

No. 19-5857

Supreme Court, U.S.
FILED

AUG 19 2019

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

JONATHAN P. FLOW, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
(NAME OF LAST COURT TO RULE ON MERITS OF CASE)

MOTION ~~FOR~~ WRIT OF CERTIORARI

JONATHAN P. FLOW

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TEL. NO. : N/A.

ORIGINAL

QUESTIONS PRESENTED

- I. Whether the Order of Dismissal with Prejudice as an Acquittance provides preclusive and legal force, requiring vacatur.
- II. Whether various violations of the Confrontation Clause violated Petitioner's due process rights and impaired the jury right to fair deliberation, requiring vacatur.
- III. Whether constitutional violation as fundamental error arises when the district court subverted witness testimony and improperly qualified use of a conscious avoidance jury instruction, requiring vacatur.
- IV. Whether the government's failure to disclose Brady material, including a waiver of attorney client privilege, only made known post-conviction, post-sentence, qualifies as constitutional violation, requiring vacatur.
- V. Whether the Order of Dismissal with Prejudice as an Acquittance, and use of incorrect statute at sentence, demand that Petitioner's sentence be immediately corrected to remove sentence enhancements.

LIST OF PARTIES

- ALL PARTIES APPEAR IN THE CAPTION OF THE CASE ON THE COVER PAGE.

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UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DOCKET NO. : 17, 2440

UNITED STATES OF AMERICA, Appellee

vs.

Jonathan P. Flom, Defendant - Appellant

DATE OF JUDGMENT OR ORDER :

: DENIAL OF REHEARING : 7 JUNE 2019

: SUMMARY ORDER : 27 FEBRUARY 2019

UNITED STATES DISTRICT COURT - EASTERN DISTRICT OF NEW YORK

DOCKET NO. : 14, CR. 507

UNITED STATES OF AMERICA

vs.

Jonathan P. Flom

DATE OF JUDGMENT OR ORDER :

: 31 JULY 2017

PARALLEL CIVIL ACTION

UNITED STATES DISTRICT COURT - EASTERN DISTRICT OF NEW YORK

DOCKET NO. : 14, CV 05575

SECURITIES AND EXCHANGE COMMISSION

vs.

Jonathan P. Flom

DATE OF JUDGMENT OR ORDER :

: ORDER OF DISMISSAL WITH PREJUDICE : 1 MAY 2019

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IN THE
SUPREME COURT OF THE UNITED STATES
Petition for Writ of CERTIORARI

Petitioner respectfully prays that a writ of CERTIORARI issue to review the judgment below.

OPINIONS BELOW

■ For cases from federal courts:

- (i) The ruling - SUMMARY ORDER of the United States Court of Appeals for the Second Circuit appears at Appendix A to this Petition and is : ■ published, to the best of Petitioner's knowledge, at: 2019 U.S. App. LEXIS 5831 (2d Cir 2019) 27 February 2019.
- (ii) the order denying rehearing of the United States Court of Appeals for the Second Circuit appears at Appendix C to this Petition and is : ■ unpublished, to best of Petitioner's knowledge.
- (iii) the judgment of the United States District Court - Eastern District New York appears at Appendix B to this Petition and is : ■ unpublished, to best of Petitioner's knowledge.
- (iv) Parallel Civil Action: The Order of Dismissal with Prejudice of the United States District Court - Eastern District of New York appears at Appendix D to this Petition and is:
■ unpublished, to best of Petitioner's knowledge.

JURISDICTION

■ For cases from federal courts:

The date on which the United States Court of Appeals for the Second Circuit decided the Petitioner's case was: 27 February 2019.

A timely petition for rehearing was denied by the United States Court of Appeals for the Second Circuit on: 7 June 2019, and a copy of the order denying rehearing appears at: Appendix C.

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

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES OF AMERICA

ARTICLE III, SECTION 2, CLAUSE 3

The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed; which District shall have been previously ascertained by law, and 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.

UNITED STATES CODE

15 U.S.C. § 78j (b)

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate

commerce or of the mails, or of any facility of any national securities exchange --

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities based swap agreement, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

18 U.S.C. § 1956

§ 1956 (a)(1)(A)(i) whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity --

(A)(i) with the intent to promote the carrying on of specified unlawful activity

shall be sentenced to a fine of not more than \$500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both. For the purposes of this paragraph, a financial transaction shall be considered to be one involving the proceeds of specified unlawful activity if it is part of a set of parallel or dependent transactions, any one of which involves the proceeds of specified unlawful activity, and all of which are part of a single plan or arrangement.

§ 1956 (a)(3) whoever, with the intent --

(A) to promote the carrying on of specified unlawful activity;

(B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity

conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified

unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph and paragraph (2), the term "represented" means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.

STATEMENT OF THE CASE

On June 7, 2019, the United States Court of Appeals for the Second Circuit Affirmed Petitioner's conviction and sentence following a jury trial in the United States District Court for the Eastern District of New York. The government had also filed a parallel civil enforcement action in the same U.S. District Court - Eastern District of New York which was dismissed with prejudice only weeks before the Second Circuit decision.¹

This Petition raises important issues with respect to the effect of the Order of Dismissal with Prejudice of the parallel action on both Petitioner's conviction and his sentence - issues which were not addressed by the Second Circuit. These issues mandate reversal of the conviction, or at a minimum, mandate as an acquittance a reduction and correction of Petitioner's sentence. Inextricably intertwined with the legal effect of the Order of Dismissal with Prejudice are trial and appellate rulings dealing with Petitioner's right to confront witnesses, erroneous and prejudicial rulings regarding witness testimony, error in jury instruction and Brady violation.

The underlying fact in both the criminal action and the parallel civil action revolve around an admitted fraudster Frank Speight ("Speight"); Speight was a SEC-registered transfer agent starting in March 2004, who began issuing fake certificates to investors from real companies with real securities. Over the course of in excess of nine (9-) years, the SEC showed that Speight was in good standing with the SEC with no SEC disciplinary nor administrative actions against Speight, even though - unbeknownst to Petitioner and the general public - the SEC never divulged that Speight was never in

1. Second Circuit Orders : (i) February 27, 2019, Appendix A; (ii) denial of rehearing, June 7, 2019, Appendix C; U.S. District Court - EDNY Order of Dismissal with Prejudice of May 1, 2019, Appendix D. Appendix-references will be designated by "Apx-___". Criminal action at U.S. District Court, 14. CR. 507. USDC-EDNY (RRM) with judgment July 31, 2017, Apx.B; Civil action at USDC-EDNY, 14. cv. 05575 (MKB)(LB) which resulted in the Order of Dismissal with Prejudice, Apx.D.

in compliance with the SEC and was conducting a fraud.

Law enforcement ended Speight's fraud in May 2013. The government then asked Speight to serve as a government agent and work with the government in setting up a reverse sting operation in conjunction with FBI agent Larsen.

In September 2013, Speight and Larsen asked Petitioner to meet them and they told Petitioner that Speight/Larsen were looking to build new business together which was not yet operating. Months later Speight/Larsen reached back to Petitioner to serve not as an attorney but as a settlement agent on December 30, 2013. From December 30, 2013 to April 2, 2014, the government did seven (7) transactions using Petitioner's third (3rd) party settlement services, paying Petitioner a total of \$6,920.34 in fees.

Petitioner was charged Sept. 22, 2014 in a one (1-) count indictment of money laundering in violation of 18 U.S.C. 1956 (a)(3) (A) and (B), both of which subsections as 1956 (a)(3) require proof of specific intent. The indictment identified 18 USC. 78j(b) which was common to both the civil and criminal actions. During trial and in the jury instruction, the government presented, and the district court sanctioned, a non-statute knowledge standard instead of the standard of specific intent as required by statute by 18 U.S.C. 1956 (a)(3)(A) and (B).

At trial and on appeal, Petitioner raised initial issues with respect to the improper ruling to allow use of Speight fraud/ 404(b) materials, which as explained herein, are now dismissed with prejudice in the parallel civil action as of May 1, 2019. Petitioner also challenged the violation of Petitioner's right to confront witnesses, the district court cut-off of cross-examination, the district court error in use of jury instruction, the violation of the government's disclosure obligation under Brady v. Maryland, 373 US 83 (1963) ("BRADY"), and the lack of evidence to support the elements of and the specific intent requirement of 18 U.S.C. 1956 (a)(3)(A) and (B).

At trial, the district court stated that there were not red flags (and that the government could not make reference) to put Petitioner on notice of the Speight fraud. Government witnesses also confirmed that Petitioner was never told nor informed of fraud.

Evidence adduced at trial from government witnesses affirmed that Petitioner bore no indicia of money laundering, no concealment, no disguise, and no manipulation - each identified under the statute 18 U.S.C. 1956 (a)(3). The evidence also demonstrated that Petitioner, unequivocally, was never told that certificates were fake, was never shown - given - or - delivered a certificate, and that the government sting itself chose to conceal the fraud from Petitioner.

When errors at the district court are viewed in conjunction with the recent Order of Dismissal with Prejudice of the government action, the government suppression of material and evidence as Speight's waiver of attorney client privilege, the district court's ex parte communications between the district court and the government, and, without limitation, failure to adhere to the statutory required specific intent, then this Honorable Court's supervisory authority must be exercised to remedy ERROR AND INJUSTICE visited upon Petitioner.

REASONS FOR GRANTING THE PETITION

I. THE ORDER OF DISMISSAL WITH PREJUDICE AS AN ACQUITTANCE PROVIDES PRECLUSIVE AND LEGAL FORCE

The Order of Dismissal with Prejudice, TRUMPETS in its effects, without limitation:

1. legal ERROR in due process: that the district court ERRED in allowing use of the Speight-fraud / 404(b) information. 2
the Speight fraud was - at the time of criminal trial an on-going parallel litigation being opposed by Petitioner; it was not proper, nor supportable, for the Speight-fraud / 404(b) information to have been used in a conclusory, presumptive manner in the criminal trial.
2. legal ERROR CAUSING ASSUMPTIVE AND PRESUMPTIVE TARIFF on the trial process, jury deliberation, and sentence.
3. legal ERROR when the Speight-fraud / 404(b) was UNRESOLVED AT LITIGATION yet USED by the government as a dominant feature in the Instant Case. As though it were fact already proven against Petitioner; indeed, it was NOT - AND - there was no fact of liability existing at that time; the Speight-fraud / 404(b) materials so infected the criminal trial process with unfairness.

There exists a clear probability the jury convicted Petitioner for the wrong reason; the jury was denied the right to fair deliberation on the offense charges. The resulting conviction - a denial of due process.

The Order of Dismissal with Prejudice is a preclusive force that affects substantial rights. The Order of Dismissal is significant in the district trial process, this on-going appeal, the presumption

2. Federal Rule of Evidence 404(b). The Speight fraud and F.R.E.D. Rule 404(b) are related in this Petition as "Speight-fraud / 404(b)".

of innocence, and sentence enhancements.

Petitioner contends, applying the preclusive force of the acquittance brought by the Order of Dismissal with Prejudice, the jury could have - and should have - grounded its verdict upon proof - if any - of elements of the charged offense in the absence of and to the exclusion of Speight - fraud / 404(b) references, information, charts, exhibits and witnesses.

Petitioner contends that there was no assurance the jury could have achieved its verdict given that the Speight - fraud / 404(b) - and a common element 15 U.S.C. 78j(b) - is Dismissed with Prejudice. The Order of Dismissal as an Acquittance exonerates Petitioner, judicially discharges from accusation; the Order of Dismissal has a res judicata effect on the nature and character of proceedings, verdict, and removal of sentence enhancements.

The Order of Dismissal with prejudice strips away by Acquittance and removes the Speight - fraud / 404(b) with material effect on trial and appellate review, such as without limitation

- Fifth and Sixth Amendment elements of offense
- Sixth Amendment due process
- Confrontation Clause protections
- Witness Selection
- Preclusion of government exhibits and charts
- Erases or identifies error of improper inferences, assumptions and presumptions used by the government and used by the district court.
- Eliminates over-reaching and incorrect inferences used by the prosecution
- Eliminates use of Speight's bad acts in government's case-in-chief against Petitioner
- Eliminates and demands removal of Speight - fraud / 404(b) material as sentence enhancements.

In support of the force of the Order of Dismissal with Prejudice,

in Nelson v. Colorado, 137 S.Ct. 1249, 1255 (2017), the principle remains that uncharged, acquitted conduct, no matter how acquitted or derived - is presumed innocent. In the Instant Case, the Speight-fraud/HOH(b) as to Petitioner was uncharged, and the Order of Dismissal with Prejudice is an acquittance - a discharge from obligation; the presumption of innocence in favor of Petitioner is the undoubted law. See, Nelson at 1256.

The Supreme Court in Johnson v. US, 544 US 295, 302 (2005) noted that "(t)his Court commonly speaks of the 'fact that a prior conviction', e.g. Apprendi v. New Jersey, 530 US 466, 490 (2000) and an order vacating a predicate conviction is spoken of as a fact as sensibly as the order entering it." Johnson, at 302.

In the Instant Case, Petitioner vigorously asserts that when the federal district court in the parallel civil action issued the Order of Dismissal with Prejudice, the Order of Dismissal as an acquittance dramatically altered Appellate review of the Instant Case.

The government declared that there was no evidence to pursue Petitioner in the Speight-fraud. ³ The government never charged Petitioner in the Speight-fraud. The district court declared that Petitioner was not being held responsible for the Speight-fraud. ⁴ (See also, Petitioner's Sentence section, infra).

3. Appellate Record will be designated by "App.R. —"; District Court Record will be designated by "Dist.R. —". On the affirmation that there was no evidence: SEE examples: e.g. affirming that Petitioner had 'no role in the fraud': App.R. 43, PSR (Nov. 3, 2016); App.R. 44, Government letter to district court (Jan. 24, 2017), stating 'no objection'; App.R. 45, PSR Addendum (Apr. 28, 2017); e.g. App.R. 43; par. 14, lines 7-8: "there is no indication that the defendant was involved in the underlying securities fraud offense."

- Dist. R. 71, p. 271: Defense counsel on cross-examination of government witness FBI LARSEN:

DEF. : Whether or not you (Larsen) knew that Flom was assisting (Speight) in selling fraudulent securities?

FBI LARSEN: No, because he would have been arrested.

4. Sentence Transcript ("SENT.TR."), p. 37-line 25 to p. 38-line 1: "Mr. Flom is not being held responsible for the underlying securities fraud".

The Order of Dismissal with Prejudice establishes several important legal effects but the one mentioned here by example is that Petitioner was cleared of civil liability. Petitioner is judicially discharged of all accusations.

Petitioner contends that the Order of Dismissal with Prejudice, under facts and circumstances of the Instant Case, has the same res judicata and law of the case effect as an acquittance, as would an order vacating A prior conviction. See, Johnson v. US, 544 US 295 (2005).

The Order of Dismissal with Prejudice Affirmed and demonstrated in the Instant Case various legal points:

- (i) the government Affirmed to the district court, pre-sentence, on three (3) occasions that Petitioner had no role in the fraud (see, Finte 3): 1. November 3, 2016 (App.R. 43); 2. January 24, 2017 (App.R. 44); 3. April 28, 2017 (App.R. 45).
- (ii) as mentioned, the district court declared its Acquittance that Petitioner "is not being held responsible for the underlying securities fraud" (See, Finte 4).
- (iii) Order of Dismissal with Prejudice ERASES use of Speight-fraud / 404(b) materials; the Order verifies Petitioner contention that the government could not - and did not - Achieve proof by preponderance of evidence in accordance with due process requirements.
- (iv) Petitioner - had no role
 - had no liability
 - had no responsibility
 - should have been, and is, presumed innocent.

In making assumptive, presumptive, and speculative use and inferences with Speight-fraud / 404(b) materials, the district court error permeated the entire trial.

The district court rulings on Speight-fraud/404(b) during trial became obviously wrong after the district court had ruled, with the post-conviction, post-sentence Order of Dismissal with Prejudice of May 1, 2019. It cannot be concluded with fair assurance that errors in the Instant Case did not substantially influence the jury, and the conviction should be vacated. See, BRECHT v. Abrahamson, 507 US 619, 639 (1993).

Facts in the Instant Case support that when the district court permitted use of Speight-fraud/404(b) materials, the government greatly entertained the jury about fraud-perpetrator Speight; Speight - when busted - the government made a government agent. Speight was not an informant on an on-going crime - Speight's crime no longer existed. So, then, the government created its own 'reverse sting' fraud; Agents (Speight; FBI Larsen) presented themselves as legitimate, lawful business (e.g. Tapes of: August 2013 (Speight); Sept. 26, 2013 (Speight/Larsen); Dec. 6, 2013 (Larsen)).⁵ The agents and the government, seven (7-) months after busting Speight and starting their operation, sought out Petitioner as a third party settlement agent. The record, in addition to nine (9-) months of tapes, clearly demonstrates; including by government witnesses, that Petitioner - dutifully accounted and performed settlements, that Petitioner was not told, lacked awareness, lacked knowledge of fraud (See, e.g. Beck, Dist. R. 70, p. 109-111; Larsen, Dist. R. 70, p. 408-409)⁶, and that the FBI determined Petitioner bore no indicia of money laundering (FBI

5. GX.152. A.T: as one of many examples: here, it is Speight calling Petitioner: p.1: Speight: "... Val who's my attorney; putting this together ..." (call of Aug. 21, 2013). (referring to Speight's Audit).

6. App. R. 88, Ex. A, Polygraph Report: Petitioner had voluntarily submitted to a polygraph, pre-indictment which noted he exceeded truthfulness and was not aware, did not know of fraud.

Forensic White, Dist. R.76, p. 597-99).

The error in the use of Speight-fraud/404(b) such as charts, testimony and Speight's guilty conduct had a substantial capacity to lure the jury into declaring guilt on a ground different - the Speight-fraud - from proof specific to the offense charged. Petitioner asserts that constitutional trial error had substantial and injurious effect or influence in determining jury verdict; such a conclusion is consistent with basic purposes of the Constitution and criminal process, protects from unconstitutional convictions, and helps to guarantee the integrity of and assuring that trials are fundamentally fair. See, BRECHT, SUPRA, at 627

Erroneous use and admission can be also measured by the significant weight the prosecution placed in front of the jury, including use of testimony and exhibits of Speight's fraud. The Speight was not the offense charged. With the Order of Dismissal with Prejudice as an acquittance, the error of wrong admittance of Speight-fraud/404(b) is accentuated. See, Satterwhite v. TEXAS, 486 US 249, 260 (1988). Speight-fraud/404(b) consumed in excess of seventy-three (73%) percent of trial proceedings. Had the Speight-fraud/404(b) been precluded from use - in light of the Order of Dismissal, it can be said the government case would be different, charts, exhibits and tapes excluded, government witnesses would be different, and witness confrontation under the Confrontation Clause would be different.

The error becomes obviously wrong with the legal force of the Order of Dismissal. The preclusive force of the Order as an acquittance affects the trial, the jury and the sentence enhancements. Fairly and properly viewed, a guilty verdict was far from assured. There is a real probability that the result of trial would have been different. See, U.S. v. TARRIDONE, 996 F2d 1414, 1420 (2d Cir. 1993).

The Order of Dismissal with Prejudice Affected substantial rights erased government allegations as to Petitioner. Government allegations in the parallel action against Petitioner alleged violation as a primary violator, aider and abettor, scienter, a common-to-both Actions violation of 15 U.S.C. 78j(b), and intent - were eliminated. The corresponding impact to the Instant Action is to see the use of Speight-frauds / 404(b) as obviously wrong in error, and its use as assumptively portraying guilt - a permeating poison into trial proceedings and sentence enhancements.

In Tellabs Inc. v. Makor Issues & Rights Ltd., 551 US 308, 314 (2007), the Supreme Court evaluated whether facts support "a strong inference of scienter", finding that scienter was not found and vacated.

In the Instant Case, the Order of Dismissal with Prejudice removes from consideration against Petitioner, without limitation, scienter, intent, and 15 U.S.C. 78j(b). The Order of Dismissal removes Speight-frauds / 404(b) also as sentence enhancements. Petitioner challenged enhancements and had pursued a four (4-) point reduction. The Order of Dismissal demonstrates removal of Speight-frauds / 404(b) enhancements: that is - correct the sentence to deduct (i) Fourteen (14-) points, using the USSG Guidelines⁷, reducing to Level 12 and ten (10-) months servitude, and then, (ii) deducting two (2-) points, removing the Special Offense characteristic, reducing to Level 10, Zone B and six (6-) months of servitude; the base level on the offense was Level 8. The district court using obviously wrong Speight-frauds / 404(b) sentence enhancements, entered a sentence at or in excess of Four hundred and eighty (480%) percent higher, at Forty-eight (48-) months. The sentence enhancements no longer can apply given the Acquittance Force of

7. The United States Sentencing Guidelines ("USSG Guidelines") and table reference were used in the PSR, App.B. 43, and by the district court at sentence (See, Gen. Tr.); See also, Petitioner Sentence Section, infra, SEE ALSO, App.E.

the Order of Dismissal. Petitioner's presumption of innocence is fully restored and re-invoked.⁸ Use of Speight-fraud / 404(b) at trial and sentence was ERROR.

Therefore, it was error for the district court to make or allow impermissible assumptions and evidentiary rulings and use of Speight-fraud / 404(b) that was still embroiled and unresolved in parallel government action. Use was obviously wrong with entry of the Order of Dismissal of May 1, 2019.

Use of Speight-fraud / 404(b) information was invalidated and scienter, intent, was erased by the Order of Dismissal with Prejudice in its legal force as an acquittance. Petitioner is judicially discharged from accusation and obligation and its use in the Instant Case.

The error of use of the Speight-fraud / 404(b) information permeated the trial process, violated due process rights, violated the right of jury fair deliberation, and sentencing. The error should be treated as if it affected the verdict. Substantial rights of Petitioner were affected and constitutional rights violated.

Wherefore, significant grounds support that the Order of Dismissal with Prejudice as acquittance provides preclusive and legal force, requiring vacatur of conviction.

II. VIOLATIONS OF THE CONFRONTATION CLAUSE VIOLATED DUE PROCESS RIGHTS AND IMPAIRED JURY RIGHT TO FAIR DELIBERATION

Various violations of the Confrontation Clause were independently, and together, Constitutional ERROR.

In the Instant Case, the exercise of the Confrontation Clause⁹ was impeded and impaired by:

1. newly discovered evidence October 30, 2018 of the existence of government agent and fraud perpetrator Speight's

8 . SEE, PETITIONER SENTENCE CONTENTION SECTION, infra.

9 . UNITED STATES CONSTITUTION, ART. III, SEC. 2, PAR. 3.

- Waiver of Attorney Client Privilege; this disclosure revealed a Brady violation¹⁰ and a Confrontation Clause violation impairing confrontation of all witnesses;
2. the district court cutting-off cross-examination of government witness #5 of 5 FBI Karcewski; and,
 3. the government failing in its Brady-obligations, making or having FBI Karcewski's target interrogation notes unavailable or lost, destroyed and not preserved.¹¹

The Supreme Court in Davis v. Alaska, 415 US 308, 316, 320 (1974) declared "restriction on the scope of cross-examination denies the defendant the right of effective cross-examination which would be constitutional error of the first magnitude and no amount of showing want of prejudice would cure it."

In the Instant Case, Petitioner contends his confrontation rights were impaired, impeded and restricted. The violations of the Confrontation Clause demand VACATUR of conviction.

A. Government Suppression or Non-disclosure Precluding Witness Confrontation

When an important witness is precluded by government suppression or the government makes testimonial material unavailable or unpreserved, the trial process has been compromised. The government has breached a fundamental Constitutional right to confront. See, Arizona v. Youngblood, 488 US 51 (1988).

10. SEE PETITIONER'S Brady violation section, infra.

11. App.R. 73, p.10 of 98: the government concedes "Others" were involved, yet failed to provide disclosure. Petitioner requested Brady information for example, on Speight, and, people in Speight's office - Harrison Katzen, William "Billy" Hancock, Esq.; this Confrontation Clause section discusses violations of failure to tender FBI Karcewski's notes.

Here in the Instant Case, an attorney Valentin 'Val' Rodriguez, who had represented the fraudster Speight, was cleared by his client Speight under a Waiver of Attorney Client Privilege executed in September 2013. When this Waiver was orchestrated by Speight with the government, the TAPES evidence that Speight, to Petitioner, had still referred to Val Rodriguez as Speight's lawyer in matters that pertain to this Instant Case. 12

On October 30, 2018, the government disclosed new evidence to Petitioner, which included Speight's Waiver of Attorney Client Privilege. The government had available the Waiver at September 2013; that date is three (3) years before Petitioner trial (June 2016). The disclosure of this Waiver came two (2) years after sentencing.

In suppressing the existence - and disclosure - of the Waiver of Attorney Client Privilege, the government directly impeded confrontation - it precluded access by the defense to an important witness who otherwise would have been available on matters exculpatory for Petitioner.

Confrontation Clause guarantees were violated by government suppression or non-disclosure; the suppression or non-disclosure precluded defense access to Speight's attorney Val Rodriguez as a witness to confront. Not only was Attorney Rodriguez impermissibly made unavailable, but as a result, the cross-examinations of government witnesses FBI Larsen, FBI Karzewski and FBI White were constitutionally impaired.

By impermissibly preventing - and hiding - access and testimony from Attorney Rodriguez, and the government thereby also limiting cross-examination of government witnesses, the reliability of government evidence alleged against Petitioner was prevented from rigorous testing of the veracity of evidence and testimony. See, Lilly v. Virginia, 527 US 116 (1999).

12. Speight, during nine (9) months of TAPERECORDINGS AS A GOVERNMENT AGENT, telephones Petitioner about Speight's work with his attorney Valentin 'Val' Rodriguez. The Waiver was executed soon after this call:
GX. 151. Speight call to Petitioner, Aug. 21, 2013: GX. 151. A.T.: Speight: "these has come back... on some things on the audit they were doing."
GX. 152. A.T.: Speight: "... VAL my attorney who's.. um... putting this thing together for 'em".

The government exclusion and preclusion of Attorney Rodriguez is a violation of the Confrontation Clause and a fundamental error. Id.

B. Cutting off cross-examination of FBI Karcewski
AND NON-DISCLOSURE OF HIS NOTES

In the Instant Case, the district court cut-off cross-examination of government witness FBI Karcewski. (Dist. R. 73, pp. 510-515). It is difficult to determine if the right of cross-examination was cut-off because the bench had formerly been the prosecutor's boss; or, was confrontation interfered because the government felt a peril of losing the Instant Case; or was it the existence of judicial ex parte communications with the prosecution.¹³ Whatever tilted district court rulings or government non-disclosure, each caused and resulted in Confrontation Clause violations and constitutional error. SEE, US v. Bagley, 473 US 667 (1985) (evidence is material ... if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different).

In the Instant Case, Petitioner had asserted his innocence. A review of the record demonstrates that each of four (4) - of only five (5) government witnesses (FBI Karcewski being the fifth) Affirmed:

- that each did not tell and Petitioner was not told of fraud (Thibault (1), Dist. R. 70, p. 84-85, on cross, exposed to perjury, admits Thibault did not Petitioner of fraud; Beck (2), Dist. R. 70, p. 109-110, on cross, that Beck made no contact with Petitioner; FBI Larsen (3), Dist. R. 70, on cross, in excess of ten (10) times affirms Larsen NEVER told Petitioner of fraud, e.g. p. 267-68, p. 350-355, p. 361-362 (lines 16-25), p. 408-409 (lines 22-24 and line 4) - defense counsel asks "... whether or not you flat out told (Petitioner) that you were engaged in fraudulent sale of securities?; Larsen reply: "No.").

13. SENT. TR., Dist. R., p. 38, lines 21-23; "District Court "... I remember Mr. Dennehy talking to me about that, because I was wondering why I had this case (the Instant Case) and Judge Cogan didn't have this case."

- that fraud was not disclosed to Petitioner (Thibault (1); Beck (2); FBI LARSEN (3))
- that there were not indicia of money laundering by Petitioner - no concealment, no disguise, no manipulation (FBI Forensic White, Dist. R. 76, p. 597-599, on cross).

Government Agent Speight, now as party opponent, had admitted to Petitioner at February 2016 (Petitioner trial was June 2016) that Speight never told Petitioner of Speight's fraud; the government chose not to call Speight as a witness; the entire collection of nine (9-) months of communication and tape recordings of the government reverse sting reveal that at no time did Speight nor Speight/Larsen tell Petitioner of fraud. (Dist. R. 73, FBI LARSEN, on cross: sample: p. 408-409, lines 22-24, line 4, when Larsen is asked "whether or not you flat out told (Petitioner) that you were engaged in fraudulent sale of securities?" and Larsen replies "No."; p. 423 et seq. when defense counsel takes FBI LARSEN through each of the offense seven (7-) transactions, asking each time of Larsen 'Did you ever tell (Petitioner) its fake? Bullshit?' and Larsen answers each time - "No".). It was believed - including from FBI LARSEN testimony - that FBI LARSEN and FBI Karcewski as a Speight case agent, would have been - as had been done - monitoring Speight communication and Speight's admission. This line of inquiry confronting government agents was permissible; it did not mature when cross-examination was cut-off of FBI Karcewski.

Petitioner then became aware that government witness FBI Karcewski had made false and contradictory statements, perjured and fabricated recollections, and made assertions of his (Karcewski's) targeted, non-Mirandized interrogation of Petitioner, ¹⁴ in the

14. Violation of Fifth Amendment of the Constitution privileges. See, Miranda v. Arizona, 384 US 436 (1966), on Miranda- warning right to counsel at the outset of a targeted interrogation process.

dark at six (6-am) April 16, 2014; Petitioner asserted that Petitioner at no time had made any admission about a fraud Petitioner was not aware of. ¹⁵ FBI Karzewski, among other things, had falsely alleged the contrary.

The district court erred when the government failed to show compelling need as to why the defense's constitutionally provided confrontation was to be restricted.

The district court also erred in denying Petitioner's Application of Federal Rule of Evidence 406 - rule of completeness.

It is of note that the government itself, post-conviction, at sentence, when strenuously arguing for harsh sentence, two (2) times acknowledged and affirmed that Petitioner never made an admission: (1) Sent. Tr., Dist. R., p. 43 "he (Petitioner) never admitted his misconduct (line 12); and (2) Sent. Tr., Dist. R., p. 44 Defendant "never once admitted what he did was wrong" (line 9).

The district court error precluded the fact of no-admission, lack of admission being exposed and being tested at cross-examination before the jury. As government witness Thibault - exposed to perjury on cross-examination stated - indeed - Thibault did not tell Petitioner of fraud, so should cross-examination of FBI Karzewski been available to expose FBI Karzewski. (See, Thibault cross, Dist. R. 70, p. 84-85).

Petitioner contends that the status of FBI Karzewski as an FBI agent does not dispose of Confrontation Clause protections and rights. Petitioner was entitled to vigorously test FBI Karzewski's perjury and falsehoods, and contradictions. A full scope of cross-examination, without limitation even exercising Federal Rule of Evidence 406, was to be available to Petitioner even if matters may have been unrelated to

15. Petitioner had submitted voluntarily to a polygraph pre-indictment, which was brought to the district court's attention early in criminal process, with a copy later submitted to the court, finding that Petitioner had been truthful when denying knowledge, awareness of any fraud. (Exhibit A to Petitioner sur-reply, p. 2). Dist. R. 88.

merits of the offense charged.

Confrontation was foreclosed when cross-examination was cut-off by the district court.

C. Unavailable, unpreserved target interrogation notes

In the Instant Case, FBI Karcewski's targeted, non-Mirandized interrogation of Petitioner took place two (2) weeks after the government terminated its reverse sting, and one (1) year after Speight's crime no longer existed. FBI Karcewski was plainly and only questioning on past-events. In his defense, Petitioner contended he did not knowingly nor with intent provide settlement services to unlawful activity, and, that there was not reason for Petitioner to be aware of fraud. As previously mentioned, supra, government witness FBI Larsen preceded FBI Karcewski's testimony; FBI Larsen - on cross-examination, revealed Petitioner's lack of awareness, lack of knowledge, throughout the nine (9) months of the government operation: FBI Larsen affirmed that Larsen/Speight never told Petitioner (e.g. confirmed by nine (9) months of tape) and Larsen never told Petitioner of fraud. FBI Karcewski's contradictory statements were open to full attack. See, Brecht v. Abrahamson, 507 US 619, 639 (1993).

FBI Karcewski targeted interrogation was to gather, take notes (as he did), and try to elicit information from Petitioner. The prosecution failed to tender FBI Karcewski's targeted interrogation (and testimonial) notes under Brady; the prosecution also had claimed the notes were unavailable, lost or destroyed or not preserved.

Testimony including FBI Karcewski's notes were covered by the Constitution's Sixth (6th) Amendment due process and Confrontation Clause to confront a witness. The Confrontation Clause does not tolerate dispensing with broad rights of confrontation just because the agent is to be present in court.

Petitioner contends Confrontation Clause error in the Instant Case are material and fundamental: (i) the government suppression or failure to disclose Speight's Waiver of Attorney Client Privilege (also a BRADY issue, infra); (ii) error in failure to tender or not preserve FBI Karczewski testimonial notes; (iii) cutting off cross-examination of FBI Karczewski - Each and together have effects, without limitation, to impair:

1. ability to confront all witnesses, including expose FBI Karczewski perjury;
2. excluded ability to call important witnesses, e.g. Speight's attorney Val Rodriguez, Esq.;
3. impeach, including right to expose contradiction or falsehood, under rigorous testing as provided by the Constitution;
4. precluded ability to present evidence through confrontation, innocent, non-culpable.

It cannot and could not be concluded with fair assurance that Confrontation Clause violation was not "constitutional error of the first magnitude" (DAVIS v. Alaska, supra). Petitioner contends Confrontation Clause violations were fundamental constitutional errors, impairing Petitioner's due process rights that merit relief and vacatur of conviction.

III. CONSTITUTIONAL VIOLATION AS FUNDAMENTAL ERROR ARISES WHEN THE DISTRICT COURT SUBVERTS WITNESS TESTIMONY AND IMPROPERLY QUALIFIES USE OF A CONSCIOUS AVOIDANCE INSTRUCTION.

Petitioner contends, as a matter of law, the standard under the indictment, 18 U.S.C. § 1956 (a)(3), is a specific intent statute, demanding a specific intent instruction. A specific intent jury instruction was not used in the Instant Case.

As a matter of law, the district court erred when use of a

conscious avoidance instruction was improperly qualified as an instruction : (1) was in error as the statute required "intent", thus conscious avoidance could not qualify : (2) the district court subverted witness testimony to then use conscious avoidance; and, (3) even in error in choosing conscious avoidance, the requirements and threshold for use of the instruction were not met when the record and testimony unequivocally show, even when inquiry was made, the fraudsters (Speight/Larsen) still concealed the existence of fraud from Petitioner, thus defeating again possible use of the instruction.

These district court errors are legal defects that were intrinsically harmful. The jury instruction used at trial was a misdescription of offense-elements and of the burden of proof in view of statute-required intent. See, Sullivan v. Louisiana, 508 US 275 (1993) (defective reasonable-doubt instruction); Brecht v. Abrahamson, 507 US 619 (1993); Neder v. US, 527 US 1 (1995).

In the Instant Case, Petitioner asserts that use of a conscious avoidance instruction is fundamental error, that it cannot be said that the jury verdict would have been the same absent these fundamental errors.

In the Instant Case, the indictment contained the offense charged under 18 U.S.C. 1956 (a)(3)(A) and (B); specific intent was to be proved and presented in the jury instruction. The jury instruction used at trial failed to follow statute requirements and elements or standard. The record shows the government had nine (9-) months of communication and tapes with Petitioner and government witness testimony that was contrary to the government's argument and inference; facts and testimony affirmed that Petitioner lacked awareness, lacked knowledge, was never told of fraud, never told of fake certificates, and, there was no concealment, no disguise, no manipulation and that Petitioner bore no indicia of money laundering.

The district court then erred in qualifying use of a conscious avoidance charge when the district court permitted a non-intent jury instruction to supplant the statute requirements for specific intent. It cannot be said with any confidence that use of non-intent jury instruction, when specific intent is the statute standard, would fairly or properly guide the jury; this error would be due process violation on the jury right to fair deliberation. For this reason, this violation, as error, merits vacatur of conviction.

The district court continued in error when the district court subverted witness testimony. Government witness FBI Larsen testified; his cross-examination revealed many exculpatory statements by FBI Larsen. Among the Larsen statements, was FBI Larsen affirming lack of awareness, lack of knowledge of fraud (recall: FBI Larsen confirmed Larsen never told Petitioner of fraud); when describing when Petitioner 'broke role' and asked Speight/Larsen a real, serious question: "Well, are they?"; FBI Larsen, on direct examination by the government - asserts "...so there, he (Petitioner) steps out of role" (Dist. R. 71, p. 237, line 21, 22). Direct Examination then asks Larsen: Govt: "Did defendant (Petitioner) ever ask you are these fictitious?" Larsen: "After this, no." Defense counsel: Objection, Your Honor, (Petitioner) did." (Dist. R. 71, p. 250, line 20-23). By example only - then - on cross-examination, defense counsel asks FBI Larsen, "Did you say to (Petitioner) at that point, we don't need no transfer agent these are bogus certificates?", and Larsen replies - "No." (Dist. R. 71, p. 351-352). FBI Larsen - through his testimony confirmed: 1. that Speight/Larsen and Larsen never told Petitioner of fraud; 2. that Larsen chose not to answer Petitioner's question ("Well, are they?"); 3. that Larsen chose to still continue to conceal the fraud (this meeting is now seven (7-) months into the government operation, with no disclosure then (at Feb. 15, 2014) nor until its conclusion - per Larsen testimony); and, 4. that Petitioner's question, context and demeanor was - for Larsen

as described in Larsen's testimony - a real question.

However, following FBI Larsen's testimony, the district court subverted Larsen's testimony: the district court asserts that to the contrary, it is a "wink-wink" between criminals - that is not what witness Larsen described nor testified.

The district court error and subversion is presented below, and with comments (Dist. R. 76, p. 570, line 4 to 8):

Lines

- { 4-5 } " Mr. Sonnett (defense counsel) has harped on the role playing. I do not think the fact that it was role playing makes a difference."
- { 6 } All this is a kind of wink-wink between three people who are,
- { 7 } as alleged, putting together a fraudulent scheme.
- { 8 } As the agent testified, at a first meeting it would not be how criminals act if he were to overtly say what's what."

Petitioner asserts:

" Wink-wink" - is error; it subverts and was not FBI Larsen's testimony.

Comments:

- { 4-5 } Larsen testified role playing made a difference, and noted the difference: Larsen described and revealed several things: - After seven (7-) months operating his sting, Larsen reveals Petitioner lacked awareness and knowledge of fraud
- that Petitioner "broke role", asking Larsen/Speight a serious question - "Well, are they?"
- { 6 } "wink-wink". FALSE. FBI Larsen Affirmed it was a real question. The Tape - and - Larsen testimony Affirm that the question was not answered, and Larsen elected not to answer so as to still conceal the fraud.
- { 6 } "wink-wink". FALSE. No code. There was not evidence

in the nine (9-) months of the government sting - nor - in the Speight fraud/404(b) of any code. Speight was not using code, Larsen was not using code. Larsen - again - affirmed in his description that Petitioner's question was real.

{ 6-7 } ... between three people who are as alleged, putting together a fraudulent scheme.

. FALSE. The government allegation was eroded, among many things, by FBI Larsen having already confirmed that Larsen never told Petitioner of Larsen/Speight fraudulent scheme.

{ 8 } " As the agent testified, at a first meeting, it would not be how..."

. FALSE. This meeting that is referred to is Saturday, Feb. 15, 2014, seven (7-) months into the Larsen/Speight sting; As the record affirms, Larsen had already had several interactions with Petitioner, yet, Petitioner was unaware of the Larsen/Speight sting.

Larsen's description unequivocally affirmed that Petitioner 'broke role', Petitioner had asked a real, serious question, there was not a code, and when asked, Larsen described that Larsen did not want to answer, wanted to get Petitioner back into role/ game playing and thus, further conceal the fraud from Petitioner, which Larsen did.

The record supports that there was no basis for the district court to subvert witness testimony. Petitioner, by Larsen account, was not consciously avoiding something that Petitioner was not aware of - according to FBI Larsen.

GOVERNMENT WITNESSES FBI LARSEN was the trial witness who sat at the table with Petitioner. The district court did not sit at the same table.

The record, transcript, and communication and TAPES of nine (9-) months, including without limitation testimony of FBI LARSEN reveal:

- Seven (7-) months into the government created reverse sting, on Sat. Feb. 15, 2014, FBI LARSEN and Speight arranged yet another encounter with Petitioner; this meeting is not their first meeting:

- FBI LARSEN, at trial, makes a distinct point to distinguish Petitioner's lack of awareness, lack of knowledge of fraud; LARSEN affirmed two (2-) times, once on government direct examination, and a second time on cross-examination, with detail, that Petitioner was no longer playing LARSEN's games and 'broke role':

- (i) Dist. R. 71, p.237, line 21, 22: LARSEN on government direct examination: "...so there he (Petitioner) steps out of role".

- (ii) Dist. R. 71, p.260: LARSEN on cross-examination, is asked, "(Petitioner) 'broke role', didn't he?", and LARSEN replies, "He did, yes".

- FBI LARSEN makes the distinction clear, that Petitioner was asking a real question, "Well, are they?". LARSEN, as mentioned, then chose to not answer, and further conceal the fraud from Petitioner. As also previously identified, FBI LARSEN in excess of ten (10-) times at trial affirms that LARSEN/Speight, LARSEN, never told Petitioner of fraud, never told Petitioner of fake certificates, never told Petitioner that LARSEN was doing unlawful things or activity.

There existed the high probability that LARSEN/Speight appearances as legitimate business people were requesting perfectly lawful settlement services, common in the industry; LARSEN/Speight never revealed their fraud - indeed as LARSEN affirmed - the fraud was concealed from Petitioner, that Petitioner had not reason to believe other than Petitioner was asked to provide lawful services to aid

lawful business. See, Tellabs Inc. v. MAJOR ISSUES & RIGHTS, 551 US 308 (2007) (no fraud by hindsight) - the Supreme Court Affirms "no fraud by hindsight", noting the rule of the Second Circuit is viewed by the Supreme Court as most stringent; See, SPECIAL SITUATIONS FUND III, OP, LP v. Deloitte, 645 Fed. Appx. 72, 74, 75 (2d Cir. 2016); See also In re Weatherford, 2013 US Dist Ct LEXIS 75090 (SDNY 2013) (unseen red flags cannot be heeded). In the Special Situations case below, the district court noted "fraud is always obvious in retrospect, but it is not reckless to lack clairvoyance." Special Situations Fund III, OP, LP v. Deloitte, 33 FSupp. 401, 426-427 (SDNY 2014).

Following after this SUBVERSION ERROR, the district court in this instant case, with its SUBVERTED version of witness testimony, claimed it was going to use a conscious avoidance charge.

It was error to use a conscious avoidance charge. The effect was to circumvent the statute and specific intent enumerated by statute. The statute required the jury to deliberate on "intent". The statute was not satisfied. The district court foreclosed independent jury consideration. Then, the district court error had the ability to steer the jury off statutory specific intent.

These errors are intrinsically harmful, and as stated in Sullivan, supra, "affects substantial rights without regard to outcome." These errors corrode public perception and trust of judicial impartiality and integrity. When the district court subverts witness testimony, ignores the statute, and improperly qualifies use of conscious avoidance instruction, it impaired the jury right to fair deliberation and demands vacatur of conviction.

IV. GOVERNMENT FAILURE TO DISCLOSE BRADY material, including A WAIVER OF ATTORNEY CLIENT PRIVILEGE BY SPLIT QUALITIES AS CONSTITUTIONAL ERROR

Suppression and non-disclosure of Brady-material violated Petitioner's due process rights. On October 30, 2018, it was revealed by the government to Petitioner that there existed, among other

new information also revealed, a Waiver of Attorney Client Privilege executed by Speight, in coordination with the government, dated from September 2013. The Waiver existed to the government one (1-) year before the indictment of Petitioner, and three (3-) years before trial in the Instant Case (June 2016), and yet, it was not disclosed until two (2-) years after Petitioner was convicted and sentenced. See, Brady v. Maryland, 373 US 83 (1963) (setting forth the constitutional duty of the government to disclose exculpatory and inculpatory information and evidence). Another Brady issue involved in this Instant Case, among information and evidence requested by the defense of the prosecution, were the notes of the FBI taken at their targeted, non-Mirandized interrogation of Petitioner.

In the Instant Case, the Sixth Amendment to the Constitution due process clause violation by the government affects defense preparation and presentation, the Confrontation Clause of the Constitution, and without limitation, jury right to fair deliberation. The Brady violation, among many things, directly damaged witness selection, witness confrontation, cross-examination, and, challenges to evidence and elements alleged in the offense charged. The damage also extends to preclusion by the government from Brady information that is deemed material and significant.

In the Instant Case, Speight (the fraudster turned government agent) was a SEC-registered transfer agent starting March 2004. Commanding 2010, among the people from 2010-2014 in Speight's office was: (i) Harrison Katzen, a FINRA-registered securities person; (ii) William "Billy" Hancock, Esq., an attorney originally with Squire Sanders law firm, Richmond, VA.; one of Speight's outside counsel was Valentin Rodriguez, Esq. In the nine (9-) months of tape orchestrated by the government, Speight and Larsen on tape reference Katzen and Val Rodriguez. ¹⁶ Brady information was

16. By example, Katzen is spoken of by Speight on Nov. 19, 2013 (GX.155.A.T) and by government witness FBI Larsen on Sat. Feb. 15, 2014 (GX.401); Val Rodriguez, Esq., is spoken of by Speight in Aug. 2013 (GX.152.A.T.); Speight executed Speight's Waiver of Attorney Client Privilege on Rodriguez in Sept. 2013. Katzen was charged by the SEC and held liable in the Speight fraud.

NOT rendered by the government on these persons nor "others".¹⁷

In the Instant Case, the government suppressed or did not release, disclose, or provide material information nor the existence of material information (e.g. FBI notes taken at target interrogation of Petitioner April 16, 2014; Speight information; Katzen nor Hancock, Esq. information). Speight's Waiver was only disclosed Oct. 30, 2018. It cannot be said that, by example, disclosure by the government at Oct. 30, 2018, qualifies as 'in time for effective use' at a trial that took place at the end of June 2016.

Speight's Waiver of Attorney Client Privilege of Sept. 2013, is material, significant and substantial. As mentioned, it was only disclosed on Oct. 30, 2018, a date over two (2-) years after trial; the Waiver existed three (3-) years before trial and was never disclosed by the government. The government was already operating their Larsen/Speight reverse sting; the government had the Waiver available to it during the period of Brady obligation. See, BAGLEY v. U.S., 473 US 667 (1985) (Affirmed the on-going obligation of the prosecutor to disclose). When the prosecution claims evidence are no longer available or destroyed, or lost, or not preserved, then the prosecution has breached its constitutional duties. The reasoning is founded on a defendant not being able to gain relief due to prosecution violations causing lost or destroyed evidence. See, Arizona v. Youngblood, 488 US 51 (1988). In the Instant Case, failures and suppression by the government to satisfy BRADY obligations opened BRADY and Confrontation Clause violations. See, Crawford v. Washington, 541 US 36 (2004) noting "interrogations by law enforcement officers fall squarely within" the class of testimonial hearsay. In the Instant Case, the FBI conducted a targeted interrogation of Petitioner; discrepancies and falsehoods alleged by the government emerged that Petitioner had no opportunity to fully test on cross-examination. The target interrogation

17. App.R. 73, p.10 of 98: the government concedes "Others" were involved yet failed to provide BRADY information.

was directed at an alleged past crime; the product of such interrogation, notes taken during interrogations by the FBI, is testimonial. The FBI notes were not delivered by the government. Discrepancies between statements (e.g. FBI Larsen and FBI Karcewski; and, FBI Karcewski, the events of interrogation, and interrogation notes) are not insignificant. The Brady violation also impaired exercise by the Petitioner of Confrontation Clause rights.

As mentioned, the newly discovered evidence on Oct. 30, 2018 revealed the government suppressed or failed to preserve or deliver other Brady information, among them, Speight's Waiver of Attorney Client Privilege and FBI interrogation notes. The suppression and non-preservation eliminated the ability of Petitioner's defense to fully and properly prepare relief the defense sought and was entitled to under the Constitution. Prosecution violations undermined Petitioner ability to evaluate information with which to, by example, confront, contradict and impeach government witness Karcewski, or, by another example, call attorney Rodriguez - Speight's attorney - as a witness. The government failure to preserve and make available the testimonial field notes of interrogation satisfies ruling and review under such cases as Brady, Bagley, Crawford and Youngblood, supra. There was no comparable evidence to, Speight's attorney Rodriguez by example, or, the original interrogation notes written by the FBI when target interrogating Petitioner. These notes satisfied Brady and Crawford, and were appropriate for the exercise of the Confrontation Clause and cross-examination of Karcewski.

Petitioner contends " (d)ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. That is not what the Sixth Amendment prescribes." Crawford, supra, at 62. The Brady violations of the government violate the Constitution.

In the Instant Case, evidence of guilt was far from conclusive; in addition, the possibility and probability that evidence denied to Petitioner would have exonerated him.

was not remote; the failure to disclose evidence and failure to preserve evidence must be deemed a denial of due process resulting in the lack of a fair trial. See, Arizona v. Youngblood, 488 US 51 (1988). The FBI, the prosecutor's office and the SEC coordinated and assisted each other; their efforts together resulted in simultaneous civil and criminal filings on the same day (Sept. 22, 2014), and these parallel actions against Petitioner were filed in the same Eastern District of New York; one (1-) year earlier at Sept. 2013 government effort had available Speight's Waiver of Attorney Client Privilege.

Petitioner contends that government Brady violations present a clear, plain and reasonable probability that Petitioner's trial preparation, the trial itself, jury deliberation, and even sentence would have been different. Confidence and reliability are disabled. Preclusion by the government is a material factor. Access to Speight's attorney Rodriguez, by another example, is a material factor.

Indeed Brady violation may be viewed to affect, without limitation: (1) evidence; (2) evidence suppression and unavailability; (3) evidence preclusion or destruction; (4) defense preparation; (5) selection of witnesses; (6) availability of witnesses; (7) Confrontation Clause and cross-examination; (8) fundamental elements of the offense charged in the Instant Case. Evidence that would have impeached and refuted government testimony was excluded by improper government conduct and is a denial of due process. In Banks v. Dretke, 540 US 668 (2004) the Supreme Court declared that "prosecutor may hide, defendant must seek" is not tenable in a system constitutionally bound to accord defendants due process". Id., at 696. There is not support for the notion that Petitioner must scavenge for hints of undisclosed Brady material - and those Petitioner knew to exist, such as FBI notes - when the prosecution represented that all materials had been disclosed. Id., at 695. In the Instant Case, government Brady violations did not accord Petitioner due process.

The question persists, not whether Petitioner would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.

Petitioner contends the existence of Brady material, suppressed or undisclosed by the government, and non-preservation of FBI target interrogation notes, qualify as constitutional violation requiring vacatur.

V. The Order of Dismissal with Prejudice as An Acquittance, and Use of Incorrect Statute at Sentencing, Demand that Petitioner's Sentence Be Immediately Corrected to Remove Sentence Enhancements

Petitioner asserts a cognizable claim that Petitioner sentence is in error. The sentence applied is faced with procedural error, and, substantive error, each of which demands immediate sentence correction to remove sentence enhancements.

In the event this Honorable Court has not vacated Petitioner's conviction on grounds presented in this Petition, Petitioner asserts review in support of sentence correction.

Petitioner contends the Order of Dismissal with Prejudice of May 1, 2019, as an acquittance, and, the error of the district court's incorrect use and wrong statute at sentence, demands that Petitioner's sentence be immediately corrected to remove Spight-Frawd/404(b) enhancements. The Spight-Frawd is now erased by the Order of Dismissal. Petitioner asserts that sentence be corrected by: (1) removal of the fourteen (14-) level and two (2-) level enhancements (total: sixteen (16-) level); (2) sentence servitude be declared served and completed; (3) that supervised release be adjusted downward as a result; and, (4) that an order of immediate release from servitude be issued and granted.

In the Instant Case, the Order of Dismissal with Prejudice of the parallel government action as an acquittance affirms with force of law that the trial and sentence, presumptively and assumptively used from unsettled, on-going litigation the Spight-Frawd/404(b) -

when it could not. The Order of Dismissal demonstrates material error. What due process does require is that Petitioner not be sentenced on the basis of materially untrue assumptions or misinformation. See, US v. Delacruz, 862 F3d 163, 175 (2d Cir 2018).

In the Instant Case, the Order of Dismissal with Prejudice as an Acquittance supports error even where the district court ruling on sentence is now determined obviously wrong after trial and after sentence.

The Order of Dismissal with Prejudice also re-affirms Petitioner's assertions of innocence, and the presumption of innocence. See, Nelson v. Colorado, 137 S.Ct. 1249, 1255 (2017) (once those convictions were erased for any reason, the presumption of innocence is restored). The final order & the Order of Dismissal - erasing Speight-fraud / 404 (b), and 15 USC § 8j (b), is from formal litigation, after close of discovery; it shows, among many things, that the presence of 15 USC § 8j (b) and use of Speight-fraud / 404 (b) to enhance Petitioner's sentence was obviously wrong.

Petitioner asserts further in support of removal of the enhancements: (1) district court error in the use of Speight-fraud / 404 (b) affects Petitioner's substantial rights; (2) legal error in light of the Order of Dismissal with Prejudice; (3) legal error occurred when the district court conducted trial and sentence under the wrong statute of 18 USC § 1956 (a)(1)(A)(i), when the indictment was a one (1-) count charge under 18 USC § 1956 (a)(3); the distinction is noted infra (and recall this distinction affected constitutional error of improper use of conscious avoidance - See, Petitioner Conscious Avoidance Section, supra):

Distinction: indictment: 1956 (a)(3): whoever with intent
... to promote... conceal or disguise.

contrasted to the statutory error at trial and sentence of:

trial/sentence: 1956 (a)(1)(A)(i): whoever knowing...;

(4) legal error is again evident when use of Speight-fraud / 404 (b) enhancements - erased by the Order of Dismissal - became obviously wrong even after the district court rulings; the record demonstrates

Petitioner contested use of Speight-fraud/404(b) through the entire trial process; (5) the record also shows that the government pre-sentence, three (3-) times declared to the district court that Petitioner had no role in the Speight-fraud. (App. R. #43, PSR, p. 6, par. 14, lines 7-8; and Affirmed by government without objection, App. R. 45, and PSR Addendum App. R. 44, respectively dated Nov. 3, 2016, Jan. 24, 2017, and, April 28, 2017; "there is no indication that the (Petitioner) was involved in the underlying securities fraud offense"). This declaration of no-role is clear and unconditional; (6) the district court at sentence pronounced that Petitioner was not being held responsible for the Speight-fraud (Sent. Tr., Dist. R., p. 37-38, line 25, line 1). Yet, the district court then used the Speight-fraud/404(b) to enhance Petitioner sentence (USSC 2B1.1 and 2S1.1) Fourteen (14-) levels, and, (USSC 2S1.1(b) specific offense characteristic) Two (2-) levels, for a total of sixteen (16-) point levels Speight-fraud; (7) the district court erred not only when using Speight-fraud/404(b) but also when using the wrong and incorrect statute. The district court declared: "I find they (the government) have correctly articulated the elements of promotional money laundering under 1956 (a)(1)(A)(i)". Sent. Tr., Dist. R., p. 23, lines 6-12. This legal error was not a one-off error. The district court a second (2nd) time pronounces: "I find that the government has proven by a preponderance of ~~the~~ evidence that the (Petitioner) committed all the elements of money laundering under 1956 (a)(1)(A)(i)". Sent. Tr., Dist. R., p. 29, lines 18-21. In fact, the Order of Dismissal with Prejudice as a final order demonstrates the government in litigation did not meet that standard of proof. As also evident, the indictment was one (1-) count of money laundering with the government having paid Petitioner third party settlement agent fees of \$6,920.24, under 1956 (a)(3)(A) and (B), a specific intent statute.

US v. Rigas, 583 F3d 108 (2d Cir 2009) holds forth the importance of resentencing where "the constellation of review" has

changed, and identifies sentence when "the factual mosaic" is altered. Here, in the Instant Case, the Order of Dismissal with Prejudice as an acquittance, has changed the factual mosaic and the constellation of review, requiring removal of the sixteen (16)-points and Speight-enhancements.

The Order of Dismissal "undoes the entire knot of calculation". See, US v Powers, 842 F3d 177, 180-181 (2d Cir 2016) (per curiam). The Order of Dismissal with Prejudice as an acquittance removes speculation, and erases allegations of criminal responsibility (as declared by the district court (Sent. Tr., Dist. R., p. 34-38, line 25, line 1)) - erasing use of Speight-fraud/404(b), and, removes civil liability against Petitioner.

The Order of Dismissal with Prejudice supports removal of sentence enhancements that the district court, now in error, associated to Speight-fraud/404(b). The Order of Dismissal as an acquittance verifies lack of intent : (1) Petitioner not a primary violator ; (2) there was not scienter ; (3) Petitioner was not held for any criminal responsibility ; (4) Petitioner was not an aider nor an abettor ; (5) no violation of 15 USC § 78j(b), which was alleged in both government actions.

In the Instant Case, legal errors that exist are grounds that the sentence enhancements should be removed and the sentence corrected. District court sentence enhancements directly impacted by the Order of Dismissal with Prejudice remove Speight-fraud/404(b) from consideration, and the sentence when corrected appears:

(i) SENTENCE : BASE LEVEL : 8 : ZONE A : 0-6 months
FINAL LEVEL WITH ENHANCEMENTS : 26 : ZONE D : 48-months (July 31, 2017)

(ii) UNDER SENTENCE CORRECTION :
: HISTORY CATEGORY
CATEGORY

"0" (ZERO) . Remains the same.

"I" . Remains the same.

FIRST : REMOVE AND DEDUCT FOURTEEN (-14) POINTS, (SEE ALSO APP. E)
FROM LEVEL 26, (DEDUCT 14), TO : LEVEL 12 : ZONE C :

: USSG SENTENCE RANGE 10-16 months.

SECOND : REMOVE AND DEDUCT TWO (-2) POINTS, SPECIFIC OFFENSE
CHARACTERISTIC, FROM LEVEL 12 TO : LEVEL 10 : ZONE B :

: USSG SENTENCE RANGE : 6-12 months.

THIRD : REMOVAL OF ENHANCEMENTS QUALIFIES THAT SUPERVISED RELEASE MAY
ADJUST TO ONE (1-) YEAR OR LESS.

Petitioner contends, based on facts and circumstances and reasons supported in law, that sentence correction, including removal of the sixteen (16-) point level enhancements due to the Order of Dismissal with Prejudice, is immediately required, and that in conjunction with remittur for sentence correction, an order be entered of immediate release from incarceration and servitude.

CONCLUSION

The Petition for Writ of Habeas Corpus should be granted.

Respectfully Submitted



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DATE : 16 AUGUST 2019.