No. 19-1159

In the Supreme Court of the United States

MICHAEL BOUCHARD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Under the "false statements statute", 18 U.S.C. §1014, it is a crime to knowingly make "any false statement or report ... for the purpose of influencing in any way the action" of the enumerated entities in the statute. In 2009 Congress amended §1014 to cover "mortgage lending businesses". The question presented is whether the United States Court of Appeals for the Second Circuit contravened this Court's precedents by denying Michael Bouchard's Motion for a Certificate of Appealability (COA Motion) and Motion for Panel Reconsideration & Reconsideration *en banc* for Mr. Bouchard to obtain review of his claim that the indictment and the manner in which it was prosecuted violated the Constitution's Ex Post Facto Clause by retroactively applying the 2009 amended version of §1014 to pre-amendment alleged conduct?

II. Under *Strickland v. Washington*, 466 U.S. 668 (1984), this Court held that the Sixth Amendment guarantees criminal defendants the right to the effective assistance of counsel for their defense. The question presented is whether the United States Court of Appeals for the Second Circuit contravened this Court's precedents and Circuit Courts' precedents by denying Michael Bouchard's Motion for a Certificate of Appealability and Motion for Panel Reconsideration & Reconsideration *en banc* for Mr. Bouchard to

QUESTIONS PRESENTED
(continued)

obtain review of his claim that he was denied effective assistance of counsel, and, Mr. Bouchard's claim that the cumulative effect of the 27 prejudicial errors by defense counsel also denied him effective assistance of counsel?

III. Michael Bouchard filed a motion with the district court for an evidentiary hearing regarding a *Brady, Giglio, Jencks* claim raised in his §2255 proceeding. The government did not oppose the motion. But, the district court ignored the motion. Mr. Bouchard then moved the Second Circuit for a Writ of Mandamus ordering the district court to schedule the hearing. The district court then abruptly denied Mr. Bouchard's §2255 petition, discovery motion, and motion for an evidentiary hearing. The question presented is whether the United States Court of Appeals for the Second Circuit contravened this Court's precedents and Circuit Courts' precedents by denying Michael Bouchard's Motion for a Certificate of Appealability and Motion for Panel Reconsideration & Reconsideration *en banc* for Mr. Bouchard to obtain review of his claims that he was entitled to an evidentiary hearing regarding the *Brady, Giglio, Jencks* claim, and, that the district court usurped the authority of the Second Circuit to decide the necessity of an evidentiary hearing on a constitutional issue?

PROCEEDINGS IN FEDERAL APPELLATE COURTS THAT ARE DIRECTLY RELATED TO THE CASE IN THIS COURT

Court In Question: U.S. Court of Appeals for the Second Circuit, Docket# 19-1913

Caption: *Michael G. Bouchard, Petitioner-Appellant v. United States of America, Respondent-Appellee*

Date of Entry of the Judgment: 11-14-19 and 12-27-19

Court In Question: U.S. Court of Appeals for the Second Circuit, Docket# 19-1037

Caption: *In Re Michael G. Bouchard, Petitioner*

Date of Entry of the Judgment: 7-8-19

Court In Question: U.S. Court of Appeals for the Second Circuit, Docket# 14-9008-am

Caption: *In re Gaspar Castillo, Attorney.*

Date of Entry of the Judgment: 1-18-18

Court In Question: U.S. Court of Appeals for the Second Circuit, Docket# 14-4156-cr

Caption: *United States of America, Appellee* v. *Michael Bouchard, Appellant*

Date of Entry of the Judgment: 7-7-16

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DECISIONS AND OPINIONS BELOW

The Second Circuit's denial of the certificate of appealability motion is at App.1a. The denial of the motion for panel reconsideration and for panel reconsideration *en banc* is at App.3a.

The Second Circuit's denial of the Petition for a Writ of Mandamus in a related case is at App.5a.

The Memorandum-Decision and Order of the U.S. District Court for the Northern District of New York denying the Petitioner's §2255 motions is at App.7a.

The Second Circuit's disclosure order releasing the disciplinary record for defense counsel Gaspar Castillo is at App.31a.

The Second Circuit's decision on direct appeal is reported at 828 F.3d 116; App.40a.

The Memorandum Decision and Order of the District Court denying motions for a judgment of acquittal and a new trial is at App.67a.

JURISDICTION

The Second Circuit denied the COA motion on 11-14-19 and denied the motion for panel reconsideration, and, reconsideration *en banc* on 12-27-19. Title 28 U.S.C. §1254 confers jurisdiction.

PROVISIONS INVOLVED

Relevant statutory provisions are at Ap.148a-152a. Relevant constitutional provisions are at 153a-155a.

STATEMENT

Michael Bouchard was convicted on a theory that he conspired to submit false statements to "mortgage lenders" which fraudulently concealed disbursements of mortgage funds at closings. The government claimed that Bouchard and 2 of his paralegals assisted 2 schemes by submitting false HUD-1 Settlement forms to mortgage lenders.[1]

The Team Title Scheme was run by cooperating witnesses Francis Thomas Disonell and Matt Kupic. Their buyers purchased properties at "an inflated sales price" with a supposed "repair rebate". At closings, the office of the lender's attorney wrote checks to buyers for repairs and to Disonell & Kupic for "consulting fees". Bouchard's office closed a small fraction of these loans.

The PB Enterprises Scheme was run by cooperating witnesses Kevin O'Connell & Michael Crowley. They signed contracts for properties at the "seller's price", then had buyers sign contracts at an inflated "buyer's price". Bouchard's paralegal, Malissa Edgerton, prepared a HUD statement for the "buyer's price" as provided by lenders. The buyers' mortgage broker, Nickole Riley Sutliff, deceived Malissa by stating that the closings involved repair credits – and then asked

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[1] A HUD-1 form is a Housing and Urban Development settlement form used in closing a property sale that details the costs & fees associated with a mortgage loan. See *United States v. Kerley*, 784 F.3d 327, 333 n.2 (6th Cir. 2015).

Malissa to change the purchase price on page 1 of the HUD to the lower "seller's price" so the sellers would have a "courtesy HUD" for capital gains tax purposes.[2] Malissa wrote checks to buyers for repairs. O'Connell & Crowley deposited the checks and then wrote checks to themselves and the buyers. Bouchard's office closed a small fraction of these loans.

On 11-30-12 after a 12 day trial, Bouchard was convicted of conspiracy to submit false statements to mortgage lenders (Count 1), bank fraud (Counts 7 and 19), submitting a false statement to a mortgage lender (Count 24), and acquitted on the other 20 bank fraud counts. Bouchard was sentenced to 48 months imprisonment. The Second Circuit reversed the convictions on Counts 7, 19 and 24, affirmed the conviction on Count 1, and remanded the case for resentencing. *United States v. Bouchard*, 828 F.3d 116 (2d Cir. 2016). App.40a. Bouchard was again sentenced to 48 months imprisonment.

Bouchard's §2255 Petition, discovery motion and motion for an evidentiary hearing were

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[2] Malissa testified at trial that: 1) she believed Sutliff that the change to page 1 of the HUD was for a repair credit; 2) she did not think she was doing anything wrong when she made the change to the HUD; and 3) when she changed the first page of the HUD she was not trying to hide anything from the lenders. (Dkt. 51, 224-226; Dkt. 52, 3-4). The innocent changes made by Malissa to the first page of the HUD were labelled by the government as "double-HUDs".

denied by the district court. The Second Circuit denied the COA motion and a motion for panel reconsideration and reconsideration *en banc.*

1. The Ex Post Facto Violations.

The grand jury documentary "evidence", grand jury testimony of an IRS Agent, the indictment, and the prosecution of the case all violated the Constitution's Ex Post Facto Clause. How so? The government's case focused almost exclusively on alleged conduct involving "mortgage lenders", and under the law it was not a crime to submit any statement – true or false – to a mortgage lender.

Count 1 charged a conspiracy to submit false statements to mortgage lenders. Under the "false statements statute", 18 U.S.C. §1014, it is a crime to knowingly make "any false statement or report ... for the purpose of influencing in any way the action" of the enumerated entities in the statute. But, mortgage lenders were not covered entities under the statute in 2002-2007, the time period encompassed by the indictment. Congress later amended §1014 in 2009 to cover "mortgage lending businesses". *See* Fraud Enforcement and Recovery Act ("FERA") of 2009, 123 Stat. 1617.

The government's case was weak. The "evidence" was overwhelmingly related to "mortgage lenders", and should have been inadmissible because it was irrelevant to proving violations of the U.S. Code pre-amendment.

The trial jury did not hear strong exculpatory evidence. One of Bouchard's paralegals, Laurie Hinds,[3] testified at the grand jury. Laurie confirmed that she and Bouchard had no knowledge about what the government labelled as a "double-HUD" scheme:

> Q[:] Were there a number of closings that you became aware of where there were more than one HUD for that closing at the Bouchard law firm?
>
> A[:] That's what you stated but I didn't -- I haven't seen any. So -- you said there were but I don't know of any. You didn't show me any so I don't have any knowledge, sorry. (Dkt. 95-1, EX. 16)

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[3] After defending Bouchard in her grand jury testimony, the innocent Laurie Hinds was targeted by the government. On July 7, 2011, AUSA Thomas Capezza informed IRS Agent Thomas Fattorusso via email about a telephone call with Laurie: "*Tom, FYI, I just received a telephone call from Laurie Hinds. I told her that she was a target of the grand jury, she may be indicted, and if she obtains an attorney, she should have that attorney contact us within the next week*". (Dkt. 95-1, EX. 17). Laurie later pled guilty to the government's "conspiracy", but explained to another employee of Bouchard's firm that "*the Feds took her into a room and said if you pleaded guilty there would be no jail time so she pleaded guilty*" and "*I have two small children, I can't go to jail*". (Id., EX. 18).

> Q[:] So it's your testimony that checks can be cut in a way that is inconsistent, with two separate HUDs, and Mr. Bouchard, that can go unnoticed by Mr. Bouchard?
>
> A[:] Yes.[4] It shouldn't be, but yes. (Id.)
>
> Q[:] And that HUD is an accounting?
> A[:] But they [the lenders] receive those checks so the bank is aware of what was disbursed. (Id.)

Laurie also told the government in a 2007 interview that "the banks know about the disbursements made at all closings because the Firm sends copies of the disbursement checks to the bank after the closing..." (Id. EX. 14).

Defense counsel failed to cross-examine Laurie at trial. The jury never heard that: 1) Laurie and Bouchard knew nothing about the "double-HUD" documents; 2) The lenders were not defrauded because they received copies of checks.

2. Defense counsel committed multiple errors.

The performance of Bouchard's defense counsel, Gaspar Castillo, was so feeble that it amounted to no representation for Bouchard. The §2255 Motion details 27 prejudicial errors.

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[4] Due to Bouchard's extremely busy law practice, the hidden agenda of the fraudsters went unnoticed. The fraudsters' transactions comprised less than just 1.4% of all legal services rendered by The Bouchard Law Firm for the time period of the indictment. (Dkt. 54 at 43, 46, 56, 60).

3. The district court's denial of an evidentiary hearing interfered with the Second Circuit.

Before trial, the government promised "open file discovery".[5] After trial the government inadvertently divulged the existence of a suppressed tape recording of a key trial witness Kevin O'Connell of PB Enterprises.[6] Bouchard's §2255 papers showed that the government breached its discovery promise and violated *Brady/Giglio/Jencks*[7] by suppressing handwritten

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[5] At a July 2, 2013 post-trial evidentiary hearing, Prosecutor Olmsted testified: "We had -- I believe open file discovery, I mean as I recall it." (Dkt. 87; 61-62).

[6] Prosecutor Olmsted testified that in one of his pre-trial meetings with O'Connell, a tape was played wherein O'Connell previously talked about manipulating the HUDs, but the tape did not refresh O'Connell's recollection about any interactions with Bouchard. (Id.; 56).

[7] "[T]he suppression by the prosecution of evidence favorable to an accused ... violates due process where the evidence is material to either guilt or to punishment..." Brady v. Maryland, 373 U.S. 83, 87 (1963). The government also has an obligation to disclose evidence that may be used to impeach a prospective witness, when the reliability of that witness could be determinative of the defendant's guilt or innocence. Giglio v. United States, 405 U.S. 150 (1972). Under "The Jencks Act", a defendant in a federal criminal trial is entitled to receive from the government any written statement in the government's possession which relates to the subject matter as to which a government witness has testified. 18 U.S.C. §3500(b).

witness interview notes, key typewritten interviews, and tape recordings of witnesses. The district court ignored a motion for an evidentiary hearing on the suppressed tape. Bouchard filed a Petition for a Writ of Mandamus with the Second Circuit seeking an order compelling the district court to schedule the hearing. The district court then hurriedly denied all of Bouchard's §2255 motions.

REASONS FOR GRANTING THE PETITION

Three questions merit review. *First*, the indictment and proceedings violated the Ex Post Facto Clause. *Second*, defense counsel's performance denied Bouchard the Sixth Amendment right to effective assistance of counsel. *Third*, the district court's denial of Bouchard's §2255 motions was an abuse of discretion and it usurped the Second Circuit's authority to decide a constitutional issue.

Bouchard was entitled to the issuance of a Certificate of Appealability, because at that stage, he showed that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017).

I. THE EX POST FACTO VIOLATIONS MERIT THIS COURT'S REVIEW

The Constitution forbids Congress from passing "Ex Post Facto" laws. U.S. Const. art I, section 9, clause 3. The Ex Post Facto prohibition forbids Congress to enact any law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." *Weaver v. Graham*, 450 U.S. 24, 28 (1981); *Calder v. Bull*, 3 Dall 386, 390, 1 L Ed 648 (1798). "Two critical elements must be present for a criminal or penal law to be ex post facto: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Weaver*, 450 U.S. at 29. Both elements exist here: **1)** the false statements statute, 18 U.S.C. §1014 (as amended in 2009 to extend to a "mortgage lending business") along with the definition of a "financial institution" in 18 U.S.C. §20 (as amended in 2009 to extend to a "mortgage lending business"), were applied retrospectively to alleged events in 2002-2007; and **2)** Bouchard was disadvantaged by it.

A. The Unconstitutional Indictment.

Count 1 violated the Ex Post Facto Clause by alleging that Bouchard conspired with PB Enterprises and Team Title to defraud **mortgage lenders** in all of their real estate closings (Dkt. 1; 7, 10). The "Manner and Means of the Conspiracy" alleged that ALL closings were part of the conspiracy:

> "It was part of the conspiracy that, in connection with the mortgage loans described above and listed in Counts 2 through 24 below, the defendant MICHAEL G. BOUCHARD agreed with others to obtain mortgage loan proceeds based upon the mortgage loan applications that were submitted to the victim mortgage lenders, and to cause the victim mortgage lenders to deposit the mortgage loan proceeds into the Bouchard Firm's escrow account." (Id., 10).

The language "the mortgage loans described above" refers to ALL of the closings as depicted on 2 fake charts created by IRS Agent Thomas Fattorusso and presented as "evidence" to the grand jury. (2d Cir. Case 19-1913, Dkt. 11, EX. R-S). The Government paraded ALL of these closings involving numerous non-bank mortgage lenders in front of the grand jury to procure an indictment that violated the Ex Post Facto Clause. Agent Fattorusso also lied twice to the grand jury while testifying on 6-22-11 and 7-27-11 by describing the non-bank lender BNC Mortgage, Inc. as a "bank". (Id. EX. T-U). The grand jury did not know that Agent Fattorusso's fake charts and testimony were false, so Bouchard was indicted for alleged conduct that was legal.

Based on the fake charts, the indictment incorporated into Count 1 ALL of the closings and unconstitutionally criminalized alleged conduct related to numerous non-bank mortgage lenders, such as BNC Mortgage, Inc., Argent Mortgage

Company LLC, Citimortgage, Inc., Option One Mortgage Corporation, First Franklin Financial Corp., The CIT Group/Consumer Finance, Inc., Homestar Mortgage Services, SIB Mortgage Corp., and America's Wholesale Lender. First, the pre-amendment false statements statute required the government to prove that the false statement was made to a bank and that the defendant knows that it is a bank to which he has made the false statement. *United States v. Sabatino*, 485 F.2d 540, 544 (2d Cir. 1973); *Bouchard*, 828 F.3d at 127. Second, the government retroactively applied the later enacted 2009 law to indict Bouchard for a conspiracy to submit false statements to numerous "mortgage lending businesses".

Counts 2-16 and 18-24 also alleged conduct involving mortgage lenders that was legal.

B. The Unconstitutional Trial Evidence.

1. The CIT Group/Consumer Finance, Inc. closing.

This closing involved a mortgage lender that was not a bank under §1014 pre-amendment. Exhibit 1.10 and testimony were used to prove conspiracy. Disonell testified about a handwritten list he used to request checks from Laurie Hinds. (Dkt. 48; 203-210). The court stressed that testimony in the charging conference. (Dkt. 116; 3).

Petrified of the threat of going to jail with 2 small children at home, Laurie Hinds followed the government's fake story line and testified that she obtained approval from Bouchard to disburse checks consistent with a list provided to her by

Disonell. (Dkt. 50; 113-114). Sadly, Laurie's testimony was false and is contradicted by a prior 2007 government interview wherein she said that she "never checked with Bouchard when the disbursement checks were cut differently than stated on the HUD" (Dkt. 95-1; EX. 14) and a 2011 government interview wherein Laurie said that she "does not think that Bouchard would not knowingly do anything wrong", and that "no closings were done if something look wrong". (Id.; EX. 15). Castillo had the interviews, but neglected to properly cross-examine Laurie with her inconsistencies.

AUSA Olmsted misled the jury in summations by arguing that this closing proved a conspiratorial agreement. (Dkt. 116; 8-11).

The district court erred by ruling in its post-trial decision that the testimony for this closing "was sufficient evidence that the defendant knew of the existence of the scheme to make false statements to mortgage lenders and that he knowingly participated in it." App.94a-95a. But the closing for this "mortgage lending business" occurred in 2002. Bouchard was prosecuted in violation of the Ex Post Facto Clause by the retroactive application of the 2009 amendment to §1014.

2. The BNC Mortgage, Inc. closings.

These closings involved another mortgage lender that was not a bank under §1014 pre-amendment. The BNC evidence from bank fraud

convictions Counts 7 and 19 was used by the jury to convict Bouchard of conspiracy under Count 1. In fact, the trial court said exactly that in its post-trial decision. App.96a-97a.

The Second Circuit reversed bank fraud convictions Counts 7 and 19 because BNC Mortgage, Inc. was not a "financial institution". *United States v. Bouchard*, 828 F.3d 116, 126 (2d Cir. 2016). In rejecting the government's argument that BNC was a financial institution, the Second Circuit relied primarily on this Court's decision in *Loughrin v. United States*, 573 U.S. 351 (2014). App.53a,55a-58a.

The Count 24 false statements conviction was reversed because BNC was not a "bank": §1014 pre-amendment requires the government to prove that the defendant Bouchard "kn[ew] that it was a bank ... to which he has made a false statement ..." and that he "intended to influence". App.59a-60a.; *Sabatino*, 485 F.2d at 544.

The Second Circuit noted that "Timing is everything: the conduct for which Bouchard was convicted occurred prior to 2009." App.52a.

Prejudicial spillover of the inadmissible BNC evidence led to the conspiracy conviction. *United States v. Hamilton*, 334 F.3d 170, 183 (2d Cir. 2003); *United States v. Rooney*, 37 F.3d 847, 856 (2d Cir. 1994).

C. Michael Bouchard has not procedurally defaulted this Ex Post Facto Claim.

1. During the trial stage, no factual record was developed for this claim.

Castillo failed to move to dismiss the indictment on Ex Post Facto grounds and the record is void of any relevant objections. Therefore, this claim requires the development of facts within Bouchard's §2255 proceeding. The procedural default doctrine does not apply to claims such as this that require development of facts outside the trial record. *Bousley v. United States*, 523 U.S. 614, 621-622 (1998).

2. Even if this claim was procedurally defaulted – and it was not – Michael Bouchard is actually innocent.

In *Murray v. Carrier*, 477 U.S. 478, 495-496 (1986), this Court held that a federal habeas court may entertain procedurally defaulted claims to prevent a "fundamental miscarriage of justice," which it defined as instances where a defendant has established there has "probably" been "[a] conviction of one who is actually innocent." Bouchard always professed his innocence. (Dkt. 54 at 19-31; Dkt. 96 at 40; Dkt. 153 at 7, 47, 66; 2d Cir. 19-1913 Dkt. 11 at 24-25 & Dkt. 29 at 17).

A claim of innocence is "a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Schlup v. Delo*, 513 U.S. 298, 315

(1995). To make a credible showing of actual innocence in order overcome a procedural default, a movant must present new reliable evidence that was not presented at trial. *Id.* at 329.

The grand jury testimony and pre-trial statements of Laurie Hinds also prove Bouchard's innocence, but those facts were undeveloped at trial by defense counsel. *Supra* 5-6, 12.

Bouchard's innocence was also declared by an unexpected ally: Prosecutor Edward Broton. At the 7-2-13 post-trial evidentiary hearing about the recanted trial perjury of witness Kevin O'Connell of PB Enterprises, AUSA Broton read excerpts of O'Connell's trial testimony. AUSA Broton then argued that O'Connell's trial testimony about discussing a scheme and "double HUDs" with Bouchard did not constitute any crime:

> Broton: And the next question,
>
> *And did you* [O'Connell] *describe to him* [Bouchard] *what you wanted to do?*
>
> *Answer: Yes.*
>
> *Question: And what did you ask him, what did he tell you?*
>
> *Answer: That we wanted to basically buy the property, have two closings in one day where we were buying it from somebody at a lower price and then reselling it at a higher price.*
>
> ...

Broton: Your Honor, I was unfamiliar with the facts of this case until this recent issue arose and I read this testimony and I thought, well, what's wrong with that? You're buying low and selling high, I don't see the crime in that. And I don't think that you can fairly characterize this conversation as an explanation of the fraud scheme that was perpetrated here. Rather, I think this is what every real estate investor wants to do, buy low, sell high.

...

And what did he [Bouchard] *say to you* [O'Connell]*?*

That wouldn't be a problem.

...

Broton: Your Honor, that testimony simply not – doesn't implicate criminality to either Bouchard, O'Connell, or anyone in -- from my take on it.

...

So after you had met with Michael Bouchard – Question: After you had met with Michael Bouchard, discussed the need to have HUDs at a high and a low price, you then had a series of closings?

The answer, "Yes."

...

> Broton: Again, your Honor, I don't see any description or agreement of a crime in that limited one question, one answer testimony". (Transcript of July 2, 2013 Evidentiary Hearing – NDNY Dkt. 87 at 28-30).
>
> ...

Prosecutor Broton's position also applies to the witness Disonell's unimpeached false testimony that he called Bouchard to ask Bouchard if he could perform "double-HUD" closings for PB Enterprises and Bouchard supposedly said yes. *Infra* 25-27. Per Prosecutor Broton, a conversation about having "double-HUDs" is really innocent because it does not describe an agreement of a crime.

What if the jury heard this official government position that supposed discussions between Bouchard and others regarding false HUDs were not a "crime" and not a "conspiratorial agreement"? Would there have been a reasonable doubt? Yes.

Kevin O'Connell recanted his perjured testimony three months after trial. *Infra* 37-38. What if O'Connell recanted at trial and told the jury that he lied about meeting with Michael Bouchard because he was threatened by Prosecutor Olmsted? Would there have been a reasonable doubt? Yes.

What if the trial jury heard Laurie Hinds' grand testimony and prior statements about

Bouchard's innocence? *Supra* 5-6, 12. Would there have been a reasonable doubt? Yes.

And, what if the trial jury received a proper instruction from the court that Bouchard's alleged conduct involving numerous closings with nine (9) mortgage lenders was actually innocent? Would there have been a reasonable doubt? Yes.

The courts below ignored this Court's decisions in *Bousley*, *Murray* and *Schlup*.

This Court has few opportunities to review clear-cut Ex Post Facto violations. The staggeringly unconstitutional rule adopted below amply warrants this Court's review.

II. THE EXTRAORDINARY NUMBER OF DEFENSE COUNSEL'S ERRORS MERITS THIS COURT'S REVIEW

The Sixth Amendment guaranteed that Bouchard would be represented effectively while facing a criminal prosecution. But he was not. Instead, Bouchard was prejudiced by defense counsel Gaspar Castillo's deficient performance.

Castillo committed at least 27 errors (incorporated herein - §2255 Motion, Dkt. 153 at 48-89; Dkt. 164 at 16-26). Each error amounts to ineffective representation. And, Castillo's overall performance was so lacking that the cumulative effect of his conduct amounted to a violation of Bouchard's constitutional right to meaningful representation.

A. Defense Counsel's Disciplinary History.

The proceedings below detail Castillo's lengthy disciplinary history. (Dkt. 153; 48-52; 2d. Cir. Case 19-1913, Dkt. 11 at PACER p.9-11).

The NYS discipline stretches back to 2009-2010, years before Bouchard's trial.

In 2014 while representing Bouchard, Castillo was temporarily suspended by the Second Circuit and the Northern District of New York regarding another case.

At a November 14, 2014 NYS disciplinary hearing, Castillo testified that "depression", "feeling overwhelmed", "being scared to death" and other reasons led him to ignore inquiries from the Second Circuit about his neglect of a 2012 appeal (that neglect is the same time period as Bouchard's trial). Castillo also testified: **"I've done a lot of things to neglect."**

In 2016 Castillo was suspended for 2 years by the Second Circuit for neglecting another case, and was then suspended for 3 years by NYS for "grave misconduct" (neglect of clients' cases plus the failure to act with reasonable diligence and promptness in representing clients) – the same misconduct displayed by Castillo at the same time in Bouchard's case. Because of Castillo's grave misconduct, he was deemed unfit to practice law and unfit to represent members of the public. Bouchard is a member of the public that was represented by the unfit Castillo.

Castillo was disbarred by NYS on January 18, 2018. (NY Slip Op 00376).

The next day, the Second Circuit's Grievance Panel issued an Order authorizing the disclosure of Castillo's federal disciplinary record because the record is relevant to Bouchard's ineffective assistance of counsel claims. App.32a-39a.

This case is unique. Castillo's lengthy history of state and federal discipline is relevant to Bouchard's Sixth Amendment claim.

B. Defense Counsel's Errors.

Here, 13 of the 27 prejudicial errors are summarized:

Error 1 of 27 (NDNY Dkt. 153; 52-53):

Shortly after the grand jury testimony concluded in August 2011, Castillo was told by Prosecutor Capezza that he had doubts about the case and that he might not proceed with an indictment. What did Castillo do? **Absolutely Nothing**. AUSA Capezza heard the live testimony of all witnesses, then conveyed to Castillo his misgivings about the proceeding and his inclination to close the case. Castillo missed a golden opportunity to close the case with no indictment. Consequently, the case lingered on, AUSA Capezza resigned from U.S. Attorney's Office, and a different prosecutor obtained the indictment on 7-25-12.

Error 2 of 27 (Id.; 53):

At arraignment, the government convinced the court to order Bouchard to avoid contact with 4 individuals that later testified for the government at trial. Castillo failed to object to the government's interference with Bouchard's constitutional right to access witnesses in his defense.

Error 3 of 27 (Id.; 53-55; Dkt. 164; 17-23):

Castillo never made a discovery motion, but relied the government's false promise that there would be "open file discovery". The government violated *Brady/Giglio/Jencks* by suppressing all handwritten interview notes, various typewritten interviews and all tape recordings.

Error 5 of 27 (Dkt. 153; 55):

Castillo filed no Trial Memorandum and did not object to false statements in the government's Trial Memorandum. For example, the government falsely stated that Bouchard was interviewed and acknowledged that he created or caused to be created multiple and inconsistent HUD-1's for the same transactions. (Dkt. 17 at PACER 10). This falsehood appeared later in the PSI report. But, the truth is found in the government's own Memorandum of Interview: "Bouchard is the bank attorney and would not have participated in signing a double-HUD closing"; "Bouchard did not prepare any of the HUDs"; and "Bouchard never spoke to anyone about holding double HUD closings".

Error 6 of 27 (Id.; 55-56):

The district court used the government's legally erroneous jury instructions to instruct the jury. Castillo made no objection to these violations of the Fifth Amendment's Due Process Clause.

Day 1 of the trial: the court told the jury that Count 24 with non-bank BNC charged Bouchard with submitting "false documentation to a bank." (Dkt. 114; 4).

Aiding and Abetting: Instructions at Dkt. 14; 51-52 and Dkt. 117; 31. Aiding and Abetting §2(b) was charged in conspiracy Count 1, while §2(a) and §2(b) were charged in bank fraud Counts 2-23. The different elements for §2(a) and §2(b) were blended together into just one erroneous and intertwined instruction. The Second Circuit's direct appeal decision sheds new light on the trial: with bank fraud Counts 7 & 19 reversed, the jury should have never been allowed to utilize the erroneous and inapplicable 18 U.S.C. §2(a) for Count 1. As for §2(b), those instructions alone were wrong. Under a §2(b) "causing" theory, the instructions omitted all 4 necessary elements. *United States v. Scotti*, 47 F.3d 1237, 1246 (2d Cir. 1995). The Due Process Clause was violated. *Francis v. Franklin*, 471 U.S. 307, 313 (1985). "[T]he complete omission of an element of an offense violates due process". *United States v. Gallerani*, 68 F.3d 611, 617 (2d Cir. 1995). The charge also omitted the instruction that the underlying offense must be committed by someone

(not the defendant) beyond a reasonable doubt. *United States v. Osorio Estrada*, 751 F.2d 128, 132 (2d Cir. 1984). The omitted reasonable doubt standard is indispensable, for it "impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue". *In Re Winshop*, 397 U.S. 358, 364 (1970).

Conspiracy: Instructions at Dkt. 14; 37-40; Dkt. 117; 22-26. The instructions omitted all 3 essential elements of conspiracy, thereby violating the Due Process Clause. *United States v. Gallerani*, 68 F. 3d 611, 617-618 (2d Cir. 1995); *Francis v. Franklin*, 471 U.S. 307, 313 (1985).

Twice the court retroactively applied the 2009 amendments by instructing the jury that the specific object of the conspiracy was the submission of false statements to "**mortgage lending institutions**". (Dkt. 117; 21-22). As the Second Circuit ruled on appeal: "[I]n 2009 Congress amended both Section 20 and Section 1014 to cover **mortgage lending institutions** specifically. (emphasis added). App.58a.

Conscious Avoidance: Instructions at Dkt. 117; 16-17. The instruction omitted crucial elements. (Dkt. 153; 42-46). The instruction was erroneously applied to the alternate Count 1 charge of "aiding and abetting a conspiracy". It is impossible to consciously avoid "aiding and abetting" under 18 U.S.C. §2(b). Id. at 46.

Error 9 of 27 (Id. at 56-66):

Castillo failed to move to dismiss the indictment on Ex Post Facto grounds. He misunderstood the law. Before trial, Bouchard informed Castillo about the 2009 amendments to The U.S. Code. But Castillo did nothing. Bouchard was indicted, prosecuted and jailed for alleged conduct involving nine (9) different mortgage lenders that was legal under the pre-amendment statutes. *Supra* 8-13, 23.

Castillo's performance was unreasonable. "An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*". *Hinton v. Alabama*, 134 S. Ct. 1081, 1089 (2014).

Bouchard showed "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland* at 694; *Hinton* at 1089. The government's mountain of inadmissible Ex Post Facto evidence caused the indictment and convictions.

Error 10 of 27 (Id.; 66-67):

Castillo signed a "Stipulation" that allowed the government to introduce exhibits for 8 "Team Title" files – 7 involving mortgage lenders. AUSA Olmsted told the jury it could convict Bouchard of conspiracy based on any 1 of these 8 closings. (Dkt. 116; 30). Castillo failed to make 2 objections:

1) the exhibits for 7 closings and Olmsted's summations violated the Ex Post Facto clause; 2) all 8 exhibits were inadmissible – Bouchard had no co-conspirator with which to submit false HUD statements on these files because paralegals Hinds and Edgerton only pled to a conspiracy regarding the separate "PB Enterprises scheme".

Error 11 of 27 (Id.; 67-68):

At trial the government slid in FRE 404(b) evidence from 19 closings not charged in Counts 2-24: 14 closings with Argent Company, LLC and 5 closings with BNC Mortgage, Inc. (both mortgage lenders). "[T]he government may offer proof of acts not included in the indictment, as long as they are within the scope of the conspiracy". *United States v. Thai*, 29 F.3d 785, 812 (2d Cir. 1994). The alleged acts here fell outside the scope of a conspiracy to submit false statements to banks pre-amendment. Castillo made no objection.

Error 15 of 27 (Id.; 70-78):

Castillo failed to impeach government witness Disonell. Disonell testified that he called Bouchard to ask if Bouchard would do "double-HUD" closings for PB Enterprises, and, Bouchard said yes. (Dkt. 49; 32-33). Disonell lied. Castillo failed to use Disonell's prior inconsistent statements during cross-examination. Prejudice ensued: 1) Bouchard was convicted; 2) the trial court used Disonell's testimony to affirm the

conspiracy conviction. App.97a.; and 3) the Second Circuit did the same. App.64a.

Disonell's testimony is contradicted by his prior inconsistent statements made during a 2009 interview with IRS agents. (2d Cir. Case 19-1913; Dkt. 11, EX. N).

Castillo missed the glaring inconsistencies and never cross-examined Disonell.

In Disonell's 2012 trial story, Nickole Riley-Sutliff of PB Enterprises calls Disonell because she doesn't know how to do double HUD closings for PB Enterprises and she wants to know if Disonell can do the closings. Then, Disonell calls Bouchard to see if he would do double HUD closings for PB Enterprises, and Bouchard says yes.

In Disonell's prior 2009 IRS interview, Disonell said that Nickole Riley [Sutliff] and Matt [Kupic] both tell Disonell about double HUD closings that Bouchard is doing. Nickole Riley-Sutliff calls Bouchard and asks if he could do double HUD closings for Disonell because Disonell is interested in doing double HUD closings. Then, Bouchard calls Disonell.

Disonell's unimpeached false trial testimony proved the government's fake case that Bouchard joined the PB Enterprises' "double-HUD" scheme. Since Castillo entirely failed to subject the prosecution's case to meaningful adversarial testing, "then there has been a denial of Sixth Amendment rights that makes the adversarial process itself presumptively unreliable." *United*

States v. Cronic, 466 U.S. 648, 659 (1984). "No specific showing of prejudice is required ... because the petitioner had been denied the right of effective cross-examination which would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it". *Id.*

Error 17 of 27 (Id.; 79-80):

Castillo never cross-examined Disonell with exculpatory information from a letter Disonell sent to his sentencing judge. (Dkt. 95 EX. 33).

Errors 20 and 21 of 27 (Id.; 81-84):

Castillo failed to cross-examine Kevin O'Connell and Michael Crowley of PB Enterprises.

Both testified at the grand jury that they had no conversations with Bouchard. (2d Cir. Case 19-1913, Dkt. 11, EX. P-Q). At trial, they both told the same new false story that they met with Bouchard together to discuss their scheme of "buying properties low" and "selling properties high", that Bouchard said it "wouldn't be a problem", and that Bouchard agreed to do their closings.

O'Connell was only impeached on separate trial testimony that he discussed "double–HUDs" with Bouchard.

Castillo neglected to cross-examine O'Connell and Crowley with their grand jury testimony that they had no conversations with Bouchard. In affirming the Count 1 conspiracy conviction, the Second Circuit used O'Connell and Crowley's unimpeached false trial testimony about their conversations and "agreement" with Bouchard. App.46a-47a. But there was no such agreement – the two told the grand jury that they never spoke with Bouchard. Again, Castillo failed to cross-examine witnesses.

Error 22 of 27 (Id.; 84):

Castillo made no objections to false statements made by Prosecutor Olmsted in Summations:

- For bank fraud Count 19 with BNC, Olmsted referenced the HUD as a false document, and, the buyer and Bouchard's agreement to a conspiracy. (Dkt. 116; 57).

- Three times in the same sentence Olmsted desbribed BNC a **bank**. (Id.; 156-157).

- Olmsted described the mortgage lender Argent Mortgage Company LLC as "**Argent Bank**". (Id.; 155).

- Olmsted described the lender Fremont Investment & Loan as "**Fremont Bank**". (Id.; 20).

C. The Decisions Below.

In denying Bouchard's ineffective assistance of counsel claim the district court failed to discern the gravity of Castillo's errors, and simply copied the government's skeletal response to the §2255 motion. App.22a. The court then ruled: "Crucially, Petitioner's claims fail to show that: (1) Mr. Castillo's performance was below an objectively reasonable standard; *and* (2) that, but for the deficiency, the ultimate outcome of the proceeding would have been different. *See Strickland*, 466 U.S. at 687." App.22a.

The district court's analysis has no basis in established law. The Second Circuit approved that analysis, and its decision to deny Bouchard's COA Motion decided this important federal question in a way that conflicts with relevant decisions of this Court. App.1a-4a. The district court created new law, approved by the Second Circuit, which stands in stark contrast to decisions of this Court.

First, the district court reached the strange conclusion that since Bouchard was acquitted of 20 of the 24 counts at trial, this equates to effective performance by Castillo regarding the 4 other counts on which Bouchard was convicted. App.22a. If that were the law - and it is not - it would forever preclude all habeas petitioners with mixed jury verdicts from raising an ineffective assistance of counsel claim. Such harsh claim preclusion is not envisioned by the Sixth Amendment. ***Second***, the decisions below overruled this Court's evidentiary standard for

the prejudice prong of an ineffective of counsel claim as established in *Strickland v. Washington*, 466 U.S. 668, 694 (1984). The courts below created a new and extremely heightened evidentiary standard for a habeas petitioner to prove prejudice resulting from defense counsel's deficient performance.

D. The Law.

The Sixth Amendment guarantees criminal defendants "the right ... to have the Assistance of counsel for [their] defence. This Court has long recognized that the right to counsel includes "the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

A petitioner seeking to attack a conviction based on ineffective assistance of counsel must show: (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland,* 466 U.S. 668, 688, 694.

In ruling on the requisite prejudice at the second step – the prejudice prong – the district court ran far afield from established law and erroneously decided that Bouchard was required to prove "*that, but for the deficiency, the ultimate outcome of the proceeding would have been different*". App.22a. There is no such requirement under the law. Rather, a much lower evidentiary

threshold applies for the prejudice prong. As this Court ruled in *Strickland*:

> "An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.
>
> Accordingly, the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution, *United States v. Agurs,* 427 U.S. at 427 U. S. 104, 427 U. S. 112-113, and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness, *United States v. Valenzuela-Bernal, supra,* at 458 U. S. 872-874. **The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.**"
>
> *Strickland* at 694. (emphasis added).

It is uncontroverted that Castillo's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for the unprofessional errors, the result of the proceeding would have been different. Confidence in the outcome has been undermined.

E. The Fremont Investment & Loan Closing.

The court's dismissal of Bouchard's ineffective assistance of counsel claim rests on just 1 closing for an alleged "overt act" involving Fremont Investment & Loan. App.23a-24a.[8]

The indictment described Fremont and nine (9) non-bank lenders as "mortgage lenders". In fact, IRS Agent Fattorusso told the grand jury that Fremont was a **"mortgage company"**. (2d Cir. Case 19-1913, Dkt.11, EX. U). The indictment failed to allege the crucial element that Fremont was a "bank" and that Bouchard knew that Fremont was a "bank" to which the statement was submitted. *Sabatino*, 485 F.2d at 544. Nor was this proven at trial. The government failed to introduce evidence at trial that linked the crucial word "bank" to Fremont Investment & Loan.[9]

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[8] Bouchard was acquitted at trial of substantive Count 17 for this same transaction with Fremont that charged bank fraud -or- in the alternative, aiding and abetting bank fraud.

[9] Prosecutor Olmsted knew that this essential element was missing. So, in summations he falsely described "Fremont Investment & Loan" as "**Fremont Bank**". (Dkt 116 at 20).

Irma Valdez of Fremont could not describe Fremont as a bank for the jury:

Q[:] And Fremont, the company that you work for, was a sub-prime lender, correct?

A[:] That is correct.

Q[:] And by that, you will agree, means that your particular bank, should I call your company a bank or did you call yourself something else?

A[:] We were Fremont Investment & Loan.
(Dkt. 48 at PACER page 38).

To support the dismissal, the district court cites "Petitioner's testimony acknowledging that Fremont was an FDIC-insured institution". App.23a. This snippet from cross-examination testimony does not reflect the full record – but it does prove ineffective assistance of counsel.

First, Bouchard's testimony on 11-26-12 acknowledged that Fremont was FDIC insured because 12 days earlier Valdez of Fremont testified that Fremont was FDIC insured (Dkt. 48; 9-10), and, Valdez identified Fremont's FDIC certificate in her testimony. (Gov. EX. 01.1).

Second, Bouchard testified on re-direct examination that before the trial he had an opportunity to look into the particular subject of the FDIC to investigate and determine the FDIC insured status of Fremont. (Dkt. 54 at 167). But, trial counsel Castillo failed to develop this

important defense beyond that short re-direct. The government listed Fremont in a proposed indictment. So, Bouchard researched Fremont on June 12, 2012, located Fremont on the FDIC's web-site and printed one page of search results. App.156a. Castillo had this printed page of research, but failed to introduce it into evidence in Bouchard's defense. And, Castillo failed to argue the fact that Bouchard did not know that Fremont was a bank at the time of this closing.

Third, the narrow language of the FDIC certificate covered only Fremont's home office in Brea, California and its Domestic U.S. branches. Bouchard's staff dealt only with Fremont's Elmsford, NY mortgage processing location, which did not take deposits and did not issue monetary instruments, and was therefore not covered as a "Domestic U.S. Branch" under the FDIC certificate. (Dkt. 153; 61-63). Bouchard's office sent the HUD statement to Fremont's Elmsford, NY office – not Fremont in California. The government tried to cure this defect by introducing at trial Exhibit 17.4B which contained a 1 page document entitled "Tax Service Order" with Fremont's with Brea, California address. But, Bouchard's office never received this internal Fremont form. As Valdez of Fremont testified: "The next page is an internal form, it's a tax service order..." (Dkt. 48 at 37). The FDIC certificate was irrelevant to Fremont's Elmsford, NY mortgage location. Castillo knew these facts,

but made no motion to dismiss and made no arguments to the jury.

Fourth, the indictment alleged that false HUDs were submitted to mortgage lenders to influence the lenders in connection with the mortgage loans that were being funded at the closings. (Dkt. 1; ¶46). The "overt act" alleged that a HUD statement was submitted to Fremont which "misrepresented the manner in which the disbursements of the loan proceeds would be made". (Id.; ¶47b). These provisions allege a specific cause and effect: the submission of the HUD to Fremont caused Fremont to wire the mortgage loan funds to Bouchard's office on the day of the closing, March 30, 2005. However, another internal Fremont form within Gov.EX 17.4B disproves this overt act: a 1 page document entitled "Final HUD-1 Prepaid Finance Charge Worksheet" shows that the HUD was not reviewed and accepted by Fremont until April 30, 2005 – which is 16 days after the loan funded. (Dkt. 95-1, EX. 48). Thus, the HUD had no influence on Fremont with respect to its funding of the loan at closing as alleged in the indictment. Castillo knew these facts, but made no motion to dismiss and made no arguments to the jury.

The government has no evidence to uphold the unjust conspiracy conviction.

In sum, the Second Circuit's panel decision validated the trail-blazing creation of erroneous new constitutional law by the district court. By

endorsing that abhorrent creation, the Second Circuit departed from this Court's decisions. The courts below do not have the authority to overrule this Court. Such grave errors merit this Court's review.

F. The Cumulative Effect of Defense Counsel's 27 Errors.

The Sixth Amendment right to counsel exists to protect the right to a fair trial. *Strickland*, 466 U.S. at 684. *Strickland* instructs that counsel's errors must be considered together, requiring courts to assess "counsel's *errors*" (plural) and analyze "the *totality of the evidence* before the judge or jury." *Id.* at 695 (emphasis added).

The cumulative effect of Castillo's 27 errors deprived Bouchard of effective counsel.

Seven Circuits – the First, Second, Third, Fifth, Seventh, Tenth, and Eleventh Circuits – follow *Strickland* in assessing counsel's errors cumulatively. *Dugas v. Coplan*, 428 F.3d 317, 335 (1st Cir. 2005); *Lindstadt v. Keane*, 239 F.3d 191, 199 (2d Cir. 2001); *McNeil v. Cuyler*, 782 F.2d 443, 451 (3d Cir. 1986); *Moore v. Johnson*, 194 F.3d 586, 619 (5th Cir. 1999), superseded by statute on unrelated grounds; *Kubat v. Thieret*, 867 F.2d 351, 370 (7th Cir. 1989); *Sanders v. Ryder*, 342 F.3d 991, 1001 (9th Cir. 2003); *Gonzales v. Tafoya*, 515 F.3d 1097, 1126 (10th Cir. 2008); *Evans v. Sec'y, Fla. Dep't of Corr.*, 699 F.3d 1249, 1269 (11th Cir. 2012).

The Fourth, Sixth, and Eighth Circuits, by contrast, reject cumulative review of ineffective-assistance claims. *Fisher v. Angelone*, 163 F.3d 835 (4th Cir. 1998), *Campbell v. United States*, 364 F.3d 727 (6th Cir. 2004), *Wainwright v. Lockhart*, 80 F.3d 1226, 1233 (8th Cir. 1996).

In resolving the split, this Court should confirm that the majority view is correct. *Strickland's* focus on counsel's *errors*, in the aggregate, is consistent with this Court's recognition that the cumulative effect of multiple errors can undermine confidence in the judicial process and the resulting verdict. Bouchard's petition presents an ideal vehicle because the courts below refused to consider the cumulative effect of counsel's errors, and cumulative review would have made a decisive difference in this case.

III. THE DENIAL OF THE §2255 EVIDENTIARY HEARING MERITS THIS COURT'S REVIEW.

A. The Recanted Trial Testimony.

After trial, government witness Kevin O'Connell recanted his perjured trial testimony. The government's post-trial "Memorandum of Interview" includes the following pertinent entries:

> "O'Connell then stated that he lied in the Michael Bouchard trial and that he never met Michael Bouchard".

"O'Connell said that he met with Assistant United States Attorney, Michael Olmsted, and Special Agent Thomas Fattorusso and told them several times he never met Michael Bouchard. O'Connell stated that Michael Olmsted told him "If you do not tell us you met with Michael Bouchard we can't help you."

"O'Connell explained that he felt Michael Olmsted threatened him and as a result O'Connell lied while testifying that he met Michael Bouchard when in fact he did not."

"O'Connell stated that it was like the movies, he had to swear to tell the truth but then lied that he had a meeting with Michael Bouchard when he had actually never met Michael Bouchard. O'Connell said that he lied because he felt that Michael Olmsted threatened him that if he did not lie he would not get a reduced sentence. Also, that in the past he had provided information on others to Special Agent Fattorusso but Fattorusso only seemed to be interested in the Bouchard".
(2d Cir. Case 19-1913; Dkt. 11, EX. W; and
2d Cir. Case 19-1037, Dkt. 1-2 at 35-36).

Prosecutor Michael Olmsted testified at the 7-2-13 evidentiary hearing that he did not threaten O'Connell and that O'Connell was "remarkably imprecise" in his grand jury

testimony that he had no conversations with Bouchard.[10] This was AUSA Olmsted's "excuse" to justify asking O'Connell questions at trial about a fictional meeting with Bouchard.

To bolster his fabricated story, AUSA Olmsted then offered stammering and scattered testimony about a tape recording of O'Connell:

> "I remember another meeting we had where we played him a tape where he had previously talked about manipulating the HUDs because we thought that might refresh his recollection that he had had -- on his interaction with Bouchard. It did not refresh his recollection but that's what -- we played him a tape. I did not, I wasn't sitting there while he listened to the tape, though, so I don't remember ever talking to him then about his obligation to tell the truth because I wasn't sitting through most of that meeting. But on the other ones, I do remember meeting with him, I remember talking to him about -- as I've testified already." (NDNY Dkt. 87 at 56; 2d Cir. Case No. 19-1037; EX."H").

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[10] O'Connell's grand jury testimony was clear and precise: Q[:] "Did you yourself have any conversations with Michael Bouchard about the use of gift money or double HUD closings or any other techniques used to close properties?" A[:] "No." (Dkt. 153 at 82; 2d Cir. 19-1913, Dkt.11, EX. P).

B. The Hindered §2255 Discovery.

In its Response to Bouchard's §2255 Motion, the government argued that the burden is on Bouchard to prove the suppression of *Brady, Jencks* and *Giglio* material. (Dkt. 161 at 27, n. 18). Bouchard then made a discovery motion. (Dkt. 166). The government then admitted that the tape recording is *Brady, Giglio* & *Jencks* material, but falsely claimed that it was turned over in pre-trial discovery. (Dkt. 174; 10). Since Bouchard never received the tape, he requested an evidentiary hearing on the suppressed tape. (Dkt. 177). The government did not oppose the motion. The court ignored the motion for almost 3 months. Bouchard filed a Petition for a Writ of Mandamus with the Second Circuit seeking an order compelling the district court to schedule the evidentiary hearing. (2d Cir. Case 19-1037 Dkt. 1-2 & 5). The district court quickly intervened and denied all of Bouchard's motions. App.7a-30a.

C. The Mandamus Petition.

The Petition revealed that a tape recording never existed, and an evidentiary hearing would solidify that fact. O'Connell's grand jury testimony showed that he was unaware of the "double-HUDs" until after he was under investigation – thus, a tape of O'Connell discussing the manipulation of HUDs never existed:

> Q GRAND JUROR: When did you become aware of the practices of double HUD?
>
> A THE WITNESS [O'Connell]: Not until after the -- after the IRS agent visited my office and kind of briefed me on, you know, and I got an attorney and got involved in all of this on the specifics of how it was done.
> (2d. Cir. Case 19-1037; Dkt. 1-2 EX. "N").

AUSA Olmsted lied at the hearing about a tape recording of O'Connell to divert attention away from the fact that he threatened O'Connell into lying at Bouchard's trial. A new evidentiary hearing would have proved that a tape recording did not exist. Under the doctrine of *falsus in uno*, AUSA Olmsted's entire testimony can be rejected as false, and, the government has nothing to rebut the truth that it knowingly introduced false testimony at trial from its witness O'Connell.

A reversal would then be warranted. "Indeed, if it is established that the government knowingly permitted the introduction of false testimony reversal is virtually automatic". *United States v. Wallach*, 935 F.2d 445, 456 (2d Cir. 1991) (internal quotation marks omitted); *United States v. Stofsky*, 527 F.2d 237, 243 (2d Cir.1975) (citing *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

Bouchard was entitled to an evidentiary hearing to prove one of two mutually exclusive claims: 1) the government suppressed a tape recording in violation of *Brady/Giglio/Jencks;* -OR- 2) Prosecutor Olmsted lied and a tape never

existed, which then brings forward a Due Process claim for a reversal.

The lower courts' decisions undermine the integrity of the §2255 discovery rules. Paragraph 2 of §2255 states "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." This language incorporates the standards governing evidentiary hearings in habeas corpus cases articulated in this Court's decision in *Townsend v. Sain*, 372 U.S. 293 (1963). Under *Townsend*, a hearing is required where the facts alleged, if true, would entitle the movant to relief, and the facts have not yet been reliably found after a full and fair hearing. *Id.*, 373 U.S. at 312-313; *United States v. Magini*, 973 F.2d 261, 264 (4th Cir. 1992).

Actual proof of the facts alleged in the motion are not required in order to demonstrate entitlement to a hearing. "The law is clear that, in order to be entitled to an evidentiary hearing, a petitioner need only *allege* – not prove – reasonably specific, non-conclusory facts that, if true, would entitle him to relief". *Aron v. United States*, 291 F.3d 708, 715 n.6 (11th Cir. 2002) (emphasis in original).

The district court abdicated its authority to decide the necessity of an evidentiary hearing by ignoring the motion for months. The issue was ripe for consideration by the Second Circuit under a pending Mandamus Petition. The district court's unusually swift invasion of the Second Circuit's authority to render a decision regarding an unresolved constitutional issue presents an extraordinarily unique situation for this Court's review.

Aside from the Mandamus Petition, the district court abused its discretion in denying the evidentiary hearing. The government agrees with Bouchard that the tape of O'Connell is *Brady/Giglio/Jencks* material. But the tape was suppressed in pre-trial discovery. Bouchard's allegations, if proved, entitle him to relief. Thus, the district court abused its discretion in denying the evidentiary hearing. *United States v. Baynes*, 622 F.2d 66, 68-70 (3d Cir. 1980); *United States v. Barboa*, 777 F.2d 1420, 1422-1423 (10th Cir. 1985)

The panel below blessed the perfunctory district court decision that this Court's decisions and other Circuits reject. That provides an ideal vehicle for this Court to confirm a habeas petitioner's right to an evidentiary hearing on *Brady/Giglio/Jencks* claims, and to evaluate the authority of a Circuit Court to decide the necessity of an evidentiary hearing on a constitutional issue abandoned by a district court.

CONCLUSION

The Petition should be granted.

Respectfully Submitted,

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