false claims and that the claims they filed in the past were also false. Waltzer had told him that they could even file in the name of Mickey Mouse and the new inside person would allow them to get through the system. This was the first time he [Farber] had heard that these claim deals were false.

Exhibit C. Farber was never charged. *Id.*, ¶ 33.

The Farber interview occurred on August 29, 2008 – one day before the four-day period when Waltzer was not recording calls. It is a fair inference that the government took the device from Walter upon learning of his misconduct regarding Farber. It explains why Waltzer would act on his own over the ensuing hours to trigger the test trade without recording equipment, all of which would have

[14] Once discovered, Petitioner moved to recall these witnesses, ECF-527. The government argued that they should not be recalled, Tr. 1/12/2018. The Court denied the request, ECF-532.

supported the defense trial narrative that Walter was a rogue operator who misinterpreted emails and recordings during his trial testimony.[15]

Chain-of-Custody Envelopes. After the close of the evidentiary hearing, but before final briefing, Petitioner also learned of withheld chain-of-custody envelopes for the recording device. These are logs, held by the FBI evidence cage, and show precisely when an informant had a device.

The withheld chain of custody logs include Joanson's hand-made annotations and initials, crossing out Waltzer's possession of the recording device from "08/13 (2008) to 09/04 (2008)," rewritten as "08/08 (2008) to 08/30 (2008)," evincing that Waltzer was without recording equipment during the "test trade" from August 30 to September 4, 2008.

The logs also show that the equipment was experiencing "malfunction" in early September 2008, providing reasonable doubt for Petitioner's claims of missing, exculpating recordings. Joanson testified falsely about this at trial, claiming there was only "one instance" where the device failed, in August 2007, during a six-hour car ride when the batteries ran out. Tr. 2/2/2010, 105. Joanson knew otherwise.

[15] Petitioner addressed the Farber report in his post-hearing brief (ECF-556.1, 77-85). The government filed four pleading thereafter (ECF-588, 589, 599 and 609) and never disputed the connection.

This evidence was known to the prosecution, having disclosed it in another Waltzer case (*United States v. Montano*, Cr.No.13-082), but kept under an umbrella Protective Order.[16]

Petitioner's post-hearing brief argued the connection between the Farber report and the custody-envelopes. In brief, they dovetail to show conclusively that the prosecution team knew that Waltzer was without the recording device during the test-trade, because he had been stripped of the device for the Farber misconduct. ECF-556-1, 77-87.

The *DCO* did not address the arguments related to Farber or the chain-of-custody envelopes.

6. Waltzer Lied about Targets and Related Facts

During Waltzer's proffer of June 6, 2007 he provided extensive detail about his three class action frauds (Bank of America, Nasdaq, Cendant), the persons involved, and other alleged crimes (Exhibit L; government's hearing exhibit 3, at 12 of 16). Christian Penta was named as Waltzer's contact at the accounting firm, Hefflers, through which the false claims flowed. Waltzer provided multiple accusations against Penta, related to Penta's participation in the "Cendant" fraud. *Id.*, ¶¶ 88-90, 92, 97, 100, 109.

[16] Petitioner's appeal to intervene to have the protective order modified in the *Montano* case is pending at 19-1661 (3d Cir.).

Penta was sentenced by District Judge Savage on November 23, 2009, two months **prior** to Petitioner's trial. His sentencing transcript (excerpt attached as Exhibit E) shows that Penta asserted that he was not involved in the Cendant class action fraud. Tr. 11/23/2009, 84-85. Judge Savage asked the government for its position with respect to Penta's assertion.

Court: Was he playing with Waltzer on that one?

Lappen: Playing with Waltzer, no. He was not playing -- if you mean --do you mean cheating playing?

Court: Yes.

Lappen: No. I don't believe he was. *Id.*, 85-86.

Later, Judge Savage asked if Walter was the "mastermind," to which Lappen stated: "Waltzer is the mastermind in this offense." The Court asked: "Would you agree that Waltzer was the puppet master?" to which Lappen responded: "I would agree that Waltzer was the one who **originated** the scheme." *Id.*,136-137.

Lappen's position before Judge Savage cannot be reconciled with Waltzer's proffer to the Government of June 6, 2007, where he fabricated details of Penta's Cendant fraud involvement. Lappen's confirmation to Judge Savage that Penta was not culpable in Cendant, demonstrates Waltzer's lack of veracity, and shows that the government knew about it. Moreover, during this same proffer Waltzer named Petitioner to the government for the first time, in a single line in paragraph 126 of 127.

More important, at Petitioner's trial, Waltzer was allowed to testify falsely that the scheme was Penta's idea, and not Waltzer's. Tr. 1/28/2010, 85. It shows Waltzer altering facts to conform the narrative to whatever he required at the moment. This lie and the government's knowledge of it harmed Petitioner before the jury and prevented him from presenting to the jury a concrete example of Waltzer lying to further his interests.

Because Petitioner did not obtain the Penta sentencing transcript until after the Court ruled on his 2255, he filed a Rule 59(e) Motion, raising this new claim for the Government's withholding of the Penta and Deborah Rice sentencing transcripts. ECF-583-1 at 14, and the resulting lie. The government was silent on this claim in its Rule 59 response (ECF-598). The Court's Rule 59(e) denial (ECF-592) provided no analysis, simply stating "[Georgiou] has not added any newly available evidence that would be relevant for the Court to consider." The Court performed no cumulative assessment, did not recognize the nexus to the 2255 claims, and, ignored the pattern of withholding and false testimony.

7. Waltzer Lied about his Plea Agreement

Waltzer testified that his plea agreement and the hope that he would avoid a lengthy prison sentence, was dependent on his telling the truth at trial. Tr. 1/26/2010, 194; 225. The Government reinforced this condition through Joanson. Tr. 2/2/2010,

243-244. The prosecution relied upon this condition in its closing argument. Tr. 2/9/2010, 104.

As outlined above, Waltzer failed to keep this part of the plea agreement and lied on multiple occasions. As such, Waltzer knew that he had violated his plea agreement in multiple ways, which the prosecution team also knew or should have known but failed to correct before the jury. It also failed to correct its argument that lying would dissolve the agreement.

Thus, the government relied upon this condition in the agreement to bolster Waltzer's credibility when it knew or should have known of the multiple falsities described herein.

To deny 2255 relief, the Court adopted the Government's language *verbatim*, finding that Waltzer did not lie. *DCO*-137.

8. The Government Presented False Securities "Analysis"

The government's securities presentation centered on SEC Analyst Daniel Koster and his slide show (Trial Ex. 305; Exhibit M, attached). It contained false and misleading information. Koster used prejudicial illustrations to assert manipulative "match" trades, which did not reflect the actual order entry and execution times of the transactions. The government thus engineered purported securities violations, criminalizing otherwise legal conduct. Koster declared his charts a "manipulation analysis," Tr. 2/3/2010, 80, asserting they conclusively

demonstrated a "matched" trade scheme to manipulate the market, *Id.*, 5, 44, 69, 73, 115, 180. However, the prosecution team knew, or should have known that false information was used, but left it uncorrected before the jury. Petitioner raised this claim in his 2255 Motion and Reply as a false evidence and ineffectiveness claim (ECF-307, at 59, 62; exhibit 16; ECF-380 at 53-54). The Court did not permit a hearing on it.

The Court denied relief concluding, without analyzing the raw data presented, that "the evidence presented at trial soundly demonstrated that Georgiou orchestrated specific manipulative trades as part of a vast stock fraud conspiracy." *DCO*-68-74. The raw data was also never presented at trial.

A matched trade "is a securities purchase or sale entered with the knowledge that a reciprocal order of substantially the same amount would be entered at substantially the same time for substantially the same price. *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 205 n. 25…(1976)." *Rockies Fund, Inc. v. S.E.C.*, 428 F.3d 1088, 1093 (D.C. Cir. 2005). When the market functions legally there are still millions of daily "matches." Indeed, Koster conceded at the hearing, the mere fact that a buyer and seller are counter-parties, does not constitute manipulation, Tr. 11/16/2017, 86. Only **prearranged coordination** done with criminal intent to deceive the market, qualifies as a fraudulent "matched" trade. *Rockies Fund*, 428 at

1093, 1095 ("The simple fact that a party has conducted a matched or wash sale (or a series of them) does not establish manipulative intent of any kind.")).

Because the intent element is essential, it is improper for an analyst without first-hand knowledge, working only with disparate, meta-data records, to conclude a "manipulation" occurred. Yet, that is precisely what Koster testified to, insisting that the trades reflect "contra-parties" involved in "manipulative trades." Tr. 2/3/2010, 5. He "knew" these trades were "manipulative," because they were executed "opposite each other...at equivalent times and prices." *Id.*, 32, 44; 64 ("these were clearly manipulative [trades]"); 69 ("I did conclude there was a manipulation and I selected trades that were indicative of that manipulation."). He further indicated that Exhibit 305 was "descriptive of this manipulation." *Id.*, 84.

The Court instructed the jury that "another prohibited transaction is a match trade, which is an order to buy or sell securities that is entered with knowledge that a matching order of substantially the same size at substantially the same time and substantially at the same price on the opposite side of the transaction has been or will be entered by or for the same or different parties." Tr. 2/12/2010, 26. Although Koster confirmed this definition, Tr. 11/16/2017, 87, emphasizing the importance of order entry times, *id.*, 120, he knowingly left the order entry and execution times off his charts. Tr. 2/3/2010, 93.

The missing entry and execution times would have exculpated Petitioner or provided reasonable doubt. The best example is Exhibit 305 (Exhibit M), Slide 25. There, Koster asserts a match trade occurred on August 7, 2006, at 4 p.m., between Waltzer and Richard Brezzi for 100,000 shares of Neutron, with Petitioner calling Walter a half-hour before the trade, marking the close. He testified that "Brezzi [ ] was selling to this Waltzer account...executed at 4:00 on that day," accusing Petitioner of making "that call to Mr. Waltzer [ ] within a half hour of that trade." Tr. 2/3/2010, 34. The government featured this trade in its closing argument, accusing Petitioner of directing the trade. Tr. 2/9/2010, 122-123.

However, none of this was correct. The underlying empirical data (Exhibit N), shows that Waltzer entered his buy orders that morning, with the purchases made between 12:06 pm to 1:10 pm. Brezzi was not the seller. Brezzi does not even enter his order until 3:42 pm that day, ultimately selling at 4 pm, but not to Waltzer. Petitioner's call to Waltzer took place at 3:38 p.m., hours after Waltzer's purchases, rendering it impossible that Petitioner was controlling Walter on that trade.

This example illustrates that Koster manipulated the data to create a false portrayal of match trades, conflating settlement of "the same shares" with criminally intended matching, even when the parties did not match. In other words, if buyers and sellers transacted on the same day, but not with each other, all of which formed

part of the same market inventory for that day, Koster reached into that inventory and matched them on his own. These "matches" were then displayed on his charts, omitting the order entry and execution times, to obfuscate his manipulation. Koster's methods are illustrated in his "analysis" of still other calls occurring after the market closed.

Koster conceded that he did not show a time for purchases. But he parsed his words that the chart reflects "the same shares," Tr. 2/3/2010, 155, ignoring the absence of times for the trades. He did this throughout his testimony. *Id.*, 107 ("[i]t was the same stock, and this is reflecting that it was the same stock, not the time of the individual executions."); *id.* ("It was the same stock, and that is the stock that traded between the accounts. The executions can happen in various manners, but it was the same stock that traded between these accounts."); *Id.* ("The times do match. It is that--what you are describing is different executions occurring at different times that were facilitated by market makers which is how the market works."); *see also id.*, 108 ("this is an analysis of the flow of stock from account to account and not of the price of the executions"); 109, 114-115, 116. When pressed to confirm whether the times and prices matched, Koster responded, "I don't recall." *Id.*, 121.

Koster explicitly testified at the hearing that Slide 25 was a "matched trade," Tr. 11/16/2017, 86-87, but when challenged, resorted to methods observed at trial,

answering questions with questions, being non-responsive and evasive, and invoking need to see the underlying data. He even claimed to not recall his trial testimony that his analysis was actually a "flow of stock," *Id.*, 88. Petitioner moved to impeach Koster with the raw data, but was stopped by the Court, limiting questioning to whether Waltzer informing with the FBI in 2006 would have changed the securities analysis. This impeded the fact and truth-seeking function. *Id.*, 88-89, 123-125.[17]

B. *Brady* Violations

The Government withheld extensive exculpatory and impeaching evidence at trial, violating Petitioner's right to due process under *Brady v. Maryland*, 373 U.S. 83 (1963).

A *Brady* claim has three elements: 1) there must be evidence favorable to the accused, either because it is exculpatory, or because it is impeaching; 2) it must have been suppressed by the prosecutor, either willfully or inadvertently; and, 3) the evidence must be material [causing] prejudice. *Dennis v. Sec'y*, 834 F.3d 263, 284-285 (3d Cir. 2016) (*en banc*). Materiality, "does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in a defendant's acquittal." *Kyles v.* Whitely, 514 U.S. 419, 434 (1995). The materiality "standard is relatively lenient" in that the question is

[17] These facts also constitute a claim of ineffective assistance of counsel, *see* section (C)(3), below.

"whether in [the] absence [of disclosure, the defendant] received a fair trial, understood as a trial resulting in a verdict worthy of confidence," *U.S. v. Mitchell*, 365 F.3d 215, 254 (3d Cir. 2004) (*quoting Kyles*). In assessing Brady materiality, a court must determine how competent counsel would have made use of the suppressed materials. *Wilson v. Beard*, 589 F.3d 651, 664-665 (3d Cir. 2009).

In addressing Petitioner's various *Brady* claims the Court applied an unreasonably narrow view of materiality, made clearly erroneous findings, overlooked relevant facts, sustained serial objections which impeded the fact-finding process, and failed to address specific arguments altogether. The Court also used the wrong standard of review, asserting that to establish prejudice, the petitioner must show 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 U.S. v. Frady*, 456 U.S. 152, 170 (1982)); *DCO*-134. This is contrary to the materiality standard, described above.

1. Suppression of Waltzer's Year-Gap Interviews

The Court found that Waltzer's interviews with the FBI from 2006 and early 2007 were withheld from Petitioner, notwithstanding they were "in the possession of the prosecution team," thus, "satisfying the first prong of *Brady*." *DCO*-141. The only remaining question is whether the suppression was material.

The interviews (Exhibit A) reflect Waltzer informing the FBI about alleged national security concerns, export-controlled transactions with Iran, drug dealers, bank fraud, and persons and transactions involving securities fraud. Waltzer also mentioned his "tax problems," and testified that he told the FBI about money laundering. Tr.9/25/17, 139. As such, the Court's finding that the interviews were limited to matters of national security, was erroneous. *DCO*-101-103.

Pretrial, in response to specific discovery requests, the government explicitly misinformed the defense that Waltzer had no contacts with it between June 2006 to June 2007. ECF-208, Ex. E and M; ECF-380, 29-31; Exhibits F, G, H, I (showing other contacts). The Court's finding that the prosecutors did not intentionally suppress the evidence is irrelevant under *Brady*. *DCO*-99, 105, 111, 140.[18]

The interviews reveal that Waltzer deceived the FBI, failing to disclose he was a global fraudster who had stolen over $45 million from class-action settlements. Tr. 11/15/2017, 87, 108 (Agent Poulton confirming); Tr. 9/25/2017, 63 (Waltzer confirming). Waltzer's attorney Delinsky, testified that Waltzer was advised to tell the FBI the truth, Tr. 9/18/2017, 87, but conceded that Waltzer did

[18] Contrariwise, the failure to respond accurately or completely to specific defense requests is "seldom if ever excusable", *U.S. v. Agurs*, 427 U.S. 97, 106 (1976); *U.S. v. Bagley*, 473 U.S. 667, 682 (1985); *U.S. v. Wecht*, 2007 WL 2342845 (W.D. Pa. Aug 15, 2007) (where "defense makes a specific request and the government fails to disclose responsive evidence, non-disclosure will generally be deemed material."); *U.S. v. McCrane*, 547 F.2d 204 (3d Cir. 1976) (defendant was entitled to new trial where prosecution denied a specific defense request for material that could impeach key government witness).

not disclose his frauds. *Id.* 88. In fact, Waltzer actually presented himself as just a concerned citizen, who's business dealings were "legitimate", Exhibit A, 2, 8, 10, 11, characterizing his exposure as just potential "tax problems." *Id.*, 4; Tr.9/18/2017, 90, 121 (Delinsky); Tr. 11/15/2017, 78-79, 82, 92 (Poulton); Tr. 9/25/2017, 62, 139-140 (Waltzer).

When Waltzer named persons and transactions stemming from securities fraud (Rascals Comedy Clubs and Transportation Logistics), he never told the FBI that he was personally involved in those frauds, Exhibit A, 1, 8, 9; Tr. 9/25/2017, 151 (Waltzer confirming failure to disclose), *but see*, Tr. 1/26/2010, 200-204; 1/28/2010, 104-105; 1/29/2010, 69 (Waltzer confessing to those frauds at trial).

Waltzer's falsities to the FBI were deliberate. He testified at the 2255-hearing that his approach was to "portray" his "patriotic duty," while having an "ulterior motive." He viewed the contacts as "some sort of insurance policy because I had not yet decided whether I was going to come forward to tell the government about my class action frauds." *Id.* 66. Waltzer's only riposte to the accusation of deceiving the FBI was "they didn't ask." *Id.* 86. When confronted about his trial testimony, where he told the jury he was **always** truthful with the government, Waltzer carved out the 2006 FBI-interviews, asserting, "I came into the government in June 2007 because that's when I became an official cooperator." *Id.,* 86. This was laid bare when Waltzer later conceded he was "providing information to the government" in

2006. *Id.*, 202. Even the Court asked during the 2255-hearing about Waltzer "not being candid to the FBI" in 2006, Tr. 11/15/2017, 197, finding that "Waltzer did not tell the FBI about his criminal history." *DCO*-101.

Thus, the Court's ruling that Waltzer's "purpose [in the undisclosed interviews] was merely to provide information on potential ongoing national security matters," *Id.*, 101, without "any dishonesty," *Id.*, 104, and "no evidence" that Waltzer was untruthful with the FBI, *Id.*, 105, cannot be reconciled with the records and testimony. Waltzer's investments were made using proceeds of crime, constituting money laundering. That is not "legitimate," yet that is what he told the FBI Tr. 9/25/17, 82, 151. *U.S. v. Brumel-Alvarez*, 976 F.2d 1235 (9th Cir. 1992) (*Brady* violation where "evidence that [informant] lied during the investigation...would be relevant to his credibility and the jury was entitled to know it."); *U.S. v. Bagcho*, 151 F.Supp.3d 60 (D.D.C. Dec. 17, 2015) (relief granted for prosecutor's failure to disclose cooperator's past falsities); *U.S. v. Cuffie*, 80 F.3d 514, 518 (D.C. Cir. 1996) ("In light of the axiomatic importance of truthful testimony for the integrity of judicial proceedings, undisclosed evidence of a witness' prior perjury has a significant impact on the fairness of the trial."). The defense could have also argued an undisclosed benefit when Waltzer was not charged for lying to the FBI, providing him with motive to cover up the falsity, and incentive to testify in a manner favorable to the government.

The period of the suppressed interviews includes a large swathe of the charged conspiracy, two substantive securities fraud counts, all three predicate-act wire-fraud counts, securities trades and data from the SEC charts, and extensive witness testimony.

Competent counsel armed with the suppressed interviews could have argued that Waltzer was not just some eyewitness to a crime, whom the police sought to question, after the fact. Rather, they show that Waltzer extensively planned before proactively approaching the FBI, embedding into his approach concealment of his own frauds. He knew the IRS criminal division had begun an investigation, but he lied to those Agents to buy time, while his lawyers met with US Attorney Meehan. During this period Waltzer was actively canvassing and even paying others for information, Tr. 9/25/2017, 60-61, "surreptitiously" working for himself "undercover," *id.*, 96, intending for the FBI to pursue and prosecute the names he provided, *Id.*, 75. Even the Court recognized that during this period "he's trying to help himself. Nobody is in doubt of that." *Id.*, 129.

Petitioner's appellate counsel testified that the suppressed evidence was material. Tr. 9/25/2017, 11-13 (Splittgerber); at 13, 18 (explaining that the losses occurred at the time Waltzer was informing with the FBI, and that "willfulness" and "*mens rea*" defenses could have been raised at trial and sentencing, including that the "losses were attributable to Waltzer independently"); at 20 ("I definitely would

have raised [the suppression as additional *Brady* violations to the Third Circuit]); at 21 (Waltzer used a similar story of "tax problems" with other individuals, consistent with Petitioner's trial defense); at 29 ("Certainly it would have been argued that the suppression was favorable and material," and that many alleged trades "occurred within the time period of 2006-early 2007, during which Waltzer was interviewing with the FBI."); at 34 ("I thought the *Brady* arguments were very strong"); at 37-38 ("the viability of the [credibility] argument would have been strengthened" explaining how a great deal of information at trial was based on Waltzer's credibility.").

Trial counsel, Michael Pasano, would have utilized the suppressed materials in Petitioner's favor:

> Waltzer had to be established as unreliable, as a witness that the jury would not accept and should, in fact, disregard, and possibly disregard the entire government case. And because that key point was the lynchpin to that road to victory, everything I could get on Waltzer I wanted.
>
> The alleged conspiracy – with Kevin Waltzer was from June of 2004 to June 2007. [If there were Waltzer] interviews with the FBI prior to June 2007, [it] would have been important. We believed Waltzer was lying to the government before. We knew he had lied to the government the first time they approached him and we believed that probably he continued to lie to them. Anything I could have that could help me establish that he was a liar who, as we argued to the jury, was all about Waltzer and nobody else, and who would say whatever it took that was in his best interest, and who had the ability to be such a con man that he could not only convince victims, you, but government agents who should arguably be more savvy to his lies, all of that would have been

> consistent with the defense of your good faith and you as dupe or mark to Waltzer, and not you as conspirator.
>
> The fact that he did not mention you in interviews [to the FBI in 2006] would have been important…to suggest that his stories about you were a later invention", and all for "impeaching Waltzer as an incredible witness that the jury should reject.
>
> It was not the government's trial presentation that Waltzer was conspiring and cooperating at the same time …They presented Waltzer as a truth teller.
>
> If I had the information available to credibly suggest to the jury that this man was in open contact and discussions with the government while at the same time involved in these transactions, I'd be arguing to the jury that's another reason why you can't believe him, because he's lying to the government, hiding his own misconduct, and dressing it up as something else and blaming you for it.
>
> Had the suppressed evidence been disclosed about Waltzer's 2006 contacts with the FBI, it would have afforded a global challenge to the SEC charts.
>
> [Regarding alleged threats during November 2006] Something I had on my mind if, in fact, it turns out that on our about the same day as [these threats] allegedly occurred he's talking to government agents, that's a fact I could have used to make better the cross-examination that I performed.
>
> Our argument was stripped of its veneer [by the suppression]. It always came back to Waltzer. If the jury believed that, discredited Waltzer, believed George, we could win the case.

Tr. 9/19/2017, 17-19, 44-45, 61-62, 63-64, 68, 70, 92, 96.

Pasano's testimony cannot be reconciled with the Court's finding that Petitioner failed to establish that the defense could have used this information in a helpful manner. *DCO*, 147. This finding ignores the law: "Alterations in defense

preparation and cross-examination are precisely the types of qualities that ma(k)e evidence material under *Brady*." *Dennis*, 834 F.3d at 311; *U.S. v. Bagley*, 473 U.S. 677, 683 (1985) (Withheld evidence is materials if it affects "preparation or presentation of the defendant's case," or the "course the defense could have pursued"); *Wilson*, 589 F.3d at 664 ("The question under *Brady* is whether disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable.").

The Court recognized that disclosure "would have allowed Georgiou to question Waltzer further about his mental state in 2006," *DCO*-140, but then failed to analyze the multiple ways defense counsel could have impeached Waltzer or created reasonable doubt. As trial counsel testified, "[i]f I had these [2006] reports…at a minimum, I could have established [that Waltzer] lied to the jury in denying these other contacts [with the government between June 2006 to June 2007]." 9/19/17, 89. A Court seeking to determine probable impact of the [suppression] must form some idea about how effectively it could have been used in cross examination." *U.S. v. Bowie*, 198 F.3d 905, 911 (D.C. Cir. 1999); *Schledwitz v. U.S.*, 169 F.3d 1003, 1016-17 (6th Cir. 1999) (*Brady* violation where suppression affected trial strategy, rejecting lower court's finding of overwhelming evidence where defendant not given opportunity to impeach essential witness and therefore could have invalidated the "intent" element of the government's proof); *U.S. v. Lee*,

573 F.3d 155 (3d Cir. 2009) (reversing for suppression affecting trial strategy).

At trial, the Court correctly instructed the jury that "Kevin Waltzer became a cooperating witness in June 2007. He could not be a member of the conspiracy after that date. That is the law with regard to conspiracy." Tr. 2/12/2010, 23. Disclosure would have permitted the defense to seek an earlier demarcation line of June 2006 for the conspiracy jury instruction, not June 2007; confirmed by trial counsel at the hearing. Tr. 9/19/2017, 71. The *DCO* offered a non-responsive counter that a "good faith" instruction was given at trial, and that the jury was told to consider Waltzer's testimony with "great care and caution." *DCO*-172. This evades the issue. While the Court acknowledged its "unity of purpose" instruction, it left out the June 2007 date. *Id.* The date is the entire point. This Court's precedent holds that "a defendant is entitled to a theory of defense instruction," which the District Court "is [b]ound to give…[if] there was any foundation in the evidence." *U.S. v. Friedman*, 658 F.3d 342 352-53 (3d Cir. 2011); *U.S. v. Blair*, 456 F.2d 514, 520 (3d Cir. 1972); *Mathews v. U.S.*, 485 U.S. 58, 63 (1988).

The *DCO* was also silent, failing to address Petitioner's argument that pursuant to a general verdict, the government cannot show which overt act the jury unanimously agreed to for each charged count, and whether that overt act would have been tainted, had it known Waltzer was informing with the FBI at the time. This was material in light of the Court's instruction to the jury that "you must

unanimously agree on the overt act that was committed." Tr.2/12/2010, 21-22.

The suppression was particularly material to the three wire-fraud-counts (6, 7 and 8) because they were each based on single, predicate-act-emails transmitted while Waltzer was informing with the FBI. Waltzer testified at trial that those events and the predicate-act-emails were part of the scheme, Tr. 1/27/2010, 88-100; Tr. 1/29/2010, 7, but the jury was deprived of the evidence supporting that all essential elements for wire fraud may not have been proven beyond a reasonable doubt. Trial counsel testified at the 2255-hearing that, in addition to arguments he could have made at trial, but for the suppression, he could have also moved pretrial to dismiss the wire-fraud counts entirely, requiring the government to drop those charges, or change the underlying predicate acts. Tr. 9/19/17, 72-74. The Court's denial failed to address these wire-fraud count arguments.

Disclosure stood to significantly bolster Petitioner's good faith defense and testimony. *See* Tr. 2/09/2010, 151-152, 167-168, 183-185 (defense summation); Tr. 2/01/2010, 195-196 (Dunkley from Bahamian brokerage-firm confirming Petitioner offered real estate collateral for loans); Tr. 2/05/2010, 23 (Petitioner testifying that global investment banks Rothschilds and JMS independently valued Avicena much higher than market price; Def.Tr.Ex, 369, 523); (Def.Tr.Ex. 881, Georgiou and his associates investing $4,800,000 in Neutron to buy restricted common shares at prevailing market prices to fund Neutron).

Alternatively, Petitioner argued he would not have needed to testify, but for the suppression and Waltzer's uncorrected false testimony.[19] The prosecution stated at the hearing that, "[i]t's Mr. Georgiou who makes the decision to testify…so only Mr. Georgiou knows whether he would have decided to testify if all that information was there…" Tr. 9/19/17, 121. Yet, the *DCO* adopted the government's closing submission *verbatim*, that it "is factually incredible and legally unavailing" that Petitioner would not have testified. *DCO*-147, n.74. This Court has held that a detailed fact-finding analysis is required to support such a conclusion. *U.S. v. Pelullo*, 173 F.3d 131 (3d Cir. 1999) (same district judge).

Notably, Waltzer never named Petitioner to the FBI in 2006. Such prior inconsistent statements are classic impeachment evidence found to be material. *Smith v. Cain*, 565 U.S. 73 (2012). Statements by a knowledgeable witness that do not implicate a defendant may also qualify as "negative" exculpatory evidence, *U.S. v. Salemo*, LEXIS 141655 (M.D. Pa. Dec. 9, 2011) (*citing Jones v. Jago*, 575 F. 2d 1164, 1168 (6th Cir. 1978) (*Brady* violation for failure to disclose eyewitness statement that made no reference to presence of the defendant)); *U.S. v. Triumph Capital*, 544 F.3d 149, 163 (2d Cir. 2008) (where witness' initial approach to the government did not inculpate the defendant, defense could have argued that once

[19] Petitioner argued immediately post-trial, and on direct appeal, when suppression of Waltzer's psychiatric history and medications were first revealed, that he would not have testified. ECF-217, 22-23; Case No.10-4774, Brief dated, 11/05/2013, 34.

witness began cooperating he fabricated a new, inculpatory version to enhance the value of his expected reward).

The Court found it was "logical" for Waltzer to not name Petitioner because they were still conspiring. *DCO*-103, 107. This conclusion does not explain why Waltzer reported other securities frauds, and, that Waltzer had sold all of his Neutron stock (Section (A)(4) above), obtained most of the $6 million, and, made no Avicena purchases between June to December 2006 (Gov.Tr.Ex. 303). It was for the jury to decide whether failing to name Petitioner supported reasonable doubt, after hearing trial counsel's arguments, including, that Waltzer introduced Petitioner as a "later invention." Tr. 9/19/2017, 61-62.

The suppression was also material because it foreclosed a valid attack on the conspiracy as a matter of law. The Court agreed with Petitioner that a conspiracy cannot exist between a defendant and government informant. *DCO*-143. *Sears v. U.S.*, 343 F.2d 139, 142 (5th Cir. 1965). However, the Court unreasonably found that Waltzer's *mens rea* as an informant was not implicated, because the FBI considered him "simply a citizen," *DCO*-101, 102, parsing a distinction between "simply providing information to the FBI" and "active cooperation." *Id.,* 107, 144. This ignored that the FBI's treatment of Waltzer as just a "citizen" was itself based on Waltzer's false portrayal of his criminality, while even the government conceded the sessions constituted "limited cooperation." ECF-322, 50. Indeed, Delinsky

confirmed at the 2255 hearing that Walter was "cooperating" with the FBI in 2006. Tr. 9/18/2017, 98, 103, 109, 110

Waltzer's mental state as an informant (even without a signed cooperation agreement pre-June 2007) alters the *mens rea* analysis, with the suppression depriving the defense of evidence by which to challenge the relevant elements of conspiracy and fraud. *U.S. v. Garner*, 915 F.3d 167 (3d Cir. 2019) ("[M]erely conspiring with Saber, a government informant, would not make Garner criminally liable. This is the rule in other Circuits [ ] and we adopt it as well."). Even Lappen conceded at the hearing, testifying, "it was not our trial presentation" that Waltzer and Petitioner were conspiring at the same time as Waltzer was informing with the FBI. Tr. 9/26/2017, 135.

Finally, the government's closing argument was material in light of the suppression. Tr. 2/9/2010, 202 ("Mr. Pasano came up here from Florida, had [Waltzer] on the stand, [and] was able to ask him any question that he wanted…"); at 203 ("You have seen everything that we had in this case was turned over to the defense… if there was something different in the case, something the government failed to put to you, you would have saw [sic] it…"). This was materially false.

2. Suppression of Walter's Interviews After He Proffered with the USAO

The government also withheld portions of Waltzer's interviews from June 6, 2007 and July 27, 2007, and the entire interview dated June 7, 2007, together,

Exhibit B, comprising government's hearing exhibits 7, 8, and 9, during the period Waltzer was proffering with the USAO. The 2255 proceedings also revealed other undisclosed and undocumented meetings between Waltzer and the government.

On February 15, 2007, the Department of Commerce (DOC) informed Waltzer that the transactions he was discussing with the FBI were illegal, and that he should cease all pursuit or be subject to U.S. laws, Exhibit A, page 12. Waltzer testified at the hearing that his efforts between 2006 and early 2007 with the government "didn't lead anywhere," Tr. 9/25/2017, 106, and that the orders he received from the DOC created a "complete break" *Id.*, 159-160. Waltzer testified at trial that once he learned of subpoenas sent to his banks in March 2007, he "knew the government was hot on [his] trial." Tr. 1/26/2010, 213; Tr. 9/25/2017, 160.

Nevertheless, Waltzer spent the ensuing months traveling to the Middle East and Paris pursuing purported national security information. Upon his arrival at the USAO on June 6, 2007, Waltzer presented "new anti-terror information." Tr. 9/25/2017, 161 (Waltzer explaining that he "didn't want to cloud [his] new information with anything that didn't [previously] work out"). All of this was suppressed, including, that Waltzer supposedly learned and reported:

- $2.7 billion in stolen currency from the Iraq Reconstruction Fund "being stored in Cyprus" to be "transferred to a Sheik's bank account in the U.A.E.";
- Iranian involvement in the purchase and sale of nuclear materials;
- weapons deals with Libya;
- arms dealers on international watch lists, paying off United Nations officials;

- forty metric tons of gold without serial numbers; and,
- persons of intrigue with documentary proof of these activities, who need U.S. protection because they are "not willing to die" for the information,

Id. 173-176; and Exhibit B.

Waltzer testified that the FBI asked him to take a polygraph test, Tr. 9/25/2010, 110, and that he signed a "cooperation agreement" that he "wouldn't lie." *Id.*, 177. However, the government maintains these do not exist. ECF-473, at 4-5. The hearing revealed that Cohen "directly" instructed Waltzer to disengage from pursuing terrorist information. *Id.*179-180.

Lappen testified that he and Cohen "laughed about" Waltzer's information: "Derek said to Waltzer something like why would people in the Middle East be giving terrorist information to a Jew in Yardley?" Tr. 9/26/17, 104.

The AUSAs knew Waltzer had regaled them with incredible claims stemming from his Middle East travels immediately preceding his June 2007 proffer, yet, they allowed Waltzer to testify falsely during cross-examination at trial that this travel was not related to his cooperation. Tr. 1/29/2010, 87. In addition to violating *Brady*, this is another instance of a pattern of false testimony that went uncorrected, deserving of a *Napue* analsyis, but which the Court failed to rule on.

The prosecution team obviously did not want its star witness' fantastical stories – about which even the Court expressed skepticism, *see* Tr.11/15/17, 137 (Waltzer "did a lot of big talking, and apparently, they [the government] weren't

listening.") – before the jury (whether true or not). Waltzer's motive for lying about these episodes was the fear that his "new anti-terror" information would lead back to his 2006 FBI interviews where he deceived the agents. Moreover, it was on cross-examination just the day prior that Waltzer testified he had no contacts with the government from June 2006 to June 2007, Tr. 1/28/2010, 144, so if he revealed that his trips to the Middle East were part of his cooperation, he would be caught in his web of lies. So, he lied again, and, once again, the false testimony went uncorrected before the jury.

This information could have been used to impeach, demonstrating Waltzer's proclivity to fabricate in his own interest. *Breakiron v. Horn*, 642 F.3d 126, 131-132 (3d Cir. 2011). Such falsity would have dovetailed with Waltzer's suppressed psychiatric history and medications – which were central to Petitioner's direct appeal *Brady* claim. This Court found that the defense was not diligent for failing to uncover mental health issues from Waltzer's sealed plea colloquy and bail report (now undercut by *Dennis v. Sec'y*, 834 F.3d 263 (3d Cir.2016) (*en banc*)), and also, that the information was not material. However, the Panel was not aware of Waltzer's outlandish stories told to the government. One can picture the jurors' eye-rolling once competent defense counsel presented Waltzer's fantastical cooperation with his history of mental health impairments.

The Court found that the three withheld interviews and other undocumented meetings were not discoverable,[20] describing them as "mostly related to currency stolen from Iraq," *DCO*, 113, and were not material because "the prosecutors and agents did not conclude Waltzer was lying." *Id.*, 143, n.73. That is not the test. The test is how the defense could have used the evidence. The theory of defense was that "Waltzer was an incredible witness whom the jury should reject," Tr. 9/19/2017, 61-62. Petitioner could have argued that Waltzer's stories were truly "incredible" and such argument would have gone a long way towards showing that Waltzer could and did fabricate.

The Court also refused to revisit suppression of Waltzer's psychiatric records because they were previously litigated, but this was without any consideration to the nexus of the withheld interviews, nor was a cumulative materiality analysis undertaken that included these records. *DCO*-58-59.

3. The Withheld Penta Information

As shown in Section A(6) above, the government told District Judge Savage that Penta was not involved in the Cendant fraud. Because Waltzer specifically contradicted that representation in his proffer statements to the government, this was

[20] The Court also found that the interviews went undisclosed because they were "classified", and because Joanson (member of the prosecution team), "did not find the Poulton reports when he was searching the FBI databases." *DCO*-165. Leaving aside that such reasoning fails under the law, the finding is erroneous, for Joanson was present for all three withheld interviews. *See* Exhibit B.

a glaring inconsistency. Because this inconsistency was fertile ground to impeach Waltzer, and dove-tailed perfectly with Petitioner's trial defense that sought to show that Waltzer was not trustworthy, the government was obliged to alert of this impeachment material, before trial. The government could not leave it to Petitioner to ferret out this powerful impeachment evidence. *Banks v. Dretke*, 540 U.S. 668, 696 (2004) ("A rule thus declaring "prosecutor may hide, defendant must seek," is not tenable in a system constitutionally bound to accord defendants due process.").

Because Petitioner did not obtain the Penta sentencing transcript until after the Court ruled on his 2255, he filed a Rule 59(e) Motion, raising this new *Brady* claim for the Government's withholding of the Penta and Deborah Rice sentencing transcripts. ECF-583-1, 18.

The Court's Rule 59(e) denial (ECF-592) provided no analysis, simply stating "[Georgiou] has not added any newly available evidence that would be relevant for the Court to consider." The Court performed no cumulative assessment, did not recognize the nexus to the 2255 claims, and, ignored the pattern of withholding and false testimony.

4. The Withheld Farber Report

Just before the September 3, 2008 test trade, Lappen and Joanson interviewed Attorney Andrew Farber. As shown above (section (A)(5) and Exhibit C), Farber told them that Waltzer tried to induce him to engage in a fraud. This was

unquestionably impeachment evidence as it related to Petitioner's trial defense. Indeed, Waltzer did to Farber, just what Petitioner claimed he did to him.

The Farber Report was material as it would have permitted Petitioner to impugn the integrity of the investigation and undermine the "process by which the [prosecution team] gathered evidence and assembled the case." *Kyles*, 514 U.S. at 449, n.19.

It would have also permitted Petitioner to demonstrate the real reason that the test-trade was not recorded – Waltzer did not have the recording device because of his Farber-related misconduct. Again, this would have been another prong in the attack on Waltzer's methods and lack of veracity.

5. The Government Withheld Evidence Demonstrating that Waltzer was Without the Recording Equipment and Failed to Record Calls in Other Cases

The government withheld evidence that Waltzer was either not recording calls, and or – because of his misconduct – could not record calls, during various times of the undercover operation. This evidence was material.

The withheld evidence in this area covers three categories.

i. Chain-of-Custody 302s

The government produced a small number of chain-of-custody 302s ("COC-302s") reflecting delivery times for Waltzer's FBI-issued recording device. However, the disclosures were limited to reports in which Petitioner was explicitly

named. The 2255 proceedings revealed there were other COC-302s the government did not produce, which Petitioner uncovered. Together, the COC-302s show Waltzer without recording equipment during the following days in 2007: June 16-26; June 28-July 4; July 6-8; July 12-16; July 28-Aug 2; Aug 8-9, 30; October 16-22; and in 2008: January 9-13; March 1-2; April 18-May 21;[21] June 8-18; July 9-10; August 30, at 3:15 p.m. to September 4, at 9:15 am. *See* ECF-511 for the COC-302s; and ECF-528 for the Court's refusal to add them to Petitioner's record.

ii. The Chain of Custody Logs

As discussed above at section (A)(5), Petitioner learned of the logs after the hearing testimony closed, but in time to brief the contents for the Court, including, that the logs contained Joanson's amendments and initials to FBI evidence cage envelopes, demonstrating Waltzer was without recording equipment from August 29, 2008 to September 4, 2008, and that the equipment was experiencing a "malfunction." ECF-556-1, at 85-87.

iii. The James Hall Records

James Hall was Waltzer's insurance fraud underling. On November 23, 2009 (60 days prior to Petitioner's trial) Hall's attorney submitted evidence in mitigation

[21] The government refuses to produce COC 302s for April 18, 2008 to May 21, 2008, making it unclear whether Waltzer had equipment during those days.

for Hall's sentencing. This evidence included records of Waltzer failing to record calls and manipulating evidence while undercover. ECF-307, exhibits 7, 8.

* * *

To deny 2255 relief, the District Court refused to add the COC 302s to the record (ECF-519), credited Lappen's "vague recollection" that the defense knew about the Hall sentencing records, *DCO*-54, and failed to address the logs entirely.

The logs corroborate the defense case, offer reasonable doubt of missing recordings, support a showing of Waltzer's misconduct, and, that the prosecution was always aware Waltzer was without recording equipment during the test trade, yet, allowed the witnesses to testify falsely. On one hand, the Court adopted the government's view that the recordings and the events of the undercover operation provide "overwhelming evidence" to defeat all of Georgiou's claims. On the other hand, when it is demonstrated the government withheld evidence, and allowed false testimony that goes to the heart of the recordings and integrity of the sting, it is deemed, "entirely insignificant." *DCO*-44.

Trial counsel sought to connect missing recordings with missing equipment, through "Charlie." Tr. 1/26/2010, 110. Having withheld the Farber report and the COC logs, the government then allowed Waltzer and Joanson to testify falsely that Waltzer possessed recording equipment at all times, including during the test trade.

The Court erred in adopting the government's view that Georgiou could have

impeached Waltzer using the COC 302s, *DCO*-45. However, those reports were ambiguous, as confirmed by Cohen at the hearing. Tr. 9/18/2017, 233. The government cannot have its witnesses testify falsely, affirmatively misrepresent to the Court that relevant evidence (the ”logs”) does not exist (ECF-417, 3, 6) and then shift the burden to the defense to pierce that falsity by pointing to other unclear and incomplete reports. It is the prosecution's obligation to correct false testimony. The "logs" were withheld from the hearing, pursuant to which members of the prosecution team falsely denied knowledge whether Waltzer possessed recording equipment during the "test trade."

The Court found that this Court did not address the Hall records on direct appeal, *DCO*-51, but denied this claim because Lappen had a "vague recollection" that defense counsel knew about the evidence. Tr. 9/26/2017, 96-102. That conclusion was unsupported. The Court also erroneously credited the government's representation that there was no evidence in the case that Waltzer tried to inculpate any innocent persons, *DCO*-54-55. This is belied by the Farber Report. Finally, the Court found that Waltzer had the ability to not record if he so chose, and, because Waltzer had an impeachable past, impeachment with the withheld records would not have mattered. *Id.* 56. This holding was contrary to the government's trial presentation that Waltzer was a **reformed** truth-teller. Waltzer was not impeached at trial, because the government withheld evidence, and he was therefore able to

testify falsely. While he could choose to not record, he would risk being caught. That risk is eliminated where the government knows he is without equipment, giving Waltzer the perfect opportunity to manipulate events, as presented in the Hall records. And again, the withheld "logs" demonstrate Waltzer was without equipment, lied about it, and the government knew it.

The combined withheld evidence would have enabled Petitioner to attack the integrity of the investigation, while undermining the "process by which the [prosecution team] gathered evidence and assembled the case." *Kyles*, 514 U.S. at 449, n.19.

C. Three Instances of Ineffective Assistance of Counsel

1. The Government's SEC Charts Were Pedagogical "Illustrations" and Not "Evidence"; Counsel Ineffectively Failed to Object to Their Admission

The government anchored its case-in-chief to a 37-page slide-show (Exhibit M) alleging "wash sales," "match trades," and "marking-the-close" transactions that were introduced through SEC analyst Daniel Koster.

Rather than a proper summary of voluminous records, the charts were a synthesis of Koster's opinions regarding manipulation, formed from his selection and organization of data designed to align with the government's theory of guilt. Included were Koster's commentary, opinions and assumptions about the evidence, and even his interpretation of undercover recordings. Petitioner was

denied his Sixth Amendment right to effective counsel ("IAC") when this exhibit was erroneously submitted to the jury as "evidence" under Rule 1006, without objection. Such testimonial aids also require cautionary instructions under that they are "not evidence." This instruction was not given, and counsel ineffectively failed to object. Tr. 2/12/2010, 13 (Court's charge referring to the chart as "evidence").

Petitioner argued on direct appeal that the Court failed its gate-keeping function when instructing the jury to receive the charts as "evidence." *Petitioner's Brief* at 63-65.[22] The government acknowledged that the charts were "pedagogical devices" and not evidence, but that the claim was "waived" because defense counsel failed to object under Fed.R.Evid. 1006. *Government's Brief* at 55.

This Court noted the waiver argument, cited the scope of Rule 1006, but did not rule on the merits. *U.S. v. Georgiou*, 777 F.3d 125, 142 (3d Cir. 2015). Petitioner thus raised this claim of ineffective assistance of counsel (IAC) in his 2255 petition, ECF-307, 61-65, for which an evidentiary hearing was **not** granted. The government's 2255 closing brief properly characterized the charts as "illustrations." ECF-557, 125-126. The Court addressed and denied the claim at *DCO*-74-79. When it was raised in Petitioner's Rule 59(e) Motion, ECF-583-2, at 16-24 and supplement, ECF-591, the claim was denied without analysis. ECF-592.

[22] Petitioner's and the government's briefs are available on PACER for case 10-4774.

The Court erred when finding, without a hearing, that it was "reasonable professional judgment" for defense counsel to agree to submission of the charts to the jury as "evidence." *DCO*-75. Rule 1006 allows summarization of admissible, voluminous records in the form of a chart, summary, or calculation primarily to avoid introducing all of the documents." *U.S. v. Pelullo*, 964 F.2d 193, 204 (3d Cir. 1992); *U.S. v. Hemphill*, 514 F.3d 1350, 1359 (D.C. Cir. 2008). Such summaries must be "accurate and non-prejudicial: *Gomez v. Great Lakes Steel*, 803 F.2d 250, 257 (6th Cir. 1986). They cannot tell the jury "what inferences to draw." *U.S. v. Grinage*, 390 F.3d 746, 750, (2d Cir. 2004).

On the other hand, "[c]ompilations or charts which are used only to summarize or organize testimony or documents, which have themselves been admitted into evidence, are distinguished from those used as evidence, pursuant to Rule 1006. Where the summaries are "'pedagogical devices' more akin to argument than evidence since [they] organize the jury's examination of testimony and documents already admitted in evidence," they do not come within Rule 1006. *U.S. v. Paulino*, 935 F. 2d 739, 753 (6th Cir. 1991); *U.S. v. Wood*, 943 F.2d 1048, 1053-54 (9th Cir. 1991). Such pedagogical devices, unlike Rule 1006 summaries, "are not evidence, but only a party's organization of evidence already presented." *U.S. v. Pinto*, 850 2d. 927, 935 (2d Cir. 1988).

When using such pedagogical devices, a court must instruct the jury that they are not evidence. *Wood*, 943 F.2d at 1053. Even with "a limiting instruction …[the] 'better practice' is to allow the exhibit to be used only as a demonstrative adjunct to testimony, and not to allow the chart to be formally admitted into and evidence and thus go to the jury room." *U.S. v. Gazie*, 786 F.2d 1166 (Table), 1986 U.S. App. LEXIS 23026, *23 (6th Cir. Feb 26, 1986). Indeed, "great care must be taken to ensure that [] proposed summar[ies] contain no annotation or suggestion, even inferential, that may be considered argumentative." *Anderson v. Otis Elevator*, 2012 U.S. Dist. LEXIS 161816 (E.D. Mich. Nov 13, 2012); *U.S. v. Bray*, 139 F.3d 1104, 1111 (6th Cir. 1998) (discussing differences between Rules 1006 and 611, and that pedagogical devices are inadmissible).

Preceding presentation of Koster's charts, the government elicited testimony that "wash sales," "match trades," and "marking-the-close" transactions, constitute illegal manipulation. Tr. 1/26/2010, 143, 175. Koster then testified that he performs "market manipulation[] type of investigations…looking for…wash sales…match trades… marking-the-close, prearranged trades," Tr. 2/02/2010, 248, which, in this case, resulted in identifying "a number of different manipulative techniques," *id.*, 249, creating a "false appearance," *id.*, 250. Then Koster began discussion of his chart. *Id.* 250-251.

Koster's testimony confirmed that the charts were not a "primary evidence-summary pursuant to Rule 1006." *DCO*-75. Koster conceded that the charts were "examples" of the activity he analyzed. Tr. 2/03/2010, 3-4, claiming he could discern "intent" as to whether the trades reflected economic sense. *Id.*, 32. His direct examination ended by telling the jury all overt acts in the Indictment were "correct." *Id.*, 55. On cross, Koster explained that he "**selected** [] trades as examples that were indicative of the trading that [he] analyzed," *id.*, 69, based on "**judgments** that [he] made in analyzing" data, making decisions to exclude accounts, transactions, and data, that did not fit his analysis. *Id*. 71-72, 79, 81-82.

Thus, the charts were clearly a selection of individual trades suffused with argument, opinion and conclusions, not summaries of voluminous data. Therefore, the Court's conclusion the charts "reflected only objective facts, and did not include any commentary from Koster," *DCO*-77 was wildly off.

Defense counsel argued in summation that the charts were "selective" and "incomplete," Tr. 2/09/2010, 159; "pretty charts that tell you absolutely nothing about what George Georgiou knew, what he thought or why he acted." *Id.*160. Counsel also testified at the hearing that, "the attack on Koster was multiple. Two primary features of it were neither the times of the buys and the sells, or the prices of the buys and sells matched, that he had compressed events, assumed connections, blamed [Georgiou] for other people`s activities," Tr. 9/19/2017, 69.

The Court credited this testimony in denying the IAC claim, *DCO*-78, but this is illogical. Counsel could not have spent the entire examination challenging accuracy of the charts, arguing on summation they were cherry-picked and incomplete, only to have agreed that the charts could be submitted to the jury under Rule 1006 as "evidence," which requires the summaries be accurate and non-prejudicial. The charts were foundational to the government`s case, propounded over and over in summation, Tr. 2/09/2010, 108, 112, 113, 114, 119, 120, 121, 122, 137. The final blow was delivered during its rebuttal-closing, telling the jury, "The Judge is going to tell you those charts **in evidence are proof**. And what do they show? They show-- and by the way, **undisputed proof**. They want to talk about what does it mean and what does it not mean, but the **undisputed proof** is that Dan Koster spent months tracking all of these trades, and those were the actual shares being sold from the Vince Derosa accounts to Kevin Waltzer to Caledonia and so forth." Tr. 2/09/2010, 204.

"The Court must reverse 'if the instruction was capable of confusing and thereby misleading the jury.'" *U.S. v. Shaw*, 891 F.3d 441, 450 (3d Cir. 2018) (*quoting U.S. v. Zehrbach*, 47 F.3d 1252, 1264 (3d Cir. 1995) (*en banc*)).

Alternatively, whether counsel exercised reasonable professional judgment, as the Court ruled, is a question of fact that requires an evidentiary hearing before reaching that conclusion. A court has discretion to conduct a hearing in 2255

proceedings, however, such discretion is constrained. *United States v. Booth*, 432 F.3d 542, 545 (3d Cir. 2005). Initially, "the court must accept the truth of the movant's factual allegations unless they are clearly frivolous on the basis of the existing record." *Virgin Islands v. Forte,* 865 F.2d 59, 62 (3d Cir. 1989). Application of this standard establishes a "reasonably low threshold for habeas petitioners to meet." *United States v. McCoy*, 410 124, 134 (3d Cir. 2005). *Booth*, 432 F,3d at 545 (*quoting McCoy*); *Cf., U.S. v. Tolliver,* 800 F.3d 138, 139 (3d Cir. 2015) ("Because material facts are in dispute surrounding Tolliver's ineffective assistance of counsel ("IAC") allegations based on her trial counsel's failure to investigate, the District Court abused its discretion in granting the §2255 motion without first holding an evidentiary hearing."). Here, the Court's conclusion that trial counsel exercised reasonable judgment when he failed to object is the quintessential instance where a hearing must be held on the question.

2. Trial Counsel Failed to Use the SEC Neutron Trading Data to Impeach Waltzer's False Testimony About "Soaking up the Float"

Defense counsel failed to use the SEC summary data of Waltzer's purchases and sales of Neutron shares (Gov.Tr.Ex.302, pg.31-35, Exhibit J), to impeach Waltzer's false testimony when interpreting the Neutron emails and events as to "soaking up the float." The arguments made at Section (A)(4), above, including

the Court's refusal to hold a hearing on that claim, apply to this ineffectiveness claim.

The Court's denial missed the mark, failing to address the raw data to assess the claim. DCO-75, n.51. In fact, the data and exhibit, was never even submitted to the jury. The alleged "Neutron manipulation" was foundational to the government`s case, reflecting the largest portion of Waltzer's testimony, for which Petitioner received 20 of his 25-year sentence. [23]

3. Trial Counsel Failed to Use the SEC Raw Data to Impeach SEC Analyst Koster's Erroneous "Match Trade" Analysis

Defense counsel failed to use the underlying securities data (Exhibit N) to impeach SEC analyst Koster on his erroneous "match" trades "analysis." The arguments made above at Section (A)(8), including the Court's refusal to hold a hearing on that claim, apply to this ineffectiveness claim. The Court failed to address the raw data, thereby, never actually addressing the claim. DCO-68.

Cross-examination of Koster regarding his charts was devoted to accusing him of inaccuracy and inconsistencies. Tr. 2/03/2010, *passim*, e.g. 58, 76, 82. However, counsel failed to use the raw data to demonstrate the flaws and falsity of the analysis. *e.g.* 100, 103, 116, 117, 128, 129, 133. This afforded Koster over

[23] The evidence (Exhibit J) is "new" as it relates to Petitioner's claim of actual innocence, ECF-556-1, 112. *Reeves v. Fayette SCI*, 897 F.3d 154 (3d Cir. July 23, 2018).

sixty opportunities to say, "I don't recall," or "I don't know," to his own "analysis.". Once Koster realized counsel was unprepared, he defied counsel to question using the records: "I would have to see that data again in order to determine...," *Id.*, 77; "if you show me a complete set of records then I might be able to tell you," *Id.,* 135; "I would have to see the actual records to make that determination," *Id.*, 136; "I would have to see the supporting documentation in order to come to that conclusion," *Id.*, 169; "I do not have those records in front of me right now," *Id.* 174.

The prosecutor seized the opportunity to show the jury counsel was unprepared: "[Koster] said he didn't recall and Mr. Pasano hasn't shown him the records," *Id.*103; "Objection, Your Honor, counsel has continued along the same line of questions, asking about records that he doesn't put in front of the witness, the witness says he doesn't know and he continued to ask him questions. If he wants to put the record in front of him, fine, if not then we just have questions with I don`t knows," *Id.*, 134-135; "Objection, again, the witness has testified that he didn't see the records and counsel continues to ask as thought the records were somehow in front of him or these were facts." *Id.* 152.

No defense summary witness or defense securities expert was called to present the exonerating data and records, *Id.*, 104, 122, leaving the jury only with counsel's arguments and unanswered questions, that the Court told the jury "constitute no

evidence," *Id.*, 167, making counsel`s failure to present the raw data fatal.

This was a securities fraud case, yet the very underlying securities data needed to exculpate Petitioner, or at least show reasonable doubt, were never shown to the jury, satisfying the standard for *Strickland* ineffectiveness. *Vickers v. Superintendent*, 858 F.3d 841, 852 (3d Cir. 2017).

D. Essential Discovery Was Withheld From the 2255 Proceedings

The Court refused to require disclosure of four categories of essential discovery.

1. Communications between Waltzer and the Prosecutors. The prosecutors were participants in the undercover operation, providing Waltzer with instructions for his subterfuge, at times, "one on one," without Agents present. ECF-307, at 23-36, 45; ECF-380, at 35-48. Pursuant to Petitioner's allegations that the prosecutors were unsworn witnesses at trial, having argued to the jury about disputed facts from a position of first-hand knowledge, the government's *2255-Response* conceded that Lappen and Cohen effectively acted in the dual role as Waltzer's handlers, personally instructing him during the sting. ECF-322, 78.

Consequently, the District Court explicitly ruled that this claim was within the scope of the evidentiary hearing. ECF-397, while also disqualifying Lappen from representing the government at the hearing. ECF-400, 413. However, all of the suppressed contacts exchanged between Waltzer and the prosecution team during

the undercover operation, including text messages, emails, and fact-based rough notes, were not provided to Petitioner for the hearing, rendering effective examination impossible, prejudicially impeding integrity of the fact-finding and truth-seeking function of the proceeding.

Pretrial, the defense submitted explicit, written discovery requests for all of Waltzer's statements to the Government.[24]

In addition to affirmative, written assurances that all contacts with Waltzer were disclosed, the government represented to the Court at the final pre-trial discovery hearing: "the defense are seeking to compel things that don't exist...we don't have anything else, we have given them what we have." Tr. 1/19/10, 9, 13; DefHrEx., 8.

But this was untrue. The Government's *2255-Response* confirmed that the prosecutors were instructing Waltzer during the undercover operation, "so he would know what to tell Georgiou, [including] the services Charlie offered, how much stock he could buy, where they would next meet or speak on the telephone, and other matters." ECF-322, 78. All of those contacts were suppressed for trial. Cellular records admitted at the hearing demonstrated that Waltzer was actively communicating with the prosecutors, including, during key moments of the

[24] These requests, and the government's responses are collected at ECF-208, Ex. M; 232, Ex. B, C, I, J, K, L, M.

undercover operation, ECF-307, Ex. 6. The records show Waltzer having calls and texting with the prosecutors on at least 200 occasions, pursuant to which he immediately contacted Petitioner trying to get him to act. Key moments included Waltzer's response when confronted by Petitioner about an IRS ruse, efforts to have Petitioner issue a press release, the "test trade," and repeated attempts to get Petitioner to send the $5,000 wire transfer. *See* ECF-380 at 38-42 for additional detailed examples.

Cohen and Waltzer had the following calls during days of the "test trade," when Waltzer was without recording equipment: 9/1/08: 1:28 pm; 3:54 pm; 9/2/08: 8:40 am; 9:00 am; 10:25 am; 10:27 am; 10:38 am; 6:31 pm; 7:41 pm; 9/3/08: 2:34 pm. ECF-307, Exhibit 6, Bates 174-175.

Waltzer and Cohen continued speaking through September 11, 2008, including text messages the morning Waltzer convinced Petitioner to wire the $5,000: 9/11/08: Text Messages at 7:39 am, 7:40 am, *Id.* Bates #213.

Hundreds of suppressed text messages between Waltzer and the FBI Agents have also never been disclosed.[25]

[25] The *DCO* stated that this Court previously denied Georgiou's Jencks Act claims with respect to suppressed text messages, *DCO*-168, n.78. This was erroneous – there was no such ruling from this Court. The communications were mandatory disclosure under the Jencks Act for trial, "exculpatory or not." *U.S. v Georgiou*, 777 F.3d 125, 142 (3d Cir. 2015).

Cohen testified at the hearing that he provided instructions to Waltzer while undercover, Tr. 9/18/2017, 220, 255, sometimes "one on one." *See also id.*, 258, 265, 266, 277. Lappen was "sure" he also had one on one conversations with Waltzer, Tr. 9/26/2017, 26. Waltzer testified that he would communicate with Cohen by cell phone, Tr. 9/25/2017, 183-84, and that the AUSAs would discuss "facts" about the case with him,[26] with "everybody at times [advising] which direction to go in the investigation," even without Agents present. *Id.*, 186. Waltzer further confirmed "dozens" of text messages with Cohen, and, was "sure" that he also exchanged text messages with Lappen. *Id.* 223-224.

Petitioner incessantly pursued discovery of these communications for the hearing, imploring the Court that it was illogical, if not impossible, to have meaningful examination of witnesses without them. ECF-354, ECF-407, ECF-437, ECF-467, ECF-527, ECF-602. Indeed, between Waltzer's monthly cellular bills, the government's concession that such contacts occurred, and the hearing testimony, hundreds of demonstrable electronic communications between Waltzer and the prosecution team occurred. Nevertheless, the District Court repeatedly refused to compel production of the electronic contacts or fact-based rough notes, ruling that

[26] Waltzer's attorney, Delinsky also testified that the AUSAs were discussing "factual information" with Waltzer during the undercover operation, Tr. 9/18/2017, 144.

the communications "did not exist," or would contain "no relevant information." ECF-370; ECF-453, at 6; ECF-477, at 3; ECF-612.

2. The "Box" of Records. The government submitted a "box" of materials to the Court for *in-camera* review during the 2255-proceedings. Included therein, but not limited to, were notes, documents and communications Waltzer provided to the FBI in 2006, IRS investigative records, and, the SEC's notes of Waltzer's interviews and other information, none of which were produced to Petitioner. The scope of the 2255-hearing encompassed Waltzer's undisclosed 2006 FBI-informant sessions. Petitioner sought and should have been afforded those materials for examination of the witnesses, and for prejudice analysis and argument. ECF-388, 389, 409. However, the District Court refused production, with not even a Vaughn Index, ECF-402, instead setting aside the records for appellate review. ECF-433.

The withholding was erroneous. For example, Waltzer's 2006 legal-fee-billing records would have been included, demonstrating that the prosecution was always aware of Waltzer's FBI-informant sessions. Also, Waltzer testified at trial that the $6 million he obtained was because his life was threatened during his November 17, 2006 trip to Toronto, yet, Waltzer's withheld, November 10-21, 2006 personal notes given to the FBI, (Exhibit A, at 12) do not memorialize any such

threats. This would have been a material inconsistency the defense could have used to confront Waltzer.

3. Chain of Custody Logs. The government affirmatively misrepresented during the 2255-proceedings that this evidence did not exist. ECF-417, 3, 6. The contents of the logs prove that Waltzer and Joanson testified falsely at trial, and that the prosecution team was always aware that Waltzer was without recording equipment during the "test trade," with device "malfunction." (Section (A)(5), above). The DCO failed to address this evidence entirely, while refusing disclosure to Petitioner, and without apparent *in-camera* review. ECF-600; ECF-609.

4. Undisclosed Recordings. Sandy Lipkins was Waltzer's partner and right-hand man, but never charged by the government. He traveled to the Middle East for Waltzer, entered his stock trades, and, actively communicated with Petitioner. Tr. 1/27/10, 23-24, 102-104. The 2255-proceedings revealed that Waltzer made secret undercover recordings of Lipkins. These were never disclosed to Petitioner, notwithstanding that Waltzer discussed Petitioner with Lipkins. Petitioner sought production, arguing the obvious inference that Waltzer was controlling the calls with Lipkins, and could not incriminate Georgiou because there was no conspiracy. ECF-407, 6; ECF-437, 4. Petitioner sought to call Lipkins at the hearing. ECF-408. The Court first ordered that Lipkins be interviewed by an

Investigator. ECF-456. Lipkins informed that he was not aware of any conspiracy between Waltzer and Georgiou to manipulate prices and did not believe any wrongdoing occurred. ECF-478. Nevertheless, the District Court refused production of the recordings, without in-camera review, and disallowed Lipkins from testifying at the 2255-hearing. ECF-453, 5; ECF-495, 4-5.

Having successfully argued sufficient grounds to include the matter within the approved scope of the evidentiary hearing, Petitioner should have been afforded related discovery, *i.e.*, the communications and notes. Absent this discovery, the Court's findings on this claim were based upon an undeveloped record. DCO-79-81, 119-123, 167-168.

In *Han Tak Lee v. Glunt*, 667 F.3d 397 (3d Cir. 2012), this Court reversed a habeas denial where the petitioner was denied discovery needed to fully develop his claim. The same is true here: having been afforded a hearing on this claim, the Court abused its discretion when it would not order related discovery. *See Dung The Pham v. Terhune*, 400 F.3d 740, 743 (9th Cir. 2005) ("A district court abuses its discretion in not ordering Rule 6(a) discovery when discovery is 'essential' for the habeas petitioner to 'develop fully' his underlying claim."); *Jones v. Wood*, 114 F.3d 1002, 1008-09 (9th Cir. 1997) (where a petitioner was afforded evidentiary hearing, district court abused its discretion by denying discovery pertaining to such claims).

E. Deprivation of Counsel

On April 3, 2017 the government filed its *2255-Response*, revealing for the first time that evidence had been withheld from the defense at trial, including that Waltzer was informing with the FBI in 2006. This evidence, however, was not included with the *Response*. On April 17, 2017 Petitioner appeared in Court and was informed for the first time that an evidentiary hearing would be held. During that conference, the Court asked Petitioner whether he intended to obtain counsel.

Petitioner requested time to engage counsel of choice. Tr. 4/17/2017, 3. The government opposed this request based on its unsupported accusations of Petitioner's "dilatory tactics" and "gamesmanship." *Id.*, 5-6. It then insisted that Petitioner make an immediate decision and be forbidden from ever changing his mind if he decided to proceed *pro se*. *Id.*, 6-7 ("This has to be a once and done deal where he decides whether he wants counsel, doesn't want counsel, and then we get counsel."); at 13 (suggesting that the Court advise Petitioner "once you decide today that you want to go *pro se*, you can't change your mind later and say you want a lawyer?"); at 14 ("this is his one chance to have a free attorney represent him. And if he wants -- if he decides he's going forward pro se, that's it.").

Petitioner explained that he "would always want the advice of counsel," *id.*, however, "I don't know who that counsel is, and my case has certain complexities to it. It's kind of, in my eyes, like having a terminal condition. You may not want

that treated by any practitioner. There has to be somebody that you're compatible with, presumably, and somebody who has certain expertise," *Id.* 10.[27]

Petitioner questioned whether the government's position, that he could not later change his mind, was correct. The Court advised it was. *Id.*,13-14. The Court reinforced the government's "one-and-done" condition, telling Petitioner that he could not later ask the Court to appoint counsel in the event he proceeded *pro se*. *Id.*, 23. After conducting a colloquy, *id*., 17-23, the Court accepted the waiver and appointed Assistant Federal Defender Freeman, as standby counsel. *Id.*, 26-27.

In the ensuing weeks Petitioner filed multiple discovery motions, resulting in the production of a continuous stream of never-before-produced documents. These productions demonstrated that the government's *2255-Response* was far from complete.

Consequently, on July 12, 2017, some two months prior to commencement of the evidentiary hearing, Petitioner filed a motion requesting an urgent conference to address, *inter alia*, the impact of the new disclosures on Petitioner's likely "need [for] legal counsel." ECF-392. The government's response agreed that such a conference should be held, and should address "Georgiou's request for certain assistance from counsel." ECF-398, 2. The Court's Order of July 14, 2017 granted

[27] The record reflects that the Court had arranged for Attorney Arianna Freeman from the Federal Community Defender to be present to be appointed. *Id.*, 27-28. Petitioner had never met or communicated with Attorney Freeman prior to that day.

the conference to address two issues, but not appointment of counsel. ECF-395. The conference was held on July 19, 2017. It did not address appointment of counsel, with no new waiver colloquy conducted. The Court did afford Petitioner leave to pursue additional discovery (which under *Habeas Rule 6a* itself requires appointment of counsel). Previously withheld records continued to be revealed by the government up to days before the scheduled hearing. e.g. Ex.G, above.

Midway through the evidentiary hearing, Petitioner uncovered additional withheld records (*e.g.* the Farber Report; chain of custody 302s). On December 29, 2017, Petitioner moved for another urgent status conference to recall witnesses, and explicitly, appointment of counsel. ECF-527. The Court granted the hearing (ECF-530), which was held on January 12, 2018. There, Petitioner explained, "I've been working very diligently for the last six weeks…the results of the evidentiary hearing how it fits with the trial have added a significant amount of complexity for me to handling this case…I don't believe that I can complete this briefing without counsel. So, I wanted to explore whether the Court will appoint counsel for me at this stage." Tr. 1/12/2018, 3.

The Court asked Petitioner if he recalled when it had previously sought to appoint counsel, ignored Georgiou's pre-hearing request for counsel made in July 2017, the changed circumstances and on-going revelation and discovery of previously undisclosed documents, and turned to the government for its

position. Refraining its "one-and-done" position, the government opposed the request. *Id.*, 3-4. The Court declined to appoint counsel.

Petitioner moved for Reconsideration, explicitly revoking any waiver of counsel, citing the Rules dictating that counsel was a statutory right "at any stage of the proceeding," which was "not discretionary." ECF-533. The government opposed this request on the basis, among others, that "[t]he defendant knowingly and voluntarily waived his right to counsel prior to the evidentiary hearing, and this Court properly advised him that this decision to waive was final." ECF-534, 2. The Court denied reconsideration. ECF-535.

Petitioner tried one additional time, recounting that he had been misinformed at the April 17, 2017 colloquy that the waiver was final and irrevocable, providing his reasoning at the time. ECF-546. The Court summarily denied appointment the next day, without response from the government. ECF-547.

The *DCO* cited *Reese v. Fulcomer*, 946 F.2d 247 (3d Cir. 1991) for declining to appoint counsel after Petitioner's repeated attempts, DCO-16. *Reese* is clearly distinguishable, as no evidentiary hearing was held.

Rule 8(c), *Rules on Motion Attacking Sentence Under Section 2255* provides the right to counsel where an evidentiary hearing is ordered. *U.S. v. Iasiello*, 166 F.3d 212 (3d Cir. 1999). 18 U.S.C. §3006A states that a court "must appoint counsel… at any stage of the proceedings." Any waiver of this right requires a

colloquy which convinces a court that a defendant-petitioner has done so knowingly, voluntarily, and intelligently. *U.S. v. Peppers*, 302 F.3d 120 (3d Cir. 2002); *Faretta v. California*, 422 U.S. 806 (1975). This Court's precedent holds that an infirm colloquy is prejudicial, *U.S. v. Jones*, 452 F.3d 233 (3d Cir. 2006). And significantly, there is no jurisprudence which renders a defendant's waiver of counsel **final and irrevocable**. Rather, the opposite is true. *U.S. v. Taylor*, 933 F.2d 307, 311(5th Cir. 1991) ("This Court has long held that a defendant who waives his right to counsel is entitled to withdraw that waiver and reassert that right.").

While a court has discretion to deny counsel if doing so will delay the proceedings, here delay was not an issue. The Court had appointed stand-by counsel who could have stepped into the role as counsel, without delay. Further, *Martel v. Clair*, 565 U.S. 648 (2012), which addressed a prisoner's rights with respect to seeking a change of court-appointed counsel during federal post-conviction proceedings, shows that a court must exercise discretion with regard to change of counsel.

Martel specifically addressed the standard to be used by a district court when a capital habeas petitioner wishes to change counsel who has been appointed under 18 U.S.C. §3599. Even though §3599 has a provision permitting a district court to permit a change of **capital** habeas counsel, the statute does contain a standard dictating how such requests should be evaluated. Accordingly, the Court looked to

18 U.S.C. §3006A, the appointment statute for non-capital 2255 petitioners and held "that courts should employ the same 'interest of justice' standard that apply in non-capital cases under" this related statute. *Martel*, 565 U.S. at 652.

Not surprisingly, in applying the interest of justice standard for change of counsel in capital or non-capital habeas cases, the *Martel* stated "the 'interest of justice' standard contemplates a peculiarly context-specific inquiry." *Id.* at 663. In conducting this inquiry, courts should look to: the timeliness of the motion, adequacy of the court's inquiry and the asserted cause supporting the change. *Id.* The application of these inquiries is accorded deference and is not to be disturbed except when the district court abuses its discretion. *Id.* The one-and-done approach applied by the Court here, by nature, was not an exercise of discretion.

Thus, Petitioner was clearly misinformed, and his waiver was not knowing, voluntary and intelligent. Further, the Court ignored its own proviso that the initial waiver of counsel could be revisited if "circumstances changed." Tr. 4/14/2017, 13-14. That is exactly what happened, as a deluge of previously withheld records flowed. *U.S. v. Fazzini*, 871 F.2d 635, 643 (7th Cir. 1989) (revocation of waiver is a "change of circumstances" sufficient "to require, if not the actual appointment of counsel, at least a new inquiry by the judge to determine whether the defendant desires the appointment of counsel."); *U.S.* v. Leveto, 540 F.3d 200 (3d Cir. 2008): "a Constitutional violation occurs where a trial Court's denial of a request

for counsel is based purely on a punitive notion," *citing*, *Menefield v. Borg*, 881 F.2d 696, 700 (9th Cir. 1989) ("A trial Court cannot insist that a defendant continue representing himself out of some punitive notion that the defendant, having made his bed, should be compelled to lie in it.").

Leveto is particularly salient here, stating, "it is a wrong conception that the defendant's initial decision to exercise his *Faretta* right...is a choice cast in stone." Other Circuits have found that, only where the defendant "gave the District Court no reason to suspect that he was uncertain about representing himself," should a waiver not be revisited. *U.S. v. Modena*, 302 F.3d 626, 630-31 (6th Cir. 2002); *U.S. v. McBride*, 362 F.3d 360, 367 (6th Cir. 2004) (no second waiver required "in the absence of an explicit revocation by the defendant or a change in circumstances that would suggest that the district court should make a reviewed inquiry of the defendant."); *see also U.S. v. Santos*, 349 Fed. Appx. 776, 779; 2009 WL 3387958, at *3 (3d Cir. Oct. 22, 2009) (Jordan, J., *dissenting*) ("I believe that the failure of the District Court to make any inquiry at all into Santo's continued desire to represent himself at sentencing violated long-standing precedent that requires Courts to affirmatively protect a defendant's right to counsel at every critical stage of a criminal proceedings....").

Thus, there is no one-and-done, or even twice-and-done. Rather, "the job is only done when the record reflects sufficient care by the district court to safeguard

the right to counsel...at every stage of the proceedings." *Von Moltke v. Gillies*, 332 U.S. 708, 722 (1948).

In *U.S. v. Royal*, 322 Fed. Appx. 226; 2009 WL 1040124 (3d Cir. Apr. 17, 2009) the Court reiterated that it is the District Court's "weighty responsibility" to ensure the waiver remains knowing and voluntary; a "duty [which] extends to all stages of the proceedings," *citing*, *U.S. v. Solemo*, 61 F.3d 214, 219 (3d Cir. 1995). Other courts have properly recognized that where "circumstances have sufficiently changed since the date of the *Faretta* inquiry that the defendant can no longer be considered to have knowingly and intelligently waived the right to counsel, a renewed Faretta inquiry is necessary." *U.S. v. Vas*, 255 F.Supp. 3d 598 (E.D. Pa. June 14, 2017).

Finally, Petitioner was also denied time to engage counsel of choice. The record supports that this decision by the Court was arbitrary. *Fuller v. Dresslin*, 868 F.2d 604 (3d Cir. 1989). The Court also failed to apply a balancing test as required under *U.S. v. Rankin*, 779 F.2d 956 (3d Cir. 1986); *U.S. v. Laura*, 607 F.2d 52 (3d Cir. 1979).

There would have been no prejudice to the government, and none has been cited, by affording a reasonable delay for Georgiou's family to raise the necessary funds to engage counsel of choice. Those best efforts are demonstrated by undersigned counsel's current representation.

CONCLUSION

For all of the above reasons 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 5th day of July, 2019 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

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