No. _____

In The

Supreme Court of the United States

SAMUEL COHEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The Ninth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

SAMUEL COHEN
Federal Register Number 57613-112
FCI Terminal Island
Post Office Box #3007
San Pedro, California 90733-3007

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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TABLE OF AUTHORITIES – Continued

the order denying rehearing appears at Appendix B.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

JURISDICTIONAL STATEMENT

This Court has jurisdiction to consider this Petition under the Supreme Court Rules, and is timely filed within ninety (90) days of the Final Order of the Ninth Circuit Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FEDERAL RULE OF CRIMINAL PROCEDURE

Rule 33: New Trial

(a) Defendant's Motion: Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment.

(b) Time to File:

(1) Newly Discovered Evidence: Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not

Microsoft was going to acquire E-Cast, a Corporation co-founded by Petitioner. Counts 8, 9, 10, and 12-19 allege that Mr. Dillon, the President of the Vanguard Public Foundation ["Vanguard"], solicited other individuals to invest in or loan monies to Vanguard, using the same or similar "Microsoft Acquisition Story" scheme, [The "Tier 2" Counts]. Part of the proceeds obtained solely, albeit fraudulently by Dillon, were subsequently invested in E-Cast through Petitioner's "Founder's Shares," and who had no reason to know or believe that the funds had been fraudulently acquired.

On November 9, 2011, a jury found Petitioner guilty of four counts of fraud relating to the Tier 1 counts totaling $1,160,000, and eleven counts of fraud relating to the Tier 2 counts totaling $1,736,974. At sentencing, prosecutors produced information indicating that there were 90 Second Tier victims when relevant conduct was considered. The Court found the total loss to be $31,400,000. The jury also found Petitioner guilty of ten counts of money laundering pursuant to 18 U.S.C. §1957, and three counts of tax evasion under 26 U.S.C. §7201.

The Government alleged a single "Microsoft Acquisition Story" scheme to defraud that included the fraudulent solicitations Mr. Dillon solely applied to his victims. Dillon however, as a defense, falsely claimed that he was acting entirely under the influence of Petitioner, believing that the "Microsoft Acquisition Story" scheme was true, and that Mr. Dillon was a "duped agent" of Petitioner. In fact, Petitioner had been "duped" by Dillon.

Dillon was not a "duped agent" as claimed by Dillon and the Government. The newly-discovered evidence included separate and unrelated sworn affidavits by Mr. Rafael Tiram and Mr. Samuel Edelshtain, both stating that Hari Dillon had also solicited monies from them using a "Microsoft Acquisition Story" scheme during April of 2002, several months before Dillon had even ever met Petitioner. In addition, Petitioner also discovered three e-mails dated May 1, 2007, July 1, 2007, and July 5, 2007, which individually and collectively disclosed the existence of a secret agreement made by Hari Dillon, Shannon Gallagher, and four others. The secret agreement provided that Dillon would repay $400,000 to disgruntled investor Barbara Rhine, in exchange for Ms. Rhine agreeing to stay silent and keep confidential information from Cohen, as to the true facts of Dillon's fraudulent solicitations. The Government acknowledged that it possessed the July 5, 2007 e-mail before trial, but could not produce any evidence that it was ever timely provided to Petitioner. In other words, the newly-discovered evidence strongly supports Petitioner's contention that Petitioner could not have known of Dillon's fraudulent Second Tier solicitations. Petitioner was unaware, due to the effort that Dillon and his associates made to keep Dillon's fraudulent solicitations confidential and unknown to Petitioner.

Based on this newly-discovered evidence, Petitioner moved for a new trial on November 7, 2014, pursuant to Federal Rule of Criminal Procedure 33, and included therein a request for an Evidentiary Hearing,

scheduled for May 20, 2015, only 2 weeks away. The District Court denied Petitioner's Rule 33 Motion, primarily on the grounds that Mr. Tiram's testimony in his Declaration was merely cumulative and impeaching, stating: "It's so collateral to the issue of whether or not Mr. Cohen is guilty." The Court also referenced the absence of Mr. Tiram from the motion hearing, further stating: "We need dates . . . we need all sorts of things." In addition, the District Court did not issue a summons for Mr. Tiram to attend the hearing of May 20, 2016, as would have been required under the law.

Petitioner appealed the decision of the District Court on May 27, 2015. Following completion of the Circuit Court's Briefing Schedule, the Court of Appeals for the Ninth Circuit issued a Notice of Oral Argument on September 9, 2016 that an Oral Argument Hearing would be held on November 17, 2016. The Circuit Court correctly noticed Petitioner, the Government, and published the Notice of the then scheduled Oral Argument Hearing to the general public on PACER.com. On October 31, 2016, the Court of Appeals extended the date for the Oral Argument Hearing to January 10, 2017, again correctly notifying Petitioner, the Government, and also publicly publishing the new Oral Argument Hearing date on PACER.com. On January 3, 2017, however, the Court of Appeals, without first providing any prior hearing on the matter, cancelled the public Oral Argument Hearing then scheduled for January 10, 2017, stating: "The decisional process would not be significantly aided by oral argument." Petitioner contends that by

ruling in *Cone v. Bell*, 556 U.S. 449, 472, 129 S.Ct. 1769, 173 L.Ed.2d 701, 2009 U.S. LEXIS 3298 (2009).

Accordingly, Petitioner now appeals two issues, including (1) the Sixth Amendment Public Trial Guarantee violation which occurred when the Circuit Court cancelled the previously scheduled, publicly noticed and ordered Oral Argument Hearing which was appropriate; and (2) which standard of review, "abuse of discretion" or "de novo," was appropriate and should have been used by the Circuit Court.

REASONS FOR GRANTING THE PETITION WITH RESPECT TO QUESTION NUMBER ONE

This case presents an opportunity of first impression for the Court to consider whether a grant and public notice of an Oral Argument Hearing by the Court of Appeals for the Ninth Circuit, which was published on PACER.com, was a grant to Petitioner and the public as a vested right to a public hearing, pursuant to the Sixth Amendment of the Constitution; and whether such right, if vested, could thereafter be withdrawn sua sponte without violating the Sixth Amendment Public Trial Guarantee and offending Constitutional Due Process.

In this case, a public Oral Argument Hearing was ordered by the Court of Appeals in order to hear defense counsel, pursuant to the ongoing criminal proceedings when Petitioner moved the Court to review the District Court's denial of Petitioner's Rule 33

decided in advance whether the District Court's hearing on May 20, 2016 was an evidentiary hearing or not.

It is evident from the Court of Appeals' ORDER of March 30, 2017 that the confusion regarding whether the hearing of May 20th was a "Motion Hearing" or an "Evidentiary Hearing" existed in the Circuit Panel's reasoning which clouded the Panel's judgment of the appeal. In Paragraph 4 of the Appellate Court's ORDER, the Panel stated: "Cohen also challenged the District Court's denial of his third motion to continue the Evidentiary Hearing." Petitioner contends that had the Circuit Court's Oral Argument Hearing been provided as previously ordered and noticed, the Panel would have learned of the confusion regarding the District Court's Hearing. Petitioner contends that the Panel would have thereafter more correctly determined and stated: "Cohen also challenges the District Court's denial of an Evidentiary Hearing."

Petitioner contends that it is of note that 14 of the 19 charges of wire fraud against Petitioner directly related to the actions of Hari Dillon fraudulently soliciting money with Dillon's fictitious "Microsoft Acquisition Story" scheme to support his lavish lifestyle and fund Dillon's own Vanguard Public Foundation. Petitioner Cohen never authorized Dillon's criminal conduct, the fraudulent "Microsoft Acquisition Story" scheme, nor was he ever aware of it. The Government, however, contended that Cohen must be charged with Dillon's fraudulent conduct because Dillon testified, [albeit falsely], that he believed the "Microsoft Acquisition Story" scheme, and further testified

investors soliciting instruments and donations to Dillon's Vanguard Public Foundation by his fraudulent solicitation techniques that included a "Microsoft Acquisition Story" scheme. The first witness to reveal this fact to investigators was Mr. Rafael Tiram. Mr. Tiram, a former law enforcement officer and now businessman, provided his personal Declaration under sworn oath and penalty of perjury, that he had previously been solicited with the "Microsoft Acquisition Story" scheme by Mr. Dillon as early as April of 2002. It is of note that Dillon did not even meet Petitioner Cohen until the fall of 2002, several months later. Petitioner contends that the "Microsoft Acquisition Story" scheme therefore could not in this instance be attributable to Petitioner Cohen under any reasonable interpretation of the circumstances.

Had Mr. Tiram been allowed to testify, it is more likely than not that the District Court would have ordered a more extensive "evidentiary" hearing. Petitioner stated that only seventeen days after the May 20, 2016 District Court hearing, another newly-discovered witness, Mr. Samuel Edelshtain came forward after learning of the case, trial, and conviction of Petitioner through an Internet news article and provided his sworn Affidavit dated June 6, 2016, that Mr. Dillon had been using the "Microsoft Acquisition Story" during the same April 2002 time period to solicit a stock investment opportunity as Mr. Tiram had also stated.

It is inconceivable that the District Court would have found Mr. Tiram's testimony cumulative and

averted, had the Court of Appeals held a preliminary hearing to the cancellation/closure of the "Oral Argument Hearing" in order to determine if any prejudice would result from not having it.

Petitioner cites to the Ninth Circuit's own precedent in *United States v. Ivester*, 316 F.3d 955, 2003 U.S. App. LEXIS 532 (9th Cir. 2003), which held: "[A]lthough the Sixth Amendment refers to a public trial, the right encompasses more than the trial itself, extending to those hearings whose subject matter involves the values that the right to a public trial serves." Furthermore, in *United States v. Rivera*, 682 F.3d 1223, 2012 U.S. App. LEXIS 12802 (9th Cir. 2012), the Court stated: "[P]ost-trial hearings and motions that include direct appeals, motions for new trials, release pending appeals and other criminal proceedings are subject to the Public Trial Clause of the Sixth Amendment." The *Rivera* Court went on to say: "There are three procedural requirements that must be met for partial closure. First, the Court must hold a hearing on the closure; second, the Court must make findings of fact; and third, the Court must establish that there are no reasonable alternatives." *Rivera*, *Id.* at 1226, citing to *United States v. Sherlock*, 962 F.2d 1349, 1992 U.S. App. LEXIS 7919 (9th Cir. 1988).

Petitioner contends that the Ninth Circuit Court of Appeals should have followed its own precedents in this case for the following reasons:

procedural error of the District Court by not summoning Mr. Tiram, and the Appeal Court Panel's error in reviewing the findings of an "evidentiary" hearing that never took place.

If this Court does not grant plenary review to resolve the question as to whether the grant of a public hearing for an Oral Argument Hearing.

As this Court has explained in *Lawrence v. Chater*, 516 U.S. 163, 116 S.Ct. 604, 133 L.Ed.2d 545 (1996), in an appropriate case, a GVR Order conserves scarce resources of this Court that otherwise may be extended on plenary consideration, and assists the Court below by flagging a particular issue that it does not appear to have been fully considered.

REASONS FOR GRANTING THE PETITION WITH RESPECT TO QUESTION NUMBER TWO

Petitioner's case presents an ideal vehicle for this Court to consider whether an appellate review of a motion for a new trial involving a claim under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) implicating mens rea, denied by the District Court, should as a matter of law, be reviewed under the "de novo" standard of review, rather than under the "abuse of discretion" standard of review.

fraudulent solicitations. Those e-mails had been concealed from Petitioner prior to the criminal trial in his case. The e-mail dated July 5, 2007 explicitly stated the objective of Dillon to keep disgruntled investor Barbara Rhine silent as to her knowledge of Dillon's fraudulent activities. Ms. Rhine had previously threatened to disclose the inculpatory information she had on Dillon to Petitioner.

The Government admitted that it had no record of producing this e-mail to Petitioner, but claimed that it produced e-mails dated May 1, 2007 and July 1, 2007, within a discovery trove of well over one thousand documents. Cohen disputed that the e-mail dated July 1, 2007 was included in the trove, and commissioned an independent examination of former defense counsel's files by Professor Sterling Harwood, J.D., in order to determine this dispute. Professor Harwood completed his search and concluded in his written report, which was provided to the Circuit Court, that Petitioner's claim of nondisclosure was correct.

This case is unique in that Petitioner was convicted of defrauding sixteen people whom he had never met; was unaware of their existence; never communicated with; never conducted any business with; and also completely unaware that they had been fraudulently solicited by Mr. Dillon to invest in Dillon's own Vanguard Public Foundation. An additional 74 victims that Dillon solicited without Petitioner's knowledge were added as relevant conduct at sentencing.

is an unwitting "duped agent" of "A" because "B" only robs the bank, or defrauds "C" to give the money to "A". This argument though conflates agent with agency. Whether the Dillon/Cohen relationship was an "agency" is a legal interpretation that has never been made. The word agency does not appear in the trial transcripts.

If this argument fails, as it must because no agency had been alleged, then so must the Government's premise that Petitioner Cohen should have known or reasonably foreseen that Dillon was using a fraudulent "Microsoft Acquisition Story" scheme to solicit others, [known as the Second Tier Investors], to invest in Dillon's Vanguard Public Foundation, in order that Dillon could subsequently invest with Petitioner.

II. IMPORTANCE OF THE CABAL E-MAILS:

Newly-discovered evidence of a Cabal was discovered 30 months after trial. The Cabal showed that Dillon and his fellow Vanguard Associates, Sam & Mary Mills, Shannon Gallagher, Susanna Moore and Susannah Schwartz, actively concealed the existence of a Second Tier Victim from Petitioner by arranging to return all money solicited by Dillon from victim Barbara Rhine. In an e-mail dated July 5, 2007 from Shannon Gallagher to Hari Dillon, Gallagher states: "My real concern is Barbara contacting "M" [Mouli Cohen]," and among the priorities Gallagher cites is to "protect

garner money from investors for his personal use, or channel it through his Vanguard Public Foundation, what blame could any juror reasonably attach to Petitioner, beyond Dillon's testimony that Petitioner was allegedly the source of Dillon's "Microsoft Acquisition Story" scheme?

The jury could only fairly convict Petitioner of the Second Tier solicitations if they found that Petitioner knew or should have known of Dillon's solicitations using the "Microsoft Acquisition Story." Had the jury been made aware of the July 5, 2007 e-mail, it is more likely that at least one juror would have harbored doubts as to whether Cohen knew or could have known of Dillon's solicitations.

The District Court ruled that the Government had no obligation to produce the July 5, 2007 e-mail because it was produced in separate private civil proceedings to which Cohen was a party, and therefore ruled it to be not newly-discovered. Petitioner contends that the District Court's definition of "not newly-discovered" does not absolve the Government from its Constitutional duty under the Fifth Amendment to provide exculpatory evidence to Petitioner under *Brady* or *Giglio*; nor does it pass Constitutional muster with the actual date of receipt within the discovery of the civil case. Because of its ruling, the District Court did not reach the issue of whether the newly-discovered e-mail was material to Petitioner's knowledge of the Second Tier investors.

This appellate ruling is in conflict with the Ninth Circuit's earlier precedents, and in conflict with the ruling of this Court in *Cone v. Bell*, 556 U.S. 449, 472, 129 S.Ct. 1769, 173 L.Ed.2d 701, 2009 U.S. LEXIS 3298 (2009); and *Rompilla v. Beard*, 545 U.S. 374, 390, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005).

Petitioner contends that the July 5, 2007 e-mail is not merely cumulative or limited to an impeachment classification, but goes to the core issue of the guilt or innocence of Petitioner Cohen. The July 5, 2007 e-mail compels the question of what Petitioner could have reasonably known about Dillon and his associates' actions to conceal from Petitioner the existence of the Second Tier investors. The materiality of the failure to disclose the July 5, 2007 e-mail is reflected in the quadrupling of Cohen's sentence to 264 months for the inclusion of the Second Tier Victims, of whom Petitioner had no actual knowledge or mens rea.

The Ninth Circuit has previously held that "materiality [in a *Brady* context] is always reviewed de novo." *United States v. Davis*, 609 F.3d 663, 696, 2010 U.S. App. LEXIS 12370 (5th Cir. 2010). See also: *United States v. Jernigan*, 492 F.3d 1050, 2007 U.S. App. LEXIS 16185 (9th Cir. 2007).

Had the Ninth Circuit Panel provided Petitioner's Oral Argument Hearing and had conducted a proper appellate review of the *Brady* claim under a "de novo" standard of review, it would have found that the Government had an obligation to disclose the July 5, 2007 e-mail and could not shield itself with the claim that

fundamental Constitutional right of the accused to be provided open and public judicial proceedings not only during the trial itself, but on all related matters collateral to an underlying criminal case. The narrow issue of whether the Constitutional application of the Public Trial Guarantee applies to Oral Argument Hearings under a Rule 33 Motion For New Trial Appeal in a Circuit Court is one that Petitioner provides here as a first impression before this Court or any circuit court, compelling plenary review. Petitioner concedes that the Circuit Court had discretion of whether or not an Oral Argument Hearing should initially be provided at all. That notwithstanding, Petitioner also contends that once the Circuit Court determined the need for an Oral Argument Hearing and thereafter issued its Notice ordering the Oral Argument Hearing, coupled with the Circuit Court's action of "publicly noticing" the Oral Argument Hearing on PACER.com, that the discretion of the Circuit Court to later cancel the Oral Argument Hearing had been waived or lost. Rather, upon the Circuit Court's issuance of the public NOTICE and the publication on PACER.com, Petitioner's Constitutional right to the public Oral Argument Hearing had vested. Petitioner contends that under such vesting, the Oral Argument Hearing could not be cancelled, rescinded, or closed without first being provided the full and fair Due Process of Law with a prior hearing on the cancellation, rescission, or closure itself. That did not occur.

Petitioner presented the following Public Trial QUESTIONS to the Ninth Circuit Court:

II. THE "ABUSE OF DISCRETION" VERSUS "DE NOVO" STANDARD OF REVIEW ISSUE:

Although the Public Trial Guarantee Issue is one of first impression to this Court, the Standard of Review Issue presented herein is one that Petitioner contends has already been established. To the extent, however, that the Circuit Court's use of an "abuse of discretion" standard of review on his Rule 33 Appeal is in conflict with not only this Court's ruling under *Cone v. Bell*, supra, that a "de novo" standard of review be applied under Petitioner's circumstances, but is also in conflict with the Circuit Court's own precedents as described above.

Petitioner contends on this issue that either a Grant, Vacate and Remand ("GVR") to the Circuit Court is appropriate, or in the event plenary review is provided, that this Court establish a clear rule that a "de novo" standard be used under Petitioner's circumstances described above.