No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Daniel Castleman,
Petitioner;

v.

United States of America,
Respondant.

ON PETITION FOR A WRIT OF CERTIORARI TO

THE ELEVENTH CIRCUIT COURT OF APPEALS

Daniel Castleman
USP Tucson
P.O. Box 24550
Tucson, AZ 85734

QUESTIONS PRESENTED

I. DID THE GOVERNMENT COMMIT PROSECUTORIAL MISCONDUCT AND WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT OR MOVE TO EXCLUDE GX-DC-2, WHEN THE GOVERNMENT PRESENTED CRITICAL EVIDENCE, TO-WIT GOVERNMENT'S EXHIBIT GX-DC-2, AS BUSINESS RECORDS UNDER THE FED. R. EVID. 803(6) EXCEPTION, CERTIFIED UNDER FED. R. EVID. 902(11), WHEN THE CERTIFICATION CERTIFIED TWO PAGES AND THE EXHIBIT CONTAINED THREE PAGES, THUS MATERIALLY ALTERING THE NATURE OF THE EXHIBIT, ESPECIALLY WHEN THE GOVERNMENT WITHHELD TWO OF THE THREE PAGES FROM DISCOVERY AND SUBSTITUTING ONE NONMATERAIL PAGE THEREBY INTIMATING CONSISTENCY WITH 902(11) CERTIFICATION IN VIOLATION OF FED. R. EVID. 803(6)(e) AND 902(11) AND BRADY, AND THE CONFRONTATION CLAUSE?

II. DID THE DISTRICT COURT ERR IN DECIDING THAT TRIAL COUSNEL WAS NOT INEFFECTIVE FOR HIS FAILING TO OBJECT TO THE ADMISSION OF DOCUMENTARY EVIDENCE WHICH HAD BEEN EDITED BY FBI PERSONNEL AND OTHERS VIOLATING CASTLEMAN'S DUE PROCESS RIGHTS, RIGHT TO CONFRONTATION, FEDERAL RULES OF EVIDENCE 1002, 1003, 1004 ("BEST EVIDENCE RULES"); AND DID THE APPELLATE COURT ERR IN FINDING IT WAS NOT DEBATABLE AMONGST REASONABLE JURISTS?

CERTIFICATE OF INTERESTED PERSONS

The following persons are believed, by Daniel Castleman, Petitioner, to have an interest in the outcome of the proceeding:

Canova, Christopher P., United States Attorney;
Castleman, Daniel, pro se, Petitioner;
Davies, Robert G., United States Attorney;
Freitas, Lisa M., Assistant United States Attorney;
Goldberg, Davie L., Assistant United States Attorney;
Kent, William M., Sentencing and Appellate Counsel;
Murphy, George F., Trial Defense Counsel;
Pocock, Vicki, FBI Investigative Analyst;
Power, Brenden, Constable, Queensland Police Service, Australia;
Wilder, Charles, FBI Special Agent.

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United States v. McGarity,

No. 09-12070, 669 F.3d 1218 (11th Cir. 2012)

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STATEMENT OF JURISDICTION

The Eleventh Circuit Court of Appeals denied Daniel Castleman a Certificate of Appealability on November 13, 2017. Castleman v. United States, No. 17-11878-F (11th Cir. Nov. 13, 2017). See Appendix B, p. 94.

The United States Supreme Court Granted Daniel Castleman an extension of time to file his Petition to and including April 12, 2018 on February 9, 2018. Castleman v. United States, Application No. 17A848; see Appendix D, p. 177.

The Supreme Court has jurisdiction to entertain this Petition for a Writ of Certiorari pursuant to 28 U.S.C. § 1254. See also Hohn v. United States, 524 U.S. 236 (1998)(holding that the Supreme Court has jurisdiction under § 1254(1) to review denial of applications for certificates of appealability).

CONSTITUTIONAL PROVISIONS, AND FEDERAL RULES OF EVIDENCE

CONSTITUTIONAL PROVISIONS

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of Life, Liberty, or property, without due process of Law . . . . U.S. Const. Amend. V.

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for his defence. U.S. Const. Amend. VI.

FEDERAL RULES OF EVIDENCE

RULE 801(c)

DEFINITIONS THAT APPLY TO THIS ARTICLE

(c) Hearsay. "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing, and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

RULE 802

THE RULE AGAINST HEARSAY

Hearsay is not admissable unless any of the following provides otherwise:

a federal statute;

these rules,

other rules prescribed by the Supreme Court.

RULE 803(b)

RECORDS OF A REGULARLY CONDUCTED ACTIVITY

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness . . .

(b) Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by———or from information transmitted by———someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification;

and

(E) neither the source of information nor the mathod or circumstances of preparation indicate a lack of trustworthiness.

RULE 902(11)

CERTIFIED DOMESTIC RECORDS OF REGULARLY CONDUCTED ACTIVITY

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

(11) Certified Domestic Records of a Regularly Conducted Activity. The original or a copy of a domestic record that meets the requirements of Rule 803(b)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the propenent must give an adverse party reasonable written notice of the intent to offer the record———and must make the record and certification available for inspection———so that the party has a fair opportunity to challenge them.

RULE 1001

DEFINITIONS THAT APPLY TO THIS ARTICLE

In this article:

(a) A "writing" consists of letters, words, numbers, or their equivalent set down in any form.

(b) A "recording" consists of letters, words, numbers, or their equivalent recorded in any manner . . .

(d) An "original" of a writing or recording means the writing or recording itself or a counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, "original" means any printout——or other output readable by sight——if it accurately reflects the information. An "original" of a photograph includes the negative or a print from it.

(e) A "duplicate" means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

RULE 1002

REQUIREMENT OF THE ORIGINAL

An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise.

RULE 1003

ADMISSIBILITY OF DUPLICATES

A duplicate is admissible to the same extent as the

original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

RULE 1004

ADMISSIBILITY OR OTHER EVIDENCE OF CONTENT

An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if:

(a) all the originals are lost or destroyed, and not by the proponent acting in bad faith;

(b) an original cannot be obtained by any available judicial process;

(c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or

(d) the writing, recording, or photograph is not closely related to a controlling issue.

STATEMENT OF THE CASE

PROCEDURAL POSTURE

Daniel Castleman ("Castleman") was arrested on Februray 29, 2008 and transferred to the Northern District of Florida, Pensacola division. Mr. Castleman was charged along with thirteen others in a forty (40) count superceding indictment. Castleman was charged with six (6) counts in the forty count indictment. Castleman was charged with:

Count 1: Violating 18 U.S.C. § 2252A(g)(child exploitation enterprise ("CEE");

Count 2: Violating 18 U.S.C. §§ 371, 1512(k), 2251(d)(1), and (e), and 2252A(a)(1)(conspiring to advertise, transport/ship, receive, and prossess child pornography and obstruction of justice;

Count 5: Violating 18 U.S.C. §§ 2251(d)(1) and (2)(advertising the exchange of child pornography);

Count 17: Violating 18 U.S.C. § 2252A(a)(1)(knowinly transporting and shipping child pornography);

Count 28: violating 18 U.S.C. § 2252A(a)(2)(receiving child pornography); and

Count 40: Violating 18 U.S.C. § 1512(c)(obstruction of justice). United States v. Berger, 3:08-cr-22 (N.D. FL 2008).

Mr. Castleman pled not guilty and proceeded to jury trial on or about January 5, 2009. On or about January 14, 2009 the jury returned a guilty verdict on all counts.

Castleman was sentence to life imprisonment on Count 1, 360 months imprisonment on Counts 2 and 5; 240 months imprisonment on counts 17, 28, and 40, with lifetime supervision. All sentences were run concurrent.

Castleman timely appealed to the Eleventh Circuit Court of Appeals. The Court vacated Counts 2 and 40, while affirming the other counts and sentences on February 6, 2012. Sub nom United States v. McGarity, 669 F.3d 1218 (11th Cir. 2012).

Castleman timely petitioned the Supreme Court for a writ of certiorari which was denied on October 9, 2012. Sub nom Castleman v. United States, 184 L. Ed. 2d 282 (2012).

Castleman timely filed his 28 U.S.C. § 2255. The Magistrate filed his Report and Recommendation ("R&R") on February 10, 2017 recommending denial of the 2255 and certificate of appealability ("COA"). Castleman timely objected to the magistrate's R&R on March 24, 2017. On April 3, 2017 the District Court adopted the R&R in toto.

Castleman timely filed his notice of appeal and timely filed his petition for a COA which was denied on November 13, 2017. Castleman v. United States, No. 17-11878-F (11 Cir. Nov. 13, 2017).

Castleman was granted an extension of time to file his Petition for a Writ of Certiorari until and including April 12, 2018. See Appendix D, pp. 177-78.

FACTUAL BACKGROUND

Australian Constable Brenden Power ("Power") of the Queensland Police Service, a member of Task Force Argos, began an investigation of an international child pornography ring ("ring") operating in internet newsgroups in 2005. Appx. C., pp. 130-31. Task Force Argos is a special branch of the Queensland Police Service responsible for investigating internet and historical pedophilia. Id. at 130. Task Force Argos derived its name from Greek mythology in which Argos Panoptes or Argos, a protector of children, kept sure watch. ECF 1173, p. 32.

Mr. Power testified that he assumed the online identity of an "informant," Eggs Benedict. Trial Transcript Volume II ("Vol. II"), pp. 185-86. Government evidence shows that the original identity of Eggs Benedict was also known as "Argus". See Affidavit in Support of Search Warrant for Daniel Castleman, p. 25. See also Government ("Gov.") Exhibits 8 and 18; ECF 1112-5, p. 27. Mr. Power testified that a person had to be a known purveyor of child pornography to be "invited" into the ring. Vol. II, p. 175. Further, one could not request admission but was an invitation only basis by the "core members" of the ring. Id. There was no fact finding or testimony on the coincidence that a known purveyor of child pornography known as "Argus", just happenned to be arrested by Task Force Argos which derived its name from Argos Penoptes informed on the internet child pornography ring. ECF 1173, p. 32. Mr. Power testified that it was lawful for him to "post child pornography" while in Queensland, Australia. ECF 1173, p. 34; Vol II., pp.

188-89.

Over an approximately 18 month investigation, 400,000 image files, and over 1,000 video files (some of the images and video files were child pornography); the FBI issued a single subpoena (IINI 1522) for an alleged binary file alleged to be from the identity "Chingachgook." Castleman as alleged to be Chingachgook. IINI 1522 requested account information concerning an alleged binary file posted on March 10, 2007 (message ID <7UuIh.22745$r73.10103@fe24.usenetserver.com>). On or about March 20, 2007 Highwinds Media (d/b/a UseNetServer) personnel (Stephen Holmes) sent an email response to IINI 1522 identifying IP address 127.0.0.1 as the IP connected to the requested message ID.

Stephen Holmes included a second IP address concerning a separate message posted on February 14, 2007 (message ID < Xns98D78A28E3DDBOpenTest@208.49.80.60>), to a different newsgroup location. The IP address connected to the second message ID was reported as 68.1.238.104. IP 68.1.238.104 was subsequently connected to Daniel Castleman. The second message was not alleged to be connected to any ring nor connected to any illegal activity.

Some two (2) months later (on or about May 16, 2007) FBI agent Charles Wilder, Constable Power and Highwinds personnel, Bardley Duganne, consulted one with the other concerning two email subpoena returns (IINI 1391 and 1398). Appx. D, pp. 168-69. The FBI inadvertently sent two separate subpoenas (IINI 1391 and 1398) to EASYNEWS (a subsidiary of Highwinds)

concerning message ID <t1var2d9i39uudegr3ricne949s9pqmna@4ax.com>. Mr. Wilder noted discrepancies between the information provided. Id. Wilder consulted with Mr. Power, who consulted with Mr. Duganne. Id. All agreed that it was impossible for the exact same message ID, posted on the exact day and time to resulve back to two different IP addresses. Id. Mr. Duganne provided a brief written response concerning the discrepancies. Id. The response was not included in discovery. ECF 1173, p. 20.

The FBI executed search warrants throughout the United States on February 29, 2008. Castleman was arrested subsequent to the search warrant and proseucted.

I. DID THE GOVERNMENT COMMIT PROSECUTORIAL MISCONDUCT AND WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT OR MOVE TO EXCLUDE GX-DC-2, WHEN THE GOVERNMENT PRESENTED CRITICAL EVIDENCE, TO-WIT GOVERNMENT'S EXHIBIT GX-DC-2, AS BUSINESS RECORDS UNDER THE FED. R. EVID. 803(6) EXCEPTION, CERTIFIED UNDER FED. R. EVID. 902(11), WHEN THE CERTIFICATION CERTIFIED TWO PAGES AND THE EXHIBIT CONTAINED THREE PAGES, THUS MATERIALLY ALTERING THE NATURE OF THE EXHIBIT, ESPECIALLY WHEN THE GOVERNMENT WITHHELD TWO OF THE THREE PAGES FROM DISCOVERY AND SUBSTITUTING ONE NON-MATERIAL PAGE THEREBY INTIMATING CONSISTENCY WITH 902(11) CERTIFICATION IN VIOLATION OF FED. R. EVID. 803(6)(e) AND 902(11) AND BRADY, AND THE CONFRONTATION CLAUSE?

The Government introduced, at trial, purported business records of Highwinds Media (d/b/a UseNetServer), to-wit: Government's Exhibit GX-DC-2 ("DC-2"), through certification by Bradley Duganne (custodian of records) pursuant to Federal Rules of Evidence ("Fed. R. Evid."), Rule 902(11) ("902(11)") (dated March 30, 2008). See Appendix ("Appx.") D, p. 161. The 902(11) Certificate certified two (2) pages as records (not including the Certification), while DC-2, as admitted at trial, contained three (3) pages (not including the Certification). There was no documentation to establish what two, of the three, pages were intended to be certified as business records.

Two of the three pages were computer generated "screenshots" of the subpoenaed UseNetServer account of "Peter Short," and one page was an email from Stephen Holmes concerning information alledged to have been copied and pasted from "Peter Short's" account, dated one year prior (March 20, 2007) to the date of the Certification. See Appendix D, pp. 163-64.

Further, the Government withheld from discovery the two (2) "screenshots" (contained in DC-2), providing only the e-mail and inserted a photocopy of two money orders (on a single page), see Appendix D, 165-67 , intimating consistency with the 902(11) Certification of two pages.

The Government's misconduct of withholding two of the three pages from discovery——only producing them when introducing DC-2 at trial, explicitly violated the requirements of 902(11), as well as it intent and spirit. Violating the requirement that the exhibit be produced for inspection prior to trial. Violating Castleman's confrontation rights and his counsel was ineffective for failing to object to its admission or otherwise failing to move to suppress, at a minimum the email, DC-2.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Dutton v. Evans, 400 U.S. 74, 105 n.7 (1970)(dissent); see also Fed. R. Evid. 801(c). Generally, hearsay evidence is excluded from admissable evidence. United States v. Marley, 621 Fed. Appx. 936, 941 (11th Cir. 2015); United States v. Ellis, 593 Fed. Appx. 852, 857 (11th Cir. 2014); see also Fed. R. Evid. 802. However, the federal rules have created many exceptions to hearsay evidence. Ohio v. Roberts, 448 U.S. 56, 62 (1980)(the hearsay rule is riddled with exceptions); see also Fed. R. Evid. 803.

Business records are classic hearsay. Kincaid & King Constr. Co. v. United States, 333 F.2d 261, 264 (9th Cir. 1964). Federal Rules of Evidence, Rule 803(6) creates the exception for records kept in a regularly conducted activity——the so-called

"business records exception." United States v. Oates, 560 F.2d 45, 71 (2d Cir. 1977); Brawner v. Allstate Indem. Co., 591 F.3d 984, 987 (8th Cir. 2010).

For business records to be admitted into evidence the proponent must lay a proper foundation. United States v. Towns, 718 F.3d 404, 422 (5th Cir. 2013), cert. denied, 2013 U.S. LEXIS 8907 (2013). To do this the proponent must authenticate the records by a custodian of records or other qualified witness——unless they are self-authenticating. United States v. Bonomolo, 566 Fed. Appx. 71, 74 (2d Cir. 2014). A business record may be self-authenticated pursuant to a certification by a custodian or other qualified person. Fed. R. Evid. 902(11).

In order for the proponent to meet 902(11) requirements they must "give the adverse party reasonable written notice of the intent to offer the record——and must make the record and certification available for inspection——so that the party has a fair opportunity to challenge them." Fed. R. Evid. 902(11). If the record cannot be properly authenticated or lack the requisite indica of trustworthiness, the evidence should be excluded from evidence. United States v. Jackson, 625 F.3d 875, 880-81 (5th Cir. 2010).

Mr. Castleman asserts that he presented sufficient facts, and extrinsic evidence, to the courts below to establish that the records in DC-2 lacked the requisite indica of trustworthiness to be admitted into evidence——that counsel failed to object or otherwise move to exclude their admission into evidence, establishing deficient performance——he was prejudiced by that

failure in that had DC-2, or otherwise the email subpoena response been excluded the Government could not have proved the necessary nexus to any enterprise—precludeing conviction.

During the Government's investigation the FBI issued a single administrative subpoena (IINI 1522) to UseNetServer concerning a newsgroup posting of the identity known as "chingachgook" later alleged to be Daniel Castleman. See Appendix ("Appx.") B, p. 87; C, pp. 138, 157.

It is undisputed that the IINI 1522 subpoena return, used at trial, was an email from Stephen Holmes. Appx. C, p. 147; D, p. 162. It is undisputed that Bradley Duganne ("Duganne") completed and signed, under penalty of perjury, the Certification Under Federal Rules of Evidence 803(6) and 902(11), Appx. C, p. 147; Appx. D, p. 161, introduced in DC-2.

It is undisputed that the Certification attached to DC-2 containted three (3) pages excluding the Certification. Appx. D, p. 162-64; Appx. A, p. 62; Appx. B, pp. 76, 85, 87, 88; Appx. C, pp. 139, 147-48.

What remains at issue is what two pages Mr. Duganne intended to certify as "business records" pursuant to the 902(11) certification, the manner Stephen Holmes retrieved the alleged IP addresses he inputted into the email subpoena return dated March 20, 2007 and the reliability of his inputting of that data into the email. Appx. C, p. 147.

In pretrial discovery the Government sequestered in a computer "file folder" labelled IINI 1522, containing the Certification signed by Bradley Duganne, the email subpoena response from Stephen Holmes (dated March 20, 2007), a photocopy of two

(2) money orders (on a single page). Appx. D at 165-67. The Certification signed by Duganne, certified two pages as "business records," which was consistent with the documents included in the "file folder" IINI 1522.

However, at trial the Government introduced DC-2 under Fed. R. Evid. 803(6) exception which consisted of the Certification by Duganne (dated March 30, 2008, over one year after the email) certifying two (2) PAGES as records, the email from Stephen Holmes, and two pages of "screenshots" of the account of Peter Short (username "Bluegrasswater"). Id. at pp. 161-64. The Government withheld the two pages of screen shots from discovery in violation of Brady v. Maryland, 373 U.S. 83 (1963). Those two pages were material in nature as to the authenticity of the inculpatory evidence used against Castleman. Further, the records were not produced as required for inspection prior to trial, violating 902(11).

The exhibit was introduced by the fact witness FBI Special Agent Charles Wilder ("Wilder"). There was no documentation, records, nor testimony as to what two of the the three pages were intended to be certified as records.

At the time of admission of the Exhibit Castleman noted that it was not consistent with the records in discovery and made Counsel (George Murphy ("Murphy")) aware of the inconsistency in order to object. Appx. A, p. 63. However, he did nothing. Thusly, DC-2 was introduced without objection. The Government only showed the e-mail to the jury and made no mention of any of the other pages in DC-2.

The email, in DC-2, was the only evidence admitted that allegedly indentified Castleman's internet protocol ("IP") address and connected him to the identity "Chingachgook" and the child pornography "enterprise." Appx. B, p. 87.

In fact, the FBI subpoenaed user account information, from UseNetServer, relating to newsgroup message ID <7UuIh.22745$ r73.10103@fe24.usenetserver.com> ("7UuIh"). Stephen Holmes, of UseNetServer, responded in an email on March 20, 2007. Mr. Holmes identified the username of "bluegrasswater," customer snapshot of "Peter Short" with the IP address of 127.0.0.1 associated to the above message ID. Appx. D, p. 162. With the last known usable IP address of 68.1.238.104. IP 127.0.0.1 is what is known as a localhost or loopback address. Appx. C, pp. 157-59. A localhost IP does not identify any specific computer on the internet. Essentially 127.0.0.1 identifies only UseNetServer's own computer network. Id. at p. 158. Newsgroup message ID 7UuIh was implicated as being connected to child pornography activity and the reason for the subpoena IINI 1522.

In Mr. Holmes' email response he included IP address information 68.1.238.104 ("238.104"), connected to newsgroup message ID <Xns98D78A28E3DDBOpenTest@208.49.80.60> ("OpenTest"). This message was never alleged to be connected to any illegal activity or any enterprise. Address 238.104 was subsequently identified as having been assigned to Mr. Castleman. The third IP address of 208.49.80.60, identified in the message ID OpenTest, was never identified as to its significance.

As stated supra, this was the only evidence used to connect

Mr. Castleman to the alleged enterprise. Had it not been introduced the Government could not have made the necessary nexus of Castleman to any illegal activities of the enterprise.

Why should Mr. Murphy have objected? As shown supra, excluding the email from admission would have severed any nexus between Castleman and the enterprise.

As identified supra, DC-2 included two screenshots of the account "Peter Short." The two screenshots appear to be consistant with a computer generated image of the account of "Peter Short" and by their very nature "business records." Mr. Castleman would have conceded to the admission of the two screenshots. The screenshots, however, show no internet activity, and more importantly no IP address information. Therefore the screenshots could not establish any nexus between Castleman and the enterprise or illegal activity.

This appears why it was imperative that the Government introduce the email.

The Government argued that they flew in William Bradford Beard ("Beard"). Appx. C, p. 148 (citing Government's Opposition to § 2255 (ECF 1112) at p. 19). Mr. Beard testified to his "intimate familiar[ity]" concerning his employees reliability in "cut[ting] and past[ing]" data into email returns. Id. at p. 150. The Government asserted that Mr. Beard was "flown" in to the Northern District to testify because "the defendant's collectively expressed consternation with [the] business records." Appx. C, p. 146. Asserting that Beard was part of trial Exhibit DC-2 and that defense counsel could have demanded Mr. Beard remain to testify for the defense. Id. Lastly, the Government

asserted that the Eleven Circuit Court of Appeals summarily dismissed an attack on the business records.

To be sure——DC-2 was introduced into evidence prior to Mr. Beard being "flown" in to testify. Taken as true, that Beard was flown in, means he was not in the city (Pensacola, FL), or abutting city, at the time DC-2 was introduced. Mr. Murphy did not object to the admission of DC-2. Federal R. Evid. 803 requires that a proper foundation must be laid BEFORE the business records are admitted into evidence. Towns, 718 F.3d at 422. Thusly, Mr. Beard's later testimony was not and could not have been part of DC-2's admission. Any extent that Mr. Beard's testimony may be construed to apply to DC-2, it is discussed further infra.

Mr. Oram, co-defendant Gary Lakey's counsel, zealously objected to the admission of email responses as business records. In response, the Government argued they flew in Mr. Beard to lay the foundation to admit, as business records, the email responses concerning Mr. Lakey's IP address information. Appx. C, pp. 107-23 To be sure——Mr. David Goldberg, Assistant United States Attorney ("Goldberg" or "Government"), specifically presented Government Exhibits GL-2, GL-6, ML-2, NM-2, NM-7, see id. at 110 (concerning co-defendants Gary Lakey, Marvin Lambert, and Neville McGarity respectively; see id. at 104). Goldberg could have included DC-2, but he did not. Under direct examinaiton Mr. Beard testified that Easynews, Newshosting, and UseNetServer were subsidiaries of Highwinds Media. Id. at 111. Mr. Lakey and Mr. McGarity were alleged to use Easynews, while Mr. Lambert was alleged to have used Newshosting.

Id. at pp. 95, 98. Though Mr. Beard testified that UsenetServer was a subsidiary of Highwinds Media, he did not view or testify as to DC-2. Therefore Mr. Beard testified, to the jury, only concerning Mr. Lakey, Mr. McGarity, and Mr. Lambert's records.

The business records introduced, ML-2, NM-2, and NM-7 were introduced prior to Mr. Beard's testimony. Id. at pp. 95-96, 98, 100 (respectively). Thus, Beard could not and did not testify to all the other co-defendant's "collective [] consternation with" those records. Id. at p. 146.

In fact the Government explicitly excluded DC-2 from Mr. Beard's testimony concerning business records. This is clearly ascertained from the following exchange between Goldberg, Murphy, and the Court:

> Mr. Murphy (defense counsel): . . . I would like to ask this witness some questions as it pertains to an exhibit that has already been shown, if I may.
> Mr. Goldberg: Objection. Beyond the scope.
> The Court: It depends on what you're talking about, Mr. Murphy.
> Mr. Murphy: Exhibit DC-2 was submitted into evidence, and I have some questions for the records custodian as it pertains to that document.
> The Court: Was it covered by the Government?
> Mr. Murphy: Pardon?
> The Court: Was that covered by the Government in their direct examination?
> Mr. Murphy: It was not, Your Honor, as to the AUTHENTICITY of that as a business record. Correct me if I'm wrong Mr. Goldberg?
> Mr. Goldberg: It was not covered in our direct. It's beyond the scope.
> The Court: Sustained . . . . Appx. C, p. 122 (emphasis added).

This exchange shows conclusively that the Government intentionally excluded Exhibit DC-2 from Mr. Beard's testimony as the custodian of records. And DC-2 was admitted solely on Mr. Duganne's Certification.

As it pertains to Mr. Lakey's, Lambert's, and McGarity's email responses as business records——Mr. Beard testified that he was "intimately familiar with the manner in which these records are kept[.]" Id. at pp. 112, 150. He testified that the information in the email response was "cut and pasted from the account information." Id. at p. 116. This was sufficient for the Court for laying of a foundation for the trustworthiness of the emails as business records for Mr. Lakey, Lambert, and McGarity.

The Government falsely asserted that since Mr. Beard's testimony was part of DC-2, the defense "could have demanded Mr. Beard remain to testify for the defense." Id. at 146. In fact, at Castleman's urging, Mr. Murphy did request that Mr. Beard remain to testify later. Id. at 124. However, Mr. Murphy rested the defense without calling a single witness or challenging the Government's case-in-chief and any manner. Id. at p. 148.

As noted supra, to any extent that Mr. Beard's testimony could be construed to apply to DC-2——Castleman had discussed with and provided Mr. Murphy with two (2) pages of an FBI report (FD-302), from discovery, concerning errors of Highwinds Media personnel providing IP and account information in two email subpoena responses. Id. at p. 149.

The FD-302 was written by FBI agent Charles Wilder, the same individual who introduced DC-2, on or about May 18, 2007. Id.; see also Appx. D, pp. 168-69.

The report shows the email returns from Highwinds Media personnel lacked the requisite indica of trustworthiness

necessary for business records to be admitted. Appx. A, pp. 63-64; Appx. B, p. 87; appx. C, pp. 149-51.

While agent Wilder was reviewing subpoena results he observed discrepancies ("errors") made by EASYNEWS. Appx. C at pp. 149; Appx. D, at p. 168. Wilder noted that the FBI sent two separate administrative subpoenas, IINI 1391 and IINI 1398, to Easynews requesting IP and user account information regarding a single newsgroup message <t1var2d9i39uudegr3ricne9vs9pqmna@4ax.com> ("t1var2d"). Id.

Easynews responded to IINI 1391 with the IP address "69.182.30.34" having posted message t1var2d "on 01/23/2007 at 03:25:53 GMT." Id. AT&T Internet identified David Lawton, 55 Tyler Street, Bloomfield, CT, having been assigned "IP of 69.182.30.34 on 01/23/2007 at 03:25:53 GMT. Id.

Easynews responded to IINI 1398 (concerning the identical message ID (t1var2d) with the "IP address [of] 64.252.120.103 on 01/23/2007 at 03:25:53 GMT." Id. This IP was later identified to have been assigned to co-defendant John Mossman.

Wilder noting the discrepancies/errors, consulted with Australian Constable Power, who "agreed that it [was] impossible to have the same newsgroup header, with the exact message ID, posted on the exact date and time, resolve back to two different IP addresses." Appx. D at p. 168. Constable Power contacted Bradley Duganne, Easynews, explaining the issue concerning IINI 1391 and 1398. Mr. Duganne "agreed that having the same message ID, posted at the exact date and time, resolving back to two different IP addresses would be impossible[.]" Id. at p. 168-

69.

"In summary, based on the results . . . Easynews . . . incorrectly reported [] IP address 69.182.30.34 . . . the reporting error . . . lead investigators to David Lawton." Id. at p. 169. Mr. Lawton was no longer a subject to this investigation. Id.

Further the FD-302 written by Wilder cites that Mr. Duganne provided a "brief written response regarding the discrepancies." Appx. C, p. 150; Appx. D at p. 169. This response was withheld from discovery by the Government violating Brady. Appx. C, p. 150.

Fortuitously for Mr. Lawton, the FBI mistakenly sent a second subpoena for the same message ID——if they had not Mr. Lawton could have been charged, tried, and convicted on unreliable business records.

Castleman had discussed the instant FD-302 report with Murphy and why it would indicate that email responses, such as copying and pasting data invites error and is unreliable. Castleman had requested Mr. Murphy to challenge the authenticity of the records. Had Murphy challenged Mr. Beard and Wilder on those errors he could have established the records unreliability prohibiting admission.

The Government argued that the Eleventh Circuit had summarily dismissed a previous challenge to the business records. Appx. C at p. 146. However, Castleman's appellate counsel did not address the issues as noted supra concerning DC-2 and the FD-302. Further since Murphy failed to address the trustworthiness of DC-2, the record had not been developed and would not

have been appropriate to raise on direct. However, if Murphy's performance had not been deficient, and he had addressed this issue, there is nothing in the records that would indicate that the Eleventh Circuit would not have reached a different conclusion—vacating and remanding to the district court. And there is nothing in the records which support that the other co-defendant's counsels were aware of the FD-302 report which undermined the subpoena responses as business records.

Castleman presented the same arguments to the district court and appellate court. The District Court erred in its opinion that Murphy's performance was not deficient because he was not charged with having to have a "photographic memory" (Appx. A, p. 30), and that Castleman was not prejudiced by that deficiency. The Appellate Court erred in deciding that the lower court's decision was not debatable amongst reasonable jurists or wrong.

Therefore Castleman respectfully requests that the Supreme Court Grant, Vacate, and Remand to the District Court for an evidentiary hearing or otherwise GRANT this Petition for a Writ of Certiorari for further briefing and arguments.

II. DID THE DISTRICT COURT ERR IN DECIDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR HIS FAILING TO OBJECT TO THE ADMISSION OF DOCUMENTARY EVIDENCE WHICH HAD BEEN EDITED BY FBI PERSONNEL AND OTHERS VIOLATING CASTLEMAN'S DUE PROCESS RIGHTS, RIGHT TO CONFRONTATION, FEDERAL RULES OF EVIDENCE 1002, 1003, 1004 ("BEST EVIDENCE RULES"); AND DID THE APPELLATE COURT ERR IN FINDING IT WAS NOT DEBATABLE AMONGST REASONABLE JURISTS?

"The best evidence rule provides that original documents must be produced to prove the content of any writing . . . . " United States v. Flanders, 752 F.3d 1317, 1336 (11th Cir. 2014) (citing and quoting United States v. Howard, 953 F.2d 610, 612 n.1 (11th Cir. 1992)(citing Fed. R. Evid. 1004)(internal quotations omitted).

Fed. R. Evid. 1002 states in pertinent part: "[a]n original writing, recording, or photograph is required in order to prove its contents unless rules or federal statute provides otherwise." Fed. R. Evid. 1002 (2011). Federal R. Evid. 1003 states in pertinent part: "[a] duplicate is admissable to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate." Fed. R. Evid. 1003(2011). The committee on the judiciary, House Report, No. 93-650 notes that the committee approved this Rule in the form submitted by the Court, with the expectation that the courts would be liberal in deciding that a "genuine question is raised as to the authenticity of the original." See also United States v. Georgalis, 631 F.2d 1199 (5th Cir. 1980).

In the instant case the Government introduced alleged text

based messages between co-defendants through newsgroup postings. The newsgroup messages were reportedly downloaded by Australian Constable Brenden Power ("Power") during the course of the investigation. Appx. C, pp. 130 and 133-34. Mr. Power testified that during the course of his investigation he saved the "conversations and posting of image files" on two (2) external USB hard drives. Id. Those external hard drives were reportedly on Government's Exhibits 1-A and 1-B. Id. at 134. Mr. Power testified that an entity known as Sheila compiled digests, which were "history of all the conversations that -- or posts that had taken" place in the previous period. Id. at 135. Constable Power testified that the digest messages did not necessarily contain the "header information" of the respective message. Id. at 136. In contrast, the individual "pristine" message will always contain the header information, as well as all of the Pretty Good Privacy ("PGP") verification data.

The Government attempted to admit the alleged paper copies of the digests, through Mr. Power, as Exhibits 17-A, B, and C. Id. at 137. Counsel for co-defendant James Freeman, Mr. Thomas Keith ("Keith"), objected. Exhibits 17-A, B, and C were never admitted into evidence.

Mr. Castleman presented information, facts and evidence to establish that all of the Government's alleged newsgroup message posts (Exhibits DC-1A, 7, 8, 10A through C, 12A and 13A through B) attributed to him came from the digests. Appx. C, at 151.

Mr. Castleman presented information, facts and evidence, to

the courts below, that the digest, provided in discovery reportedly from Exhibits 1-A and B, had been altered or edited by no less than four individuals including FBI Investigative Analyst ("IA") Vicki Pocock, and entities identified as Paris, mejackson, and Argos_6. Mr. Castleman's position is that Argos_6 was a member of the Queensland Police Service's Task Force Argos based on Power's testimony. Appx. C at 130 and 151.

Mr. Castleman showed the courts below that the original digests were in ".txt" format and converted to Microsoft Word (".doc")("MSWord") format by the prosecution team.

AUSA Goldberg asserted that the digests had been converted from the ".txt" format to the MSWord format "for the ease of" defense counsels. Appx. C, p. 152; see also id. at 142. Castleman responded that Mr. Goldberg did not present any evidence from those who converted the digests to MSWord as to why it was done. He presented no affidavits nor declarations to support his assertions, therefore his factual assertion must be disregarded. United States v. Rodriguez, 732 f.3d 1299, 1305 (11th Cir. 2013)(citing United States v. Washington, 714 F.3d 1358, 1361 (11th Cir.2013); see also Rosin v. United States, 522 Fed. Appx. 578 (11th Cir. 2013); In re Morris Paint & Varnis Co., 773 F.2d 130, 134 (7th Cir. 1985)("[a]rguments and factual assertions made by counsel in a brief, unsupported by affidavits, cannot be given any weight"); McVay v. Western Plains Service Corp., 823 f.2d 1395, 1398 (10th Cir. 1987) ("McVay's counsel [] made unsupported factual assertions and related arguments . . . [w]e disregard all such references[.]")

To support his assertions, Castleman presented copies of the MSWord properties (within the metadata of the files) of the twenty-eight (28) digests provided in discovery. The property values of digests 0, 1, 2, and 3 show that the entity identified as Paris created the MSWord Digests on June 21 and 22nd of 2006 (respectively). The property values concerning digest 0 indicates that FBI IA Vicki Pocock ("Pocock") modified (or altered/edited) the digest approximately one (1) month later on July 27, 2006. The properties show that the Digest was modified at least three (3) times over approximately one hour and 13 minutes. Two of the other three digests appear to have been edited or modified over a six (6) hour period by the entity identified as Paris. Equally important is the properties show that the above MSWord digests were converted from .txt in June of 2006, some two months prior to the FBI's reported involvement in the case. Constable Power testified that the FBI did not become involved until August of 2006. Appx. C, P. 132. Power testified that Task Force Argos began their investigation in 2005. Id. at 131.

Since the digests seem to have been converted some two (2) months prior to the FBI's involvement in the investigation (according to Constable Power's sworn testimony), it is incredulous to believe AUSA Goldberg's unsupported assertion that the digests were converted for the ease of counsels. The fact that FBI analyst Pocock had unfettered access to evidence, raises the specter that the Queensland Police Service operated as an agent of the FBI during this investigation.

Since at least four (4) digests were converted to MSWord (taken as true) prior to the FBI's involvement, it is reasonable to believe that the digests saved on Government's exhibit 1-A and B are in MSWord format and not in their original ".txt" format.

Castleman presented competent information and evidence to show that the evidence used against him at trial came from the digests. That the digests had been coverted from their original format into a MSWord (".doc") format, and the FBI personnel and others had modified, edited or otherwise altered the digests. Castleman presented the courts below information on how they could discern that the Government's exhibits used at trial came from the digests and were not individual messages downloaded by Constable Power. Appx. C, pp. 154-56.

Exhibits 1-A and B were admitted at trial, however, no defendant's counsels had access to 1-A or B. No defendant's counsels retained any expert to review the contents of 1-A or B. There is literally no independant verification of what evidence is actually contained on 1-A and B. It is equally probable that the only text based messages on 1-A and B are the digests.

The district court dismissed Castleman's assertions, not because he failed to present evidence; but rather because the Government noted that text messages and binary data downloaded by Constable Power was alleged to be on 1-A and B. As well as "none of the other seasoned defense attorneys made such an objection or requested such an instruction (referring to objecting to the digests or requesting a spoliation instruction.) Appx. A, pp. 20-21. Further stating that Castleman failed to present

any "proof that information relevant to his defense" was lost. Id. at 20.

What the Court required of Castleman, to prove what was altered, was not possible——since he was not given access to 1-A and B, he could not view what was or was not in fact saved on those exhibits. It is pure speculation, on the Court's part, as what is actually on those exhibits, since no party, save the adverse party, had direct access to them. In rejecting Castleman's uncontraverted assertions, the lower court stated that noneof the other "seasoned" attorneys objected or requested a spoliation instruction. The lower court impermissibly speculated that any other attorney investigated the digest properties or had any access to the MSWord file properties which Castleman had provided to his counsel. In fact there is not a shred of evidence in the record to even infer that any other attorney had copies of the MSWord file properties which showed modification or were even aware there were modifications to the digests. Nor did Castleman allege that any excerpt of the digests were admitted against his co-defendants. Therefore what any other attorney did or did not do in relation to their client was not relevant as it would not apply to Mr. Castleman.

In Castleman's filings he established that he found that the digests used against him at trial were modified by the Government or its agents. Castleman advised his counsel, Mr. Murphy, of this. Castleman requested Murphy to obtain a computer forensic expert for use in his defense. Murphy failed to act or futher invesigate the modification. Further, he failed to

move to suppress or otherwise exclude the digest messages used against Castleman as they violated Fed. R. Evid. 1001, 1002, 1003, and 1004. There was no strategic or tactical reason not to move for their exclusion. This constitutes deficient performance.

Castleman demonstrated that he was prejudiced by the deficient performance in that had they been excluded the Government could not have established the elements for proving transportation, reception, or advertisement for child pornography, precluding conviction.

The District Court erred in its determination that there was no deficient performance nor prejudice. The appellate Court erred in finding that it was not debatable amongst reasonable jurists.

Therefore Castleman respectfully requests that the Supreme Court Grant, Vacate, and Remand to the District Court for an evidentiary hearing or otherwise GRANT this Petition for a Writ of Certiorari for further briefing and arguments.

CONCLUSION

Though Castleman is not a skilled legal writer and may have inartfully presented his arguments; he did present sufficient verifiable facts and evidence to the district court to meet Strickland's two prong test, of deficient performance and prejudice, to warrant an evidentiary hearing. Strickland v. Washington, 466 U.S. 668 (1984).

The district court denied Castleman's "business records" as-

sertions, not because he did not present verifiable facts and evidence——but because in the Court's standard, counsel is not charged with having a "photographic memory." And because the Eleventh Circuit court of Appeals "summarily dismissed" a prior challenge to the business records. However, the Eleventh Circuit was never presented with the facts that the Certification certified two pages while the Exhibit contained three pages with no indication of what two of the three pages were intended to be business records by the custodian. Nor were they presented evidence that conclusively showed that the manner in which the subpoena responses were produced were inherently unreliable. Thusly the district court's applied standard of as long as the Government presents a certification under 902(11), regardless as to what was intended to be business records or the manner a record is produced is sufficient to be admitted; and does not violate the Fifth Amendment's Due Process clause nor the Sixth Amendments Confrontation clause, nor violate Fed. R. Evid. 803(6), or 902(11). This in error.

The Eleventh Circuits position that the above is not debatable amongst reasonable jurists is also in error.

Mr. Castleman presented the district court evidence which showed that the Government only provided digests which had been "modified" by the Government in discovery. He presented factual information which established that many of the digests had been "modified" by the FBI prior to their testified involvement in the investigation. And that the digests were the only text based evidence used to establish transportion, reception, and

advertisement of child pornography.

The district court's denial of Castleman's assertions based on the position that Castleman failed to provide evidence of what extent or what was altered, established an impossible standard for him to meet. Since he, nor any counsel, was given access to the non-adulterated digest, it was not possible to to establish what was altered. Further, the burden was on the proponent to establish that the converted digests were reliable. In fact the Government did not advise counsels as to their conversion. Nor is there a shred of evidence in the record that any other counsel was aware that FBI personnnel had "modified " the digests.

The district court was in error that Castleman's Fifth and Sixth Amendment Rights were not violated and the Fed. R. Evid. 1002, 1003, and 1004 were not violated requireing an evidentiary hearing.

The Eleventh Circuit was in error that the above issue was not debatable amongst reasonable jurists.

PRAYER

Therefore for the foregoing reasons Daniel Castleman, Petitioner, pro se, prays this Honorable Supreme Court to Grant, Vacate, and Remand to the District Court for an evidentiary hearing; or remand to the Court of Appeals to issue a Certificate Appealibility; or GRANT this Petition for a Writ of Certiorari

for further briefing.

Respectfully Submitted,

April 10, 2018
Date

Daniel Castleman
Petitioner, pro se

CERTIFICATE OF COMPLIANCE

Daniel Castleman ("Castelman"), Petitioner, is currently incarcerated in USP Tucson and proceeding pro se.

Supreme Court Rule 33.2(b) limits typewritten petitions for writs of Certiorari typed on 8½ X 11 inch paper to no more than forty (40) pages without leave from the Court.

Mr. Castleman certifies that this Petition is 28 pages, not including those pages excluded from the page count by Rule 33.1(d). The Petition used a Prestige/Pica typeset at ten (10) cahracters per inch with margins set to one inch on all sides. The petition uses white opaque, non-gloss paper.

/s/ Daniel Castleman
Petitioner, pro se