728 F.3d 327
United States Court of Appeals,
Fourth Circuit.

UNITED STATES of America,
Plaintiff–Appellee,
v.
Gregory BARTKO,
Defendant–Appellant.

No. 12–4298.
|
Argued: May 17, 2013.
|
Decided: Aug. 23, 2013.

**Synopsis**

**Background:** Defendant was convicted in the United States District Court for the Eastern District of North Carolina, James C. Dever III, Chief Judge, of conspiracy to commit mail fraud, launder money instruments, engage in unlawful monetary transactions, mail fraud and aiding and abetting, and sale of unregistered securities and aiding and abetting. Defendant appealed.

**Holdings:** The Court of Appeals, Floyd, Circuit Judge, held that:

[1] government's use of false testimony at trial did not affect jury's final judgment;

[2] government's failure to provide evidence regarding agreements with witnesses did not violate *Brady*;

[3] defendant was not prejudiced by district court's denial of his motion to unseal an ex parte sealed document;

[4] denial of defendant's requested accomplice/informer and multiple conspiracy instructions was not abuse of discretion;

[5] district court properly determined the amount of loss attributed to defendant;

[6] application of four-level enhancement for an offense that involved 50 or more victims was warranted; and

[7] district court properly imposed a four-level enhancement for being a registered broker or dealer convicted of a securities offense.

Affirmed.

West Headnotes (36)

[1] **Criminal Law**
New Trial

Court of Appeals reviews the district court's denial of a motion for a new trial under an abuse of discretion standard.

9 Cases that cite this headnote

[2] **Criminal Law**
Specification of errors
**Criminal Law**
Points and authorities

Defendant's failure to include in his appellate brief his contentions regarding his *Brady* claim, and the reasons for them, with citations to the authorities and parts of the record on which he relied, rendered such claim waived. F.R.A.P.Rule 28(a)(9)(A), 28 U.S.C.A.

2 Cases that cite this headnote

[3] **Criminal Law**
Use of False or Perjured Testimony
**Criminal Law**
Duty to correct false or perjured testimony

Government may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, regardless of whether the government solicited testimony it knew or should have known to be false or simply allowed such testimony to pass uncorrected.

2 Cases that cite this headnote

[4] **Criminal Law**
Effect of perjured testimony; remedy

A new trial is required when the government's knowing use of false testimony could affect the judgment of the jury.

1 Cases that cite this headnote

[5] **Criminal Law**
Materiality and probable effect of information in general

Court of Appeals does not automatically require a new trial whenever a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict.

4 Cases that cite this headnote

[6] **Constitutional Law**
Use of Perjured or Falsified Evidence

Due process is violated not only where the prosecution uses perjured

  

testimony to support its case, but also where it uses evidence which it knows creates a false impression of a material fact. U.S.C.A. Const.Amend. 5.

[7] **Criminal Law**
What constitutes perjured testimony

Evidence offered by prosecution may be false either because it is perjured, or, though not itself factually inaccurate, because it creates a false impression of facts which are known not to be true.

1 Cases that cite this headnote

[8] **Criminal Law**
What constitutes perjured testimony

Witness's testimony, in prosecution for securities and mail fraud conspiracy, that he had not received any promises or inducements in exchange for his trial testimony was not false, and thus government did not use false testimony to obtain defendant's conviction, where nothing in witness's agreement with government, to be interviewed as part of investigation, suggested that witness's not being a target was conditioned on participation in the investigative interview, or that he would not be a target in the future.

2 Cases that cite this headnote

[9] **Criminal Law**
Effect of perjured testimony; remedy

Impeachment of witness, in prosecution for securities and mail fraud conspiracy, based on his false statement that government had not made him any promises would not have affected jury's final judgment, and thus new trial was not warranted, where defense counsel had thoroughly impeached witness on numerous grounds.

1 Cases that cite this headnote

[10] **Criminal Law**
Constitutional obligations regarding disclosure

In order to prove that the government's failure to tender certain evidence constitutes a *Brady* violation, the burden rests on defendant to show that the undisclosed evidence was (1)

  

favorable to him either because it is exculpatory, or because it is impeaching; (2) material to the defense; and (3) that the prosecution had materials and failed to disclose them.

2 Cases that cite this headnote

[11] **Criminal Law**
Materiality and probable effect of information in general

Evidence is "exculpatory" and "favorable," for purpose of determining whether its suppression by the prosecution violates *Brady*, if it may make the difference between conviction and acquittal had it been disclosed and used effectively.

1 Cases that cite this headnote

[12] **Criminal Law**
Materiality and probable effect of information in general

Evidence is "material," for purpose of determining whether its suppression by the prosecution violates *Brady*, if it is likely to have changed the verdict.

4 Cases that cite this headnote

[13] **Criminal Law**
Review De Novo
**Criminal Law**
Discretion of Lower Court

It is an abuse of discretion for the district court to commit a legal error, and that underlying legal determination is reviewed de novo.

4 Cases that cite this headnote

[14] **Criminal Law**
Impeaching evidence

Government's failure to provide securities and mail fraud conspiracy defendant with proffer agreements it had with witness and witness's wife did not prejudice defendant, and thus did not violate *Brady*, where defense counsel had thoroughly impeached witness and proffer agreements would have been cumulative.

1 Cases that cite this headnote

[15] **Criminal Law**
Impeaching evidence

Court of Appeals discards as

  

immaterial under *Brady* undisclosed impeachment evidence when it was cumulative of evidence of bias or partiality already presented and thus would have provided only marginal additional support for the defense.

3 Cases that cite this headnote

[16] **Criminal Law**
Impeaching evidence

In general, evidence whose function is impeachment may be considered to be "material," for *Brady* purposes, where the witness in question supplied the only evidence linking the defendant to the crime.

[17] **Criminal Law**
Impeaching evidence

Court of Appeals may find impeaching evidence to be "material," for *Brady* purposes, where the witness supplied the only evidence of an essential element of the offense, especially where the undisclosed matter would have provided the only significant basis for impeachment.

3 Cases that cite this headnote

[18] **Criminal Law**
Impeaching evidence

Evidence of tolling agreements that government had entered into with witness was not material, and thus government's failure to disclose it to defendant did not violate *Brady*, where witness's testimony served primarily as a summary of the substantial documentary evidence at trial.

[19] **Criminal Law**
Materiality and probable effect of information in general

Although courts of necessity examine undisclosed evidence item-by-item, their materiality determinations must evaluate the cumulative effect of all suppressed evidence to determine whether a *Brady* violation has occurred.

[20] **Criminal Law**
Materiality and probable effect of information in general

  

When the net effect of the evidence withheld by the government in a case raises a reasonable probability that its disclosure would have produced a different result, defendant is entitled to a new trial.

3 Cases that cite this headnote

[21] **Criminal Law**
Materiality and probable effect of information in general

A reasonable probability does not mean that defendant would more likely than not have received a different verdict with the evidence suppressed by the government, only that the likelihood of a different result is great enough to undermine confidence in the outcome of the trial.

9 Cases that cite this headnote

[22] **Criminal Law**
Materiality and probable effect of information in general

Likelihood that, had the government not suppressed information from securities and mail fraud conspiracy defendant, a different result would have occurred was not great enough to undermine confidence in the outcome of defendant's trial, where evidence of defendant's guilt was overwhelming.

6 Cases that cite this headnote

[23] **Criminal Law**
Discovery and disclosure; transcripts of prior proceedings

Defendant was not prejudiced by district court's denial of his motion to unseal an ex parte sealed document submitted by the government, where sealed document did not contain any Jencks materials.

1 Cases that cite this headnote

[24] **Criminal Law**
Instructions

A district court's decision whether to give a jury instruction is reviewed for abuse of discretion.

5 Cases that cite this headnote

[25] **Criminal Law**
Failure or Refusal to Give

  

Instructions

A district court's decision not to give a requested instruction by the criminal defendant amounts to reversible error only if the proffered instruction: (1) was correct, (2) was not substantially covered by the charge that the district court actually gave to the jury, and (3) involved some point so important that the failure to give the instruction seriously impaired the defendant's defense.

5 Cases that cite this headnote

[26] **Criminal Law**
Failure or Refusal to Give Instructions

Failure to give defendant's requested instruction is not reversible error unless defendant can show that the record as a whole demonstrates prejudice.

1 Cases that cite this headnote

[27] **Criminal Law**
Testimony of accomplices

District court's decision, in prosecution for mail fraud, money laundering, and other charges, denying defendant's requested accomplice/informer instruction was not abuse of discretion, where the instruction actually given by the court substantially covered the requested instruction.

3 Cases that cite this headnote

[28] **Conspiracy**
Instructions

A court need only instruct on multiple conspiracies if such an instruction is supported by the facts; hence, a multiple conspiracy instruction is not required unless the proof at trial demonstrates that appellants were involved only in separate conspiracies unrelated to the overall conspiracy charged in the indictment.

12 Cases that cite this headnote

[29] **Criminal Law**
Elements and incidents of offense

Even if one overarching conspiracy is not evident, the district court's failure to give a multiple conspiracies instruction is reversible error only when the defendant suffers substantial prejudice as a result; to find such prejudice, the

  

evidence of multiple conspiracies must have been so strong in relation to that of a single conspiracy that the jury probably would have acquitted on the conspiracy count had it been given a cautionary multiple-conspiracy instruction.

11 Cases that cite this headnote

[30] **Conspiracy**
Particular conspiracies

District court's refusal to give defendant's requested multiple conspiracies instruction was not abuse of discretion, where evidence of multiple conspiracies was not so strong in relation to that of a single conspiracy that the jury probably would have acquitted on the conspiracy count had it been given a cautionary multiple-conspiracy instruction.

11 Cases that cite this headnote

[31] **Conspiracy**
Single or multiple conspiracies

A single overall conspiracy can be distinguished from multiple independent conspiracies based on the overlap in actors, methods, and goals.

1 Cases that cite this headnote

[32] **Criminal Law**
Review De Novo
**Criminal Law**
Sentencing

When deciding whether the district court properly applied the Sentencing Guidelines, Court of Appeals reviews the court's factual findings for clear error and its legal conclusions de novo.

2 Cases that cite this headnote

[33] **Criminal Law**
Sentencing

District court's decision concerning a role adjustment is a factual determination, reviewable for clear error.

1 Cases that cite this headnote

[34] **Sentencing and Punishment**
Value of loss or benefit

  

District court properly determined the amount of loss attributed to defendant, resulting in an eighteen-level increase to his base offense level for conspiracy, mail fraud, and sale of unregistered securities, where money in refund checks sent to investors was not ultimately returned to the investors, and defendant was not entitled to credit against loss for the amount of money he caused to be returned to the victims before the offense was detected. U.S.S.G. § 2B1.1(b)(1)(J), 18 U.S.C.A.

1 Cases that cite this headnote

[35] **Sentencing and Punishment**
False pretenses and fraud

Application of four-level enhancement for an offense that involved 50 or more victims was warranted, in sentencing defendant for conspiracy, mail fraud, and sale of unregistered securities, where district court determined that more than 50 investors were victims of defendant's offenses. U.S.S.G. §§ 2B1.1, 2B1.1(b)(2)(B), 18 U.S.C.A.

[36] **Sentencing and Punishment**
False pretenses and fraud

District court properly imposed a four-level enhancement for being a registered broker or dealer who committed a securities offense, in sentencing defendant for conspiracy, mail fraud, and sale of unregistered securities, where defendant was a broker and his offense involved a securities violation. U.S.S.G. § 2B1.1(b)(18), 18 U.S.C.A.

1 Cases that cite this headnote

**Attorneys and Law Firms**

***331 ARGUED:** Donald Franklin Samuel, Garland, Samuel & Loeb, Atlanta, Georgia, for Appellant. Kristine L. Fritz, Office of the United States Attorney, Raleigh, North Carolina, for Appellee. **ON BRIEF:** Amanda R. Clark–Palmer, Garland, Samuel & Loeb, Atlanta, Georgia, for Appellant. Thomas G. Walker, United States Attorney, Jennifer P. May–Parker, Assistant United States Attorney, Office of the United States Attorney, Raleigh, North Carolina, for Appellee.

Before KEENAN and FLOYD, Circuit Judges, and HENRY E. HUDSON, United States District Judge for the Eastern District of Virginia, sitting by designation.

**Opinion**

  

Affirmed by published opinion. Judge FLOYD wrote the opinion, in which Judge KEENAN and Judge HUDSON concurred.

FLOYD, Circuit Judge:

Appellant Gregory Bartko was charged by a superseding indictment with conspiracy to commit mail fraud, launder money instruments, engage in unlawful monetary transactions, make false statements, and obstruct proceedings of the Securities and Exchange Commission (SEC), in violation of 18 U.S.C. § 371 (Count One); mail fraud and aiding and abetting, in violation of 18 U.S.C. §§ 1341 and 2 (Count Two through Count Five); sale of unregistered securities and aiding and abetting, in violation of 15 U.S.C. §§ 77e, 77x, and 18 U.S.C. § 2 (Count Six); and making false statements to a federal agent in January and October 2009, in violation of 18 U.S.C. § 1001(a)(2) (Counts Seven and Eight). Before trial, and pursuant to the government's motion, the district court dismissed Counts Seven and Eight, as well as two of the objects of the conspiracy in Count One—making false statements and obstructing SEC proceedings. After a thirteen-day trial, the jury convicted Bartko of the remaining counts.

Thereafter, Bartko filed four motions for a new trial, all of which the district court denied. The district court subsequently sentenced Bartko to 272 months' imprisonment. This timely appeal followed.

In his appeal, Bartko maintains that the district court erred in denying two of his motions for a new trial, improperly considered an ex parte sealed document submitted by the government, abused its discretion by not instructing the jury on accomplice/informant testimony and on multiple conspiracies, and improperly imposed Sentencing Guidelines enhancements based on the amount of loss, the number of victims, and Bartko's status as a registered broker/dealer at the time of the offenses. We have jurisdiction pursuant to 28 U.S.C. § 1291 and ***332** 18 U.S.C. § 3742(a). Discerning no reversible error, we affirm both Bartko's conviction and sentence.

## I.

From 2004 to 2005, Bartko was the leader and organizer of a financial scheme that involved securing money from investors to provide funding for two private equity funds, the Caledonian Fund and the Capstone Fund. John Colvin, Scott Hollenbeck, Darryl Laws, Rebecca Plummer, and Levonda Leamon participated in the scheme. As a part of their scheme, the parties mailed, faxed, and e-mailed correspondence to one another and engaged in banking transactions.

Bartko was a securities attorney, investment banker, and registered broker/dealer. Laws was also an investment banker who, along with Bartko, created the Caledonian Fund. Colvin was the president of Colvin

  

Enterprises and a co-managing general partner with Scott Hollenbeck of Franklin Asset Exchange. Leamon and Plummer were financial advisors who owned and operated Legacy Resource Management (LRM).

In January 2004, Bartko was seeking investors for the Caledonian Fund. On January 15, 2004, Colvin sent to Bartko a fax regarding an investment opportunity that one of Colvin's companies, Webb Financial Services, was offering. The articles of incorporation for the company were attached. They listed Scott Hollenbeck as the initial registered agent of Webb Group. These materials made fraudulent claims that the principal and interest were guaranteed and that the investments were insured. On January 15 and 16, 2004, Bartko performed a record check on Colvin with the National Association of Securities Dealers. On February 17, 2004, he made the same record check on Hollenbeck. According to those records, both had past allegations of forgery and both had been fired from securities-related jobs. Hollenbeck's check also showed that his securities license had been suspended for violations of securities rules.

Bartko sent a fax to Laws on January 19, 2004, which detailed Colvin's fraudulent fundraising methods. For example, one page of the materials stated that "[p]rincipal investment is secured & insured [and that the] [i]nterest rate declared is guaranteed[.]" In a fax that Colvin sent to Bartko on February 9, 2004, proposing an agreement between Franklin Asset Exchange and the Caledonian Fund, Hollenbeck was referred to in the materials as a "Co–Managing General Partner" of Franklin Asset Exchange and as "the founder and creator of both Franklin Asset Exchange, LLC and The Webb Group Financial Services, Inc."

Colvin ultimately agreed to raise $3 million for the Caledonian fund through the Franklin Asset Exchange. Although the March 30, 2004, agreement to raise the money was signed by Colvin, it was Hollenbeck who actually solicited and secured the money from the individual investors.

In April 2004, the North Carolina Securities Regulatory Agency issued a cease and desist order directing Hollenbeck to stop selling securities in North Carolina. This arose from his involvement in a separate investment scheme regarding Mobile Billboards of America (Mobile Billboards). Bartko, along with his co-counsel, Wes Covington, provided legal representation to Hollenbeck on this matter. During the course of that representation, Hollenbeck provided Bartko with information concerning how he had sold the Mobile Billboards investments. Hollenbeck informed Bartko that he had promised investors that their money was guaranteed and insured. He also provided to Bartko a copy of his promotional ***333** materials, including an application for an insurance policy that he used to show that the investment was insured.

From January 15, 2004, to May 6, 2004, Hollenbeck fraudulently raised large amounts of money for the Caledonian Fund, as well as for other investments, from a total of 171 investors. He then deposited the money into Franklin Asset Exchange or some similar account. The money was not separated but was instead comingled. He sent the money to various entities, as

  

directed by Colvin.

Hollenbeck and Colvin raised $701,000 for the Caledonian Fund, which was wired to the Caledonian Fund on four separate occasions between February and May 2004. Bartko and Laws used the money to pay salaries and expenses. None of it was used for investments or loans.

In late 2004, after Colvin failed to send Bartko the $3 million that he had promised, Bartko terminated their relationship. In November 2004, the Caledonian Fund dissolved. The $701,000 in the fund was not returned to the investors.

Almost immediately after dissolution of the Caledonian Fund, Bartko began the Capstone Fund. Hollenbeck was the primary fundraiser. Nevertheless, on December 8, 2004, during a deposition with the SEC concerning Mobile Billboards, Hollenbeck was asked what investments he was currently selling. He failed to mention the Capstone Fund. Bartko and his co-counsel, Wes Covington, were at the deposition representing Hollenbeck, but neither one corrected Hollenbeck's false statement.

Although securities law disallowed it, Hollenbeck continued selling securities and raising money for the Capstone Fund through fraudulent means. Moreover, some of the investors were not accredited or sophisticated investors, as required by securities law. To be an accredited investor, one's net worth or net income must reach a certain threshold.

On January 11, 2005, Bartko met with potential investors at LRM. Around the same time as this meeting, Bartko asked Plummer and Leamon whether LRM would receive money from the Capstone Fund's investors and then send the money back to the Capstone Fund. Because the money that Hollenbeck had raised—over $1 million at that point—was fraudulently obtained and because the Capstone Fund was an unregistered fund, Bartko wanted LRM to appear to be the investor. Plummer and Leamon agreed, and on January 19, 2005, they opened a bank account with TriStone Bank for the purpose of receiving the Capstone Fund money. TriStone, however, eventually closed their account and so, at Bartko's suggestion, they opened an account with Wachovia.

Also on January 19, 2005, Bartko issued reimbursement checks to several investors. But then Bartko instructed Hollenbeck to have the investors receiving the reimbursements endorse the checks and return them to LRM. Bartko sent some of the checks to Hollenbeck to return to the investors because he did not have their addresses. Instead, Hollenbeck forged the signatures of the investors on the checks and embezzled the proceeds.

The money that was sent to LRM was returned to the Capstone Fund. Thus, with the exception of one individual, no refunds were actually made to the investors. All told, Bartko received $2,684,928.86 from forty Capstone Fund investors.

In February 2005, the North Carolina Secretary of State learned that Hollenbeck was continuing to sell investments for Bartko, and it advised the SEC of that fact. On March 14, 2005, Alex Rue, an attorney

  

for the SEC, confronted Bartko. Bartko then filed an interpleader action in ***334** the Middle District of North Carolina on May 26, 2005, and ultimately returned ninety-four percent of the Capstone Fund money to the court.

Bartko eventually stood trial for conspiracy to commit mail fraud, launder money instruments, and engage in unlawful monetary transactions (Count One); mail fraud and aiding and abetting (Count Two through Count Five); and sale of unregistered securities and aiding and abetting (Count Six). The district court dismissed Counts Seven and Eight, as well as two of the objects of the conspiracy in Count One-false statements and obstructing SEC proceedings. After a thirteen-day trial, the jury convicted Bartko of the remaining counts.

Bartko then filed four motions for a new trial. The district court denied them all in a comprehensive and well-reasoned 120–page order. At the subsequent sentencing hearing, Bartko objected to several of the Sentencing Guidelines enhancements, including those based on the amount of loss, the number of victims, and Bartko's status as a registered broker/dealer at the time of the offenses. The district court overruled the objections and sentenced Bartko to 272 months' imprisonment. This appeal followed.

## II.

[1] First, Bartko argues that the district court erred in denying two of his motions for a new trial. Rule 33 of the Federal Rules of Criminal Procedure provides, in relevant part, that "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed.R.Crim.P. 33. "We review the district court's denial of a motion for a new trial under an abuse of discretion standard." *United States v. Wilson*, 624 F.3d 640, 660 (4th Cir.2010).

### A.

Bartko's first motion for a new trial concerns a report on Internal Revenue Agent Scott Schiller's interview with Judge Anderson Cromer, who presided over receivership litigation involving Webb Group and Franklin Asset Exchange as plaintiffs and Bull Mountain Project, Colvin, Colvin Enterprises, and others as defendants. Bartko and Covington had represented the plaintiffs and had obtained a substantial settlement. The government failed to give this report to Bartko until after trial.

In the fact section of Bartko's opening brief, he states the following:

> This interview summary, referred to in Bartko's new trial motions as the Judge Cromer "302," revealed

  

> that the judge believed that Bartko had performed ethically and professionally in connection with the coal company litigation and that Bartko had made disclosure of his prior relationship with Colvin, Hollenbeck and the proposed receiver. Because that information had not previously been furnished to the defense, the defense did not know that Judge Cromer's testimony would have been favorable. He was, therefore, never called as a witness and the topic of the coal company litigation was never raised at trial. The jury never learned that Bartko's efforts on behalf of Hollenbeck's victims in other schemes resulted in a $20 million recovery for the people he—Bartko—supposedly victimized.

The only mention that Bartko makes in the argument section of his opening brief, however, is that the interview report "related to Mr. Bartko's actual innocence of the charges in this case, because that information related to his behavior and state of mind, rather than the credibility of any ***335** particular witness." Bartko also states that the government agreed "when it moved to exclude this evidence" that it "would have unfairly cast Bartko in a favorable light."

After reading Bartko's opening brief, it first appeared to us, as it did to the government, that Bartko was not raising this issue on appeal. But, then in his reply brief, buried in a footnote, he states that it is an issue in this appeal and that "this *Brady* violation [was] a component of his argument that the cumulative effect of the withheld evidence resulted in a trial that was unfair."

[2] The argument section of an appellant's opening brief must contain the "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." Fed. R.App. P. 28(a)(9)(A). Because Bartko has failed in this regard, we consider this issue waived. *See Wahi v. Charleston Area Med. Ctr.*, 562 F.3d 599, 607 (4th Cir.2009) (concluding that those issues on which the appellant failed to comply with the specific dictates of Rule 28(a)(9)(A) were waived).

B.

[3] [4] [5] In Bartko's second motion for a new trial, he protests that the government allowed Scott Hollenbeck to testify falsely that he had not received any promises or inducements in exchange for his trial testimony. The Supreme Court long ago opined that "a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction." *Napue v.*

  

*Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). "This is true regardless of whether the [g]overnment solicited testimony it knew or should have known to be false or simply allowed such testimony to pass uncorrected." *United States v. Kelly*, 35 F.3d 929, 933 (4th Cir.1994). A new trial is required when the government's knowing use of false testimony could affect the judgment of the jury. *See Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). "We do not, however, automatically require a new trial whenever 'a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict....' " *Id.* (quoting *United States v. Keogh*, 391 F.2d 138, 148 (2d Cir.1968)).

[6] [7] To obtain a new trial on the basis that Hollenbeck testified falsely, Bartko must demonstrate that Hollenbeck gave false testimony; he need not demonstrate that Hollenbeck committed perjury. "[D]ue process is violated not only where the prosecution uses perjured testimony to support its case, but also where it uses evidence which it knows creates a false impression of a material fact." *Hamric v. Bailey*, 386 F.2d 390, 394 (4th Cir.1967). Hence, "[e]vidence may be false either because it is perjured, or, though not itself factually inaccurate, because it creates a false impression of facts which are known not to be true." *Id.*

In early 2009, as part of its investigation of the Capstone Fund, as well as several other investment schemes, the United States Attorney for the Eastern District of North Carolina wanted to interview Scott Hollenbeck. Thus, the government entered into a proffer agreement with him and his attorney, Scott Holmes. The agreement, directed to Holmes but signed by both Holmes and Hollenbeck, set forth the following:

> As you have indicated, your client, Mr. Hollenbeck, is interested in meeting with federal agents currently investigating the sale of numerous investments, including Webb Group, Franklin Asset Exchange, Disciples Trust, and Capstone. ***336** I have informed you that Mr. Hollenbeck is not a target of this investigation. The parties will schedule an interview of Mr. Hollenbeck to take place at the Federal Correctional Institution in Coleman, Florida. Mr. Hollenbeck, you, and the United States Attorney's Office (USAO) agree as follows concerning the "ground rules" for this interview:
>
> 1. In any trial in this matter, the USAO will not offer into evidence in its case in-chief or at sentencing any statements made by Mr. Hollenbeck at the interview; provided, however, this Paragraph 1 shall not apply to any prosecution for false statements, obstruction of justice, or perjury that is based in whole or in part on statements made by Mr. Hollenbeck at the interview.
>
> 2. Notwithstanding Paragraph 1 above:
>
> a. the USAO may use information derived directly or indirectly from statements made by Mr. Hollenbeck at the interview for the purpose of obtaining other evidence, and that

  

> evidence may be used in the prosecution and sentencing of Mr. Hollenbeck by the USAO; in any trial of this matter or at sentencing, the USAO may use statements made by Mr. Hollenbeck at the interview to cross-examine him if he testifies or to rebut any evidence offered by or on behalf of him.
>
> 3. This agreement is limited to statements made by Mr. Hollenbeck at the interview and does not apply to any other statements made by Mr. Hollenbeck at any other time. No understandings, promises, or agreements exist with respect to the meeting other than those set forth in this agreement, and none will be entered into unless memorialized in writing and signed by all parties.
>
> 4. The USAO will not share the statements made by Mr. Hollenbeck during the interview with any other state or federal prosecuting entity unless the prosecuting entity agrees to be bound by the terms of this agreement.
>
> Please return the original signed copy of this letter agreement prior to the interview.

Scott Hollenbeck's wife, Crystal Hollenbeck, also entered into a proffer agreement with the government. It is almost identical to her husband's agreement.

[8] At trial, on direct examination, the government asked Hollenbeck, "Mr. Hollenbeck, what if any promises has the government made to you about your testimony here today?" Hollenbeck responded, "None." Despite any contrary suggestion by Bartko, our review of the record convinces us that this was a truthful statement.

Bartko makes much of the fact that the agreements stated that the Hollenbecks were not targets of the investigation into the sale of investments, including Webb Group, Franklin Asset Exchange, Disciples Trust, and the Capstone Fund. From this, Bartko concludes that Hollenbeck had some sort of incentive to assist the government in its prosecution of Bartko. But that is not how we interpret the agreement.

Paragraph three of the agreements make clear that "[n]o understandings, promises, or agreements exist[ed] with respect to the meeting other than those set forth in th[e] agreement[s], and none will be entered into unless memorialized in writing and signed by all parties." Because nothing in the agreements suggests that the Hollenbecks not being a target ***337** was conditioned on their participation in the investigative interviews, or that they would not be a target in the future, we decline to graft such a provision into the agreements.

Therefore, Hollenbeck's answer that he had not been promised anything in return for his testimony at trial was true. But, his answer to the follow-up question by his counsel was not. During cross-examination of Hollenbeck, Bartko's counsel asked, "Now, one of the things that you said when you took the stand was that the government has made you no promises, correct? You said that?" Hollenbeck replied, "That is exactly

  

right." Then defense counsel followed up: "And the government has not, as of this time, made you any promises, have they?" Hollenbeck answered, "They have not." The district court held that Hollenbeck's answer to this question was not false. However, it provided an alternative analysis on the assumption that Hollenbeck's testimony on this point was false.

From our review of the record, we conclude that the government had made a promise to Hollenbeck. In fact, it made to him several promises concerning how the information that he gave at the investigatory interview would and would not be used against him. And, because the government made those promises, it had a duty to correct Hollenbeck's answers when he testified falsely that it had not made any promises. But this it regrettably failed to do. Therefore, we must now decide whether that testimony could have affected the jury's judgment.

[9] Had Hollenbeck testified truthfully when asked whether the government had made any promises to him up to that time, Bartko arguably could have used that fact to impeach Hollenbeck. But, having made an exhaustive review of the record, we do not think that impeachment could have made an iota of difference in the jury's final judgment. As explained by the district court,

> [d]efense counsel thoroughly impeached Hollenbeck on the subject of bias in favor of the government and on Hollenbeck's motive to lie to please the government. Defense counsel thoroughly impeached Hollenbeck concerning his desire to avoid prosecution for his fraud involving Colvin, Webb Group, Franklin Asset Exchange, Disciple Trust, the Caledonian Fund, and the Capstone Fund. Defense counsel thoroughly impeached Hollenbeck about his desire to receive a cooperation-based reduction in his 168–month prison sentence stemming from the Mobile Billboards fraud. Furthermore, defense counsel explored at great length and with absolutely devastating effect Hollenbeck's character for untruthfulness. Defense counsel recounted the many lies Hollenbeck had told and the many frauds he had committed throughout his life. In fact, this court has never seen a witness more thoroughly impeached than Hollenbeck. In the face of such blistering impeachment and the other evidence in the trial, one more false statement by Hollenbeck could not have possibly affected the jury's judgment.

  

*United States v. Bartko*, No. 5:09–CR–321–D, slip op. at 101–02 (E.D.N.C. Jan. 17, 2012) (citations omitted). Consequently, the district court did not err in refusing to grant to Bartko a new trial on this issue.

C.

In Bartko's second motion for a new trial, he also contends that the government's failure to disclose the agreements between it and Scott and Crystal Hollenbeck amounts to a *Brady* violation.

***338** [10] [11] [12] [13] As this Court recognized in *United States v. Wilson*, 624 F.3d 640 (4th Cir.2010):

> In *Brady* [*v. State of Maryland* ], the Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. [83] at 87, 83 S.Ct. 1194 [10 L.Ed.2d 215 (1963) ]. In order to prove that the [g]overnment's failure to tender certain evidence constitutes a *Brady* violation, the burden rested on [the defendant] to show that the undisclosed evidence was (1) favorable to him either because it is exculpatory, or because it is impeaching; (2) material to the defense, *i.e.*, "prejudice must have ensued"; and (3) that the prosecution had materials and failed to disclose them. *United States v. Stokes*, 261 F.3d 496, 502 (4th Cir.2001).

*Id.* at 660–661. "Evidence is 'exculpatory' and 'favorable' if it 'may make the difference between conviction and acquittal' had it been 'disclosed and used effectively.' " *Id.* at 661 (quoting *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)). And, it is " 'material' if it is 'likely to have changed the verdict.' " *Id.* (quoting *Moseley v. Branker*, 550 F.3d 312, 318 (4th Cir.2008)). "It is an abuse of discretion for the district court to commit a legal error-such as improperly determining whether there was a *Brady* violation-and that underlying legal determination is reviewed de novo." *Wilson*, 624 F.3d at 661 n. 24.

There is no dispute that factors one and three of the test set forth in *Stokes* are satisfied-namely that the proffer agreements were favorable to Bartko because they were impeaching and that the prosecution had the materials and failed to disclose them. *See Stokes*, 261 F.3d at 502. Thus, our inquiry here will focus on only the second element: whether the agreements were material to the defense. In other words, was Bartko prejudiced by the non-disclosure? *See id.*

The district court held that the Hollenbecks' proffer agreements constituted cumulative impeachment evidence. In the alternative, it stated that there is no reasonable probability that the jury's verdict would have been different if the government had disclosed the agreements.

[14] If Bartko had had the Hollenbecks' proffer agreements, he could have used them

  

in an attempt to attack Scott Hollenbeck's credibility. But, as the district court noted, "Bartko's impeachment of Hollenbeck was devastatingly thorough and thoroughly devastating." *Bartko*, No. 5:09–CR–321–D, slip op. at 103. It encompassed:

> (1) Hollenbeck's felony convictions, (2) his bias in favor of the government due to his desire to receive a Rule 35 motion and a reduction in his 168–month prison sentence for his involvement in Mobile Billboard's fraud, (3) his bias in favor of the government due to his desire to avoid being prosecuted for the fraud that he committed with Colvin, Webb Group, Franklin Asset Exchange, Disciples Trust, and others, (4) his bias in favor of the government due to his desire to avoid being prosecuted for the fraud he committed while raising money for the Caledonian Fund and the Capstone Fund, (5) myriad specific instances of lying, fraud, and forgery throughout Hollenbeck's adult life, (6) prior inconsistent statements to prosecutors, (7) contradictions within his trial testimony, and (8) his inability to recall certain facts.

*Bartko*, No. 5:09–CR–321–D, slip op. at 107–08. Thus, the proffer agreements ***339** would have been cumulative and, as such, we are unable to fathom how the jury's knowing about them could have further damaged Hollenbeck's credibility. The "proffer agreement[s] had nothing to add and would not have shed any new light on the depth of Hollenbeck's wrongdoing, the magnitude of his incentive to cooperate with the government, or the absence of his credibility." *Bartko*, No. 5:09–CR–321–D, slip op. at 103. Hence, we are confident that there is no reasonable probability that the jury would have reached a different verdict if Bartko had been given and effectively used the Hollenbecks' proffer agreements.

D.

In Bartko's third motion for a new trial, he contends that the government committed a *Brady* violation in failing to disclose the tolling agreements that it had entered into in 2010 with Levonda Leamon. The agreements tolled the statute of limitations "for potential federal criminal violations regarding Ms. Leamon's involvement in the fraudulent sale of investments during the year 2005, including conspiracy, mail fraud, the sale of unregistered securities, and money laundering." The purpose of the agreements was "to allow additional time for the parties to present facts and discuss the

  

matter ... [and] to evaluate and discuss potential resolutions to [the] case." The January 5, 2010, agreement tolled the statute of limitations on Leamon's crimes until July 5, 2010; and the July 2, 2010, agreement tolled the statute of limitations until December 5, 2010. It appears from the record that, without these agreements, the statute of limitations on some of Leamon's alleged crimes would have run before she gave her testimony at Bartko's trial.

As already enumerated, we consider three factors in determining whether a *Brady* violation has occurred: whether the undisclosed evidence was "(1) favorable to [the defendant] either because it is exculpatory, or because it is impeaching; (2) [whether the evidence was] material to the defense, i.e., 'prejudice must have ensued'; and (3) [whether] the prosecution had materials and failed to disclose them." *Stokes*, 261 F.3d at 502. The government acknowledges that the Leamon agreements are impeaching and that it had the materials but failed to disclose them. Thus, as before, because factors one and three are met, we need focus on only the second factor-the materiality factor.

[15] We "discard[ ] as immaterial ... undisclosed impeachment evidence where it was cumulative of evidence of bias or partiality already presented 'and thus would have provided only marginal additional support for [the] defense.' " *United States v. Cooper*, 654 F.3d 1104, 1120 (10th Cir.2011) (second alteration in original) (quoting *Douglas v. Workman*, 560 F.3d 1156, 1174 (10th Cir.2009)).

[16] [17] "In general, evidence whose function is impeachment may be considered to be material where the witness in question supplied the only evidence linking the defendant to the crime." *United States v. Avellino*, 136 F.3d 249, 256 (2nd Cir.1998). Likewise, we may find impeaching evidence to be "material where the witness supplied the only evidence of an essential element of the offense." *Id.* at 257. "This is especially true where the undisclosed matter would have provided the only significant basis for impeachment." *Id.*

[18] Leamon testified at trial that she was a seventy-year-old high school graduate and former flight attendant. She became a co-owner of LRM in 2003 or 2004 with her role primarily being community involvement. She also attested to Bartko's ***340** use of LRM's office for the January 11, 2005, meeting and how LRM received money from the Capstone Fund, as well as Hollenbeck's other investors, and then sent the money back to Capstone. According to Leamon, she spoke with Hollenbeck and Bartko about pooling the money that came in from investors and the potential round trip of the refund checks as the investors endorsed them to LRM. Leamon also stated that LRM received a six-percent commission from the Capstone Fund.

Leamon further testified about LRM's process of mailing statements and letters to investors, as well as corrected statements and letters, the closing of the account at TriStone Bank and the opening of an account with, as Bartko put it, "a larger bank like a Wachovia."

As the district court noted, "This testimony served primarily as summary evidence of

  

[LRM's] bank activity, mailings, and meetings, which was corroborated by substantial documentary evidence, the testimony of victims, the testimony of Plummer, and the testimony of Bartko." *Bartko,* No. 5:09–CR–321–D, slip op. at 111. "In short, Bartko's admissions and a mountain of other evidence independently corroborate Leamon's testimony." *Id.* at 112. As such, Leamon's testimony was not material. And, because it was not material, the district court did not err in its refusal to grant Bartko a new trial on this issue.

E.

[19] [20] [21] Although "courts of necessity examine undisclosed evidence item-by-item, their materiality determinations must evaluate the cumulative effect of all suppressed evidence to determine whether a *Brady* violation has occurred." *United States v. Ellis,* 121 F.3d 908, 916 (4th Cir.1997). When "the net effect of the evidence withheld by the [government] in [a] case raises a reasonable probability that its disclosure would have produced a different result, [the defendant] is entitled to a new trial." *Kyles v. Whitley,* 514 U.S. 419, 421–22, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). "A reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with the evidence,' only that the likelihood of a different result is great enough to 'undermine [ ] confidence in the outcome of the trial.' " *Smith v. Cain,* —— U.S. ——, 132 S.Ct. 627, 630, 181 L.Ed.2d 571 (2012) (quoting *Kyles,* 514 U.S. at 434, 115 S.Ct. 1555).

[22] Here "the likelihood of a different result is [not] great enough to 'undermine[ ] confidence in the outcome of [Bartko's] trial.' " *See id.* As the district court aptly noted,

> In so finding, the court stresses that Bartko's case was not a close one. The trial record reveals overwhelming evidence of Bartko's guilt. The jury carefully heard the evidence over a three-week period. The jury received detailed jury instructions. After deliberating approximately four hours, the jury unanimously convicted Bartko on all six counts.
>
> ....
>
> Circumstantial this case was; tenuous it absolutely was not. The mountain of evidence marshaled against Bartko demonstrated his guilt beyond any shadow of a doubt. Moreover, if the jury had had any doubts, Bartko's testimony destroyed them. The jury was permitted not only to disbelieve Bartko's testimony, but to believe the opposite.

*Bartko,* No. 5:09–CR–321–D, slip op. at 118. Therefore, having reviewed the omitted evidence "in the context of the entire record." ***341** *United States v. Agurs,* 427 U.S. 97, 112, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), and finding that there is no reasonable probability that the disclosure of the withheld evidence or the correction of Hollenbeck's false testimony could have

  

produced a different result, we conclude that the district court did not err in refusing to grant Bartko a new trial.

F.

Having analyzed the *Brady* and *Giglio* issues that Bartko raises, we pause here to address the discovery practices of the United States Attorney's office in the Eastern District of North Carolina.[1] A cursory review of this Court's opinions reveals recent consideration of at least three cases involving discovery abuse by government counsel in this district. *See, e.g.*, *United States v. Flores–Duran*, 531 Fed.Appx. 348, 351–53, No. 11–5167, 2013 WL 3286248, *2–4 (4th Cir. July 1, 2013)[2] (noting that (1) "[d]uring the week prior to trial, ... the [g]overnment sent over one thousand pages of additional discovery, the bulk of which was due no later than fourteen days prior to trial" and that the government argued its "discovery violation" was excusable because it "misread[ ] ... the discovery order; a power outage [occurred] at the courthouse in Raleigh; and [it made a] last minute decision to present certain evidence" and (2) that on the Saturday immediately prior to the Monday on which trial was to begin, the government faxed key information obtained approximately twenty-four hours earlier to defense counsel's office, but it did nothing to ensure that counsel received the fax, even though it sent the information outside of normal business hours); *United States v. Burkhardt*, 484 Fed.Appx. 801, 802 (4th Cir.2012) (considering a defendant's appeal of his civil commitment as a sexually dangerous person and citing as a "matter of concern" the government's failure to disclose prior to the commitment hearing that one of the defendant's victims would testify); *United States v. King*, 628 F.3d 693, 701–04 (4th Cir.2011) (vacating and remanding the defendant's conviction for felony possession of a firearm because the government "specifically rebuffed both ... written and oral demands [by the defendant] that it disclose" potentially exculpating grand jury testimony and "refused to disclose" the testimony, even after the district court "suggest[ed] that it do so"). And this case, which confronts us with three alleged constitutional violations—two instances of withholding discoverable evidence and one choice to leave uncorrected a witness's false testimony—only adds to the list.

Mistakes happen. Flawless trials are desirable but rarely attainable. Nevertheless, the frequency of the "flubs" committed by this office raises questions regarding whether the errors are fairly characterized as unintentional. *Cf.* Oral Argument at 24:50–25:10, *Flores–Duran*, 531 Fed.Appx. 348, 2013 WL 3286248 (No. 11–5167), *available at* http://www.ca4.uscourts.gov/OAaudioop.htm. (referencing the government's late disclosure of pages of discovery in violation of the judge's discovery order and stating, "This is a repeat offense by the government. The order is entered by the court requiring disclosure by a certain date, and the government simply ignores it. And their explanation for ignoring it is, 'I missed it. ***342** So what. There's no prejudice.' And it just happens

  

again and again."). Moreover, the government's responses to queries regarding its practices are less than satisfactory. For example, in this case, when asked at oral argument about its failure to correct Scott Hollenbeck's testimonial misstatement regarding promises he had received, the government suggested that at the time Hollenbeck made the misstatement, trial counsel had no recollection of the promises made to him. But as Judge Keenan aptly noted, such an idea "just strains credulity." Oral Argument at 21:54–21:56, *United States v. Bartko* (No. 12–4298), *available at* http://www.ca4.uscourts.gov/OAaudiotop.htm. Similarly artless responses have been given in other cases. *See, e.g.*, Oral Argument at 11:20–14:30, *Flores–Duran*, 531 Fed.Appx. 348, 2013 WL 3286248 (No. 11–5167), *available at* http://www.ca4.uscourts.gov/OAaudiotop.htm. And here, when we gave counsel an opportunity to correct her farfetched assertion, she refused. Faced with such behavior, we must conclude that this office is uninterested in placating concerns about its practices.

As detailed above, our confidence in the jury's conviction of Bartko was not undermined by the government's misconduct in this case. And such is the result in many cases. Remedies elude defendants because discovery violations ultimately prove immaterial to the verdict. But that is not the true problem. The problem is that the government appears to be betting on the probability that reams of condemning evidence will shield defendants' convictions on appeal such that at the trial stage, it can permissibly withhold discoverable materials and ignore false testimony. Make no mistake, however. We may find such practices "harmless" as to a specific defendant's verdict, but as to litigants in the Eastern District of North Carolina and our justice system at large, they are anything but harmless. "No [one] in this country is so high that [she or] he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it." *United States v. Lee*, 106 U.S. 196, 220, 1 S.Ct. 240, 27 L.Ed. 171 (1882). The law of this country promises defendants due process, U.S. Const. amend. V, and the professional code to which attorneys are subject mandates candor to the court, *see Model Rules of Prof'l Conduct R. 3.3.*, and fairness to opposing parties, *see id.* R. 3.4. Yet the United States Attorney's office in this district seems unfazed by the fact that discovery abuses violate constitutional guarantees and misrepresentations erode faith that justice is achievable. Something must be done.

We urge the district court in the Eastern District of North Carolina to meet with the United States Attorney's Office of that district to discuss improvement of its discovery procedures so as to prevent the abuses we have referenced here. Moreover, if this sort of behavior continues in subsequent cases, this Court may wish to require that the United States Attorney for the Eastern District of North Carolina, as well as the trial prosecutor, be present at oral argument so that the panel can speak directly to her or him about any alleged misconduct. Sanctions or disciplinary action are also options.

  

To underscore our seriousness about this matter, and to ensure that the problems are addressed, we direct the Clerk of Court to serve a copy of this opinion upon the Attorney General of the United States and the Office of Professional Responsibility for the Department of Justice. The transmittal letter should call attention to this section of the opinion.

***343** We do not mean to be unduly harsh here. But "there comes a point where this Court should not be ignorant as judges of what we know as men [and women]." *Rumsfeld v. Padilla*, 542 U.S. 426, 465 n. 10, 124 S.Ct. 2711, 159 L.Ed.2d 513 (2004) (Stevens, J., dissenting) (quoting *Watts v. Indiana*, 338 U.S. 49, 52, 69 S.Ct. 1347, 93 L.Ed. 1801 (1949)). What we know is that we are repeatedly confronted with charges of discovery abuse by this office. What we know is that our questions regarding this abuse remain unanswered. And what we know is that such conduct is unacceptable. Appropriate actions need to be taken to ensure that the serious errors detailed herein are not repeated. Whatever it takes, this behavior must stop.

## III.

[23] Next, Bartko contends that the district court improperly considered an ex parte sealed document submitted by the government. Bartko had filed a motion asking the district court to unseal the document, but the court denied his motion.

At our request, the government provided to us a copy of the sealed document, which asks the district court to make an in camera review of grand jury testimony in another case to determine whether that testimony contained any Jencks materials. The district court concluded that the sealed document did not, and we agree. Thus, we need not decide whether the district court erred in considering the document in that it caused no harm to Bartko.

## IV.

[24] [25] [26] Bartko also maintains that the district court erred by not instructing the jury on accomplice/informant testimony and on multiple conspiracies. A district court's "decision to give (or not to give) a jury instruction ... [is] reviewed for abuse of discretion." *United States v. Russell*, 971 F.2d 1098, 1107 (4th Cir.1992). A district court's decision not to give a requested instruction by the criminal defendant amounts to reversible error only if the proffered instruction: (1) was correct, (2) was not substantially covered by the charge that the district court actually gave to the jury, and (3) involved some point so important that the failure to give the instruction seriously impaired the defendant's defense. *United States v. Lewis*, 53 F.3d 29, 32 (4th Cir.1995). Even if these factors are met, however, failure to give the defendant's requested instruction is not

  

reversible error unless the defendant can show that the record as a whole demonstrates prejudice. *See Ellis,* 121 F.3d at 923.

A.

Bartko complains that the district court abused its discretion in its refusal to instruct the jury that it "should consider the testimony of Hollenbeck, Leamon and Plummer with great care and scrutiny." It appears that Bartko asked for an instruction regarding the testimony of an accomplice, informer, or witness with immunity. But, the district court declined and gave the following instruction instead:

> You, as jurors, are the sole and exclusive judges of the credibility of each of the witnesses called to testify in this case, and only you can determine the importance or weight that their testimony deserves. After making your assessment concerning the credibility of a witness, you may decide to believe all of that witness'[s] testimony, only a portion of it, or none of it.
>
> In making your assessment of each witness, you should carefully scrutinize all of the testimony given by each witness, the circumstances under which each witness has testified, and all of the ***344** other evidence which tends to show whether a witness, in your opinion, is worthy of belief. Consider each witness'[s] intelligence, motive to falsify, state of mind, and appearance and manner while on the witness stand. Consider each witness'[s] ability to observe the matters as to which he or she testified and consider whether he or she impresses you as having an accurate memory or recollection of these matters. Consider also any relation each witness may bear to either side of the case, the manner in which each witness might be affected by your verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

[27] This instruction certainly encompasses any specific instruction that the jury "should consider the testimony of Hollenbeck, Leamon and Plummer with great care and scrutiny." And, as detailed herein, the record fails to support any argument that the three were promised something in exchange for their testimony. Thus, in our judgment, we are unable to say that the district court's decision denying Bartko's request to give an accomplice/informer instruction was an abuse of discretion in that Bartko was not prejudiced by the omission.

B.

[28] [29] Bartko also insists that the district court erred in refusing to give his requested multiple conspiracy charge. "A court need only instruct on multiple conspiracies if such an instruction is supported by the facts."

  

*United States v. Mills*, 995 F.2d 480, 485 (4th Cir.1993). Hence, "[a] multiple conspiracy instruction is not required unless the proof at trial demonstrates that appellants were involved only in 'separate conspiracies unrelated to the overall conspiracy charged in the indictment.' " *United States v. Kennedy*, 32 F.3d 876, 884 (4th Cir.1994) (quoting *United States v. Castaneda–Cantu*, 20 F.3d 1325, 1333 (5th Cir.1994)). And, even if one overarching conspiracy is not evident, the district court's failure to give a multiple conspiracies instruction is reversible error only when the defendant suffers substantial prejudice as a result. *United States v. Tipton*, 90 F.3d 861, 883 (4th Cir.1996). For us to find such prejudice, "the evidence of multiple conspiracies [must have been] *so* strong in relation to that of a single conspiracy that the jury probably would have acquitted on the conspiracy count had it been given a cautionary multiple-conspiracy instruction." *Id.*

Bartko proposed that the district court give the following multiple conspiracy charge:

> You must determine whether the conspiracy charged in the indictment existed, and, if it did, whether the defendant was a member of it. If you find that the conspiracy charged did not exist, then you must return a not guilty verdict, even though you find that some other conspiracy existed. If you find that a defendant was not a member of the conspiracy charged in the indictment, then you must find that defendant not guilty, even though that defendant may have been a member of some other conspiracy.

According to Bartko, "the [g]overnment's evidence, at best, would show that there were two separate and independent conspiracies: the Caledonian Fund and Capstone Fund. There was no testimony that the activities of either fund overlapped or coexisted. The only connection between the Funds was Bartko."

[30] [31] But, "a single overall conspiracy can be distinguished from multiple independent conspiracies based on the overlap ***345** in actors, methods, and goals." *United States v. Stockton*, 349 F.3d 755, 762 (4th Cir.2003). Here, we have all three. The actors in both conspiracies were the same: Bartko, Franklin Exchange, and Scott Hollenbeck. The methods of investor recruitment and the handling of their money were also the same. And, the goals of raising money for investing and personal gain were the same. Moreover, we are unable to say that "the evidence of multiple conspiracies was *so* strong in relation to that of a single conspiracy that the jury probably would have acquitted on the conspiracy count had it been given a cautionary multiple-conspiracy instruction." *Tipton*, 90 F.3d at 883. Hence, we are unconvinced that the district court committed reversible error in its refusal to give a multiple conspiracy

  

charge.

V.

[32] [33] Bartko next complains that the district court improperly imposed Sentencing Guidelines enhancements based on the amount of loss, the number of victims, and his status as a registered broker/dealer at the time of the offenses. When deciding whether the district court properly applied the Guidelines, "we review the court's factual findings for clear error and its legal conclusions de novo." *United States v. Allen*, 446 F.3d 522, 527 (4th Cir.2006). The district court's decision concerning a role adjustment is a factual determination, reviewable for clear error. *United States v. Kellam*, 568 F.3d 125, 147–48 (4th Cir.2009). "A finding of fact is clearly erroneous when, 'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' " *In re Mosko*, 515 F.3d 319, 324 (4th Cir.2008) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948)).

A.

Bartko argues that the district court erred in determining the amount of loss attributed to him. The district court imposed an eighteen-level increase to his base offense level pursuant to U.S.S.G. § 2B1.1(b)(1)(J) (providing an eighteen-level increase for a loss of more than $2,500,000).

But Bartko claims that he should have been able to take advantage of a Guidelines-provided credit against loss for the amount of money he caused to be returned "to the victim[s] before the offense was detected." U.S.S.G. § 2B1.1 cmt. n.3(E)(i). The Guidelines provide, however, that "[t]he time of detection of the offense is the earlier of (I) the time the offense was discovered by a victim or a government agency; or (II) the time the defendant knew or reasonably should have known that the offense was detected or about to be detected by a victim or government agency." *Id.*

[34] First, Bartko contends that none of the refund checks should be counted in the loss amount. But, as detailed above, and as observed by the district court during the sentencing hearing, "the part [of the refund checks] that wasn't embezzled ended up being filtered back through LRM as part of the conspiracy," with the exception of investor Danny Briley, who decided not to endorse his refund check over to LRM. Thus, because the money was not ultimately returned to the investors, the district court did not clearly err on this point.

Second, Bartko avers that the loss amount should be reduced by the money that was returned to the investors through the interpleader. As noted above, the SEC knew of Bartko's offense when Alex ***346** Rue, an attorney from that office, met with him on March 14, 2005. But, Bartko did not file his

  

interpleader action until after that, on May 26, 2005. Consequently, he is unable to avail himself of Guidelines-provided credit against loss for the amount of money he caused to be returned "to the victim[s] before the offense was detected." U.S.S.G. § 2B1.1 cmt. n.3(E)(i). Thus, the district court did not err in overruling Bartko's objection to this enhancement.

B.

[35] Bartko also avers that the district court erred by finding that there were more than fifty victims of his crimes. Bartko posits "that none of the money invested in Caledonian should be counted towards [his] loss amount.... Therefore, the number of victims is limited to those people who invested in Capstone, which is fewer than 50." The import of this objection is that, under U.S.S.G. § 2B1.1(b)(2)(B), the district court is to impose a four-level enhancement if the offense that the defendant was convicted of "involved 50 or more victims." The commentary accompanying this Guideline provides, in relevant part: " 'Victim' means ... a person who sustained any part of the actual loss determined under subsection (b)(1) [the amount of loss chart]." U.S.S.G. § 2B1.1 cmt. n.1. Neither party disputes that there were at least thirty-nine investors in Capstone. So, we are left to decide if there were at least eleven investors in Caledonian. We think that there were.

As we have already observed, from January 15, 2004, to May 6, 2004, Hollenbeck fraudulently raised large amounts of money from a total of 171 investors for the Caledonian Fund, as well as other investments. The money was not separated, but was comingled. He sent the money to various entities, including the Caledonian Fund, as directed by Colvin.

If one's money is combined with other funds and, as here, $701,000 is lost from the total, then each individual or entity who contributed to the total loses a pro-rata share of her contribution. And, because each of those who contributed "sustained [a] part of the actual loss determined under subsection (b)(1)," *id.*, they are a victim pursuant to U.S.S.G. § 2B1.1(b)(2)(B). Accordingly, the district court did not commit clear error in its refusal to sustain Bartko's objection to the imposition of this enhancement.

C.

Finally, Bartko asserts that the district court erred in imposing an enhancement pursuant to U.S.S.G. § 2B1.1(b)(18)(A) inasmuch as, according to him, he was part-owner of a registered broker-dealer, but it was not used to commit the crime.

[36] Pursuant to U.S.S.G. § 2B1.1(b)(18), "[i]f the offense involved ... a violation of securities law and, at the time of the offense, the defendant was ... a registered broker or dealer, or a person associated with a broker

  

or dealer[,] ... increase by 4 levels." The accompanying comment to this Guideline defines a "registered broker or dealer" as "a broker or dealer registered or required to register." U.S.S.G. § 2B1.1 cmt. n.14(A) (incorporating 15 U.S.C. § 78c(a)(48)).

Without citation, Bartko maintains that "[t]he purpose of this enhancement is not to increase the punishment for anybody who happened to have a broker-dealer license who commits a securities law violation." He is mistaken. The meaning of the Guideline is clear. Under § 2B1.1(b)(18), the district court is to impose a four-level enhancement when a broker or dealer's criminal offense involves a ***347** securities law violation. There is no dispute that Bartko was a broker and that his offense involved a securities violation. Thus, the four-level enhancement was proper.

D.

The government states that, even if we find any procedural sentencing error in our review, the error is harmless. But, because we find no error in the district court's sentencing of Bartko, we need not engage in a harmless error review.

VI.

For the foregoing reasons, we affirm Bartko's conviction and sentence.

The Clerk of Court shall serve a copy of this opinion upon the Attorney General of the United States and the Office of Professional Responsibility for the Department of Justice. The transmittal letter should call attention to Section II(F) of this opinion.

*AFFIRMED.*

**All Citations**

728 F.3d 327

Footnotes

1 We note that the current United States Attorney for the Eastern District of North Carolina did not assume office until 2011, which is after some of the conduct described herein occurred.

2 We recognize that unpublished cases have no precedential value in this circuit. We rely on them here not for their legal conclusions, but only to demonstrate that certain conduct has occurred repeatedly.

  

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:09-CR-321-D

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| UNITED STATES OF AMERICA | ) | |
| | ) | |
| v. | ) | **ORDER** |
| | ) | |
| GREGORY BARTKO, | ) | |
| | ) | |
| Defendant. | ) | |

On November 1, 2010, Gregory Bartko ("Bartko" or "defendant") stood trial accused of one count of conspiracy to commit mail fraud, money laundering, and the sale of unregistered securities, four counts of mail fraud and aiding and abetting, and one count of selling unregistered securities and aiding and abetting. The superseding indictment essentially charged Bartko with leading an interstate criminal scheme "to profit from fraudulent sales of investments to individual members of rural Baptist churches and others, and to conceal those profits." [D.E. 1] at 1. The investments primarily concerned two private equity funds that Bartko—a long-time securities lawyer and securities dealer in Atlanta, Georgia—created, named the Caledonian Fund and the Capstone Fund. Ultimately, the trial focused on Bartko's knowledge, intent, and good faith. After a thirteen-day trial, on November 18, 2010, a jury convicted Bartko of all six counts.

On July 1, 2011, Bartko filed two motions for a new trial [D.E. 211–13].[1] The first motion alleged that the government violated Brady v. Maryland, 373 U.S. 83 (1963), by failing to disclose to Bartko an IRS agent's report concerning an interview of North Carolina Superior Court Judge Anderson Cromer ("Judge Cromer Interview Report") about receivership litigation in Forsyth County, North Carolina [D.E. 211]. The second motion alleged that the government violated Giglio v. United States, 405 U.S. 150 (1972), by failing to disclose to Bartko two 2009

[1] D.E. 212 and D.E. 213 are the same motion.

proffer agreements, one concerning government witness Scott Hollenbeck ("Hollenbeck") and the other concerning Hollenbeck's wife, Crystal Hollenbeck ("2009 Hollenbeck Proffer Agreements") [D.E. 212–13]. On July 15, 2011, Bartko filed a supplemental motion for a new trial [D.E. 225], alleging that the government violated Giglio by failing to disclose to Bartko two 2010 tolling agreements with government witness Levonda Leamon ("2010 Leamon Tolling Agreements"), [D.E. 225-1], which tolled the statute of limitations on Leamon's potential crimes until after Bartko's trial.[2] The government filed responses in opposition [D.E. 219–20, 227]. On July 25, 2011, the court held a hearing on the motions and permitted Bartko to file an omnibus reply, which he did on August 1, 2011 [D.E. 236]. On October 3, 2011, Bartko filed a fourth amended motion for a new trial [D.E. 237], arguing that government witness Gary Mlot ("Mlot") used false demonstrative exhibits and presented false testimony concerning certain money that Hollenbeck and John Colvin ("Colvin") had wired to Bartko in 2004. See Napue v. Illinois, 360 U.S. 264, 265 (1959). On October 5, 2011, the government responded in opposition [D.E. 238]. On October 26, 2011, the parties filed a joint notice of request for a transcript of Mlot's testimony [D.E. 240]. On November 21, 2011, the Mlot transcript was filed [D.E. 242]. On November 23, 2011, the government filed a supplemental response in opposition concerning the Mlot testimony and the Mlot exhibits [D.E. 243]. On December 7, 2011, Bartko filed a reply [D.E. 244–45].[3] For the reasons stated below, Bartko's motions for a new trial are denied.

I.

To evaluate Bartko's motions, the court has carefully reviewed the entire trial record. During the thirteen-day trial, thirty-one witnesses testified for the government and the

[2] Leamon was suspected of criminal activity stemming from her participation in Bartko's schemes. See [D.E. 225-1] at 2–3, 4–5.

[3] Bartko filed his reply as an attachment to a motion for leave to file a reply. See [D.E. 244-2]. The court granted the motion on December 14, 2011 [D.E. 245].

government introduced 366 exhibits. In turn, four witnesses, including Bartko, testified for the defense and the defense introduced forty-eight exhibits. The court cannot possibly recount all of the testimony and documents presented. Nor can it highlight all of the telephone conversations, fax and email exchanges, mailings, and other communications that occurred and connections that existed between Bartko, Hollenbeck, Colvin, and others. Nevertheless, in this section, the court recounts in detail some of the evidence presented against Bartko. In doing so, the court divides the evidence into four chronological segments: the Caledonian Fund, the Capstone Fund, the Forsyth County receivership litigation, and the post-Capstone Fund litigation.

A.

In 1992, Hollenbeck moved to Kernersville, North Carolina, and began selling insurance and other investment products. Hollenbeck held himself out as a devout Christian and was a prominent member of Gospel Light Baptist Church ("Gospel Light"), a very large Baptist church in Forsyth County, North Carolina. Hollenbeck often gave financial seminars at rural Baptist churches throughout the United States and would meet clients through such seminars and through referrals from such services.

Beginning in 2000, Hollenbeck sold a succession of investment products to customers. The investment products were for a fixed term (e.g., seven years, five years, or thirteen months) and an alleged guaranteed rate of return (e.g., 12 percent or 14.4 percent). After making the sale, Hollenbeck would collect the customer's money, send the money to the company whose investment product he was selling, and receive a commission. Hollenbeck sold investment products for several independent companies, beginning with ETS Payphones, Inc., continuing with Mobile Billboards of America, Inc. ("Mobile Billboards"), and then ending with two companies that he founded and managed, Franklin Asset Exchange, LLC ("Franklin Asset

Exchange") and Webb Financial Group, Inc. ("Webb Group"). Depending on the company and the investment product, Hollenbeck's sales commission ranged from 6 to 18 percent of the investment. Hollenbeck was an excellent salesman and sold approximately $25 million worth of these investment products between 2000 and 2005.

Hollenbeck's remarkable success, however, was too good to be true. Hollenbeck was a fraud. He used a variety of fraudulent tactics to sell securities, including telling investors—both orally and in writing—that their investment was insured with either a surety bond or an insurance policy with American International Group, Inc. ("AIG"). For a while, Hollenbeck could maintain the facade. The companies whose securities Hollenbeck sold would initially pay the quarterly "interest" to investors. See Hollenbeck Tr. [D.E. 200] 7–16. Either Hollenbeck or the company would then send quarterly statements to investors reflecting "interest" earned or "interest" distributed. See id. 48. But the companies were not legitimate businesses; they were Ponzi schemes in which those operating the companies were using new investor money to make the interest payments to earlier investors. Like all Ponzi schemes, Hollenbeck's eventually unraveled. When each successive scheme began to unwind, Hollenbeck would find a new fraudulent investment to sell, assure his earlier investment clients that the old investment would work out, and use some of his own commissions on new sales to placate his old investment clients. See id. 7–16.

In January 2004, Bartko was an attorney licensed to practice law in Georgia, North Carolina, and Michigan. He had specialized in securities law for approximately fifteen years. See Bartko Tr. [D.E. 193] 253. At the time of the events for which he was indicted and convicted, he was specializing in securities law as a sole practitioner at his own law firm, Law Office of Gregory Bartko, LLC, in Atlanta.

Bartko received a Juris Doctor degree from Detroit College of Law in 1979, and an LL.M. degree in securities regulation from Georgetown University Law Center in 1989. Additionally, Bartko was a licensed securities dealer who held himself out as an investment banker. Bartko ran his investment banking operations in Atlanta—out of the same office as his law firm—through a Utah corporation, Capstone Partners, L.C. ("Capstone Partners"). As an investment banker, Bartko sold securities. Bartko had a Series 7, a Series 24, a Series 63, and a Series 79 securities license. Id. 48–49. Notwithstanding Bartko's academic, legal, and business credentials, 2003 was a down year for Bartko's law practice. By January 2004, Bartko was in financial distress. See Govt. Exs. 631–32, 634–35, 638–39, 648, 687–88, 696–97; Bartko Tr. 287–88; Mlot Tr. [D.E. 242] 3–25, 129–30.

In January 2004, Bartko sought investors for a private equity fund, the Caledonian Fund, which Bartko and his business partner Darryl Laws ("Laws") planned to create. Laws lived in La Jolla, California, and, like Bartko, held himself out as an investment banker. On January 15, 2004, Bartko received promotional material via telefax from Colvin, a Tennessee businessman, concerning Webb Group and the financial products it offered. The promotional material contained references to guaranteed, fixed returns of 14.4 percent and included other indicators of fraud, such as the claim that the "[i]nvestments are protected by the Securities Investor Protection Corporation." Govt. Ex. 202. Colvin also faxed the promotional material to Laws. See Govt. Ex. 201; Laws Tr. [D.E. 233] 7–8. The material identified Hollenbeck as president of Webb Group. See Govt. Ex. 202. Hollenbeck was Colvin's business partner and top salesman. Despite the documents' overt indications of fraud, Bartko testified that he was unaware of any potential illegal activity because he did not closely review the documents. See Bartko Tr. 10–11.

Bartko's diligence concerning Colvin, however, had not otherwise waned. After

receiving the promotional material from Colvin on January 15, 2004, Bartko accessed the National Association of Securities Dealers ("NASD") records concerning Colvin. See Govt. Ex. 38. Bartko admitted that he checked the box on the NASD forms indicating that he was considering Colvin for employment in order to gain access to Colvin's NASD records. Bartko Tr. 162–64. He testified that he falsely made this representation and that he really was not considering Colvin for employment at that time. See id. On January 16, 2004, Bartko conducted a second NASD record search on Colvin. See Govt. Ex. 38. The NASD records referenced fraud that Colvin had committed in the securities industry. See Bartko Tr. 148–52. Again, Bartko claimed carelessness, that the purpose of his NASD search was not to find past instances of fraud or illegality, and that he did not recall clicking through to access the screen pages referencing Colvin's fraudulent past. See id. 15–16, 148–52.

Colvin and Bartko had more discussions in January 2004. According to Bartko, Colvin had originally sought Bartko's and Laws's advice regarding some corporate documentation and assistance with a possible acquisition. See id. 8–9, 12–14. Bartko and Laws had even agreed to provide investment banking services to Colvin for $10,000. See id. 9. But the relationship among the three men quickly expanded to something more: raising money for the Caledonian Fund. See id. 17–18.[4]

On January 19, 2004, Bartko sent a fax to Laws in La Jolla, California, detailing Colvin's fundraising methods. Bartko's fax cover sheet noted that the attached "documents are more explanatory in terms of what John I [sic] doing to raise this dough." Govt. Ex. 203. The documents included numerous indicators of fraud, including promises of a "guaranteed return"

[4] In fact, when negotiating their initial retainer with Colvin, Bartko and Laws offered to reduce their price if Colvin would agree to provide an initial investment for the Caledonian Fund. Bartko Tr. 17.

of 12 percent and statements that the "[i]nvestments are secured by [a] surety bond program registered with AIG Insurance Company." Id.; Laws Tr. 18–25. The documents also indicated that Colvin, through Webb Group, was raising money and that the money was coming from individuals. See Govt. Ex. 203; Bartko Tr. 176–77. Notwithstanding the clear indications of fraud in the documents, Bartko, a long-time securities lawyer and securities dealer, testified that he did not know that Colvin was fraudulently raising money. See Bartko Tr. 166–70. Again, Bartko testified that he barely reviewed the documents. Id. 177–78.

Bartko and Laws continued to speak to Colvin about investing money in the Caledonian Fund. See Govt. Ex. 288; Laws Tr. 30–39. On February 9, 2004, Colvin sent a lengthy fax to Bartko referencing Colvin's willingness, now through Franklin Asset Exchange, to invest $1 million into the Caledonian Fund over the next five months. Govt. Exs. 204–05. Specifically, the fax proposed a private equity agreement between Franklin Asset Exchange and the Caledonian Fund. See id.; Laws Tr. 30–33. The fax referred to Hollenbeck as a "Co-Managing General Partner" of Franklin Asset Exchange and also described Hollenbeck as "the founder and creator of both Franklin Asset Exchange, LLC and The Webb Group Financial Services, Inc." Govt. Ex. 204. Although Hollenbeck is referred to as a manager and creator in the documents concerning Franklin Asset Exchange and Webb Group—and although Bartko had already sent faxed documents to Laws detailing how Webb Group would be raising money for the Caledonian Fund—Bartko testified that he did not believe that Hollenbeck was involved in raising funds for Colvin. See Bartko Tr. 24, 153–55.

On February 17, 2004, Bartko conducted a NASD record check concerning Hollenbeck. See Govt. Ex. 38. Bartko admitted at trial that he checked the box on the NASD records indicating that he was considering Hollenbeck for employment in order to gain access to

Hollenbeck's records, even though that representation was false. See Bartko Tr. 162–63. The NASD records referenced Hollenbeck's prior sanctions: one in 1999 for committing forgery, and another in 2003 for misconduct concerning the sale of securities. See Govt. Ex. 40; Bartko Tr. 157–60. By his own testimony, Bartko conducted this search because he thought it was important to know who the founder and creator of Franklin Asset Exchange and Webb Group was. Bartko Tr. 157. Apparently, however, it was not important enough for Bartko to actually read the records. Although evidence of Hollenbeck's fraudulent past was right before his eyes, Bartko once more testified that he did not recall seeing the information concerning Hollenbeck's 1999 forgery and that he learned about Hollenbeck's 2003 misconduct "much later." Id. 159, 162–63. Laws, Bartko's business partner in the Caledonian Fund, was not so blind. Laws's notes on his copy of Colvin's February 9, 2004 fax reveal Laws's knowledge of Hollenbeck's 2003 sanction. See Govt. Ex. 204; Laws Tr. 31–33.

On February 18, 2004, Bartko's telephone records reveal a five-minute telephone call with Colvin. See Govt. Ex. 400. Thereafter, Colvin orally agreed with Bartko and Laws to provide $3 million to the Caledonian Fund. See Govt. Ex. 220; Laws Tr. 38–40. On February 24, 2004, the parties signed a letter of intent, which Bartko drafted. See Govt. Ex. 220; Bartko Tr. 25; Laws Tr. 38–40. Under the terms of the letter of intent, Webb Group agreed to provide $3 million to the Caledonian Fund over the next six months in monthly installments of $500,000. See Govt. Ex. 220; Laws Tr. 38–40.[5]

[5] Although only Webb Group and the Caledonian Fund were parties to the letter of intent, most of the money Webb Group had pledged would come from Franklin Asset Exchange. In a February 9, 2004 fax to Bartko, Colvin had explained the relationship between Webb Group and Franklin Asset Exchange. See Govt. Ex. 204. As of 2004, Webb Group "will continue to perform administrative functions such as the execution of . . . investor statements, welcoming letters, and other administrative functions. Franklin Asset Exchange, LLC will assume ownership of all previous instruments which were issued to execute the investment objectives of The Webb Financial Group, Inc. and will . . . achieve the [Caledonian] Fund's objectives . . . by managing the Fund's

As of February 24, 2004, Bartko and Laws had not yet formally established the Caledonian Fund or obtained a separate bank account for it. Any money sent pursuant to the letter of intent would have to be sent to and placed in another account. Accordingly, on February 27, 2004, and pursuant to the letter of intent, Franklin Asset Exchange wired $251,000 to Bartko's bank account for his company, Capstone Partners. See Govt. Ex. 207; Mlot Tr. 25. The wire transfer request stated, "[p]er Scott Hollenbeck." Govt. Ex. 207. Bartko testified that he received the wire transfer form, but did not notice "[p]er Scott Hollenbeck" on the wire transfer request. See Bartko Tr. 160–61, 284–85.

Hollenbeck continued to raise money, and on March 2, 2004, received a $321,157 investment from Landmark Baptist Church. See Govt. Exs. 504, 673. Before investing, Pastor Michael Lamb ("Pastor Lamb") of Landmark Baptist Church received from Hollenbeck certain Webb Group documents and a document that Hollenbeck falsely claimed was a surety bond insuring the investment. See Govt. Exs. 50, 70. On that same date, telephone records indicate a ten-minute call from Colvin to Bartko. See Govt. Ex. 401. On March 4, 2004, two days after Colvin and Bartko spoke, Franklin Asset Exchange wired $100,000 to Capstone Partners. Hollenbeck signed the wire transfer form. See Govt. Ex. 208; Mlot Tr. 25–26. Once again, Bartko testified that he received the wire transfer form, but that he did not notice Hollenbeck's name on it. See Bartko Tr. 160–61, 284–85.

On March 10, 2004, Hollenbeck received an $80,000 investment from Barry M. Singletary ("Singletary"). See Govt. Exs. 61, 504. Before investing, Singletary received from Hollenbeck certain Webb Group documents and a document that Hollenbeck falsely claimed was a surety bond insuring the investment. See Govt. Ex. 60. On March 18, 2004, Franklin Asset

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capital assets . . . ." Id. Hollenbeck had created both entities.

Exchange wired $150,000 to Capstone Partners. See Govt. Ex. 650; Mlot Tr. 26–27.

On March 29, 2004, Colvin, on behalf of Franklin Asset Exchange, purchased a Directors' and Officers' Liability Errors and Omissions Liability Insurance Policy from AIG through insurance broker Arthur J. Gallagher & Co. See Govt. Exs. 340, 343–44; Reno Tr. [D.E. 220-3] 6–7, 11–13. The policy cost $51,475. See Reno Tr. 10–11. At trial, Cal Reno ("Reno") of Arthur J. Gallagher & Co. testified that such a policy provides insurance protection to directors, officers, and employees of a firm providing services to other people. Id. 4. If someone alleges that such a director, officer, or employee committed a wrongful act in providing such services, the insurance policy will pay to defend the director, officer, or employee and will potentially pay any court costs or indemnity that a court might find against the person or firm. Id. 4–5, 52–53. An errors and omissions insurance policy does not, however, extend to individual investors. In other words, the policy will not cover a purchased investment or a loss related to that investment. Id. 5, 52–53. Reno also testified that the policy sold to Franklin Asset Exchange provided $3 million in aggregate insurance coverage, and that the insured had to pay the first $150,000 of any claim. See id. 8, 11–13.

On March 30, 2004, Franklin Asset Exchange formalized its relationship with the Caledonian Fund by entering a notes subscription agreement with it. See Govt. Ex. 221; Bartko Tr. 26; Laws Tr. 40–41. Under the agreement, Franklin Asset Exchange agreed to provide the Caledonian Fund $3 million in installments of $500,000 on March 23, 2004, March 30, 2004, April 15, 2004, May 15, 2004, June 15, 2004, and July 15, 2004. Govt. Ex. 221. In return, the Caledonian Fund agreed to pay 10 percent interest on the money and to repay interest and principal in forty-eight months. Id.; Laws Tr. 38. On April 1, 2004, Bartko's telephone records reveal an eleven-minute call from Colvin. See Govt. Ex. 401.

On March 31, 2004, Bartko and Laws each took a $50,000 draw against the money raised for the Caledonian Fund. See Bartko Tr. 180–81. Bartko testified that the draw was the equivalent of their quarterly salary. Id.

Bartko and Laws formally created the Caledonian Fund in April 2004. Once formed, the Caledonian Fund hired several employees who worked in California, opened a bank account, prepared a budget, and began looking for investment opportunities. See Def. Ex. 202; Bartko Tr. 28–31; Laws Tr. 89–101, 105. Other than the $501,000 received to date from Colvin and Hollenbeck, however, the Caledonian Fund lacked any money to invest.

In late April 2004, Hollenbeck received a cease and desist order dated April 26, 2004, from the North Carolina Secretary of State Securities Division ("North Carolina Securities Division"), which ordered him to stop selling all securities, including the securities of Mobile Billboards. See Govt. Ex. 330. Mobile Billboards had advertised itself as a company that facilitated placement of advertising on truck-mounted billboards, and had raised money through the sale of its own securities. Mobile Billboards, however, actually was a Ponzi scheme involving the sale of unregistered securities, and Hollenbeck was its most successful salesman. Alone, Hollenbeck had raised over $10 million for the company. But Hollenbeck's success with Mobile Billboards ended when, on April 26, 2004, Agent J.C. Curry ("Agent Curry") and Agent Cheryl Young ("Agent Young") of the North Carolina Securities Division delivered the cease and desist order to Hollenbeck at his office in Kernersville, North Carolina.

According to the cease and desist order,

**FINDINGS OF FACT**

1. Respondent **SCOTT BRADLEY HOLLENBECK** (hereinafter "**Hollenbeck**") is, upon information and belief, a natural person who resides at 1524 Chimney Rock Drive, Kernersville, North Carolina, 27284 and maintains offices at 1202-C N. East Mountain Street, Kernersville,

North Carolina, 27284.

2. On February 18, 2002, Respondent Hollenbeck offered and sold an "investment opportunity" in the form of a sale-and-leaseback program to members of the public in North Carolina whereby investors could allegedly earn a fixed 13.49% rate of return by purchasing equipment from Mobile Billboards of America, Inc. (hereinafter "MBA") and simultaneously leasing the purchased equipment to management/lease companies related to MBA.

3. The offer and sale of the sale-and-leaseback program to persons in North Carolina under the circumstances described in Paragraph 2, above, constitutes the "offer" of and "sale" of a "security" as those terms are defined in N.C.G.S. §§78A-2(8) and 78A-2(11) respectively.

4. The security offered and sold by the Respondent to persons in North Carolina was not registered with the Securities Division of the Department of the Secretary of State under the provisions of the Securities Act prior to or at the time of being offered or sold to persons in North Carolina and was not exempt from registration nor covered under federal law, in violation of N.C.G.S. §78A-24.

5. At the time of effecting securities transactions on February 18, 2002 (as described in Paragraph 2, above), Respondent Hollenbeck was registered as a salesman with a dealer registered under the Securities Act, however the security transactions effected were not recorded on the regular books or records of the dealer and the transactions were not disclosed nor authorized in writing by the dealer prior to execution of the transactions.

6. Due to a review of representative activity by the dealer with whom Respondent Hollenbeck was registered at the time of the securities transactions (as described in Paragraph 2, above), the dealer discharged Hollenbeck on May 17, 2002 and concluded that Hollenbeck effected security transactions with customers not recorded on the regular books or records of the dealer and [that] the transactions were not disclosed nor authorized in writing by the dealer prior to execution of the transactions, in violation of firm policy.

7. Respondent Hollenbeck is not currently registered as a salesman or dealer pursuant to the Securities Act.

8. In connection with the offer and sale of the aforesaid security to persons in North Carolina, the Respondent omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, in violation of N.C.G.S. §78A-8(2), in that the Respondent omitted to state to offerees that the

security being offered was not registered pursuant to the provisions of the Securities Act, in violation of N.C.G.S. §78A-24.

9. It is in the public interest of the citizens of North Carolina that Respondent be prohibited from violating the provisions of the Securities Act in connection with selling or making offers to sell securities, buying or soliciting offers to buy securities, and transacting business as a dealer or salesman.

## CONCLUSIONS OF LAW

. . .

2. There is reasonable cause to believe the Respondent has engaged in violations of the Securities Act, specifically N.C.G.S. §§78A-8, and 78A-24.

3. There is reasonable cause to believe the Respondent will continue to commit acts and omissions in violation of the Securities Act.

4. It is necessary and appropriate for the protection and preservation of the public interest or for the protection of investors that the Respondent be temporarily ordered to cease and desist from making offers and sales of securities in violation of the Securities Act and, in connection with such solicitations, omitting to state material facts necessary to make other statements made, in light of the circumstances under which they were made, not misleading.

5. The public interest would be irreparably harmed by the delay inherent in issuing an order under the provisions of N.C.G.S. §78A-47(b)(1).

**NOW, THEREFORE, IT IS ORDERED**, pursuant to the authority contained in N.C.G.S. §78A-47(b)(2), that Respondent, **SCOTT BRADLEY HOLLENBECK** and **ANY AND ALL PERSONS IN ACTIVE CONCERT AND PARTICIPATION WITH SCOTT BRADLEY HOLLENBECK**, shall immediately cease and desist:

a. offering for sale, soliciting offers to purchase, or selling, in or from North Carolina, the securities of Mobile Billboards of America, Inc. in the form of a "sale-and-leaseback program" *and any security of any issuer, howsoever denominated, unless and until such securities have been registered pursuant to the provisions of the Securities Act*;

b. offering for sale, soliciting offers to purchase, or selling, in or from North Carolina, the securities of Mobile Billboards of America,

> Inc. in the form of a "sale-and-leaseback program" *and any security of any issuer, howsoever denominated, unless and until said persons become registered as dealers or salesmen pursuant to the provisions of the Securities Act*;
>
> c. *in connection with the offer, sale or purchase of any security, omitting to state material facts necessary in order to make statements made, in light of the circumstances under which such statements were made, not misleading.*

Id. (bold emphases in original) (italicized emphases added).

On April 26, 2004, while Agents Curry and Young were at Hollenbeck's office, Hollenbeck called Colvin concerning the agents and the cease and desist order. Colvin, in turn, told Hollenbeck to call Bartko for legal advice. Colvin also called Bartko and told Bartko that a team member had received a cease and desist order and needed his legal advice. See Bartko Tr. 40. Hollenbeck then spoke with Bartko about the order, see id. 39–41, but Bartko did not take any action until April 30, 2004.

In the meantime, on April 27, 2004, Bartko sent an unrelated fax to Laws. Bartko had problems beyond Hollenbeck's cease and desist order. NASD was auditing Capstone Partners, one of Bartko's companies. Bartko's fax complained of "a grueling week here with the NASD looking down my windpipe . . . ." Govt. Ex. 210. He lamented having "to openly disclose the [Caledonian Fund] investment to explain why we had $500,000 come thru [sic] our bank account." Id. In the next breath, however, Bartko explained that he had devised a solution: "I rectified the issue today by transferring all remaining [Caledonian Fund money received from Colvin] to my IOLTA lawyer's trust account." Id.; Laws Tr. 44–45.

The next day, Bartko sent a related fax to Colvin: "[P]lease wire your next funds using our lawyer's trust account. The cash coming into Capstone [Partners] created snafus during the NASD audit." Govt. Ex. 211. On that same date, Bartko's telephone records reflect a

seventeen-minute call from Colvin. See Govt. Ex. 401.

On April 30, 2004, Bartko responded to Hollenbeck's cease and desist order. Bartko faxed a letter to Agent Curry, referencing the North Carolina Secretary of State's "continuing inquiry concerning Mr. Hollenbeck . . . ." Govt. Ex. 331. The fax implored Agent Curry that Bartko "did not and do[es] not represent Mr. Hollenbeck individually, rather I have done some limited general corporate legal work for The Webb Financial Group, Inc., a North Carolina corporation, which legal work is essentially complete at this time." Id.[6] The letter went on to state that Bartko had recommended to Hollenbeck that Hollenbeck hire a securities lawyer in Raleigh. Id.

When Bartko faxed this letter to Agent Curry, Hollenbeck was continuing to use fraud to raise money for Franklin Asset Exchange, and Colvin and Hollenbeck were continuing to send money, through Franklin Asset Exchange, to Bartko for the Caledonian Fund. For example, on May 3, 2004, Hollenbeck received a $61,140 investment from George D. Brown ("Brown"). See Govt. Ex. 658. Before Brown invested, Hollenbeck gave him Webb Group documents that included fraudulent information and a document purporting to be a surety bond. See Govt. Ex. 70. On the date that Hollenbeck received Brown's money, he placed a seven-minute telephone call to Bartko. See Govt. Ex. 406. Moreover, on May 3, 2004, and in accordance with Bartko's previous instructions, see Govt. Ex. 211, Franklin Asset Exchange wired $100,000 to Bartko's attorney IOLTA trust account. See Govt. Ex. 650; Mlot Tr. 27.

Bartko admitted at trial that he knew by May 3, 2004, that the money he was receiving

[6] At trial Bartko admitted that, by this date, the Caledonian Fund had received over $500,000 from Hollenbeck and Colvin via either Webb Group or Franklin Asset Exchange. See Bartko Tr. 190–91. Nonetheless, he claimed that he could not figure out the relationship between Webb Group and Franklin Asset Exchange, see id. 191, even though he had received a February 9, 2004 fax from Colvin detailing the relationship between the two companies and explaining that Hollenbeck was "the founder and creator of both . . . ." Govt. Ex. 204.

for the Caledonian Fund was coming from either Franklin Asset Exchange or Webb Group. See Bartko Tr. 191–92.[7] Bartko insisted, however, that he did not know that Hollenbeck was using fraud to raise money for Franklin Asset Exchange and Webb Group. See id. 147, 167–70, 180, 187–88, 191–92.

In any event, on May 4, 2004, Hollenbeck received a $15,111 investment from Hayden M. Furrow ("Furrow"). See Govt. Ex. 662. Before investing, Furrow received from Hollenbeck some fraudulent Franklin Asset Exchange documents and a document purporting to be a surety bond. See Govt. Exs. 77–78. On that same date, Bartko's telephone records reveal a sixteen-minute call to Hollenbeck. See Govt. Ex. 400.

On May 6, 2004, Franklin Asset Exchange wired $100,000 to Bartko's attorney IOLTA trust account. See Govt. Exs. 209, 650; Mlot Tr. 27–28. The wire transfer request referenced Scott Hollenbeck. See Govt. Ex. 209. Once more, Bartko testified that he received the wire transfer request, but did not notice Hollenbeck's name. See Bartko Tr. 284–85.[8]

On May 6, 2004, Bartko faxed a letter to Agent Curry of the North Carolina Securities Division. The fax stated, in part, "I spoke in detail with [my former law partner, Durham, North

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[7] Of course, the jury was entitled to believe that Bartko knew this fact well before the date he claimed. On January 19, 2004, Bartko faxed to Laws documents indicating that Colvin would be raising money for the Caledonian Fund through Webb Group. Govt. Ex. 203. Then, on February 9, 2004, Colvin sent Bartko a lengthy fax proposing a private equity agreement between Franklin Asset Exchange and the Caledonian Fund, and detailing the relationship between Franklin Asset Exchange and Webb Group. Govt. Exs. 204–05. Several other documents predating May 3, 2004—including separate, express agreements under which Franklin Asset Exchange and Webb Group would each provide $3 million to Bartko's Caledonian Fund—indicated that both Franklin Asset Exchange and Webb Group were raising money for and supplying money to the Caledonian Fund. See, e.g., Govt. Exs. 207–09, 220–21.

[8] This is now the third time in a four-month span that Bartko has received a wire transfer from Franklin Asset Exchange concerning the transfer of a large sum of money and referencing Hollenbeck, but claimed that he failed to see Hollenbeck's name. In this regard, it is worth noting that each wire transfer form is a one-page document, and that Hollenbeck's name is not buried in a sea of other data. Quite the contrary, Hollenbeck's name appears prominently on all three documents. See Govt. Exs. 207–09.

Carolina attorney Wes Covington] about this investigation [of Hollenbeck] and he and I have agreed to represent Mr. Hollenbeck as co-counsel in connection with your pending investigation and any civil or other actions that may arise therefrom." Govt. Ex. 332. On May 14, 2004, Hollenbeck met with Bartko and Covington at Covington's office in Durham. Bartko Tr. 39–41, 44. Hollenbeck paid Bartko and Covington $12,500 each as a retainer for their legal services. See Govt. Ex. 521; Hollenbeck Tr. 72–73.[9]

According to Bartko, Hollenbeck told Bartko that Mobile Billboards involved the sale of a business opportunity, not the sale of a security. Bartko Tr. 42. Bartko also testified that as of May 14, 2004, he had no idea that Hollenbeck had been raising funds for Colvin and Franklin Asset Exchange, or that Hollenbeck was the source of the $701,000 that Franklin Asset Exchange provided the Caledonian Fund. See id. 44. The jury, however, was certainly entitled to credit rapidly mounting evidence that strongly suggests otherwise. After all, according to Bartko's own testimony, Bartko knew by May 3, 2004, that either Webb Group or Franklin Asset Exchange was providing money to the Caledonian Fund. See id. 192. Bartko had also received myriad documents detailing the relationship between Webb Group and Franklin Asset Exchange and Hollenbeck's deep involvement—including as a co-managing general partner—with both. See, e.g., Govt. Exs. 203–05, 207–09, 220–21. In fact, by May 14, 2004, Bartko had received three wire transfers from Hollenbeck. See Govt. Exs. 207–09. Hollenbeck signed one of those transfers. Govt. Ex. 208. The other two were "[p]er Scott Hollenbeck." Govt. Exs. 207, 209. Finally, Bartko had twice spoken with Hollenbeck on days that Hollenbeck had secured large investments. The first was a seven-minute call from Hollenbeck to Bartko on May 3, 2004, the day Hollenbeck received a $61,140 investment from George D. Brown. See

[9] Bartko's check was made out to Capstone Partners. Govt. Ex. 521.

Govt. Exs. 406, 658. The other conversation was a sixteen-minute call from Bartko to Hollenbeck on May 4, 2004, when Hollenbeck obtained a $15,111 investment from Hayden M. Furrow. See Govt. Exs. 400, 662.

The mountain of circumstantial evidence of Bartko's guilt would continue to rise. On June 4, 2004, Mel Locke of Arthur J. Gallagher & Co., the insurance brokerage company that had sold the AIG errors and omissions insurance policy to Franklin Asset Exchange, received a call from Rita Harfield of AIG concerning someone using the policy and telling investors that it protected the investor's investment and guaranteed the return on that investment. See Govt. Ex. 345; Reno Tr. 16–17, 20.[10] On June 8, 2004, Jeanne Blasher ("Blasher") of Arthur J. Gallagher & Co. received a similar call. Alanna Schow, an underwriter at AIG, notified Blasher about someone with Franklin Asset Exchange distributing false certificates of insurance. See Govt. Ex. 346; Reno Tr. 18–20.

After receiving these inquiries, Reno, the Arthur J. Gallagher & Co. employee who had sold the AIG errors and omissions insurance policy to Franklin Asset Exchange, spoke with Hollenbeck and Colvin. Reno Tr. 20. Reno told them that he was calling to advise them that AIG had received inquiries about the Franklin Asset Exchange insurance policy and that the insurance policy did not guarantee a return on investment. Id. Colvin and Hollenbeck confirmed their understanding of this fact and told Reno that they would reconfirm this fact with their investment clients. Id.

On June 8, 2004, Hollenbeck faxed Bartko documents concerning Hollenbeck's

[10] At trial, Reno compared government exhibit 149, which Hollenbeck had used in a sales presentation, and government exhibit 344, an actual errors and omissions insurance policy document issued by AIG through Arthur J. Gallagher & Co. See Reno Tr. 8–9. Reno noted that government exhibit 149 had information concerning "notice" and "retention" (i.e., deductible) removed. See id. 9. Reno also identified other fraudulent insurance documents that were contained in Hollenbeck's sales-presentation materials. See id. 13–15; see also Govt. Exs. 90, 149.

fraudulent method of selling investments, including promotional materials of Franklin Asset Exchange that promised a "guaranteed return" of 12 percent. The fax also referenced Hollenbeck's use of a document purporting to be a surety bond to fool investors into believing that their principal was insured. See Govt. Exs. 280–81.[11] Hollenbeck's fax also included a copy of Colvin's March 2, 2004 application to AIG to obtain the errors and omissions insurance policy for Franklin Asset Exchange. See Govt. Ex. 280; Bartko Tr. 45–47; Reno Tr. 28–29. On June 9, 2004, Bartko replied by fax to Hollenbeck. "Scott," Bartko wrote, "I am in receipt of all pages you faxed to my office last night relating to the 'Franklin Asset Surety Bond' issue. I will be sending copies of this material directly to Wes. . . . [W]e should schedule a follow up call this afternoon." Govt. Ex. 281; see also Hollenbeck Tr. 90–92.

At trial, Bartko admitted that the documents that he received from Hollenbeck on June 8, 2004, repeatedly referenced Franklin Asset Exchange, the company Bartko already knew was raising money for the Caledonian Fund. See Bartko Tr. 200; cf. Govt. Exs. 280–81. Covington, Bartko's co-counsel, also understood what these documents showed: Hollenbeck—acting through Franklin Asset Exchange—was engaging in fraud. Accordingly, on June 11, 2004, Covington wrote a letter to Hollenbeck, with a copy to Bartko, concerning Hollenbeck's fraudulent sales tactics. "I am concerned," wrote Covington,

> that while you have stopped selling the Mobile Billboards product, that you may be nonetheless exposing yourself to additional scrutiny and/or prosecution *by the ongoing sale of products* that purport to be guaranteed by a surety bond when, in fact, the only potential coverage is from an errors and omissions insurance policy apparently purchased by John Colvin.

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[11] At trial, Reno testified that a surety bond is typically found in the construction industry. Such a bond promises to pay to complete a construction project if the party obligated to complete the project fails to fulfill the obligations in accordance with the construction contract. See Reno Tr. 5–6. Reno also testified that he had never heard of a surety bond that covered an investment or that covered a loss if something went wrong with an investment. Id. 6. In fact, Reno testified that he had never heard of an insurance policy that would insure an investment in a private equity fund. Id.

Govt. Ex. 243 (emphasis added). Covington's letter also warned Hollenbeck that

> [i]t is important, in my opinion, to insure whenever possible that you are not exposing yourself to any further scrutiny or actions by the Secretary of State's Office. For that reason, I am suggesting that you refrain from any further sales of any kind save products that Greg and I approve until this matter can be finally resolved.

Id.

By no later than June 11, 2004, therefore, Bartko had documents showing that Hollenbeck had used fraudulent sales tactics to convince investors to invest in Franklin Asset Exchange. Bartko also knew that Hollenbeck had raised money for Franklin Asset Exchange and that Franklin Asset Exchange had invested $701,000 in the Caledonian Fund.[12] Nonetheless, Bartko did not sever his business or legal ties with Hollenbeck, Webb Group, or Franklin Asset Exchange. Nor did he dissolve the Caledonian Fund and return the $701,000 to investors. Instead, on June 30, 2004, Bartko and Laws each took a $50,000 draw against the $701,000 raised by Franklin Asset Exchange for the Caledonian Fund. See Bartko Tr. 180–81.

Although Franklin Asset Exchange had agreed on March 30, 2004, to provide $3 million to the Caledonian Fund by July 15, 2004, Colvin and Hollenbeck delivered only $701,000. And although Bartko testified that he had hoped to raise $100 million for the Caledonian Fund, id. 18, the Caledonian Fund had received investment funds from no other source. Furthermore, the Caledonian Fund had yet to invest a penny of the $701,000. See id. 180–82. Because Colvin failed to deliver the remaining $2.3 million, the relationship between Colvin and the Caledonian Fund deteriorated in the summer of 2004. See Laws Tr. 132–46. Hollenbeck, however,

[12] Additionally, at trial, Bartko admitted that he knew by June 2004 that Hollenbeck had made false promises of a guaranteed return and had used a fake surety bond to convince people to invest in Mobile Billboards. See Bartko Tr. 197–200, 203. Bartko also admitted that those same false promises and a similarly fake surety bond appeared in the June 8, 2004 fax Hollenbeck had sent to Bartko. See id. 197–200.

remained in the fold with Bartko.

Despite Bartko's knowledge of the cease and desist order and of Hollenbeck's illegal behavior—including fraud in connection with raising money for Mobile Billboards and Franklin Asset Exchange—on September 3, 2004, Bartko, Hollenbeck, Laws, and Covington met to discuss having Hollenbeck raise funds directly for the Caledonian Fund. See Govt. Exs. 212–14; Laws Tr. 49–56. During the meeting, Hollenbeck discussed how he had raised approximately 90 percent of the $14 to $16 million that Colvin, through Franklin Asset Exchange, had invested during 2003 and 2004. See Govt. Ex. 212; Laws Tr. 53–56. Hollenbeck also discussed the 12 percent guaranteed return on the notes that he had sold, and discussed his use of AIG's errors and omissions insurance policy. See Govt. Ex. 212; Laws Tr. 53–56. In Laws's notes from the meeting, Laws wrote that "Scott [Hollenbeck] is circumventing 'Regs' by taking a finder's fee." Govt. Ex. 212. According to Laws, the "Regs" referenced securities regulations that required Hollenbeck to have a securities license to sell securities and to raise capital. See Laws Tr. 55–56. Even Bartko testified that he remembered discussing Hollenbeck "circumventing the Regs." Bartko Tr. 51.

After the September 3, 2004 meeting ended, Bartko, Laws, and Covington conferred. Covington stated to Bartko and Laws that Hollenbeck was raising money in coffee klatsches after Bible study meetings. See Laws Tr. 165. Despite being one of only three people in a face-to-face meeting, the very purpose of which was to discuss using Hollenbeck to raise money directly for an investment fund Bartko operated, Bartko denied hearing Covington make this comment. See Bartko Tr. 244–45.

In any event, Bartko testified that he did not want Hollenbeck to be a salesman for the Caledonian Fund. Id. 50. Rather, Bartko wanted Hollenbeck to be only a "finder," one who

would simply refer interested investors to Bartko. See id. 50–51. Again, however, the evidence belies Bartko's testimony. On September 1, 2004, two days before meeting with Hollenbeck, Laws emailed Bartko. "Prior to our meeting [with Hollenbeck]," Laws wrote,

> I would like to get a feel for the following:
>
> - How much capital can Scott [Hollenbeck] really raise in a thirty day period?
> - Does Scott require us to cover his and his team's expenses that are incurred in the course of raising money for [the Caledonian Fund]?
> - The timing for [the Caledonian Fund] to prepare documents to enable Scott and his team to raise funds for us?
> - What church building funds, endowments, pensions and high net worth individuals will he and his team approach on [the Caledonian Fund's] behalf?
>
> . . .
>
> - What kind of capital commitments can he queue up in short order?

Govt. Ex. 213. Having received the email, Bartko did not object to Laws's questions or clarify that he intended Hollenbeck to be a finder only. Instead, Bartko faxed these talking points to Hollenbeck the next day. See Govt. Ex. 214. Moreover, in an October 20, 2004 email to Laws, Bartko referenced "[g]et[ting] Scott to commit to raise at least $1.0 million each month for us," and detailed what securities Hollenbeck could sell to raise that money and what commissions scale might keep Hollenbeck motivated to continue raising money for the Caledonian Fund in the long term. See Govt. Exs. 217–18. Clearly, the jury was entitled to believe that Bartko envisioned Hollenbeck being much more than "a finder."

On September 27, 2004, Hollenbeck wrote Covington a panicked note. "WES—I NEED YOUR HELP!" Govt. Ex. 254 (emphases in original). Up to this point, Hollenbeck had been using some of his commissions from his fraudulent sale of investments to pay investors in

Mobile Billboards and other "guaranteed" investments their quarterly distributions. But the funds he needed to maintain his various Ponzi schemes were withering. Hollenbeck stated that he had only $31,000 total in all of his bank accounts, but that investors were expecting to receive $240,000 in quarterly distributions and that two church investors had closings that week and needed to liquidate their investments of $70,000 and $30,000, respectively. Id. Hollenbeck asked Covington to call Colvin and to have Colvin wire at least $340,000 to Hollenbeck. Id.

On October 19, 2004, Hollenbeck, on Bartko's and Covington's legal advice, consented to the entry of a final cease and desist order issued by the North Carolina Securities Division. See Govt. Ex. 330. The cease and desist order stated,

> **WHEREAS,** Scott Bradley Hollenbeck (hereinafter, "Hollenbeck" or "Respondent") is a natural person who resides at 1524 Chimney Rock Drive, Kernersville, North Carolina, 27284 and maintains offices at 935 N. East Mountain Street, Kernersville, North Carolina, 27284; and
>
> **WHEREAS,** the Secretary of State of the State of North Carolina (the "Secretary of State"), as Administrator of the North Carolina Securities Act (North Carolina General Statutes, Chapter 78A), the Securities Division of the Department of the Secretary of State (the "Securities Division"), and *counsel for the Respondent* have negotiated this Final Order to Cease and Desist; and
>
> . . .
>
> **NOW, THEREFORE,** the Securities Administrator, acting through her duly appointed Deputy Securities Administrator, pursuant to and under all authority granted by the North Carolina Securities Act, and with the consent of the Respondent, does hereby issue this Final Order to Cease and Desist in settlement of the above-captioned matter.
>
> . . .
>
> II.
>
> FINDINGS OF FACT
>
> . . .
>
> 2. On February 18, 2002, Respondent Hollenbeck offered and sold an

"investment opportunity" in the form of a sale-and-leaseback program to members of the public in North Carolina whereby investors could allegedly earn a fixed 13.49% rate of return by purchasing equipment from Mobile Billboards of America, Inc. (hereinafter "MBA") and simultaneously leasing the purchased equipment to management/lease companies related to MBA.

3. The offer and sale of the sale-and-leaseback program to persons in North Carolina under the circumstances described in Paragraph 2, above, constitutes the "offer" of and "sale" of a "security" as those terms are defined in N.C.G.S. §§78A-2(8) and 78A-2(11) respectively.

4. The security offered and sold by the Respondent to persons in North Carolina was not registered with the Securities Division of the Department of the Secretary of State under the provisions of the Securities Act prior to or at the time of being offered or sold to persons in North Carolina and was not exempt from registration nor covered under federal law, in violation of N.C.G.S. §78A-24.

5. At the time of effecting securities transactions on February 18, 2002 (as described in Paragraph 1, above), Respondent Hollenbeck was registered as a salesman with a dealer registered under the Securities Act, however the security transactions effected were not recorded on the regular books or records of the dealer and the transactions were not disclosed nor authorized in writing by the dealer prior to execution of the transactions.

6. Due to a review of representative activity by the dealer with whom Respondent Hollenbeck was registered at the time of the securities transactions (as described in Paragraph 2, above), the dealer discharged Hollenbeck on May 17, 2002 and concluded that Hollenbeck effected security transactions with customers not recorded on the regular books or records of the dealer and that the transactions were not disclosed nor authorized in writing by the dealer prior to execution of the transactions, in violation of firm policy.

7. *Respondent Hollenbeck is not currently registered as a salesman or dealer pursuant to the Securities Act.*

8. In connection with the offer and sale of the aforesaid security to persons in North Carolina, the Respondent omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, in violation of N.C.G.S. §78A-8(2), in that the Respondent omitted to state to offerees that the security being offered was not registered pursuant to the provisions of the Securities Act, in violation of N.C.G.S. §78A-24.

9. It is in the public interest of the citizens of North Carolina that Respondent be *permanently prohibited from violating the provisions of the Securities Act in connection with selling or making offers to sell securities, buying or soliciting offers to buy securities, and transacting business as a dealer or salesman.*

CONCLUSIONS OF LAW

. . .

2. *There is reasonable cause to believe the Respondent has engaged in violations of the Securities Act, specifically N.C.G.S. §§78A-8, and 78A-24.*

3. *There is reasonable cause to believe the Respondent will continue to commit acts and omissions in violation of the Securities Act.*

4. It is necessary and appropriate for the protection and preservation of the public interest or for the protection of investors that the Respondent be *permanently ordered to cease and desist from making offers and sales of securities in violation of the Securities Act and in connection with such solicitations, omitting to state material facts necessary to make other statements made, in light of the circumstances under which they were made, not misleading.*

**NOW, THEREFORE, IT IS ORDERED**, pursuant to the authority contained in N.C.G.S. §78A-47(b)(2), that Respondent, **SCOTT BRADLEY HOLLENBECK** and **ANY AND ALL PERSONS IN ACTIVE CONCERT AND PARTICIPATION WITH SCOTT BRADLEY HOLLENBECK**, shall permanently cease and desist:

a. offering for sale, soliciting offers to purchase, or selling, in or from North Carolina, the securities of Mobile Billboards of America, Inc. in the form of a "sale-and-leaseback program" *and any security of any issuer, howsoever denominated, unless and until such securities have been registered pursuant to the provisions of the Securities Act*;

b. offering for sale, soliciting offers to purchase, or selling, in or from North Carolina, the securities of Mobile Billboards of America, Inc. in the form of a "sale-and-leaseback program" *and any security of any issuer, howsoever denominated, unless and until said persons become registered as dealers or salesmen pursuant to the provisions of the Securities Act*;

c. *in connection with the offer, sale or purchase of any security,*

> *omitting to state material facts necessary in order to make statements made, in light of the circumstances under which such statements were made, not misleading.*

Id. (bold emphases in original) (italicized emphases added); see Bartko Tr. 189–90.

On October 20, 2004, the same date that the North Carolina Securities Division issued the cease and desist order, Bartko emailed Laws about "Scott ad nauseam." Govt. Ex. 216; Laws Tr. 56–60. The email stated that Bartko planned to meet with Hollenbeck and Covington "this coming Monday in Durham." Govt. Ex. 216. The meeting concerned

> two things. First there are some brewing securities issues associated with some of Scott's offering activities 2–3 years ago for [Mobile Billboards] that just got sued by the SEC and Wes [Covington] and Scott have asked for my help. Scott is not in hot water, but let's just say his clients aint [sic] too happy that [Mobile Billboards] is no longer making quarterly distributions.
>
> More importantly, Scott is ready to sit down and talk about the alternatives we presented to him when we met in Charlotte. I think he is finally getting the message that he needs [a] "Plan B" and that [Colvin] is not likely to be mailing million dollar checks anytime soon. Scott asked Wes if he (Wes) thought he [(Hollenbeck)] should turn to Greg [Bartko] and [the Caledonian Fund] as the alternative deployment vehicle for his funds and Wes said "of course."

Id.; see Laws Tr. 57–58.

That same day, Bartko sent Laws a second email and discussed getting Hollenbeck "to commit to raise at least $1.0 million each month for us religiously (no pun intended)." Govt. Ex. 218; see Laws Tr. 59–63. Bartko testified at trial that this comment simply referred to Hollenbeck's devout Christianity, and not to where or how Hollenbeck raised money from investors. Bartko Tr. 55. In fact, Bartko testified that he did not believe that Hollenbeck was going to churches, making presentations, and raising money from individuals. Id. The evidence, however, suggests otherwise. After all, in the September 3, 2004 meeting between Bartko, Laws, and Covington, Covington commented "about [Hollenbeck] . . . rais[ing money] in coffee clutches [sic] after a Bible study meeting." Laws Tr. 165. Bartko's comment was just more of

the same.

Also in Bartko's second email to Laws, Bartko told Laws that he wanted Hollenbeck "to honor the Franklin [Asset Exchange] seed commitment to [the Caledonian Fund] by paying down the balance of $2.3 million to us." Govt. Ex. 218. Thus, Bartko wanted Hollenbeck to raise $4.3 million for the Caledonian Fund by December 31, 2004. Id.; Laws Tr. 61–63. Laws wanted even more, suggesting in response that Hollenbeck should raise $5 million for the Caledonian Fund by December 31, 2004. Govt. Ex. 217; Laws Tr. 63–66, 68–69. At trial, Bartko testified that by October 20, 2004, he was aware that Hollenbeck had been the primary fundraiser for Colvin and Franklin Asset Exchange. See Bartko Tr. 52–53. Again, however, Bartko claimed that he had no idea that Hollenbeck used fraud to sell investments and denied conspiring with Hollenbeck or anyone else. See id. 55–56, 308.

Hollenbeck never raised any more money for the Caledonian Fund. The $701,000 was the only money that the Caledonian Fund ever received from any investors and the Caledonian Fund never invested a penny of it. See id. 180–81; Laws Tr. 171. Rather, the Caledonian Fund essentially ceased operations in November 2004 after spending nearly all of the $701,000 received from Colvin and Hollenbeck through Franklin Asset Exchange. See Bartko Tr. 57, 61–62; Laws Tr. 70. In 2004, Bartko alone received and spent $331,042 of the $701,000. See Govt. Ex. 691.[13]

As the Caledonian Fund was failing, a great deal of negative publicity surrounded Mobile Billboards and its top salesman, Hollenbeck. The SEC filed suit against Mobile Billboards on

[13] On December 27, 2004, Bartko transferred $25,000 from his attorney IOLTA trust account to his Capstone Partners account. See Govt. Ex. 692; Bartko Tr. 223–24; Mlot Tr. 46–48. This $25,000 constituted the last remaining portion of the $701,000 originally sent to Bartko for the Caledonian Fund. Bartko's records described the $25,000 transfer as Bartko's "[d]raw (half)" for the Caledonian Fund for the period "9/30/04." Govt. Ex. 692; see also Bartko Tr. 223–24; Mlot Tr. 46–48.

September 21, 2004, and discussed Mobile Billboards's fraudulent behavior. Furthermore, on November 1, 2004, Bartko and Covington filed a lawsuit in the United States District Court for the Middle District of North Carolina on behalf of 139 plaintiffs against various individuals and entities associated with Mobile Billboards. See Bartko Tr. 110–13. Bartko and Covington's lawsuit concerned the sale of unregistered securities and fraud—much of which had been perpetrated by Hollenbeck—and sought to recover damages. According to SEC attorney Alex Rue ("Rue"), who testified at trial and who had represented the SEC in its case against Mobile Billboards, Bartko and Covington essentially copied the September 21, 2004 SEC complaint seeking injunctive relief against Mobile Billboards and sued executives and entities associated with Mobile Billboards. Bartko and Covington did not, however, sue Mobile Billboards's top salesman, Hollenbeck. Rather, Bartko and Covington listed Hollenbeck, Levonda Leamon ("Leamon"),[14] and 137 others as plaintiffs. Bartko and Covington even asked Hollenbeck to obtain the signatures from the other plaintiffs that would indicate their consent to participate as plaintiffs. Ever the fraudster, Hollenbeck then forged the signatures of the other plaintiffs. See Hollenbeck Tr. 101.

B.

With the Caledonian Fund now defunct, Bartko decided in November 2004 to create a new private equity fund, Capstone Private Equity Bridge and Mezzanine Fund, LLC ("Capstone Fund"). The new fund would not include Laws, but would use Hollenbeck or corporate entities that Hollenbeck controlled to raise money from investors. By this time, Bartko had represented Hollenbeck in negotiating a final cease and desist order with the North Carolina Securities

[14] Leamon was co-owner of Legacy Resource Management, Inc. ("Legacy"), a North Carolina corporation that had also illegally sold Mobile Billboards's securities. Her role in Mobile Billboards and in Bartko's schemes is discussed more fully, below.

Division, an order that stemmed from Hollenbeck's fraudulent sale of Mobile Billboards's securities. Bartko had read and understood a June 8, 2004 fax from Hollenbeck indicating that Hollenbeck had used fraudulent tactics to raise money through Franklin Asset Exchange. A June 11, 2004 letter from Covington had confirmed those suspicions. Bartko had sent and received countless other documents evincing Hollenbeck's fraud in connection with Webb Group, Franklin Asset Exchange, and fundraising for the Caledonian Fund. Yet, Bartko wanted—indeed, needed—Hollenbeck's participation. After all, Bartko needed money for his new private equity fund, and Hollenbeck knew how to get it.[15]

So, on November 12, 2004, Bartko sent a fax to Hollenbeck, with a copy to Wes Covington, concerning Bartko's new private equity fund. See Def. Ex. 351; Bartko Tr. 84–87; Hollenbeck Tr. 184–85. The fax stated,

> Scott—I have revised this draft agreement to accommodate our discussions yesterday with Wes as well as you. I also added some "protective" language in section 5(d) and the attached exhibit that should make it abundantly clear to everyone that we must stay away from any activities that could be construed as requiring agent or [broker-dealer] registration.
>
> I offer this for your comments if any. I will include this version in the Fed X [sic] delivery coming to you tomorrow which will include all of the final offering documents for the Fund.

Def. Ex. 351. Bartko attached an "Introducing Party's Agreement" between the Capstone Fund and "Crystal Enterprises, LLC, a North Carolina limited liability Fund, with its principal place of business at 935-N East Mountain Street, Kernersville, North Carolina 27284 ('Finder')." Id. The address of Crystal Enterprises, LLC ("Crystal Enterprises") was the business address that Hollenbeck used for his various business entities. See Govt. Exs. 4–5. It was also the business

[15] Bartko testified that, in November 2004, he had no idea that Hollenbeck had used fraud to raise the money that the Caledonian Fund received. See Bartko Tr. 90–91. Of course, the jury was entitled to credit the mountain of evidence to the contrary, including Bartko's own incredible testimony.

address referenced in the final cease and desist order Bartko and Covington had negotiated on Hollenbeck's behalf. See Govt. Ex. 330. "Crystal" was the name of Hollenbeck's wife, and "Crystal Enterprises, LLC" was a corporate name Bartko created in drafting the proposed agreement. See Bartko Tr. 85, 208; Hollenbeck Tr. 317–18. By using Crystal Enterprises instead of Scott Hollenbeck, Bartko removed Hollenbeck's name from the SEC's and North Carolina's regulatory radar screen. Such concealment was necessary because by this time—as Bartko the lawyer and Bartko the securities dealer well knew—Mobile Billboards had imploded and negative publicity shrouded its top salesman, Scott Hollenbeck.

Just as Bartko had claimed for the Caledonian Fund, he testified that he wanted Hollenbeck to act only as a "finder" and to forward the names of interested and qualified investors to Bartko. Bartko Tr. 87–88.[16] He did not want Hollenbeck to sell securities for the Capstone Fund. Id. Yet, on November 16, 2004, Bartko sent a fax to Hollenbeck: "Scott—I am sending you the one page from the final [Private Placement Memorandum] for the Capstone Fund, that now better sets forth the rollover process after one-year. Also, today, we should talk about how to structure the investments to be made by the *non-accredited investors*." Govt. Ex. 257 (emphasis added).

On November 23, 2004, Bartko, without Laws's participation, officially formed the

[16] As will become clear, "qualified investors" referred to accredited investors. SEC Regulation D permits the sale of unregistered securities to accredited investors. Accredited investor is defined in Regulation D, Rule 501. Specifically, that term refers to "[a]ny natural person whose individual net worth, or joint net worth with that person's spouse, at the time of his purchase exceeds $1,000,000," or as "[a]ny natural person who had an individual income in excess of $200,000 in each of the two most recent years or joint income with that person's spouse in excess of $300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year . . . ." 17 C.F.R. § 230.501(a)(5)–(6). The term also encompasses 501(c)(3) organizations, which can be accredited investors if their total assets exceed $5 million and if the organization was "not formed for the specific purpose of acquiring the securities offered . . . ." 17 C.F.R. § 230.501(a)(3).

Capstone Fund. See Govt. Ex. 46. Bartko never filed a registration statement with the SEC for the securities associated with the Capstone Fund. See Govt. Ex. 311.

When Bartko created the Capstone Fund, Hollenbeck had already communicated with one potential investor: Danny Briley ("Briley"). Briley, who testified at trial, lived in Tennessee, and his brother-in-law was a friend of Hollenbeck. In 2004, Briley had some experience investing in stocks and mutual funds. He had sold his house and wanted to invest the equity at a good rate of return. On December 1, 2004, Briley emailed Hollenbeck:

> I was going to talk to Greg Bartko later this week. Before I talk with him, I wanted to make sure it was OK to talk to him about how you are "bundling" the product with insurance bonds. I don't expect him to acknowledge any principal safety etc., but wanted to make sure he was at least aware. Are you OK with this or would you prefer I did not mention that to him.

Govt. Ex. 287. Hollenbeck responded via email and stated, "Feel free to talk to Greg—he is aware of the insurance bonds . . . ." Id.

The following day, Hollenbeck advised Briley to send his application to invest in the Capstone Fund directly to Hollenbeck. Id. Hollenbeck also stated that he had spoken with Bartko and that Bartko would call Briley. Id.

That same day, December 2, 2004, Bartko spoke with Cal Reno's assistant's secretary, Kathleen Somers, of Arthur J. Gallagher & Co., about adding some additional named funds to the Franklin Asset Exchange insurance policy. See Govt. Ex. 347; Reno Tr. 20–22. On December 3, 2004, Reno returned Bartko's call and left a telephone message with Bartko. In the message, Reno asked Bartko to send a prospectus for the funds to be added and said that, upon receipt and review, Reno would ask AIG to add the funds to the policy. See Govt. Ex. 348; Reno Tr. 22–24.

On December 7, 2004, Bartko sent a fax to Hollenbeck at "CMH Enterprises, LLC." See

Govt. Ex. 260; Bartko Tr. 208.[17] CMH are the initials of Hollenbeck's wife, Crystal M. Hollenbeck. The fax stated, "Investor packages have been sent to [five potential investors]. . . . Also, as per our discussion last evening, Danny Briley has a call into me about his interest. I will call him within the hour, but you might wish to touch bases with him too. . . . Lastly, let's make the connections with . . . Cal Reno today." Govt. Ex. 260.

According to Bartko's trial testimony, on December 7, 2004, he did speak with Briley about investing in the Capstone Fund. Bartko Tr. 209. Briley raised the topic of bundling the product with insurance bonds. Id. Bartko testified that he had no clue what Briley meant. Id. 209–10.

Still on December 7, 2004, Reno again spoke with Bartko. See Reno Tr. 24–28. Bartko reiterated his desire to add some investments to the Franklin Asset Exchange insurance policy. Among those investments was the Capstone Fund. See Govt. Ex. 349; Reno Tr. 23–28. As he had done in his December 3, 2004 telephone message to Bartko, Reno stated that he would need to review the Capstone Fund's prospectus. Reno also noted that because Bartko was neither the insured nor the person with whom Arthur J. Gallagher & Co. had dealt when placing the original insurance policy, Reno would need to discuss Bartko's proposed addition with Colvin and Hollenbeck and obtain their consent. Reno Tr. 25–27. Finally, Reno told Bartko that the

[17] Bartko formally incorporated CMH Enterprises, LLC ("CMH Enterprises") on January 3, 2005. See Govt. Exs. 48, 293. On January 4, 2005, Bartko sent a fax to Hollenbeck at CMH Enterprises. See Govt. Ex. 265. The fax stated, "This is the final form of Introducing Party-Finder's Agreement that is needed between CMH and our Fund in order for the Fund to pay a fee associated with referrals made to us. . . . This is the same form as given to you in draft form several weeks ago. Now that CMH is formally organized as a Delaware LLC effective 1/3/05, we should have this fully executed so that fees can be paid." Id. Crystal Hollenbeck signed the agreement as "Managing Member" of CMH Enterprises, and Scott Hollenbeck faxed the document back to Bartko. Id.; Hollenbeck Tr. 142–43.

insurance policy did not guarantee investment returns or provide any similar coverage. Id. 27.[18]

On December 8, 2004, in his capacity as Hollenbeck's lawyer, Bartko represented Hollenbeck at a deposition that the SEC took at Bartko's law office in Atlanta. See Govt. Ex. 430. Covington represented Hollenbeck at the deposition as well. See id. SEC attorney Rue represented the SEC at the deposition. The deposition arose out of the SEC's September 2004 lawsuit against Mobile Billboards. During the deposition, Hollenbeck admitted to fraudulent sales tactics, including using a document purporting to be a "surety bond" to sell investments in Mobile Billboards. See id. (Dep. 157–61 & Ex. 26); Bartko Tr. 221–22. In addition, during the deposition, Hollenbeck denied having sold any securities since being fired from a securities firm and losing his securities licenses in 2003. Govt. Ex. 430 (Dep. 25–28 & Exs. 25–27). As for his current activities, Hollenbeck testified that he traveled to churches and led seminars on biblical principles of money management. See id. (Dep. 36). Rue specifically asked Hollenbeck, "Are you selling any sort of a financial product at this time?" Id. Hollenbeck responded, "Yes, sir." Id. Rue then asked, "And, what is that?" Id. Hollenbeck replied, "It's a private equity fund that has a fixed rate that you—it rolls every 12 months and can be used to get a quarterly distribution or let the money accumulate, and it is not a security." Id. (Dep. 37). Rue then inquired as to whether "that [is] a product that you put together yourself?" Id. Hollenbeck answered, "No, sir. It was put together by John Colvin." Id. Hollenbeck also testified in the deposition that he had put approximately one hundred clients into Colvin's fund, that no one else sells interests in the

[18] At trial, Bartko testified that he did indeed speak with Reno on December 7, 2004. See Bartko Tr. 212–14. According to Bartko, he called Reno merely to see whether the Capstone Fund would fall within the AIG policy's definition of portfolio-entities and to see whether the Capstone Fund could buy the type of coverage reflected in the policy. Id. 213–16. Bartko denied knowing that Hollenbeck used the AIG policy to defraud investors and denied wanting to add the Capstone Fund to the AIG policy to facilitate Hollenbeck's fraudulent sales. See id. Of course, the jury was entitled to disbelieve Bartko's testimony and to infer that Bartko hoped to add the Capstone Fund to the AIG policy in order to facilitate Hollenbeck's fraudulent sales.

fund, and that the fund contained approximately $13 million. Id. (Dep. 156). At no time during the deposition did Hollenbeck mention selling a financial product involving the Caledonian Fund or the Capstone Fund. Bartko likewise said nothing.[19]

After the deposition on December 8, 2004, Hollenbeck continued to meet with prospective investors about investing in the Capstone Fund. On December 9, 2004, Hollenbeck received and deposited Briley's $100,000 investment into the Capstone Fund via Franklin Asset Exchange. See Govt. Exs. 513, 595, 655.

On December 14, 2004, Hollenbeck secured Rebecca Mathes's ("Mathes") $75,000 investment (F/B/O Winifred Piek) into the Capstone Fund via Franklin Asset Exchange. See Govt. Ex. 675. Mathes, who testified at trial, lived in Delavan, Wisconsin, and was a nurse. Mathes wanted to make an investment on her mother Winifred Piek's behalf. Mathes and her mother were not sophisticated investors. At the time, her mother was making $1,000 per year and had sold her house for $102,000. Other than that $102,000, her mother had no assets. Mathes learned about Hollenbeck because Hollenbeck was her pastor's brother. Cf. Govt. Ex. 16. Because Mathes wanted to invest some of her mother's money, she contacted Hollenbeck. Hollenbeck then spoke to her about an investment with a return of 12 percent that was "secure," "guaranteed," and "insured." See Govt. Exs. 100–02. Based on these assurances, Mathes invested $75,000 on her mother's behalf into the Capstone Fund via Franklin Asset Exchange. See Govt. Exs. 103–06, 513.

In December 2004, Bartko received two separate investments from Donna Gates

[19] Despite significant evidence to the contrary, see, e.g., Govt. Exs. 203, 207–09, 212–13, 243, 280–81; Bartko Tr. 174–76; Laws Tr. 18–25, 53–56, Bartko testified that, as of December 8, 2004, he did not know that Hollenbeck had raised $701,000 for the Caledonian Fund while making false promises about guaranteed and insured investments. Bartko Tr. 223. Bartko also testified that Franklin Asset Exchange was very confusing. Id.

("Gates"), which he deposited directly into the Capstone Fund. The first was a $400,000 investment; the second, an additional $47,000. See Govt. Ex. 663. Gates testified that she and her husband obtained the $447,000 after settling a personal-injury claim for themselves and their adopted minor daughter. Gates lived in Oregon and had worked as a welder. Her husband, who was disabled, had worked as a laborer in the construction industry. Neither was a sophisticated investor. Gates heard Hollenbeck give a presentation at her Baptist church in rural Oregon in November 2004. During his sales presentation, Hollenbeck never revealed the cease and desist order, the pending SEC investigation, or Bartko's dual role as Hollenbeck's attorney and as the owner of the Capstone Fund. Gates and her husband then had a separate meeting with Hollenbeck and the Gateses' pastor. There, Hollenbeck provided written material to Gates, which included fraudulent statements concerning the AIG insurance policy. See Govt. Exs. 90–92. Gates questioned Hollenbeck and her pastor about Hollenbeck's claim during his sales presentation that the investment was insured for up to $1 million, but ultimately decided to trust Hollenbeck and her pastor. Accordingly, Gates decided to invest the money in the Capstone Fund. Gates completed an investment suitability questionnaire, Def. Ex. 512, and wrote a $400,000 and a $47,000 check, both made payable to the Capstone Fund. See Govt. Ex. 595. After receiving the checks, Bartko, on behalf of the Capstone Fund, mailed correspondence to Gates concerning the investment. See Govt. Exs. 239–40; Def. Ex. 512.

Bartko testified that he received and reviewed Gates's investor suitability questionnaire. Bartko Tr. 94–96; see Def. Ex. 512. Bartko also testified that he concluded that the Gateses were "accredited investors"[20] and notified them that the Capstone Fund accepted both

[20] Again, an accredited investor is defined in SEC Regulation D, Rule 501 to include "[a]ny natural person whose . . . joint net worth with that person's spouse . . . at the time of his purchase exceeds $1,000,000," or as "[a]ny natural person who had . . . [a] joint income with that person's spouse in excess of $300,000 in each of [the two most recent years] and has a reasonable expectation

investments. Bartko Tr. 95–96; see also Def. Ex. 512. Bartko, on behalf of the Capstone Fund, mailed Gates quarterly statements dated December 22, 2004, and March 31, 2005, concerning the investment. See Govt. Exs. 95, 98.

Bartko admitted that before he accepted the Gateses' investment into the Capstone Fund, he knew that Hollenbeck did not have a securities license, that Hollenbeck was subject to a cease and desist order, that Hollenbeck admitted at his December 8, 2004 SEC deposition that he had falsely assured investors in Mobile Billboards that their investment was insured, and that he had reviewed documents that Hollenbeck had forwarded on June 8, 2004, concerning Hollenbeck's fraudulent sales tactics. See Bartko Tr. 276–77. Nonetheless, Bartko admitted that he did not inform Gates or her pastor of these facts and did not know whether Gates was aware of this information. Id. At trial, Gates testified that she was not aware of this information and that such information would have negatively impacted her decision to invest in the Capstone Fund.

On December 20, 2004, the SEC, through SEC attorney Rue, issued a Wells Notice to

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of reaching the same income level in the current year . . . ." 17 C.F.R. § 230.501(a)(5)–(6). On their investor suitability questionnaire, the Gateses listed their joint net worth as between $350,000 and $699,000, and their joint income as between $60,000 and $100,000. Def. Ex. 512. Both ranges fell well below the applicable accredited-investor thresholds. Even the quickest glance at the investor suitability questionnaire would reveal that the Gateses were far from qualifying as accredited investors. Bartko admitted at trial that he knew and understood the definition of accredited investor. Bartko Tr. 255. Nevertheless, Bartko accepted the Gateses into the Capstone Fund. At trial, Bartko tried to justify this decision by adding the Gateses' stated net worth to their $447,000 investment, reaching a total net worth in excess of the $1 million threshold. Id. 95. Bartko's calculation was obviously flawed. All sophisticated securities lawyers and investment bankers know that an individual's net worth is the difference between that individual's total assets and total liabilities. All sophisticated securities lawyers and investment bankers also know that an investment is an asset encompassed in both an individual's total assets and, ultimately, net worth. Bartko holds an LL.M. in securities regulation from Georgetown and specialized in securities law for sixteen years. He also held himself out as a sophisticated investment banker. Yet, his proffered justification for believing the Gateses to be accredited investors contained elementary miscalculations. The jury was entitled to disbelieve Bartko's testimony.

Hollenbeck through Hollenbeck's attorneys, Covington and Bartko. According to Rue, a Wells Notice advises a person that the SEC enforcement staff is going to recommend to the SEC that the SEC file suit against that person. The Wells Notice is intended to give the targeted person an opportunity to persuade the SEC enforcement staff not to make the recommendation and thereby avoid an SEC lawsuit. Rue testified that he provided the Wells Notice as a result of Hollenbeck's admissions of fraud in his December 8, 2004 deposition and as a result of the SEC's investigation of Mobile Billboards. Rue testified that he spoke with Bartko about the Wells Notice in December 2004.

On December 21, 2004, Hollenbeck, on behalf of Franklin Asset Exchange, wrote checks totaling $375,620 to the Capstone Fund. See Govt. Ex. 690. The checks were the proceeds of money that Hollenbeck had fraudulently raised from Danny Briley, Winifred Piek (i.e., Rebecca Mathes's mother), Michael Lewis, Susan I. Mitchell, and Raymond Reddick. An individual name appeared in the memo line of each check. See id. Bartko received and deposited the money into the Capstone Fund's account. See id.

On December 30, 2004, Hollenbeck received Sharon Glover's ("Glover") $30,000 investment into the Capstone Fund via Franklin Asset Exchange. See Govt. Ex. 665. Glover, who testified at trial, is a high school graduate and a widow from rural Michigan. In 2004, Glover was unemployed. She had no annual income. Glover's husband had been the family's sole provider, but he had died in October 2003. Glover received $200,000 from a life insurance policy, but that money was rapidly dwindling. At the time, her only other assets were a small older house with a mortgage and a 1997 car. Jobless and desperate to generate some income to pay her mortgage and other living expenses, Glover decided to invest $30,000 of the remaining life insurance proceeds. She had never previously invested money, but wanted to earn interest

on the $30,000. Glover heard of Hollenbeck through her son-in-law, Berean Baptist Church Pastor Tim Cook ("Pastor Cook"). Hollenbeck called Glover and they discussed an investment. Eventually, Hollenbeck sent her documents, which included fraudulent statements concerning insurance. See Govt. Exs. 109, 160, 163–64. She decided to invest the $30,000. See Govt. Ex. 665. Glover was never told about Hollenbeck's cease and desist order or his prior forgeries.

On December 30, 2004, Hollenbeck also received Jason Hemsted's ("Hemsted") $35,000 investment into the Capstone Fund via Franklin Asset Exchange. See Govt. Ex. 669. Hemsted, who testified at trial, was a college graduate and a member of a Baptist church in Hammond, Indiana. His father died in 2004, and he received $35,000 from a life insurance policy. At the time, Hemsted's annual income was $33,000 and his net worth consisted of the $35,000 and a van worth $2,000. Cf. Def. Exs. 171–72. A friend from church recommended speaking with Hollenbeck about investing. Thereafter, Hollenbeck spoke with Hemsted on the telephone and discussed an insured investment with a 12 percent guaranteed interest rate. Hemsted then invested $35,000 in the Capstone Fund via Franklin Asset Exchange. When Hemsted invested, he did not know that Hollenbeck had a cease and desist order, that Hollenbeck admitted in a December 2004 deposition to using fraudulent insurance policies to sell investments, or that Bartko was Hollenbeck's attorney.

Hollenbeck also fraudulently received money for the Capstone Fund from Berean Baptist Church. See Govt. Ex. 651. Pastor Cook, who testified at trial, explained that Berean Baptist Church is in Adrian, Michigan, approximately thirty miles northwest of Toledo, Ohio. The church is a 501(c)(3) non-profit organization, and Pastor Cook served as Stewardship Pastor for twelve years. By late 2004, the church was debt free and had $250,000 in the bank.

Hollenbeck came to the church and gave a financial seminar. The church was interested

in investing a portion of the $250,000, and Hollenbeck provided documents to Pastor Cook concerning the Capstone Fund. See Govt. Exs. 123, 128. During Hollenbeck's sales presentation to the Deacon Board, Hollenbeck said that the investment in the Capstone Fund was covered by an AIG insurance policy for up to $3 million. Hollenbeck never revealed that the North Carolina Securities Division had issued a cease and desist order against him, that he had lost his securities license, or that some documents associated with the alleged AIG insurance policy were forged. Hollenbeck likewise never stated that he was only a "finder" and never revealed that he was not permitted to discuss the investment in the Capstone Fund and that he could only refer the church to Bartko. Ultimately, the church invested $170,000 in three checks and planned to use the interest income for certain expenses. See Govt. Ex. 651. The church made the checks payable to Franklin Asset Exchange. At the time of its investment, the church's total assets were well below $5 million. See Bartko Tr. 260. The church indicated its financial status on an investor suitability questionnaire the church completed before investing. See Def. Ex. 511.

At trial, Bartko testified that during the holidays in late 2004 and early 2005, he reviewed the suitability questionnaires that Hollenbeck's prospective investors had submitted. See Bartko Tr. 98. He testified that he concluded that Berean Baptist Church was an accredited investor and accepted Berean Baptist Church into the Capstone Fund. Id. 99–100; see also Def. Ex. 511.[21]

[21] A 501(c)(3) organization cannot be an accredited investor without a net worth in excess of $5 million. 17 C.F.R. § 230.501(a)(3). Berean Baptist Church listed its net worth as exceeding $1 million, but did not otherwise specify a precise amount. See Def. Ex. 511. Nor did Bartko have independent knowledge of the church's finances. See Bartko Tr. 258–60. Indeed, according to Pastor Cook, the church's net worth fell well short of $5 million. See id. 260. On direct examination, Bartko testified that he deemed Berean Baptist Church to be an accredited investor based on its stated annual income in excess of $200,000 and on its stated net worth of over $1 million. Id. 100. On cross examination, Bartko admitted that he knew that those thresholds applied only to individuals, id. 254–56, and that he knew that Berean Baptist Church was not an individual. Id. 259–61. Bartko then tried to escape from this last admission by testifying to his belief that Pastor

Bartko testified that he never spoke with Pastor Cook, the church's finance pastor, but did speak with Pastor Rogers, who was in charge of the church. See Bartko Tr. 258–60. According to Bartko, he and Pastor Rogers did not discuss the church's finances or financial condition. See id. Moreover, Bartko admitted that when he accepted Berean Baptist Church into the Capstone Fund, he knew that Hollenbeck did not have a securities license, that Hollenbeck was subject to a cease and desist order, that he had reviewed the documents that Hollenbeck had forwarded on June 8, 2004, and that Hollenbeck had admitted at his December 8, 2004 SEC deposition that he had falsely assured investors in Mobile Billboards that their investment was insured. Id. 276–77. Nonetheless, Bartko admitted that he did not inform Berean Baptist Church of these facts and did not know whether Berean Baptist Church was aware of this information. Id. 277. At trial, Pastor Cook testified that the church was not aware of this information and that it would have negatively impacted the decision to invest in the Capstone Fund.

On December 30, 2004, Hollenbeck, on behalf of Franklin Asset Exchange, wrote checks totaling $285,000 to the Capstone Fund. See Govt. Ex. 690. The checks were the proceeds of money that Hollenbeck had fraudulently raised from Sharon Glover, Jason Hemsted, Wiley Reddick,[22] and Berean Baptist Church. See id. An individual or church's name appeared on the memo line of each check. Id. Bartko received and deposited the money into the Capstone Fund's account. See id.

On January 4, 2005, Hollenbeck received investments of $95,861 and $2,004 from

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Rogers, not the church as an organization, was the true investor. Id. 259. But when the Assistant United States Attorney ("AUSA") confronted Bartko on this incredible statement, Bartko conceded that Berean Baptist Church was listed as the investor on the investor suitability questionnaire and that all three of the church's investment checks were written in the name of Berean Baptist Church. Id. 261.

[22] Wiley Reddick made a second investment of $10,000 in the Capstone Fund on January 21, 2005. Govt. Exs. 596, 690.

Carlene Rudd-Smith ("Rudd-Smith") into the Capstone Fund via Franklin Asset Exchange. See Govt. Ex. 681. Rudd-Smith, who testified at trial, is a seventy-four-year-old retired postal worker who lived in rural North Carolina. After her father's death, she and her siblings decided to sell the family farm and invest the proceeds to earn interest to care for their widowed mother. Hollenbeck assured Rudd-Smith that the rate of return was 12 percent and that the investment was insured. Before investing, Rudd-Smith spoke with members of Gospel Light who were happy with their investments with Hollenbeck. Rudd-Smith, however, knew nothing about Hollenbeck's cease and desist order or that he had confessed to forging documents. Without that knowledge, Rudd-Smith filled out one check for $95,861 and another check for $2,004, made them payable to Franklin Asset Exchange, and mailed them to Hollenbeck. See Govt. Exs. 514, 681.

On January 5, 2005, Hollenbeck received an investment of $72,982 from Guy G. Smith, Sr. into the Capstone Fund via Franklin Asset Exchange. See Govt. Ex. 677. Smith, who testified at trial, is seventy years old and a retired furniture-factory worker. He lived on a $550 monthly disability check, but had inherited $85,000 from his deceased brother. He wanted to invest the money to earn interest income. Smith's wife had invested some money with Hollenbeck; therefore, Smith met with Hollenbeck to discuss investing $70,000. Hollenbeck promised Smith that he would not lose his principal. No one, however, told Smith about Hollenbeck's sordid history.

On January 10, 2005, Hollenbeck, on behalf of Franklin Asset Exchange, wrote checks totaling $435,505 to the Capstone Fund. See Govt. Ex. 690. The checks were the proceeds of money that Hollenbeck had fraudulently raised from Carlene Rudd-Smith, Guy G. Smith, Sr., Max Hudson, Claude Dean Hopper, Jr., Hemalatha Rachapudy, Jim Dykes, Richard Kennedy,

Carol Frey, and Archibald Brown. See id.

In sum, from early December 2004 until early January 2005, Hollenbeck had made fraudulent sales presentations to investors concerning the Capstone Fund, had received $1,156,125 from investors who wanted to invest in the Capstone Fund, and had forwarded that money via Franklin Asset Exchange to Bartko. See id. Bartko, in turn, deposited that money in the Capstone Fund's bank account. Id.

In early January 2005, Bartko persuaded Dr. Teo Dagi ("Dagi") to become a partner in the Capstone Fund. See Bartko Tr. 63–64. Bartko described Dagi as a wealthy and successful medical doctor and investor. See id. 64–65.[23] According to Bartko, after reviewing the Franklin Asset Exchange's suitability questionnaires (which Hollenbeck completed) between December 2004 and January 2005, Bartko and Dagi decided that there was too much risk associated with the Franklin Asset Exchange investment due to the references to individual names of people who had invested through Franklin Asset Exchange. Id. 102. Accordingly, the Capstone Fund decided in early January 2005 to return the funds to the individuals. See id. 102–03.

Bartko testified that, at the time that Bartko made the decision to return the funds, he knew that Hollenbeck did not have a license to sell securities, was subject to a cease and desist order, and was not legally allowed to sell securities. See id. 239–40. Bartko admitted knowing that, other than Danny Briley, he had not spoken to any of the seventeen individual investors listed on the Franklin Asset Exchange checks and that seventeen individuals would not have invested tens of thousands or hundreds of thousands of dollars without someone explaining the investment to them. See id. 240–41.[24] Bartko also admitted being unsure of the background or

[23] Dagi did not testify at trial.

[24] This testimony draws into question Bartko's earlier testimony that he intended for Hollenbeck to act only as a "finder" for the Capstone Fund who simply forwards the names of interested and qualified investors to Bartko. See Bartko Tr. 85–88.

financial sophistication of the seventeen individual investors who had invested through Franklin Asset Exchange. See id. 241.

Bartko advised Hollenbeck that he would be returning the checks to the individual non-accredited investors who had invested through Franklin Asset Exchange. Id. 109–10. Bartko and Hollenbeck then discussed how non-accredited investors could invest in the Capstone Fund. See id. Bartko described to Hollenbeck the idea of an investment club. Id. 110. In fact, Bartko testified that he and Hollenbeck discussed that idea several times. Id. 109–110.

After speaking with Hollenbeck about the possibility of forming an investment club to pool money to invest in the Capstone Fund, Bartko broached the topic with Leamon and Rebecca Plummer ("Plummer") of Legacy. See id. 120; Plummer Tr. [D.E. 217-9] 23–25, 27–30.[25] Bartko had met Leamon and Plummer on August 31, 2004, at Covington's Durham law office in connection with a possible lawsuit against various individuals and entities associated with Mobile Billboards. See Bartko Tr. 110–13, 116–17. As mentioned, Bartko and Covington filed that suit on November 1, 2004, and represented Hollenbeck, Leamon, and 137 other individuals who had invested in Mobile Billboards. See id. 110–13.

Leamon and Plummer were two unsophisticated, elderly woman who operated Legacy. See Govt. Exs. 6–7. Neither had more formal education than a high school degree. Plummer Tr. 3; Leamon Tr. [D.E. 217-9] 130. Leamon and Plummer started Legacy in 2001 and each owned 50 percent. Legacy was a two-person operation in Kernersville, North Carolina. Leamon was the president and Plummer was the secretary/treasurer. Leamon was a retired flight attendant, but she also had an insurance license. Legacy (and its predecessor company CLR Group, Inc.)

[25] Plummer and Leamon testified separately at trial, but their testimony is contained in a single transcript [D.E. 217-9]. Plummer's testimony comprises pages 3–129; Leamon's, pages 129–153.

provided financial advice and sold certain financial products, including insurance and investments in Mobile Billboards. Leamon and Plummer also had sold investments in Webb Group, Franklin Asset Exchange, and Disciples Trust.[26] When Mobile Billboards imploded in the summer of 2004, Leamon and Plummer each received a cease and desist order just like Hollenbeck's from the North Carolina Securities Division, prohibiting them from selling securities. Thereafter, Legacy struggled financially. See Plummer Tr. 26; Leamon Tr. 136–40. After meeting Covington and Bartko at the August 31, 2004 meeting, Leamon and Plummer sought legal and business advice from Covington and Bartko. See, e.g., Plummer Tr. 20–21, 23, 29; Leamon Tr. 136–40.

Bartko periodically spoke with Leamon and Plummer in December 2004 and January 2005 about the Capstone Fund. See Bartko Tr. 117–18. In January 2004, Bartko and Hollenbeck told the two women that Bartko wanted to use Legacy's office to make a presentation to possible Capstone Fund investors. Id. 118–19; Plummer Tr. 29–32; Leamon Tr. 140–41, 148–49. The meeting occurred on January 11, 2005, at Legacy's office, and Bartko, Dagi, Leamon, Plummer, and Glenn O'Ferrell ("O'Ferrell") attended. O'Ferrell was a retired firefighter and supposedly had access to certain firefighter pension funds. During the meeting, Bartko made a presentation concerning the Capstone Fund. See Bartko Tr. 118–19, 247; Plummer Tr. 29–32; Leamon Tr. 140–41, 148–49.

According to Leamon and Plummer, at about the same time as the January 11 meeting, Bartko told them that he could no longer do non-legal business with Hollenbeck,[27] and that the Capstone Fund was going to be refunding the money of Hollenbeck's individual non-accredited

[26] Disciples Trust was another fund that Colvin created in 2004 and that Hollenbeck fraudulently sold.

[27] Bartko testified that at the meeting at Legacy on January 11, 2005, he stated that he did not wish to do any more non-legal work for Hollenbeck. See Bartko Tr. 248.

Franklin Asset Exchange clients. But at the same time, Bartko spoke with Leamon and Plummer about forming an investment club and having Hollenbeck's clients invest their soon-to-be-returned money back into the Capstone Fund. See Bartko Tr. 117–18, 120–21, 125–26; Plummer Tr. 23–24; Leamon Tr. 141–42.

Bartko admitted at trial that he did speak with Plummer and Leamon about forming an investment club to allow individual non-accredited investors to invest in the Capstone Fund. See Bartko Tr. 117–18, 120–21, 125–26. But Bartko denied ever telling Hollenbeck, Leamon, or Plummer to contact Hollenbeck's individual non-accredited investors to persuade them to invest in the Capstone Fund. See id. 126, 246, 248. Bartko also denied ever joining a conspiracy with anyone to launder money, commit mail fraud, or sell unregistered securities. See id. 125–26, 248–52.

In Bartko's discussions with Legacy about investing in the Capstone Fund, Bartko told Leamon and Plummer that Legacy would receive a 6 percent finder's fee from the Capstone Fund for any investments from Legacy or its clients. Id. 125–28; Plummer Tr. 53–54, 68; Leamon Tr. 150. Hollenbeck and Legacy, in turn, agreed with Hollenbeck that they would split the 6 percent finder's fee. Hollenbeck would get 4 percent and Legacy would receive the remaining 2 percent. See Plummer Tr. 51–54; Leamon Tr. 150.

At trial, Bartko denied knowing that Hollenbeck and Legacy had reached an agreement to split Legacy's 6 percent finder's fee. Bartko also testified, however, that such an arrangement between Hollenbeck and Legacy would not have surprised him. See Bartko Tr. 251–52. Again, Bartko denied participating in a criminal conspiracy with Hollenbeck, Plummer, and Leamon to launder money, commit mail fraud, or sell unregistered securities. See id. 125–26, 248–52.

After the January 11, 2005 meeting at Legacy, Bartko remained in North Carolina and

attended a meeting on January 12, 2005, at Gospel Light. Gary Hall ("Hall"), a retired airline pilot and member of Gospel Light who testified at trial, had grown concerned in late 2004 about Gospel Light's investments through Hollenbeck. Hall had previously invested with Colvin and Hollenbeck in Franklin Asset Exchange, but had withdrawn his investments in November 2004 after learning about Hollenbeck's cease and desist order on the internet. Hall also investigated the purported insurance policy Hollenbeck had promised would protect Hall's investment and learned that it did not insure the principal. In addition, in November 2004, Hall had rejected Hollenbeck's sales presentation to invest in the Caledonian Fund. Due to his growing concerns about Hollenbeck, Hall told the Gospel Light pastor that Gospel Light should withdraw its investment. As a result, the pastor scheduled a meeting for January 12, 2005, to be held at the church in Walkertown, North Carolina.

On January 12, 2005, Bartko, Covington, and Hollenbeck attended the meeting at Gospel Light. The Gospel Light pastor and various church leaders also attended. See Govt. Ex. 62. During the meeting, Hall asked Bartko what role Bartko and Covington had with Franklin Asset Exchange. Initially, each said none. Bartko then stated that he had minimal contact with Colvin and minimal involvement with Franklin Asset Exchange. Hall also asked Covington whether Hollenbeck had a duty to disclose the cease and desist order to potential investors. Covington responded that Hollenbeck had no such responsibility so long as the new investment was not similar to Mobile Billboards. Thereafter, the Gospel Light pastor asked to withdraw the church's $2 million investment in Franklin Asset Exchange.

According to Hall, after the pastor asked for the funds to be returned, Bartko explained where the funds were and that it would take some time to return the funds. A deacon then asked about Hollenbeck's guarantee and surety bond. See id. Covington answered that an insurance

agent mistakenly had told Hollenbeck that the surety bond insured the principal. Bartko then stated that he and Covington had told Hollenbeck "last week" that the agent's information was erroneous and that Hollenbeck should stop passing it along to investors. Id. (providing Hall's notes written during the meeting).[28] Of course, this statement contradicted Bartko's testimony that he and Covington had "told [Hollenbeck] . . . way back in June" to stop telling investors that their investment was covered by a surety bond. Bartko Tr. 227; see also Govt. Ex. 243.

After the meeting at Gospel Light concluded, Hollenbeck drove Bartko to the airport. On the way, the two stopped and met with Robin Denny ("Denny") of Kernersville, North Carolina, at her home. See Denny Tr. [D.E. 220-12] 3–6. Earlier that day, Denny's sister-in-law, whose father served on the board at Gospel Light, had called Denny and had told her that Gospel Light was having difficulty getting Hollenbeck to return money that it had invested with Hollenbeck. Id. 6. Denny was concerned about an $800,000 to $900,000 investment that her mother, Judy Wright Jarrell ("Jarrell"), had made with Hollenbeck and Colvin via Franklin Asset Exchange. See id. 3–6, 23–26. Denny called Hollenbeck and they agreed to meet that evening at Denny's home. Id. 6–7.

Denny, her two brothers, her sister-in-law, and her mother attended the meeting with Hollenbeck and Bartko. Id. 7. According to Denny, who testified at trial, both Hollenbeck and Bartko assured Denny and the others for thirty minutes that Jarrell's money was safe, that the money was insured by AIG, and that the money would be returned within two weeks if Jarrell wanted to liquidate the investment. Id. 7–9, 27–28. Bartko also said that if there were a problem with the investment, then Jarrell would need to seek compensation from Hollenbeck and the

[28] At trial, Bartko testified that he did not recall Covington making such statements. See Bartko Tr. 226. Bartko also testified that he did not make such statements at the meeting. Id. 226–27.

family would have the burden to prove fraud. Id. 7–8, 10–11. Bartko and Hollenbeck provided Denny with their and Covington's business cards. Id. 12. Hollenbeck also said that he would send a fax the next morning instructing the family on how to liquidate the investment. Id. 12.[29]

On January 13, 2005, Hollenbeck sent a fax addressed to Judy Wright Jarrell, Barry Denny, and Robin Denny. He attached three business cards and stated, "Please send letter to request liquidation to these three people. God bless you. Thank you for your friendship." Govt. Ex. 52; Denny Tr. 12–13. The three business cards were Hollenbeck's (identifying his business name as SBH Enterprises, LLC), Bartko's (identifying him as Managing General Partner with the Capstone Fund), and Covington's (identifying Covington's law firm). See Govt. Ex. 52; Denny Tr. 12–13.

In response, on January 13, 2005, Barry Denny, on behalf of his mother-in-law, Jarrell, wrote and faxed letters to Hollenbeck, Bartko, and Covington. See Govt. Ex. 53; Denny Tr. 13–14. Per Bartko's business card and Hollenbeck's instructions, Denny addressed the letter to Bartko in his capacity as Managing General Partner with the Capstone Fund, listed Jarrell's accounts, and requested liquidation. See Govt. Ex. 53; Denny Tr. 13–15.

Bartko did not comply. Instead, on January 14, 2005, Bartko faxed a letter to Barry Denny on Bartko's law firm letterhead. Govt. Ex. 54; Denny Tr. 16–18. The letter stated as follows:

Upon coming to my office this morning, I have received and reviewed the letter

[29] At trial, Bartko testified that he attended the meeting solely in his capacity as Hollenbeck's lawyer. Bartko Tr. 229. Bartko did not recall Hollenbeck assuring those assembled that the investment was safe. Id. 230. Bartko did recall Hollenbeck saying that Jarrell could get her money back, but was fuzzy on whether Hollenbeck added a two-week time limit. Id. 230–31. Bartko did not recall Hollenbeck assuring those assembled that insurance with AIG protected the investment. Id. 231. Bartko denied telling those assembled that the investment was safe or insured. Id. 231–32. According to Bartko, he merely explained how a person would make a claim under AIG's errors and omissions insurance policy. See id. 232.

> faxed to my attention that relates to the demand being made for liquidation of certain investments made for the benefit of Judy M. Wright. I understand that Mrs. Wright is your mother-in-law.
>
> Please note that your letter is incorrectly directed to me in my capacity as a managing-member of a private equity fund, Capstone Private Equity Bridge & Mezzanine Fund, LLC ("Fund"). When I was with Scott Hollenbeck on Wednesday evening, I was accompanying him in my capacity as one of his two attorneys that are assisting him throughout his dealings with the Mobile Billboards of America, Inc. matters, as well as related matters, but I in no way was present in any capacity as a principle [sic] in the Fund that you directed your letter to. The Fund is a recently-formed Delaware limited liability company that does make a variety of private equity investments in the bridge and mezzanine sectors, but the Fund has no involvement with any investments made by Mrs. Wright and accordingly has no involvement in permitting the return or liquidation of her investments made through companies controlled by Scott Hollenbeck.
>
> Scott has advised me that the import of your letter of January 13, 2005 was really directed to me as one of his lawyers, and I will treat it as such.

Govt. Ex. 54.

While Barry Denny and Bartko engaged in this exchange, Robin Denny conducted some research of her own. She "spent most of the morning [of January 13, 2005,] on the telephone with [AIG] . . . . [AIG] did not know who [we] were." Denny Tr. 18. Robin Denny "faxed our certificates" to AIG, but AIG did not recognize the documents. Id. AIG told Denny that AIG did not guarantee the investment and that AIG had no record of the investment. See id.

Denny's mother did not receive the return of her investment within two weeks. Id. 18–19. She later learned that Franklin Asset Exchange had invested the money in a coal mine in Montana named Bull Mountain. Id. 22–23.[30]

On January 14, 2005, Bartko and investor Danny Briley engaged in a lengthy email exchange concerning Briley's investment of $100,000 in the Capstone Fund via Franklin Asset

[30] As explained infra in connection with the Forsyth County receivership litigation, Jarrell ultimately recovered approximately 75 percent of the money she had invested with Hollenbeck via Franklin Asset Exchange.

Exchange. See Govt. Ex. 136. Bartko told Briley that his "investment was included in a 'batch' of subscriptions that were actually submitted to [the Capstone Fund] by Franklin Asset Exchange, LLC, which is one of Scott's companies." Id. Bartko then wrote,

> Based on Franklin's subscription and suitability questionnaire, it is an accredited investor so we thought initially that we were able to accept all subscriptions from Franklin. On further analysis, some of the capital received by Franklin is represented by some non-accredited investors. Your subscription is one that I am reviewing today among several and on first blush, your subscription does NOT qualify as an accredited subscription so we believe we will be returning your funds to you no later than Monday.
>
> Danny . . . . [sic] I would like to discus this with you personally to explain to you the facts giving rise to our decision NOT to formally accept any non-accredited subscriptions and to confirm your address so we can get your funds out to you by check on Monday.

Id.

Briley testified that he understood Bartko's message to mean that he did not qualify as an accredited investor. Briley responded to Bartko's email and stated, "What's a good time to call? I'm wide open." Id. Bartko replied and told Briley to call at 4:30 p.m. Id. Bartko added, "I would love to keep you in the Fund. I need you to qualify as being an accredited investor under one or more of the definitions contained in the [Private Placement Memorandum] you received from us. Take a look at that before you ring me and we can discuss this issue at some length." Id.

At 5:18 p.m. on January 14, 2005, Briley responded:

> [T]hank you for the insight. I'm curious on one thing—in our previous conversation, I thought you had said that interest accrual started from the time [the] check was placed with you. I thought that odd since you could not start doing business until you had reached a certain level. Loss of interest is a risk that I was willing to take, so no harm done. If I had been able to stay in the fund, when would I have started accruing the 1% [sic]?
>
> Thanks again for all of the information. I'm disappointed but understand the regulatory concerns.

Id.

> At 5:29 p.m. on January 14, 2005, Bartko replied:
>
> Danny . . [sic] we reached the minimum of $1.0 MM on 12/31/04 just coincidentally. So the answer to your question is 1/1/05, but since we were advised NOT to formally accept the non-accredited investments, we now have fallen back under the minimum. So since that is the case, no interest accrues. That is why we had to make this decision NOW and not later as much longer would begin to incur the wrath of investors if interest was NOT accruing.
>
> Your check is going out [on] Monday without fail.

Id.

On January 18, 2005, Bartko wrote a letter on behalf of the Capstone Fund and faxed it to Hollenbeck. See Govt. Ex. 271. In the letter, Bartko stated that the Capstone Fund determined Franklin Asset Exchange to be an accredited investor and not specifically formed for purposes of investing in the Capstone Fund. Id. Nevertheless, "[f]urther analysis reveals that *the individual investors that provided funds to Franklin are not accredited investors and that their respective investments into Franklin may very well consist of the offer and sale of unregistered securities in violation of Section 5 of the Securities Act and comparable state law.*" Id. (emphasis added) Thus, "*we have decided not to accept any direct or indirect investments from those people that subscribed to Franklin in order to enable Franklin to subscribe to our Fund investments.*" Id. (emphasis added).

But while Bartko was saying one thing, he was doing quite another. On January 18, 2005, Bartko and Hollenbeck's telephone records reveal that they spoke nine times. See Govt. Ex. 686; Plummer Tr. 35–36. During that time, Bartko sent a securities filing to the SEC and the North Carolina Securities Division regarding "Capstone Private Equity Bridge & Mezzanine Fund, LLC—Regulation D Rule 506 Covered Securities Filing." Govt. Ex. 338; see also Govt. Ex. 310. Regulation D, Rule 506 provides an exemption from securities registration

requirements for certain limited offers and sales. 17 C.F.R. § 230.506.

The filings required Bartko to list any

> person who has been or will be paid or given, directly or indirectly, any commission or similar remuneration for solicitation of purchasers in connection with sales of securities on the offering. If a person to be listed is an associated person or agent of a broker or dealer registered with the SEC and/or with a state or states, list the name of the broker/dealer.

Govt. Exs. 310, 338. Bartko listed only CMH Enterprises. Id. Bartko did not mention Hollenbeck, Legacy, Leamon, or Plummer in the filings. Nor did Bartko identify any other person or entities that had or would be paid for solicitations or purchases in connection with the sale of the securities in the Capstone Fund offering. See id. In addition, the filings stated that the Capstone Fund did not intend to sell to non-accredited investors in the offering and that the minimum investment was $50,000. See id.

On that same date, Bartko's telephone records reveal a call from his telephone to Legacy for six minutes. See Govt. Ex. 402. The day after that telephone call, Leamon and Plummer opened a new bank account for Legacy at TriStone Bank ("TriStone") to handle the refund checks of Hollenbeck's individual investors. Govt. Exs. 627, 686; Plummer Tr. 33–36; Leamon Tr. 141–42. Despite these suspicious circumstances, Bartko, as he was apt to do, testified that he did not remember talking to either Leamon or Plummer about opening a new bank account to handle refund checks. See Bartko Tr. 246. Bartko, however, admitted knowing shortly after January 19, 2005, that Legacy had opened a new bank account at TriStone. Id. 246–47.

January 19, 2005, the day that Legacy opened its new bank account, would turn out to be a very busy day for Bartko. First, Bartko, through the Capstone Fund, sent refund checks and letters via Federal Express to individual investors who had invested money in the Capstone Fund through Franklin Asset Exchange. See, e.g., Govt. Exs. 140 (Carlene Rudd-Smith), 169 (Sharon

Glover), 665 (Sharon Glover), 669 (Jason Hemsted), 675 (Rebecca Mathes (F/B/O Winifred Piek)), 677 (Guy G. Smith, Sr.), 681 (Carlene Rudd-Smith). On that same date, Bartko sent a fax to Hollenbeck, noting that several "FED X [sic] packages are going out today. We need correct addresses for Carlene Rudd and Carole [sic] Frey." Govt. Ex. 269. Bartko sent another fax on that date to Hollenbeck, listing "additional FED X [sic] packages that went out today as well." Govt. Ex. 270. The faxes identified each individual non-accredited investor who had invested via Franklin Asset Exchange, provided a copy of Bartko's letter to the investor, and provided a copy of the refund checks that the Capstone Fund issued to the investors. See Govt. Exs. 269–70.

Bartko's letter to each non-accredited investor stated the following:

> Enclosed you will find our Fund check representing the amount that you were proposing to invest with our Fund through the submission of your Subscription Agreement and related Suitability Questionnaire. We are extremely grateful for your interest in subscribing for units of limited liability membership ("Units") in our Fund.
>
> Initially, we were of the opinion that subscriptions that our Fund received directly from the Franklin Asset Exchange, LLC ("Franklin"), which does qualify as being an accredited investor, were appropriate under circumstances where investors such as yourself initially pooled their funds with Franklin for the specific purpose of having Franklin then subscribe for Fund Units. *However, upon further analysis and consideration of all the circumstances, our Fund is not able to accept your subscription due to the fact that you, as the indirect subscriber, do not qualify as being an "accredited investor" as defined in our Fund information Memorandum and under Section 18 of the Securities Act of 1933.*
>
> The managing-members of our Fund resolved unanimously on January 13, 2005 to return all investment funds tendered to the fund that fall within this category. Accordingly, enclosed is your check representing your investment without interest, since the Fund has not yet received subscriptions representing the mandatory minimum level of subscriptions, which is a condition to the accrual of any interest on your investment. I am hopeful that this situation has not caused you any undue hardship.
>
> Please give me a call if you have any questions or comments. Again, thank you

> very much for your confidence in our Fund. Believe me, I wish we were sending you your confirmation of receipt of your subscription, but we must be mindful of all of the compliance considerations we are governed by.

E.g., Govt. Exs. 140, 169, 269–70 (emphasis added).

Bartko sent the checks and the letters via Federal Express directly back to most of the individual non-accredited investors.[31] Bartko, however, did not have addresses for six of the individual investors; therefore, he sent those six checks to Hollenbeck in Kernersville, North Carolina. See Govt. Ex. 272; cf. Govt. Ex. 690 (listing the seventeen individual investors and Berean Baptist Church, all of whom had invested via Franklin Asset Exchange). The six investors and the amounts invested were Jim Dykes ($40,000), Archibald Brown ($55,000), Max Hudson ($42,640), Claude Dean Hopper, Jr. ($20,000), Richard Kennedy ($10,000), and Hemalatha Rachapudy ($20,000). Govt. Ex. 272. When Hollenbeck received these checks, he decided not to forward them to the respective investors. Instead, Hollenbeck forged these six investors' names on the checks, deposited the money, and used the proceeds to pay his earlier investors their December 2004 "distribution." See Hollenbeck Tr. 157–58.[32]

As for the other individual non-accredited investors who had invested in the Capstone Fund via Franklin Asset Exchange and received their checks via Federal Express directly from Bartko, five victims testified about endorsing their refund checks over to Legacy in order to get into the Capstone Fund. Specifically, Rebecca Mathes, Jason Hemsted, Sharon Glover, Carlene Rudd-Smith, and Guy G. Smith, Sr., all testified concerning their own investments and the endorsement of their refund checks to Legacy. Mathes, investing on behalf of her mother

[31] Included among these investors is Carlene Rudd-Smith. The mailing she received is specifically referenced in count two of the superseding indictment.

[32] At trial, the defense argued that Hollenbeck's theft of the six checks helped prove that Bartko and Hollenbeck were not co-conspirators. The jury, however, was entitled to view Hollenbeck's conduct as proof of the age-old adage that there is no honor among thieves.

Winifred Piek, testified that Hollenbeck called her and told her to endorse her mother's check to Legacy to get into the Capstone Fund and then to send it back. Hemsted testified that Hollenbeck told him to endorse his check to Legacy and to send it back. Carlene Rudd-Smith, who took notes of the conversation, testified that Hollenbeck told her that the Capstone Fund was filled, but that they were starting another fund and to endorse her check "Carlene Rudd-Smith, Payable only to Legacy Resource Management," and to send it back. Govt. Ex. 140. Guy Smith testified that he could not recall the details of endorsing the check to Legacy, but that his signature was on the check, that he did endorse it, and that he trusted Hollenbeck to invest the money. Sharon Glover testified that she spoke with either Bartko or Hollenbeck, who told her to endorse her check to Legacy and to send it back. The five victims testified that they did as they were instructed. See Govt. Ex. 686. In addition, five other victims endorsed their refund checks to Legacy and sent them back.

TriStone Bank's records corroborate this testimony. Those records show that ten individual investors endorsed their refund checks to Legacy, and that Legacy deposited the checks into Legacy's new TriStone account.[33] In sum, $698,485 of the refund checks that the Capstone Fund sent to individuals were immediately endorsed to Legacy and returned. See id.

On the same day that Legacy—after a telephone call from Bartko—opened its TriStone bank account, and on the same day that nearly $700,000 made its way from Bartko's Capstone Fund, to individual non-accredited investors, who were then told to endorse the checks to Legacy, Bartko and Hollenbeck's telephone records reveal that the two men spoke an

[33] The ten individual investors and amounts invested were Michael Lewis ($174,369), Susan I. Mitchell ($26,251), Raymond Reddick ($50,000), Winifred Piek ($75,000), Jason Hemsted ($35,000), Sharon Glover ($30,000), Wiley Reddick ($60,000), Carlene Rudd-Smith ($95,861 and $2,004), Carol Frey ($80,000), and Guy G. Smith, Sr. ($70,000). See Govt. Ex. 686. Rudd-Smith's $95,861 check is specifically referenced in count three of the superseding indictment.

astonishing eighteen times. See id.

An email with another potential investor sheds light on the subject matter of those eighteen calls. On January 19, 2005, Danny Briley, who as mentioned also received a refund check and letter from Bartko, emailed Bartko:

> Greg,
>
> I rec'd the check back from Capstone yesterday. Thank you for getting that out to me quickly. *Scott also called and said that he had come up with a work-around—I believe it was a non securities registered investment club which could pool the money together and invest in Capstone.* I thought about this last night and discussed with my wife. We have decided not to pursue this opportunity at this time.

Govt. Ex. 137 (emphasis added).

Bartko replied to Briley's email later that day:

> Danny,
>
> *I just was on the phone with Scott and he reported the same to me.* Thanks for consideration of our Fund. I think we will do something in the future for our mutual benefit. Don't close the book entirely!!

Govt. Ex. 138 (emphasis added).

This email reveals Bartko's knowledge that Hollenbeck was contacting the non-accredited investors who received the refund checks from the Capstone Fund. It reveals Bartko's knowledge that Hollenbeck was discussing with those investors pooling the money to immediately reinvest in the Capstone Fund. It reveals that Hollenbeck was actually reporting the results of such contacts to Bartko. The jury was entitled to regard this email as powerful evidence that Bartko and Hollenbeck were conspiring to launder money, to commit mail fraud, and to sell unregistered securities.

On January 20, 2005, Bartko's telephone records reveal that he twice spoke by telephone with Legacy. See Govt. Ex. 686. That same day, Bartko and Hollenbeck's telephone records

reveal that they spoke another astounding twelve times. See id. On January 21, 2005, Bartko and Hollenbeck's telephone records reveal that they spoke one time. See id.

In sum, between January 18, 2005, and January 21, 2005—during which Bartko called Legacy, Legacy opened the TriStone bank account, and almost $700,000 in alleged "refund" checks circulated from Bartko's Capstone Fund to Hollenbeck's non-accredited investors and then to Legacy—Bartko and Hollenbeck spoke on the telephone *forty* times and exchanged *eleven* fax transmissions. See id. The jury was entitled to infer that the forty telephone calls and the eleven faxes exchanged in this four-day period were powerful evidence of the charged conspiracy. See, e.g., United States v. Yearwood, 518 F.3d 220, 226 (4th Cir. 2008).

The ten non-accredited investors mentioned earlier were not the only ones who, after hearing a presentation from Hollenbeck, invested in the Capstone Fund via Legacy. For instance, on January 21, 2005, after a sales presentation from Hollenbeck, Shirley Bibey ("Bibey") gave Hollenbeck one check for $55,246.98 and another for $56,783.82 to invest in the fund via Legacy. See Govt. Exs. 514, 653. Bibey, who testified at trial, explained that Hollenbeck had provided her various documents concerning the Capstone Fund and assured her that the investment yielded a 12 percent return and was insured. See Govt. Exs. 149, 155, 157. After investing, Bibey received correspondence dated January 25, 2005, from Legacy concerning her investment. See Govt. Exs. 152–53.

On January 24, 2005, Legacy deposited $605,151.39 into its TriStone bank account. See Govt. Ex. 628.

On January 25, 2005, Legacy received Bibey's two checks from her January 21, 2005 investment. See Govt. Exs. 628, 653. Bartko's telephone records from that day reveal a telephone call with Legacy. See Govt. Ex. 402; see also Govt. Ex. 408.

On January 27, 2005, Legacy deposited another $698,930.10 into the TriStone account. Govt. Ex. 628. The deposit included money received from the ten individual non-accredited investors who had received the "refund" checks from Bartko and then immediately endorsed the checks over to Legacy. See id.[34] Plummer then wrote a single check for $1,303,881.40 from Legacy's TriStone account to the Capstone Fund, and mailed that check to Bartko. See id.

On January 27, 2005, Bartko faxed a proposed "Introducing Party's Agreement" to Leamon and Plummer "to cover Legacy's referral of accredited investors to the Fund + [sic] any and all direct investments by Legacy into the Fund." Def. Ex. 61; see also Bartko Tr. 251. On that same date, Leamon signed the agreement and sent it back to Bartko. See Def. Ex. 81. The agreement provided that the Capstone Fund would pay Legacy a 6 percent finder's fee either on its own investments into the Capstone Fund or on the investments of others that Legacy found. See id.

Thereafter, Legacy sent statements and other correspondence to the individual investors. See Govt. Exs. 104–06, 112–13, 152–53, 170–71. The statements did not reflect an investment in Legacy. Rather, the statements reflected that the individuals had invested directly in the Capstone Fund.

On January 31, 2005, Bartko spoke by telephone with Legacy. See Govt. Ex. 402. That same day, Bartko received and deposited into the Capstone Fund the $1,303,881.40 check from Legacy. See Govt. Ex. 596.

At trial, Bartko admitted that he knew that Legacy's $1,303,881.40 check included money from the ten individual non-accredited investors that he had refunded through the Capstone Fund only eight days earlier. See Bartko Tr. 265; cf. Govt. Ex. 686.

[34] Plummer testified that Legacy had never had anything close to $1.3 million in its bank accounts before these transactions. See Plummer Tr. 44, 60–61.

On February 2, 2005, telephone records reveal a seventeen-minute call from Legacy to Bartko. See Govt. Ex. 408. On that same date, the Capstone Fund paid Legacy $78,232.90 in "[r]eferral [f]ees." See Govt. Exs. 234, 693. On February 4, 2005, Legacy, in turn, paid Hollenbeck $51,255 in "[r]eferral fees." See Govt. Exs. 235, 693.

On February 7, 2005, telephone records reveal a ten-minute call from Legacy to Bartko. See Govt. Ex. 408. The next day, the Capstone Fund paid Legacy $53,820 for a "[f]inder's [f]ee." See Govt. Exs. 236, 693. On February 11, 2005, telephone records reveal a six-minute call from Legacy to Bartko. See Govt. Ex. 408. Telephone records reveal a fifteen-minute call from Bartko to Legacy four days later. See Govt. Ex. 402. On that same date, February 15, 2005, Legacy paid a $51,578 commission to Hollenbeck. See Govt. Ex. 693.

At trial, Bartko denied conspiring with Hollenbeck or anyone else to get individual non-accredited investors who had initially invested in the Capstone Fund via Franklin Asset Exchange to reinvest in the Capstone Fund via Legacy. See Bartko Tr. 245. From there, Bartko's testimony became muddled and contradictory. Although Bartko denied any sort of explicit reinvestment plan, he admitted that he had assumed that some of the money that the Capstone Fund had returned to non-accredited investors on or about January 19, 2005, would be "pooled" by Legacy. Id. 249. Bartko then retreated further from his initial denial, admitting that he knew that the money that Legacy sent to the Capstone Fund included some of the money that the Capstone Fund had just refunded to non-accredited investors. See id. 265. Despite these admissions, Bartko tried to avoid liability by denying knowledge of the names of the ten specific non-accredited investors. Id. 249. The jury was entitled to find his claimed ignorance to be false. After all, the Capstone Fund's bank records clearly show the names of the ten individual investors who had endorsed the Capstone Fund refund checks to Legacy, and Bartko possessed

and controlled those bank records. Govt. Ex. 596. Perhaps more tellingly, the money, fax, and telephone record trail shows that within less than two weeks, nearly $700,000 circulated from Bartko's Capstone Fund, to the "refunded" non-accredited investors, then to Legacy, and then right back into the Capstone Fund. Govt. Ex. 686. Furthermore, Bartko admitted knowing that Leamon and Plummer did not have licenses to sell securities and admitted knowing that the Capstone Fund could not directly accept investments in its unregistered securities from non-accredited investors. Id. 251.

On February 10, 2005, Bartko emailed SEC attorney Rue concerning the lawsuit that Bartko and Covington had filed on behalf of Hollenbeck, Leamon, and 137 other plaintiffs involving Mobile Billboards:

> We . . . have received and reviewed the recent Motion filed by David Dantzler on behalf of the Receiver[, raising concerns about the lawsuit Bartko and Covington had filed]. Reference is made . . . to [a] call that the 4 of us had before we filed our NC complaint.
>
> . . . . During that call, it is our recollection that although you may have questioned the wisdom of filing the NC lawsuit, the SEC did not object so long as we did not include the Receiver Entities, which you pointed out was prohibited by the existing order. I believe that was David's tack too.
>
> I would like an affidavit from you that we would append to our response that would indicate the content of the call. We are not seeking to draw swords between the SEC and the Receiver, but it is clear that no one contested our filing of the complaint . . . .

Govt. Ex. 300.

On February 14, 2005, Rue responded, asking specific questions about Hollenbeck and the Wells Notice:

> I am out of the country and will discuss your request with my colleagues when I return, although my initial reaction is that we will not provide an affidavit. As I recall the telephone conversation, David did raise questions regarding the issues he has raised in the receiver's filing. Moreover, at the time of the call, we did not know that Hollenbeck's victims had not been told that Hollenbeck was filing a

lawsuit naming them as plaintiff[s] without their knowledge or consent.

> I will be back in the office next week. I expect you will have information for me by that time. We are going to need to have the details [concerning] the Franklin Private Equity fund. Mr. Hollenbeck testified that he had raised $21 million in that fund. Who did he raise that money from? What did he tell those people? Where did that money go? Has he stopped raising money for the fund? Is he selling anything else now? Where is the church money invested? We cannot recommend any settlement with your client if he is engaged in ongoing [violations] of the law.

Id.

On February 18, 2005, Shirley Bibey spoke to Hollenbeck about getting a refund of her $112,030.80 investment. See Govt. Ex. 150. She then wrote Hollenbeck a follow-up letter, again requesting liquidation. Id. Bibey testified that she wrote the letter because a friend had alerted her to problems involving Hollenbeck.

Four days after her call to Hollenbeck, Bibey spoke with Agent Curry of the North Carolina Securities Division. During that interview, Bibey provided some of the fraudulent documents that Hollenbeck had given her during his sales presentation. See Govt. Ex. 339.

On that same day, February 22, 2005, Rue sent a letter to Bartko concerning Hollenbeck's Wells Notice. See Govt. Ex. 302. The letter stated, inter alia, that

> we will need the following information before we can make any recommendation to the Commission to accept a settlement from Mr. Hollenbeck:
>
> *(1) The source of any "finder's fees and commissions" Mr. Hollenbeck has received from any other source than Mobile Billboards, paid either through the Webb Group or from any other source;*
>
> *(2) Mr. Hollenbeck's current sources of income, including a detailed description of any product Mr. Hollenbeck has sold (or is currently selling) and the amount of income from his sales of any such product;*
>
> *(3) Details concerning what Mr. Hollenbeck described as the "private equity fund," including the promotional materials Mr. Hollenbeck used to sell the fund, the disposition of the funds raised, the names, contact information and amount invested by each investor and the commissions*

*Mr. Hollenbeck was paid;*

. . .

> While we would certainly like to see this matter resolved through a settlement, as I have told you several times, we simply cannot make any settlement recommendation with regard to Mr. Hollenbeck without a complete understanding of Mr. Hollenbeck's financial affairs and his past and current business activities.

Id. (emphases added). On that same date, Bartko's telephone records reveal a ten-minute call to Legacy. See Govt. Ex. 402. On February 23, 2005, Bartko's telephone records reveal another twenty-one-minute call to Legacy. See id.

Also on February 22, 2005, Bartko attended a hearing in federal court in Georgia. According to Bartko, the hearing concerned the lawsuit that he and Covington had filed on behalf of Hollenbeck, Leamon, and 137 other plaintiffs against individuals and affiliates of Mobile Billboards. During the hearing, a defense lawyer stated that some of the 139 plaintiffs did not know that they were involved in a lawsuit. See Bartko Tr. 112. Shortly after the hearing, Bartko spoke with Hollenbeck and Hollenbeck admitted that he had forged the consent forms of other plaintiffs. See id. 112–13. Nevertheless, Bartko did not sever his relationship with Hollenbeck.

On February 24, 2005, Agent Curry faxed Rue various sales materials that Bibey had received from Hollenbeck in January 2005 before she had invested $112,030.80 in the Capstone Fund. See Govt. Ex. 339. The sales materials stated that the principal investment "is secured," and that the "stated interest [rate is] guaranteed . . . ." Id. The sales materials also included an AIG "Surety Bond Program" and stated—in Hollenbeck's handwriting—that Bartko would speak directly to Bibey about the Capstone Fund. Id. The materials included in this fax alarmed Rue. He was concerned that Hollenbeck was continuing to use a fake surety bond to defraud

investors, and that the fund that Hollenbeck was now selling was connected to Hollenbeck's lawyer—Gregory Bartko.

On February 28, 2005, Leamon wrote a letter to Bibey. See Govt. Ex. 159. The letter stated that,

> [i]n accordance with your request for a refund of money, which was intended to be invested, we are enclosing the following two checks:
>
> 1. $56,783.82, which represents IRA, [sic] funds. This check needs to be deposited into an IRA account immediately so it will qualify as a rollover and you will not be taxed on this amount.
>
> 2. $55,246.98 of non-qualified funds.
>
> It was a pleasure to handle the administrative duties for this transaction and please contact us with any questions you might have.

Id. Upon receiving the Legacy letter and the Legacy checks, Bibey testified that she immediately drove to TriStone Bank and *cashed* the checks.

On March 1, 2005, Bartko's telephone records reveal a six-minute call to Legacy. See Govt. Ex. 403. On that same date, the Capstone Fund paid Legacy $5,602.61 in "[r]eferral [f]ees." See Govt. Exs. 598, 693. On March 4, 2005, Legacy paid $3,735.07 in "Capstone referral fees" to Hollenbeck. See Govt. Exs. 237, 693.

On March 7, 2005, TriStone closed Legacy's account. See Govt. Ex. 630. Legacy had been in financial disarray since Mobile Billboards collapsed in the summer of 2004. But in less than two months since Legacy had opened the account on January 19, 2005, Legacy had funneled $1,303,881.40 to Bartko's Capstone Fund.[35] In exchange, Legacy received from the Capstone Fund a total of $137,655.90 in three payments, two of which exceeded $50,000. Those payments all occurred within one month. Legacy, in turn, made three payments to Hollenbeck in

[35] This money was almost all of the money that the Capstone Fund ever received.

less than one month. Those payments totaled $106,568.07.

Not surprisingly, upon seeing such large amounts of money moving through Legacy's brand new account in such rapid succession, TriStone astutely recognized that something was amiss. According to both Leamon and Plummer, TriStone's president called Legacy. See Plummer Tr. 60–61; Leamon Tr. 146–47. He spoke with Leamon, telling her that there was a problem with Legacy's account, that TriStone would be closing the account, and that someone from Legacy needed to come retrieve what little money remained in the account. Leamon Tr. 146–47.

Leamon and Plummer immediately called Covington and asked him to find out why TriStone was closing the Legacy account. Id. 147. Covington later called back and told Leamon and Plummer that TriStone would not provide any information to him. Id. Plummer and Leamon then called Bartko to relay the news. Id. Legacy's telephone records reveal a four-minute call to Bartko, and Bartko's reveal another thirteen-minute call to Legacy. See Govt. Exs. 402, 408. Unconcerned that TriStone had uncovered Legacy's suspicious activities and undeterred by the bank's actions, Bartko told Leamon and Plummer to open an account at a larger financial institution. See Bartko Tr. 126, 246; Leamon Tr. 147. Bartko then suggested Wachovia, where Bartko banked. Bartko Tr. 126, 246; Leamon Tr. 147

On March 9, 2005, Bartko sent a letter to SEC attorney Rue in response to Rue's February 22, 2005 letter concerning Hollenbeck's Wells Notice. Bartko's correspondence stated, inter alia,

> (1). Other than Mobile Billboards of America, Inc. ("MBA"), Mr. Hollenbeck has received compensation during the last three years in two principal categories. He has received "agent compensation" for his sales of investment products offered by Merchant Capital and he has received "principal compensation" in the form of management fees received for his efforts in managing investment capital received by the Franklin Asset

Exchange, LLC. In that regard, Mr. Hollenbeck received payment of management fees directly from Colvin Enterprises, Inc., a company owned and managed by John K. Colvin of Nashville, Tennessee. Specifically, Mr. Hollenbeck received a 6% management fee on all funds deployed to Mr. Colvin or nominee companies of Mr. Colvin. At the present time, we are completing a full accounting on all funds managed through Franklin Asset Exchange, LLC, but we can estimate these funds to be approximately $21.0 million over the course of the last two years to three years.

(2) *Mr. Hollenbeck's current sources of income are now quite spotty. He is not engaged in the offer or sale of any investment products that require broker-dealer or insurance registration. His activities have been and are solely that of a financial planner, for which he is registered as such by the International Association of registered Financial Consultants, Inc. Occasionally, Mr. Hollenbeck refers clients to other sources of investment and may receive a finder's or introducing fee.* Mr. Hollenbeck recently closed his office location and now conducts his financial planning and referral business from his home in Kernersville, N.C. *His activities over the last three to four months have primarily involved providing financial planning and consulting advice to his clients, church groups and church related organizations and in some measure, referring selected customers to others that offer or provide investment products or services. His compensation received for these efforts has been either in the form of set consulting fees or "referral fees." Again, even if Mr. Hollenbeck has received referral fees for the introduction of a prospective customer to an issuer or another offering investment products, we are informed that his activities have been strictly limited to referring customers to others, which does not involve any activities that would require broker dealer or agent registration.*

. . .

With this letter, we are herewith delivering to you copies of promotional literature and disclosure documents that were approved for distribution to investors of Franklin. These materials were prepared with the advice and guidance of Mr. Colvin and approved by him for distribution to the Franklin investors. *You may assume that as soon as we realized the nature of the distribution of these materials, we strongly recommended to Mr. Hollenbeck that he cease offering any investment products by Franklin.* However, Mr. Colvin pressed our client for additional investment capital through the summer and fall of 2004. Due to what Mr. Colvin perceived to be issues and potential liabilities relating to the management of Franklin, he decided to continue raising capital through the referrals made to him by our client, through a new limited liability company he authorized to be formed by the name of Disciples Trust, LLC, renamed Disciples Limited, LLC.

. . .

> Virtually all of the investment capital raised by Franklin Asset was deployed not by Mr. Hollenbeck, but by Mr. Colvin. It was not uncommon for Mr. Colvin to simply contact Mr. Hollenbeck and instruct him to wire or transfer large sums of capital to one or more borrowers that Mr. Colvin had a relationship with.

See Govt. Ex. 303 (emphases added). Obviously, Bartko's letter does not mention the Capstone Fund, Hollenbeck's role in raising money for the Capstone Fund, or a "finder" relationship between the Capstone Fund and CMH Enterprises. The letter likewise omits any mention of Legacy. Nor does it mention Hollenbeck's recent receipt of $106,568.07 from Legacy. Nor does it mention Berean Baptist Church, Donna Gates, or any others who invested in the Capstone Fund following a presentation from Hollenbeck.

On March 10, 2005, Rue responded to Bartko by email:

> I haven't read the package carefully yet, but I have serious concern about the sales into the private equity fund that were made on December 25, 2004. These sales ($300,000+) took place after his deposition. We need to talk about these sales and exactly what you mean by Hollenbeck "referring selected customers to others that offer or provide investment products or services." Based on that, it appears that Hollenbeck may be doing the same thing he did with Colvin and the Disciples Trust.
>
> . . .
>
> We need to have a frank discussion about what now appears to be in excess of $30 million in fraudulent sales Mr. Hollenbeck has made over the last several years and how to resolve the entire situation.

Govt. Ex. 306. Rue and Bartko agreed to meet on March 14, 2005.

When that day arrived, Rue met with Bartko in Atlanta and discussed with him evidence that Hollenbeck had fraudulently raised money for the Capstone Fund, including the late January 2005 investment of Shirley Bibey. Cf. Govt. Ex. 307. Bartko told Rue that Hollenbeck was a "finder" for the Capstone Fund, that Hollenbeck had referred a number of non-accredited investors to the Capstone Fund, but that Bartko had sent the money back to the non-accredited

investors. Bartko said nothing to Rue about the fact that ten of those "refunded" non-accredited investors had immediately returned their money to the Capstone Fund via Legacy. Bartko also did not mention Legacy or the $106,568.07 that Hollenbeck had recently received from Legacy.

Despite Bartko's myriad omissions and concealments, the Capstone Fund and Bartko's scheme were starting to unravel. As they were, Bartko began to cover his tracks. After his meeting with Rue, Bartko had a conference call with Hollenbeck and Covington, during which Bartko told Hollenbeck about the meeting with Rue and complained about Hollenbeck using a surety bond in his meeting with Bibey. See Bartko Tr. 130–31.

At trial, Bartko testified that on March 14, 2005, and based on Rue's information, Bartko then knew that Hollenbeck had used a fake surety bond to sell the Capstone Fund. See id. Of course, the jury was entitled to find that Bartko knew of this fact well before March 14, 2005.

On March 18, 2005, Rue emailed Bartko. See Govt. Ex. 308. "To follow up on our conversation Monday," the email began,

> please let me know when I can expect to receive the following:
>
> 1. Copies of the materials from Hollenbeck concerning investors in the Capstone Partners Private Equity B & M Fund. I would like to see both those you accepted and those you sent back.
>
> 2. Names and contact information of the investors identified on the Franklin Asset and Disciples Trust spreadsheets.
>
> 3. Accountings of Franklin Asset Exchange, Disciples Trust and The Webb Group.
>
> We share your concern about John Colvin's role in the two Hollenbeck funds and would like to get any documents Mr. Hollenbeck may have that show Mr. Colvin's role in the two funds.

Id.

On March 22, 2005, Bartko sent a letter to Hollenbeck (with a copy to Covington). In the

letter, Bartko discussed the March 14, 2005 meeting with Rue and reminded Hollenbeck of the "rules of the road" concerning being a finder (as opposed to a salesman). But Bartko did not abandon Hollenbeck. Rather, Bartko closed his letter by assuring Hollenbeck that the letter was not intended "as harshness on my part." Def. Ex. 350; Bartko Tr. 132–34.

On March 24, 2005, Bartko wrote to Rue. See Govt. Ex. 309. Bartko's letter stated, in part,

> This letter with attachments follows our meeting in your office on March 14, 2005.
>
> . . .
>
> As to your last inquiry requesting documents that our client has relative to the involvement of Mr. Colvin with Webb and Franklin, we are now undertaking a search of all materials that fall within this category. That search will take some time, especially in light of the fact that our client is visiting family out of state through early next week. In the meantime, I have reviewed my files maintained in this office as one of the managing members of Caledonian Private Equity Partners, LLC (an Isle of Man limited liability company completely separate and distinct from Capstone Private Equity Bridge & Mezzanine Fund, LLC), and I am herewith delivering to you the following in that regard:
>
> February 24, 2004 Commitment Letter;
>
> March 30, 2004 Notes Subscription Agreement;
>
> March 30, 2004 Promissory Note;
>
> September 1, 2004 Letter To John Colvin; and
>
> October 1, 2004 Demand Letter By Fund Counsel.
>
> The request you made for documentation relating to the Capstone Private Equity Bridge & Mezzanine Fund, LLC ("Capstone Fund") places me in somewhat of a ticklish situation, as I am one of the managing members of the Capstone Fund and my decisions on behalf of that fund must be made in furtherance of my fiduciary duty as such, yet also in line with my role as co-counsel for Mr. Hollenbeck in this case. Before I actually deliver materials to the SEC that relate to that fund, I have decided to consult with our counsel, Squire, Sanders & Dempsey, LLP in Palo Alto, CA. I want to be able to secure independent advice from counsel to the fund before we just deliver documents relating to our fund that do not have

> anything to do with the above-referenced SEC investigation and related civil litigation, especially considering the fact that the fund has not paid any compensation to Mr. Hollenbeck, individually or to any entity he controls.

Id.

The SEC now temporarily at bay, Bartko's Capstone Fund activities and dealings with Legacy proceeded apace. On March 23, 2005, Legacy's telephone records reveal a twenty-four-minute call to Bartko. See Govt. Ex. 408. On March 29, 2005, the Capstone Fund paid $5,460 in "referral fees" to Legacy. See Govt. Exs. 598, 693.

On April 1, 2005, Legacy mailed quarterly statements reflecting "1st Quarter Earnings" for investments in the "Capstone Private Equity Fund." See, e.g., Govt. Exs. 106, 147, 173; Plummer Tr. 50–51. Legacy prepared and mailed the statements to all investors who had received refund checks from the Capstone Fund and then endorsed those checks over to Legacy to reinvest in the Capstone Fund. See Plummer Tr. 50–51.[36]

By early April 2005, however, Bartko also had retained attorney Ross Albert ("Albert") as legal counsel. See Bartko Tr. 134–35, 138. Bartko now knew that his efforts to avoid liability while simultaneously keeping the money in the Capstone Fund could not continue. Rue testified that beginning on April 5, 2005, he received various letters from Albert concerning Bartko and the Capstone Fund. See Def. Exs. 53–55. On April 6, 2005, the Capstone Fund terminated the finder's agreement with Hollenbeck. See Bartko Tr. 134; Def. Ex. 355.[37] Two days later, Bartko, on behalf of the Capstone Fund, demanded that Legacy send a letter to each investor and inform the investors that Legacy, not the Capstone Fund, had received their money and that all correspondence and statements would come from Legacy, not the Capstone Fund. See Govt.

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[36] One person who received such a quarterly statement was Carlene Rudd-Smith. See Govt. Ex. 147. This mailing is referenced in count four of the superseding indictment.

[37] Technically, the agreement had been with CMH Enterprises.

Exs. 107, 141, 176; Bartko Tr. 136–37.[38] On April 12, 2005, Bartko terminated his attorney-client relationship with Hollenbeck. See Def. Ex. 349; Bartko Tr. 136.[39]

On April 18, 2005, in accordance with Bartko's letter ten days earlier, Leamon mailed letters to all investors[40] informing them of "an administrative error" with their investment paperwork. See, e.g., Govt. Exs. 107, 141, 176. Specifically,

> [t]he purpose of this letter is to correct an administrative error regarding your account with Legacy Resource Management, Inc. You were previously mailed a letter of acknowledgment along with a statement showing the amount of funds deposited in our account from you. The error we found when we reviewed the statements at the end of the first quarter was that Capstone Private Equity Fund was shown as the entity receiving your funds when actually it was our company.
>
> Please be advised that all correspondence, interest payments, etc. regarding your funds will come from our office. Please call us with any questions you might have.

Govt. Ex. 107. Carlene Rudd-Smith testified that she received this mailing.

Eventually, Bartko's attorney, Albert, advised Rue that Bartko planned to file an interpleader action on behalf of the Capstone Fund and return all money invested in the Capstone Fund, less commissions. Before filing the action, however, Bartko received two calls from investors.

Donna Gates testified that she called Bartko on May 16, 2005, to speak with him about the investment in the Capstone Fund. She wanted to inquire about withdrawing what she thought would be $16,000 in accrued interest on her investment. During the call, Bartko told

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[38] According to Bartko, on April 8, 2005, Bartko was surprised to learn that Legacy had sent correspondence to investors reflecting an investment directly into the Capstone Fund. See Bartko Tr. 134–35. Given the mountain of circumstantial evidence suggesting otherwise, the jury was entitled to infer that Bartko's claimed "surprise" was feigned.

[39] Bartko said he did so after discovering that Hollenbeck had forged six of the Capstone Fund refund checks. See Bartko Tr. 136.

[40] These investors included victim Carlene Rudd-Smith. The mailing sent to her is identified in count five of the superseding indictment.

Gates that Hollenbeck had a cease and desist order at the time of his presentation and that the insurance was a fraud. Bartko also said that he could return the investment, less a 6 percent finder's fee, or that Gates could stick with Bartko and invest the money. Gates then asked Bartko whether she needed an attorney, and he said no. Bartko told Gates that the FBI was on the case. Gates then asked Bartko if she could speak with the FBI in Oregon about the case, and Bartko told her, "No, the FBI won't tell you anything."

At trial, Bartko admitted speaking with Gates in May 2005 about the Capstone Fund's impending interpleader action. Bartko denied making these other statements to Gates. Bartko Tr. 273–75.

Gates was not the only investor with whom Bartko spoke. After not receiving an interest check in April 2005 for his investment in the Capstone Fund, investor Jason Hemsted testified that he repeatedly called Hollenbeck. Hollenbeck, however, never returned Hemsted's calls. Eventually, Hemsted called Bartko. According to Hemsted, Bartko told him that something had gone wrong with the Capstone Fund, that there were some legalities that he could not discuss, and that Hemsted would get his money back but that it might take some time. Bartko also told Hemsted that Bartko was an attorney and had been "put over this" to help rectify the situation. Bartko did not address this conversation in his testimony.

On May 26, 2005, the Capstone Fund—through Bartko as its lawyer—filed an interpleader action in the United States District Court for the Middle District of North Carolina, claiming that Legacy had been a direct investor in the Capstone Fund and seeking the return of Legacy's investment to the proper parties. In the interpleader action, Bartko named the purported investors in the Capstone Fund as defendants and tendered $1,346,926.76 to the

court.[41] The amount tendered did not include the 6 percent finder's fee paid to Legacy. In the complaint, Bartko wrote, "The Fund PPM made no guarantees of any returns to any subscribers to the Fund, nor were any Fund representations, either oral or written ever made to any prospective subscribers that any investment in the Fund was guaranteed." Govt. Ex. 356 ¶ 5. The complaint described Legacy as a finder. Id. ¶¶ 10–12. The complaint also asserted that Legacy had invested in the Capstone Fund as an accredited investor and on its own account. See id. ¶¶ 12–13. The complaint further stated that "[t]he Defendants that are named in this interpleader action are believed to be Legacy Clients. They are not and never have been subscribers accepted to the Fund, although some of the Legacy Clients were rejected as Fund subscribers due to the fact that they did not qualify as accredited investors." Id. ¶ 16.

The complaint did not describe Legacy as operating an investment club or as pooling investor funds. At trial, however, Bartko claimed that Legacy was legally pooling investor funds. See Bartko Tr. 264–65. Bartko also admitted that he knew that ten of the investors who had invested through Legacy were ten non-accredited investors who the Capstone Fund purportedly rejected on January 19, 2005, *because* they were non-accredited investors. See id. 265. The complaint did not mention this information. The complaint likewise omitted any reference to Hollenbeck or CMH Enterprises, as well as statements that Bartko learned from Rue on March 14, 2005, about Hollenbeck's fraudulent use of documents to sell investments in the Capstone Fund. See Govt. Ex. 356; Bartko Tr. 262–65.

[41] At trial, Bartko argued that he could not be a fraudster because he returned most of the money to investors. The interpleader action, he contended, demonstrates a lack of criminal intent. The jury obviously disagreed. Furthermore, the fact that Bartko returned most of the investors' money does not negate the fact—which the jury was entitled to find—that he fraudulently obtained it in the first place. The jury easily could have concluded that once SEC attorney Rue confronted Bartko on March 14, 2005, Bartko ultimately had only two options: he could flee, or he could shut down the Capstone Fund and return the money. Either of the two was inevitable. Only one of the two possibly could have ended well.

SEC attorney Rue testified that after Bartko filed the interpleader action, Rue decided not to ask the SEC to pursue a civil action against Bartko or the Capstone Fund. Rue did, however, advise the SEC broker-dealer section about his concerns arising from Bartko, Hollenbeck, and the Capstone Fund.

In June and July 2005, David McClellan ("McClellan") of the SEC examined Bartko's broker-dealer license with Capstone Partners. McClellan, who testified at trial, stated that he was the branch chief of the broker-dealer office of compliance for the SEC in Atlanta. As part of the examination, McClellan interviewed Bartko and asked Bartko about the Caledonian Fund and the Capstone Fund. With respect to the Caledonian Fund, Bartko told McClellan that some money from the Caledonian Fund was initially deposited in the Capstone Partners account, but was transferred to the Caledonian Fund once the Caledonian Fund established its own bank account. Moreover, Bartko told McClellan that once the money was transferred to the Caledonian Fund account, he did not know what happened to the money because he had no day-to-day duties concerning the Caledonian Fund. Bartko also told McClellan that he did not have access to the Caledonian Fund's bank account after the money was transferred to the Caledonian Fund because he (Bartko) was not the managing member of the Caledonian Fund. Rather, Bartko told McClellan that Laws was the managing member.

During the June and July 2005 examination, McClellan also asked Bartko about the Capstone Fund. Bartko told McClellan that he created the Capstone Fund to raise money from accredited investors and that he initially received about $1.6 million in December 2004 and January 2005 from Franklin Asset Exchange. After reviewing subscription documents from Franklin Asset Exchange, however, Bartko determined that eighteen investors were not accredited and returned about $1 million to those non-accredited investors.

McClellan also asked Bartko about Legacy. Bartko told McClellan that the Capstone Fund entered a finder's agreement with Legacy on or about January 24, 2005, and agreed to pay Legacy a 6 percent finder's fee. Bartko also said that Legacy invested about $1.5 or $1.6 million on January 31, 2005, and later provided about $700,000 in referrals to the Capstone Fund. Bartko told McClellan that the Capstone Fund paid Legacy a total of $143,000 in finder's fees.

On September 21, 2005, the United States District Court for the Middle District of North Carolina entered an order in the interpleader action. The order distributed the interpleaded funds to the individuals and entities identified as Legacy clients, including the ten victims whose money circled from the Capstone Fund, to the victim, to Legacy, and then back to the Capstone Fund between January 19, 2005 and January 31, 2005. See Def. Ex. 154. Each victim received 94 percent of his or her investment. No victim received the 6 percent finder's fee that the Capstone Fund had paid to Legacy. No victim received any interest payments from the Capstone Fund.

C.

Bartko's fraud had not yet run its course.[42] On January 18, 2005, Covington filed a lawsuit in the Superior Court of Forsyth County, North Carolina, on behalf of Webb Group and Franklin Asset Exchange against BMP Capital Resources, Inc. (formerly BMP Investments, Inc.) ("BMP"), Bull Mountain Development, Co. 1, LLC ("BMDC-1"), Colvin Enterprises, Inc., George Parthemos, Joseph W. Dickey, and Colvin. [D.E. 220-4]. Hollenbeck verified the complaint on behalf of Webb Group and Franklin Asset Exchange. Id. Essentially, the lawsuit alleged that Webb Group and Franklin Asset Exchange, through Hollenbeck, had invested

[42] The jury did not hear evidence concerning the events recounted in this section of the order. The court adds the information in this section to address Bartko's motion for a new trial concerning the Judge Cromer Interview Report.

millions of dollars with the various Bull Mountain defendants in return for the defendants' promise to pay plaintiffs on certain promissory notes. See generally id. Defendants, however, failed to pay what was due to Webb Group and Franklin Asset Exchange and had defrauded both entities into investing. See id. at ¶¶ 11–21. After Covington filed suit, Bartko entered a notice of appearance in the case on behalf of Webb Group and Franklin Asset Exchange.

On February 25, 2005, the Forsyth County Clerk of Court filed an entry of default against BMP and BMDC-1. See Smith v. Bull Mountain Coal Props., Inc., No. CV-06-169-BLG-RFC-CSO, 2008 WL 1736047, at *2 (D. Mont. Mar. 7, 2008). On March 15, 2005, before a default judgment was entered, Webb Group and Franklin Asset Exchange obtained a confession of judgment from BMP and BMDC-1. Ultimately, Webb Group and Franklin Asset Exchange, through attorneys Covington and Bartko, recovered over $20 million by way of a negotiated settlement with the Bull Mountain entities and others. See id.

In April 2006, Covington and Bartko contacted North Carolina Superior Court Judge Anderson Cromer ("Judge Cromer") about establishing a receivership to return the BMP settlement money to the individuals who had invested in Webb Group and Franklin Asset Exchange. Judge Cromer agreed to establish a receivership. On April 19, 2006, and at Bartko's and Covington's suggestion, Judge Cromer appointed Glenn Smith, Jr., ("Smith") as receiver. See [D.E. 220-5] (April 19, 2006 order appointing receiver). Smith and Bartko had worked together for a number of years at Capstone Partners, and Smith had also done financial work for the Capstone Fund. See Bartko Tr. 65–66.

Although Judge Cromer agreed to establish a receivership and to appoint Smith as the receiver, he "was skeptical of the actions of Covington and Bartko from the moment the attorneys first approached the Court . . . . [Bartko, Covington, and Smith were e]ach . . . told that

every action taken in the case either before or after the Receiver was appointed would have to be totally transparent . . . ." [D.E. 220-8] at 7–8.

On January 5, 2007, Judge Cromer held a hearing, which Covington and Smith attended. See [D.E. 220-7]. Smith told Judge Cromer that Webb Group and Franklin Asset Exchange "made other investments in other entities besides Bull Mountain . . . ." Id. at 24. Covington told the court that "our goal here is to get all these people's money back if at all possible." Id. at 34. Judge Cromer then ordered Smith to make another filing to address entities other than Bull Mountain that had received money from Webb Group or Franklin Asset Exchange. Id. at 40–42. Covington agreed to make an "all-inclusive" filing. Id. at 41.

On January 19, 2007, Covington wrote Judge Cromer concerning other entities that had received money. Among others, Covington discussed the Caledonian Fund:

> This is a series of notes totaling approximately $700,000.00 issued between February 27, 2004, and May 4, 2004 based on a $3,000,000 total funding commitment by John Colvin that was never completed. The notes carry a four (4) year maturity at 4% [sic] per annum. It is apparent that this is another example of fraud, misrepresentation, and breach of contract by Mr. Colvin who has already been sued and a Judgment obtained which has been domesticated in the state of his residence, Tennessee. We believe that this debt is probably uncollectible as quite a number of suits are already filed against Mr. Colvin. In addition, the Receiver has received documentation directly from [the Caledonian Fund] that clearly indicates that the [Caledonian Fund] is now uncollectible and most likely insolvent.

See [D.E. 220-17] at 2. Covington's letter did not tell Judge Cromer about Bartko's role with the Caledonian Fund, or with Laws, Colvin, and Hollenbeck.

On January 23, 2007, Smith filed a report with Judge Cromer concerning investments that Colvin and Hollenbeck had made in entities other than BMP. See [D.E. 220-8] at ¶ 30. One of the investments involved the $701,000 that Franklin Asset Exchange, via Colvin and Hollenbeck, had invested in the Caledonian Fund. See id. Before preparing this report, Smith

wrote Laws on August 6, 2006, seeking to recover the $701,000. See [D.E. 220-13]. On August 14, 2006, Bartko—*who was simultaneously acting as legal counsel to Smith in the receivership litigation*—assisted Laws in drafting a response to Smith in which the Caledonian Fund refused to repay the $701,000 to Smith and alleged that Colvin had defrauded the Caledonian Fund. See [D.E. 220-14, -15]. On January 23, 2007, Smith reported to Judge Cromer that the $701,000 was not recoverable. See [D.E. 220-8] at ¶ 30. Neither Bartko nor Smith ever disclosed to Judge Cromer Bartko's relationship with Laws, Colvin, Hollenbeck, or the Caledonian Fund.

On April 5, 2007, Judge Cromer held another hearing in the Forsyth County receivership litigation. Judge Cromer held a third hearing on July 25, 2008, this time concerning disbursements of the settlement proceeds and to consider Bartko's and Covington's request to each receive a $2 million contingent attorney fee in connection with their work on the Forsyth County receivership litigation. See [D.E. 220-6]. During the hearing, attorney Kevin Miller ("Miller") spoke on behalf of Judy Wright Jarrell. See id. at 39–62.[43] Miller raised issues concerning the tangled web of conflicts among Bartko, Covington, Hollenbeck, Colvin, Smith, and the various corporate entities, including Webb Group and Franklin Asset Exchange. See id. Miller then opposed Bartko's and Covington's fee request and discussed, among other things, Hollenbeck, Smith, and the meeting that took place in Robin Denny's living room on January 12, 2005. See id. at 49–50, 68. In response to Miller's argument, Bartko told Judge Cromer that he had terminated Hollenbeck as a legal client in March 2005. Id. at 94. Bartko also told Judge Cromer,

> I can't say enough about Glenn Smith because of what you heard, I think, from the witness stand today. Glenn and I have worked together on a variety of projects, none of which involved this. I am a CEO and a broker-dealer. Mr.

[43] Yes, the same Judy Wright Jarrell already discussed in connection with the January 12, 2005 meeting at Robin Denny's home.

> Smith is a broker. We hold his license and he does my financial operations work. That's it.

Id. at 95. With respect to the meeting in Robin Denny's living room on January 12, 2005, Bartko told Judge Cromer,

> And addressing just a moment the visit that [Miller] recounted at the home of his client, what he didn't know and couldn't relate to you was, *yes, I was there that day*. And the reason I was there was because we had had a meeting in January of '05, I think he said it was. The purpose for the meeting—and my recollection is that the meeting included Mr. Covington and Mr. Smith, and we were trying to get our hands around these records so that Mr. Smith could develop capital accounts for all the investors. There was really no record keeping on who had invested in this venture or these three ventures. So why was I at [Denny's] house? *Because Scott Hollenbeck offered to take me to the airport. I had to be with him. We did stop at his client's house. We had a nice chat. I didn't say, "Boo." And I don't know how long it was, maybe an hour or something like that, and I left.* And any comments that Mr. Miller wants to draw, or conclusions, from that meeting, I am not going to dispute that. But I am letting you know that is the purpose why I was there, I was on my way back to the airport.

Id. at 99–100 (emphases added). Of course, Bartko's comments to Judge Cromer—made as an officer of the court—contradict Bartko's trial testimony—made under oath—concerning the January 12, 2005 meetings at Gospel Light Baptist Church and at Robin Denny's home. See Bartko Tr. 105–08, 224–32.

At the same July 2008 hearing, Covington—in Bartko's presence—claimed that he, Bartko, and Smith had told Judge Cromer "everything" about their relationship with Hollenbeck and Colvin. [D.E. 220-6] at 86. Specifically, Covington said,

> we told you about all of our relationships with Hollenbeck, Colvin, etc. We disclosed everything to you. And the transcripts of the various hearings that have taken place in this case will reflect that. The letters that I have sent you and that Mr. Bartko has sent you will reflect that.

Id. In fact, however, Bartko had failed to disclose to Judge Cromer the full nature of his various relationships with Colvin, Hollenbeck, Laws, the Caledonian Fund, and the Capstone Fund. See id. at 90–101.

On September 5, 2008, Judge Cromer entered an order approving distribution of settlement proceeds. See [D.E. 220-18]. The victims received refunds of approximately 75 percent of the money that Hollenbeck and Colvin, through Webb Group or Franklin Asset Exchange, had fraudulently obtained and invested in the Bull Mountain project in 2003 and 2004. See id. at 14. Judge Cromer also awarded Bartko and Covington an attorney's fee of over $2 million each. Id. at 10–12. The attorney's fee award came out of the $20 million settlement. See id.

Bartko never used any of his $2 million contingency fee to repay the $701,000 that the Caledonian Fund received from Colvin and Hollenbeck via Franklin Asset Exchange.

D.

On May 10, 2007, a federal grand jury in the Eastern District of North Carolina indicted Hollenbeck, Michael A. Lomas, Michael L. Young, Barry C. Maloney, Laurinda Holohan, Susan Knight, and Arthur J. Anderson, Jr., for fraudulent conduct arising from Mobile Billboards. See United States v. Hollenbeck, No. 5:07-CR-117-BR, [D.E. 3] (E.D.N.C. May 10, 2007). On February 6, 2008, a jury convicted Hollenbeck of one count of conspiracy and twelve counts of mail fraud and aiding and abetting. Id., [D.E. 322]. On May 6, 2008, the court sentenced Hollenbeck to 168 months' imprisonment. Id., [D.E. 373].[44]

On August 6, 2009, a federal grand jury in the Eastern District of North Carolina indicted Colvin for fraudulent conduct arising from Webb Group and Franklin Asset Exchange, including over $17 million invested in various enterprises like the development of the Bull Mountain coal mine near Roundup, Montana, and the Caledonian Fund. See United States v. Colvin, No. 4:09-

[44] The jury in Bartko's trial heard testimony concerning Hollenbeck's conviction and sentence. It did not hear testimony about the trials or sentences of the other Mobile Billboards defendants.

CR-72-D, [D.E. 1] (E.D.N.C. August 6, 2009). On June 11, 2010, a jury convicted Colvin of one count of conspiracy and five counts of mail fraud and aiding and abetting. Id., [D.E. 64]. On January 18, 2011, the court sentenced Colvin to 300 months' imprisonment. Id., [D.E. 92].[45]

On November 4, 2009, a federal grand jury in the Eastern District of North Carolina indicted Bartko and Laws and charged each with conspiracy (count one), mail fraud and aiding and abetting (counts two through four), and false statements and aiding and abetting (counts five and six). See [D.E. 1]. On January 6, 2010, a federal grand jury in the Eastern District of North Carolina issued a superseding indictment charging Bartko, Laws, and Plummer with conspiracy (count one) and mail fraud and aiding and abetting (counts two through five), charging Bartko and Plummer with the sale of unregistered securities and aiding and abetting (count six), and charging Bartko and Laws with false statements and aiding and abetting (counts seven and eight) [D.E. 30].

On February 2, 2010, attorney Wes Covington committed suicide. During the trial, the jury heard that Covington died on February 2, 2010. See Bartko Tr. 195. The jury did not hear that Covington had killed himself. See id.

On June 1, 2010, Plummer pled guilty to the conspiracy count (count one) in the superseding indictment, with the objects of mail fraud and the laundering of monetary instruments [D.E. 67]. On October 18, 2010, Laws pled guilty to count seven of the superseding indictment and to count one of a criminal information charging him with false statements in a tax return [D.E. 118].

On October 28, 2010, the United States moved to dismiss counts seven and eight as to Bartko, and two of the objects alleged in count one of the superseding indictment (i.e., false

[45] In Bartko's trial, the jury heard Colvin's name but did not hear about his indictment, conviction, or sentence. Colvin did not testify at Bartko's trial.

statements and obstructing SEC proceedings) [D.E. 135]. On October 29, 2010, the court granted the motion [D.E. 137].

On November 1, 2010, Bartko's trial began. During the thirteen-day trial, the United States called thirty-one witnesses and introduced 366 exhibits. Bartko called four witnesses, including himself, and introduced forty-eight exhibits. On November 18, 2010, after deliberating approximately four hours, the jury convicted Bartko on all six counts.

II.

Bartko has filed four motions for a new trial under Federal Rule of Criminal Procedure 33. In these four motions, he claims that he was denied a fair trial because the government violated its obligations under Brady and Giglio. Specifically, Bartko alleges that he was denied a fair trial because the government failed to disclose favorable evidence and knowingly permitted government witnesses to testify falsely.

Rule 33(a) provides that "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). "Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty." Fed. R. Crim. P. 33(b)(1). Ordinarily under Rule 33, when a defendant seeks a new trial based on newly discovered evidence,

> (a) the evidence must be, in fact, newly discovered, i.e., discovered since the trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) the evidence relied on must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal.

United States v. Bales, 813 F.2d 1289, 1295 (4th Cir. 1987). When a Brady or Giglio violation forms the basis of a Rule 33 motion, however, "the proper legal standard is more favorable to the defendant than that identified in Bales." United States v. Cohn, 166 F. App'x 4, 12 (4th Cir.

2006) (per curiam) (unpublished); see also United States v. Sutton, 542 F.2d 1239, 1242 n.3 (4th Cir. 1976).

To prove a Brady violation, Bartko must show three elements: "(1) that the evidence is favorable, either because it is exculpatory or impeaching; (2) that the government suppressed the evidence; and (3) that the evidence was material to the defense." United States v. Higgs, 663 F.3d 726, 735 (4th Cir. 2011). Under Brady and its progeny, a defendant is entitled to a new trial based on the government's non-disclosure of exculpatory or impeachment evidence if the defendant establishes a reasonable probability that with the favorable evidence the defendant would have obtained a different result at trial. Smith v. Cain, No. 10-8145, slip op. at 2–3 (U.S. Jan. 10, 2012); Strickler v. Greene, 527 U.S. 263, 296 (1999); United States v. Robinson, 627 F.3d 941, 951–53 (4th Cir. 2010); United States v. Cargill, 17 F. App'x 214, 227 (4th Cir. 2001) (per curiam) (unpublished). Although less rigid than the defendant's burden under Bales, this is still a challenging standard. See Cargill, 17 F. App'x at 227–31; Sutton, 542 F.2d at 1242 n.3.

To prove a Giglio violation involving false testimony, Bartko must show that the government introduced or failed to correct trial testimony that it knew or should have known was false. United States v. Agurs, 427 U.S. 97, 103–04 (1976); Giglio, 405 U.S. at 154. Giglio provides an even less-demanding standard for motions for a new trial based on the government's use of or knowing failure to correct false testimony. Cargill, 17 F. App'x at 227–31; Sutton, 542 F.2d at 1242 n.3. Under Giglio, "[a] new trial is required if the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury." Elmore v. Ozmint, 661 F.3d 783, 830 (4th Cir. 2011) (quotations omitted) (alteration and omission in original); see also Giglio, 405 U.S. at 154; Napue, 360 U.S. at 271.

In accordance with Brady and its progeny, the court will evaluate each item individually,

and then separately evaluate their cumulative effect for purposes of materiality. See, e.g., Kyles v. Whitley, 514 U.S. 419, 436–37 & n.10 (1995); Smith v. Sec'y, Dep't of Corr., 527 F.3d 1327, 1334 (11th Cir. 2009); Campbell v. Polk, 447 F.3d 270, 276 (4th Cir. 2006); McHone v. Polk, 392 F.3d 691, 697 (4th Cir. 2004); United States v. Arias, Nos. 99-6644, 99-6645, 2000 WL 933010, at *6 (4th Cir. July 10, 2000) (per curiam) (unpublished table decision); United States v. Ellis, 121 F.3d 908, 916–18 (4th Cir. 1997). In doing so, the court will keep in mind that the fundamental inquiry under Brady and Giglio is whether the court has confidence in the outcome of the trial. See Smith, slip op. at 3; Kyles, 514 U.S. at 434–35; United States v. Bagley, 473 U.S. 667, 682 (1985); Higgs, 663 F.3d at 735.

A.

Before evaluating the items Bartko contests, the court examines the Supreme Court's decisions in Brady, Brady's progeny, and Giglio. This brief discussion serves an important function. Juxtaposing the circumstances of these cases with the evidence in Bartko's case—recounted, in part, in detail above—provides a most illuminating comparison.

In Brady, Brady testified at trial and admitted participating in murdering the victim, but claimed that his co-defendant Boblet actually killed the victim. Brady asked the jury not to impose capital punishment. The jury, however, convicted Brady of murder and sentenced Brady to death. After his trial, Brady learned that Boblet made an admission to the police that he (Boblet) actually killed the victim. Brady cited this new evidence and sought a new trial as to his conviction and sentence. Brady argued that if the jury had known about Boblet's admission, it would not have found Brady guilty or, at a minimum, would not have sentenced Brady to death. The Supreme Court held that Brady was entitled to a new trial only on punishment. Brady, 373 U.S. at 84–85, 88–91. In so holding, the Court declared that the suppression of

evidence that, if made available to the defendant, would tend to exculpate the defendant or reduce the defendant's penalty, violates due process regardless of the good or bad faith of the prosecutor. Id. at 87–88. In reaching this conclusion, the Court also emphasized that the fundamental inquiry is whether the defendant received a fair trial. Id. at 86–87.

In Giglio, the government failed to correct its key witness, Robert Taliento, after he testified that he received no promises from the government in exchange for his testimony. Taliento was Giglio's "alleged coconspirator in the offense and the only witness linking [Giglio] with the crime." Giglio, 405 U.S. at 151. Giglio's defense counsel cross-examined Taliento about whether the government had promised him that, in exchange for his testimony, he would not be prosecuted, but Taliento denied any such promise. See id. at 151–52. In closing argument, the AUSA stated, "[Taliento] received no promises that he would not be indicted." Id. at 152 (quotation omitted) (alteration in original). After his conviction, Giglio learned that another AUSA, who was not trial counsel, had promised Taliento "that if he testified before the grand jury and at trial he would not be prosecuted." Id. Giglio cited the new evidence and sought a new trial. The Supreme Court granted Giglio's motion:

> [Brady] held that suppression of material evidence justifies a new trial . . . . When the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of evidence affecting credibility falls within this general rule. We do not, however, automatically require a new trial whenever "a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict . . . ." A finding of materiality of the evidence is required under Brady. A new trial is required if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . . ."

Id. at 154 (citations omitted). In finding a violation of due process and granting a new trial to Giglio, the Court noted that the government's case "depended almost entirely on Taliento's testimony; without it there could have been no indictment and no evidence to carry the case to

the jury." Id.

In Agurs, Agurs was convicted of second-degree murder. Agurs argued at trial that she stabbed the victim in self-defense. Agurs, 427 U.S. at 100. Unbeknownst to Agurs, the victim had a criminal record, which included one assault conviction and two convictions for carrying a deadly weapon (a knife). Id. at 100–01. The prosecutor did not reveal the victim's criminal record to Agurs. Rather, Agurs learned about the victim's criminal record only after Agurs's conviction. Id. Thereafter, Agurs sought a new trial. Id.

Agurs argued that the prosecutor's failure to disclose the victim's criminal record violated Brady and its progeny. The Supreme Court disagreed. Id. at 108–14. The Court again emphasized that Brady concerns a "defendant's right to a fair trial [under] the Due Process Clause of the Fifth Amendment." Id. at 107. The Brady standard does not focus on "[t]he mere possibility that" the non-disclosed evidence "might have helped the defense, or might have affected the outcome of the trial . . . ." Id. at 109–10. Rather,

> [t]he proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record.

Id. at 112–13. The Court then stated that after reviewing the nondisclosure "in the context of the entire record[,] the trial judge remained convinced of [Agurs's] guilt beyond a reasonable doubt, and since we are satisfied that his firsthand appraisal of the record was thorough and entirely reasonable, we hold that the prosecutor's failure to tender [the victim's] record to the defense did not deprive [Agurs] of a fair trial . . . ." Id. at 114.

In Bagley, Bagley was indicted for violating federal narcotic and firearms statutes. The government's principal witnesses were two state law enforcement officers moonlighting as

private security guards. The two state officers assisted federal agents with an undercover investigation of Bagley. Before trial, Bagley sought discovery of "any deals, promises or inducements" made to these two witnesses. Bagley, 473 U.S. at 669 (quotation omitted). In response, the government provided affidavits from the two witnesses in which each denied receiving any rewards or promises of rewards. Id. at 670. After his conviction, Bagley learned that each witness had been paid $300 pursuant to an undisclosed agreement between the witness and the Federal Bureau of Alcohol, Tobacco and Firearms. Id. at 671. Bagley moved to vacate his conviction under 28 U.S.C. § 2255 and sought a new trial. Id. The district court denied the motion. Id. at 672–73.

The Ninth Circuit reversed and held that the government's non-disclosure warranted an automatic reversal of the conviction and a new trial. Id. at 674. The Supreme Court granted certiorari. It confirmed that Brady encompassed impeachment evidence, id. at 676–78, and that Brady's materiality standard focuses on confidence in the outcome of the trial. Id. at 680–82. The Court then announced the applicable materiality standard:

> The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

Id. at 682. The Court then rejected the Ninth Circuit's holding that the government's conduct warranted automatic reversal, and remanded the case to the Ninth Circuit for consideration of materiality. Id. at 683–84.

In Kyles, Kyles was convicted in Louisiana state court of first-degree murder and sentenced to death. During state post-conviction proceedings, Kyles learned that Louisiana had failed to disclose to him certain favorable evidence, including (1) contemporaneous eyewitness statements taken by police following the murder, (2) various statements that a non-testifying

informant named "Beanie" made to the police, and (3) a computer printout of license plate numbers of cars parked at the crime scene on the night of the murder, which did not include the license plate number of Kyles's car. Kyles, 514 U.S. at 428–29, 431.

On appeal, the Supreme Court noted that the materiality standard does not require a defendant to show by a preponderance of the evidence that disclosure of the suppressed evidence would have resulted in the defendant's acquittal. Id. at 434. Rather, the Court held that Brady requires a defendant to show "that the favorable evidence could *reasonably* be taken to put the *whole case* in such a different light as to undermine confidence in the verdict." Id. at 435 (emphases added). Moreover, the Court held that the materiality standard turns on the cumulative effect of all suppressed evidence favorable to the defendant, not on each piece of evidence considered item by item. Id. at 436–37 & n.10, 451–54.

In reversing Kyles's conviction and death sentence, the Court noted that the eyewitness statements would have resulted in a drastically weaker case for the prosecution and a much stronger case for the defense, and would have substantially destroyed the value of Louisiana's two best witnesses. Id. at 441–45. As for Beanie, his statements were replete with inconsistencies and self-incriminating assertions, and would have permitted the defense to undermine certain crucial physical evidence used to convict Kyles. Id. at 445–49. Finally, the Court held that the list of license plates would have had some value in exculpating Kyles. Id. at 450–51. Ultimately,

> confidence that the verdict would have been unaffected cannot survive when suppressed evidence would have entitled a jury to find that the eyewitnesses were not consistent in describing the killer, that two out of the four eyewitnesses testifying were unreliable, that the most damning physical evidence was subject to suspicion [due to Beanie], that the investigation that produced it was insufficiently probing, and that the principal police witness was insufficiently informed or candid.

Id. at 454.

Finally, in Smith, Smith stood trial in Louisiana state court accused of five murders in connection with an armed robbery. Larry Boatner was the government's key witness. In fact, "[n]o other witnesses and no physical evidence implicated Smith in the crime." Smith, slip op. at 1. At trial, Boatner testified "that he had '[n]o doubt' that Smith was the gunman [Boatner] stood 'face to face' with on the night of the crime." Id. at 3 (citation omitted) (first alteration in original). On that evidence, and that evidence alone, the jury convicted Boatner on all five counts. See id.

During state post-conviction proceedings, Smith discovered that the government had withheld certain contradictory statements that Boatner had made to lead investigator Detective John Ronquillo ("Ronquillo") shortly after the crimes occurred. Id. at 1–2. Specifically, Ronquillo's notes from the night of the robbery and murders stated "that Boatner 'could not . . . supply a description of the perpetrators other then [*sic*] they were black males.'" Id. at 2 (citation omitted) (alteration and addition in original). Five days after the crime, moreover, Boatner admitted that "he 'could not ID anyone because [he] couldn't see faces'" and that he "'would not know them if [he] saw them.'" Id. (citation omitted) (alterations in original).

On appeal, the Supreme Court reiterated that "evidence is 'material' within the meaning of Brady when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." Id. (quotation omitted). Furthermore, the Court stressed that the fundamental inquiry is whether the withheld evidence "undermine[s] confidence in the outcome of the trial." Id. at 3 (quotation omitted).

The Court held that the evidence was material: "Boatner's testimony was the *only* evidence linking Smith to the crime. And Boatner's undisclosed statements directly contradict

his testimony." Id. (emphasis in original). By withholding that evidence, the government violated Brady. "Boatner's undisclosed statements alone suffice to undermine confidence in Smith's conviction." Id. at 3–4.

With these cases in mind, the court now turns to the merits of Bartko's four motions for a new trial based on alleged Brady and Giglio violations.

B.

The court first will review individually each item Bartko contests. See, e.g., Kyles, 514 U.S. at 436–37 & n.10; Smith, 572 F.3d at 1334; Ellis, 121 F.3d at 916.

1.

In his first motion for a new trial, Bartko relies on the September 29, 2009 Judge Cromer Interview Report. See [D.E. 211-1]. IRS Agent Scott Schiller ("Agent Schiller") and AUSA Clay Wheeler ("Wheeler") were present for the interview. Id. The interview concerned the investigation of Bartko, Hollenbeck, Colvin, and Covington. See id. Judge Cromer had presided over the Forsyth County receivership litigation involving Webb Group and Franklin Asset Exchange as plaintiffs versus BMP, Colvin, Colvin Enterprises, Inc., and others as defendants. Id. Bartko did not specifically request discovery about the Forsyth County receivership litigation until after trial. See [D.E. 220] at 11 (citing January 28, 2011 Samuel Letter [D.E. 220-10]).

In his motion for a new trial, Bartko initially claims that the government improperly withheld Agent Schiller's summary of Judge Cromer's interview. Because the Judge Cromer Interview Report itself was inadmissible hearsay evidence and therefore cannot be material for Brady purposes,[46] Bartko argues that the Judge Cromer Interview Report would have led to

[46] See United States v. Moussaoui, 365 F.3d 292, 308 (4th Cir. 2004) (holding that "obviously inadmissible statements" cannot be the basis of a Brady motion), amended on other

material evidence. See Wood v. Bartholomew, 516 U.S. 1, 6 (1995) (per curiam) (holding that inadmissible evidence cannot support a Brady motion unless the evidence is likely to lead to discovery of admissible, exculpatory evidence). Specifically, Bartko cites Judge Cromer's statement that Judge Cromer had presided over a hearing in the summer of 2008 concerning distribution of settlement proceeds and that "most of the investors were overjoyed that they were getting a large portion of their money back." See [D.E. 211-1] at 2. Bartko's motion for a new trial also focuses on Judge Cromer's alleged statement that "you don't recover $20 million without a lot of hard work" as Brady material. See id.[47]

The government does not violate Brady "if the evidence in question is available to the defendant from other sources, either directly or via investigation by a reasonable defendant." United States v. Bros. Constr. Co. of Ohio, 219 F.3d 300, 316 (4th Cir. 2000) (quotation and citations omitted); see also Higgs, 663 F.3d at 735; Stockton v. Murray, 41 F.3d 920, 927 (4th Cir. 1994). Such reasonable investigation includes interviewing witnesses in preparation for trial. See United States v. Wilson, 901 F.2d 378, 381 (4th Cir. 1990). Furthermore, evidence "actually known by the defendant falls outside the ambit of the Brady rule." United States v. Roane, 378 F.3d 382, 402 (4th Cir. 2004); see also Higgs, 663 F.3d at 735.

Although Bartko claims that the government suppressed evidence of Judge Cromer's

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grounds, 382 F.3d 453 (4th Cir. 2004); Hoke v. Netherland, 92 F.3d 1350, 1356 n.3 (4th Cir. 1996) (acknowledging that inadmissible evidence is, "as a matter of law, immaterial for Brady purposes" (quotation omitted)).

[47] Bartko plucked this statement from its context. After acknowledging that most investors were happy to be getting some of their money back, Judge Cromer immediately stated that "some of the investors were not happy about the amount of attorneys' fees Covington and Bartko had requested. CROMER advised that they had requested to be paid attorneys' fees of between 25%–30% of the recovered money. He added that he thought both lawyers had done a lot of work getting the investors their money back. CROMER advised, 'You don't recover $20 million without a lot of hard work . . . [sic] Covington and Bartko represented that they had been working long and hard with almost 100% recovery.' As a result CROMER ordered that Covington and Bartko be paid all or most of their fees." [D.E. 211-1] at 2.

praise of his legal work in the Forsyth County receivership litigation, [D.E. 211] at 2–3, Judge Cromer's comments to investigators simply restate Judge Cromer's comments at the July 25, 2008 receivership hearing. Bartko was present at the hearing when Judge Cromer praised Bartko's legal work. See [D.E. 220-6] at 1, 62–67, 69–70. A transcript of the hearing was available upon request from the court reporter. See id. at 102–03. Moreover, Bartko knew Judge Cromer's role in the Forsyth County receivership litigation, knew where to locate Judge Cromer, and could have independently interviewed Judge Cromer. Accordingly, the government did not suppress evidence of Judge Cromer's "praise" concerning Bartko's legal work. See, e.g., Higgs, 663 F.3d at 735; McHone, 392 F.3d at 702; Roane, 378 F.3d at 402; Bros. Constr. Co. of Ohio, 219 F.3d at 316.

Bartko's argument that the government suppressed evidence of Judge Cromer's opinion that most of the victims in the Forsyth County receivership litigation were "overjoyed" to get a large portion of their money back from the fraud-induced investment in Bull Mountain fails for similar reasons. Bartko was present at the July 25, 2008 hearing where some victims praised Bartko's legal work and expressed happiness with getting a large portion of their money back. [D.E. 220-6] at 1, 35–39, 77, 79–80, 82–83, 85–86. The court identified each victim before allowing the victim to make a statement at the hearing. See id. Furthermore, a transcript of the hearing was available upon request from the court reporter. See id. at 102–03. Bartko, as counsel for Smith, even had a list of the victims and the ability to interview each one about his or her "happiness" concerning the victim's recovery in the Forsyth County receivership litigation. Cf. [D.E. 220-18] (September 5, 2008 order approving distribution of settlement proceeds). Thus, the government did not suppress information concerning the happiness of the victims involved in the Forsyth County receivership litigation. See, e.g., Higgs, 663 F.3d at 735;

McHone, 392 F.3d at 702; Roane, 378 F.3d at 402; Bros. Constr. Co. of Ohio, 219 F.3d at 316. The government, in short, did not violate Brady.

Even if the government had suppressed the interview report, the government would not have violated Brady. Judge Cromer's interview report, when read in its entirety, is not favorable to Bartko. At the end of the report, Agent Schiller wrote,

> CROMER added that the following information would have aided him during the course of the [Forsyth County receivership litigation]:
>
> –CROMER was not aware, until later, that some of the investors had previously invested in Capstone Partners; that Bartko was associated with Capstone; that Hollenbeck had sent Bartko $700,000 from Capstone investor funds, and that the $700,000 represented proceeds from a possible investor fraud. He advised that upon learning all this, he did not want to take any action that might interfere with an ongoing criminal investigation.
>
> –CROMER was not aware that John Colvin had assisted Hollenbeck in possibly defrauding investors or that Colvin directed Hollenbeck where to send investor contributions.
>
> –CROMER did not know until the summer of 2008 that Covington had been [censured] by the Montana State Bar.
>
> –CROMER was not aware that, prior to the appointment of the Receiver, Bartko had sent letters to investors informing them that he had some ideas about where they could invest their recovered funds.

[D.E. 211-1] at 3. Such evidence would hardly have been favorable to Bartko. In fact, if Judge Cromer had testified about these four issues and the fraud on the court that Bartko perpetrated during the Forsyth County receivership litigation, the testimony would have utterly devastated Bartko's defense. Thus, Judge Cromer's interview report is not favorable. See, e.g., McHone, 392 F.3d at 702 (upholding denial of a Brady motion because "the *unfavorable* portion of the [evidence] would have outweighed any exculpatory value" and "would have been fatal to [defendant's] claim" (quotation omitted) (emphasis in original)).

Finally, even if Bartko cleared the previous two hurdles, his motion would still fail

because Judge Cromer's interview report is not material. Inadmissible evidence is not subject to disclosure under Brady unless it leads to material admissible evidence. See, e.g., Wood, 516 U.S. at 6–8; Moussaoui, 365 F.3d at 308; Banks v. Reynolds, 54 F.3d 1508, 1521 n.34 (10th Cir. 1995) (collecting cases). Here, Bartko agreed before trial that evidence concerning the Forsyth County receivership litigation was irrelevant and therefore inadmissible. See [D.E. 123, 133].[48] Furthermore, this court presided at Bartko's trial and understands the allegations in both the superseding indictment and the record. The court believes that evidence regarding the Forsyth County receivership litigation would have been inadmissible at Bartko's trial under Federal Rule of Evidence 403. Cf. Sprint/United Mgmt. Co. v. Mendelsohn, 552 U.S. 379, 384 (2008) (noting a trial court's "wide discretion" under Rule 403 (quotation omitted)); PBM Prods., LLC v. Mead Johnson & Co., 639 F.3d 111, 125 (4th Cir. 2011); United States v. Udeozor, 515 F.3d 260, 265 (4th Cir. 2008); Garraghty v. Jordan, 830 F.2d 1295, 1298 (4th Cir. 1987); United States v. Penello, 668 F.2d 789, 790 (4th Cir. 1982) (per curiam). Evidence concerning the Forsyth County receivership litigation would have done nothing but confuse the issues, mislead the jury, and waste time. Therefore, Judge Cromer's interview report and any information derived from it would have been inadmissible, and "by definition not material, because it never would have

[48] Bartko's post-trial creation of a new trial strategy involving the Forsyth County receivership litigation does not make evidence supporting that new trial strategy material to the trial that actually occurred. See, e.g., United States v. Celestin, 612 F.3d 14, 23 (1st Cir. 2010); Arias, 2000 WL 933010, at *6 (holding that undisclosed evidence was not material because "[n]o matter how much [the defendants] argue about using different trial strategies, the fact remains that the new evidence discovered . . . has nothing to do with the principal players or issues in their case"); United States v. Jones, No. 93-5344, 1994 WL 8118, at *5 (4th Cir. Jan. 14, 1994) (per curiam) (unpublished table decision); accord United States v. Andrews, 532 F.3d 900, 911–12 (D.C. Cir. 2008) (Rogers, J., concurring) (asserting that evidence supporting a new trial strategy is material only when the evidence is actually favorable and only when the government's case "was not overwhelming to begin with"); United States v. Madori, 419 F.3d 159, 169–70 (2d Cir. 2005) (holding that evidence supporting a new trial strategy is not material when there was otherwise substantial evidence of the petitioner's guilt and when the alleged new trial strategy would not have overcome that substantial evidence).

reached the jury and therefore could not have affected the trial outcome." United States v. Ranney, 719 F.2d 1183, 1190 (1st Cir. 1983); see also Wood, 516 U.S. at 6; Moussaoui, 365 F.3d at 308; Breedlove v. Moore, 279 F.3d 952, 964 (11th Cir. 2002); Hoke, 92 F.3d at 1356 n.3.

2.

Bartko's second motion for a new trial concerns the government's alleged suppression of the two 2009 Hollenbeck Proffer Agreements. The government concedes that the evidence was favorable to Bartko and suppressed by the government. [D.E. 219] at 6.[49] Bartko argues that the agreements prove Hollenbeck lied while testifying at trial and that the agreements were key impeachment material. See [D.E. 213] at 2–6. In response, the government argues that Hollenbeck did not testify falsely and that the two 2009 Hollenbeck Proffer Agreements were cumulative impeachment evidence. See [D.E. 219] at 7–10. Bartko replies that the two agreements support impeachment based on a different bias or motive, and therefore are not cumulative. See [D.E. 236] at 9–14.

a.

When the government knowingly offers or fails to correct false testimony, it violates due process. See, e.g., Giglio, 405 U.S. at 153–54; Napue, 360 U.S. at 269; Alcorta v. Texas, 355 U.S. 28, 31–32 (1957) (per curiam); Pyle v. Kansas, 317 U.S. 213, 215–16 (1942); Mooney v.

[49] In opposing Bartko's second and third motions for a new trial, the government submitted a declaration from former AUSA Wheeler. [D.E. 227-7]. Wheeler was the lead prosecutor in this case and failed to produce the two 2009 Hollenbeck Proffer Agreements. Id. at ¶¶ 2, 7. The declaration explains how Wheeler placed the two 2009 Hollenbeck Proffer Agreements in the pleading and correspondence file in 2009, instead of in a discovery file. When the government produced or made available the discovery in the Bartko case in 2010, Wheeler failed to review the correspondence file, assuming that it did not have discoverable material in it. Id. at ¶¶ 1–2, 7. In addition, in 2010, Wheeler simply failed to recall the proffer agreements that had been made with Scott and Crystal Hollenbeck. Id. at ¶ 7. The court credits the explanation and finds that the mistakes were made in good faith. Nonetheless, under Brady and its progeny, a prosecutor's good faith is not relevant to determining whether a defendant is entitled to relief. See, e.g., Brady, 373 U.S. at 87.

Holohan, 294 U.S. 103, 112–13 (1935) (per curiam); Basden v. Lee, 290 F.3d 602, 614 (4th Cir. 2002). False testimony can violate Brady and Giglio—thereby necessitating a new trial—"if 'there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" Basden, 290 F.3d at 614 (quoting Agurs, 427 U.S. at 103); see also Elmore, 661 F.3d at 830; Daniels v. Lee, 316 F.3d 477, 493 (4th Cir. 2003); Boyd v. French, 147 F.3d 319, 329–30 (4th Cir. 1998); United States v. Kelly, 35 F.3d 929, 933 (4th Cir. 1994). However, a defendant asserting a false-testimony claim must meet "the heavy burden of showing" that the witness in question actually testified falsely. See, e.g., United States v. Griley, 814 F.2d 967, 971 (4th Cir. 1987).

To put Bartko's motion in context, the court notes the following background information. In early 2009, the United States Attorney for the Eastern District of North Carolina was investigating the sale of numerous investments, including sales involving Webb Group, Franklin Asset Exchange, Disciples Trust, and the Capstone Fund. As part of that investigation, the United States Attorney's Office for the Eastern District of North Carolina wanted to interview Hollenbeck. As mentioned, in 2008, a jury in the Eastern District of North Carolina had convicted Hollenbeck of numerous fraud counts in connection with Mobile Billboards, and Hollenbeck was serving a 168-month sentence in a federal prison in Florida. His wife, Crystal, was also living in Florida.

On February 2, 2009, AUSA Wheeler, who was leading the investigation, spoke with attorney Curtis Scott Holmes ("Holmes"), who had represented Scott Hollenbeck at Hollenbeck's trial. See [D.E. 227-7] at ¶ 4. Holmes asked Wheeler if Scott Hollenbeck was a target of the on-going government investigation. Id. Wheeler responded that the government did not consider Scott Hollenbeck a target at that time. Id.

On February 26, 2009, Wheeler sent draft proffer agreements to Holmes. Id. at ¶ 5. One agreement was for Scott Hollenbeck and one was for Crystal Hollenbeck. The purpose of each agreement was to facilitate interviews with the Hollenbecks. See id. at ¶¶ 5–6.

Crystal Hollenbeck signed the proffer agreement sent to her husband's counsel. See id. at ¶ 5; [D.E. 213-1] at 3–4. It stated as follows:

> As you have indicated, Ms. Hollenbeck is interested in meeting with federal agents currently investigating the sale of numerous investments, including Webb Group, Franklin Asset Exchange, Disciples Trust, and Capstone. I have informed you that Ms. Hollenbeck is not a target of this investigation. The parties will schedule an interview of Ms. Hollenbeck to take place either in the vicinity of the Federal Correctional Institution in Coleman, Florida or in Orlando, Florida.
>
> Ms. Hollenbeck, you, and the United States Attorney's Office (USAO) agree as follows concerning the "ground rules" for this interview:
>
> 1. In any trial in this matter, the USAO will not offer into evidence in its case-in-chief or at sentencing any statements made by Ms. Hollenbeck at the interview; provided, however, this Paragraph 1 shall not apply to any prosecution for false statements, obstruction of justice, or perjury that is based in whole or in part on statements made by Ms. Hollenbeck at the interview.
>
> 2. Notwithstanding Paragraph 1 above:
>
>  a. the USAO may use information derived directly or indirectly from statements made by Ms. Hollenbeck at the interview for the purpose of obtaining other evidence, and that evidence may be used in the prosecution and sentencing of Ms. Hollenbeck by the USAO;
>
>  b. in any trial of this matter or at sentencing, the USAO may use statements made by Ms. Hollenbeck at the interview to cross-examine her if she testifies or to rebut any evidence offered by or on behalf of her.
>
> 3. This agreement is limited to statements made by Ms. Hollenbeck at the interview and does not apply to any other statements made by Ms. Hollenbeck at any other time. No understandings, promises, or agreements exist with respect to the meeting other than those set forth in this agreement, and none will be entered into unless memorialized in writing and signed by all parties.

4. The USAO will not share the statements made by Ms. Hollenbeck during the interview with any other state or federal prosecuting entity unless the prosecuting entity agrees to be bound by the terms of this agreement. Please return the original signed copy of this letter agreement prior to the interview.

[D.E. 213-1] at 3–4. Scott Hollenbeck also signed a proffer agreement that was substantively identical to, but in a different format from, the one that AUSA Wheeler had actually sent. See [D.E. 227-7] at ¶ 5; [D.E. 213-1] at 2.[50]

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[50] It stated the following:

As you have indicated, your client, Mr. Hollenbeck, is interested in meeting with federal agents currently investigating the sale of numerous investments, including Webb Group, Franklin Asset Exchange, Disciples Trust, and Capstone. I have informed you that Mr. Hollenbeck is not a target of this investigation. The parties will schedule an interview of Mr. Hollenbeck to take place at the Federal Correctional Institution in Coleman, Florida. Mr. Hollenbeck, you, and the United States Attorney's Office (USAO) agree as follows concerning the "ground rules" for this interview:

1. In any trial in this matter, the USAO will not offer into evidence in its case-in-chief or at sentencing any statements made by Mr. Hollenbeck at the interview; provided, however, this Paragraph 1 shall not apply to any prosecution for false statements, obstruction of justice, or perjury that is based in whole or in part on statements made by Mr. Hollenbeck at the interview.

2. Notwithstanding Paragraph 1 above:

   a. the USAO may use information derived directly or indirectly from statements made by Mr. Hollenbeck at the interview for the purpose of obtaining other evidence, and that evidence may be used in the prosecution and sentencing of Mr. Hollenbeck by the USAO; in any trial of this matter or at sentencing, the USAO may use statements made by Mr. Hollenbeck at the interview to cross-examine him if he testifies or to rebut any evidence offered by or on behalf of him.

3. This agreement is limited to statements made by Mr. Hollenbeck at the interview and does not apply to any other statements made by Mr. Hollenbeck at any other time. No understandings, promises, or agreements exist with respect to the meeting other than those set forth in this agreement, and none will be entered into unless memorialized in writing and signed by all parties.

After each Hollenbeck had signed the respective proffer agreement, each was interviewed separately in Florida. The interviews occurred on April 21 and 22, 2009. See [D.E. 227-7] at ¶ 6.

The investigation of Webb Group, Franklin Asset Exchange, Disciples Trust, and the Capstone Fund, which was referenced in the two 2009 Hollenbeck Proffer Agreements, led to John Colvin's indictment on August 6, 2009. Likewise, the investigation led to the indictment of Bartko and Laws on November 4, 2009, and the superseding indictment of Bartko, Laws, and Plummer on January 6, 2010.

In response to Bartko's motion for a new trial, Wheeler, who signed the two Hollenbeck Proffer Agreements, executed the following declaration on July 15, 2011:

> 1. I was an Assistant United States Attorney with the Eastern District of North Carolina from September 3, 2002 until May 31, 2011.
>
> 2. In that position, I was lead counsel on the criminal investigation and prosecution of Gregory Bartko.
>
> 3. When I ended my employment with the U.S. Attorney's Office on May 31, 2011, I did not take any documents relating to the investigation and prosecution of Greg Bartko with me. I do not have any such documents in my possession.
>
> 4. On February 2, 2009, I had a phone conversation with attorney [Curtis] Scott Holmes. He asked me for the first time whether Scott Hollenbeck was a target of our investigation. I told him we did not consider him a target at that time.
>
> 5. On February 26, 2009, I sent, by e-mail and regular mail, draft proffer agreements to Mr. Holmes for Scott and Crystal Hollenbeck. Mr. Holmes

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> 4. The USAO will not share the statements made by Mr. Hollenbeck during the interview with any other state or federal prosecuting entity unless the prosecuting entity agrees to be bound by the terms of this agreement.
>
> Please return the original signed copy of this letter agreement prior to the interview.

[D.E. 213-1] at 2.

later gave me signed versions of these agreements. While Crystal Hollenbeck signed the exact proffer agreement I sent to Mr. Holmes, Scott Hollenbeck signed an agreement that was substantively identical but in a different format from the one I had sent. In particular, it did not contain U.S. Attorney's Office letterhead.

6. The purpose of these proffer agreements was to facilitate interviews with Scott and Crystal Hollenbeck in Florida. Those interviews occurred on April 21 and 22, 2009.

7. These proffer agreements were placed in the pleadings and correspondence file I kept for Mr. Bartko. In 2010, when the government produced or made available discovery in the Bartko case, my best memory is that I did not review this file, assuming that it did not have discoverable material in it. At that time, I simply did not remember the proffer agreements that had been made with Scott and Crystal Hollenbeck.

8. Other than my February 2, 2009 conversation with Scott Holmes and the proffer agreements, I do not recall making any statements to Scott Hollenbeck, Crystal Hollenbeck, or any attorney for either of them about their status as a target. I never assured Scott or Crystal Hollenbeck that they would not become targets. The statement I made on February 2, 2009 and in the proffer agreements was strictly limited to their current status.

9. The proffer agreements were the only agreement of any kind between the Government and Scott Hollenbeck or Crystal Hollenbeck. There were no other proffer or immunity agreements.

10. I did not make any other promises to Scott or Crystal Hollenbeck or any attorney for either of them regarding their interviews or testimony at trial.

11. I did not make any statements, oral or written, to Scott or Crystal Hollenbeck or any attorney for either of them regarding a Rule 35 motion or any other sentencing benefit prior to the jury beginning its deliberations at the *Bartko* trial.

12. I never made any promises to Crystal Hollenbeck, Scott Hollenbeck, or any attorney for either of them regarding whether Crystal Hollenbeck would or would not be prosecuted.

13. On December 7, 2009, Scott Holmes sent me an e-mail requesting that I ask the Bureau of Prisons to move Scott Hollenbeck to Butner for the convenience of facilitating his cooperation.

14. On December 28, 2009, I responded to this e-mail by telling him that we

would think through his suggestion.

15. The Government decided not to make a request to the Bureau of Prisons to move Scott Hollenbeck to Butner. Scott Hollenbeck was not moved to Butner.

16. Other than this request, I do not recall any other benefit that Hollenbeck requested or that I discussed as a result of his cooperation with the government in connection with the prosecution of Greg Bartko.

. . .

I declare under penalty of perjury that the foregoing is true and correct.

[D.E. 227-7].

On November 3, 2010, at the beginning of Scott Hollenbeck's direct examination, Wheeler asked Hollenbeck "what if any promises has the government made to you about your testimony here today?" Hollenbeck Tr. 5. Hollenbeck replied "None." Id. On November 5, 2010, near the end of Hollenbeck's lengthy cross-examination, defense counsel asked Hollenbeck: "Now, one of the things that you said when you took the stand was that the government has made you no promises, correct? You said that?" Id. 298. Hollenbeck replied: "That is exactly right." Id. Defense counsel then asked Hollenbeck, "And the government has not, as of this time, made you any promises, have they?" Id. Hollenbeck replied: "They have not." Id.

"Precise questioning is imperative as a predicate for . . . perjury." United States v. Hairston, 46 F.3d 361, 375 (4th Cir. 1995) (quotation omitted). A finding of perjury "cannot be based upon evasive answers or even misleading answers so long as they are literally true. In the face of evasion or misleading answers, it is the lawyer's duty to bring the witness back to the mark . . . ." Id. (quotation omitted). Here, Hollenbeck's answer to the government's question on direct examination was true. The government had made no promise to him regarding his

November 2010 trial testimony against Bartko. Hollenbeck's March 8, 2009 proffer agreement covered only statements made at his April 2009 debriefing, not statements made at any other time, including Bartko's November 2010 trial. See [D.E. 213-1] at 2. Furthermore, defense counsel's initial focus on Hollenbeck's testimony on direct examination obviously led Hollenbeck to believe that the questioning pertained to promises about Hollenbeck's November 2010 trial testimony, not promises in his March 8, 2009 proffer agreement granting use immunity for statements that Hollenbeck made during his April 2009 debriefing. Cf. United States v. Bryan, 58 F.3d 933, 960 (4th Cir. 1995), abrogated on other grounds by United States v. O'Hagan, 521 U.S. 642 (1997). Thus, Hollenbeck did not testify falsely or misleadingly.

Alternatively, even if the court assumed that Hollenbeck's testimony was false, there is no reasonable likelihood that Hollenbeck's false testimony on this point could have affected the jury's judgment. See, e.g., Agurs, 427 U.S. at 103; Basden, 290 F.3d at 614; Kelly, 35 F.3d at 933. Defense counsel thoroughly impeached Hollenbeck on the subject of bias in favor of the government and on Hollenbeck's motive to lie to please the government. See Hollenbeck Tr. 301–08. Defense counsel thoroughly impeached Hollenbeck concerning his desire to avoid prosecution for his fraud involving Colvin, Webb Group, Franklin Asset Exchange, Disciples Trust, the Caledonian Fund, and the Capstone Fund. Id. Defense counsel thoroughly impeached Hollenbeck about his desire to receive a cooperation-based reduction in his 168-month prison sentence stemming from the Mobile Billboards fraud. Id. 299–308.[51] Furthermore, defense counsel explored at great length and with absolutely devastating effect Hollenbeck's character for untruthfulness. Defense counsel recounted the many lies Hollenbeck had told and the many frauds he had committed throughout his life. E.g., id. 176–78, 182, 201, 211–12, 214–224,

[51] See Fed. R. Crim. P. 35.

227–32, 234–45, 249–50, 253–54, 258–62, 277–78, 281–82, 288–98, 309–10, 337. In fact, this court has never seen a witness more thoroughly impeached than Hollenbeck. In the face of such blistering impeachment and the other evidence in the trial, one more false statement by Hollenbeck could not have possibly affected the jury's judgment.

b.

Next, Bartko argues that even if Hollenbeck did not testify falsely, the government's failure to disclose the proffer agreements violates Brady. See, e.g., Smith, slip op. at 2–3. To violate Brady, however, the agreements must be material, in that they are not merely cumulative of the existing impeachment evidence against Hollenbeck. See, e.g., McHone, 392 F.3d at 700; Ellis, 121 F.3d at 917–18 & n.10. Bartko contends that impeachment based on the two agreements would have been different in character from the countless other statements, actions, and motives used to impeach Hollenbeck. Therefore, according to Bartko, the agreements were not cumulative. See [D.E. 236] at 9 (citing United States v. Kohring, 637 F.3d 895 (9th Cir. 2011)). In making this argument, Bartko relies on Kohring, a case in which the Ninth Circuit determined that evidence suppressed by the government "would have added an entirely new dimension to the jury's assessment." Kohring, 637 F.3d at 905. The chief witness against Kohring was impeached at trial for the lenient treatment he received from the government on public corruption charges. See id. at 904. After trial, Kohring learned that the government also had intervened on the chief witness's behalf to prevent the witness from being charged with completely different crimes the witness had committed: sexual exploitation of minors and attempts to conceal sexual exploitation behavior by soliciting perjury from the minors and by arranging for one of the minors to make herself unavailable to testify against him. See id. The Ninth Circuit found that the new impeachment information concerning the government's chief

witness was not cumulative. Id. The Ninth Circuit noted that the evidence of sexual misconduct and obstruction of justice "would have shed [new] light on the magnitude of [the chief witness's] incentive to cooperate with authorities and would have revealed that he had much more at stake than was already known to the jury." Id.

Here, in contrast, Bartko's impeachment of Hollenbeck was devastatingly thorough and thoroughly devastating. It included (1) Hollenbeck's desire to avoid prosecution for fraud involving Colvin, Webb Group, Franklin Asset Exchange, Disciples Trust, the Caledonian Fund, and the Capstone Fund, (2) Hollenbeck's desire to obtain a reduction in his 168-month sentence for Mobile Billboards's fraud, and (3) Hollenbeck's repeated admissions concerning the numerous lies told and numerous frauds committed throughout his life. Scott Hollenbeck's 2009 proffer agreement had nothing to add and would not have shed any new light on the depth of Hollenbeck's wrongdoing, the magnitude of his incentive to cooperate with the government, or the absence of his credibility.

Crystal Hollenbeck's 2009 proffer agreement is similarly distinguishable from the evidence in Kohring. Crystal Hollenbeck's role in assisting Scott Hollenbeck with paperwork in his business activities was known to the jury. Indeed, defense counsel asked Scott Hollenbeck on cross examination about Crystal Hollenbeck's involvement in his business, including questions concerning an email from Crystal Hollenbeck to Bartko about the newly formed "finder," CMH Enterprises, in which Crystal Hollenbeck expressed concerns about her liability. Hollenbeck Tr. 285–87. In light of this and other evidence of Crystal Hollenbeck's involvement in Scott Hollenbeck's business, Crystal Hollenbeck's 2009 proffer agreement would have added nothing to Bartko's defense. It would have been merely cumulative, and thus is also distinguishable from the suppressed evidence in Kohring.

In opposition to this conclusion, Bartko argues that Crystal Hollenbeck's proffer agreement would have provided for a different avenue of impeachment, specifically, that "Hollenbeck was told that his wife was not a target . . . ." [D.E. 236] at 8.[52] In support, Bartko cites LaCaze v. Warden La. Corr. Inst. for Women, 645 F.3d 728 (5th Cir. 2011), amended on other grounds, 647 F.3d 1176 (5th Cir. 2011) (per curiam), for its holding that "the State's failure to disclose an agreement not to prosecute the son of the main testifying witness was material . . . ." [D.E. 236] at 11. In LaCaze, Meryland Robinson killed Princess LaCaze's husband at Princess LaCaze's request. See 645 F.3d at 730–31. Robinson's fourteen-year-old son accompanied him to and from the murder scene, but did not participate in the murder. Id. During the murder investigation, Robinson told the police that he wished to provide a statement to the police, but did not want to have his statement used to prosecute his son. Id. at 731–33. The police agreed not to use Robinson's statement to prosecute his son. See id. Thereafter, Robinson stated that he spoke expressly with Princess LaCaze before the murder and expressly agreed with her that he would kill LaCaze's husband. Robinson reiterated this statement at trial. See id. at 731.

From the prosecution's opening statement through the prosecution's final rebuttal argument, the state built its entire case against LaCaze on Robinson's credibility. See id. at 732. Indeed, Robinson's testimony was the only direct evidence of LaCaze's criminal intent to have her husband killed. Id. at 731, 737–38. Prosecutors never disclosed to LaCaze Robinson's agreement with police. Id. at 731.

LaCaze is distinguishable in at least three important ways. First, Bartko has not shown

[52] Crystal Hollenbeck did not testify at trial. Thus, the government's February 2009 proffer agreement with Crystal Hollenbeck can be material only in relation to Scott Hollenbeck's testimony. Generally, evidence that merely impeaches those who do not testify lacks relevance, much less materiality. See United States v. Sanchez, 118 F.3d 192, 196–97 (4th Cir. 1997).

that Scott Hollenbeck "was told that his wife was not a target." [D.E. 236] at 12. In 2009, the government entered two separate proffer agreements, one with Crystal Hollenbeck on February 26, 2009, and one with Scott Hollenbeck on March 8, 2009. See [D.E. 213-1] at 2–4. Neither agreement references the other, and Scott Hollenbeck's proffer agreement contains neither promises regarding Crystal Hollenbeck nor statements concerning her status. Id. In no other way did the government suggest to Scott Hollenbeck that his wife was not a target.[53]

Second, and more importantly, even if the court assumes that the government told Scott Hollenbeck in March 2009 that his wife was not a target, both 2009 proffer agreements clearly state that they provide only use immunity for statements that the speaker made at the 2009 debriefings, and that the government could still prosecute both Scott and Crystal Hollenbeck using information derived from the statements. See id.[54] In fact, unlike LaCaze, the government could have used Scott Hollenbeck's statements at his 2009 debriefing to prosecute Crystal Hollenbeck, and vice versa.

Third, unlike LaCaze, the government did not build its case against Bartko on Scott Hollenbeck's credibility and never presented (not even through Hollenbeck) direct evidence of Bartko's criminal intent. Stated differently, unlike Robinson's direct testimony in LaCaze that he had had a conversation with Princess LaCaze before the murder and had expressly agreed with her to murder her husband, Hollenbeck provided no such direct testimony that he and Bartko expressly agreed to commit the crimes charged in the superseding indictment. Rather, the government presented a mountain of circumstantial evidence of Bartko's criminal intent in

[53] Although the same attorney represented both Scott Hollenbeck and Crystal Hollenbeck, even if that attorney shared Crystal Hollenbeck's proffer agreement with Scott Hollenbeck, this fact would not support a finding that the *government* told Scott Hollenbeck that his wife was not a target.

[54] The plain text of these agreements, alone, shows that they are far from the "free pass" Bartko claims they are. [D.E. 212] at 6.

the form of documents (such as correspondence, emails, bank records, telephone records), and witness testimony (exclusive of Hollenbeck). Accordingly, LaCaze does not help Bartko.

Bartko also argues that he could have impeached Scott Hollenbeck using the government's 2009 statement to Hollenbeck that it would not prosecute him. Specifically, Bartko asserts that had he known that the government had told Scott Hollenbeck in February 2009 that he was not a target of the on-going investigation concerning Webb Group, Franklin Asset Exchange, Disciples Trust, or the Capstone Fund, that information "would have been the high point of any cross-examination." [D.E. 213] at 5. In making this argument, Bartko suggests that a person who is told that he is not a target generally assumes he will never be prosecuted.

The court doubts that any competent lawyer ever would advise a client that a prosecutor's statement during an on-going investigation that a client is or is not a target, subject, or witness is irrevocable, and no evidence suggests that Scott Hollenbeck's lawyer or anyone else ever provided such advice to Hollenbeck. Moreover, Bartko has not shown that Scott Hollenbeck believed that either he or his wife were immune from prosecution for crimes involving Webb Group, Franklin Asset Exchange, Disciples Trust, or the Capstone Fund because the government had told him in February 2009 that he was not a target. In fact, the plain language in the 2009 proffer agreements states that each Hollenbeck was told he or she was not a target, but also states that each could still be prosecuted. See [D.E. 213-1] at 2–4; see also [D.E. 227-7] at ¶¶ 8–10, 12. Furthermore, given the volume of devastating impeachment material that defense counsel had and used during Hollenbeck's cross-examination, the February 2009 non-target status comment would have been only an immaterial blip in an already exhaustive and devastating impeachment.

In sum, both 2009 Hollenbeck Proffer Agreements are cumulative impeachment evidence that Scott Hollenbeck was biased in favor of cooperating with the government in the hopes of, not in exchange for, lenient treatment. At Bartko's trial, defense counsel used a plethora of other evidence to demonstrate that same bias. The two 2009 Hollenbeck Proffer Agreements simply do not belong to an additional category of impeachment evidence. See Ellis, 121 F.3d at 917–18; United States v. Hoyte, 51 F.3d 1239, 1243 (4th Cir. 1995) (holding that additional impeachment evidence was not material because the witness "was impeached in so many other ways"); United States v. Rawle, No. 90-6255, 1991 WL 22836, at *4 (4th Cir. May 6, 1991) (per curiam) (unpublished table decision) ("The actions of [the] witnesses[, which the defense used for impeachment,] were of such an unlawful and immoral magnitude that an agreement with the government would only provide cumulative [impeachment] evidence.").

Alternatively, even if the court assumed that both 2009 Hollenbeck Proffer Agreements were not cumulative impeachment evidence, there is no reasonable probability that, had the agreements been disclosed, the jury would have reached a different verdict. See, e.g., Smith, slip op. at 2–3; Banks v. Dretke, 540 U.S. 668, 700–03 (2004). Materiality of impeachment evidence hinges both on the importance of a particular witness to the case and on the government's reliance on the witness's testimony. See, e.g., Smith, slip op. at 3; Banks, 540 U.S. at 700–03; Strickler, 527 U.S. at 292–96; Giglio, 405 U.S. at 154. Scott Hollenbeck was not critical to the government's case, and the government did not rely on his credibility in prosecuting Bartko. Defense counsel's devastating cross examination of Hollenbeck impeached Hollenbeck with multiple categories of impeachment evidence, including (1) Hollenbeck's felony convictions, (2) his bias in favor of the government due to his desire to receive a Rule 35 motion and a reduction in his 168-month prison sentence for his involvement in Mobile Billboards's fraud, (3) his bias

in favor of the government due to his desire to avoid being prosecuted for the fraud that he committed with Colvin, Webb Group, Franklin Asset Exchange, Disciples Trust, and others, (4) his bias in favor of the government due to his desire to avoid being prosecuted for the fraud he committed while raising money for the Caledonian Fund and the Capstone Fund, (5) myriad specific instances of lying, fraud, and forgery throughout Hollenbeck's adult life, (6) prior inconsistent statements to prosecutors, (7) contradictions within his trial testimony, and (8) his inability to recall certain facts. After all this, the government could not have relied on Hollenbeck's credibility, for Hollenbeck had none left.

The government's approach in its closing corroborates this conclusion. In its initial closing argument, the government described Hollenbeck as a man who had told hundreds of lies hundreds of times. The government then reiterated that the case against Bartko was built on the other evidence presented at trial, including a mountain of documents, the testimony of other witnesses, and Bartko's own incredible testimony. In response, the defense attempted to make the whole case turn on Hollenbeck's credibility and urged the jury to remove Hollenbeck's entire testimony from its consideration. In its rebuttal argument, the government espoused a similar approach, explicitly—and quite properly—arguing that Hollenbeck's testimony was not needed at all to return a guilty verdict on any count. Rather, the government argued that the mountain of evidence arising from the documents, the testimony of other witnesses, and Bartko's own contradictory testimony proved Bartko's guilt beyond a reasonable doubt.

Having presided at this trial and having thoroughly reviewed the entire record, the court finds that had the two 2009 Hollenbeck Proffer Agreements been disclosed to the defense and then been used to impeach Hollenbeck, there is no reasonable probability that the withheld impeachment evidence would have altered at least one juror's assessment of Bartko's

culpability. See, e.g., Smith, slip op. at 3; Banks 540 U.S. at 700–03; Strickler, 527 U.S. at 292–96; United States v. Bodkins, 274 F. App'x 294, 299–301 (4th Cir. 2008) (per curiam) (unpublished); Ellis, 121 F.3d at 917–18; Hoyte, 51 F.3d at 1243; compare Brown v. French, 147 F.3d 307, 312–13 (4th Cir. 1998) (holding that undisclosed impeachment evidence was not material because the government had built its case on "overwhelming physical evidence tying [the defendant] to the crime"), with Monroe v. Angelone, 323 F.3d 286, 315–16 (4th Cir. 2003) (holding that undisclosed impeachment evidence was material because the witness's "trial testimony was not only relevant to [the defendant's] conviction, it was crucial").

3.

Bartko's third motion alleges that the government failed to disclose tolling agreements the government had entered into with Leamon in 2010. See [D.E. 225]. Those agreements tolled the statute of limitations "for potential federal criminal violations regarding Ms. Leamon's involvement in the fraudulent sale of investments during the year 2005, including conspiracy, mail fraud, the sale of unregistered securities, and money laundering . . . ." [D.E. 225-1] at 2–3, 4–5. The parties agreed to toll the statute of limitations "to allow additional time for the parties to present facts and discuss the matter . . . [and] to evaluate and discuss potential resolutions to [the] case." Id. at 2, 4. The first agreement, entered into on January 5, 2010, tolled the statute of limitations on Leamon's crimes until July 5, 2010. The second agreement, entered into on July 2, 2010, tolled the statute of limitations until December 5, 2010. Without these agreements, the five-year statute of limitations for some of Leamon's alleged crimes apparently would have run before her testimony in Bartko's case was complete.

The government concedes that this evidence was suppressed and that it had limited impeachment value. Thus, the issue becomes materiality. See Smith, slip op. at 2–3; Giglio,

405 U.S. at 154; Higgs, 663 F.3d at 735. The government argues that the 2010 Leamon Tolling Agreements are not material. [D.E. 227] at 7–8. In response, Bartko argues that Leamon's testimony was "vital" to a finding of his guilt on the conspiracy count in count one because the jury returned a general verdict. See [D.E. 236] at 15. Bartko argues that the verdict could have been based solely on activity related to Plummer, Leamon, and Legacy. Id.

First, in arguing this motion before the court on July 25, 2011, Bartko contended that this trial really was a three-witness trial and that the three witnesses were Hollenbeck, Plummer, and Leamon. Bartko's contention is preposterous. At the outset of this order, the court recounted at great length some of the evidence presented during this thirteen-day trial.[55] The court's description does not even come remotely close to recounting all of the evidence presented in this trial. The court utterly and completely rejects any notion that this trial—under any stretch of the imagination—was, or could be fairly characterized as, a three-witness trial.

Second, "[t]he materiality of Brady material depends almost entirely on the value of the evidence relative to the other evidence" in the case. Rocha v. Thaler, 619 F.3d 387, 396 (5th Cir. 2010) (quotations omitted), cert. denied, 132 S. Ct. 397 (2011). "Undisclosed evidence that is merely cumulative of other evidence is not material," nor is possible impeachment evidence regarding "a witness whose account is strongly corroborated by additional evidence supporting a guilty verdict . . . ." Id. at 396–97 (quotations omitted); see also Wood, 516 U.S. at 8 (holding that undisclosed impeachment evidence was not material because even without the witness's testimony, the physical evidence and testimony of other witnesses "overwhelming[ly]" demonstrated the defendant's guilt); United States v. Walters, 350 F. App'x 826, 830–31 (4th

[55] The court did so because Brady and its progeny require the court to review omitted evidence "in the context of the entire record." Agurs, 427 U.S. at 112–14; see Kyles, 514 U.S. at 460.

Cir. 2009) (per curiam) (unpublished) (rejecting a Brady motion based on undisclosed impeachment evidence because the witness's testimony was corroborated by other evidence in the case), cert. denied, 130 S. Ct. 2121 (2010); Ellis, 121 F.3d at 918 (holding that withheld impeachment evidence was not material because the witness's testimony was corroborated by other evidence in the case).

Here, Leamon's testimony involved her personal background, the formation of Legacy, her role with Legacy as the person involved in the community, and Plummer's role with Legacy as the person in charge of the books. Leamon's testimony also included Leamon's introduction to Bartko as part of the Mobile Billboards lawsuit in which Covington and Bartko were her lawyers, Legacy's dire financial status following the collapse of Mobile Billboards and the related adverse publicity, Bartko's use of Legacy's office for a January 11, 2005 meeting, the process Legacy used to receive money from the Capstone Fund's and Hollenbeck's other clients and then to send the money to the Capstone Fund, and Legacy's receipt of a 6 percent commission from the Capstone Fund. Finally, Leamon discussed Legacy's mailing of statements and letters to victims, the closing of Legacy's account at TriStone Bank and the switch to Wachovia, and Legacy's mailing of corrected statements and letters to investors. This testimony served primarily as summary evidence of Legacy's bank activity, mailings, and meetings, which was corroborated by substantial documentary evidence, the testimony of victims, the testimony of Plummer, and the testimony of Bartko.

Moreover, Leamon's testimony was not probative of Bartko's knowledge, intent, or good faith, all of which were the key elements that Bartko contested in connection with counts one through six. The only portions of Leamon's testimony possibly pertinent to Bartko's mental state were that both Hollenbeck and Bartko told her and Plummer to pool the investors' refunded

money and send the pooled money back to Bartko, Leamon Tr. 141–42, and that after the TriStone account was closed, Bartko told her, "[D]on't deal with a small bank, this time go to a larger bank like Wachovia." Id. 147. At trial, however, Bartko's own testimony corroborated his knowledge and intent on these points. Bartko admitted (1) that he told Leamon that he was refunding money from Hollenbeck's non-accredited investors, Bartko Tr. 125–26, (2) that he spoke with Plummer and Leamon in January 2005 about forming an "investment club" to pool money and then about investing in the Capstone Fund, id. 121, 248, 304–05, (3) that, at the time, he "assumed that some of [the refunded money from the non-accredited investors] would be the same as [that] later pooled through Legacy," id. 249, (4) that he agreed to pay a 6 percent finder's fee to Legacy, id. 251, (5) that, at the time, he "would not have [been] surprised" that Hollenbeck and Legacy had an arrangement whereby Legacy paid Hollenbeck, id. 252, and, (6) that, at the time, he knew that "[m]aybe ten" rejected non-accredited investors had reinvested in the Capstone Fund through Legacy. Id. 265. Furthermore, Bartko testified that although he did not tell Leamon or Plummer to open a new bank account at TriStone, id. 126, 246, he was aware that Legacy had done so shortly after Legacy had opened the account. Id. 246. Bartko also recalled "having a conversation . . . when [Leamon and Plummer] were having problems with the bank account and they asked me about a bank . . . so I said I've had good luck with Wachovia." Id. 126.

In short, Bartko's admissions and a mountain of other evidence independently corroborate Leamon's testimony. Such extensive corroboration of Leamon's testimony from documentary evidence, victim testimony, Plummer's testimony, and Bartko's testimony obliterates Bartko's materiality argument. See, e.g., Wood, 516 U.S. at 8 (holding that undisclosed impeachment evidence was not material because even without the witness's

testimony, the physical evidence and testimony of other witnesses "overwhelming[ly]" demonstrated the defendant's guilt); Rocha, 619 F.3d at 396; Walters, 350 F. App'x at 830–31; United States v. Jackson, 345 F.3d 59, 74–75 (2d Cir. 2003); Ellis, 121 F.3d at 918; United States v. Fankhauser, No. 93-5288, 1994 WL 66088, at *4 (4th Cir. Mar. 1, 1994) (per curiam) (unpublished table decision).

Bartko also contends that because he believed that the five-year statute of limitations had run on Leamon's potential crimes, "there was almost no viable material in hand to impeach Ms. Leamon, or to attempt to show the jury that she had a motive to curry favor with the government." [D.E. 225] at 4–5. The court disagrees. First, even though the five-year statute of limitations apparently had run on prosecuting Hollenbeck at the time of Bartko's November 2010 trial, defense counsel still asked Hollenbeck about his fear concerning such a criminal prosecution and his desire to avoid it. Defense counsel cannot now reasonably argue that its mistaken belief that the statute of limitations had run on Leamon's alleged crimes somehow prevented Bartko from exploring Leamon's understanding about whether she could still be prosecuted for the crimes set forth in the superseding indictment (or for her other conduct) and about her desire to avoid such prosecution.

Second, it is not at all clear that defense counsel *wanted* to impeach Leamon using her fear of prosecution for the charged crimes. The defense and the jury both knew that Plummer, Leamon's business partner, had pleaded guilty to the conspiracy count and was awaiting sentencing. Nonetheless, during cross-examination of Plummer, the defense did not attack Plummer based on her plea agreement or based on her desire to receive a reduced sentence. It is not clear that the defense would have treated Leamon—whose conduct the defense concedes had "[n]o discernible difference" from Plummer's—differently. Id. at 4.

Third, the defense had other evidence it could have used to impeach Leamon. During its cross of Plummer, the defense attacked Plummer's credibility by exploring her role in a Ponzi scheme that took place after Bartko closed the Capstone Fund. See Plummer Tr. 69–71. That scheme involved Leamon, Hollenbeck, and real estate investments.[56] In fact, Plummer expressly implicated Leamon in that scheme. Id. 70. But when Leamon took the stand, the defense did not use this impeachment evidence.

Finally, and perhaps most tellingly, the government and the defense barely mentioned Leamon in closing argument. Thus, although the defense could have impeached Leamon by exploring several sources of potential bias, it simply chose not to. The defense will not now be heard to complain about it.

In opposition to this conclusion, Bartko argues that the rules of evidence governing wrongful acts would have prevented the defense from exploring Leamon's bias arising from her desire to avoid prosecution. See Fed. R. Evid. 608, 609. Rules 608 and 609, however, do not govern bias impeachment. See, e.g., United States v. Abel, 469 U.S. 45, 50–51 (1984); Taylor v. Molesky, 63 F. App'x 126, 133 (4th Cir. 2003) (per curiam) (unpublished); Quinn v. Haynes, 234 F.3d 837, 845 (4th Cir. 2000);[57] Hafner v. Brown, 983 F.2d 570, 576 (4th Cir. 1992); United States v. McNatt, 931 F.2d 251, 255–56 (4th Cir. 1991). Moreover, because of the mountain of documentary evidence, the testimony of victims, the testimony of Plummer, the testimony of Bartko, and the testimony of other witnesses corroborating Leamon's testimony, the court finds no "reasonable probability that the jury would have returned a different verdict if [Leamon's] testimony had been either severely impeached or excluded entirely." Strickler, 527 U.S. at 296;

[56] Interestingly, this scheme also involved Bartko. Plummer Tr. 126–29. Bartko drafted the promissory note and reviewed the documents that were integral to that scheme. Id.

[57] This case actually analyzed West Virginia Rules of Evidence 608 and 404, but the Fourth Circuit noted that those rules are identical to their federal counterparts. Quinn, 234 F.3d at 845 n.9.

see also Wood, 516 U.S. at 8; Rocha, 619 F.3d at 396; Walters, 350 F. App'x at 830–31; Jackson, 345 F.3d at 74–75; Ellis, 121 F.3d at 918; Fankhauser, 1994 WL 66088, at *4.

4.

In Bartko's fourth amended motion for a new trial [D.E. 237], Bartko alleges that the government, through witness Gary Mlot, used false demonstrative exhibits and presented false testimony concerning the $701,000 that Colvin and Hollenbeck, through Franklin Asset Exchange, wired to Bartko in 2004 for investment in the Caledonian Fund. Cf. Giglio, 405 U.S. at 153–54; Napue, 360 U.S. at 265; Mooney, 294 U.S. at 112–13; Roane, 378 F.3d at 400–01.

The government may not knowingly elicit perjured or misleading testimony, and may not knowingly fail to correct unsolicited but still false or misleading testimony by government witnesses. Otherwise, the government violates due process. See Giglio, 405 U.S. at 153–54; Napue, 360 U.S. at 269; Mooney, 294 U.S. at 112–13; Basden, 290 F.3d at 614. The defendant bears the burden of proving knowledge and falsity. See King, 628 F.3d at 701–02; Roane, 378 F.3d at 401; Griley, 814 F.2d at 971. Even if the defendant meets this burden, his claim does not automatically prevail, for the false testimony must also have been material. See Agurs, 427 U.S. at 103 ("[T]he Court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." (footnotes omitted)); Elmore, 661 F.3d at 830; Basden, 290 F.3d at 614.[58] Stated differently, "[a] new trial is required [only] if the false testimony could . . . in any reasonable likelihood have affected the

[58] Bartko argues that "[u]nder Mooney-Napue [sic], proof of the requisite prosecutorial knowledge would establish on its own that the falsified evidence was material, thereby requiring reversal of a conviction without further inquiry into the effect of the false evidence on the outcome or the strength of the government's other evidence." [D.E. 237] at 12 n.5. Bartko misunderstands the applicable Supreme Court and Fourth Circuit case law.

judgment of the jury . . . ." Giglio, 405 U.S. at 154 (quotation omitted) (omissions in original); see also Agurs, 427 U.S. at 103; Napue, 360 U.S. at 271; Elmore, 661 F.3d at 830; Basden, 290 F.3d at 614; Kelly, 35 F.3d at 933.

According to Bartko, Mlot, a CPA and financial analyst employed in the United States Attorney's office, falsely testified that money that Hollenbeck received from victims George D. Brown, Leon Woodruff, Pastor Michael Lamb, Hayden M. Furrow, and Barry M. Singletary ended up in the Caledonian Fund account. Bartko also alleges that Mlot presented misleading charts that erroneously conveyed to the jury that the money of those five victims flowed directly from Hollenbeck to the Caledonian Fund. When Bartko made the motion, Bartko did not have a copy of the transcript of Mlot's testimony. On November 21, 2011, the court reporter filed a copy of that transcript [D.E. 242].

The court has reviewed the Mlot testimony, the exhibits discussed during Mlot's testimony, and the underlying exhibits referenced in the exhibits discussed during the Mlot testimony (to the extent admitted at trial). The court also has reviewed the government's opposition [D.E. 238] and supplemental opposition [D.E. 243], and Bartko's reply [D.E. 244–45]. Based on this review, Bartko clearly fails to demonstrate falsity.

The Mlot transcript and exhibits demonstrate that Mlot never falsely testified that the money of the five testifying victims was the same money transferred to Bartko's bank accounts for the Caledonian Fund. See Govt. Exs. 658 (George D. Brown's investment), 662 (Hayden M. Furrow's investment), 673 (Landmark Baptist Church's investment), 683 (Barry M. Singletary's investment); Mlot Tr. 25–40. Indeed, Mlot testified that the money Hollenbeck obtained from all victims in early 2004 went into "one big pot" in Hollenbeck's bank account. See Mlot Tr. 30. Mlot also testified that government exhibits 658, 662, 673, and 683 do not reflect all deposits

into Hollenbeck's account or transfers out of it. See id. 31–35, 40. In short, Mlot did not testify falsely and the exhibits discussed during his testimony were not false. Mlot's testimony and the exhibits likewise were not misleading. Alternatively, the evidence was not material. See, e.g., Agurs, 427 U.S. at 103; Giglio, 405 U.S. at 154.

C.

Having analyzed individually the evidence on which Bartko based his motions, the court must now assess the cumulative effect of that evidence on Bartko's conviction. The suppressed evidence is considered collectively for purposes of materiality. Kyles, 514 U.S. at 436 n.10, 454. Evidence that would have been excluded at trial is "by definition not material," and is therefore not considered. Ranney, 719 F.2d at 1190; see also Wood, 516 U.S. at 6; Agurs, 427 U.S. at 105–06; Moussaoui, 382 F.3d at 472. Likewise, because the court finds that the testimonies of Hollenbeck and Mlot were not perjurious or misleading, the court does not include their allegedly false testimony in the cumulative materiality analysis. See Ellis, 121 F.3d at 927–28; see also Smith, 572 F.3d at 1334–37. Thus, the court considers the collective materiality only of the suppressed impeachment evidence involving Hollenbeck and Leamon.

After a painstakingly careful and thorough review of the entire record and a reflection on the entire trial, the court finds that the cumulative effect of the suppressed impeachment evidence does not "undermine[] confidence in the outcome of the trial." Kyles, 514 U.S. at 434 (quotation omitted). Simply put, the cumulative effect of further impeachment of Hollenbeck with the proffer agreements and the impeachment of Leamon with the tolling agreements "could [not] reasonably be taken to put the whole case into such a different light as to undermine confidence in the verdict." Id. at 435; see Smith, slip op. at 2–3; Strickler, 527 U.S. at 296; Hoyte, 51 F.3d at 1243. Therefore, the evidence is not material. See Smith, slip op. at 2–3;

Kyles, 514 U.S. at 434–35, 454; Agurs, 427 U.S. at 111–13; Higgs, 663 F.3d at 735.

The same conclusion holds true even if the court were to have considered, in addition to the suppressed impeachment evidence, the allegedly omitted evidence from Judge Cromer and the allegedly false or misleading testimonies of Hollenbeck and Mlot.[59] In so finding, the court stresses that Bartko's case was not a close one. The trial record reveals overwhelming evidence of Bartko's guilt. The jury carefully heard the evidence over a three-week period. The jury received detailed jury instructions. After deliberating approximately four hours, the jury unanimously convicted Bartko on all six counts.

In opposition to this conclusion, Bartko contends that "[t]he evidence against Mr. Bartko was not overwhelming." [D.E. 211] at 4. He is wrong. He also asserts that "the case against Mr. Bartko was circumstantial and tenuous." Id. Wrong again. Circumstantial this case was; tenuous, it absolutely was not. The mountain of evidence marshaled against Bartko demonstrated his guilt beyond any shadow of a doubt. Moreover, if the jury had had any doubts, Bartko's testimony destroyed them. The jury was permitted not only to disbelieve Bartko's testimony, but to believe the opposite. See United States v. Griffin, 391 F. App'x 311, 320 (4th Cir. 2010) (unpublished) (acknowledging, in the Brady context, that "[i]t has long been established that when a defendant testifies, the trier of fact may consider his or her testimony in

[59] As stated, the materiality standard for the government's knowing use of false or misleading testimony is different from the materiality standard for suppressed evidence (whether impeachment evidence or non-impeachment evidence). Compare Giglio, 405 U.S. at 154 ("the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . ." (quotation omitted)), with Smith, slip op. at 2 ("there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different" (quotation omitted)). Here, when deciding whether the cumulative effect of both the allegedly false testimonies and suppressed evidence is material, the court employed Giglio's *lower standard for materiality*. See Smith, 572 F.3d at 1334; Arias, 2000 WL 933010, at *4–6 (recognizing the conflicting standards and concluding that the false testimony and suppressed evidence collectively was not material "even if we employ [Giglio's] lower materiality standard"). In doing so, the court remains very "confident that the jury's verdict would have been the same." Kyles, 514 U.S. at 453.

determining whether it shows guilt if it finds that the testimony was false"), cert. denied, 131 S. Ct. 1058 (2011); cf. Wright v. West, 505 U.S. 277, 296 (1992) (plurality opinion) ("As the trier of fact, the jury was entitled to disbelieve [the defendant's] uncorroborated and confused testimony . . . [and] to discount [the defendant's] credibility . . . and to take into account [the defendant's] demeanor when testifying . . . [;] [a]nd if the jury did disbelieve [the defendant], it was further entitled to consider whatever it concluded to be perjured testimony as affirmative evidence of guilt."); Wilson v. United States, 162 U.S. 613, 620–21 (1896) ("[I]f the jury were satisfied . . . that false statements in the case were made by defendant, . . . they had the right . . . to regard [the] false statements . . . as in themselves tending to show guilt."); United States v. Burgos, 94 F.3d 849, 867 (4th Cir. 1996) (en banc) ("Relating implausible, conflicting tales to the jury can be rationally viewed as further circumstantial evidence indicating guilt."); United States v. Mejia, 82 F.3d 1032, 1038 (11th Cir. 1996) ("A proper inference the jury can make from disbelieved testimony is that the opposite of the testimony is true."), abrogated on other grounds by Bloate v. United States, 130 S. Ct. 1345 (2010).

In sum, Bartko "received a fair trial . . . resulting in a verdict worthy of confidence." Kyles, 514 U.S. at 434. No Brady or Giglio violations occurred.

III.

Bartko received a fair trial in compliance with due process. The verdict is worthy of confidence. Accordingly, the court DENIES Bartko's motions for a new trial [D.E. 211–13, 225, 237]. Furthermore, the court DENIES Bartko's motion to unseal [D.E. 221]. The court is prepared to proceed with sentencing. Counsel shall confer and submit a proposed term of court in which to schedule the sentencing.

SO ORDERED. This 17 day of January 2012.

JAMES C. DEVER III
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:09-CR-321-D
No. 5:15-CV-42-D

| | | |
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| GREGORY BARTKO, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | **ORDER** |
| | ) | |
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Respondent. | ) | |

On November 1, 2010, Gregory Bartko ("Bartko" or "petitioner") stood trial accused of one count of conspiracy to commit mail fraud, money laundering, and the sale of unregistered securities, four counts of mail fraud and aiding and abetting, and one count of selling unregistered securities and aiding and abetting. The superseding indictment essentially charged Bartko with leading an interstate criminal scheme "to profit from fraudulent sales of investments to individual members of rural Baptist churches and others, and to conceal those profits." [D.E. 30] 1. The investments primarily concerned two private equity funds that Bartko, a long-time securities lawyer and securities dealer in Atlanta, Georgia, created named the Caledonian Fund and the Capstone Fund. Ultimately, the trial focused on Bartko's knowledge, intent, and good faith. On November 18, 2010, after a thirteen-day trial, a jury convicted Bartko of all six counts.

On July 1, 2011, Bartko moved for a new trial alleging that the government violated Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972). Thereafter, Bartko supplemented his motion for a new trial with additional motions. On January 17, 2012, in a 120-page order, the court denied Bartko's motions for a new trial [D.E. 246]. On April 4, 2012,

the court sentenced Bartko to 60 months' imprisonment on counts one and six and 216 months' consecutive imprisonment on counts two, three, four, and five [D.E. 257, 260]. Bartko appealed [D.E. 262]. On August 23, 2013, the United States Court of Appeals for the Fourth Circuit affirmed Bartko's conviction, Bartko's sentence, and this court's denial of Bartko's motions for a new trial. See United States v. Bartko, 728 F.3d 327 (4th Cir. 2013). On January 27, 2014, the Supreme Court denied Bartko's writ of certiorari. See Bartko v. United States, 571 U.S. 1183 (2014).

On January 26, 2015, Bartko moved under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence [D.E. 292]. On January 27, 2015, Bartko filed an amended motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence [D.E. 295]. On July 6, 2015, the government moved to dismiss, or alternatively for summary judgment concerning, Bartko's section 2255 motion [D.E. 301] and filed a memorandum in support [D.E. 302]. On July 27, 2015, Bartko moved to amend his section 2255 motion [D.E. 305]. On August 4, 2015, Bartko filed numerous exhibits in support of his amended section 2255 motion [D.E. 310]. On September 16, 2015, the court granted Bartko's motion to amend and dismissed as moot the government's motion to dismiss because the motion concerned Bartko's original section 2255 motion [D.E. 316]. On November 25, 2015, the government moved to dismiss, or alternatively for summary judgment concerning, Bartko's amended section 2255 motion [D.E. 321] and filed a memorandum in support [D.E. 322]. On December 30, 2015, Bartko responded in opposition and cross-moved for summary judgment [D.E. 327, 328]. On January 13, 2016, the government replied [D.E. 329]. On January 19, 2016, Bartko moved for discovery [D.E. 330]. On January 20, 2016, the government responded in opposition to Bartko's cross-motion for summary judgment [D.E. 331]. On February 2, 2016, the government responded in opposition to Bartko's motion for discovery [D.E. 332]. On February 10, 2016, Bartko replied concerning his cross-motion for summary judgment [D.E. 335].

On March 28, 2018, Bartko moved for leave to file supplemental Brady claims [D.E. 339] and filed a memorandum in support [D.E. 340]. On May 9, 2018, the government moved to dismiss Bartko's supplemental Brady claims [D.E. 343] and filed a memorandum in support [D.E. 344]. On May 23, 2018, Bartko responded in opposition [D.E. 345]. On June 6, 2018, the government replied [D.E. 346]. On June 8, 2018, Bartko moved for leave to file a surreply [D.E. 347]. On June 19, 2018, the court granted Bartko's motion to file a surreply [D.E. 350]. As explained below, the court denies Bartko's motion for leave to file supplemental Brady claims, denies Bartko's motion for discovery, grants the government's motion for summary judgment, denies Bartko's cross-motion for summary judgment, and dismisses Bartko's section 2255 claims.

I.

During Bartko's thirteen-day trial, 31 witnesses testified for the government, and the government introduced 366 exhibits. This court's 120-page order denying Bartko's motions for a new trial exhaustively recounts many aspects of the trial record that led to Bartko's conviction. See [D.E. 246]. That 120-page order also recounts the various witnesses, non-witnesses, and entities associated with Bartko's case. See id. Familiarity with that 120-page order and the entire record is presumed. Moreover, Bartko's latest motions have (again) prompted this court to review the entire record.

Bartko asserts eighteen claims. See [D.E. 292, 305]. Bartko alleges that documents that he obtained through the Freedom of Information Act ("FOIA") contain material information, and he asserts that the documents show that the government violated Brady v. Maryland, 373 U.S. 83 (1963), Giglio v. United States, 405 U.S. 150 (1972), and Napue v. Illinois, 360 U.S. 264 (1959). Bartko argues that his section 2255 claims, combined with the issues raised in his motions for a new trial and his direct appeal, demonstrate prejudice and that the court should vacate his conviction.

A.

Summary judgment is appropriate when, after reviewing the record as a whole, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(a); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247–48 (1986). The party seeking summary judgment initially must demonstrate the absence of a genuine issue of material fact or the absence of evidence to support the nonmoving party's case. See Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Once the moving party has met its burden, the nonmoving party may not rest on the allegations or denials in its pleading, see Anderson, 477 U.S. at 248–49, but "must come forward with specific facts showing that there is a genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (emphasis and quotation omitted). A trial court reviewing a motion for summary judgment should determine whether a genuine issue of material fact exists for trial. See Anderson, 477 U.S. at 249. In making this determination, the court must view the evidence and the inferences drawn therefrom in the light most favorable to the nonmoving party. See Scott v. Harris, 550 U.S. 372, 378 (2007).

A genuine issue for trial exists if there is sufficient evidence favoring the nonmoving party for the factfinder to return a verdict for that party. Anderson, 477 U.S. at 249. "The mere existence of a scintilla of evidence in support of the plaintiff's position [is] insufficient . . . ." Id. at 252; see Beale v. Hardy, 769 F.2d 213, 214 (4th Cir. 1985) ("The nonmoving party, however, cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another."). Only factual disputes that might affect the outcome under substantive law properly preclude summary judgment. Anderson, 477 U.S. at 248.

In reviewing a section 2255 motion, the court is not limited to the motion itself. The court also may consider "the files and records of the case." 28 U.S.C. § 2255(b); see United States v.

McGill, 11 F.3d 223, 225–26 (1st Cir. 1993). Likewise, a court may rely on its own familiarity with the case. See, e.g., Blackledge v. Allison, 431 U.S. 63, 74 n.4 (1977); United States v. Dyess, 730 F.3d 354, 359–60 (4th Cir. 2013).

B.

Bartko did not raise his eighteen claims on direct appeal. Thus, Bartko procedurally defaulted his claims unless he can show "cause" and "actual prejudice" or that he is "actually innocent." Bousley v. United States, 523 U.S. 614, 622 (1998); see Massaro v. United States, 538 U.S. 500, 504 (2003); United States v. Fugit, 703 F.3d 248, 253 (4th Cir. 2012); United States v. Sanders, 247 F.3d 139, 144 (4th Cir. 2001); United States v. Mikalajunas, 186 F.3d 490, 492–93 (4th Cir. 1999).

"Cause" requires a showing that "something external to the defense, such as the novelty of the claim or a denial of effective assistance of counsel" prevented the defendant from raising the claim on direct appeal. Mikalajunas, 186 F.3d at 493; see Murray v. Carrier, 477 U.S. 478, 488 (1986). "Prejudice" requires a showing that the alleged errors at defendant's trial worked "to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." United States v. Frady, 456 U.S. 152, 170 (1982) (emphasis omitted); see McCarver v. Lee, 221 F.3d 583, 592 (4th Cir. 2000). In the context of a Brady claim, "a petitioner shows 'cause' when the reason for his failure to develop facts . . . was the [government's] suppression of the relevant evidence." Banks v. Dretke, 540 U.S. 668, 691 (2004). A petitioner shows "prejudice" when "the suppressed evidence is 'material' for Brady purposes." Id. "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Id.

To show actual innocence, the petitioner "must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." Bousley, 523 U.S. at 623 (quotations omitted). When a defendant did not argue actual innocence on direct appeal, he may not do so in support of a section 2255 motion unless he can show by clear and convincing evidence that he is factually innocent of the offense for which he was convicted. See Bousley, 523 U.S. at 623; United States v. Pettiford, 612 F.3d 270, 282 (4th Cir. 2010).

II.

Bartko's first, second, third, fourth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fifteenth, and seventeenth claims allege that the government violated its obligations under Brady, Giglio, or Napue. To prove a Brady violation, Bartko must show three elements: "(1) that the evidence is favorable, either because it is exculpatory or impeaching; (2) that the government suppressed the evidence; and (3) that the evidence was material to the defense." United States v. Higgs, 663 F.3d 726, 735 (4th Cir. 2011); see Turner v. United States, 137 S. Ct. 1885, 1893 (2017); Smith v. Cain, 565 U.S. 73, 75 (2012); Banks, 540 U.S. at 691; Strickler v. Greene, 527 U.S. 263, 281–82 (1999); Giglio, 405 U.S. at 154–55; Brady, 373 U.S. at 87; United States v. Robinson, 627 F.3d 941, 951–53 (4th Cir. 2010). Evidence is favorable if it "it may make the difference between conviction and acquittal." Bagley, 473 U.S. at 676. 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." Id. at 682; see Turner, 137 S. Ct. at 1893; Smith, 565 U.S. at 75; Moseley v. Branker, 550 F.3d 312, 318 (4th Cir. 2008).

A "conviction obtained through use of false evidence, known to be such by representatives" of the government, violates due process. Napue, 360 U.S. at 269. A party asserting a Napue claim must prove that the evidence is both false and material and that the prosecutor knew that the

evidence was false. See, e.g., Basden v. Lee, 290 F.3d 602, 614 (4th Cir. 2002). "[A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." United States v. Agurs, 427 U.S. 97, 103 (1976); see Giglio, 405 U.S. at 153–54; United States v. Chavez, 894 F.3d 593, 601 (4th Cir. 2018); Elmore v. Ozmint, 661 F.3d 783, 830 (4th Cir. 2011).

"[T]he materiality of suppressed evidence is considered collectively, not item by item." Moseley, 550 F.3d at 318 (quotation omitted); see Turner, 137 S. Ct. at 1893–94; Kyles v. Whitley, 514 U.S. 419, 436–37 & n.10 (1995); Juniper v. Zook, 876 F.3d 551, 567–68 (4th Cir. 2017); Smith v. Sec'y, Dep't of Corr., 572 F.3d 1327, 1334 (11th Cir. 2009); Campbell v. Polk, 447 F.3d 270, 276 (4th Cir. 2006); McHone v. Polk, 392 F.3d 691, 697 (4th Cir. 2004); United States v. Arias, 217 F.3d 841, 2000 WL 933010, at *6 (4th Cir. July 10, 2000) (per curiam) (unpublished table decision); United States v. Ellis, 121 F.3d 908, 916–18 (4th Cir. 1997). The fundamental inquiry under Brady and Giglio is whether the court has confidence in the outcome of the trial. See Turner, 137 S. Ct. at 1893–95; Smith, 565 U.S. at 75; Kyles, 514 U.S. at 434–35; Bagley, 473 U.S. at 682; Higgs, 663 F.3d at 735.

A.

Bartko first alleges that the government violated Brady by not disclosing Special Agent Fleming's handwritten notes from an interview with government witness Mark Winn. Bartko argues that there are material differences between Special Agent Fleming's handwritten notes and the FBI 302 report concerning the interview that the government produced during discovery. See [D.E. 292] 13–16; [D.E. 305] 6–7.

Winn testified during the government's case-in-chief. Winn worked for the Financial

Industry Regulatory Authority ("FINRA") and was responsible for ensuring that information was properly maintained in FINRA's Central Registration Depository System ("CRD"). Winn testified that CRD is a computer system that houses information concerning licensing, qualifications, and disciplinary proceedings of registered broker-dealer firms and their employees. [D.E. 282-1] 108–11. CRD allows employers or users to run a pre-hire search of an individual that they are contemplating hiring to see if that individual has any prior disciplinary proceedings or any other reportable events, such as customer complaints or terminations. See id. at 114–15, 127–30. The user must get consent from the individual being searched and affirm that they are considering the individual for employment. See id. at 118–19. Winn testified that after the user runs the CRD search, the user would first see a composite information page that included the individual's name, address, and other general information. See id. at 127–28. If an individual had any "disclosure accounts" (i.e., reportable events or disciplinary proceedings), those accounts would be summarized at the bottom of the composite page. See id. at 128. If a user wanted to access the details of the disclosures, the user would need to look to the left side of the screen, which contained different links, and click on the link that said "disclosures." See id.

On January 15, 2004, Bartko searched CRD for records concerning John Colvin. See [D.E. 193] 148, 162–64. On January 16, 2004, Bartko conducted a second record search on Colvin. See id. On February 17, 2004, Bartko searched CRD for records concerning Scott Hollenbeck. See id. at 157. Bartko became involved with Colvin when Colvin sent Bartko promotional materials via telefax concerning Webb Group and the financial products it offered. See [D.E. 246] 5. The promotional material contained references to guaranteed, fixed returns of 14.4 percent and included other indicators of fraud, such as the claim that the investments were protected by the Securities Investor Protection Corporation. Id. The material identified Hollenbeck as president of Webb

Group. Hollenbeck was Colvin's business partner and top salesman. Id. Winn testified that CRD records concerning Hollenbeck referenced fraud and other reportable events. See [D.E. 282-1] 132–37. Winn also testified that CRD records concerning Colvin referenced fraud and other reportable events. See id. at 137–43.

Bartko admitted at trial that he checked the box on the CRD records indicating that he was considering Colvin and Hollenbeck for employment to gain access to Colvin's and Hollenbeck's records, even though those representations were false. See [D.E. 193] 162–64. Bartko also testified that he only viewed the composite screen when he searched Colvin and Hollenbeck and that he did not remember reviewing any further details concerning either Colvin or Hollenbeck. See id. at 15–17, 148–150.

Bartko alleges that Special Agent Fleming's handwritten notes from his interview with Winn contain "favorable" statements that reveal the complexity of the CRD system. Bartko argues that he would have used this information to cross-examine Winn concerning the complexities of CRD and to show that Bartko likely saw only limited information concerning Hollenbeck and Colvin. See [D.E. 292] 14; [D.E. 305] 6–7. In support of this argument, Bartko alleges the following variances between Special Agent Fleming's handwritten notes and the FBI 302 report:

- The initial screen on the CRD system is a composite screen that shows limited information such as name, date of birth, resident and business address, a link to disciplinary and reportable events. The interview notes show that if someone wants to actually review the disciplinary and reportable events, there is a lengthy process involved—it is not simply a matter of looking at one page that immediately reveals this information.

- In describing "reportable disclosures" available in the CRD system, Winn remarked (as reported in SA Fleming's notes but not in the 302) that there were none shown which related to Hollenbeck's termination in 2002, with Winn's explanation being "no—just reason for termination they have responsibility to submit the termination disclosure. No trigger yet."

- In describing other "reportable events" available in the CRD system, Winn remarked (as reported in SA Fleming's notes but not the 302) that some events were not "in the system in 2004."

- In describing termination comments available in the CRD system with regards to Colvin, Winn remarked (as reported in SA Fleming's notes but not the 302) that firm comments are not required and would not have appeared on the initial screen. Winn further remarked that one would have to go to the "prior employment screen" for that information.

- Winn mentioned in his interview that Colvin had a customer complaint in July 2004 (reported in SA Fleming's notes but not in the 302), but that was not accessible in early 2004 when Bartko accessed the CRD records.

- In Winn's discussion of "non-reportable customer complaints," Winn said customer complaints are reportable only for two years and then are accessible only in the archived section. Winn also said that Colvin's record would have shown at least one customer complaint of historical nature.

[D.E. 292] 14–15.

Even viewing the evidence in the light most favorable to Bartko, Fleming's handwritten notes are not favorable. Moreover, the notes are not exculpatory, and they do not contain impeachment material because the handwritten notes, the FBI 302 report, and Winn's testimony are consistent. See, e.g., McHone, 392 F.3d at 701.

As for the first and fourth alleged variance, Winn testified that a user performing a search in the CRD system would first see a composite information page. See [D.E. 282-1] 127–30. Winn also testified that if an individual had any "disclosure accounts" (i.e., reportable events), those accounts would be listed at the bottom of the composite page. See id. at 128. If an individual wanted to access the disclosures, the individual would need to look to the left side of the screen which contained different links and click on the link that said "disclosures." See id. This statement comports with the FBI 302 report. See [D.E. 303-1] 2 ("The navigation page would lead [the user]

to a 'composite screen' . . . . A 'hyperlink' would then connect the searcher to details concerning the disclosures.").

As for the second alleged variance, Bartko omits that, right before the sentence he cites, the handwritten notes state that Winn saw a "full termination in May 2002" for Hollenbeck. See [D.E. 292-1] 6.

As for the third alleged variance, this information comports with Winn's testimony. Winn testified that some reportable events in Colvin's and Hollenbeck's CRD reports were not in the system in 2004. See [D.E. 282-1] 138–40.

As for the fifth alleged variance, Bartko fails to explain how this information would provide him with impeachment material. Winn testified that a customer filed a complaint concerning Colvin in 2003 and that the complaint would have been available when Bartko searched for Colvin in January 2004. See [D.E. 282-1] 143. Winn's statement that there was an additional customer complaint filed in July 2004 that would not have been available at the time Bartko searched for Colvin is irrelevant and has no impeachment value because it does not conflict with Winn's testimony.

As for the sixth alleged variance, this information comports with Winn's testimony. Winn testified that "[c]ertain types of customer complaints are only to be reported for up to two years." [D.E. 282-1] 129. Accordingly, Bartko's claim fails.

In any event, even viewing the evidence in the light most favorable to Bartko, the evidence is not material. See, e.g., Turner, 137 S. Ct. at 1893–95. The government introduced substantial other evidence showing that Bartko was aware of Hollenbeck's lies and fraudulent fundraising methods. See [D.E. 246] 5–20. Accordingly, there is no reasonable probability that, had this

evidence been disclosed, the result of Bartko's trial would be different. See, e.g., Turner, 137 S. Ct. at 1893–95.

B.

In his second claim, Bartko alleges that the government violated Brady by not disclosing Postal Inspector Carroll's handwritten notes from an interview of SEC enforcement attorney Alex Rue. See [D.E. 292] 16–17; [D.E. 305] 8–9. Rue represented the SEC in its case against Mobile Billboards of America, Inc. ("Mobile Billboards") concerning fraudulent investment products, a case that involved Scott Hollenbeck, Mobile Billboards's top salesman. See [D.E. 282-5] 103–04, 113. Bartko represented Hollenbeck in the SEC case involving Mobile Billboards. See id. at 106.

Bartko alleges that the notes contain exculpatory information and that there are variances between Carroll's notes and the memorandum of interview ("MOI") from the interview that the government produced to Bartko during discovery. Specifically, Bartko contends that Carroll's notes state that Rue told the "interviewers—including the AUSAs in this case—that he 'did not believe that Bartko knew that Hollenbeck was selling securities for Bartko.'" [D.E. 292] 16–17. Bartko contends that these notes reveal that the chief SEC investigator believed that Bartko was unaware of Hollenbeck's fraudulent activities. See id. at 17. Bartko also cites numerous other statements from Carroll's notes that he contends are favorable to him. See [D.E. 305] 8–9.

Carroll's notes are not favorable to Bartko. See, e.g., McHone, 392 F.3d at 702. Carroll's notes do not state, as Bartko contends, that Rue did not believe that Bartko knew Hollenbeck was selling securities for Bartko. Rather, Carroll's notes state that "I did not believe GB—knew [redacted] was sending GB signed checks not consistent w/ being finder" [D.E. 292-2] 4. This statement means that Rue did not believe Bartko, and Rue knew that Bartko was receiving checks from Hollenbeck in a manner not consistent with being a finder. Moreover, Carroll's notes are

inculpatory. The notes state that "[Redacted] admits to using forged doc—GB in room, hears this, and not withstanding sends him to sell for him," and "[w]orking through Capstone—realized GB was dishonest w/ SEC—After received documents w/ rejected investors—Then [redacted] calls me and tells me GB did not return $ it was sent to LRM + returned to him." [D.E. 292-2] 3, 5. Carroll's notes also state that "[n]ow know GB involved in 2 offerings, tied to SBH [redacted]—two people I was investigating." Id. at 4. Accordingly, Bartko's second claim fails. See, e.g., McHone, 392 F.3d at 702.

C.

In his third claim, Bartko argues that the government withheld material information concerning John Colvin that Bartko could have used to impeach Colvin's statements that were introduced at trial under the co-conspirator hearsay exception. See [D.E. 292] 17–19; [D.E. 305] 9–11. (Colvin did not testify at trial.) Specifically, Bartko contends that there are material variances between Inspector Carroll's notes and the 10-page MOI produced to Bartko during discovery concerning statements that Colvin made during an interview with Carroll and Special Agent William DeSantis of the Internal Revenue Services. See id. Bartko argues that Carroll's notes "include statements which are exculpatory and impeaching to statements admitted during Petitioner's trial and attributed to the Petitioner as a co-conspirator under Fed. R. Evid. 801(d)(2)(E)." [D.E. 305] 10. Bartko identifies the following alleged variances:

> (i) Carroll's notes reflect that Colvin signed the AIG surety bond application on March 2, 2004 as the general partner of the Franklin Asset Exchange, whereas the MOI reflects that Colvin refused the request by Hollenbeck and Bartko that he do so; (ii) Carroll's notes reflect that Hollenbeck and his wife were cooperating with the prosecution and that Colvin raised questions about why the Hollenbecks were not being indicted; (iii) Carroll's notes refer to lies during the interview, fake statements and lies from witnesses, whereas there are no such references in Carroll's MOI; and (iv) Carroll's notes include no mention by Colvin that Bartko prepared the offering materials for Webb Group Financial and the Franklin Asset Exchange, whereas

specific reference is included to that effect in Carroll's MOI.

[D.E. 292] 18–19.

As for the first alleged variance, Bartko is incorrect. Carroll's notes do not state that Colvin signed the AIG surety bond application. To the contrary, Carroll's notes state that "[Colvin] [d]id not sign bond application in March '04—[he] was not a General Partner in FAE. Bartko & SBH asked [him] to use [his] name—[he] refused—[he] was still a registered investment advisor." [D.E. 292-3] 14. This notation comports with the MOI. See [D.E. 303-2] 4. In any event, this information is not favorable or material.

As for the second alleged variance, even assuming such variance exists, Bartko fails to explain how such variance is favorable or material. The notes do not contain exculpatory evidence. To the extent that the notes contain any impeachment evidence, such evidence is not material because it is cumulative. Defense counsel thoroughly impeached Hollenbeck about his desire to receive a cooperation-based reduction in his 168-month prison sentence stemming from the fraud involving Mobile Billboards. See, e.g., Turner, 137 S. Ct. at 1893–95; United States v. Parker, 790 F.3d 550, 558 (4th Cir. 2015); McHone, 392 F.3d at 700; Ellis, 121 F.3d at 917 n.10; United States v. Hoyte, 51 F.3d 1239, 1243 (4th Cir. 1995). Defense counsel also explored at great length and with absolutely devastating effect Hollenbeck's character for untruthfulness. See [D.E. 246] 107–08. Thus, there is no reasonable probability that any additional impeachment evidence concerning Hollenbeck would have resulted in a different verdict. See, e.g., Turner, 137 S. Ct. at 1893–95; Kyles, 514 U.S. at 435; Bartko, 728 F.3d at 338–39.

As for the third alleged variance, Bartko does not cite any alleged lie or false statement or explain how any alleged lies are Brady material. Thus, Bartko's allegation is too vague and conclusory to show a Brady violation. See, e.g., United States v. Eason, 829 F.3d 633, 638 n.5 (8th

Cir. 2016); United States v. Soto-Mendoza, 641 F. App'x 691, 694 (9th Cir. 2016) (per curiam) (unpublished). Moreover, despite Bartko's contentions, Inspector Carroll's MOI is consistent because it reflects Colvin's statements that he knew Hollenbeck was lying to investors, using a fake surety bond, and discussing investments with Wells Fargo. Compare [D.E. 303-2] 4–5, with [D.E. 328] 13. Accordingly, Bartko's claim fails.

As for the fourth alleged variance, there is no inconsistency. Carroll's notes state that "[redacted]—had a segment private placement memo for Webb Group or FAE" above which Carroll wrote "believe Bartko wrote it." [D.E. 292-3] 14. This notation comports with Carroll's MOI which states, "Colvin stated that Hollenbeck had a PPM for FAE and Webb Group that he believes was written by Bartko." [D.E. 303-2] 3. Accordingly, the evidence is not favorable to Bartko.

In Bartko's amended motion to vacate, he raises a fifth alleged variance. See [D.E. 305] 10–11. Specifically, Bartko contends that Carroll's notes, dated May 27, 2009, show that the FBI interviewed Colvin in 2003 because Colvin was suspected of selling investments and claiming that a surety bond secured the investments. See id. This evidence, however, is not material. It is merely cumulative impeachment evidence. See Turner, 137 S. Ct. at 1894–95. Moreover, Colvin's statements could be impeached in so many other ways, most notably by using Colvin's 2010 federal conviction for mail fraud and securities fraud. See Parker, 790 F.3d at 558; McHone, 392 F.3d at 700; Ellis, 121 F.3d at 917 n.10; Hoyte, 51 F.3d at 1243; cf. United States v. Colvin, 467 F. App'x 181 (4th Cir. 2012) (per curiam) (unpublished). Thus, there is no reasonable probability that impeachment material concerning Colvin's alleged involvement in a fraudulent investment scheme in 2003 would have changed the outcome of Bartko's trial. See, e.g., Turner, 137 S. Ct. at 1893–95.[1]

[1] Bartko also asserts that the FOIA action revealed that there are as many as eight additional witness MOIs that the government did not disclose to him. See [D.E. 305] 10. Bartko's speculation and conjecture fail to state a claim for a Brady violation. See, e.g., United States v. Garcia-Martinez,

D.

In Bartko's fourth claim, he argues that the government withheld written instructions that the government provided to law enforcement concerning the process to follow when contacting prospective witnesses. See [D.E. 292] 19–20; [D.E. 292-4]; [D.E. 303-4]. In his amended motion, Bartko cites additional case notes. See [D.E. 305] 11–12; [D.E. 310-2]. The case notes include a list of 20 individuals that the government contacted to determine whether they met the definition of "victim" for sentencing purposes and a summary of an interview with John Ricci, one of the government's witnesses at Bartko's sentencing. See [D.E. 310-2]. Bartko argues that these instructions and notes evince the "government's misconduct in avoiding the documentation of Brady information and its pattern of insulating from Petitioner's defense what could be (and is shown to be) materially exculpatory evidence." [D.E. 305] 12.

Even viewing the record in the light most favorable to Bartko, the cited evidence is not favorable or material. The government created the instructions in preparation for Bartko's sentencing. See [D.E. 322] 20. Bartko argued at sentencing that his fraud did not involve 50 or more victims. See [D.E. 276] 10. Accordingly, the government needed to interview witnesses who could describe Hollenbeck's and Bartko's fraud. Nonetheless, even if some of the victims that the agents contacted did not remember Hollenbeck's and Bartko's fraud (and thus did not testify at Bartko's sentencing), such information was not material to whether there were 50 or more victims. Moreover, to the extent that Bartko contends that these documents show that the offense did not involve 50 or more victims, that claim also fails. Bartko raised and lost this claim on direct appeal. See Bartko, 728 F.3d at 346. Bartko cannot use section 2255 to recharacterize and relitigate a claim

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730 F. App'x 665, 673 (10th Cir. 2018) (unpublished); United States v. Pearson, 676 F. App'x 202, 203 (4th Cir. 2017) (per curiam) (unpublished); United States v. Caro, 597 F.3d 608, 619 (4th Cir. 2010).

he lost on direct appeal. See Frady, 456 U.S. at 164–65; Dyess, 730 F.3d at 360; United States v. Roane, 378 F.3d 382, 396 n.7 (4th Cir. 2004); Boeckenhaupt v. United States, 537 F.2d 1182, 1183 (4th Cir. 1976) (per curiam). Accordingly, this claim fails.[2]

E.

In Bartko's sixth claim, he argues that undisclosed notes from the FBI's interview with David Lewis, one of Wes Covington's law partners, contain material exculpatory evidence. See [D.E. 292] 21; [D.E. 305] 13–14.[3] Covington was Bartko's co-counsel when Bartko represented Hollenbeck in regulatory matters concerning Mobile Billboards and also was involved in various other fraudulent schemes with Bartko before committing suicide. See [D.E. 246] 15–16, 19–23, 26, 28–29, 33, 44, 46–48, 64, 67, 74–79.

Bartko alleges that the notes are exculpatory because they show that Hollenbeck asked Wes Covington (and not Bartko) to provide "lulling" letters to the Gospel Light Baptist Church. See [D.E. 305] 13. According to Bartko, this information evinces that he did not know of, or participate in, Hollenbeck's fraudulent schemes. See id. Bartko also argues that he would have used this evidence to oppose Lewis's motion to quash the subpoena Bartko served on Lewis's law firm, which sought recorded conversations between Covington and Hollenbeck. See id. at 13–14.

Even viewing the record in the light most favorable to Bartko, the Lewis interview notes are not favorable. Lewis was not involved with Bartko's, Hollenbeck's, and Covington's fraudulent dealings. Lewis did not state that Bartko did not participate in "lulling" churches and other investors. See [D.E. 310-3]; [D.E. 303-6]. Rather, Lewis's statement speaks only to Lewis's lack of knowledge

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[2] Bartko also references notes to other withheld witness interviews. See [D.E. 305] 9–10. Bartko's conclusory references are insufficient to state a claim. See, e.g, Pearson, 676 F. App'x at 203; Caro, 597 F.3d at 619.

[3] Bartko withdrew his fifth claim. See [D.E. 305] 12–13.

concerning Bartko's involvement, and the "favorableness prong of Brady requires more." United States v. Sipe, 388 F.3d 471, 487 (5th Cir. 2004); United States v. Dillman, 15 F.3d 384, 390 (5th Cir. 1994). Alternatively, Lewis's statements are not material. See, e.g., Turner, 137 S. Ct. at 1893–95. Lewis's statements that he did not know about Bartko's involvement with "lulling" churches and other investors are insignificant because Lewis was not involved in the fraud. See, e.g., United States v. McCoy, 348 F. App'x 900, 902 (4th Cir. 2009) (per curiam) (unpublished) ("It is quite clear that evidence that merely contradicts a legally-insignificant witness statement or fact offered by the Government is, by definition, immaterial."). The mountain of evidence marshaled against Bartko demonstrated his guilt beyond any shadow of a doubt. See [D.E. 246] 118–19. Accordingly, there is no reasonable probability that a statement from an uninvolved third party would have affected the outcome of Bartko's trial. See, e.g., Turner, 137 S. Ct. at 1893–95; United States v. Sanchez, 118 F.3d 192, 196–97 (4th Cir. 1997). Thus, Bartko's claim fails.

F.

In Bartko's seventh claim, he argues that the undisclosed MOI and Inspector Carroll's notes from an interview with SEC broker-dealer examiner Gannon Lasseigne contain exculpatory evidence. See [D.E. 292] 21–22; [D.E. 305] 14–16. Lasseigne worked on the SEC's broker-dealer examination of Capstone Partners, a registered broker-dealer that Bartko owned.

Lasseigne did not testify at trial. Nonetheless, Bartko argues that, if the MOI were disclosed, he would have called Lasseigne as a defense witness and used Lasseigne to:

> corroborate [his] testimony describing the nature of the SEC examination, to establish through an SEC witness the sheer volume of information and material Bartko provided during the examination; and to demonstrate that the testimony given by witness David McClellan was at variance with Lasseigne's recollection. Perhaps most importantly, Lasseigne's testimony could have been used by Bartko to further establish the false and misleading statements made to Bartko by Rue and McClellan as to the purpose of the broker-dealer examination and the fact that information

> obtained from Bartko as a result of the SEC's misrepresentations was obtained for use by AUSA Wheeler in Bartko's prosecution. In addition, Lasseigne's testimony would have contradicted the false denials by witnesses Rue and McClellan to the effect that the selection of the timing of the broker-dealer examination for Capstone Partners, L.C. was due to it being a "cycle exam" rather than a specific request by Rue that the SEC examiners conduct a contrived spot exam.

[D.E. 292] 22.

Bartko's claim is nonsensical. Bartko does not cite where Carroll's notes or the MOI contain the favorable information that he contends exists. See [D.E. 292-6]; [D.E. 303-7]. Specifically, Bartko does not cite, and the court has not found, where the MOI or Carroll's notes state that the SEC made misrepresentations to Bartko to obtain evidence for AUSA Wheeler. Moreover, "Bartko's post-trial creation of a new trial strategy involving the [SEC] does not make evidence supporting that new trial strategy material to the trial that actually occurred." [D.E. 246] 93 n.48 (collecting cases).

The remainder of the information in the MOI and Carroll's notes comport with David McClellan's trial testimony. McClellan was the branch chief of the broker-dealer office of compliance for the SEC in Atlanta and was involved with the SEC's examination of Capstone Partners. McClellan testified that Bartko cooperated during the SEC's investigation and that he never refused to give McClellan access to requested bank statements. See [D.E. 282-7] 81–82. McClellan also testified that he conducted an oversight audit exam of Capstone Partners because Alex Rue had dealt with Bartko in March 2005, believed that there were some issues with Capstone Partners, and asked McClellan to investigate. See id. at 84–85. Accordingly, the notes are not favorable because they comport with Rue's trial testimony. See McHone, 392 F.3d at 702.

In any event, even viewing the record in the light most favorable to Bartko, the MOI and Carroll's notes are plainly unfavorable to Bartko. The MOI states that Lasseigne told Carroll that

there was "an issue of money laundering through Bartko's IOLTA account." [D.E. 303-7] 2. The MOI further states that "Lasseigne stated Bartko's business practices as a whole led him to additional questions and wanting to see all of Bartko's accounts, including his attorney trust account." Id. These details comport with Carroll's handwritten notes. See [D.E. 310-4] 3. Thus, even assuming that the MOI and Carroll's notes contain some favorable information, the notes and the MOI do not constitute Brady material because "the unfavorable portion of the [evidence] would have outweighed any exculpatory value." McHone, 392 F.3d at 702 (emphasis omitted). Accordingly, Bartko's claim fails.

G.

Bartko's eighth claim, tenth, and eleventh claims all concern Scott Hollenbeck. In his eighth claim, Bartko argues that the government withheld an FBI 302 report from an October 15, 2010, interview of C. Scott Holmes—Hollenbeck's former defense counsel—and Holmes's notes from a 2008 interview with Bartko. See [D.E. 292] 22–23. Bartko argues that these materials would have allowed him to more thoroughly impeach Hollenbeck concerning Hollenbeck's desire to assist the government in hopes of receiving a Rule 35 motion for a sentence reduction. See [D.E. 305] 18.

Bartko's claim that the 302 report is favorable is laughable. The 302 report states:

> Holmes got the impression that Bartko's warnings to Hollenbeck appeared to be more "CYA" for Bartko's benefit rather than to provide Hollenbeck with real legal guidance. He noted that some of what Bartko was relaying did not make sense in light of the facts as Holmes understood them. Therefore, Holmes became suspicious that Bartko had been mostly interested in benefitting from Hollenbeck by tapping into Hollenbeck's sales charisma and the huge network of sales prospects Hollenbeck had developed.
>
> Holmes stated that during his meeting with Bartko, Bartko informed Holmes that he had consulted with a criminal attorney who advised him to shut down Capstone and refund the money to investors.

[D.E. 303-8] 1–2.

In his tenth and eleventh claims, Bartko alleges that the government failed to turn over notes from a June 3, 2010, interview of Hollenbeck, which allegedly contain impeachment evidence. See [D.E. 292] 25; [D.E. 305] 21–22. Bartko also claims that the government failed to disclose that Hollenbeck gave false testimony at Colvin's trial concerning whether Hollenbeck had received promises or benefits for testifying. See [D.E. 292] 26; [D.E. 305] 21–25.

Bartko's eighth, tenth, and eleventh claims all fail because Bartko cannot show that any additional impeachment materials concerning Hollenbeck are material. As this court explained in its 120-page order:

> Scott Hollenbeck was not critical to the government's case, and the government did not rely on his credibility in prosecuting Bartko. Defense counsel's devastating cross examination of Hollenbeck impeached Hollenbeck with multiple categories of impeachment evidence, including (1) Hollenbeck's felony convictions, (2) his bias in favor of the government due to his desire to receive a Rule 35 motion and a reduction in his 168-month prison sentence for his involvement in Mobile Billboards's fraud, (3) his bias in favor of the government due to his desire to avoid being prosecuted for the fraud that he committed with Colvin, Webb Group, Franklin Asset Exchange, Disciples Trust, and others, (4) his bias in favor of the government due to his desire to avoid being prosecuted for the fraud he committed while raising money for the Caledonian Fund and the Capstone Fund, (5) myriad specific instances of lying, fraud, and forgery throughout Hollenbeck's adult life, (6) prior inconsistent statements to prosecutors, (7) contradictions within his trial testimony, and (8) his inability to recall certain facts. After all this, the government could not have relied on Hollenbeck's credibility, for Hollenbeck had none left.

[D.E. 246] 107–08. Indeed, the Fourth Circuit agreed with this court and held that "we do not think that impeachment [of Hollenbeck] could have made an iota of difference in the jury's final judgment." Bartko, 728 F.3d at 337.[4] Accordingly, Bartko's eighth, tenth, and eleventh claims fail.

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[4] To the extent that Bartko argues that the FBI memorandum is exculpatory because it mentions a meeting between Hollenbeck and Covington without Bartko, see [D.E. 305] 23, that claim also fails. In light of te meetings that Bartko did have with Hollenbeck, Covington, and others, [D.E. 246] 20–34, Bartko fails to explain how a single meeting between Hollenbeck and Covington supports his claim that he was unaware of Hollenbeck's fraudulent fundraising tactics. In any event, the evidence is not material. See Turner, 137 S. Ct. at 1893–95; Bartko, 728 F.3d at 337.

H.

In his ninth claim, Bartko alleges that Special Agent Fleming's handwritten notes from her interviews with Levonda Leamon and Rebecca Plummer contain material variances between the MOIs and FBI 302 report, which were produced to Bartko during discovery. See [D.E. 292] 23–25; [D.E. 305] 18–20. Leamon and Plummer co-owned Legacy Resource Management ("LRM"), a North Carolina corporation that had also been involved with Mobile Billboards. See [D.E. 246] 43–44. Leamon and Plummer started Legacy in 2001 and each owned 50 percent. Legacy was a two-person operation in Kernersville, North Carolina. Leamon was the president and Plummer was the secretary/treasurer. When Mobile Billboards imploded in the summer of 2004, Leamon and Plummer each received a cease and desist order from the North Carolina Secretary of State Securities Division, prohibiting them from selling securities.[5] Thereafter, Legacy struggled financially. Leamon and Plummer sought legal and business advice from Covington and Bartko. Id. at 44. Bartko also worked with Leamon and Plummer to form an "investment club" to allow non-accredited investors to invest in the Capstone Fund, Bartko's private equity fund. See id. at 44–45.

Bartko argues that variances between Fleming's handwritten notes and the MOIs/FBI 302 report show that "the prosecution team engaged in a concerted effort to 'sanitize' the Leamon and Plummer witness statements from evidence favorable to Bartko (impeachment evidence)." [D.E. 292] 24. Specifically, Bartko alleges that Fleming's handwritten notes are impeachment evidence because they state (falsely) that Leamon and Plummer said that they never sold investments other than in Mobile Billboards. See [D.E. 292] 24.[6]

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[5] Hollenbeck also received a cease and desist order. See [D.E. 246] 11.

[6] Bartko withdrew his claims concerning three other alleged material variances between the notes and the FBI 302 report. [D.E. 305] 19.

Bartko also alleges that the documents evince that Leamon, Plummer, and Hollenbeck engaged in a separate real-estate fraud without Bartko and that the government wrongly tried to connect Bartko to that fraud. See [D.E. 305] 19–20; [D.E. 310-6]. Bartko argues that he could have used this evidence to impeach Plummer and show that her testimony that Bartko prepared promissory notes for a real-estate scheme was false. See [D.E. 305] 20. Bartko contends that he would have used this evidence to show that "the three co-conspirators had absolutely no misgivings about developing an additional fraud scheme" and to support his defense that he "was not aware of the false and misleading investment sales activities." Id.

The court rejects Bartko's claim. Once again, Bartko does not cite where the documents mention a separate fraud involving Leamon, Plummer, and Hollenbeck or where there the documents mention Leamon and Plummer denying selling any investments other than Mobile Billboards. See [D.E. 310-6]; [D.E. 310-11]. The court has reviewed Fleming's notes and did not find such statements. Moreover, even if the notes did discuss a separate fraud involving Leamon, Plummer, and Hollenbeck, the notes comport with Plummer's trial testimony. See [D.E. 282-6] 74–75, 88. Accordingly, Bartko's claim fails. See [D.E. 246] 110–15.

Bartko also cites a page of the handwritten notes that allegedly states that Leamon and Plummer told interviewers that Bartko did not demand that they return the finder's fees paid to LRM. See [D.E. 305] 20; [D.E. 310-11] 14. It is not clear from the notes whether the statement is attributable to Leamon, Plummer, or someone else. Assuming without deciding that the notes are impeaching concerning Plummer's trial testimony because Plummer testified that Bartko did demand LRM return the finder's fees, the notes do not come close to being material. See [D.E. 282-6] 86–87; [D.E. 246] 110–15.[7] Whether or not Bartko demanded that LRM return the finder's fees was

[7] Leamon did not testify concerning the matter.

not favorable or material to Bartko's trial. See, e.g., Turner, 137 S. Ct. at 1893–95; McHone, 392 F.3d at 700 ("We are unwilling to find, based on this single, immaterial inconsistency, that the undisclosed evidence is 'favorable' under Brady."). Moreover, in denying Bartko's motion for a new trial, this court found that Leamon's suppressed tolling agreement, a document with greater evidentiary value, was not material. See [D.E. 246] 109–15. This court also flatly rejected Bartko's claim that his trial was a "three-witness trial" involving Hollenbeck, Leamon, and Plummer. See id. at 110. The government presented a mountain of circumstantial evidence of Bartko's criminal intent in the form of documents (including correspondence, emails, bank records, and telephone records) and other witness testimony. Furthermore, Bartko's testimony was incredible, and the jury was entitled not only to disbelieve it, but to believe the opposite. See [D.E. 246] 118–19. Thus, there is no reasonable probability that, had the government disclosed those notes to Bartko, the trial's outcome would have been different. See id. at 110–15; Turner, 137 S. Ct. at 1893–95.

I.

In Bartko's twelfth claim, he alleges that the government violated Brady by not disclosing Inspector Carroll's handwritten notes from a September 25, 2009, interview of government witness Tim Cook. See [D.E. 292] 27; [D.E. 305] 27–29. Tim Cook was a Pastor at Berean Baptist Church, one of the churches from which Hollenbeck and Bartko solicited investments. Cf. [D.E. 246] 38–40 (discussing Pastor Cook's interactions with Bartko and Hollenbeck). Bartko argues that Carroll's notes state that Cook had no knowledge of Bartko or Capstone, while Cook testified that Hollenbeck discussed Capstone in his presentation to the Berean Baptist Church. See [D.E. 292] 27; [D.E. 305] 28.

Again, Bartko misstates the evidence. Carroll's notes do not state that Cook never heard Bartko or Capstone. To the contrary, Carroll's notes state "Church; you Cashier's Check to

him—don't think never put in to Capstone." [D.E. 310-9] 1. This sentence comports with Cook's trial testimony. Cook testified that "Capstone was the name that I had in mind that we were supposed to write the check and make it out to Capstone. When [Hollenbeck] called me around the holidays . . . then he said make sure to make it out to Franklin Asset Exchange." [D.E. 282-7] 158–59. In any event, even if Carroll's handwritten notes did not mention Capstone, the notes do not provide Bartko with impeachment evidence because the notes do not contain any prior inconsistent statement. Accordingly, Bartko's claim fails.

J.

In his thirteenth claim, Bartko alleges that the government violated Brady, Giglio, and Napue by eliciting, and failing to correct, false testimony from Hollenbeck concerning a January 31, 2005, confrontational phone call between Bartko and Hollenbeck after Bartko discovered that Hollenbeck embezzled six refund checks. See [D.E. 292] 27–32; [D.E. 305] 29–32. Specifically, Bartko argues that the government introduced evidence concerning this phone call to show that Bartko knew of Hollenbeck's fraudulent activities on January 31, 2005. See [D.E. 292] 28–29. According to Bartko, however, he did not have a confrontational phone call with Hollenbeck until April 12, 2005. See id. at 29.

Bartko procedurally defaulted this claim because he knew his theory concerning the timing of the phone calls when he filed his direct appeal. Cf. [D.E. 246] 54, 70 & n.39. In opposition to this conclusion, Bartko alleges that:

> [n]ewly obtained documents and statements made by SA Fleming during her investigation of phone records and the specific dates and frequency of Petitioner's conversations with Leamon, Plummer and Hollenbeck reveal that: (i) Hollenbeck's testimony which he described in detail evidencing a confrontational phone call with Petitioner and Covington relating to the discovery of embezzled and forged checks by Hollenbeck was false in terms of when the call occurred; (ii) the prosecution, through AUSA Wheeler, clearly knew or should have known the conversations about

> the embezzled checks did not occur until months later after Petitioner terminated all of his dealing with Hollenbeck—in fact on April 12, 2005; and (iii) AUSA Wheeler not only failed to correct Hollenbeck's testimony on this issue by presenting him with his very own documentation within Hollenbeck's files, but the prosecution failed to disclose to Petitioner's defense the incongruity of the true facts and the false theory propagated by the government.

[D.E. 305] 30.

Bartko offers no support for his assertions. Rather, Bartko cites handwritten notes from interviews with witnesses Susan Smith, Quinn Hopkins, Chrysta Taylor, and Ted Johnson and argues that the interview notes show that the government's phone call summary charts were misleading. See id. at 31–32; [D.E. 310-12–310-15].[8] Bartko fails to identify what portion of the notes support his claim. The court has reviewed the handwritten notes and concludes that the notes do not support Bartko's claim. Accordingly, Bartko has failed to show "cause" to overcome procedural default.

Alternatively, Bartko's claim fails on the merits. Even viewing the record in the light most favorable to Bartko, Bartko has not shown that the government violated Napue because Bartko fails to show that Hollenbeck's testimony was false and that the government knew of the alleged false testimony. See, e.g., Basden, 290 F.3d at 614. To the extent that Bartko argues that the witness interview notes are Brady material, that claim also fails. The notes are not favorable or material. Moreover, Special Agent Fleming testified concerning the limitations of the summary charts. See [D.E. 282-8] 101–02. Thus, Bartko's claim fails.

K.

In his fifteenth claim, Bartko generally alleges that the government failed to disclose "scores" of MOIs and handwritten notes that contain Brady material. See [D.E. 292] 42–43; [D.E. 305] 35–39. Bartko cites Inspector Carroll's handwritten notes from an October 13, 2010, interview of

[8] Bartko also purportedly cites an internal FBI memorandum but fails to cite where on the docket such memorandum has been filed. [D.E. 305] 31.

Pastor McCullough, an investor in Capstone referred by Hollenbeck. See [D.E. 305] 38. Bartko also cites Inspector Carroll's handwritten notes and an MOI from an October 14, 2010, interview of Randolph James, an attorney that represented Leamon and Plummer. See id. at 38–39.

As for Inspector Carroll's interview notes concerning Pastor McCullough, the notes appear to state that Pastor McCullough did not recall ever hearing Bartko's name associated with the investment in Capstone but that he did see Bartko's name on paperwork. See [D.E. 310-17]. The notes also state that Pastor McCullough did not speak with Bartko directly and did not know of Plummer, Leamon, or LRM. See id. Bartko argues that this information supports his defense that "Hollenbeck's continuing fraudulent sales activities were clandestine in nature and designed to dupe [Bartko] into continuing to believe Hollenbeck was acting as a mere finder—not a seller of securities." [D.E. 305] 39.

Bartko fails to explain how Pastor McCullough's statement is favorable. The court concludes that this statement is not favorable because it is not exculpatory and it has no impeachment value. First, Pastor McCullough did not testify. Moreover, Hollenbeck's failure to mention Bartko's name during a conversation soliciting an investment from Pastor McCullough has no relevance to whether Bartko knew of Hollenbeck's fraudulent schemes and the lies he was telling his investors. See, e.g., United States v. Wilson, 624 F.3d 640, 661 (4th Cir. 2010) ("[Witness's] statement fails on both fronts because it has no bearing on [defendant's] participation in the [offense] and therefore provides no information relevant to the offense . . . ."). In any event, this statement is not material. See Turner, 137 S. Ct. at 1893–95. The trial record includes a mountain of documentary evidence and witness testimony that proved Bartko's guilt beyond any reasonable doubt. Accordingly, there is no reasonable probability that one victim's testimony concerning whether Hollenbeck mentioned Bartko during a conversation soliciting an investment would have altered the outcome of Bartko's trial.

As for Inspector Carroll's interview notes concerning James, Bartko lists numerous statements from the notes that he alleges are exculpatory or impeaching. See [D.E. 305] 39; see also [D.E. 328] 39–40. Bartko argues that the notes are favorable because James told Inspector Carroll that (1) LRM acted as an investment advisor; (2) Bartko sent LRM an e-mail thanking LRM for its investment in January 2005; (3) James provided a copy of his LRM file to the government; (4) Bartko was a "very bright guy"; (5) Leamon was "incredibly stupid" not to question the reason for the transactions between LRM and Capstone; (6) James described Plummer as articulate and bright; (7) Leamon and Plummer consulted James about concerns regarding Hollenbeck and Mobile Billboards; and (8) Bartko never implied that LRM did anything wrong. See [D.E. 305] 39; [D.E. 328] 39–40. Bartko fails to explain how any of these statements are exculpatory, and the court concludes that they are not. Furthermore, the notes are inculpatory. See McHone, 392 F.3d at 702. The notes also state that (1) Bartko told James that he was winding down Capstone to "sidestep" the SEC; (2) Bartko told James that multiple individuals told Bartko that he had a conflict of interest in the way he was running Capstone; and (3) Bartko was giving LRM legal advice while it appeared that Bartko was involved in a conspiracy to hide the source of funds he was received. See [D.E. 310-19] 2–3. Accordingly, the court rejects Bartko's argument that the Inspector Carroll interview notes concerning James were favorable to Bartko's defense. See McHone, 392 F.3d at 702.[9]

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[9] Bartko also argues that James was presented with an e-mail during the interview that corroborates Bartko's testimony that LRM and Hollenbeck agreed to a finder's fee arrangement without Bartko's knowledge. See [D.E. 328] 39–40. After reviewing the e-mail, James told interviewers that Hollenbeck received part of the finder's fee because Hollenbeck introduced LRM to Bartko. See [D.E. 310-19] 2; [D.E. 310-18] 3.

The court rejects Bartko's argument. James also stated that the e-mail informed Bartko that LRM did not have all the money that Bartko had paid them because they had paid Hollenbeck his portion. See id. Thus, contrary to Bartko's assertions, the e-mail that investigators showed to James does not state or imply that Bartko did not know about the arrangement. Instead, the e-mail merely informs Bartko that Hollenbeck had been paid his portion of the fee. Accordingly, Bartko's claim fails. See McHone, 392 F.3d at 702.

As for Bartko's argument concerning any impeachment value of Inspector Carroll's notes concerning his interview of James, Bartko contends that James's statement that Bartko made a formal demand to LRM to return all finder's fees is impeachment evidence. Bartko's claim fails, however, because the alleged statement comports with Plummer's trial testimony. Compare [D.E. 305] 39, with [D.E. 282-6] 86–87. Bartko also argues that James's statement that Bartko contacted LRM to solicit investors for him conflicts with Leamon's testimony because Leamon testified that she was directed to refer potential investors to Bartko. See [D.E. 328] 39. These statements do not conflict.

Bartko also claims that "James apparently provided an entire copy of his LRM file to the government . . . the contents of which were never made available to the defense. These file materials would most likely include a multitude of statements made by Leamon and Plummer to James . . . ." [D.E. 292] 39. This claim is too speculative to state a claim. See Caro, 597 F.3d at 619 ("Because [defendant] can only speculate as to what the requested information might reveal, he cannot satisfy Brady's requirement of showing that the requested evidence would be 'favorable to [the] accused.'").

Bartko also argues that the government failed to comply with its promise of "open file discovery." [D.E. 305] 36–38. The government's failure to comply with an alleged open file discovery policy does not, standing alone, constitute a Brady violation. See, e.g., United States v. Greatwalker, 356 F.3d 908, 911 (8th Cir. 2004).

L.

In his sixteenth and seventeenth claims, Bartko asserts prosecutorial misconduct. See [D.E. 305] 40–45. In claim sixteen, Bartko argues that the materials he received through FOIA show that the scope of prosecutorial misconduct concerning the suppression of Brady materials was far greater than was known at the time of Bartko's motions for a new trial and direct appeal. See id. at 40.

Bartko argues that these additional materials give rise to a "free standing due process claim" and a prosecutorial misconduct claim. Id.

Bartko's sixteenth claim fails. The court has thoroughly reviewed all of Bartko's claims, the FOIA materials, and the record. Even viewing the record in the light most favorable to Bartko, Bartko has not shown that the government violated Brady. See, e.g., Strickler, 527 U.S. at 281.

As for Bartko's seventeenth claim, Bartko argues that AUSA Wheeler falsely stated in a declaration filed with the court that he did not make any statements to Hollenbeck, Crystal Hollenbeck (Hollenbeck's wife), or any attorney for either of them concerning a Rule 35 motion or any other sentencing benefit before jury deliberations in Bartko's trial. See [D.E. 305] 42–45; [D.E. 227-7]. In support, Bartko primarily relies on docket entries from Scott Hollenbeck's case, all of which were available when he filed his notice of appeal.

Bartko procedurally defaulted this claim because the factual basis for his claim was available when he filed his direct appeal. Moreover, Bartko has not shown "cause" to overcome his procedural default.[10] Alternatively, this evidence is not material. As stated, defense counsel thoroughly impeached Hollenbeck about his desire to receive a cooperation-based reduction in his 168-month prison sentence stemming from the Mobile Billboards fraud. Defense counsel also explored at great length and with absolutely devastating effect Hollenbeck's character for untruthfulness. Thus, there is no reasonable probability that any additional impeachment evidence concerning Hollenbeck would have resulted in a different verdict. See Turner, 137 S. Ct. at 1893–95; Kyles, 514 U.S. at 435; Bartko, 728 F.3d at 338.

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[10] Bartko's argument that he became aware of this claim upon receipt of Special Agent Fleming's notes through his FOIA action fails. In order to show cause, Bartko must demonstrate that "some external impediment prevent[ed] counsel from constructing or raising the claim [on appeal]." Carrier, 477 U.S. at 492. Bartko has failed to allege that some external impediment prevented him from reviewing Hollenbeck's criminal docket and raising this claim on direct appeal.

M.

In his fourteenth claim, Bartko argues that the government violated his due process rights by conducting parallel civil and criminal investigations solely to obtain evidence to use in Bartko's criminal prosecution. See [D.E. 292] 32–42; [D.E. 305] 33–35. Bartko's claim fails. First, Bartko cannot show "cause" to overcome his procedural default. Bartko does not cite any external factor that prevented him for raising this claim on direct appeal. To the contrary, Bartko's cross-examination of SEC attorney Alex Rue shows that Bartko believed that there was improper collusion, at least as of the time of trial. See [D.E. 282-5] 186–89 ("Q: Do you remember talking to a compliance specialist at the NASD about the fact that you are going to try to set up Greg Bartko?"). Despite Bartko's contentions that he was not able to "put the pieces together of the SEC's inappropriate funneling" of records until he received records from FOIA, [D.E. 305] 35, the only alleged evidentiary support Bartko cites is an internal FBI memorandum from March 31, 2005. See [D.E. 310-16]. The court has thoroughly reviewed the FBI memorandum. Even viewing the evidence in the light most favorable to Bartko, it does not support Bartko's claim.

Alternatively, Bartko's claim fails on the merits. The government may conduct parallel civil and criminal investigations "without violating the due process clause, so long as it does not act in bad faith." United States v. Stringer, 535 F.3d 929, 936–37 (9th Cir. 2008); see United States v. Kordel, 397 U.S. 1, 11–12 (1970); United States v. Parrott, 248 F. Supp. 196, 202 (D.D.C. 1965).[11]

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[11] In Kordel, the Supreme Court rejected the defendant's argument that the government violated his due process rights by conducting parallel investigations. See Kordel, 397 U.S. at 11–13. In doing so the Court stated:

> We do not deal here with a case where the Government has brought a civil action solely to obtain evidence for its criminal prosecution or has failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution; nor with a case where the defendant is without counsel or reasonably fears prejudice from adverse pretrial publicity or other unfair injury; nor with any other special

Bartko dedicates nearly thirteen pages of his motion to discussing alleged improper coordination between the SEC and AUSA Wheeler. Bartko alleges, among other things, that "[r]ecords received by Bartko . . . validate Bartko's assertion that the SEC, the receiver for MBA and AUSA Wheeler coordinated their efforts to gather evidence from MBA and thereafter from Bartko, in order to initiate criminal prosecutions of not only MBA officials, but a follow-on prosecution of Bartko." [D.E. 292] 36. Strikingly, Bartko offers no support for any of his allegations, despite contending that records he received through his FOIA requests support his assertions. Accordingly, Bartko's unsubstantiated allegations fail to support his claim. Cf. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Second, even assuming that the court found improper coordination, the remedy would be to suppress any unlawfully obtained evidence and order a new trial. See United States v. Tweel, 550 F.2d 297, 300 (5th Cir. 1977); United States v. Scrushy, 366 F. Supp. 2d 1134, 1137–40 (N.D. Ala. 2005). Despite alleging that the SEC "intentionally deceived Bartko into waiving his Fifth Amendment right and duped him into providing information directly to AUSA Wheeler for use against him in the criminal investigation," [D.E. 292] 39–40, Bartko does not cite or describe any evidence that AUSA Wheeler obtained as a result of the alleged unlawful coordination between the SEC and AUSA Wheeler that the government used in his criminal trial. Accordingly, Bartko's claim fails.

N.

In his final claim, Bartko argues that he has sufficiently alleged an "actual innocence" claim; therefore, he should be excused from showing cause and prejudice. Bartko's claim fails.

"To establish actual innocence, [a defendant] must demonstrate that, in light of all the

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> circumstances that might suggest the unconstitutionality or even the impropriety of this criminal prosecution.

Id. at 11–12 (footnotes omitted).

evidence, it is more likely than not that no reasonable juror would have convicted him." Bousley, 523 U.S. at 623 (quotations omitted). When a defendant did not argue actual innocence on direct appeal, he may not do so in support of a section 2255 motion unless he can show by clear and convincing evidence that he is factually innocent of the offense for which he was convicted. See Pettiford, 612 F.3d at 282. "[T]his standard is not satisfied by a showing that a [defendant] is legally, but not factually, innocent." Id.; see Bousley, 523 U.S. at 623. Even viewing the record in the light most favorable to Bartko, no rational factfinder could find that he is factually innocent of the crimes of which he was convicted. Thus, Bartko cannot escape procedural default. In any event, the court considered each of Bartko's claims on the merits and concludes that each claim fails.

O.

The court also must assess the cumulative effect of the evidence on which Bartko based his section 2255 motion.[12] The suppressed evidence is considered collectively for purposes of materiality. Kyles, 514 U.S. at 436 n.10, 454; Juniper, 876 F.3d at 567–68. In making this assessment, the court does not consider evidence that it determines is either not favorable or not suppressed. See Kyles, 514 U.S. at 433, 437–38. As discussed, Bartko failed to show that the majority of evidence he cites is favorable to him because it is not exculpatory or impeaching. Thus, the court only considers references to the FBI's 2003 interview with Colvin, Hollenbeck's false testimony at Colvin's trial, and the statement from Leamon or Plummer that Bartko did not demand that they return the finder's fees paid to LRM. The court considers this evidence in conjunction with the Hollenbeck proffer agreements and the Leamon tolling agreement, which the court considered in ruling on Bartko's motions for a new trial. See [D.E. 246] 117; Schledwitz v. United States, 169

[12] The court assumes without deciding that the standard for adjudicating Bartko's Brady claims under Federal Rule of Criminal Procedure 33 and 28 U.S.C. § 2255 are the same. See United States v. Johnson, 380 F. Supp. 2d 660, 670 n.4 (E.D. Pa. 2005).

F.3d 1003, 1012 (6th Cir. 1999).

None of the evidence is exculpatory. Rather, the evidence very slightly would have improved Bartko's ability to impeach Hollenbeck, Colvin, Plummer, and Leamon. In denying Bartko's motion for a new trial, this court explained in painstaking detail why additional impeachment materials concerning Hollenbeck and Leamon would not undermine confidence in the outcome of Bartko's trial. See [D.E. 246] (discussing the immateriality of Leamon's testimony and the already devastating impeachment of Hollenbeck). The Fourth Circuit agreed with this court that additional impeachment of Hollenbeck could not have made an iota of difference in the jury's judgment. See Bartko, 728 F.3d at 337. The Fourth Circuit also agreed that the Leamon tolling agreements were not material because Leamon's testimony served as summary evidence and was corroborated by substantial documentary evidence and other witness testimony. See Bartko, 728 F.3d at 340.

Bartko's newly cited evidence in his section 2255 motion does not change this outcome. The alleged new impeachment evidence concerning Hollenbeck and Colvin is merely cumulative and thus immaterial. See, e.g., Turner, 137 S. Ct. at 1893–95; Parker, 790 F.3d at 558; Hoyte, 51 F.3d at 1243 n.3; Langley v. Chester, 869 F.2d 594, 1989 WL 14199, at *3–4 (4th Cir. 1989) (per curiam) (unpublished table decision). The court also considers Leamon's or Plummer's statement that Bartko did not demand that they return the finder's fees paid to LRM. As stated, it is unclear from the handwritten notes whether Leamon, Plummer, or another unidentified witness made this statement. The court concludes, however, that the evidence does not change the cumulative materiality assessment, regardless of which witness made the statement. There are many reasons why Leamon or Plummer may have made this alleged inconsistent statement that do not bear on the issue of credibility (i.e., misrecollection). Furthermore, the issue concerning whether Bartko demanded that LRM return the finder's fees was immaterial to the trial. See, e.g., Wilson, 624 F.3d

at 661. Thus, there is no reasonable probability that this evidence, combined with the cumulative impeachment evidence concerning Hollenbeck and Colvin, would have altered the outcome of Bartko's trial.

Materiality is considered "in light of the evidence adduced against the defendant at trial; when a conviction is supported by overwhelming evidence of guilt, habeas relief is not warranted." Leka v. Portuondo, 257 F.3d 89, 104 (2d Cir. 2001); see Agurs, 427 U.S. at 112–13; Spicer v. Roxbury Corr. Inst., 194 F.3d 547, 561 (4th Cir. 1999). Bartko's case was not close. The evidence against Bartko overwhelmingly demonstrated his guilt. As the court explained in its 120-page order, if the jury had any doubts about Bartko's guilt, Bartko's incredible testimony destroyed them. The jury was permitted not only to disbelieve Bartko's testimony, but to believe the opposite. [D.E. 246] 118–19. The court has thoroughly reviewed the undisclosed evidence in the context of the entire record and in the light most favorable to Bartko. The court concludes that there is no reasonable probability that the undisclosed evidence could have impacted Bartko's trial. See Turner, 137 S. Ct. at 1893–95; Agurs, 427 U.S. at 112–13; Bartko, 728 F.3d at 340–41.

III.

Bartko moved for leave to file a supplemental Brady claim. In January 2018, investigators from Bartko's defense team located Hollenbeck in Orlando, Florida, and asked him if he would submit to an interview. See [D.E. 339] 2; [D.E. 340] 5. Hollenbeck agreed, and investigators interviewed Hollenbeck twice. See [D.E. 339] 2. After these two initial interviews, Hollenbeck agreed to provide a statement under penalty of perjury. See id. at 3. In his statement, Hollenbeck told investigators that he gave perjured testimony during Bartko's trial and that he did so because he received "veiled threats" from the government that it would prosecute him and his wife for their involvement in Bartko's investment schemes. See id. at 3–4.

Bartko's supplemental Brady claim alleges that (1) Hollenbeck made 21 perjured, false, or misleading statements at trial; (2) the government failed to disclose to Bartko inducements that it offered to Hollenbeck in exchange for his cooperation in Bartko's prosecution; (3) the government "encouraged" Hollenbeck to implicate Bartko in the fake surety bond scheme; (4) the government encouraged Hollenbeck to testify falsely and knowingly allowed (or at least acted with reckless indifference to) Hollenbeck's false testimony concerning any expected benefits he would receive from testifying; and (5) the government failed to correct aspects of Hollenbeck's testimony that they should have known was perjured, false, or misleading. See [D.E. 339] 4–15; [D.E. 340] 5–7.

"On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." Fed. R. Civ. P. 15(d); see 28 U.S.C. § 2242. Leave to supplement "should be freely granted, and should be denied only where good reason exists such as prejudice to the defendants." Franks v. Ross, 313 F.3d 184, 198 n.15 (4th Cir. 2002) (quotation and alteration omitted); Walker v. United Parcel Serv., Inc., 240 F.3d 1268, 1278 (10th Cir. 2001).

Bartko filed his supplemental claims more than four years after his judgment became final. See 28 U.S.C. § 2255(f). Accordingly, Bartko's supplemental Brady claims are untimely unless he can show that his claims relate back to his original pleading. See Mayle v. Felix, 545 U.S. 644, 650, 659–64 (2005); Gray v. Branker, 529 F.3d 220, 241 (4th Cir. 2008); United States v. Pittman, 209 F.3d 314, 318 (4th Cir. 2000); Brizuela v. Clarke, 112 F. Supp. 3d 366, 380–81 (E.D. Va. 2015), appeal dismissed, 633 F. App'x 178 (4th Cir. 2016) (per curiam) (unpublished); Fed. R. Civ. P. 15(c). Under Federal Rules of Civil Procedure Rule 15(c), relation back is allowed when "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Fed. R. Civ. P. 15(c)(1)(B). Bartko has

not met this standard, and Bartko's supplemental Brady claims are untimely. See Mayle, 545 U.S. at 650, 659–64; Gray, 529 F.3d at 241; Pittman, 209 F.3d at 318; Brizuela, 112 F. Supp. 3d at 380–81.

Alternatively, even if Bartko's supplemental Brady claims relate back to his original motion, Bartko's claims fail on the merits. Recantation testimony is "viewed with great suspicion" and, standing alone, is insufficient to set a aside a conviction. See Dobbert v. Wainwright, 468 U.S. 1231, 1233–34 (1984) (Brennan, J., dissenting from denial of certiorari) (collecting cases); Byrd v. Collins, 209 F.3d 486, 508 n.16 (6th Cir.2000); Thompson v. Garrison, 516 F.2d 986, 988 (4th Cir. 1975); United States v. Johnson, 487 F.2d 1278, 1279 (4th Cir. 1973) (per curiam). Indeed, "suspicions are even greater when . . . the recanting witness is one who was involved in the same criminal scheme and, having received the benefit of his cooperation agreement," has nothing left to lose. Haouari v. United States, 510 F.3d 350, 353 (2d Cir. 2007). When a witness recants testimony, the court may grant relief only when it is "reasonably well satisfied" that the testimony was actually false. See Nix v. Whiteside, 475 U.S. 157, 183 n.3 (1986) (Blackmun, J., concurring); United States v. Roberts, 262 F.3d 286, 293 (4th Cir. 2001). Thus, if the court disbelieves the recantation testimony, the court must reject the claim. See, e.g., Roberts, 262 F.3d at 293; United States v. Grey Bear, 116 F.3d 349, 351 (8th Cir. 1997); United States v. Mahdi, 172 F. Supp. 3d 57, 68 (D.D.C. 2016).

The court does not believe Hollenbeck's recantation statements. First, Scott Hollenbeck is one of the least credible witnesses to appear in a United States District Court. As discussed at length in this court's 120-page order, Hollenbeck's life is filled with lies, fraud, and forgery. Second, Hollenbeck recanted his trial testimony approximately eight years after Bartko's trial and when he had nothing left to lose. See, e.g., Johnson, 487 F.2d at 1279–80; United States v. Henry, 821 F.

Supp. 2d 249, 259 (D.D.C. 2011). Third, copious amounts of other evidence supported Hollenbeck's trial testimony concerning Bartko's knowledge of Hollenbeck's fraudulent fundraising tactics. See [D.E. 246] 3–79 (describing the mountain of evidence presented during Bartko's trial including Bartko's own incredible testimony). Fourth, and the court is not making this up, Hollenbeck recanted his recantation testimony. On April 26, 2018, Inspector Carroll interviewed Hollenbeck. See [D.E. 346, 346-1]. Hollenbeck stated under penalty of violating 18 U.S.C. § 1001 that his testimony at trial, and the statements he made to investigators and the government pre-trial, were the truth. See [D.E. 346-1] 4. On this record, no factfinder in this section 2255 proceeding could credit anything that Hollenbeck says. Thus, the court rejects Bartko's contention that this court must accept Hollenbeck's recantation testimony as credible and accurate. Barwick v. Celotex Corp., 736 F.2d 946, 960 (4th Cir. 1984) ("A genuine issue of material fact is not created where the only issue of fact is to determine which of the two conflicting versions of the [witness's] testimony is correct."); see Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 806 (1999); In re Family Dollar FLSA Litig., 637 F.3d 508, 512 (4th Cir. 2011); Rohrbough v. Wyeth Labs., Inc., 916 F.2d 970, 975 (4th Cir. 1990).[13]

In any event, even assuming Hollenbeck's recantation statements are true (which the court could never find to be true due to the inability to credit anything Hollenbeck says), Bartko's claim still fails. The court does not need to decide whether the "reasonable probability" or the "jury might

[13] Having presided over Bartko's thirteen-day trial, this court had ample opportunity to assess Hollenbeck's credibility. Based on the court's familiarity with Bartko's case and Hollenbeck, an evidentiary hearing to assess Hollenbeck's credibility is unwarranted. See, e.g., United States v. Arledge, 597 F. App'x 757, 758–59 (5th Cir. 2015) (per curiam) (unpublished); Shah v. United States, 878 F.2d 1156, 1158–59 (9th Cir. 1989); United States v. Kearney, 682 F.2d 214, 220–21 (D.C. Cir. 1982). Moreover, Bartko is not entitled to an evidentiary hearing because, even if the court found Hollenbeck's recantation credible (which it does not), Bartko would not be entitled to relief. See, e.g., United States v. Terry, 366 F.3d 312, 314–15 (4th Cir. 2004).

have reached a different conclusion" standard concerning recantation testimony applies because Bartko's claim fails under both standards. Compare Roberts, 262 F.3d at 293, with Garnett v. Clarke, No. 7:14CV00452, 2015 WL 7571949, at *4 (W.D. Va. Nov. 24, 2015) (unpublished).[14] Bartko continues to assert that "Hollenbeck was the prosecution's key witness against Bartko" despite this court's and the Fourth Circuit's rejection of that argument. [D.E. 340] 9. As this court explained:

> In its initial closing argument, the government described Hollenbeck as a man who had told hundreds of lies hundreds of times. The government then reiterated that the case against Bartko was built on the other evidence presented at trial, including a mountain of documents, the testimony of other witnesses, and Bartko's own incredible testimony. In response, the defense attempted to make the whole case turn on Hollenbeck's credibility and urged the jury to remove Hollenbeck's entire testimony from its consideration. In its rebuttal argument, the government espoused a similar approach, explicitly—and quite properly—arguing that Hollenbeck's testimony was not needed at all to return a guilty verdict on any count. Rather, the government argued that the mountain of evidence arising from the documents, the testimony of other witnesses, and Bartko's own contradictory testimony proved Bartko's guilt beyond a reasonable doubt.

[D.E. 246] 108; see Bartko, 728 F.3d at 337–41. Indeed, Hollenbeck further demonstrated his complete and utter lack of credibility by recanting his recantation testimony. This court, having presided over Bartko's thirteen-day trial and having again reviewed every piece of evidence, concludes that, in light of the entire case, Hollenbeck's recantation testimony would not have made any difference in Bartko's trial.

Bartko's remaining allegations also fail. Bartko offers no evidence (other than Hollenbeck's completely incredible statements to Bartko's investigators) to support his bald claims that the government knowingly used Hollenbeck's "perjured" testimony, that the government encouraged

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[14] Bartko argues that the government knowingly used "false" and/or "perjured" testimony that created a false impression of material fact. See [D.E. 340] 30–31; [D.E. 345] 11–12. As stated, Bartko fails to show that Hollenbeck's testimony was perjured, let alone that the government knew of the alleged falsity. See Agurs, 427 U.S. at 103.

Hollenbeck to implicate Bartko, or that the government in any way encouraged Hollenbeck to testify falsely. Accordingly, the court denies Bartko's supplemental section 2255 claim.

IV.

As for Bartko's motion for discovery, a habeas petitioner "is not entitled to discovery as a matter of ordinary course." Bracy v. Gramley, 520 U.S. 899, 904 (1997). Rule 6 of the Rules Governing 2255 Proceedings provides:

> A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Criminal Procedure or Civil Procedure, or in accordance with the practices and principles of law. If necessary for effective discovery, the judge must appoint an attorney for a moving party who qualifies to have counsel appointed under 18 U.S.C. § 3006A.

R. Governing Section 2255 Cases 6(a). Good cause exists where "specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is entitled to relief." Bracy, 520 U.S. at 908–09 (quotation and alteration omitted); see Stephens v. Branker, 570 F.3d 198, 213 (4th Cir. 2009); Ramey v. United States, No. RWT-14-106, 2014 WL 12661574, at *1 (D. Md. Feb. 14, 2014) (unpublished). Rule 6 does not "sanction fishing expeditions based on a petitioner's conclusory allegations." Williams v. Bagley, 380 F.3d 932, 974 (6th Cir. 2004) (quotation omitted).

Bartko requests: (1) a "complete set" of Special Agent Fleming's and Inspector Carroll's notes from 20 alleged witness interviews, and FBI 302 reports and MOIs from 14 alleged witness interviews; (2) FBI Special Agent Orin Sprague's notes from his alleged interview with John Colvin; (3) Inspector Carroll's handwritten notes from May 27, 2009, and June 3, 2010, and e-mails from AUSA Wheeler or AUSA Bragdon to case agents concerning witness interviews; (4) field notes and interview reports from interviews conducted with victims before Bartko's sentencing; (5) "[i]nvestigative records" concerning a real-estate development Ponzi scheme conducted by Plummer,

Leamon, and Hollenbeck; (6) "[a]ny handwritten notes or materials delivered to case agents, AUSA Wheeler or AUSA Bragdon by either of the Hollenbecks, or their counsel, in preparation for their debriefing on April 21–22, 2009 and for any such materials following the debriefing"; (7) e-mail communications among Alex Rue, David McClellan, Gannon Lasseigne, AUSA Wheeler, S. Gregory Hayes (or his counsel), and David Dantzler concerning the broker-dealer examination of Capstone; (8) e-mail communications among C. Scott Holmes, AUSA Wheeler, Scott Hollenbeck, or any case agent concerning any benefits or inducement that the Hollenbecks received in exchange for their cooperation with the government; (9) drafts or any other materials or communications concerning two tolling agreements between the government and Levonda Leamon; (10) file materials concerning Randolph James's representation of Leamon, Plummer, or Legacy; (11) e-mail communications among Scott Hollenbeck, Crystal Hollenbeck, and C. Scott Holmes "between the date of Hollenbeck's conviction in the Eastern District of North Carolina and the approval of the Rule 35(b) sentence reduction motion heard by the court on or about May 31, 2011"; (12) a copy of the video recording of Hollenbeck's investment presentation; (13) a copy of the government's Rule 35(b) motion for a reduction of Hollenbeck's sentence; (14) "[c]opies of email communications originated by former AUSA Wheeler or AUSA Bragdon that related to the preparation and delivery of his declaration dated July 15, 2011 and thereafter filed with the Clerk in Bartko's prosecution on a post-conviction basis"; and (15) a copy of the Department of Justice's Office of Professional Responsibility's final report concerning its investigation of AUSA Wheeler and any responsive materials submitted by AUSA Wheeler or the United State's Attorney's Office for the Eastern District of North Carolina during the investigation. See [D.E. 330-2].

Bartko's request is a fishing expedition. First, Bartko has not shown that the discovery materials he requests even exist. See, e.g., United States v. Wilson, 901 F.2d 378, 381–82 (4th Cir.

1990). Second, Bartko has not shown that the alleged discovery materials contain any exculpatory or impeaching information. In any event, Bartko's discovery request is deficient because "he has not demonstrated that such discovery would result in him being entitled to habeas relief." Stephens, 570 F.3d at 213. Rather, similar to his section 2255 motion, Bartko makes broad and conclusory allegations devoid of factual support. See [D.E. 330] 9–13. Indeed, Bartko does not cite record evidence to support his claims.[15] Bartko also continues to request investigative materials concerning Hollenbeck. As this court and the Fourth Circuit made clear, Hollenbeck's credibility was completely and thoroughly destroyed at trial. No additional evidentiary materials concerning Hollenbeck's credibility could have made any difference at Bartko's trial. See Bartko, 728 F.3d at 337. Furthermore, Bartko's claim that the government assured him that he would receive "open file" discovery does not change this outcome. See, e.g., Greatwalker, 356 F.3d at 911–12. Accordingly, the court denies Bartko's motion for discovery.

V.

In sum, the court GRANTS the government's motion for summary judgment [D.E. 321], DENIES Bartko's cross-motion for partial summary judgment [D.E. 327], DENIES Bartko's motion for discovery [D.E. 330], DENIES Bartko's motion for leave to file supplemental Brady claims [D.E. 339], GRANTS the government's motion to dismiss [D.E. 343], DENIES Bartko's section 2255 motions [D.E. 292, 295, 339], DISMISSES Bartko's claims, and DENIES a certificate of appealability. See 28 U.S.C. § 2253(c); Miller-El v. Cockrell, 537 U.S. 322, 336–38 (2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000). The clerk shall close the case.

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[15] Bartko cites Inspector Carroll's handwritten notes, [D.E. 310-1], but Carroll's notes do not support Bartko's claims.

SO ORDERED. This 2 day of November 2018.

JAMES C. DEVER III
United States District Judge

**UNPUBLISHED**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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**No. 18-7528**

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UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

GREGORY BARTKO,

Defendant - Appellant.

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Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. James C. Dever III, District Judge. (5:09-cr-00321-D-1; 5:15-cv-00042-D)

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Submitted: July 24, 2019 Decided: August 15, 2019

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Before KEENAN, DIAZ, and FLOYD, Circuit Judges.

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Dismissed by unpublished per curiam opinion.

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Donald Franklin Samuel, GARLAND, SAMUEL & LOEB, Atlanta, Georgia, for Appellant. Kristine L. Fritz, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

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Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Gregory Bartko seeks to appeal the district court's order denying relief on his 28 U.S.C. § 2255 (2012) motion. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B) (2012). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2012). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable, and that the motion states a debatable claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484-85.

We have independently reviewed the record and conclude that Bartko has not made the requisite showing. Accordingly, we deny Bartko's motion for a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

*DISMISSED*

FILED: August 15, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-7528, US v. Gregory Bartko
5:09-cr-00321-D-1, 5:15-cv-00042-D

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NOTICE OF JUDGMENT

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Judgment was entered on this date in accordance with Fed. R. App. P. 36. Please be advised of the following time periods:

**PETITION FOR WRIT OF CERTIORARI:** To be timely, a petition for certiorari must be filed in the United States Supreme Court within 90 days of this court's entry of judgment. The time does not run from issuance of the mandate. If a petition for panel or en banc rehearing is timely filed, the time runs from denial of that petition. Review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for compelling reasons. (www.supremecourt.gov)

**VOUCHERS FOR PAYMENT OF APPOINTED OR ASSIGNED COUNSEL:** Vouchers must be submitted within 60 days of entry of judgment or denial of rehearing, whichever is later. If counsel files a petition for certiorari, the 60-day period runs from filing the certiorari petition. (Loc. R. 46(d)). If payment is being made from CJA funds, counsel should submit the CJA 20 or CJA 30 Voucher through the CJA eVoucher system. In cases not covered by the Criminal Justice Act, counsel should submit the Assigned Counsel Voucher to the clerk's office for payment from the Attorney Admission Fund. An Assigned Counsel Voucher will be sent to counsel shortly after entry of judgment. Forms and instructions are also available on the court's web site, www.ca4.uscourts.gov, or from the clerk's office.

**BILL OF COSTS:** A party to whom costs are allowable, who desires taxation of costs, shall file a Bill of Costs within 14 calendar days of entry of judgment. (FRAP 39, Loc. R. 39(b)).

**PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC:** A petition for rehearing must be filed within 14 calendar days after entry of judgment, except that in civil cases in which the United States or its officer or agency is a party, the petition must be filed within 45 days after entry of judgment. A petition for rehearing en banc must be filed within the same time limits and in the same document as the petition for rehearing and must be clearly identified in the title. The only grounds for an extension of time to file a petition for rehearing are the death or serious illness of counsel or a family member (or of a party or family member in pro se cases) or an extraordinary circumstance wholly beyond the control of counsel or a party proceeding without counsel.

Each case number to which the petition applies must be listed on the petition and included in the docket entry to identify the cases to which the petition applies. A timely filed petition for rehearing or petition for rehearing en banc stays the mandate and tolls the running of time for filing a petition for writ of certiorari. In consolidated criminal appeals, the filing of a petition for rehearing does not stay the mandate as to co-defendants not joining in the petition for rehearing. In consolidated civil appeals arising from the same civil action, the court's mandate will issue at the same time in all appeals.

A petition for rehearing must contain an introduction stating that, in counsel's judgment, one or more of the following situations exist: (1) a material factual or legal matter was overlooked; (2) a change in the law occurred after submission of the case and was overlooked; (3) the opinion conflicts with a decision of the U.S. Supreme Court, this court, or another court of appeals, and the conflict was not addressed; or (4) the case involves one or more questions of exceptional importance. A petition for rehearing, with or without a petition for rehearing en banc, may not exceed 3900 words if prepared by computer and may not exceed 15 pages if handwritten or prepared on a typewriter. Copies are not required unless requested by the court. (FRAP 35 & 40, Loc. R. 40(c)).

**MANDATE**: In original proceedings before this court, there is no mandate. Unless the court shortens or extends the time, in all other cases, the mandate issues 7 days after the expiration of the time for filing a petition for rehearing. A timely petition for rehearing, petition for rehearing en banc, or motion to stay the mandate will stay issuance of the mandate. If the petition or motion is denied, the mandate will issue 7 days later. A motion to stay the mandate will ordinarily be denied, unless the motion presents a substantial question or otherwise sets forth good or probable cause for a stay. (FRAP 41, Loc. R. 41).

FILED: August 15, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 18-7528
(5:09-cr-00321-D-1)
(5:15-cv-00042-D)

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UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

GREGORY BARTKO

Defendant - Appellant

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J U D G M E N T

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In accordance with the decision of this court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

FILED: October 16, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 18-7528
(5:09-cr-00321-D-1)
(5:15-cv-00042-D)

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UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

GREGORY BARTKO

Defendant - Appellant

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O R D E R

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The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Keenan, Judge Diaz, and Judge Floyd.

For the Court

/s/ Patricia S. Connor, Clerk

FILED: December 6, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 19-441
(5:09-cr-00321-D-1)

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In re: GREGORY BARTKO

Movant

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O R D E R

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Movant has filed a motion under 28 U.S.C. § 2244 for an order authorizing the district court to consider a second or successive application for relief under 28 U.S.C. § 2255.

The court denies the motion.

Entered at the direction of Judge Floyd with the concurrence of Judge Keenan and Judge Diaz.

For the Court

/s/ Patricia S. Connor, Clerk

U.S. CONSTITUTION - AMENDMENT 5

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 offense 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.

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part VI. Particular Proceedings
Chapter 153. Habeas Corpus (Refs & Annos)

# 28 U.S.C.A. § 2255

## § 2255. Federal custody; remedies on motion attacking sentence

Effective: January 7, 2008

Currentness

**(a)** A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

**(b)** 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. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

**(c)** A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

  

**(d)** An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

**(e)** An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

**(f)** A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--

**(1)** the date on which the judgment of conviction becomes final;

**(2)** the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

**(3)** the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

**(4)** the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

**(g)** Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint

  

counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

**(h)** A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--

**(1)** newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

**(2)** a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

## CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 967; May 24, 1949, c. 139, § 114, 63 Stat. 105; Pub.L. 104-132, Title I, § 105, Apr. 24, 1996, 110 Stat. 1220; Pub.L. 110-177, Title V, § 511, Jan. 7, 2008, 121 Stat. 2545.)

28 U.S.C.A. § 2255, 28 USCA § 2255
Current through P.L. 116-91.

**End of Document**

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part VI. Particular Proceedings
Chapter 153. Habeas Corpus (Refs & Annos)

28 U.S.C.A. § 2253

# § 2253. Appeal

Effective: April 24, 1996

Currentness

**(a)** In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

**(b)** There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

**(c)(1)** Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

**(A)** the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

Appendix - Exhibit 9

  

**(B)** the final order in a proceeding under section 2255.

**(2)** A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

**(3)** The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

## CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 967; May 24, 1949, c. 139, § 113, 63 Stat. 105; Oct. 31, 1951, c. 655, § 52, 65 Stat. 727; Pub.L. 104-132, Title I, § 102, Apr. 24, 1996, 110 Stat. 1217.)

28 U.S.C.A. § 2253, 28 USCA § 2253
Current through P.L. 116-91.

**End of Document**

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part VI. Particular Proceedings
Chapter 153. Habeas Corpus (Refs & Annos)

# 28 U.S.C.A. § 2244

## § 2244. Finality of determination

Effective: April 24, 1996

Currentness

**(a)** No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

**(b)(1)** A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

**(2)** A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--

**(A)** the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

Appendix - Exhibit 10

  

**(B)(i)** the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

**(ii)** the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

**(3)(A)** Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

**(B)** A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

**(C)** The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

**(D)** The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

**(E)** The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

**(4)** A district court shall dismiss any claim presented in a second or successive application that

  

the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

**(c)** In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

**(d)(1)** A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

**(A)** the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

**(B)** the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

**(C)** the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

**(D)** the date on which the factual predicate of the claim or claims presented could have been

  

discovered through the exercise of due diligence.

**(2)** The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

## CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 965; Pub.L. 89-711, § 1, Nov. 2, 1966, 80 Stat. 1104; Pub.L. 104-132, Title I, §§ 101, 106, Apr. 24, 1996, 110 Stat. 1217, 1220.)

28 U.S.C.A. § 2244, 28 USCA § 2244
Current through P.L. 116-91.

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part VI. Particular Proceedings
Chapter 153. Habeas Corpus (Refs & Annos)

# 28 U.S.C.A. § 2242

## § 2242. Application

Currentness

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

If addressed to the Supreme Court, a justice thereof or a circuit judge it shall state the reasons for not making application to the district court of the district in which the applicant is held.

**CREDIT(S)**

(June 25, 1948, c. 646, 62 Stat. 965.)

Appendix - Exhibit 11

28 U.S.C.A. § 2242, 28 USCA § 2242
Current through P.L. 116-91.

  

**End of Document**

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part I. Organization of Courts (Refs & Annos)
Chapter 21. General Provisions Applicable to Courts and Judges

# 28 U.S.C.A. § 455

## § 455. Disqualification of justice, judge, or magistrate judge

Currentness

**(a)** Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

**(b)** He shall also disqualify himself in the following circumstances:

**(1)** Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

**(2)** Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

**(3)** Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

Appendix - Exhibit 12

  

**(4)** He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

**(5)** He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

**(i)** Is a party to the proceeding, or an officer, director, or trustee of a party;

**(ii)** Is acting as a lawyer in the proceeding;

**(iii)** Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

**(iv)** Is to the judge's knowledge likely to be a material witness in the proceeding.

**(c)** A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

**(d)** For the purposes of this section the following words or phrases shall have the meaning indicated:

**(1)** "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

  

**(2)** the degree of relationship is calculated according to the civil law system;

**(3)** "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

**(4)** "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

**(i)** Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

**(ii)** An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

**(iii)** The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

**(iv)** Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

**(e)** No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

  

**(f)** Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

## CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 908; Pub.L. 93-512, § 1, Dec. 5, 1974, 88 Stat. 1609; Pub.L. 95-598, Title II, § 214(a), (b), Nov. 6, 1978, 92 Stat. 2661; Pub.L. 100-702, Title X, § 1007, Nov. 19, 1988, 102 Stat. 4667; Pub.L. 101-650, Title III, § 321, Dec. 1, 1990, 104 Stat. 5117.)

28 U.S.C.A. § 455, 28 USCA § 455
Current through P.L. 116-91.