

APPENDIX A

United States Court of Appeals, Third Circuit.

C.A. Nos. 18-2953 and 18-3168

UNITED STATES OF AMERICA

vs.

GEORGE GEORGIOU, Appellant

(E.D. Pa. Crim. No. 2-09-cr-00088-001)

(Criminal treated as civil)

Present: MCKEE, SHWARTZ, and PHIPPS,
Circuit Judges

(Submitted April 9, 2020)

ORDER

Georgiou's motions to accept an application for a certificate of appealability ("COA") and a reply in excess of the word limit are granted. The Government's motion to file a response in excess of the word limit is likewise granted. To the extent a COA is required under 28 U.S.C. § 2253(c)(1)(B), Georgiou's application for a COA is denied. Jurists of reason would not debate the District Court's conclusion that Georgiou did not show that the Government failed to correct false testimony and evidence at his trial, see Napue v. Illinois, 360 U.S. 264 (1959), or that the Government failed to disclose evidence as required by Brady v. Maryland, 373 U.S. 83 (1963). Jurists of reason likewise would not debate the District Court's conclusion that Georgiou failed to show that his Sixth Amendment right to the effective assistance of counsel was violated. See Miller-El v. Cockrell, 537 U.S. 322, 336 (2003); Strickland v. Washington, 466 U.S. 668, 687, 694 (1984). The District Court did not abuse its discretion in denying the discovery requests that Georgiou mentions in his application for a COA, and to the extent a COA is not required, we summarily affirm those denials. See Williams v. Beard, 637 F.3d 195, 209 (3d Cir. 2011). We also summarily affirm the District Court's denials of Georgiou's post-waiver requests for appointment of counsel. See United States v. Leveto, 540 F.3d 200, 207 (3d Cir. 2008).

By the Court,
s/Patty Shwartz
Circuit Judge

Dated: May 4, 2020

APPENDIX B

2018 WL 9618008

**United States District Court,
E.D. Pennsylvania.**

UNITED STATES of America, Plaintiff,
v.
George GEORGIOU

CRIMINAL NUMBER No. 09-88
Filed 06/19/2018

MEMORANDUM

ROBERT F. KELLY, Sr. J.

*1 Presently before the Court is a *pro se* Motion Under [28 U.S.C. § 2255](#) to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (“[§ 2255](#) Motion”) by George Georgiou (“Georgiou”), the Responses and Replies thereto, as well as consideration of the evidence adduced at the evidentiary hearing, including the parties’ proposed Findings of Fact and Conclusions of Law, and Georgiou’s *pro se* “Petitioner’s Supplemental Brief in Support of His Habeas Petition.” For the reasons set forth below, we deny Georgiou’s [§ 2255](#) Motion.

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I. BACKGROUND

The general synopsis of the case and the factual background have been excerpted from the United States Court of Appeals for the Third Circuit's ("Third Circuit") opinion in [United States v. Georgiou, 777 F.3d 125, 130-33 \(3d Cir. 2015\).](#)

A federal jury convicted Appellant George Georgiou ... of conspiracy, securities fraud, and wire fraud for his participation in planned manipulation of the markets of four publicly traded stocks, resulting in more than \$55,000,000 in actual losses. The District Court sentenced him to 300 months' imprisonment, ordered him to pay restitution of \$55,823,398 and ordered that he pay a special assessment of \$900. The Court also subjected Georgiou to forfeiture of \$26,000,000.

[Georgiou, 777 F.3d at 130.](#)

From 2004 through 2008, Georgiou and his co-conspirators engaged in a stock fraud scheme resulting in more than \$55 million in actual losses. The scheme centered on manipulating the markets of four stocks: Neutron Enterprises, Inc. ("Neutron"), Avicena Group, Inc. ("Avicena"), Hydrogen Hybrid Technologies, Inc. ("HYHY"), and Northern Ethanol, Inc. ("Northern Ethanol") (collectively, "Target Stocks"). At all relevant times, the Target Stocks were quoted on the OTC Bulletin Board ("OTCBB")¹ or the Pink OTC Markets Inc.

¹ "The OTCBB is '[a]n interdealer quotation system for unlisted, over-the-counter securities. The OTC Bulletin Board or 'OTCBB' allows Market Makers to display firm prices for domestic securities, foreign securities, and [American Depository Receipts] that can be updated on a real-time basis.' " [Georgiou, 777 F.3d at 130 n.1](#) (quoting OTCBB Glossary, Financial Industry Regulatory Authority ("FINRA"),

<http://www.finra.org/Industry/Compliance/MarketTransparency/OTCBB/Glossary/P126264> (last visited Jan. 5, 2015)).

(“Pink Sheets”).²

***3** In order to facilitate their scheme, Georgiou and his coconspirators opened brokerage accounts in Canada, the Bahamas, and Turks and Caicos. Once opened, the co-conspirators used these accounts to engage in manipulative trading in the Target Stocks. Specifically, by trading stocks between the various accounts they controlled, the co-conspirators artificially inflated the stock prices and created the false impression that there was an active market in each Target Stock.

As a result of this manipulation, Georgiou and his co-conspirators were able to sell their shares at inflated prices. In addition, these artificially inflated shares would be used as collateral to fraudulently borrow funds on margin and obtain millions of dollars in loans from Caledonia Corporate Management Group Limited (“Caledonia”) and Accuvest Limited (“Accuvest”), both brokerage firms based in the Bahamas. Eventually, these accounts experienced severe trading losses since the assets purportedly serving as collateral proved to be worthless.³

In June [2007],⁴ unbeknownst to Georgiou, Kevin

² “The Pink Sheets, now known as OTC Market Group Inc., is ‘an electronic inter-dealer quotation system that displays quotes from broker-dealers for many over-the-counter (OTC) securities.’” [Georgiou, 777 F.3d at 130 n.2](#) (quoting [OTC Link LLC](#), SEC, <http://www.sec.gov/answers/pink.htm> (last visited Jan. 5, 2015)).

³ “Indeed, Caledonia was forced to liquidate its business, resulting in approximately \$25 million in losses. These losses were sustained by the firm’s clients, many of whom lost their entire retirement savings.” [Georgiou, 777 F.3d at 131 n.3](#).

⁴ The Third Circuit stated the year as 2006; however, it appears that, in connection with Georgiou’s petition for certiorari, the Solicitor General of the United States (“Solicitor General”) inquired about the typographical error identifying the wrong date, and was informed by then Assistant United States Attorney, Louis D. Lappen (“Lappen”), that, as set forth in the district court record, Kevin Waltzer’s (“Waltzer”) cooperation began in 2007. (Gov’t’s Omnibus Resp. to Discovery Mots. 30.) Apparently,

Waltzer,⁵ one of his co-conspirators, began cooperating in an FBI sting operation. Through Waltzer's cooperation, the FBI monitored Georgiou's activities, including many of his emails, phone calls and wire transfers.

1. Georgiou's Four Manipulation Schemes: Neutron, Avicena, HYHY, and Northern Ethanol

Georgiou and his co-conspirators manipulated the prices of the Target Stocks by creating matched trades,⁶ wash sales,⁷ and misleading email blasts. They used various alias accounts, nominees, and offshore brokerage accounts to conceal both their ownership of the Target Stocks and their

(cont'd)

the Solicitor General stated, in its briefing, that “[u]nbeknownst to petitioner, in mid-2007, co-conspirator Kevin Waltzer started cooperating with the Federal Bureau of Investigation (FBI)” and included a footnote explaining that “[t]he Court of Appeals incorrectly stated that Waltzer's cooperation began earlier.” (Pet'r's Reply 31.)

⁵ “Waltzer pled guilty to one count of wire fraud, one count of mail fraud, and one count of money laundering, pursuant to a written plea agreement. He was sentenced to a term of imprisonment of 132 months, followed by a term of supervised release, and ordered to pay \$40,675,241.55 in restitution.” [Georgiou, 777 F.3d at 131 n.4](#). Waltzer has been released from prison prior to the full term of imprisonment of 132 months. See Crim. No. 08-552.

⁶ “A ‘matched trade’ is an order to buy or sell securities that is entered with knowledge that a matching order on the opposite side of the transaction has been or will be entered for the purpose of: (1) creating a false or misleading appearance of active trading in any publicly traded security; or (2) creating a false or misleading appearance with respect to the market for any such security.” [Georgiou, 777 F.3d at 131 n.5 \(quoting Indictment ¶ 9\)](#).

⁷ A ‘matched trade’ is an order to buy or sell securities that is entered with knowledge that a matching order on the opposite side of the transaction has been or will be entered for the purpose of: (1) creating a false or misleading appearance of active trading in any publicly traded security; or (2) creating a false or misleading appearance with respect to the market for any such security.” [Georgiou, 777 F.3d at 131 n.5 \(quoting Indictment ¶ 9\)](#).

involvement in the fraudulent scheme.

At least some of the manipulative trades were transacted through market makers⁸ located in the United States. Georgiou communicated via phone and e-mail with Waltzer about their plans, and also had occasional in-person meetings with Waltzer and others in the United States about these schemes. In these communications, Georgiou provided direction on how to implement the manipulative schemes, and demonstrated his role and culpability in orchestrating and perpetrating the fraud. After fourteen months, Georgiou wired \$5,000 to the account of an undercover FBI agent as part of a test transaction. Six days later, Georgiou was arrested.

2. The Caledonia Fraud

In December 2006, Georgiou opened a margin-eligible account in his wife's name at Caledonia. As a result, Georgiou was able to obtain loans and purchase stock without using his own funds. Georgiou represented to the principals at Caledonia that the margin in his account would be collateralized by approximately \$15 million worth of Avicena and Neutron stock, but did not disclose that the value of these securities had been artificially inflated.

In March 2007, Georgiou borrowed approximately \$3,394,000 from Caledonia to purchase 1,697,000 shares of Avicena from Waltzer. That loan was secured by Avicena and Neutron stock held in the name of Georgiou's wife at another brokerage firm, and was never repaid.

During the same month, Georgiou borrowed

⁸ "A market maker is a firm that facilitates trading in a stock, provides quotes [for] both a buy and sell price for a stock, and potentially profits from the price spread." Georgiou, 777 F.3d at 131 n.7 (quoting Indictment ¶ 33; 15 U.S.C. § 78c(38) (A "market maker means any specialist permitted to act as a dealer ... and any dealer who, with respect to a security, holds himself out (by entering quotations in an inter-dealer communications system or otherwise) as being willing to buy and sell such security for his own account on a regular or continuous basis")).

approximately \$2.8 million from Caledonia to purchase Neutron stock and to provide financing to Neutron. The loan was ostensibly secured by Avicena and Neutron stock held in a different name at another brokerage firm. This loan was also never repaid. Caledonia was unable to cover the substantial deficits incurred as a result of Georgiou's activities. Ultimately, Caledonia suffered approximately \$25 million in losses. The firm was later dissolved and liquidated.

***4 3. The Accuvest Fraud**

In June 2007, Georgiou met with representatives of Accuvest in the Bahamas to discuss opening a brokerage account. In September 2007, Georgiou opened an account at Accuvest in a different name. The trading in the account was handled through William Wright Associates ("Wright"), an Accuvest affiliate based in California. From October 2007 through February 2008, Georgiou deposited HYHY and Northern Ethanol stock into this account, and in return, Accuvest provided a margin loan of ten percent of the value of the account. Georgiou did not disclose that the value of these securities had been artificially inflated. On several occasions in 2008, Georgiou directed Wright, via email, to wire cash from this account to Avicena, or Team One Marketing, a Canadian company associated with Georgiou.

In August 2008, Georgiou instructed Wright to open a second Accuvest account, which was funded with 10 million shares of Northern Ethanol. As had happened before, Georgiou did not disclose that the value of these securities had been artificially inflated. Georgiou failed to repay the money that he had borrowed on margin and in cash loans from Accuvest. The artificially inflated stock did not cover the loans and Accuvest lost at least \$4 million.

Id. at 131-32.

A. PROCEDURAL HISTORY

1. Trial, Post-Trial, And Appeal

***5** On February 12, 2010, at the conclusion of a three-

week trial, a jury found Georgiou guilty of the following: one count of conspiracy in violation of [18 U.S.C. § 371](#); four counts of securities fraud in violation of Section 10(b) of the Securities Exchange Act of 1934 (the “Exchange Act”), [15 U.S.C. §§ 78j\(b\)](#) and [78ff](#); and four counts of wire fraud in violation of [18 U.S.C. §§ 1343](#) and [1349](#).⁹

During the trial, the government convincingly proved Georgiou’s criminal activity through various means, including: an incriminating phone conversation that Georgiou inadvertently recorded of himself describing his criminal activity to a co-conspirator; testimony of one of Georgiou’s co-conspirators, Waltzer, who described criminal activity, which was corroborated by incontrovertible emails, financial records, and trading records; recorded conversations, both in-person and over the telephone, in which the jury heard Georgiou repeatedly describe his historical stock manipulations and committing stock fraud in real time with an undercover FBI agent;¹⁰ financial and trading records; witness testimony establishing that Georgiou did exactly what he said he did in the recordings, *i.e.*, engaging in extensive stock manipulation; recordings of Georgiou asking if the undercover FBI agent was a “cop” and discussing plans to speak in code and otherwise conceal the nature of their activity; incriminating emails from Georgiou furthering his scheme in the name of a fictional lawyer, Andreas Augland, and in the name of one of his fronts, Ron Wyles; and Georgiou attempt to procure false testimony from his cohort, Alex Barrotti (“Barrotti”).

In addressing one of Georgiou’s post-trial motions, I previously summarized the nature and quality of the evidence as follows:

⁹ “Georgiou was convicted of securities fraud pursuant to Section 10(b) of the [Exchange] Act and Section 10(b)’s implementing regulation, SEC Rule 10b-5 (‘Rule 10b-5’).” [Georgiou, 777 F.3d at 133](#) (citing [15 U.S.C. § 78j\(b\)](#); [17 C.F.R. § 240.10b-5](#); [15 U.S.C. § 78ff](#) (prescribing penalties for willful violations of the Act)).

¹⁰ The undercover FBI agent was known as “Charlie” in his dealings with Georgiou. He testified during the trial and at the evidentiary hearing.

Georgiou presented a version of the relevant events which largely contradicted the evidence presented at trial. The Government captured Georgiou in various recordings stating “[n]obody is wearing a wire,” suggesting that they conduct their meetings in a “hot tub” and asking if [Charlie] was “a cop.” On the witness stand, Georgiou insisted that he had actually been investigating and recording Waltzer, but produced no evidence to corroborate his claims. The Government also offered into evidence a recording in which Georgiou accidentally recorded himself stating:

Well, Karen [Georgiou’s wife] has read the letter now, and she said you need to explain to me how twenty-two million dollars in losses have occurred. She goes you know. And it is almost like she is clairvoyant. Some of the things she started saying she goes what, you guys put up a bunch of stock that was inflated, and you borrowed against it and you sunk a firm. These are her words now. I am not paraphrasing.

(Trial Tr. vol. 11, 247, Feb. 8, 2010.) Numerous other recordings presented by the Government, in addition to voluminous emails and financial records, overwhelmingly demonstrated that Georgiou had committed the crimes charged.

***6** (Doc. No. 211 at 36-37.) During Georgiou’s cross-examination at trial, the following exchange took place regarding Georgiou’s inadvertent incriminating self-recording:

Q. Right, and you call up Vince, and you say my wife has figured it out, she says you guys put up a bunch of stock that was inflated, you borrowed against it, and you sunk a firm. Isn’t that what those words say?

A. That is what those words say.

Tr. 2/8/2010, 248-49. Georgiou’s guilt was not only overwhelmingly supported by all of the evidence, but, significantly, by his own words in his own inadvertent recording.

Regarding another post-trial motion, I, again,

commented about the overpowering nature of the evidence by stating:

The Government's evidence against Georgiou included voluminous recordings, emails, financial records and other evidence that overwhelmingly demonstrated that Georgiou had committed the crimes charged. All of which was consistent with Waltzer's testimony. Georgiou, on the contrary, produced no evidence to corroborate his claim that he had actually been investigating and recording Waltzer. "The testimony of [a witness] must be considered in the totality of the circumstance and all of the evidence introduced at trial." Waltzer's version of the relevant events conforms with the staggering physical evidence in this case. As such, we conclude that even if the jury had found Waltzer to be unreliable, Georgiou's trial nevertheless resulted in a verdict worthy of confidence, considering the totality of the circumstances and all of the evidence introduced at trial.

(Doc. No. 266 at 39-40) (quoting United States v. Hankins, 872 F. Supp. 170, 174-75 (D.N.J. 1995)). In fact, Georgiou himself acknowledges the large amount of evidence at trial by stating that "[a] large body of evidence pertaining to the conspiracy period was presented to the jury, including, stock trades, phone logs, emails, and recordings, all diametrically opposed in interpretation by the parties." (Pet'r's Br. 1.)

Also, at trial, Georgiou testified and perjured himself. He attempted to explain away the \$5,000 bribe payment that he made to Charlie as part of the test trade (which he discussed explicitly in numerous recorded conversations) by telling the jury that the \$5,000 was a loan to Waltzer to help Waltzer pay his lawyers due to Waltzer's purported IRS problems. Georgiou also testified that he was going along with the fraud because he was investigating Waltzer about this IRS matter. Tr. 2/8/10, 56-57. Significantly, Georgiou could not explain what he would have accomplished had he concluded this investigation of Waltzer's IRS issues. Tr. 2/8/10, 29-33, 209-14. As I previously explained in a prior Memorandum Opinion, Georgiou failed to produce any corroborating evidence of his claim that he had actually been investigating

and recording Waltzer. (Doc. No. 266 at 39-40.)

The government further established that Georgiou lied about the \$5,000 bribe payment with the testimony of his cohort, Barrott. Barrott testified that, after Georgiou was arrested in this case, Georgiou asked Barrott to testify for him and lie about their financial dealings. Tr. 2/8/10, 269-308. Georgiou also asked Barrott to falsely testify to support Georgiou's lies to the jury, saying that Barrott overheard a telephone conversation in which Waltzer told Georgiou he needed \$5,000. *Id.* at 302-03. Additionally, Georgiou asked Barrott, who was skilled with computers, to help him concoct a story to convince the jury that a lawyer named Andreas Augland was real when, in fact, as Georgiou admitted to Barrott, "[A]ctually, [Augland] does not exist." *Id.* at 304-05.

*7 Regarding the overwhelming amount of evidence and Georgiou's perjured testimony, I commented, during sentencing, as follows:

According to the evidence, the Defendant clearly manipulated and inflated stocks to his advantage and to the significant disadvantage of others. In addition, he obstructed justice by perjuring himself in this court. The evidence in this case was overwhelming. The defendant sat there and listened to it, and yet he took the witness stand and gave evidence that really left the Court stunned. It was almost pathetic. I could not understand why he thought what he was doing was a good idea.

It obviously failed because this case went almost three weeks, and that jury I think was out about less than two hours, maybe an hour and a half, and lunch was served to them while they were there. That's how powerful the testimony and the evidence were in this case, and they found him guilty of all nine counts.

Tr. 11/19/10, 83-84.

On November 19, 2010, this Court sentenced Georgiou to 60 months' imprisonment as to Counts One, and Three through Nine, and a consecutive term of 240 months' imprisonment as to Count Two. This Court

also imposed a three-year term of supervised release, restitution of \$55,832,398, a special assessment of \$900, and forfeiture of \$26,000,000.

Georgiou filed a series of post-trial motions seeking a new trial, which were all denied in memorandum opinions and orders. (Doc. Nos. 211, 212 (September 29, 2010), Doc. Nos. 218, 219 (November 9, 2010), and Doc. Nos. 240, 241 (March 18, 2011).) Georgiou filed numerous additional motions seeking, *inter alia*, more evidence and reconsideration, which were denied in a lengthy memorandum opinion and order. (Doc. Nos. 266, 267 (December 12, 2011).)

On December 23, 2011, Georgiou filed a Notice of Appeal.¹¹ (Doc. No. 268.) After this Notice of Appeal, Georgiou filed a motion in Waltzer's criminal case, United States v. Waltzer, Crim. No. 08-552, to unseal certain documents regarding Waltzer, which this Court denied on March 30, 2012, based on the ground that Georgiou's Notice of Appeal divested this Court of jurisdiction to consider the motion.¹² (Doc. No. 276.) On April 13, 2012, Georgiou filed another Notice of Appeal. (Doc. No. 277.)

On January 20, 2015, the Third Circuit affirmed Georgiou's conviction and sentence. See Georgiou, 777 F.3d at 147. In its lengthy opinion, the Third Circuit itself noted that there was extensive evidence of Georgiou's fraudulent activities in the trial record, stating:

In light of the extensive evidence in the trial record, including recordings of Appellant discussing fraudulent activities, emails between Appellant and co-conspirators regarding manipulative trades, voluminous records of the trades themselves, bank accounts and wire transfers, Appellant's argument that the evidence of Waltzer's substance abuse and

¹¹ Initially, Georgiou filed a Notice of Appeal on December 29, 2010, and filed another Notice of Appeal on December 23, 2011. (Doc. Nos. 233, 268.)

¹² Georgiou filed his Motion to Unseal in United States v. Waltzer, Crim. No. 08-552, and the Honorable Stewart Dalzell promptly denied it without prejudice to its reassertion in Georgiou's case. (Crim. No. 08-552; Doc. No. 81.)

mental illness, or his meetings with the SEC, is material for our Brady analysis cannot stand. Waltzer’s testimony is ‘strongly corroborated’ by recordings of phone calls and meetings, and records of actual trades.... Thus, this evidence would “generally not [be] considered material for Brady purposes” because when considered “‘relative to the other evidence mustered by the state,’ ” the allegedly suppressed evidence is insignificant.... Moreover, for the foregoing reasons, the evidence at issue had not been suppressed, nor is it favorable to the Appellant. As such, Appellant’s Brady arguments must fail.

*8 Id. at 141-42 (citations omitted) (alteration in original). Georgiou petitioned for certiorari in the United States Supreme Court (“Supreme Court”), which was denied on November 2, 2015. See Georgiou v. United States, 136 S. Ct. 401 (2015).

2. Habeas Corpus Litigation

Georgiou filed his timely *pro se* [§ 2255](#) Motion on January 26, 2017.¹³ (Doc. No. 307.) The government filed its Response in Opposition on April 3, 2017.¹⁴ (Doc. No. 322.) Georgiou filed a *pro se* Reply, the government filed a Response to Georgiou’s Reply, and Georgiou filed a *pro se* “Sur-Surreply.”¹⁵ (Doc. Nos. 380, 383, 393.)

¹³ We have jurisdiction over Georgiou’s [§ 2255](#) Motion pursuant to [28 U.S.C. §§ 1331](#) and [2255](#).

¹⁴ The government is represented by Lappen, who is now the Deputy United States Attorney. In his role as an Assistant United States Attorney, Lappen was involved in the investigation of Georgiou, as well as Georgiou’s trial, post-trial, and appeal. During trial, the government was also represented by Derek A. Cohen (“Cohen”), who, at that time, was an Assistant United States Attorney. For ease of understanding, I will refer to Lappen as “AUSA Lappen” and to Cohen as “AUSA Cohen.” Both AUSA Lappen and AUSA Cohen testified at the evidentiary hearing. Tr. 9/18/2017, 167-297; Tr. 9/26/17, 50-142.

¹⁵ Georgiou’s [§ 2255](#) Motion and supporting briefs will be referred to collectively as the [§ 2255](#) Motion. We will be using the parties’ pagination when citing to their submissions.

Georgiou's [§ 2255](#) Motion raises numerous issues, many of which flow from two primary complaints. First, Georgiou contends that unbeknownst to the defense, Waltzer was acting as a government cooperator for approximately one year before June 2007 when Waltzer confessed to his crimes and began actively cooperating with the government. Georgiou concludes, from this view of the facts, that numerous legal errors occurred because Waltzer supposedly "was acting for his own purposes, to manufacture leads and evidence" for the government, rather than acting with the "mens rea" of a criminal. (Pet'r's Br. 2.) In light of these supposed facts, Georgiou believes that numerous charges against him are infirm, and that his attorneys somehow could have used this evidence to impeach Waltzer (and presumably all the other evidence in the case) and change the outcome of the trial.

Georgiou's second general attack on his conviction is that the government acted improperly by allowing Waltzer to speak directly, "one on one," with the AUSAs who were working with Waltzer and government agents in dozens of fraud investigations, including the investigation and prosecution of Georgiou. Again, Georgiou raises numerous claims that flow from this claim of government misconduct, and he suggests that Waltzer and the government attorneys conspired to frame him. Georgiou contends that the AUSAs were witnesses to the fraud and were conflicted in representing the government in light of their involvement with Waltzer; that the government should have provided this information to the defense, and that he was prejudiced – *i.e.*, if these errors had not occurred, somehow the result of the proceeding would have been different.

***9** In its Response to Georgiou's [§ 2255](#) Motion, the government agreed to an evidentiary hearing to establish a factual record for a limited number of issues and requested that the Court appoint counsel to represent Georgiou. In his *pro se* [§ 2255](#) Motion, Georgiou requested court-appointed counsel to represent him and, on April 17, 2017, we conducted a hearing regarding the appointment of counsel. See Tr. 4/17/17. Cognizant of the fact that an evidentiary hearing was imminent, the issue of appointment of

counsel was of the utmost importance.¹⁶ During the hearing, Georgiou stated that he wanted to represent himself. Id. at 6. Consequently, we conducted a thorough colloquy of Georgiou on his request to proceed *pro se*. Id. at 10-38; see also [United States v. Peppers](#), 302 F.3d 120, 132-37 (3d Cir. 2002).

The Court was prepared to appoint an attorney from the Federal Community Defender Office for the Eastern District of Pennsylvania (“Federal Defender”) to represent Georgiou. See Tr. 4/17/17, 6. In fact, Arianna J. Freeman (“Federal Defender Freeman”), who is the Federal Defender’s Managing Attorney Non-Capital Habeas Unit, was present at the hearing for that purpose. Id. at 27. Federal Defender Freeman was ready and willing to represent Georgiou; however, Georgiou refused the appointment of counsel, waived counsel, and chose to represent himself.¹⁷ Id. at 6-30. After conducting an extensive colloquy in order to determine whether Georgiou’s waiver was knowing,

¹⁶ “Rule 8(c) of the Rules Governing Section § 2255 Proceedings, [28 U.S.C. foll. § 2255](#), provides that ‘[i]f an evidentiary hearing is required, the judge shall appoint counsel for a movant who qualifies for the appointment of counsel under [18 U.S.C. § 3006A\(g\)](#)’” [United States v. Iasiello](#), 166 F.3d 212, 213 (3d Cir. 1999) (footnote omitted).

“[18 U.S.C. § 3006A\(g\)](#) allows for appointment of counsel when ‘the interests of justice so require and such person is financially unable to obtain representation.’” Id. at 213 n.2. On April 18, 2017, Georgiou filed a CJA 23 Financial Affidavit indicating his qualification as an indigent defendant. (Doc. No. 331.)

¹⁷ After asking Georgiou for the reason that he would not accept counsel appointed by the Court, Georgiou responded as follows:

As far as why I wouldn’t want counsel, I would always want the advice of counsel, but I don’t know who that counsel is and my case has certain complexities to it. It’s kind of, in my eyes, having a terminal condition. You may not want that treated by any practitioner. There has to be someone you’re compatible with, presumably, and somebody who has certain expertise.

Tr. 4/17/17, 9. Georgiou is concurrently representing himself opposing the forfeiture proceedings in our case, and in a civil action brought by the Securities and Exchange Commission (“SEC”). See [SEC v. Georgiou](#), Civ. No. 09-616.

intelligent, and voluntary, and upon ensuring that he understood the full implications of his decision, I was satisfied that he knowingly, intelligently, and voluntarily decided to proceed *pro se*.¹⁸ *Id.* at 27-28. Out of an abundance of caution, Federal Defender Freeman was “appointed to assist [Georgiou] as stand-by counsel only. This Appointment is pursuant to [Title 18, § 3006A](#), counsel’s duties are limited to answering legal and procedural questions from [Georgiou].”¹⁹ *Id.*; Doc. No. 332.

***10** During the pendency of his [§ 2255](#) Motion, Georgiou proceeded to file countless *pro se* motions seeking discovery from the government. Significantly, the government produced records which were not produced pretrial. Georgiou supplemented the record with the newly produced documents received from the government. On July 14, 2017, in light of the

¹⁸ As I was conducting the colloquy, AUSA Lappen requested extra time to go back to his office and obtain a copy of the Third Circuit’s approved colloquy for a defendant who wants to proceed *pro se*. See Tr. 4/17/17, 11. Specifically, AUSA Lappen stated:

[Georgiou] now says he wants to represent himself and go *pro se*. He’s obviously been very litigious. I would request that if – that before he be allowed to go *pro se*, that I get a copy of the Third Circuit approved colloquy for a defendant who wants to go *pro se* and we follow that line by line, word for word, so that we don’t have further litigation, with all due respect to Your Honor, over whether the colloquy is sufficient.

In part, I hear him saying he wants to go *pro se* for now. I think what he is going to do – he’s not saying unequivocally he wants to go *pro se* for the balance of this procedure and for these hearings. So I think we need to have a full colloquy, formal colloquy.

Id. AUSA Lappen was granted the extra time out of an abundance of caution. See *id.* at 14-15. After the brief recess, I continued with the colloquy using the Third Circuit’s approved colloquy. See *id.* at 16-24.

¹⁹ Research and Writing Attorney for the Federal Defender, Thomas Gaeta (“Federal Defender Gaeta”), also provided some assistance to Georgiou, but it appeared such assistance was administrative in nature.

government's new production of records, the Court granted Georgiou's *pro se* request for an urgent status conference, and instructed the parties to be prepared to discuss, *inter alia*, the following issues:

1. the Government's disclosure that an Assistant United States Attorney was assigned to the Waltzer matter in 2006; and
2. the witnesses who both sides expect to call at the evidentiary hearing.

(Doc. No. 395.) Also, I ordered that a limited evidentiary hearing was required to develop a factual record regarding the following issues:

1. Kevin Waltzer's ("Waltzer") contacts with the Government before June 2007, including the U.S. Attorney's Office involvement.
2. Waltzer's communications with the Government attorneys during the investigation of Georgiou and other defendants.
3. Whether former counsel were constitutionally ineffective for (a) deciding not to engage a securities expert witness for trial; (b) supposedly entering into an unauthorized agreement with the Government to extend the trial, based on a conflict with Government counsel; (c) failing to establish the existence of Georgiou's fictional lawyer, Andreas Augland; (d) failing to properly advise and inform Georgiou concerning plea offers from the Government; and (e) failing to use additional evidence to cross-examine Government witness Alex Barrotti?²⁰

(Doc. No. 397.) An additional ineffective assistance of counsel claim for failure to argue that Waltzer's communications with the AUSAs were improper was subsequently added to the list of limited issues being addressed at the evidentiary hearing.

On July 19, 2017, a status conference was conducted where many issues were discussed, and the dates for

²⁰ Georgiou later withdrew the ineffectiveness claims (b) through (e) above, and the Court issued an order formally dismissing those claims with prejudice. (Doc. No. 495.)

the evidentiary hearing were set for September 18, 19, 25 and 26.²¹ (Doc. No. 401.) From July 19, 2017, until the start of the evidentiary hearing on September 18, 2017, dozens of motions were filed, mainly, by Georgiou regarding discovery. Among the matters at issue were the government's supplementation of the record throughout the habeas proceeding, Georgiou's continual search for records, and the witness list for the evidentiary hearing. Georgiou also sought to compel the testimony of AUSA Lappen as a necessary witness, and his disqualification from representing the government at the evidentiary hearing.²² During this time period, the government provided Georgiou with substantial discovery as requested for the proceedings, which included more records that were not produced to Georgiou's defense.

***11** Also, a significant issue that arose was which witnesses that were proposed by Georgiou, numbering more than forty, should be permitted to testify at the evidentiary hearing. Georgiou and the government agreed upon twenty witnesses, and, due to Georgiou's *pro se* status, the government was in the unusual position of contacting and scheduling Georgiou's witnesses, which it did diligently. (Doc. No. 449.) A number of proposed witnesses were in dispute, which required the Court to determine who were permitted to testify. (Doc. No. 452.) Given the seriousness of the situation, there were ten disputed proposed witnesses who the Court had interviewed by an investigator for the Federal Defender ("Federal Defender Investi-

²¹ The evidentiary hearing was originally scheduled for August 2017, but was rescheduled until September 2017. (Doc. Nos. 329, 401.)

²² The Court granted Georgiou's Motion to Compel the testimony of AUSA Lappen as a necessary witness and; therefore, he was required to testify at the evidentiary hearing. (Doc. No. 413.) Consequently, he was disqualified from representing the government at the evidentiary hearing, and Assistant United States Attorney Lesley S. Bonney ("AUSA Bonney") represented the government. (*Id.*) However, AUSA Lappen was permitted to remain at counsel table during the evidentiary hearing. (Doc. No. 438.) After the evidentiary hearing was concluded, AUSA Lappen continued to represent the government along with AUSA Bonney.

gator") to determine whether their testimony was relevant.²³ (Doc. Nos. 456 (Court expanded the role of the Federal Defender for the limited purpose of hiring an investigator to interview Georgiou's proposed witnesses), 471.) Overall, the issue of which witnesses would be permitted to testify was not only hotly debated, but it was earnestly considered by the Court given the progression of the habeas proceedings; specifically, the expansion of the record, and Georgiou's allegations of serious misconduct by the government.

Georgiou also pursued the ability to have three current federal inmates, who allegedly knew Waltzer while he was incarcerated, testify about what Waltzer supposedly said to them while in prison, which Georgiou alleged was exculpating of himself and incriminating of Waltzer. (Doc. Nos. 408, 410, 449.) Specifically, the three inmates who Georgiou sought to testify about Waltzer's alleged statements to them are: Adam Lacerda ("Lacerda"); Michael Vandergrift ("Vandergrift"); and Jeff Bellamy ("Bellamy"). Both Lacerda and Vandergrift chose not to testify by pleading the Fifth Amendment through their attorneys at the start of the evidentiary hearing. (Doc. No. 468.) Regarding Bellamy, Georgiou claimed that Bellamy would testify that Waltzer had confessed to him that Georgiou had never engaged in illegal conduct with Waltzer, and that Waltzer continued to use cocaine during his time working with the FBI. (Doc. No. 408.) Instead, on September 19, 2017, Bellamy took the stand and testified under oath that Georgiou offered him \$10,000 to testify for Georgiou at the evidentiary hearing and to sign an affidavit

²³ One of the disputed proposed witnesses was Georgiou's sentencing counsel, Mark Cedrone ("Cedrone"). (Doc. Nos. 471, 478.) Georgiou states that he had a third party contact Cedrone. (Doc. No. 478.) After the Federal Defender Investigator completed his investigation of the remaining witnesses, Georgiou was permitted to supplement the record explaining their relevance to the limited issues being addressed at the evidentiary hearing, and the government was granted time to file a response. (Doc. No. 471.) Regarding six of the witnesses, Georgiou withdrew his request for their testimony, and I made rulings pertaining to the remaining witnesses. (Doc. No. 495.)

written by Georgiou. Tr. 9/19/17, 138-60. We will delve further into Bellamy's testimony, as well as what occurred with Vandergrift and Lacerda's counsel, in our Findings of Fact. See Findings of Fact, infra ¶¶ 56-70.

The evidentiary hearing was conducted on the following dates: September 18, 19, 25, 26; November 15, 16; and December 1, 2017. All of the days of testimony were full days, except for the testimony on December 1, 2017, which only lasted a little more than an hour. Throughout the entire evidentiary hearing, Georgiou effectively represented himself and thoroughly questioned all of the nineteen witnesses, which encompassed many seasoned and accomplished attorneys.²⁴ Georgiou zealously advocated for himself. Not only did he effectively utilize the law, but he fully used his unparalleled knowledge of the facts of his case, including the trial record, to his full advantage. He also took full advantage of his *pro se* status, and its attendant leeway, by knowingly attempting to expand the scope of the evidentiary hearing at every turn. Such maneuvering required the need to constantly reign Georgiou in when he sought to expand the scope. The record is now fully developed and includes the additional facts that are helpful to fully resolve Georgiou's claims.

***12** On December 1, 2017, at the conclusion of the evidentiary hearing, the parties were given a little more than sixty days, until February 5, 2018, to file their proposed Findings of Fact and Conclusions of Law, as well as any other briefing. (Doc. Nos. 516.) The time limit was extended, at Georgiou's request, until March 5, 2018, which gave the parties a total of approximately ninety days. (Doc. Nos. 535, 549.) Since the moment that I set the day for the final briefing to be filed, Georgiou has claimed that he needs more time. Tr. 12/1/17, 55-56. At that time, I explained to Georgiou, "We must have fixed and hard dates at this point. It has been dragging on for a long time." Id. at

²⁴ In her role as stand-by counsel, Federal Defender Freeman was present at counsel table with Georgiou along with Federal Defender Gaeta.

Subsequently, Georgiou filed more *pro se* motions seeking, among other things, to: obtain more discovery; recall several witnesses; supplement the record; release information that was redacted in FBI records; amend his [§ 2255](#) Motion; and obtain an expansion of time for filing his final briefing.

In addition, Georgiou also filed a *pro se* “Motion Requesting Urgent Status Conference” seeking, *inter alia*, the “Appointment/Engagement of Counsel” on December 29, 2017. (Doc. No. 527.) Notably, Georgiou’s request for appointment of counsel was long after my ardent attempts to appoint counsel during the April 17, 2017 colloquy, and subsequent to the conclusion of the evidentiary hearing where Georgiou effectively questioned nineteen witnesses. Georgiou’s Motion for an urgent status conference was granted on January 11, 2018, and an oral argument was held on January 12, 2018. (Doc. Nos. 530, 531.)

During the oral argument, Georgiou sought time to find an attorney, and the government strenuously argued that starting over with a new attorney, after Georgiou conducted the hearing and wrote various habeas briefs, would waste a tremendous amount of resources. Tr. 1/12/18, 3-6. I denied Georgiou’s request for appointment of counsel stating that I was not going to delay the proceedings any further. *Id.* at 6; Doc. No. 532. In light of the appointment of counsel issue raised by Georgiou, it is important for this Court to make crystal clear that Georgiou has possessed both an excellent understanding of the issues and the ability to adequately present, forcefully and coherently, his contentions throughout the entire time that he has represented himself.²⁵ See [Reese v. Fulcomer](#).

²⁵ I noted several times to Georgiou that he has far and away the best command over all of the aspects of the case. Tr. 1/12/18, 15, lines 13-17 (“I’ve commented and I think I commented in this court on the record that of everybody in this room, you have a more complete knowledge of this entire record than anybody.”). Also, Georgiou had the means to adequately investigate, prepare and present all of his claims as evidenced by the fact that he filed approximately fifty-four motions, and many responses and replies,

946 F.2d 247, 264 (3d Cir. 1991).

On January 17, 2018, Georgiou sought reconsideration of the denial of appointment of counsel. (Doc. No. 533.) Georgiou argued that Rule 8(c) of the Rules Governing Section § 2255 Proceedings was triggered by the need for an evidentiary hearing, and the Court's current denial of appointment of counsel amounted to an abridgement of his statutory right. (*Id.*) I denied Georgiou's request for appointment of counsel on January 24, 2018. (Doc. No. 535.) He also filed a *pro se* "Urgent Motion to Address Appointment of Counsel Pursuant to Obtaining Colloquy Transcript and Extension of Time to File Final Briefing" on February 14, 2018, which was denied on February 15, 2018.²⁶ (Doc. Nos. 546, 547.)

*13 On March 5, 2018, more than ninety days after the conclusion of the evidentiary hearing, Georgiou filed his proposed Findings of Fact and Conclusions of Law, and a Supplemental Brief (collectively “Georgiou’s Findings of Fact and Conclusions of Law Submission”), and the government filed its Proposed Findings of Fact and Conclusions of Law. (See Doc. Nos. 556, 557.)

B. LAYOUT OF THE MEMORANDUM OPINION

This Memorandum Opinion is divided into two parts. Part I addresses the claims, in which, the record as a whole conclusively establishes that Georgiou is not entitled to any relief, and no evidentiary hearing was

(cont'd)

since proceeding *pro se*. Not only did the vast majority of the motions and other submissions include effective legal argument, but they also adequately applied legal argument to the facts of the case. Moreover, Georgiou's questioning of the nineteen witnesses during the evidentiary hearing was legally sound and comprehensive of the important issues at hand.

²⁶ For some reason, unknown to the Court, Georgiou has absolutely no interest in having Federal Defender Freeman represent him in a full capacity. Even as late as February 14, 2018, when the final briefing was due on February 20, 2018, Georgiou acknowledged Federal Defender Freeman as his stand-by counsel, but appeared completely uninterested in her representation, instead, asking for the appointment of new counsel. (Doc. No. 546.)

required. Specifically, Part I addresses the following claims:

1. Count Nine, charging wire fraud, should be “dismissed for constructive amendment-fatal variance” because the wire supposedly was not in furtherance of the fraud;
2. this Court erred in instructing the jury on securities fraud;
3. the government engaged in misconduct in its closing argument to the jury;
4. the government suborned perjury when Waltzer testified that he recorded all calls with Georgiou when supposedly there were unrecorded calls toward the end of the undercover operation when Georgiou and the government were engaged in the “test” trade;
5. the government engaged in misconduct in failing to disclose evidence that Waltzer supposedly failed to record calls of a defendant in a different investigation, James Hall, against whom Waltzer also cooperated (and following the investigation, Hall pleaded guilty); and
6. based on a change to Brady law, Georgiou believes that this Court should revisit the Brady claims (relating to Waltzer’s mental health and drug use) previously litigated and rejected in this Court and the Court of Appeals, despite a finding in both courts that the information not disclosed by the government was not material.

Additionally, Part I addresses the following ineffective assistance of counsel claims:

1. Counsel were ineffective for failing to object to SEC Accountant Daniel Koster (“Koster”) testifying as a lay witness;
2. Counsel were ineffective for failing to properly cross-examine Koster on his flawed analysis;
3. Counsel were ineffective for failing to object to summary charts created by Koster being admitted as evidence pursuant to Federal Rule of Evidence

1006;

4. Counsel were ineffective for failing to require that Government Exhibits 301-304 be admitted into evidence and reviewed by a jury;
5. Counsel were ineffective for failing to “uncover the AUSA Secret Communication Arrangement with Waltzer, and move for their Disqualification[;];”
6. Counsel were ineffective for failing to discover information about Waltzer’s mental state;
7. Counsel were ineffective for failing to impeach Waltzer for his perjury in connection with his email with Georgiou;
8. Counsel were ineffective for failing to obtain “critical evidence of Waltzer manipulating recordings in Hall and other cases[;];”
9. Counsel were ineffective for failing to pursue a multiple conspiracies jury instruction based on an alleged fatal variance in the Indictment;
10. Counsel were ineffective in failing to pursue again during trial (having raised the claim pretrial) a motion to dismiss Count One on the ground that there was a “fatal variance between pleading and proof[;];”
11. Counsel were ineffective for “failing to raise jurisdictional-extraterritoriality, and irrevocable liability issues, pretrial;” and

*14 12. Counsel were ineffective for failing to object to a forfeiture money judgment.

Part II encompasses my “Findings of Fact and Conclusions of Law,” which addresses those issues specifically designated as being addressed at the evidentiary hearing. Those issues are the following:

1. Waltzer’s contacts with the Government before June 2007, including the U.S. Attorney’s Office involvement;
2. Waltzer’s communications with the Government attorneys during the investigation of Georgiou and other defendants;

3. Counsel were ineffective for failing to engage a securities expert on behalf of the defense for trial; and

4. Counsel were ineffective for failing to argue that Waltzer's communications with the AUSAs were improper.

Finally, Georgiou's claims are multidimensional and overlapping. Additionally, his writing is dense and needs to be untangled in many cases. The Court has made every effort to view all of Georgiou's claims broadly in light of his *pro se* status. See Mala v. Crown Bay Marina, Inc., 704 F.3d 239, 244-46 (3d Cir. 2013) (discussing the obligation of a court to liberally construe *pro se* pleadings and other submissions, particularly focusing on imprisoned *pro se* litigants). Also, the Court has made every effort to address each issue raised in the hundreds of pages of briefing. To the extent that any issue has not been specifically addressed in our Memorandum Opinion, we have considered it, and deny it, finding that it does not warrant discussion.

II. LEGAL STANDARD

Under 28 U.S.C. § 2255(a), a federal prisoner may file a motion requesting that the sentencing court vacate, set aside, or correct his sentence on the basis "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." 28 U.S.C. § 2255(a). If a party is entitled to relief under § 2255(a), "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." Id. § 2255(b). "In considering a motion to vacate a defendant's sentence, 'the court must accept the truth of the movant's factual allegations unless they are clearly frivolous on the basis of the existing record.' " United States v. Booth, 432 F.3d 542, 545 (3d Cir. 2005) (quoting Gov't of the Virgin Islands v. Forte, 865 F.2d 59, 62 (3d Cir. 1989)). "The district court is required to hold an evidentiary hearing unless the motion and

files and records of the case show conclusively that the movant is not entitled to relief.” *Id.* (citation omitted); see also § 2255(b). “The obligation to liberally construe a *pro se* litigant’s pleadings is well-established.” Higgs v. Att’y Gen. of the U.S., 655 F.3d 333, 339 (3d Cir. 2011) (citations omitted).

A. PREVIOUSLY LITIGATED/PROCEDURAL DEFAULT

1. Previously Litigated

“Once a legal argument has been litigated and decided adversely to a criminal defendant at his trial and on direct appeal, it is within the discretion of the district court to decline to reconsider those arguments if raised again in collateral proceedings under 28 U.S.C. [§] 2255.” United States v. Orejuela, 639 F.2d 1055, 1057 (3d Cir. 1981) (citing cases). “Section 2255 generally may not be employed to relitigate questions which were raised and considered on direct appeal.” United States v. DeRewal, 10 F.3d 100, 105 n.4 (3d Cir. 1993) (citation omitted); see also United States v. Palumbo, 608 F.2d 529, 533 (3d Cir. 1979). “[R]elitigation may be allowed for ‘newly discovered evidence that could not reasonably have been presented at the original trial, a change in applicable law, incompetent prior representation by counsel, or other circumstances indicating that an accused did not receive full and fair consideration of his federal constitutional and statutory claims.’” United States v. Scott, 664 F. App’x 232, 237 (3d Cir. 2016) (quoting Palumbo, 608 F.2d at 533).

2. Procedural Default

*15 “Because collateral review under § 2255 is not a substitute for direct review, a movant ordinarily may only raise claims in a § 2255 motion that he raised on direct review.” Hodge v. United States, 554 F.3d 372, 378-79 (3d Cir. 2009) (citing Bousley v. United States, 523 U.S. 614, 621 (1998)). “Put differently, a movant has procedurally defaulted all claims that he neglected to raise on direct appeal.” Id. at 379 (citing Bousley, 523 U.S. at 621). “But courts will exempt a movant from that rule if he can prove either that he is actually innocent of the crime for which he was

convicted, or that there is a valid cause for the default, as well as prejudice resulting from the default.” *Id.* (citing [Bousley, 523 U.S. at 622](#)).

a. Cause and Prejudice

To demonstrate cause for procedural default, a petitioner “must show that some objective factor external to the defense impeded counsel’s efforts to raise the claim.” [United States v. Pelullo, 399 F.3d 197, 223 \(3d Cir. 2005\), as amended](#) (Mar. 8, 2005) (quoting [McCleskey v. Zant, 499 U.S. 467, 493 \(1991\)](#)) (internal quotation marks omitted). “Examples of external impediments ... include interference by officials, a showing that the factual or legal basis for a claim was not reasonably available to counsel, and ineffective assistance of counsel.” *Id.* (quoting [Wise v. Fulcomer, 958 F.2d 30, 34 n.9 \(3d Cir. 1992\)](#)) (internal quotation marks omitted); [see also Hodge, 554 F.3d at 379](#) (“Ineffective assistance of counsel that rises to the level of a Sixth Amendment violation constitutes cause for a procedural default.”). Notably, if a petitioner fails to establish the requisite cause excusing procedural default, it is unnecessary to determine whether he or she has shown actual prejudice. [Pelullo, 399 F.3d at 223-24](#); [see also Smith v. Murray, 477 U.S. 527, 533 \(1986\)](#).

To establish prejudice, a petitioner must not merely show that there were errors that created a possibility of prejudice, but that the errors “worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.” [Holland v. Horn, 519 F.3d 107, 112 \(3d Cir. 2008\)](#) (quoting [United States v. Frady, 456 U.S. 152, 170 \(1982\)](#)).

b. Actual Innocence²⁷

²⁷ Actual innocence “serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar ... or ... expiration of the statute of limitations.” [McQuiggin v. Perkins, 569 U.S. 383, 386 \(2013\)](#). “The Supreme Court has not yet recognized the existence of a freestanding claim of actual innocence.” [Wright v. Superintendent Somerset SCI, 601 F. App’x 115, 119 \(3d Cir. 2015\)](#) (citing [McQuiggin, 569 U.S. at 386](#)). Georgiou attempts to raise a freestanding claim of actual innocence.

*16 “To establish actual innocence, a habeas petitioner must persuade[] the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.” [Sweger v. Chesney, 294 F.3d 506, 522 \(3d Cir. 2002\)](#) (alteration in original) (citation omitted); [see also Schlup v. Delo, 513 U.S. 298, 324-26 \(1995\)](#) (stating that a “quintessential miscarriage of justice” claim is one that a petitioner is entirely innocent of the crime). “Actual innocence means ‘factual innocence, not mere legal insufficiency.’ ” [Sweger, 294 F.3d at 523](#) (quoting [Bousley, 523 U.S. at 623](#)). “The Supreme Court has required a petitioner ‘to support his allegations of constitutional error with *new reliable evidence* – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial.’ ” [Id.](#) (quoting [Schlup, 513 U.S. at 324](#)). “‘Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful.’ ” [Id.](#) (quoting [Schlup, 513 U.S. at 324](#)); [see also Sistrunk, 674 F.3d at 192](#) (“Schlup sets a supremely high bar.”); [Werts v. Vaughn, 228 F.3d 178, 193 \(3d Cir. 2000\)](#) (noting that the actual innocence exception “will apply only in extraordinary cases”).

“New reliable evidence is almost always required to establish actual innocence.” [Id.](#) (footnote omitted). “We have held,’ however, ‘that, in certain circumstances, the lack of new evidence is not necessarily

_____ (cont'd)

Here, assuming *arguendo* that Georgiou could make a freestanding claim of actual innocence, his claim is without merit. Considering Georgiou’s arguments regarding how the newly produced records impacted his trial, we conclude that he has not presented sufficient persuasive evidence of actual innocence because his arguments either have no bearing on his *factual* innocence or he conclusorily denies other facts that the overwhelming evidence brought out at trial unequivocally established. Adding Georgiou’s offered evidence into the mix of all of the evidence would still permit a reasonable juror to vote to convict. Thus, in light of all of the evidence, Georgiou has not shown that the new evidence is “so probative of innocence that no reasonable juror would have convicted [him.]” [Sistrunk v. Rozum, 674 F.3d 181, 191 \(3d Cir. 2012\)](#) (citations omitted).

fatal to an argument that a petitioner is actually innocent.’” [United States v. Davies, 394 F.3d 182, 191 \(3d Cir. 2005\)](#) (quoting [Cristin v. Brennan, 281 F.3d 404, 420 \(3d Cir. 2002\)](#)). For example, actual innocence may be demonstrated “by pointing to post-conviction decisions holding that a substantive criminal statute does not reach [a petitioner’s] conduct.” *Id.* (internal quotation marks and quoted case omitted).

III. PART I – EVIDENTIARY HEARING UNNECESSARY

A. SECTION 1 – VARIOUS CLAIMS

1. Count Nine, Charging Wire Fraud, Should Not Be Dismissed For Constructive Amendment-Fatal Variance

Georgiou states that “Count Nine charged wire fraud against ‘Accuvest ... a Bahamian brokerage firm’, alleging that for the purpose of executing the scheme ... a \$5,000 wire transfer ... to a Philadelphia bank account as payment for manipulating trading in Northern Ethanol stock was completed.” (Pet’r’s Br. 17.) He argues that:

Count Nine must be dismissed for constructive amendment–fatal variance. There was no nexus between the government’s alleged \$5,000 bribe and any wire fraud against Accuvest. Indeed, the government’s argument is illogical. Northern Ethanol shares were deposited at Accuvest. The four Northern Ethanol trades conducted at Accuvest generated \$110,000 of proceeds. The alleged purpose of the bribery was to manipulate the shares upwards, to create liquidity. If anything, Accuvest would have benefited by selling shares and reducing the margin debt. There is a prejudicial variance between the Indictment and proof.

(*Id.*) The government argues that this claim does not entitle Georgiou to any relief as it is waived and without merit. (Gov’t’s Resp. 7.)

a. Previously Litigated/Procedural Default

Georgiou raises this claim for the first time in his

§ 2255 Motion. He does not advance any specific argument pertaining to the “cause and prejudice” exception to the procedural default rule. Georgiou could have raised this argument on direct appeal, but did not. To the extent that he makes a universal argument that the procedural default rule does not apply because his prior counsel were ineffective, this argument fails. As discussed below, we find Georgiou’s constructive amendment-fatal variance argument groundless; therefore, we, likewise, deny his claim of ineffective assistance, as counsel cannot be ineffective for failing to raise a meritless claim. See Strickland v. Washington, 466 U.S. 668, 691 (1984) (finding that failure to pursue “fruitless” claims “may not later be challenged as unreasonable”).

*17 Also, Georgiou fails to satisfy the “actual innocence” exception to the procedural default rule because he has not provided new reliable evidence of his actual innocence. Even with Georgiou’s present-day arguments, and the newly produced documents upon which he currently relies, there is no way that we could conclude that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence. See Bousley, 523 U.S. at 623. Consequently, Georgiou’s claim that Count Nine must be dismissed for constructive amendment-fatal variance, which could have been raised on direct appeal, but was not, is procedurally defaulted.

b. Merits

In the alternative, even if Georgiou’s claim is not procedurally barred, his claim is meritless. Georgiou makes a very general and sweeping claim, but does not present a thorough and well-reasoned analysis of his argument in conjunction with the evidence convincingly used against him at trial. Significantly, “vague and conclusory allegations contained in a § 2255 petition may be disposed of without further investigation by the District Court.” United States v. Thomas, 221 F.3d 430, 437 (3d Cir. 2000) (citing United States v. Dawson, 857 F.2d 923, 928 (3d Cir. 1988)). After reviewing Georgiou’s vague and conclusory claim, we conclude that he is not entitled to habeas relief.

2. Jury Instructions For Securities Fraud – No Constructive Amendment

Georgiou, who was indicted under Section 10(b) of the Exchange Act, argues that the government “constructively amended” the indictment to charge Section 9(a) of the Exchange Act, and this Court improperly instructed the jury on Section 9(a). (Pet'r's Br. 18-20.) “An indictment is constructively amended when evidence, arguments, or the district court's jury instructions effectively amend the indictment by broadening the possible bases for conviction from that which appeared in the indictment.” [United States v. McKee, 506 F.3d 225, 229 \(3d Cir. 2007\)](#) (quotation, internal quotation marks, and alteration omitted); see also [United States v. Syme, 276 F.3d 131, 148 \(3d Cir. 2002\)](#) (stating that a constructive amendment “occurs where a defendant is deprived of his ‘substantial right to be tried only on charges presented in an indictment returned by a grand jury’”).

The government did not argue that Georgiou was guilty of violating Section 9(a) and the jury was not asked to decide whether Georgiou violated Section 9(a). Section 9(a) prohibits individuals from effecting “a series of transactions in any security *registered on a national securities exchange* ... creating actual or apparent active trading in such security, or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others.” [15 U.S.C. § 78i\(a\)\(2\)](#) (emphasis added). Georgiou’s case did not involve stocks that traded on a national securities exchange, and the government did not charge him with this violation.

Section 10(b) makes it unlawful:

[t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered ... any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

[Georgiou, 777 F.3d at 133](#) (citing [15 U.S.C. § 78j\(b\)](#))

(alteration in original). In order to enforce this statute, the SEC promulgated Rule 10b-5, which makes it unlawful for any person “[t]o employ any device, scheme or artifice to defraud[;] [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made ... not misleading, or[;] [t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.” [17 C.F.R. § 240.10b-5](#). To state a claim under Section 10(b) of the Act and Rule 10b-5, a plaintiff must allege: (1) a material misrepresentation or omission; (2) scienter; (3) a connection with the purchase or sale of a security; (4) reliance, or transaction causation in fraud-on-the-market cases; (5) economic loss; and (6) loss causation, or a causal connection between the material misrepresentation or omission and the loss. See [Dura Pharm., Inc. v. Broudo](#), 544 U.S. 336, 341-42 (2005).

*18 Although Section 10(b) outlaws a “manipulative or deceptive device or contrivance,” it does not define those terms. See [GFL Advantage Fund, Ltd. v. Colkitt](#), 272 F.3d 189, 203-04 (3d Cir. 2001). Examining the term “manipulation” in relation to Section 10(b), the Supreme Court stated that “[m]anipulation’ is ‘virtually a term of art when used in connection with securities markets.’” [Santa Fe Indus., Inc. v. Green](#), 430 U.S. 462, 476 (1977) (quoting [Ernst & Ernst v. Hochfelder](#), 425 U.S. 185, 199 (1976)).²⁸ In [Santa Fe Industries](#), which is a

²⁸ In [Ernst](#), the Supreme Court explained:

“Wash sales” are transactions involving no change in beneficial ownership. “Matched” orders are orders for the purchase/sale of a security that are entered with the knowledge that orders of substantially the same size, at substantially the same time and price, have been or will be entered by the same or different persons for the sale/purchase of such security. Section 9(a) of the 1934 Act, [15 U.S.C. § 78i\(a\)\(1\)](#), proscribes wash sales and matched orders when effectuated “(f)or the purpose of creating a false or misleading appearance of active trading in any security registered on a national securities exchange, or ... with respect to the market for any such security.”

Section 10(b) case, the Supreme Court cited to Section 9(a) in broadly explaining that market manipulation “refers generally to practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity.” *Id.* (citing [15 U.S.C. § 78i](#) (prohibiting specific manipulative practices); [Ernst & Ernst, 425 U.S. at 195, 199 n.21, 205](#)) (citations omitted).

Explicitly relying upon the Supreme Court’s ruling in [Santa Fe Industries](#), the Third Circuit defined “manipulation” under Rule 10(b) as follows: “[t]he term ‘manipulation’ ‘refers generally to practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity.’” [Rabin v. NASDAQ OMX PHLX LLC, 712 F. App’x 188, 193 n.7](#) (3d Cir. 2017) (quoting [Santa Fe Indus., 430 U.S. at 476](#) (citing [Ernst & Ernst, 425 U.S. at 199](#) (stating that “manipulation … connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities”))).

Along the same lines as [Santa Fe Industries](#), I instructed the jury regarding Section 10(b) as follows:

The SEC has identified some, but not all types of transactions that constitute fraud under these regulations. These include fictitious transactions effected for the purpose of creating a false or misleading appearance with respect to the market for any security.

One such transaction is a wash sale which involves no change of beneficial ownership of the stock. In other words, the same party is the buyer and the seller of the stock.

Another prohibited transaction is a match[ed] trade, which is an order to buy or sell securities that is entered with knowledge that a matching order of substantially the same size at substantially the same time and substantially at the same price on

(cont’d)
[Ernst, 425 U.S. at 205 n.25](#) (alteration in original)
(citations omitted).

the opposite side of the transaction has been or will be entered by or for the same or different parties.

A third prohibited transaction is marking the close which is a form of market manipulation that involve[s] attempting to influence the closing price of a publicly trade[d] share by executing purchase or sale orders at or near the close of normal trading hours.

Such activity can artificially inflate or depress the closing price for that security and can affect the price of the market on close orders, which are orders submitted to purchase shares at or near as possible to the closing price.

***19** These are examples under the SEC regulations of transactions that constitute fraud when effected for the purpose of creating a false or misleading appearance of act of trading in any listed security, or a false or misleading appearance with respect to the market for any such transactions.

(Tr. 2/12/2010, 26-27.) Pursuant to the parties' joint request, I further instructed:

In order to find the defendant guilty of securities fraud, you must find that the government has proven beyond a reasonable doubt all of the elements of the securities fraud as I am about to instruct you, including that the defendant acted willfully, knowingly and with the intent to defraud.

(Id. at 27.)

Georgiou's argument centers on the jury instructions, which included, at the government's request, clarifying definitional language borrowed from Section 9(a) to further explain to the jury the types of manipulative conduct that are widely understood as "manipulative" as prohibited under Section 10(b) for which Georgiou was indicted and found guilty. In a nutshell, Georgiou is arguing that the jury instructions regarding manipulation under Section 10(b) improperly encompassed examples of manipulative market activity that included practices such as "wash sales" and "matched orders," and provided the definitions of those terms contained in

Section 9(a). Specifically, Georgiou argues that Section 9(a) is inapplicable to his case since he was not charged under Section 9(a), and none of the companies in his case involved “listed securities” or any “national securities exchange.” (Pet’r’s Br. 19.) He also argues that the cumulative prejudice of the jury instructions cannot be overstated because “[e]very stage of the trial saw the jury bombarded with claims that ‘wash sales’, ‘match trades’, and ‘marking the close’, were illegal.” (*Id.*) The government argues that Georgiou’s claim is not cognizable because he has not alleged a constitutional violation, and the claim is procedurally defaulted. (Gov’t’s Resp. 63-64.) Additionally, it asserts that Georgiou’s claim is without merit, and he was not prejudiced because he would have been convicted with or without the clarifying jury instructions. (*Id.*)

a. Previously Litigated/Procedural Default

First, Georgiou’s claim is procedurally defaulted. Georgiou raised a similar claim in his Supplemental and Amended Motion for a New Trial, which this Court rejected.²⁹ (See Doc. No. 211 at 33-34.) Georgiou

²⁹ The September 29, 2010 Memorandum Opinion states:

Georgiou also seeks a new trial as a result of the Court defining certain terms in its charge to the jury, including “wash sale,” “match[ed] trade” and “marking the close.” As stated in United States v. Rennert:

The Court finds that any objections with respect to the instructions which dealt with market manipulation terms and practices are wholly without merit. The Court, in these instructions, merely described certain market practices which have been found to be manipulative. These definitions were necessary because the terms and practices are “terms of art” or only readily understandable if you are actually involved in the securities industry. Thus, the Court instructed the jurors as to these terms so that they could more properly and fairly consider the case. [No. 96-51, 1997 WL 597854, at *22 \(E.D. Pa. Sept. 17, 1997\)](#).

Numerous cases define the terms “wash sale,” “matched trade” and “marking the close” as manipulative or deceptive practices. See, e.g., SEC v. Wilson, No. 04-1331, 2009 WL 2381954, at *1 (D. Conn. July 31, 2009); SEC v.

did not raise the jury instructions issue before the Third Circuit on the merits. He does not allege, and the Court does not discern, any cause for his failure to present his claim to the Third Circuit. He appears to generally raise ineffective assistance of counsel, which may constitute cause for procedural default; however, as discussed below, we cannot fault counsel for failing to litigate a claim that is meritless. See Strickland, 466 U.S. at 691. In the absence of cause, the Court need not address the issue of prejudice. However, we note that Georgiou also fails to prove prejudice because it is clear that he has not demonstrated prejudice, and cannot, because he has not shown “that [these identified] errors at his trial ... worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.” Frady, 456 U.S. at 170 (emphasis omitted).

*20 In turn, the actual innocence exception to the procedural default doctrine is inapplicable because Georgiou has not provided new reliable evidence of his actual innocence. Accordingly, the Court will, alternatively, deny Georgiou’s claim entitled “Prejudicial Jury Instructions for Securities Fraud – Constructive Amendment” as procedurally barred.

b. Merits

Even assuming that Georgiou’s claim is properly raised pursuant to § 2255, it is completely without merit. My jury instructions were proper, and there was no constructive amendment of the indictment to include Section 9(a). The jury was properly instructed regarding manipulation under Section 10(b) and was given appropriate examples according to Santa Fe

(cont'd)

Kimmes, 799 F. Supp. 852, 859 (N.D. Ill. 1992). The goal of jury instructions is to aid the jury in its understanding of the applicable law, which includes both the language of the relevant statute and the case law which explains it. Moreover, at Georgiou’s request, the parties jointly submitted additional language regarding the challenged instruction in order to clarify the mental state required for conviction. Therefore, we conclude that no error was committed as a result of the Court defining the relevant terms in its jury instructions.

(Doc. No. 211 at 33-34.)

Industries and its progeny. Thus, it was wholly appropriate to instruct the jury that examples of manipulative market activity included practices such as “wash sales” and “matched orders,” and to provide the definitions of those terms contained in Section 9(a). My use of the examples of “wash sales” and “matched trades,” and their definitions, in the jury instructions was intended to assist the jury after a very long and complicated securities fraud trial. See [United States v. Petersen, 622 F.3d 196, 203 \(3d Cir. 2010\)](#) (“[A] district court has broad discretion in fashioning a jury charge as long as it communicates ‘the substance of the law’ so the jury is not misled or confused.”) (citation omitted). Also, I specifically instructed the jury that it was required to determine whether Georgiou acted willfully, knowingly and with the intent to defraud, as required by Section Rule 10(b). (Tr. 2/12/2010, 27.) The jury instructions adequately communicated the substance of Section 10(b) and neither misled nor confused the jury.

Georgiou was not prejudiced in any way by my proper jury instructions, and he has not made any showing otherwise. Additionally, the jury instructions were not an avenue for the government to amend the indictment using Section 9(a). The government indicted Georgiou on securities fraud in violation of Section 10(b), not Section 9(a), and the indictment was not amended during trial to broaden the possible bases for conviction from Section 10(b) to Section 9(a). As it pertained to securities fraud, the trial, including the jury instructions, was solely conducted pursuant to Section 10(b), and Section 9(a) played no role in the trial whatsoever. There was no constructive amendment. As a result, Georgiou’s claim entitled “Prejudicial Jury Instructions for Securities Fraud – Constructive Amendment” is denied.

3. The Government Did Not Engage In Misconduct In Its Closing Arguments To The Jury

Georgiou argues that the government improperly vouched for government witnesses based on personal knowledge and made a series of prejudicial comments in closing. (Pet’r’s Br. 42.) Regarding these claims, Georgiou includes the following excerpts summarizing

the allegedly prejudicial comments from the government's closing argument to the jury:

"If the FBI didn't stop him when it did, he could have stolen another 200 million from these victims. This is where he was headed" (at 94) ... "defendant tried to pull the ultimate con on you, ladies and gentlemen of the jury. He sat on that witness stand and he tried to tell you a fairy tale not even a child could believe" (95) ... an "incredible story" (95) ... a "fictional tale of chasing some phantom IRS documents from Kevin Waltzer" ... "this fairy tale" ... "he made up a story" (95) ... Listen to "what the defendant says about this because it shows what an incredible lie he is telling and just how guilty he is" ... its "a fancifultale" (102) ... "when he gets on the stand he tells you something that is incredible that you can not believe" ... (Gov. Ex. 420) is an "admission of the entire fraud" (103) ... "with your own life skills you can tell as you saw him [Kevin Waltzer] on the stand and you judged his credibility and you look at it with all of the other evidence in the case that corroborates everything that Kevin Waltzer said ... you know (Kevin Waltzer) is telling you the truth, and nobody from the government is telling you to take Kevin Waltzer's word for it" (105) ... "Richard Brezzi who is basically a front for Vince Derosa" (120) ... as to Neutron Enterprises, "which 'we' know is junk" (128) ... April 2008 is when Georgiou's "lies kind of enter the stratosphere" (129) ... "where is the (Kevin Waltzer) fraud?" (130) ... "a fictitious universe" (131) ... "not hearing the defendant trying to get any IRS documents from Kevin Waltzer" (131) ... Georgiou "didn't tell the FBI he was conducting an investigation upon arrest" (131) ... Georgiou, "knows what he is doing is criminal" ... he claims the \$5,000 "is for something else, that is the lie" (136) ... all Georgiou "has is some phantom phone call that Kevin Waltzer that either didn't record or wasn't recorded" (136) ... "it is a seven minute call and if you believe the defendant, that Kevin Waltzer picked up the phone and the defendant said everything we've just said and done for the last four years isn't true and we are changing everything in one seven minute call" (136) ... "it is absurd" (136) ... he "cons Barrootti into this loan"

(137) ... “Georgiou was doing all the trading in that (Caledonia) account” (139) ... buying “junk stocks on margin” (139) ... “this case was over after the first witness (FBI Agent “Charlie”)” (201) ... “he is not presumed innocent once you have heard this evidence” (201) ... defense counsel (Michael Pasana) “was able to ask (Kevin Waltzer) any question that he wanted” (202) ... you were “able to watch (Kevin Waltzer), was he telling you the truth?” (202) ... “did he (Kevin Waltzer) seem like he was the one telling the truth” ... (Kevin Waltzer) had, “no idea about IRS documents” (202) ... “this whole IRS thing is ridiculous” ... “you have seen everything that we had in this case was turned over to the defense” (203) ... “they have no burden ... but they decided to put on a case” (203) ... “if there was something different in this case, you would have saw it” (203) .. “and all you saw was perhaps the biggest lie I submit one could see from the witness stand in the testimony of that man (Georgiou)” (203) ... “those [SECJ charts in evidence are proof” (203) ... “undisputed proof (203) ... “the undisputed proof is that Daniel Koster from the SEC went in and spent months tracking all of these trades” “those charts are evidence of this crime” (204) ... “wires went to Tom Bock. I suggest the evidence, Tom Bock was laundering money for him” (205) ... Georgiou “was profiting plenty, \$3 million and that was only a small part of what we could actually recover from Canada” (205) ... “this idea that (Georgiou) is an intermediary I submit is nonsense” (205) ... “you saw Mr. Dunkley ... he ruined the man ... he ruined the man’s life” (205) ... “Georgiou will tell lies when it is convenient and he lied to you over, and over, and over” (207) ... “the person who profited most according to the records that we see is Vince Derosa” ... “that (one sided conversation where Georgiou is speaking to Derosa) is a ‘confession’, and (Georgiou) made it” (209) ... “this is “Alice in Wonderland” ... “not like Law and Order ... we (the lawyers) would be better looking” (210) ... “don’t see that kind of fiction in a courtroom” (210) ... “it was a Ponzi scheme in a way” ... Georgiou calling it “artificial ... that is a second ‘confession’ ” ... there are “two ‘confessions’ in this case” .. “artificial does not mean ‘unstable’, that is a lie” (212) ... “who talks about lying on the stand

other than somebody who is lying on the stand” (213) ... “there is no evidence in this case that supports that [IRS chase], there is one hint, July 22nd ‘I would like those IRS documents’, none of this other stuff is about that” ... “Georgiou’s investigation [of Waltzer] is laughable” (214) ... “so ridiculous” ... “so ridiculous it insults your intelllgence” (215) ... Georgiou’s son dying of cancer was “used inappropriately ... to get ‘our’ sympathy” ... “Charlie is not crazy” (216) ... Georgiou’s “private investigations ... ‘we’ have no proof of that” ... “on behalf of the United States” (219).

***21** (Id. at 42-43.)

Georgiou claims that AUSA Cohen’s comments were especially toxic since they were made during the rebuttal of the government’s closing argument, so there was no opportunity for the defense to cure the statements and the alleged harm was not cured leaving an indelible impression on the jury. (Id. at 43.) Georgiou also argues that “[t]he AUSAs improperly vouched for Waltzer, Charlie, and the SEC as the truth tellers, invoking loyalty ‘on behalf of the United States’, while Georgiou [the foreigner] was the liar, who ‘inappropriately’ tried to get ‘OUR sympathy’, using his son’s terminal brain cancer.³⁰ (Id.) He states that:

AUSA Cohen was disingenuous, concealing from the jury his first hand involvement in the events he was interpreting. He decreed the SEC’s analysis ‘undisputed’, with no point to the trial after Charlie – who was ‘not crazy’ – testified. If there was any remaining, reasonable doubt in the mind of the jurors, it should be erased because Georgiou had not made just one ‘confession,’ but ‘two confessions.’

(Id.)

The government argues that Georgiou cannot establish a constitutional violation and he procedurally defaulted on the claims because he did not

³⁰ AUSA Lappen gave the government’s closing argument, and AUSA Cohen gave the government’s rebuttal. See Tr. 3/29/2010.

pursue them on appeal and cannot establish any cause for failing to do so. (Gov’t’s Resp. 85.) It asserts that the government did not engage in misconduct during closing, and Georgiou was not prejudiced. (*Id.* at 86) (citing to Gov’t’s Resp. to Def.’s Suppl. Am. Mot. for a New Trial Pursuant to Rule 33 (Doc. No. 203) at 27-40). According to the government, “[it] properly commented on the evidence and the credibility of its witnesses based on the trial record and it did not rely on, or cite to, any information that was outside the record.” (*Id.*) Arguing that Georgiou’s complaints are baseless, the government, alternatively, asserts that, even if Georgiou identified improper comments by the government that the Court should have excluded, he has not shown that he was prejudiced; that is, that the absence of those comments could not have made a difference in the outcome of trial. (*Id.*)

a. Previously Litigated/Procedural Default

First, Georgiou’s claim is procedurally defaulted. Georgiou raised a similar claim in his Supplemental and Amended Motion for a New Trial, which this Court rejected.³¹ (Doc. No. 211 at 34-37.) Georgiou did

³¹ The claim raised post-trial involved “improper arguments” by the government during its closing argument and rebuttal. (Doc. No. 211 at 34.) The claim included, *inter alia*, that the prosecutor improperly interjected his first-hand knowledge of the arrest into the case, which Georgiou alludes to in his current argument. (*Id.*) I denied Georgiou’s post-trial motion concluding as follows:

Numerous other recordings presented by the Government, in addition to voluminous emails and financial records, overwhelmingly demonstrated that Georgiou had committed the crimes charged. The Government’s comments regarding Georgiou’s testimony, while passionate, were not based on anything outside of the record. Further, the Court instructed the jury about its role in resolving credibility issues and about remarks by the attorneys. Finally, Georgiou was represented by experienced federal criminal defense attorneys who did not object to the Government’s comments on any basis other than burden shifting. This fact further demonstrates that the plain error standard has not been met. See, e.g., United States v. Bethancourt, 65 F.3d 1074, 1080 (3d Cir. 1995) (finding no reversible error where defendant was represented by counsel who

not raise the issue of prosecutorial misconduct during closing arguments and rebuttal before the Third Circuit. He argues that the “cause” for failing to raise this claim on appeal was the government’s suppression of its “firsthand involvement in the undercover operation.” (Pet’r’s Br. at 43.) We reject Georgiou’s argument because it is unclear how the government’s contacts with Waltzer, even assuming for purposes of this argument only that they were improperly hidden from him, establish “cause.”

***22** To show “cause” adequate to overcome procedural default, a defendant must establish that an “objective factor external to the defense” prevented him from advancing the claim at a procedurally appropriate time. See Pelullo, 399 F.3d at 223. The government’s closing argument and rebuttal were issues that were contemporaneously addressed when they were made to the jury and during post-trial. Despite Georgiou’s argument that the government’s alleged firsthand involvement in the undercover operation establishes “cause,” a review of the government’s conduct and statements during its closing and rebuttal, in conjunction with Georgiou’s instant argument, simply does not demonstrate that neither the legal nor factual basis for his claim was not reasonably available to him until recently.

He appears to generally argue that prior counsel were constitutionally ineffective for not raising these issues, and that their constitutional deficiency is grounds for excusing his procedural default; however, we disagree. Since we find Georgiou’s claim to be groundless, we conclude that his counsel cannot be ineffective for failing to raise a meritless claim. See Strickland, 466 U.S. at 691. There is no justification for Georgiou’s failure to raise his current prosecutorial misconduct claim on appeal. Accordingly, he has not established

(cont’d)

“impressed” the court as being “articulate and experienced” but failed to object during the prosecution’s rebuttal). Therefore, we find that the challenged statements, when viewed in light of the entire record, did not undermine the fundamental fairness of the trial or contribute to a miscarriage of justice.

(Id. at 36-37.)

cause for his procedural default.

In the absence of cause, we need not discuss the issue of prejudice. Nevertheless, Georgiou cannot establish that he was prejudiced by the alleged prosecutorial misconduct. Based on the trial record and all of the overwhelming evidence against him, Georgiou has not demonstrated prejudice because he has not shown that the alleged misconduct at his trial worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions. See [Frady, 456 U.S. at 170](#).

Georgiou has not shown the requisite cause and prejudice to excuse his default, nor has he shown that he is actually innocent. We, therefore, conclude that Georgiou has defaulted on this claim, and it is procedurally barred. Thus, Georgiou's prosecutorial misconduct claim is denied.

b. Merits

Even assuming that Georgiou's claim is properly raised pursuant to [§ 2255](#), it is completely without merit. "A petitioner may qualify for federal habeas relief if acts of prosecutorial misconduct 'so infect[ed] the trial with unfairness as to make the resulting conviction a denial of due process.'" [Howard v. Horn, 56 F. Supp. 3d 709, 726 \(E.D. Pa. 2014\)](#) (quoting [Greer v. Miller, 483 U.S. 756, 765 \(1987\)](#)). "To constitute a due process violation, 'the prosecutorial misconduct must be of sufficient significance to result in the denial of the defendant's right to a trial.'" [Id.](#) (quoting [United States v. Bagley, 473 U.S. 667, 676 \(1985\)](#)). "It is not enough to prove that the prosecutor's remarks were 'undesirable or inappropriate,' or even 'universally condemned' – the petitioner must show that he was denied a fair trial." [Id.](#) (internal citations omitted); [see also Werts, 228 F.3d at 197-98](#) (stating that for due process to have been offended, the prosecutorial misconduct must be of sufficient significance to result in the denial of the defendant's right to a fair trial).

"To evaluate whether a prosecutor's misconduct rose to the level of a constitutional violation, a court must examine the prosecutor's conduct in the context of the

whole trial.” *Id.* (citing [Greer, 483 U.S. at 765-66; Reid v. Beard, 420 F. App’x 156, 159 \(3d Cir. 2011\)](#) (“A reviewing court must ‘examine the prosecutor’s offensive actions … [by] assessing the severity of the conduct, the effect of the curative instructions, and the quantum of evidence against the defendant.’ ”)). “Overall, the misconduct must be sufficiently prejudicial in the context of the entire trial as to violate a petitioner’s due process rights.” *Id.* (citation omitted).

*23 After examining Georgiou’s argument, the remarks at issue, the quantum of evidence against Georgiou, and the effect of curative instructions, we find that Georgiou’s prosecutorial misconduct claim fails. Considering the disputed statements within the context of the case, we find no constitutional violation. The record shows that the statements at issue were either supported by other statements in the record or acceptable arguments based on the trial testimony and the defense’s arguments. The prosecutors’ closing argument and rebuttal were not improper, but were properly based upon the record and appropriately referenced gaps in Georgiou’s theory of events in light of the evidence that had been offered, or had not been offered, at trial.

Regarding Georgiou’s claim that the prosecutor improperly vouched for government witnesses, we note that “[v]ouching is a type of prosecutorial misconduct.” [Lam v. Kelchner, 304 F.3d 256, 271 \(3d Cir. 2002\)](#). “It constitutes an assurance by the prosecuting attorney of the credibility of a government witness through personal knowledge or by other information outside of the testimony before the jury.” *Id.* (citations omitted). “In order to find vouching, two criteria must be met: (1) the prosecution must assure the jury that the testimony of a Government witness is credible, and (2) this assurance must be based on either the prosecutor’s personal knowledge or other information that is not before the jury.” *Id.* (citation omitted).

“On habeas review, however, prosecutorial misconduct such as vouching does not rise to the level of a federal due process violation unless it affects fundamental fairness of the trial.” *Id.* (citation omitted). “Thus,

habeas relief is not available simply because the prosecutor's remarks were undesirable or even universally condemned." *Id.* "The relevant question for a habeas court is whether those remarks 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " *Id. at 271-72* (quoting [*Darden v. Wainwright, 477 U.S. 168, 180-81 \(1986\)*](#)).

In this case, the concerns underlying the vouching prohibition were not implicated by the prosecutors' closing argument or rebuttal. Although the government stated that its witnesses were credible, it did not do so based on information outside of the record. "[A] prosecutor is entitled to considerable latitude in summation to argue the evidence and any reasonable inferences that can be drawn from that evidence." [*United States v. Green, 25 F.3d 206, 210 \(3d Cir. 1994\)*](#) (citation omitted). In examining the prosecutor's remarks as a whole, we conclude that they represented a permissible argument based on reasonable inferences which the jury could draw from the evidence at trial. [*See United States v. Walker, 155 F.3d 180, 187 \(3d Cir. 1998\)*](#) (stating "where a prosecutor argues that a witness is being truthful based on the testimony given at trial, and does not assure the jury that the credibility of the witness based on his own personal knowledge, the prosecutor is engaging in proper argument and is not vouching"). Likewise, the jury could not glean anything about the prosecutors' personal knowledge of Georgiou's investigation or arrest. The prosecutors never implied that the jury should disregard the evidence in favor of the government's undisclosed knowledge or judgment.

Georgiou's claim also fails to the extent that he is arguing that the prosecutors' statements not only individually infringed on his rights, but they also had a cumulative effect on the trial that violated due process. " 'The cumulative effect of prosecutorial misconduct ... can rise to the level of a constitutional violation even if the individual instances of misconduct, standing alone, do not.' " [*Howard, 56 F. Supp. 3d at 730*](#) (quoting [*LaBrake v. Stowitzky, No. 07-0212, 2009 WL 2854747, at *9 \(E.D. Pa. Sept. 3, 2009\)*](#)) (alteration in original). In our case, the

statements at issue were neither individually improper nor prejudicial. Georgiou fails to establish that the cumulative effect of the prosecutors' statements infected the trial to such a degree that his due process rights were violated.

*24 Although we find that no comment by the prosecution in their closing argument or rebuttal rendered the trial unfair, we do acknowledge that any potential prejudice that may have resulted from any of the remarks at issue was immediately alleviated by my jury instructions. I properly instructed the jury that "statements and arguments of lawyers for the parties are not evidence," and that "[a]s the only judges of the credibility and facts in this case you, the jurors, are responsible to give the testimony of every witness and all of the other evidence whatever credibility and weight that you think they are entitled to." Tr. 2/12/10, p. 11, 50. "[I]t is well established that jurors are presumed to follow their instructions." [Gov't of the Virgin Islands v. Mills, 821 F.3d 448, 463 \(3d Cir. 2016\)](#) (citation omitted).

Even though we have not found any misconduct, it is also important to note that "[m]isconduct does not deprive the defendant of a fair trial '[w]hen the evidence [against the defendant] is strong, and the curative instructions adequate.'" [Ragan v. Sec'y, Pa. Dep't of Corr., 687 F. App'x 177, 183 \(3d Cir. 2017\)](#) (quoting [United States v. Morena, 547 F.3d 191, 196 \(3d Cir. 2008\)](#)). Here, as the Third Circuit quantified, the evidence of Georgiou's guilt was overwhelming, [Georgiou, 742 F. Supp. 2d at 636-37](#), and the pertinent jury instructions were more than adequate.

When viewed in the context of the entire trial, including my jury instructions, and the overwhelming evidence presented, Georgiou cannot show that the prosecutors' closing argument or rebuttal so infected the trial with prejudice as to violate due process. See [Moore v. Morton, 255 F.3d 95, 107 \(3d Cir. 2001\)](#) (stating that "Supreme Court precedent counsels that the reviewing court must examine the prosecutor's offensive actions in context and in light of the entire trial, assessing the severity of the conduct, the effect of the curative instructions, and the quantum of evidence against the defendant"). The prosecutors'

statements did not result in a fundamentally unfair trial. Accordingly, we will deny habeas relief on Georgiou’s claim that the prosecution engaged in prosecutorial misconduct in its closing.

4. The Government Did Not Suborn Perjury

Georgiou claims that the government suborned perjury in eliciting testimony from Waltzer about whether he possessed a recording device during a three-day period when the test trade was conducted. (Pet’r’s Br. 45.) He claims that he made exculpatory calls to Waltzer during this time period that were not recorded, and that Waltzer lied about whether he had a recording device. (*Id.*) He asserts that “the absence of government recordings, leading up to and including the day of the test trade, supported that Waltzer deliberately failed to record exculpatory events which would have altered the narrative.” (*Id.*) According to Georgiou, the position that Waltzer possessed a recording device at all times was unequivocal; however, it was all a lie, and “the government knew that Waltzer did not possess the recording device at key moments, but suborned perjury which deceived the Court and the jury, poisoning the proceedings against Georgiou.” (*Id.* at 47.)

The government argues that “Georgiou cannot come close to showing, based on his own fantastical view of the evidence, that the government suborned perjury or engaged in any misconduct in connection with this testimony.” (Gov’t’s Resp. 88.) The government points out that Georgiou’s “claim is based on the communications that occurred toward the end of the undercover operation (from August 30 through September 4, 2008) – which was *after* Georgiou had committed to the massive stock fraud deal with Charlie.” (*Id.*) It also states that “[o]n September 17, 2008, Georgiou met with Charlie in a Philadelphia hotel and again confirmed the details of the Northern Ethanol stock manipulation deal” and “said that he would have the company issue press releases to justify the buying activity.” (*Id.* at 88 n.33) (citing Tr. 1/25/10, 142; Gov’t Exs. 442T, 443T). Thus, the government argues that “Georgiou made clear his intent to go forward with the stock fraud deal both before and after the three-day period during which Georgiou claims he spoke briefly

with Waltzer and altered the meaning of all the recorded conversations.” (Id.)

*25 The government also states:

First, the government recognizes that there may have been a few, brief unrecorded phone calls between Georgiou and Waltzer from August 30 through September 4. At trial, in cross-examining FBI Agent [David] Joanson [“FBI Agent Joanson”], counsel pointed to the following unrecorded calls: a one-minute call, two two-minute calls, and a seven-minute call. Tr. 2/2/10, 198-201. These unrecorded calls do not suggest, much less prove, that Waltzer lied, and they do not change the plain meaning of all the recordings of Georgiou engaging in blatant fraud.

(Id. at 90.) The government goes on to state:

The record also establishes possible explanations for the small number of missing recordings. Waltzer testified that he thought he recorded all calls with Georgiou, but he also testified that he may have inadvertently failed to record some calls, he may have had battery problems, there may have been some calls that were dropped, and that some calls could have gone to voicemail. Tr. 1/26/10, 218-21; Tr. 1/29/10, 44, 48-50. Agent Joanson also testified that there can be equipment failures. Tr. 2/2/10, 245-46. It is also true that FBI records, which Georgiou possessed at the time of trial, suggest that as part of the process of retrieving recording devices from Waltzer and replacing them with new ones, Waltzer may not have had the device at that time, which Waltzer did not recall at trial. There were many possible explanations for why a call listed on a telephone record does not match a recording. There is no basis to conclude that Waltzer or the government lied – particularly when considered in the context of all the evidence presented at trial.

(Id. at 90-91.) Also, the government asserts that Georgiou cannot show that he was prejudiced because the possibility that Waltzer did not have a recording device during the short period in question, and that Waltzer did not recall that fact at trial, is entirely

insignificant considering the government's evidence and Georgiou's defense. (*Id.* at 91.) According to the government, it did not suborn perjury, and Georgiou cannot show that he was prejudiced. (*Id.* at 92.)

a. Previously Litigated/Procedural Default

Georgiou's claim is procedurally defaulted. It appears that Georgiou had access to all reports relating to his case regarding Waltzer's possession of a recording device prior to trial, but did not raise this claim on direct appeal. At the evidentiary hearing, Georgiou's trial counsel, Michael S. Pasano ("Pasano"), testified that he was aware of the reports that he could have used to argue that Waltzer did not possess the recording device during the time that Georgiou was discussing the test trade, but, instead, chose to make a consistent argument to the jury that Waltzer was selectively recording and trying to manipulate the evidence against Georgiou. Tr. 9/19/17, 31, 135-36. Specifically, Pasano stated, "It's better if [Waltzer] has equipment and he's not recording than if he doesn't have equipment." *Id.* at 31, 135-36.

Thus, this claim is procedurally defaulted because it is raised for the first time in this habeas proceeding, and Georgiou has not established that an exception to the procedural default rule applies. To the extent that he argues that he has shown cause through ineffective assistance of counsel, we find that defense counsel's failure to raise this claim during the trial or on direct appeal did not amount to constitutionally ineffective assistance. It was a strategically reasonable decision by Pasano not to raise the issue at trial. See Strickland, 466 U.S. at 689 (providing strategic decisions by counsel are "virtually unchallengeable" and generally do not provide a basis for post-conviction relief on the grounds of ineffective assistance of counsel). Additionally, the claim is meritless. See id. at 691 (finding that failure to pursue "fruitless" claims "may not later be challenged as unreasonable"). Although the absence of cause obviates our need to address the issue of prejudice, we note that Georgiou cannot demonstrate prejudice sufficient to excuse his default because the integrity of the entire trial has not been infected by Georgiou's claim.

***26** Regarding the actual innocence exception to procedural default, Georgiou has stated, but has not shown, that he is actually innocent, and certainly has failed to provide evidence of his innocence sufficient to show that no reasonable jury would have convicted him under the circumstances. Therefore, Georgiou's claim is procedurally barred.

b. Merits

Although this claim is procedurally defaulted, we find that it is also without merit. "A witness commits perjury if he or she 'gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory.'" [United States v. Hoffecker, 530 F.3d 137, 183 \(3d Cir. 2008\)](#) (quoting [United States v. Dunnigan, 507 U.S. 87, 94 \(1993\)](#)). "To establish a due process violation, [petitioner] must show that: (1) [the witness] committed perjury; (2) the Government knew or should have known of [the] perjury; (3) [the] testimony went uncorrected; and (4) there is a reasonable likelihood that the false testimony could have affected the verdict." [Id.](#) (citing [Lambert v. Blackwell, 387 F.3d 210, 242 \(3d Cir. 2004\)](#)).

Georgiou's entire argument is based upon the premise that Waltzer did not have the recording device during the test trade time period. However, it has never been proven that Waltzer, in fact, did not possess the recording device during the relevant time period. Although the evidentiary hearing was conducted regarding a narrow set of issues that did not include the instant issue, Georgiou used it as an opportunity to question several witnesses about Waltzer's possession of the recording device during the relevant time period. He also used it as an opportunity to present FBI records regarding unrecorded calls and possession of the recording device to various pertinent witnesses.

While Waltzer was on the stand, Georgiou extensively questioned him about the instant issue, and never obtained testimony from him establishing that he did not, in fact, possess the recording device. Tr. 9/25/17, 204-09. Georgiou also never elicited that Waltzer

knew that he did not possess the recording device during the relevant time period or that Waltzer had lied under oath during trial by stating that that he did possess it. See id.

During trial, as the government points out, Waltzer testified that he thought he had recorded all calls with Georgiou, but he also testified that he may have inadvertently failed to record some calls, he may have had battery problems, there may have been some calls that were dropped, and that some calls could have gone to voicemail. (Gov't's Resp. 90) (citing Tr. 1/26/10, 218-21; Tr. 1/29/10, 44, 48-50). At the evidentiary hearing, Waltzer stated that he thought that he possessed the recording device during the test trade time period, but he could not say so for a fact. Tr. 9/25/17, 204-05. He also testified that he could not recall if he was without the recording device during the test trade days. Id. at 206. He further stated that he had the recording device for the vast majority of the time that he acted undercover. Id. at 207. Additionally, he said that “[t]here were times where hey, there's an equipment malfunction, stand down for five days, don't make a – you know, don't call anybody, go on vac – do whatever, you know. But almost always – I don't want to say always because you might find one instance where I didn't.” Id. Thus, it is impossible to know from the record whether Waltzer actually committed perjury under the standard requiring that he gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory. See Hoffecker, 530 F.3d at 183.

***27** At the evidentiary hearing, Georgiou specifically asked AUSA Lappen and AUSA Cohen about the instant issue, and both men clearly testified that they did not know if Waltzer possessed the recording device during the relevant time period. Tr. 9/18/17, 230-34, 246-50; Tr. 9/26/17, 105-11. Additionally, Georgiou also questioned FBI Agent David Joanson (“FBI Agent Joanson”) and FBI Agent Corey Riley (“FBI Agent Riley”) about this issue, and their testimony resulted in the conclusion that Waltzer may or may not have possessed the recording device during the test trade

time period.³² Tr. 9/19/17, 192-93, 198-99, 206-08; Tr. 11/15/17, 248-54.

Notably, there was no factual evidence adduced at the evidentiary hearing or in the record establishing that Waltzer did not possess the recording device during the test trade time period. We acknowledge the difficult task that Georgiou has in order to show that Waltzer did not, in fact, possess the recording device during the relevant time period; however, such a showing is pivotal because it forms the premise of his claim. Without establishing that Waltzer did not possess the recording device during the test trade time period, Georgiou cannot make the requisite showing that Waltzer committed perjury.

Also, as previously stated, both AUSA Lappen and AUSA Cohen clearly testified during the evidentiary hearing that neither had knowledge during trial that Waltzer did not possess the recording device during the pertinent time period. Tr. 9/18/17, 230-34, 246-50; Tr. 9/26/17, 105-11. Neither AUSA allowed Waltzer to commit perjury by lying on the stand stating that he did, in fact, possess the recording device when he did not. Georgiou has made no showing whatsoever that either AUSA Lappen or AUSA Cohen knew or should have known of the alleged perjury by Waltzer, which, again, Georgiou has not even established. Thus, there is no doubt that neither AUSA Lappen nor AUSA Cohen acted improperly or committed prosecutorial misconduct.

Finally, we note that there is no reasonable likelihood that the alleged false testimony by Waltzer regarding possession of the recording device during the test trade period could have affected the verdict. We agree with the government's argument that the issue is insignificant considering the government's evidence and Georgiou's defense. (See Gov't's Resp. 91.) First, and significantly, the government's evidence of Georgiou's guilt, including the test trade, was

³² FBI Agent Riley testified that, from the records, it appeared that Waltzer did not possess the recording device, but he could not say with certainty. Tr. 9/19/17, 198-99.

multifaceted and overwhelming. Second, the defense engaged in a sound trial strategy arguing that Waltzer was a master manipulator who tried to dupe Georgiou and selectively record Georgiou only when the recording could incriminate him. Tr. 1/29/10, 38-41 (cross-examining Waltzer on failure to record calls and manipulating evidence); Tr. 2/2/10, 196 (cross-examining FBI Agent Joanson about Waltzer's failures to record Georgiou at different times). The defense's argument was bolstered by the fact that there was no dispute that Waltzer had control over whether he would record a call since he possessed the device and needed to turn it on when he received or made a call.

Although Georgiou argues that the narrative of the trial would have been altered, his argument is neither supported by the record nor the evidence presented at trial. Even if Georgiou was able to successfully show that Waltzer did not possess the recording device during the test trade time period, which he has not been able to do, and Waltzer perjured himself, there is not a reasonable likelihood that the alleged false testimony could have affected the verdict. See Hoffecker, 530 F.3d at 183. The verdict in this case was fully supported by the overwhelming evidence presented at trial.

*28 Accordingly, we will deny habeas relief on Georgiou's claim that the government suborned perjury in eliciting testimony from Waltzer about whether he possessed a recording device during a three-day period when the test trade was conducted.

5. The Government Did Not Engage In Misconduct Regarding The James Hall Records

Georgiou claims that the government violated Brady v. Maryland, 373 U.S. 83 (1963), by failing to produce evidence that Waltzer did not record telephone calls of James Hall ("Hall"), one of the approximately twenty-five charged defendants against whom Waltzer cooperated.³³ (Pet'r's Br. 48-49.) Basing his claims on

³³ "Under Brady, the prosecution bears an affirmative duty 'to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the

Hall's sentencing memorandum and attached telephone records ("Hall Records"), Georgiou argues that the telephone records show that some calls were not recorded; therefore, Waltzer "had the time and opportunity to manipulate others 'off record,' " which could have been used to impeach Waltzer.³⁴ (*Id.* at 48) (citing Ex. 7 at 7-8). He states that "[t]he government ridiculed Georgiou at trial (and has ever since), yet, had in its possession, undisclosed, parallel allegations and evidence which demonstrated a pattern of Waltzer's undercover deceptions, corroborating Georgiou's claims." (*Id.*) He further argues that "Hall's phone records show that Waltzer failed to record dozens of calls, the suppression of which foreclosed impeaching him for his rogue conduct."³⁵ (*Id.*) Instead,

_____ (cont'd)
police,' and to provide it to the defense." [Gibson v. Sec'y, Pa. Dep't of Corr., 718 F. App'x 126, 130 \(3d Cir. 2017\)](#) (quoting [Kyles v. Whitley, 514 U.S. 419, 437 \(1995\)](#)). A subset of Brady material includes disclosure of "materials that go to the question of guilt or innocence as well as materials that might affect the jury's judgment of the credibility of a crucial prosecution witness." [United States v. Friedman, 658 F.3d 342, 357 \(3d Cir. 2011\)](#); see [Giglio v. United States, 405 U.S. 150, 154 \(1972\)](#). In order to prove a Giglio violation, a defendant must show the same three prongs required under the test for a Brady violation. See [United States v. Risha, 445 F.3d 298, 303 \(3d Cir. 2006\)](#) (applying the three-part Brady test regarding withheld impeachment evidence). Thus, throughout this Memorandum Opinion, our analysis under Brady subsumes any of Georgiou's claims pertaining to Giglio material.

³⁴ Georgiou claims that the government also failed to disclose the call logs in other cases. (Pet'r's Br. 48) (citing Ex. 9). According to Georgiou, these call logs would have identified gaps in time where no recordings were made; thereby, supporting his defense that, contrary to Waltzer's testimony, Waltzer was not recording or did not possess the recording device. (*Id.*) I have reviewed all of the records that Georgiou has submitted regarding this claim, and I refer to all of the records as the "Hall Records."

³⁵ Georgiou states that "[he] believes Ms. Flannery [Hall's attorney] conflated, in part, times Waltzer did not have a recording device, or did not record, with times he was and was not wearing a wire at in person meetings. The critical proof, however, are Hall's phone logs, which are not

Georgiou argues that “Waltzer was able to lie with impunity that he had the recording device at all times, and made all recordings.”³⁶ (*Id.*) (citing Tr. 1/29/10, p. 35-158).

a. Previously Litigated/Procedural Default

***29** The government argues that this claim is previously litigated because Georgiou raised it on appeal as part of the numerous Brady claims, which were all rejected. (Gov’t’s Resp. 93-94.) It states that “[a]lthough the Court did not specifically address this argument; the Court of Appeals rejected all of Georgiou’s Brady claims.” (*Id.* at 94.) It also asserts that, if the claim is not considered previously litigated, Georgiou procedurally defaulted by failing to raise it as a separate issue on appeal and cannot establish cause for having failed to do so. (*Id.*) Examination of Georgiou’s appellate brief reveals that he briefly raises the present claim in relation to his argument that the suppression of mental health information was part of a pattern of discovery misconduct related to Waltzer. The instant claim is couched within subpart E of Point 1, which accuses the government of suppressing evidence concerning Waltzer’s history of mental illness and substance abuse. (Brief of Defendant-Appellant [Georgiou, Case No. 10-4774, p. 37 \(3d Cir. 11/5/13\)](#)). In relation to his appeal, the Third Circuit stated that “Georgiou ... argues that the District Court erred in denying his motion for a new trial based on purported Brady and Jencks Act violations.... We find no error.” [Georgiou, 777 F.3d at 130.](#)

The Third Circuit thoroughly addressed the suppression claims regarding Waltzer’s mental health and substance abuse, but did not address Georgiou’s instant claim. However, we find that its denial of Georgiou’s Brady and Jencks Act claims peripherally

(cont’d)

affected, evincing that Waltzer failed to record dozens of calls, exactly as claimed in Georgiou’s case.” (Pet’r’s Br. 49.)

³⁶ Regarding this claim, Georgiou asserts that trial counsel were ineffective, which is addressed in Section 2. (See Pet’r’s Br. 65.)

included the instant claim.³⁷ Consequently, we would, ordinarily, not reach the merits of this claim. See DeRewal, 10 F.3d at 105 n.4 (stating that a § 2255 motion generally may not be employed to relitigate questions which were raised and considered on appeal). However, given our unique circumstances, and in the interest of thoroughness, we will address it. See Orejuela, 639 F.2d at 1057 (“Once a legal argument has been litigated and decided adversely to a criminal defendant at his trial and on direct appeal, it is within the discretion of the district court to decline to reconsider those arguments if raised again in collateral proceedings under 28 U.S.C. § 2255.”).

b. Merits

“To prove a Brady violation, a defendant must show the evidence at issue meets three critical elements.” Dennis v. Sec'y, Pa. Dep't of Corr., 834 F.3d 263, 284 (3d Cir. 2016) (en banc). “First, the evidence ‘must be favorable to the accused, either because it is exculpatory, or because it is impeaching.’” Id. (quoting Strickler v. Greene, 527 U.S. 263, 280; United States v. Bagley, 473 U.S. 667, 676 (1985) (“Impeachment evidence ..., as well as exculpatory evidence, falls within the Brady rule.”)). “Second, it ‘must have been suppressed by the State, either willfully or inadvertently.’” Id. at 284-85 (quoting Strickler, 527 U.S. at 282). “Third, the evidence must have been material such that prejudice resulted from its suppression.” Id. at 285 (citations omitted).

“The ‘touchstone of materiality is a ‘reasonable probability’ of a different result.’” Id. (quoting Kyles, 514 U.S. at 434); see also Turner v. United States, 137 S. Ct. 1885, 1893 (2017) (“[E]vidence 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.”). “Materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant’s acquittal ... [Rather], [a]

³⁷ To the extent that it is found that Georgiou’s claim was not previously raised on direct appeal, we note that his claim would be procedurally defaulted.

‘reasonable probability’ of a different result is ... shown when the government’s evidentiary suppression undermines confidence in the outcome of the trial.” Id. (alterations in original) (citation omitted). “The materiality of withheld evidence must be considered collectively, not item by item.” Id. at 312 (citing [Kyles, 514 U.S. at 436](#)).

“Material evidence can include evidence that may be used to impeach a witness.” [Friedman, 658 F.3d at 358](#) (citation omitted). “[I]nadmissible evidence may be material if it could have led to the discovery of admissible evidence.” [Johnson v. Folino, 705 F.3d 117, 130 \(3d Cir. 2013\)](#). Brady requires disclosure of information actually known to the prosecution and “all information in the possession of the prosecutor’s office, the police, and others acting on behalf of the prosecution.” [Wilson v. Beard, 589 F.3d 651, 659 \(3d Cir. 2009\)](#).

***30** During the evidentiary hearing, AUSA Lappen testified that Georgiou’s attorneys were aware of the arguments that another defendant against whom Waltzer was cooperating, James Hall, was making about Waltzer’s alleged failure to record exculpatory calls. Tr. 9/26/17, 99-103. AUSA Lappen unequivocally stated that he knows that Hall’s attorney, Anne Flannery, provided that information to Georgiou’s attorney, Catherine Recker (“Recker”). Id. at 100-01. He also stated that “I just – I have a – recollection – I have a vague recollection, which is why I asked Ms. Recker. You guys knew all about this whole stuff. I remember that they knew about it.” Id. at 102. The following exchange between Georgiou and AUSA Lappen sheds light on the issue:

Q In this proceeding, there was evidence produced, actual phone records of dozens and dozens of calls between Waltzer and targets where there were no government recordings, correct?

A I don’t recall that specifically. I know that Ann Flannery made those allegations, particularly when she was first starting to try to defend the case, but that ... went nowhere for her. Her client admitted to his guilt, number one, and number two, those phone records, many of them, as I recall, were like one-

minute calls many of them, and there were times, again, that there were – they could have been hangups and Waltzer may not have recorded a phone call. There was nothing in there that we thought was in any way, shape, or form exculpatory as to you, it wasn't your case, and I know that your lawyer was well-aware of this information.

Id. at 99-100. Although Recker was scheduled to testify at the evidentiary hearing, Georgiou decided not to call her as a witness. Tr. 9/25/17, 265-66. Without any testimony or evidence to the contrary, AUSA Lappen's testimony that Georgiou's defense counsel, Recker, was aware of the Hall Records is uncontested.

In light of AUSA Lappen's uncontested testimony that Georgiou's defense counsel was well aware of the Hall Records, Georgiou cannot establish that the government suppressed them. See Dennis, 834 F.3d at 292 (“Only when the government is aware that the defense counsel already has the material in its possession should it be held to not have ‘suppressed’ it in not turning it over to the defense.”). Consequently, there has been no violation under Brady or Giglio, and Georgiou's claim fails.

We need not reach the issue of whether the alleged suppression was material; however, we find that it would not have been material. It is speculative, at best, that any potentially unrecorded calls in the Hall Records are proof of deliberate efforts by Waltzer to fail to record exculpatory calls. The government argues that “contrary to Georgiou's theory, here, there was no evidence in the Hall case or any of the other dozens of investigations, in which Waltzer participated, that Waltzer was ever manipulating these calls in any fashion, much less trying to frame an innocent man.” (Gov't's Resp. 95-96.) It goes on to point out that Hall and every other charged defendant in those investigations involving Waltzer, other than Georgiou, pleaded guilty.³⁸ (Id. at 96.) It further

³⁸ The government argues that the more that Georgiou would have tried to explore the recording process involving other cases, the more he would have risked the jury learning about numerous other cases where Waltzer

clearly states that “[it] did not possess a shred of evidence that Waltzer ever was trying to manipulate the recordings or manufacture a case against an innocent person.” (Id.)

*31 Regarding Waltzer’s recording activity, the government states:

Waltzer testified that he did his best to record all calls with targets, including Georgiou, but that since he made over 1,000 recordings, he was not perfect. In particular, as discussed above, he explained that he could not always turn on the recorder for incoming calls, so that such calls could result in the caller hanging up, or were brief, or would go to voicemail. Waltzer would then call back targets and record them. Waltzer also explained that with all the calls he made and received, he may have made mistakes. Additionally, Waltzer could not manipulate any recordings once they were made since he was only able to turn the device on and off. Tr. 1/26/10, 220-22; Tr. 1/29/10, 44, 50. Waltzer also testified that there were some periods of time, and he could not recall when they were, that agents instructed him to “go dark” and not accept calls. Tr. 1/29/10, 35-36. Evidence of unrecorded calls, most of which are a minute or two in length (Georgiou Br. Exh. 8), was not impeaching and was entirely consistent with the testimony concerning the recording process. In particular, unrecorded calls could be hang ups, brief calls, voicemails, or mistakes (when Waltzer could not pick up or was not able to record).

(Id. at 95) (footnote omitted).

Georgiou assumes that the recordings and phone records from the Hall case are “critical impeachment evidence;” however, they do not rise to that level. They do not, as Georgiou argues, prove that Waltzer had manufactured a false narrative by failing to record

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recorded incriminating conversations against defendants who eventually pleaded guilty. (Gov’t’s Resp. 96 n.37.) This, the government asserts, would not have aided Georgiou in his defense that he was an innocent man who was chasing Waltzer due to an IRS problem. (Id.)

exculpatory events. Significantly, there does not appear to be any evidence in the Hall case, or the others, that Waltzer was actually manipulating the calls to manufacture a case against innocent people. Georgiou's assertion that the Hall Records would plainly impeach Waltzer's testimony that he possessed the recording device at all times is uncertain, and the importance placed by Georgiou of possibly impeaching Waltzer on this specific point is not as significant as Georgiou argues.

Whether there were times that Waltzer did not have the device is not critical because Waltzer had the ability to turn the device on and off.³⁹ Thus, if Waltzer wanted to manipulate evidence by engaging in an exculpatory conversation with a target and not record it, he could have done so, as Georgiou's counsel recognized and tried to exploit at trial by presenting a consistent theme to the jury, using relevant chain of custody reports, that Waltzer was a master manipulator who simply chose not to record Georgiou's exculpatory calls. See Tr. 9/19/17, 31, 135-36 (Pasano testifies that he chose to make a consistent argument to the jury that Waltzer was selectively recording and trying to manipulate the evidence against Georgiou stating that “[i]t’s better if [Waltzer] has equipment and he’s not recording than if he doesn’t have equipment”).

***32** Also, the fact that Waltzer may not have possessed the recording device at all times is not pivotal in the grand scheme due to defense counsel's consistent attack on Waltzer as being a master manipulator who chose not to record Georgiou's exculpatory calls. Notably, Waltzer's credibility was already undermined by the fact that his role as a mastermind of a large class action fraud was addressed at trial. Thus, even if defense counsel had been able to impeach Waltzer with the Hall Records, the marginal effect in diminishing Waltzer's perceived credibility would have been insignificant. See, e.g.,

³⁹ Waltzer was only able to turn the recording device on and off; therefore, he was unable to manipulate any recordings once they were made. Tr. 1/26/10, 220-22; Tr. 2/2/10, 99-102.

[Landano v. Rafferty, 856 F.2d 569, 574 \(3d Cir. 1988\)](#)

(considering impeachment evidence immaterial under Brady where the “marginal effect in diminishing [the witness’s] perceived credibility would have been negligible”).

When placed in proper context within the trial and Waltzer’s testimony, there is no doubt that the Hall Records are not material under Brady; that is, the records would not place the whole case in such a different light as to undermine confidence in the verdict. See Kyles, 514 U.S. at 434-35 (“The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.”). Even with the absence of the Hall Records, Georgiou received a fair trial. The jury’s guilty verdict is worthy of confidence.

Evaluating the cumulative effect of the Hall Records in cross-examining Waltzer, we conclude that Georgiou has not established materiality. When viewed collectively in the context of the entire record, we find that Georgiou does not establish a reasonable probability that the result of the trial would have been different had he utilized the Hall Records. The alleged nondisclosure of these records did not result in an unfair trial and does not put the case in such a different light as to place Georgiou’s convictions in doubt. During trial, the jury was presented with extensive direct and circumstantial evidence of Georgiou’s guilt from multiple and substantiating sources. Remarkably, one such source was Georgiou’s own inadvertent recording where he incriminated himself. In light of the government’s strong case, and viewing the case as a whole, the government’s alleged failure to provide the Hall Records to the defense prior to the trial did not lead to an untrustworthy guilty verdict.⁴⁰ Accordingly, Georgiou’s claim that the

⁴⁰ In connection with the Hall case, Georgiou also claims that the government violated Brady or Giglio by failing to produce emails between Waltzer and Hall which would have shown Waltzer “puppeteering his underlings” regarding Waltzer’s class action fraud scheme. (Pet’r’s Br. 48) (citing Ex. 8-i). He asserts that “[w]hile Waltzer’s

government violated Brady and Giglio by suppressing material evidence that Waltzer failed to record calls in other cases consistent with Georgiou's defense is denied.

6. This Court Will Not Revisit The *Brady* Claims Relating to Waltzer's Mental Health and Drug Use

a. Previously Litigated/Procedural Default

*33 Relying upon a recent opinion by the Third Circuit in Dennis, 834 F.3d at 291, Georgiou seeks for this Court to revisit the Brady claims relating to Waltzer's mental health and drug abuse, which is an argument that the Third Circuit already considered.⁴¹ See Georgiou, 777 F.3d at 139-41. Regarding Waltzer's

_____ (cont'd)

insurance frauds were addressed at trial, none of this tactile, visibly impeaching evidence, was put to Waltzer on cross examination." (Id.) The government asserts that this claim fails under all of the Brady prongs because there is "nothing here that could have altered the result of the trial or undermine confidence in the verdict." (Gov't's Resp. 97.) Specifically, it argues that it provided substantial evidence of Waltzer's class action fraud scheme to Georgiou, which included information and documents showing that Waltzer was the mastermind of the scheme and was routinely directing his underlings, including Hall. (Id.) Furthermore, it points out that Waltzer was cross-examined on these facts at trial by Georgiou's attorney. (Id.) (citing Tr. 1/28/10, p. 79-89). After examining Georgiou's claim, we find that he simply cannot show a reasonable probability that, had the emails at issue been disclosed to the defense, along with the other Hall Records, the result of the trial would have been different. See Dennis, 834 F.3d at 285.

⁴¹ We repeatedly rejected Georgiou's Brady claims relating to Waltzer's mental health and drug use evidence on the grounds that the evidence was not favorable to Georgiou or material. (Doc. No. 218 at 6-12 (Nov. 9, 2010); Doc. No. 240 at 17-19 (Mar. 18, 2011); Doc. No. 266 at 17-43 (Dec. 12, 2011).) In my December 12, 2011 Memorandum Opinion, I noted that "this Court observed Waltzer over the course of three days of testimony and such observations did not indicate in any way that Waltzer appeared to be under the influence of controlled substances and/or alcohol. To the contrary, Waltzer appeared sharp and alert." (Doc. No. 266 at 33 n.23.)

mental health, the Third Circuit in Georgiou definitively ruled that the “evidence concerning Waltzer’s mental health is neither favorable to [Georgiou] nor material.” Id. at 141. As for the issue of Waltzer’s drug use, the Third Circuit specifically found that “such evidence is not favorable to [Georgiou] for purposes of our Brady analysis” and “it cannot be deemed material.” Id. at 140.

Contrary to its decision in Georgiou, as well as other cases from this circuit, the Dennis Court held that a defendant is not required to exercise due diligence to obtain Brady material; rather, the government must produce such material regardless of the defendant’s exercise of diligence. See Dennis, 834 F.3d at 291 (stating that “the concept of ‘due diligence’ plays no role in the Brady analysis”). Georgiou argues that the Dennis Court’s ruling that due diligence plays no role in the Brady analysis benefits him because the Third Circuit previously found that Georgiou failed to exercise diligence in seeking to obtain Waltzer’s bail report and the minutes from Waltzer’s arraignment and guilty plea, which contain evidence of Waltzer’s cocaine use and mental health history. See Georgiou, 777 F.3d at 139-41. Dennis, however, provides no assistance because the Third Circuit rejected Georgiou’s claims on other grounds than diligence, *i.e.*, favorableness and materiality.⁴² See id. The Dennis decision in no way alters the Third Circuit’s analysis in Georgiou regarding favorability and materiality.

“Once a legal argument has been litigated and decided adversely to a criminal defendant at his trial and on direct appeal, it is within the discretion of the district court to decline to reconsider those arguments if raised again in collateral proceedings under 28 U.S.C. § 2255.” Orejuela, 639 F.2d at 1057 (noting that there are “strong policies favoring finality in litigation and the conservation of scarce judicial resources”); see also United States v. Travillion, 759 F.3d 281, 288 (3d Cir. 2014) (stating that, as a general practice, “issues

⁴² The Third Circuit’s Brady analysis also includes Georgiou’s claim regarding documents from SEC meetings with Waltzer finding that they are neither favorable nor material. See Georgiou, 777 F.3d at 141-42.

resolved in a prior direct appeal will not be reviewed again by way of a [§ 2255 motion](#)"); [DeRewal, 10 F.3d at 105 n.4](#) ("Many cases have held that [Section 2255](#) generally 'may not be employed to relitigate questions which were raised and considered on direct appeal.'"). Due to the Third Circuit's conclusive ruling that neither evidence of Waltzer's substance abuse nor his mental health is favorable or material under the facts of this action, we do not need to revisit the [Brady](#) claims relating to these issues, even in light of [Dennis](#). Accordingly, we decline to relitigate the arguments set forth by Georgiou.

7. Conclusion

*34 None of Georgiou's claims provide a basis for habeas relief. No evidentiary hearing was required on these claims because the records of the case show conclusively that Georgiou is not entitled to relief. [See Booth, 432 F.3d at 545; § 2255\(b\)](#).

B. SECTION 2 – INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

Georgiou argues that his trial counsel rendered ineffective assistance of counsel.⁴³ Following the evidentiary hearing, Georgiou voluntarily withdrew several of his ineffective assistance of counsel claims. ([See Doc. No. 495](#) (order recognizing the withdrawal of claims).) We have categorized the remaining ineffective assistance of counsel claims into the following three groups:

Claims Pertaining to SEC Testimony and Evidence

1. Counsel were ineffective for failing to object to SEC Accountant Daniel Koster ("Koster") testifying

⁴³ One of Georgiou's ineffective assistance of counsel claims, which is based on the forfeiture order, is asserted against his sentencing counsel. Otherwise, Georgiou's ineffectiveness claims appear to solely pertain to trial counsel. Consequently, our discussion is primarily confined to trial counsel. However, to the extent that Georgiou also sought to allege claims of ineffectiveness of appellate counsel, those claims would fail based upon the same reasoning.

as a lay witness;

2. Counsel were ineffective for failing to properly cross-examine Koster on his flawed analysis;
3. Counsel were ineffective for failing to object to summary charts created by Koster being admitted as evidence pursuant to [Federal Rule of Evidence 1006](#); and
4. Counsel were ineffective for failing to require that Government Exhibits 301-304 be admitted into evidence and reviewed by a jury.

Claims Pertaining to AUSAs' Communications with Kevin Waltzer ("Waltzer") and Aspects of Waltzer's Testimony

1. Counsel were ineffective for failing to "uncover the AUSA Secret Communication Arrangement with Waltzer, and move for their Disqualification[;]"
2. Counsel were ineffective for failing to discover information about Waltzer's mental state; and
3. Counsel were ineffective for failing to impeach Waltzer for his perjury in connection with his email with Georgiou.

Claims Pertaining to Various Issues

1. Counsel were ineffective for failing to obtain "critical evidence of Waltzer manipulating recordings in Hall and other cases[;]"
2. Counsel were ineffective for failing to pursue a multiple conspiracies jury instruction based on an alleged fatal variance in the Indictment;⁴⁴
3. Counsel were ineffective in failing to pursue again during trial (having raised the claim pretrial) a motion to dismiss Count One on the ground that there was a "fatal variance between pleading and proof[;]"
4. Counsel were ineffective for "failing to raise

⁴⁴ This claim is addressed in conjunction with the following ineffective assistance claim based on an alleged fatal variance because they both involve the same issues.

jurisdictional-extraterritoriality, and irrevocable liability issues, pretrial;” and

5. Counsel were ineffective for failing to object to a forfeiture money judgment.

(Pet'r's Br. 61-68.)

During the September 19, 2017 evidentiary hearing, Georgiou questioned his trial counsel, Pasano, on an assortment of issues. See Tr. 9/19/17, 4-136. Regarding Georgiou's ineffective assistance of counsel claims, Pasano was specifically questioned about his decision to not engage a securities expert, and his testimony has been utilized in our decision of that claim found in our Findings of Fact and Conclusions of Law. Additionally, any relevant testimony that Pasano gave about his representation, which was not a specific claim addressed at the evidentiary hearing, has been utilized where appropriate in our analysis of Georgiou's ineffectiveness claims. As for the remaining ineffective assistance of counsel claims, which were not specifically addressed at the evidentiary hearing, the record affirmatively indicates that Georgiou's claims for relief are without merit. See United States v. Vaughn, 704 F. App'x 207, 211-12 (3d Cir. 2017) (stating that “[28 U.S.C. § 2255\(b\)](#) mandates that the court hold an evidentiary hearing ‘[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief’”). Consequently, they have been decided on the record without a hearing.

1. Law – Strickland v. Washington

*35 The United States Supreme Court in Strickland v. Washington, set forth the standard for claims of ineffective assistance of counsel in violation of the Sixth Amendment. [466 U.S. 668 \(1984\)](#). Pursuant to Strickland, counsel is presumed to have acted effectively unless the petitioner demonstrates both that “counsel’s representation fell below an objective standard of reasonableness” and that there was “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” [Id. at 686-88, 693-94.](#)

Under the reasonable performance prong of the

analysis, “the challenger’s burden is to show ‘that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.’” [Harrington v. Richter, 562 U.S. 86, 104 \(2011\)](#) (quoting [Strickland, 466 U.S. at 687](#)). In order to evaluate counsel’s performance, the reviewing court “must apply a ‘strong presumption’ that counsel’s representation was within the ‘wide range’ of reasonable professional assistance.” [Id.](#) (quoting [Strickland, 466 U.S. at 689](#)); [see also Jacobs v. Horn, 395 F.3d 92, 102 \(3d Cir. 2005\)](#) (stating that the “proper standard for attorney performance is that of ‘reasonably effective assistance’ ”). “There are ‘countless ways to provide effective assistance in any given case’ and ‘[e]ven the best criminal defense attorneys would not defend a particular client in the same way.’” [Harrington, 562 U.S. at 106](#) (quoting [Strickland, 466 U.S. at 689](#)). The reviewing court is required to “reconstruct the circumstances of counsel’s challenged conduct” and ‘evaluate the conduct from counsel’s perspective at the time.’” [Id. at 107](#) (quoting [Strickland, 466 U.S. at 689](#)). Notably, “it is difficult to establish ineffective assistance when counsel’s overall performance indicates active and capable advocacy.” [Id. at 111.](#)

Under the prejudice prong of the analysis, a petitioner must demonstrate that counsel’s errors were “so serious as to deprive [petitioner] of a fair trial, a trial whose result is reliable.” [Id. at 104](#) (quoting [Strickland, 466 U.S. at 687](#)). Consequently, a petitioner “must demonstrate ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is sufficient to undermine confidence in the outcome.’” [Id.](#) (quoting [Strickland, 466 U.S. at 694](#)). “[The Third Circuit] ‘has endorsed the practical suggestion in [Strickland](#) [that we may] consider the prejudice prong before examining the performance of counsel prong because this course of action is less burdensome to defense counsel.’” [United States v. Lilly, 536 F.3d 190, 196 \(3d Cir. 2008\)](#) (quoting [Booth, 432 F.3d at 546](#)) (alterations in original); [see also Strickland, 466 U.S. at 697.](#)

“[I]n considering whether a petitioner suffered

prejudice, ‘[t]he effect of counsel’s inadequate performance must be evaluated in light of the totality of the evidence at trial: a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.’” [Rolan v. Vaughn, 445 F.3d 671, 682 \(3d Cir. 2006\)](#) (quoting [Hull v. Kyler, 190 F.3d 88, 110 \(3d Cir. 1999\)](#)); see also [Saranchak v. Beard, 616 F.3d 292, 311 \(3d Cir. 2010\)](#) (where the verdict of movant’s guilt had overwhelming record support, “it would take a considerable amount of new, strong evidence to undermine it”).

2. Analysis

a. Claims Pertaining to SEC Testimony and Evidence

***36** Four of Georgiou’s ineffective assistance of counsel claims focus on prior counsel’s handling of SEC analyst Daniel Koster and the evidence presented through his testimony at trial. Specifically, Georgiou argues that prior counsel were ineffective for the following reasons: (1) choosing not to object to Koster testifying as a law witness; (2) failing to properly cross-examine Koster; (3) failing to object to the government introducing Koster’s summary charts into evidence; and (4) failing to use or present a securities expert at trial.

For some background on these issues, the Third Circuit’s decision in our case is helpful. See [Georgiou, 777 F.3d at 143 n.16](#). The Third Circuit previously explained:

The Government submitted a trial memorandum, including the following stipulations reached by the parties: (1) “[v]arious trading records and financial evidence relating to the scheme will be introduced in the form of summary charts and testimony pursuant to [Rule 1006](#)”; (2) Koster would “present testimony and accompanying charts concerning the manipulative trading activity charged in the indictment”; and (3) Koster may further testify as a “summary fact witness to explain the relevance of his trading analysis to the other evidence presented in the case.” Georgiou objected generally to the use

of a summary witness, and to the use of witnesses and charts to summarize anything other than voluminous writings, recordings, or photographs, specifically objecting to summary of oral testimony.

However, Georgiou did not dispute that the “charts and the underlying records have been produced to defendant” and that “defendant has stipulated that [they] are authentic and qualify as business records under Rule 803(6).” Before trial, Georgiou’s counsel indicated that he had concerns about the proposed testimony of the Government’s SEC witnesses and would be objecting if they “stray[ed] from within [] legal limits,” specifically identifying “the issue of opinion testimony or improper summary of things not admissible in evidence.” However, counsel also stated his concerns with the charts had been “resolved.” Furthermore, at trial, no objections were lodged by Appellant with respect to Koster’s testimony, or the admission of charts.

Id. (alterations in original) (citations omitted). Clearly, the government’s use of Koster during the trial, including his testimony, and the summarization of records and evidence, were issues that Georgiou’s defense counsel and the government not only addressed, but seriously analyzed. We will now address each of Georgiou’s claims in turn.

i. Counsel Were Not Ineffective in Choosing Not to Object to Koster Testifying as a Lay Witness

Georgiou argues that his prior counsel were ineffective for failing to object to Koster testifying as a lay witness, rather than an expert witness.⁴⁵ (Pet’r’s Br. 61.) He argues that “Mr. Koster should have been declared an expert, as his analysis was ‘based on scientific, technical, or other specialized knowledge within the scope of Rule 702.’” (Id.) (citing Fed. R. Evid. 701). The government argues that Georgiou asserted a similar claim on appeal, which was rejected by the Third Circuit. (Gov’t’s Resp. 103.) Since Georgiou’s claim has already been rejected by the

⁴⁵ Georgiou’s post-trial claim that Koster should have been declared as an expert was rejected by this Court on September 29, 2010. (See Doc. No. 211.)

Third Circuit, the government argues that “prior counsel could not have been ineffective for failing to argue that Koster should have been required to testify as an expert” because “[c]ounsel cannot be ineffective for failing to raise a meritless objection.” (*Id.*) (quoting [Werts, 228 F.3d at 203](#)). We agree.

*37 In [Georgiou](#), the Third Circuit stated:

Under [Federal Rule of Evidence 701](#), if a witness does not testify as an expert, opinion testimony must be: “(a) rationally based on the witness’s perception; (b) helpful to clearly understanding the witness’s testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.”

[Georgiou, 777 F.3d at 143 \(citing Fed. R. Evid. 701\)](#). Addressing Georgiou’s argument that Koster’s testimony was based on specialized knowledge and, thus, inadmissible from a lay witness, the Third Circuit concluded as follows:

We agree with the District Court’s assessment that Koster’s testimony, including comparisons of stock quantities and prices did not require prohibited “scientific, technical, or other specialized knowledge,” and thus was squarely within the scope of [Rule 701](#). (App. 40.) Koster’s testimony provided factual information and summaries of voluminous trading records that he had personally reviewed in his capacity as an SEC employee and as part of the SECs investigation of Georgiou.

Id. at 143-44 (citing [SEC v. Treadway, 430 F. Supp. 2d 293, 321-22 \(S.D.N.Y. 2006\)](#)). The Third Circuit went on to clearly state as follows:

Because Koster “present[ed] testimony and accompanying charts concerning the manipulative trading activity charged in the indictment ... [and] explain[ed] the relevance of his trading analysis to the other evidence presented in the case,” within the scope of [Rule 701](#) and the parties’ pretrial stipulation, the District Court did not abuse its discretion in admitting his testimony as a lay witness.

Id. at 144 (alteration in original).

Squarely addressing Petitioner's argument that the District Court erred by allowing Koster to testify as an undeclared expert, we note that the Third Circuit concluded that the "the District Court did not abuse its discretion in admitting his testimony as a lay witness." Id. (citation omitted). As a result, any attempt by Georgiou's trial counsel to have the government seek to declare Koster as an expert would have been meritless. "[C]ounsel cannot be deemed ineffective for failing to raise a meritless claim." Werts, 228 F.3d at 203. Clearly, there are no grounds for relief here, and, Georgiou's claim that counsel were ineffective for failing to object to Koster testifying as a lay witness is denied.

Additionally, we further point out that Georgiou's counsel, Pasano, was effective in light of his testimony at the evidentiary hearing where he explained that he made a strategic decision not to challenge Koster testifying as a lay witness. Specifically, Pasano stated that, if he objected to Koster as Georgiou now says that he should have, the government would have had the Court declare Koster an expert, and Koster would have given similar testimony, yet with the elevated status of a court-sanctioned expert witness. Tr. 9/19/17, 117-18. Thus, the jury likely would have received Koster's testimony just as favorably, if not more favorably, than it did in convicting Georgiou. Counsel cannot be considered ineffective for making this sound, strategic decision not to object to Koster testifying as a lay witness. See Strickland, 466 U.S. at 690-91 (stating that a strategic choice "made after thorough investigation of law and facts relevant to plausible options [is] virtually unchallengeable"). As such, Georgiou has shown neither deficient performance nor prejudice as a result of this sound strategic choice, and, therefore, his claim provides no basis for habeas relief.⁴⁶

⁴⁶ Georgiou argues that if Koster had been declared an expert he would have received "expert level discovery, revealing the interviews and related work product with Waltzer, debunking the presentation of independence." (Pet'r's Br. 61.) However, as we have already found, "the

ii. *The Cross-Examination of Koster*

(1) *Erroneous Trade Analysis*

*38 Georgiou argues that counsel were ineffective in cross-examining Koster on his “Erroneous Trade Analysis” because “Mr. Koster’s analysis was riddled with error, having conflated the concept of counter parties and ‘flow of stock’, with illicit matched ‘manipulation.’” (Pet’r’s Br. 61.) He asserts that “[w]hile defense counsel used rapid-fire questioning in an effort to discredit the analysis, there was a complete failure to put empirical records to Koster, to prove Koster’s analysis was fatally flawed.” (Id. at 61-62.) According to Georgiou, “Defense counsel had all of the empirical records to discredit Koster, but failed to use them.”⁴⁷ (Id. at 62) (citing Ex. 16).

_____ (cont'd)

Government provided Georgiou not only with an outline of the areas about which Koster would testify, but also produced the slides which Koster had prepared to explain his analysis.” (Doc. No. 211 at 30.) Koster explained at trial, and again at the habeas evidentiary hearing, that he based his analysis on financial and trading records and other objective evidence. Tr. 2/2/10, 252-56; Tr. 2/3/10, 69-71; Tr. 11/16/17, 133. Koster recalled only one telephone conversation with Waltzer. Tr. 11/16/17, 51-52. Koster explained that his analysis of the Target Stocks may have started because Waltzer identified certain stocks, but Koster did not base his analysis on Waltzer: “I did analyze a lot of trade data and I try not to start with any preconceived notions in doing so. And my recollection is that Mr. Waltzer pointed to which stocks may have been manipulated, at which point I conducted my own analysis and made my own conclusions.” Id. at 56; see also id. at 65 (the existence of a conspiracy was not at the foundation of Koster’s analysis; he “went into it … with an open mind and made [his] own judgments on what … occurred and didn’t occur”). There is no evidence to support Georgiou’s theory that Koster based his analysis or trial testimony on information from Waltzer. In fact, the trial and evidentiary hearing record establishes that Koster conducted an independent objective analysis.

⁴⁷ A complete analysis of Georgiou’s argument is found on page 62 of his Habeas Brief. (See Pet’r’s Br. 62.)

The government argues that Georgiou's claim fails.⁴⁸ (Gov't's Resp. 105-07.) It states that Georgiou cannot establish that he was prejudiced by any failure of counsel to pursue additional cross-examination because "the trial record shows that Koster accurately summarized and described the evidence relating to these trades, counsel thoroughly cross-examined him on the timing of the trades and the parties to the trades, and there was nothing to be gained by a further presentation of records and accompanying cross-examination." (Id. at 105.) It asserts that Georgiou's counsel cross-examined Koster demonstrating that "the trades that the government

⁴⁸ The government points out that Georgiou raised an earlier iteration of this claim based on the issue of "matched trades." (Gov't's Proposed Findings of Fact and Conclusions of Law ¶¶ 101-05.) Regarding the issue of "matched trades," Koster testified that they are "executing a trade between accounts, such that that trade is designed to match up between that account so they are contra-parties. So one account is selling to the other in a way that creates the appearance, that false appearance to the marketplace." Tr. 2/2/10, 249. The government states that Georgiou's prior post-trial motion included an argument about "matched trades," in which he argued that "Koster presented a number of trades as having occurred between two parties that Georgiou claims were not contra-parties (between co-conspirator accounts) because a market maker acted as an intermediary to the trade." (Gov't's Proposed Findings of Fact and Conclusions of Law ¶ 101.) "Georgiou argued that Koster's presentation was flawed, and that the government made improper arguments to the jury by relying on this flawed analysis." (Id.) We rejected Georgiou's argument and request for a hearing. (See Doc. No. 211 at 37-38.) The government emphasizes that Georgiou's counsel did cross-examine Koster on the aforementioned points, but simply was unsuccessful in attempting to persuade Koster to alter his analysis based on the precise timing of the trades and the involvement of the market maker. (Gov't's Proposed Findings of Fact and Conclusions of Law ¶ 104.) To the extent that Georgiou is attempting to raise his prior claim regarding "matched trades," we find, after considering the trial record, that Koster accurately described evidence relating to the trades at issue, and that counsel skillfully cross-examined Koster regarding the timing of the trades, as well as the parties to those trades.

contended were matched occurred at different times in the day and involved an intermediary purchaser, *i.e.*, the market maker.” (*Id.* at 106.) According to the government, “Koster simply was not persuaded to alter his analysis based on the precise timing of these trades and the involvement of the market maker.” (*Id.*) It argues that “[n]o further cross-examination, with or without records, would have made any difference in the jury evaluation of Koster’s testimony or the government’s closing argument.” (*Id.*) It states that “Koster made clear, and the government properly argued, that the co-conspirators were buying and selling the stock in ways that were consistent with the manipulative activity reflected in the recordings, the trade records, the financial records, and the testimony in the case.” (*Id.* at 107-08.) It states that the proposed additional cross-examination would not undermine Koster’s extensive analysis and presentation which reflected the elaborate stock fraud activity of Georgiou and his coconspirators. (*Id.* at 107.)

***39** After examination of all of the arguments, and Koster’s testimony, we agree with the government that Georgiou’s ineffective assistance of counsel claim fails. First, it is clear that Georgiou’s counsel, through a detailed cross-examination of Koster, revealed that Koster’s analysis of trades that the government contended were “matched” involved an intermediary purchaser, the market maker, and occurred at different times in the day. Tr. 2/3/10, 104-21. Georgiou’s counsel focused on questioning Koster about market makers, and their involvement in the trades at issue, as well as their role in the stock market overall. *Id.* Likewise, he consistently questioned Koster on the timing of trades, including the trades at issue. See id. Additionally, Koster was effectively cross-examined by Georgiou’s counsel about his analysis of Government Exhibit 305 (slide 25), which Georgiou argues was woefully flawed. Tr. 2/3/10, 154-56. Moreover, during the evidentiary hearing, Pasano explained his cross-examination of Koster in the following way:

My cross tried to take him through a range of trades and charts from the four principal companies and to show discrepancies or things that he got wrong and

to constantly pound the theme that these don't match, that the times are off, like I said, the prices are off, that the parties aren't George, that the calls are assumptions, all to build to a theme that he's not a firsthand witness, he doesn't know what the true facts are, he's interpreting events after, you know, years, and he has selectively chosen some things and ignored others. So those were the main themes that I pounded in what I wanted to be a tight examination because I didn't want it to become a feature of the trial because, as I said earlier, I wanted the jury's focus to be Waltzer and then Georgiou's testimony.

Tr. 9/19/17, 116-17. There is no doubt that Georgiou's counsel effectively and reasonably cross-examined Koster attacking his analysis about "matched trades" on the bases currently set forth by Georgiou; namely, the timing; the market maker's intermediary role; and Government Exhibit 305 (slide 25). In fact, counsel challenged Koster's testimony almost exactly as Georgiou now contends that he should have. Although Georgiou's claim centers on counsel's failure to "put empirical records to Koster to prove [his] analysis was fatally flawed," Georgiou fails to show how a cross-examination, with or without the records, would have made any difference to the jury's evaluation of either Koster's testimony or the government's closing argument. (See Pet'r's Br. 62.)

Thus, we conclude that counsel's effective cross-examination of Koster was within the wide range of reasonable professional assistance. See Strickland, 466 U.S. at 688. Counsel's performance was objectively reasonable and was not deficient. Moreover, even if we concluded that counsel's performance was deficient, Georgiou has not established that he suffered any prejudice. He has completely failed to show that he was deprived of a fair trial by counsel's cross-examination of Koster's regarding his analysis without the use of empirical records. See id. at 687. While he argues that the empirical records were available to counsel, Georgiou fails to show that there is a reasonable probability that, but for counsel's failure to use those records, the result of the trial would have been different. See id. Hence, Georgiou's

ineffective assistance of counsel claim based on “Erroneous Trade Analysis” is denied.

(2) Statistical Insignificance

Georgiou’s next attack on his counsel’s cross-examination of Koster involves his allegation that counsel should have pointed out the “statistical insignificance” of Koster’s testimony concerning the numbers of manipulative trades he identified in the trading records. (Pet’r’s Br. 63.) He argues as follows:

Mr. Koster claimed he “analyzed all of the trading in the four stocks, and this is the manipulative analysis that I found”, Id.73. This included 82 instances where alleged co-conspirators were “contra parties” in Avicena trades. and 54 instances in Neutron trades; Gov. Ex. 305 at 5. There were 19 instances of wash sales, and 26 instances of trades marking the close. Contrary to the claim of “overwhelming evidence”, in the proper light, Koster’s accusations were exculpating.

***40** There were an estimated 10,000 Avicena trades, and 22,000 Neutron trades. across 650 and 1200 trading days, respectively, during the alleged conspiracy period. As such, Kosters 26 instances of alleged marking the close (for both companies) was over 1800 total trading days: less than 1.5 %. The 19 “wash sales” ALL belonged to Waltzer, Tr. 02.03.10 at 73-74. Koster was unable to present a single alleged wash sale from any other account. This speaks for itself. Furthermore, every alleged wash sale by Waltzer coincides with a forced sale margin call by the brokerage firm. Waltzer was kiting between accounts to avoid margin calls, having been forced to sell, not creating artificial volume.

Finally, Koster calculated that the “key accounts” (which purportedly controlled all the free trading stock), represented 50% of total trading volume, which means, the key accounts represented approximately 15,000 trades, and yet, Koster could identify on[ly] 136 instances where the key accounts were “contra parties”. This makes no sense whatsoever, if the key accounts were in a conspiracy. Defense counsel was ineffective for failing to

discredit Koster with this data.

(Id.)

The government argues that Georgiou's analysis as to why these trades were not "statistically significant" is simply wrong.⁴⁹ (Gov't's Resp. 108.) The government also argues that Georgiou's ineffective assistance of counsel claim fails because counsel were effective and Georgiou was not prejudiced. (Gov't's Resp. 108.) It argues that "[o]n direct examination, Koster testified extensively about the evidence of market manipulations that he found in the records. On cross-examination, counsel countered by suggesting that Koster was cherry-picking to find evidence to fit his theory." (Id.) (citing Tr. 2/3/10, 68-69 (in response to counsel's suggestion that Koster was choosing trades that fit his theory: "After doing my analysis, I did conclude that there was a manipulation and I selected trades that were indicative of that manipulation.")); Tr. 2/3/10, 73 ("I analyzed all of the trading in the four stocks, and this is the manipulative activity that I found.")) The government states that "[i]n closing, counsel tried to convince the jury of the defense theory, consistent with its cross-examination of Koster, by repeatedly accusing the government of 'cherry picking' evidence and 'cutting corners' in its investigation to present only evidence that 'fit the government theory.' " (Id.) (citing Tr. 2/9/10, 158-62).

⁴⁹ The government states that:

[Georgiou] suggests that identifying a set number of wash sales, for example, that are a small subset of all transactions in the relevant stocks means they were not statistically significant. But he completely ignores the volumes and prices of these wash sales – and their impact on the market – particularly as compared to the hundreds or even thousands of other small transactions that had little impact on overall price. See, e.g., Tr. 2/2/10, 263-64; Tr. 2/3/10, 9-10, 26-27, 37-41, 46-48 (Koster discussing how Georgiou related accounts were involved in huge percentage of trading activity in those stocks at particular times and how manipulative activities of Georgiou and his co-conspirators impacted the price). There simply was no way that counsel could have shown that Koster's analysis was flawed because it was "statistically insignificant."

(Gov't's Resp. 108.)

According to the government, “[c]ounsel thus challenged the significance of the trading activity that Koster presented almost exactly as Georgiou now contends he should have” and “[c]ounsel could not be considered ineffective for not making the same or slightly different argument couched in terms of ‘statistical insignificance.’” (Id. at 107-08.) Thus, the government argues that counsel were effective and Georgiou was not prejudiced.⁵⁰ (Id. at 108.)

*41 After examining all of the arguments, the record as a whole, and Koster’s testimony, counsel did contest the significance of the trading activity presented by Koster along the same lines as Georgiou currently seeks. One of the main themes of counsel’s cross-examination of Koster’s analysis was that he was cherry-picking in order to find evidence that fit the government’s theory. Tr. 2/3/10, 68-70. In conjunction with his cherry-picking line of cross-

⁵⁰ Georgiou’s Reply Brief includes a chart that he claims demonstrates the flaws in Koster’s testimony. (Doc. No. 380 at 20.) Through the chart, Georgiou contends that “[t]here were essentially no market dealings between Waltzer and Georgiou in Year 1 [(June 2004 to May 31, 2005)] of the alleged conspiracy.” Id. Georgiou also claims that the chart shows that Waltzer was a net seller, not a net buyer, during the conspiracy time frame. Id. This, Georgiou argues, proves that Waltzer could not have been “soak[ing] up the float” as was alleged by the government. Id. Georgiou’s theory fails because it is unclear whether the chart accurately depicts the objective transaction data. Also, whether or not that is the case, the fact that Waltzer was a net seller or a net buyer over the course of a year has no relevance to whether Georgiou committed stock fraud. The evidence presented at trial soundly demonstrated that Georgiou orchestrated specific manipulative trades as part of a vast stock fraud conspiracy. That evidence included not only objective trade and financial data, but also emails and recorded conversations discussing the manipulation. (See, e.g., Gov’t Trial Ex. 1 (12/17/04 email from Georgiou to Waltzer, in response to Waltzer’s request to sell Neutron stock, directing Waltzer to sell specific quantities of the stock at specific prices).) Regardless of whether Waltzer was buying or selling stock at any particular time, this chart, which at best reflects a small part of the scheme, does nothing to undermine the overwhelming evidence that established stock fraud.

examining Koster, counsel's closing argument tried to convince the jury of the defense theory that the government presented only evidence that fit into its own theory. Tr. 2/9/10, 158-62. After considering the record as a whole, counsel conducted a thorough and skilled cross-examination of Koster. During the evidentiary hearing, Pasano testified that his cross-examination of Koster included the reasonable strategy of including several main themes, one of which was that Koster selectively chose some things and ignored others. Tr. 9/19/17, 116-17, 135. Pasano, who is an experienced and skilled attorney, effectively tried to discredit Koster's testimony.

Lastly, Georgiou has not shown that he was prejudiced. As for Georgiou's analysis regarding why the trades at issue were not "statistically significant," it is unclear whether it is mathematically correct in light of the overall scheme. Without delving into the statistics and whether Georgiou has included all of the relevant information needed for a correct statistical analysis, we conclude that he has not shown that he suffered any prejudice under Strickland. That is, in light of the totality of the evidence before the jury, Georgiou has not shown that there is a reasonable probability that, but for counsel's failure to additionally cross-examine Koster with Georgiou's "Statistical Insignificance" information, the result of the trial would have been different or that the absence of this cross-examination undermines confidence in the verdict. See Strickland, 466 U.S. at 694. Consequently, Georgiou's ineffective assistance of counsel claim based on "Statistical Insignificance" is denied.

iii. The Failure to Object to the Admission of Koster's Summary Charts Into Evidence

Regarding the summary charts created by Koster that were used at trial, Georgiou starts his argument by stating that "[his] complaint is not admissibility, but rather, defense counsel's failure to object to the charts being admitted under Federal Rule of Evidence 1006, which allowed for a jury instruction that the charts were 'evidence.'"⁵¹ (Pet'r's Br. 62) (citations omitted).

⁵¹ In Georgiou, the Third Circuit stated that "[Georgiou] also argues that the District Court admitted prejudicial

He states that the government's summary charts in Government Exhibits 301-304 ("Exhibits 301-304" or "Exhibits") qualify as summary chart evidence under Rule 1006.⁵² (*Id.*) However, he argues that Government Exhibit 305, which was a power-point presentation by Koster, should not have been admitted under Rule 1006, but should have been admitted under Federal Rule of Evidence 611(a) as a "pedagogical" assist to the jury, which requires a jury instruction that the charts are not evidence. (*Id.* at 62-63.) He contends that Government Exhibit 305, while properly presented to the jury, was not an admissible summary of evidence, but instead was a "synthesis of Mr. Koster's impressions and suppositions." (*Id.* at 62.) Based upon the aforementioned argument, Georgiou claims that he received ineffective assistance of counsel. (*Id.*)

*42 The government asserts that the summary charts were properly admitted into evidence. (Gov't's Resp. 109.) It further asserts that counsel were not ineffective for not objecting to them, and Georgiou

(cont'd)
charts into evidence without providing cautionary instructions to the jury." Georgiou, 777 F.3d at 142. Although the Third Circuit raised the issue, it did not address it. See id.

⁵² In furtherance of his ineffectiveness claim, Georgiou argues that Government Exhibits 301 through 304 should have been submitted to the jury as evidence, but were never submitted to the jury for review. (Pet'r's Br. 64.) He argues that "[t]he jury may have seen through Koster's inaccuracies, by cross referencing his claims of manipulation against empirical records." *Id.* He further asserts that "[t]his was critical for discrediting both Koster and Waltzer's presentation of conspiracy." *Id.* The government argues that the Exhibits are lengthy documents showing trading data for numerous accounts in the Target Stocks. (Gov't's Proposed Findings of Fact and Conclusions of Law ¶ 153.) It asserts that "[t]he data contained within these exhibits is part of the objective evidence that Koster analyzed in making his summary charts, and it is information about which Koster was thoroughly cross-examined." (*Id.*) After review, and in light of the totality of the evidence at trial, we find that Georgiou has not shown that the failure to have Government Exhibits 301-304 submitted to the jury for review was prejudicial under Strickland.

cannot establish that counsel's alleged ineffectiveness prejudiced him. (*Id.*) It argues that Government "Exhibit 305 is a primary evidence summary pursuant to Rule 1006." (*Id.* at 110.) It goes on to state that the charts were proper summaries, and Government Exhibit 305 summarized trading records, financial records, emails, and telephone records, and that they were independently admissible. (*Id.* at 110-11.) It argues that counsel were not ineffective for failing to raise a meritless objection because the charts were properly admitted. (*Id.* at 111.) Furthermore, the government states that no relief is due because "Georgiou could not have achieved a different result at trial based on a small difference in how the jury received the charts." (*Id.*)

Federal Rule of Evidence 1006 "permits parties to use charts or other exhibits to summarize voluminous materials if a summary would be helpful to the jury. Decisions in this connection are committed to the sound discretion of the trial court, which in this context is very broad." United States v. Bansal, 663 F.3d 634, 668 (3d Cir. 2011) (citation omitted). "Under Rule 1006, summary evidence is admissible 'only if the underlying materials upon which the summary is based are admissible.' " United States v. Manamela, 463 F. App'x 127, 132 (3d Cir. 2012) (quoting United States v. Pelullo, 964 F.2d 193, 204 (3d Cir. 1992)). "However, Rule 1006 does not require that the underlying materials actually be admitted into evidence." Id.

"Compilations or charts which are used only to summarize or organize testimony or documents which have themselves been admitted into evidence are distinguished from those used as evidence pursuant to Rule 1006 of the Federal Rules of Evidence." United States v. Blackwell, 954 F. Supp. 944, 971 (D.N.J. 1997). "Charts that summarize documents or testimony, already admitted into evidence, may be admissible under Rule 611(a) ... of the Federal Rules of Evidence as demonstrative evidence, as opposed to Rule 1006, as substantive evidence." Id. "When Rule 611 charts are used, however, it is required the charts be accompanied by an instruction from the court which 'informs the jury of the summary's purpose and

that it does not constitute evidence.’ ” Id. (citation omitted).

Here, Georgiou does not contest that the summary charts in Government Exhibits 301-304 met the requirements of Federal Rule of Evidence 1006. Regarding Georgiou’s arguments pertaining to Government Exhibit 305, we find that it was properly admitted under Rule 1006. It summarized trading records, financial records, emails, and telephone records, and all of the underlying documents, which were provided to Georgiou, were admissible. See Eichorn v. AT & T Corp., 484 F.3d 644, 650 (3d Cir. 2007) (“Courts have cautioned that Rule 1006 is not a back-door vehicle for the introduction of evidence which is otherwise inadmissible, and that the voluminous evidence that is the subject of the summary must be independently admissible.”). Government Exhibit 305 was presented to the jurors to aid their understanding of voluminous evidence and to make relevant evidentiary connections. It reflected only objective facts, and did not include any commentary from Koster. Additionally, Koster was subject to extensive cross-examination regarding all of his charts, including Government Exhibit 305.

In light of the parties’ pre-trial stipulation about the summary charts, it is clear that defense counsel were acutely aware of how the government intended to use the summary charts at trial, and, correctly decided that the summary charts, including Government Exhibit 305, satisfied the requirements of Rule 1006. The jury was properly instructed to consider all of the summary charts as any other evidence in the case and to accord such weight as they saw fit. Tr. 2/12/10, 13. Thus, we conclude that the decision by trial counsel agreeing to all of the summary charts, including Government Exhibit 305, being admitted under Rule 1006 was the result of reasonable professional judgment. As such, “counsel’s representation did not fall below an objective standard of reasonableness.” Strickland, 466 U.S. at 688.

*43 Moreover, we find that Georgiou was not prejudiced by the admission of Government Exhibit 305 under Rule 1006 because he had all of the underlying records before trial and had sufficient

opportunity to point out to the jury any inaccuracies in the summary chart either through the cross-examination of Koster or through his own testimony. As Georgiou's trial counsel, Pasano, explained “[t]he attack on Koster was multiple. Two primary features of it were that neither the times of the buys and the sells or the prices of the buys and the sells matched, that he had compressed events, assumed connections, blamed [Georgiou] for other people's activities. All of those were parts of the cross.” Tr. 9/19/17, 69. During his closing argument, Pasano attacked the Government's charts saying that they were selective and incomplete. Tr. 2/9/10, 159. He stated that Koster's presentation contained “[p]retty charts that tell you absolutely nothing about what George Georgiou knew, what he thought, or why he acted.” Id. at 160. He further stated that “[a]ll that the charts really tell you is that a whole lot of people, not George Georgiou, made a whole lot of money trading in these stocks, not George Georgiou, millions and millions of dollars, not George Georgiou.” Id. at 161.

As previously explained, in order to establish prejudice, “the party claiming ineffective assistance ‘must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” [Campbell v. Burris, 515 F.3d 172, 184 \(3d Cir. 2008\)](#) (quoting [Strickland, 422 U.S. at 694](#)). “‘It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceedings ... not every error that conceivably could have influenced the outcome undermines the reliability of the proceeding.’” Id. (quoting [Strickland, 466 U.S. at 693](#)). Simply put, Georgiou cannot show that there is a reasonable probability that, but for the fact that Government Exhibit 305 was admitted under [Rule 1006](#), the result of the trial would have been different. See id. For all the reasons explained above, Georgiou’s claim for ineffective assistance of counsel is denied.

b. Claims Pertaining to AUSAs’ Communications with Waltzer and Aspects of Waltzer’s Testimony

Georgiou asserts that he received ineffective assistance of counsel based upon the following three grounds: “Failure to Uncover the AUSAs Secret

Communication Arrangement with Waltzer, and move for their Disqualification;” “Failure to Uncover Waltzer’s 20 year Psychiatric History and Medications, and Pre Proffer Cooperator’s Mental State;” and “Failure to Impeach Waltzer for his perjury pertaining to historical emails with Georgiou, by not analyzing and cross referencing with Daniel Koster’s summary of Neutron transactions.” (Pet’r’s Br. 65.) The government argues that all of these claims are frivolous. (Gov’t’s Resp. 112.) It states that Georgiou cannot show that counsel were ineffective in any of these areas and that he was prejudiced because “there was no secret communication arrangement with Waltzer and no basis to disqualify the AUSAs; whatever information existed about Waltzer’s mental state was not impeaching and not material; and the record demonstrates that Waltzer was truthful as his testimony was corroborated by the ‘staggering’ independent evidence in the case, including recordings, emails, trading and financial records, and testimony from other witnesses.” (Id. at 112-13.)

First, Georgiou’s claim based upon his heading, “Failure to Uncover the AUSAs Secret Communication Arrangement with Waltzer, and move for their Disqualification,” is denied because he has not shown that there was any secret communication arrangement between the AUSAs and Waltzer, and the evidence adduced at the evidentiary hearing establishes that there was never such an arrangement. See Findings of Fact, infra ¶¶ 38-48. The government had ordinary communications with Waltzer while working with the FBI agents in a large undercover investigation involving multiple subjects and targets. See, e.g., Tr. 9/26/17, 62-64 (Lappen – text messaging was ministerial and substantive conversations involved participation of agents); Tr. 9/18/17, 258-59 (Cohen – significant communications involved AUSAs and agents; logistics may have been “one on one”); Findings of Fact, infra ¶¶ 38-48. Trial counsel, Pasano, also testified that, as a strategic matter, he would not have wanted to call the AUSAs to testify at trial. Tr. 9/19/17, 99-102 (explaining that there is nothing improper about AUSAs communicating with cooperators and there would be no tactical advantage to putting a prosecutor on the

stand to explain those communications). Thus, there was no basis to disqualify the AUSAs. Georgiou's counsel cannot be found to be ineffective for not raising a meritless claim. See Werts, 228 F.3d at 203.

*44 Second, regarding Georgiou's claim premised upon the failure to discover information about Waltzer's mental state, we have previously stated that we will not revisit the issue of Waltzer's mental health in light of the Third Circuit's decision that there was no Brady material that counsel could have used to impeach Waltzer. See Georgiou, 777 F.3d at 140-41 (holding that evidence concerning Waltzer's mental health was neither favorable nor material under Brady). Consequently, we find that Georgiou has neither shown ineffectiveness nor prejudice. Thus, this claim fails.

Third, in his claim entitled, "Failure to Impeach Waltzer for his perjury pertaining to historical emails with Georgiou, by not analyzing and cross referencing with Daniel Koster's summary of Nuetron transactions, as detailed in [I-C-ii]," Georgiou claims that "Waltzer knew he was not conspiring with Georgiou, instead, dumping his stock the entire time." (Pet'r's Br. 9.) He also claims actual innocence by arguing that "the entire testimony and interpretation of the emails was a deception. Waltzer was lying to and deceiving Georgiou at the time he wrote the emails, dumping his stock, not conspiring with Georgiou to inflate prices." (Id.) Without delving into defense counsel's performance regarding this claim, we find that Georgiou has failed to establish Strickland's prejudice prong. See Lilly, 536 F.3d at 196. Waltzer's testimony at trial regarding emails with Georgiou was credible and consistent with the overwhelming independent evidence establishing Georgiou's guilt. Moreover, Georgiou's sweeping claim that the entire testimony and interpretation of the emails was a deception, and that he was not conspiring to inflate prices, is not only conclusory, but against the weight of the evidence. See Thomas, 221 F.3d at 437 (stating "vague and conclusory allegations contained in a § 2255 petition may be disposed of without further investigation by the District Court"). Georgiou has not only failed to establish that Waltzer perjured himself

regarding the historical emails with Georgiou, but he has not shown that, but for counsel's failure to impeach Waltzer regarding his alleged perjury about the emails, there is a reasonable probability that the result of the trial would have been different. See [Strickland, 466 U.S. at 694](#). Thus, this claims fails because Georgiou has not shown "a probability sufficient to undermine confidence in the outcome" of the trial. See [Jacobs, 395 F.3d at 105](#) (quoting [Strickland, 466 U.S. at 693-94](#)).

c. Claims Pertaining to Various Issues

i. Failure to Obtain Telephone Records From Another Criminal Case Involving James Hall and Others

Georgiou asserts that defense counsel were ineffective for not obtaining and using the telephone records from James Hall's ("Hall") case, and cases of others against whom Waltzer cooperated, to support his theory that Waltzer did not record exculpatory calls in Georgiou's case. (Pet'r's Br. 65.) We have addressed Georgiou's previous claim that the government engaged in misconduct in failing to disclose evidence that Waltzer supposedly failed to record calls of Hall, and concluded that there was no evidence of misconduct by the government. See [supra 50-58](#). To the extent that Georgiou's current claim relies upon the premise that the government engaged in misconduct in either his case or Hall's case, it is thoroughly rejected and denied.

In his ineffective assistance of counsel claim, Georgiou argues that:

Waltzer cooperated against the underlings he engaged for his class-action insurance frauds. At James Hall's sentencing, November 2009, Attorney Flannery submitted a detailed brief, and argued, that Waltzer had manipulated evidence, while deliberately failing to record calls to alter the narrative. At the hearing, CID-IRS Agent Kaufmann testified that certain email evidence was questionable. Attorney Flannery included Hall's phone logs, evincing Waltzer failed to record dozens of calls.

*45 (Pet'r's Br. 65.) He further argues that “[c]onsidering the significance of recordings to the case, defense counsel's failure to obtain this critical evidence of Waltzer manipulating recordings in Hall and other cases was trial altering for Georgiou.” (Id.)

The government argues that this claim should be denied because “there was no evidence of Waltzer's malfeasance in the Hall case” and “[t]here was no evidence that Waltzer was manipulating calls to hide exculpatory evidence or frame innocent people.” (Gov't's Resp. 116.) It goes on to state that “[a]ll of the charged defendants, including Hall, pleaded guilty, and counsel would not have helped Georgiou by trying to present evidence about Waltzer's recording in other cases. All the jury would have learned, if this Court admitted any evidence from these other cases, is that Waltzer cooperated against guilty people.” (Id.)

The issue of Waltzer selectively recording calls was extensively argued by defense counsel. Utilizing Waltzer's telephone records and recordings that the government provided in pretrial discovery, Georgiou and his counsel argued, during trial, that Georgiou made game-changing statements in a few short unrecorded calls between Waltzer and Georgiou. During the evidentiary hearing, Georgiou's trial counsel, Pasano, acknowledged that he attacked Waltzer based on the premise that he was selectively recording Georgiou in order to make Georgiou look bad by not revealing when Georgiou said things that were favorable. Tr. 9/19/17, 135-36. As Georgiou states, “[r]ecordings were the heart of the Government's case against Georgiou, heavily relied upon by the Court as overwhelming evidence. Georgiou's very defense was that there was a completely different narrative, hidden by Waltzer's failure to record exculpating calls, and by manipulating evidence.”⁵³ (Pet'r's Br. 65.) He goes on to argue that “[t]he claims made by Attorney Flannery matched Georgiou's exactly, and would have been

⁵³ The government provided Georgiou's counsel with Waltzer's telephone records and recordings in pretrial discovery. (Gov't's Proposed Findings of Fact and Conclusions of Law ¶ 131.)

critical for corroborating Georgiou's claims." (Id.) The government argues that "[c]ounsel approached this issue effectively, relying on the undisputed evidence that Waltzer had the ability to record or not record calls, and then argue, as they did, that the supposed unrecorded calls in Georgiou's case were exculpatory." (Gov't's Resp. 116-17.)

Georgiou equates the Hall records as critical evidence of Waltzer manipulating recordings in Hall's case and others, but the records do not, in and of themselves, equal evidence of Waltzer manipulating records. Notably, there is no evidence in the record that Waltzer intentionally failed to record, or destroyed the recordings, of any exculpatory calls.⁵⁴ Likewise, there was no evidence that Waltzer was manipulating calls to hide exculpatory evidence or frame people as all of the charged defendants in cases involving Waltzer's active cooperation, including Hall, pleaded guilty. Thus, Georgiou boldly relies upon the unsubstantiated contention that the Hall telephone records would have been accepted by the jury as bona fide truth that Waltzer selectively recorded calls in Hall and, therefore, did the same in Georgiou's case. The government argues that "[w]ith no solid evidence that Waltzer engaged in wrongdoing in other cases, and given the overwhelming evidence corroborating Waltzer's testimony, Georgiou would not have achieved a different result at trial if only counsel had presented telephone records from Hall's case or other cases." (Gov't's Resp. at 117.)

***46** We agree with the government. Georgiou's bare conclusion that he would have achieved a different result at trial if only his counsel had presented telephone records from Hall's case or other cases, in which Waltzer cooperated, is insufficient to make a showing of the prejudice prong of the Strickland standard. See [Johnson v. United States, 294 F. App'x](#)

⁵⁴ During trial, FBI Agent Joanson testified that Waltzer could only turn the recorder on or off, and he could not erase recordings. Tr. 2/2/10, 99-100. He further testified that the FBI reviewed Waltzer's recordings to make sure that Waltzer was not turning off the recorder during a conversation, and that there was no evidence of his tampering with the recorder. Id. at 101-02.

[709, 710-11 \(3d Cir. 2008\)](#) (finding that petitioner's vague and conclusory claim did not establish prejudice under Strickland); [United States v. Terry, 366 F.3d 312, 316 \(4th Cir. 2004\)](#) ("[C]onclusory allegations are insufficient to establish the requisite prejudice under Strickland."). Also, the record contradicts Georgiou's claim. Here, the government's evidence was more than sufficient for a jury, acting in accordance with law, to find Georgiou guilty. Georgiou has not demonstrated a "reasonable probability" that the trial would have been different had his counsel presented the records at issue. Without establishing prejudice, Georgiou's ineffective assistance of counsel claim fails, and we need not address the performance prong. See [Strickland, 466 U.S. at 697](#); [Lilly, 536 F.3d at 196](#). Consequently, Georgiou's ineffective assistance of counsel claim is denied.

ii. Jury Instruction – Fatal Variance

Georgiou argues that his counsel were ineffective for failing to reassert their pretrial claim that Count One⁵⁵ of the indictment should have been dismissed because the government charged multiple conspiracies in Count One, and "the evidence at trial evinced a fatal variance between pleading and proof."⁵⁶ (Pet'r's Br. 67.) Specifically, he asserts that "the evidence at trial evinced a fatal variance between pleading and proof.... Indeed, considering Waltzer's testimony that he was not aware of others in the alleged conduct, or who was on the other side of the trades, and that his views were 'in retrospect,' the pretrial motion of a mischarged single conspiracy had more merit after trial." (Id.) He also asserts that, after the government

⁵⁵ Count One charged a dual object conspiracy to commit securities fraud and wire fraud in violation of the general conspiracy statute, [18 U.S.C. § 371](#), and described Georgiou's manipulation and attempted manipulation of several stocks. (See Doc. No. 42.)

⁵⁶ In our December 7, 2009 Memorandum Opinion, we examined Georgiou's pre-trial argument that Count One should be dismissed because it does not describe one conspiracy, but actually describes six separate conspiracies. (See Doc. No. 100.) We denied Georgiou's argument as premature since "there is no variance because this case has yet to go to trial." (Id. at 8.)

presented its evidence, counsel should have pursued a multiple conspiracies jury instruction.⁵⁷ (*Id.*)

The government argues that Georgiou's claim fails because his counsel were effective for electing not to pursue this failed claim and, in any event, Georgiou was not prejudiced. (Gov't's Resp. 121.) It asserts that “[t]here was no point in counsel reasserting [the pretrial] motion during the trial because the evidence presented at trial was consistent with the charges in the indictment that properly included a single, overreaching conspiracy to manipulate the Target Stocks.” (*Id.*) It goes on to state that it may properly charge a single conspiracy with multiple objects or a master conspiracy with more than one subsidiary scheme, and “[it] proved that Georgiou operated a single conspiracy to manipulate the Target Stocks even though there were several sub-schemes, to manipulate each of the stocks and defraud the brokerage firms.” (*Id.*) (citing [United States v. Kemp, 500 F.3d 257, 288 \(3d Cir. 2007\)](#); [United States v. Morrow, 717 F.2d 800, 804 \(3d Cir. 1983\)](#)). We agree with the government.

“A variance exists ‘where the charging terms [of the Indictment] are unchanged, but the evidence at trial proves facts materially different from those alleged in the indictment.’” [United States v. Scott, 607 F. App'x 191, 195 \(3d Cir. 2015\)](#) (quoting [United States v. Castro, 776 F.2d 1118, 1121 \(3d Cir. 1985\)](#)). “‘To prevail ... [the appellant] must show (1) that there was a variance between the indictment and the proof adduced at trial and (2) that the variance prejudiced some substantial right.’” *Id.* (quoting [United States v. Balter, 91 F.3d 427, 441 \(3d Cir. 1996\)](#)).

*47 “Where a single conspiracy is alleged in the indictment, there is a variance if the evidence at trial proves only the existence of multiple conspiracies.’” *Id.* (quoting [United States v. Kelly, 892 F.2d 255, 258 \(3d Cir. 1989\)](#)). “‘We will sustain the jury's verdict if there is substantial evidence, viewed in the light most favorable to the Government, to support a finding of a

⁵⁷ See Third Circuit Model Jury Instruction 6.18.371H (Conspiracy – Single or Multiple Conspiracies).

single conspiracy.’” Id. (quoting United States v. Perez, 280 F.3d 318, 345 (3d Cir. 2002)).

“To prove a conspiracy, the government must establish a unity of purpose between the alleged conspirators, an intent to achieve a common goal, and an agreement to work together toward that goal.’” Id. (quoting United States v. Gibbs, 190 F.3d 188, 197 (3d Cir. 1999)). “In determining whether there is a single conspiracy or multiple conspiracies, we consider three factors: ‘(1) whether there was a common goal among the conspirators; (2) whether the agreement contemplated bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators; and (3) the extent to which the participants overlap in the various dealings.’” Id. at 196 (quoting Kemp, 500 F.3d at 287). “The government need not prove that each defendant knew all of the conspiracy’s details, goals, or other participants.” Id. (quoting Gibbs, 190 F.3d at 197).

The indictment alleged that Georgiou was engaged in a dual object conspiracy to commit securities fraud and wire fraud, all in violation of the general conspiracy statute, 18 U.S.C. § 371, through his manipulation and attempted manipulation of several stocks. The trial evidence proved a single conspiracy, not multiple, unrelated conspiracies. The government adduced substantial evidence at trial demonstrating the sub-schemes of Georgiou’s conspiracy clearly involved the common goal of artificially inflating stocks to generate fraud proceeds. “[A] finding of a master conspiracy with sub-schemes does not constitute a finding of multiple, unrelated conspiracies and, therefore, would not create an impermissible variance.” United States v. Smith, 789 F.2d 196, 200 (3d Cir. 1986); see also Kemp, 500 F.3d at 288 (stating “the Government may not charge ‘multiple unrelated conspiracies,’ but it can charge a ‘master conspiracy [with] more than one subsidiary scheme’”). Here, the sub-schemes clearly overlapped with the master conspiracy since each sub-scheme involved furthering a common goal of artificially inflating stocks to generate fraud proceeds. The criminal activity relating to all of the Target Stocks occurred at overlapping times with overlapping methods involving

overlapping participants, and the intended result would not have come to bear without such continuous cooperation. As for the portion of the conspiracy involving the victim financial firms, Caledonia and Accuvest, the allegations and proof also involved the same time period and same stocks.

“[T]he government need not prove that each defendant knew all the details, goals, or other participants’ in order to find a single conspiracy.” Kelly, 892 F.2d at 260 (quoting United States v. Theodoropoulos, 866 F.2d 587, 587 (3d Cir. 1989)). As the indictment alleged, and the government’s trial evidence showed, Georgiou worked with various co-conspirators, known and unknown, to manipulate the Target Stocks. The involvement of these co-conspirators, whom the government established that Georgiou controlled, cut across the sub-schemes and involved Georgiou directing them to either buy or sell the Target Stocks for his criminal benefit. In his manipulative trading, Georgiou also used various nominees and accounts, and the conspiracy could not have succeeded without the continuous participation of numerous co-conspirators. In light of all of this, and consistent with the allegations in the indictment, the evidence presented at trial regarding the conspiracy claim demonstrated Georgiou’s involvement in a single, although extremely complex, conspiracy. See Perez, 280 F.3d at 345 (citing Smith, 789 F.2d at 200). We cannot conclude that a reasonable juror could not find enough commonality to constitute a single conspiracy.

*48 Thus, we find that the government supported the conspiracy alleged in the indictment, and the evidence at trial did not create a variance that surprised or prejudiced Georgiou. As a result, we conclude that no impermissible variance occurred. Since Georgiou’s variance argument fails, we find no ineffectiveness of counsel in failing to challenge the indictment on that ground or failing to pursue a multiple conspiracies jury instruction. It was well within the range of reasonable professional assistance for Georgiou’s counsel not to advance either of the present arguments that lack merit. See Werts, 228 F.3d at 203 (“[C]ounsel cannot be deemed ineffective for failing to

raise a meritless claim.”) Georgiou’s claim also fails under the prejudice prong because he neither argues nor shows that he suffered any prejudice. Accordingly, this claim is denied.

iii. Failure to Raise Jurisdictional-Extraterritoriality and Irrevocable Liability Issues Pretrial

The following paragraph in Georgiou’s Memorandum of Law in Support of his [§ 2255](#) Motion contains his ineffectiveness argument regarding the failure to raise jurisdictional-extraterritoriality liability issues pretrial:

Defense counsel failed to raise jurisdictional-extraterritoriality, and irrevocable liability issues, pretrial. The government cannot demonstrate which alleged co-conspirators the jury found, leaving Waltzer as the only point of irrevocable liability which tied trades to the United States. All other dealings were involved foreign nationals, between Canada and the Bahamas, Turks and Caicos and Grand Cayman. Had defense counsel raised these issues, numerous elements of the indictment, including a significant narrowing of the alleged conspiracy, would have required hearings. Without irrevocable liability, many alleged co-conspirators, losses, and allegations, may have been eliminated. This may have significantly reduced alleged losses and enhancements, while also downsizing Georgiou’s sentencing exposure. The failure to fully address irrevocable liability issues where no United States nexus existed, was prejudicial and ineffective.

(Pet’r’s Br. 67.)

Relying upon [Morrison v. Nat’l Australia Bank Ltd., 561 U.S. 247, 267 \(2010\)](#), the Third Circuit, in Georgiou, stated that the anti-fraud provisions of the Securities Exchange Act, Section § 10(b) and Section 10(b)’s implementing regulation, SEC Rule 10b-5 (“Rule 10b-5”), have no extraterritorial application. [Georgiou, 777 F.3d at 134](#) (stating “[i]n indeed, Section 10(b) has no extraterritorial reach”). In determining whether the transactions at issue in Georgiou were

“domestic transactions,” under Morrison, the Third Circuit stated that “we consider ‘not ... the place where the deception originated, but [the place where] purchase and sales of securities’ occurred.” Id. at 135 (quoting Morrison, 561 U.S. at 266) (alteration in original). The location where the parties incurred irrevocable liability, *i.e.*, where the parties became bound to effectuate the purchase or sale, can be considered in determining whether a purchase or sale is domestic. Id. at 136 (citation omitted). “Accordingly, territoriality under Morrison turns on ‘where, physically, the purchaser or seller committed him or herself to pay for or deliver a security.’ Id. (quoting United States v. Vilar, 729 F.3d 62, 77 n.11 (2d. Cir. 2013)).

The Third Circuit found that “[h]ere, at least one of the fraudulent transactions in each of the Target Stocks was bought and sold through U.S.-based market makers.” Id. Relying upon Koster’s testimony, the Third Circuit stated that “some of the relevant transactions required the involvement of a purchaser or seller working with a market maker and committing to a transaction in the United States, incurring irrevocable liability in the United States, or passing title in the United States” and “[t]he record also contains evidence of specific instances in which the Target Stocks were bought or sold at Georgiou’s direction from entities located in the United States.” Id. (footnote omitted). The Third Circuit concluded that this Court’s application of Section 10(b) to Georgiou’s transactions was proper because “the evidence is sufficient to demonstrate that Georgiou engaged in ‘domestic transactions’ under ... Morrison.” Id. at 137.

*49 Regarding Georgiou’s ineffective assistance of counsel claim, the government states that “Georgiou previously litigated a different version of this claim in the Court of Appeals, and the court rejected his claim.” (Gov’t’s Resp. 124.) According to the government, “[o]n appeal, Georgiou argued that the government presented insufficient evidence on the securities fraud charges because they supposedly involved the extraterritorial application of United States laws.” (Id.) “The Court of Appeals rejected his

claim, holding that because fraudulent transactions in the Target Stocks involved U.S.-based market makers, Georgiou engaged in ‘domestic transactions’ – involving ‘the purchase or sale of any [] security in the United States.’ ” (*Id.*) (quoting [Georgiou, 777 F.3d at 136-37](#)) (alteration in original). Thus, the government argues that counsel were not ineffective for failing to pursue a meritless claim because “[t]he Court of Appeals has already rejected his extraterritorial challenge to the charges and affirmed the convictions. Nothing in the law would allow for a reduction in the loss calculation for foreign transactions that were part of a scheme for which he was fairly convicted.” (*Id. at 126.*) It goes on to argue that “[t]he loss calculation properly reflected ‘the reasonably foreseeable pecuniary harm that resulted from the offense.’ ” (*Id.*) (quoting [U.S.S.G. § 2B1.1](#) app. note 3(A)(i)).

In his Reply Brief, Georgiou addresses his extraterritoriality argument by focusing on the premise that his theory about Waltzer’s *mens rea* would eliminate Waltzer’s transactions as the domestic nexus for irrevocable liability. (Pet’r’s Reply 18-19.) To the extent that Georgiou’s ineffective assistance of counsel claim is premised upon his theory about Waltzer’s *mens rea*, it necessarily fails because, for all of the reasons set forth in the Findings of Fact and Conclusions of Law Section, the underlying *mens rea* theory is without merit. See [Werts, 228 F.3d at 203](#) (“[C]ounsel cannot be ineffective for failing to raise a meritless objection.”) He also impermissibly debates the Third Circuit’s holding in [Georgiou](#); however, we will not address this argument.

Closely examining Georgiou’s ineffective assistance of counsel claim, he speculatively asserts that if defense counsel had raised the jurisdictional-extraterritoriality and irrevocable liability issues pretrial, “numerous elements of the indictment, including a significant narrowing of the alleged conspiracy, would have required hearings.” (Pet’r’s Br. 67.) The argument that hearings may have been conducted does not provide a basis for an ineffective assistance of counsel claim. Likewise, he speculates that “many

alleged co-conspirators, losses, and allegations, may have been eliminated,” and “[t]his may have significantly reduced alleged losses and enhancements, while also downsizing [his] sentencing exposure.”⁵⁸ (*Id.*) Georgiou does not provide any legal support for his speculative arguments, and we find that they are not grounds for habeas relief. “In order to sustain an ineffective assistance of counsel claim, a petitioner must make concrete allegations of actual prejudice and substantiate them or risk summary dismissal.” Reeves v. Attorney Gen. of, No. 14-5436, 2015 WL 5544431, at *7 (E.D. Pa. Sept. 16, 2015) (citing Wells v. Petsock, 941 F.2d 253, 259-60 (3d Cir. 1991)); see also Strickland, 466 U.S. at 693 (stating that the defendant must “affirmatively prove prejudice”); United States v. Tilley, No. 10-691, 2011 WL 673914, at *2 (W.D. Pa. Feb. 17, 2011) (“Speculation and conjecture are insufficient to establish prejudice.”).

***50** Georgiou’s speculative hypothesis fails to raise a *prima facie* claim of ineffective assistance of counsel; namely, that there is a reasonable probability that, but for the fact that defense counsel did not raise jurisdictional-extraterritoriality, and irrevocable

⁵⁸ Regarding Georgiou’s sentence, the government notes as follows:

At sentencing, this Court calculated the total actual loss caused by Georgiou’s schemes to be \$55,832,398. Tr. 11/19/10, 58. This calculation was based on the following losses suffered by: (1) the three financial institutions Georgiou defrauded through his use of manipulated stocks, *i.e.*, Accuvest (\$3,613,856), Alliance (\$5,890,748), and Caledonia (\$22,000,000), Tr. 11/19/10, 55; (2) Alex Barrotti, whom Georgiou defrauded of \$16,000,000 by falsely promising to cover Barrotti’s losses for trades made at Georgiou’s direction, Tr. 11/19/10, 55; and (3) the numerous victim shareholders who bought HYHY stock during Georgiou’s pump and dump scheme and who collectively lost at least \$8,327,794. Tr. 11/19/10, 58; Gov. Exh. 305. Thus, this Court determined that Georgiou caused losses of more than \$50,000,000 under U.S.S.G. § 2B1.1(b)(1)(M), which resulted in a 24-level increase to the base offense level of 7.

(Gov’t Resp. 126.)

liability issues, pretrial, the result of the proceeding would have been different.⁵⁹ See [Strickland, 466 U.S. at 694](#). Confidence in the outcome of the trial is not undermined by Georgiou’s argument, especially in light of the Third Circuit’s decision in [Georgiou](#). See [Strickland, 466 U.S. at 693](#) (“It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.... [N]ot every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.”). Since Georgiou has made an insufficient showing on the prejudice prong of the [Strickland](#) standard, we deny habeas relief without addressing the performance prong. See [id. at 697](#).

iv. Failure to Object to a Forfeiture Money Judgment

Georgiou argues that his sentencing counsel were ineffective for failing to object to the Court’s forfeiture order for a \$26,000,000 money judgment. (Pet’r’s Br. 68.) He argues that the Forfeiture Order should be reversed for counsel’s ineffectiveness. (*Id.*) The government asserts, and we agree, that this claim fails because it is not cognizable and meritless. (Gov’t’s Resp. 129.)

“Challenges to criminal forfeiture ... are not cognizable under [§ 2255](#), even when they are couched as ineffectiveness claims.” See [United States v. Bansal](#),

⁵⁹ The government states that “Georgiou could not have been prejudiced because this Court also found that Georgiou was responsible for intended losses that ‘far exceeded a hundred million [dollars]’ based on his scheme involving Northern Ethanol.” (Gov’t’s Resp. 127.) (citing Tr. 11/19/10, 57). It argues that the Court identified the applicable guideline range by considering only the actual losses because Georgiou’s guideline range was already, literally, off the guideline chart. (*Id.*) (citing Tr. 11/19/10, 57-58). Thus, according to the government, “even if counsel should have raised the extraterritorial argument and somehow reduced the actual loss calculation, the intended loss figure would have resulted in at least the same or higher guidelines.” (*Id.*)

[No. 05-193-2, 2015 WL 11017834, at *9 \(E.D. Pa. June 22, 2015\)](#) (citing [Winkelman v. United States, 494 F. App'x. 217, 220 n.4 \(3d Cir. 2012\)](#) (“[C]ourts have held that § 2255 authorizes challenges addressed only to custody and not to fines, restitutionary orders and the like.”); [United States v. Golden, Nos. 04-4645, 00-608-01, 2005 WL 3434004, at *5 \(E.D. Pa. Dec. 12, 2005\)](#) (forfeiture order “is not a sufficient restraint on liberty to satisfy the ‘in custody’ requirement for habeas corpus relief”); see also [United States v. Ross, 801 F.3d 374, 380 \(3d Cir. 2015\)](#) (“[T]he monetary component of a sentence is not capable of satisfying the ‘in custody’ requirement of federal habeas statutes.”). As a result, Georgiou’s ineffective assistance of counsel claim based upon the criminal forfeiture order is denied.⁶⁰

Also, even if we were to find jurisdiction to hear Georgiou’s challenge to the forfeiture order, it would be without merit. The Third Circuit found that the forfeiture order was, in fact, proper concluding that “the \$26,000,000 subject to forfeiture constitutes, or is derived from proceeds traceable to the offenses of which the defendant was convicted.”⁶¹ [Georgiou, 777 F.3d at 147](#) (citations omitted).

3. Conclusion

***51** In sum, all of Georgiou’s claims of ineffective assistance of counsel are denied. The existing record establishes that Georgiou’s claims fail as a matter of law under the standard set forth by [Strickland](#). [See Strickland, 466 U.S. at 686-88, 693-94](#). Viewing all of Georgiou’s allegations, and giving the highly deferential scrutiny that we are required to give to counsel’s performance, there is no doubt that Georgiou received objectively reasonable representation by his attorneys who reasonably, professionally, effectively, and zealously represented him. In light of the effective

⁶⁰ We note that Georgiou has a separate pending motion with this Court regarding his Forfeiture Order, which has been briefed and will be addressed in a separate memorandum opinion. (Doc. No. 384.)

⁶¹ The government argues that the amount of \$26,000,000 was well below the victims’ total losses of \$55,832,398. (Gov’t’s Resp. 131.)

representation that he received from his attorneys, Georgiou has not been, and cannot show, that he has been prejudiced in any way. Also, we point out that there were no errors at trial so serious as to deprive Georgiou of a fair trial or to undermine confidence in the outcome, which had overwhelming record support. Thus, we conclude that none of Georgiou's claims assert a violation of his constitutional rights. Consequently, all of his ineffective assistance of counsel claims are denied.

IV. PART II – EVIDENTIARY HEARING

The evidentiary hearing before me took place over seven days. It was limited to the following four issues:

1. Waltzer's contacts with the Government before June 2007, including the U.S. Attorney's Office involvement;
2. Waltzer's communications with the Government attorneys during the investigation of Georgiou and other defendants;
3. Counsel were ineffective for failing to engage a securities expert on behalf of the defense for trial; and
4. Counsel were ineffective for failing to argue that Waltzer's communications with the AUSAs were improper.

As previously explained, nineteen witnesses testified. Georgiou, proceeding *pro se*, effectively represented himself, and was granted wide latitude in extensively questioning the witnesses. The testimony of the nineteen witnesses was credible, persuasive, and corroborated by documentation.⁶² Having reviewed all of the evidence and submissions, including the parties' proposed findings of fact and conclusions of law, as well as Georgiou's Supplemental Brief, I make the following factual findings and conclusions of law.

⁶² My credibility determinations are based on my observations of each witness while he or she was testifying, and considering those observations and the witness testimony in the context of the other evidence presented during the hearing and at trial.

A. FINDINGS OF FACT

1. Facts Relating To Issues Addressed At The Evidentiary Hearing

a. Waltzer's 2006-2007 Contacts with the Government

As addressed in detail below, the government did not produce to Georgiou in pretrial discovery certain information (factually unrelated to this case) concerning contacts that Waltzer had with the FBI before he began cooperating with the government in June 2007. Those contacts involved interviews with the FBI relating to national security information. The government did provide, however, voluminous discovery to Georgiou concerning Waltzer's cooperation with the government and his history of fraud, including his statements about, and dealings with, Georgiou. The government also advised Georgiou pretrial that in June 2007, Waltzer provided information relating to national security. Georgiou raises numerous claims based on this disclosure issue. Based on the evidence presented at trial and the evidentiary hearing, the facts relating to Waltzer's contacts with the government and the government's disclosure of evidence of those contacts are as follows:

1. On June 9, 2006, IRS Special Agent Thomas Kauffman ("IRS Agent Kauffman") first confronted Waltzer at his office in Newtown, Pennsylvania, about "suspicious or unusual financial transactions," involving companies and financial accounts that Waltzer controlled. Waltzer denied any wrongdoing in connection with those companies and transactions. Waltzer claimed that, although he "had nothing to hide," he could not explain the financial transactions and needed additional time to research them and get a written response to IRS Agent Kauffman. Hearing Ex. H1 (IRS Memorandum of Interview). IRS Agent Kauffman summarized this meeting in an IRS Memorandum of Interview that the government provided to Georgiou before trial. Id.

*52 2. At trial, Waltzer testified that he deflected questions and lied to IRS Agent Kauffman in June 2006 even though he thought, at that point, that "it's

over.” He explained that he immediately hired lawyers to help him evaluate his own potential criminal exposure, respond to the government investigation, and “figure out what [his] options were.” Tr. 1/26/10, 210-12. Waltzer likewise admitted during the evidentiary hearing that he lied to the IRS in 2006. Tr. 9/25/17, 85.

3. Over the course of the next year, Waltzer worked with his lawyers internally investigating his extensive fraud activity, analyzing his financial circumstances, and determining whether to disclose his misconduct to the government and cooperate. Waltzer’s lead attorney was Stephen Delinsky (“Delinsky”) from the Boston office of Eckert Seamans. Ultimately, Waltzer decided to admit his misconduct and cooperate with the government, and did so beginning in June 2007. Tr. 1/26/10, 212-16. Waltzer made his final decision to confess and cooperate shortly before presenting himself to the government in June 2007. Id. at 213; Tr. 11/15/17, 49-50 (Vaira).

4. On June 27, July 19, August 22, and August 30, 2006, IRS Agent Kauffman spoke on the telephone with Delinsky concerning Waltzer’s financial transactions which IRS Agent Kauffman was investigating. Those telephone calls are documented in IRS Memoranda that the government did not produce to Georgiou before trial. See Hearing Exs. H17 (June 27, 2006); H11 (July 19, 2006); H12 (August 22, 2006); H18 (August 30, 2006). The conversations involved Delinsky responding to Kauffman’s inquiries with innocuous information and not admitting any wrongdoing on behalf of Waltzer in the hope that the investigation would end without the government charging Waltzer. Tr. 9/18/17, 37-42 (Delinsky).

5. Pretrial, the government provided extensive discovery to Georgiou concerning Waltzer’s class action fraud and other fraud and misconduct by Waltzer. The class action fraud did not involve Georgiou, and thus the IRS reports about telephone calls with Waltzer’s lawyers have nothing to do with Georgiou. The IRS reports about those telephone calls also do not contain any impeachment material about Waltzer’s class action fraud that the government did

not disclose to Georgiou in pretrial discovery. Indeed, these reports contain no additional impeachment material for Waltzer. At trial, Waltzer admitted that he lied to the IRS and was working with his lawyers to determine whether he would ultimately confess and cooperate. Waltzer testified that he presented himself to the government only after he concluded that there was no way out. Tr. 1/26/10, 211-13. The reports of agent calls with Delinsky were not relevant or impeaching as to Waltzer (and Delinsky was not a witness at trial).

6. In October 2006, before Waltzer and his lawyers determined whether Waltzer would admit to his illegal conduct in the class action fraud scheme and seek to actively cooperate with the government, Waltzer's attorneys learned that Waltzer possessed national security information, and that the information should be presented to the FBI. Delinsky, whose testimony at the evidentiary hearing I find credible, testified that in the post-9/11 world, he generally understood that if he "had a client that had national security information, [he] was to make contact with the Department of Justice and they would determine what agency and who should be the recipient of that [information]." Tr. 9/18/17, 49. Delinsky explained that he travelled from Boston and met his law partner, Leroy Zimmerman, in Philadelphia to get direction from then U.S. Attorney Patrick Meehan ("Meehan") about how to present this national security information to the government. Delinsky spoke very briefly to Meehan about this matter and did not identify the name of his client, Kevin Waltzer. As a result of this meeting, Delinsky was advised to present Waltzer's information to FBI agents working in the area of national security. Id. at 46-47.

*53 7. Delinsky then brought Kevin Waltzer to Philadelphia where he was interviewed regarding national security matters by FBI Special Agent Maureen Poulton ("FBI Agent Poulton"). FBI Agent Poulton had no involvement in, or knowledge of, the class action fraud investigation. She interviewed Waltzer on October 26, 2006, and followed up with him on October 30, and again on November 9. On November

28, 2006, as additional follow up, FBI Agent Poulton spoke with Mr. Delinsky on the telephone about Waltzer. See Hearing Ex. H25.

8. A little over one week later, on December 7, 2006, FBI Agent Poulton telephoned Special Agent Robert Dugan (“Agent Dugan”) of the U.S. Department of Commerce because one of the matters addressed by Waltzer involved export issues, which are within the expertise of the Department of Commerce. FBI Agent Poulton arranged for Waltzer to meet with Agent Dugan, who worked in New York. They were unable to arrange that interview until February 15, 2007. The information that Waltzer discussed with Agent Dugan in February 2007 was the same information that Waltzer had provided to FBI Agent Poulton in November 2006. See Hearing Ex. H25.

9. FBI Agent Poulton summarized her interviews of Waltzer and the other contacts described above in a composite report. Hearing Ex. H25. Pretrial, the government did not produce this composite report to Georgiou. As discussed further below, the assigned Assistant U.S. Attorneys discovered this report only in connection with these habeas proceedings and produced it to Georgiou at that time.

10. Throughout the habeas proceedings, Georgiou has attempted to characterize Waltzer’s provision of national security information to the FBI, or his interviews (or as Georgiou calls it, “his cooperation”) with the FBI, as occurring over a lengthy period of time – as broadly as from June 2006 through the time that he formally proffered with the government in June 2007. See, e.g., Tr. 9/18/17, 201 (Cohen), 299 (Dugan); Tr. 9/25/17, 17 (Splittgerber), 110, 112 (Waltzer). As noted above, the factual record establishes otherwise. Waltzer’s interviews with the FBI occurred during a brief period, from October 26 through November 9, 2006, and if one includes FBI Agent Poulton’s telephone call with counsel, that would extend to November 28, 2006. FBI Agent Poulton, whose testimony I find credible in all respects, appropriately characterized this as Waltzer providing information during “one session” and “three follow-up sessions.” Tr. 11/15/17, 151 (Poulton). Georgiou exaggerates and mischaracterizes the scope

and significance of these interviews.

11. The interview with the Department of Commerce, initiated by FBI Agent Poulton on December 7, 2006, but which did not take place until much later (February 15, 2007), does not translate into Waltzer “cooperating” during some much larger period. Georgiou has extended that “cooperation” period in both directions – backwards to the time that Waltzer was confronted by the IRS in June 2006 through the time he appeared for his proffer in June 2007. In making numerous legal arguments about the significance of this alleged cooperation, Georgiou vastly distorts the record, and the Court rejects his version of the facts.

12. Georgiou contends that the reports showed that Waltzer was lying to, and deceiving, the agents by reporting on false national security information and by not disclosing his prior frauds and misconduct (including his conduct with Georgiou). Georgiou further claims that the reports showed that Waltzer himself was engaged in illegal activity in connection with the information he was providing. The hearing testimony credibly and overwhelmingly established otherwise, as described below, about Waltzer and the information he provided during these interviews with FBI Agent Poulton. The witnesses testifying to these facts included Waltzer, Delinsky, FBI Agent Poulton, and Agent Dugan. The Court finds the testimony of each of these witnesses credible and consistent in all material respects. The Court also observed Waltzer testify at trial, and despite the thorough cross-examination of him, he testified credibly and consistently with the overwhelming evidence presented by the government, including witness testimony and independent, objective evidence. The facts relating to the reports are as follows:

*54 a. In October 2006, in the presence of his counsel, Waltzer presented himself to the FBI in Philadelphia, where he spoke to FBI Agent Poulton about national security information. The FBI considered Waltzer as a citizen who was providing information. Tr. 11/15/17, 67, 77, 82 (Poulton). The FBI did not consider him an informant, cooperator, or source working for the FBI, and the FBI was not

directing Waltzer's conduct or actions in any respect. Tr. 11/15/17, 76, 84, 148 (Poulton); Tr. 9/25/17, 131 (Waltzer).⁶³

b. Because Waltzer had no such active role with the FBI, FBI Agent Poulton did not question Waltzer about his criminal history or background (including his prior and ongoing frauds) and did not expect him to volunteer that information. Tr. 11/15/17, 146-48 (Poulton). Consistent with Waltzer's status as a citizen reporting information, the FBI also did not take steps to investigate Waltzer's credibility or question him about his motives. Tr. 11/15/17, 104-05 (Poulton).⁶⁴

c. During Waltzer's 2006 interviews, Waltzer did not tell the FBI about his prior criminal history (including his dealings with Georgiou) since his purpose was merely to provide information on potential ongoing national security matters, and the FBI did not question him about his criminal past. Tr. 9/25/17, 63, 66, 78 (Waltzer). Acting on the advice of counsel, Waltzer provided the national security information, in part, because he was "hoping that it was some sort of insurance policy because [he] had not yet decided whether or not [he] was going to come forward to tell the government about [his] class action frauds." Tr. 9/25/17, 66, 80 (Waltzer). On the advice of counsel, Waltzer provided this information without entering any deals with the FBI. Waltzer was not concerned that he could be in criminal jeopardy from these

⁶³ FBI Agent Joanson also testified that Waltzer became a cooperating witness in June 2007, and prior to that (as set forth in the reports) he was "just an individual coming in, giving information to the FBI." Tr. 11/15/17, 167.

⁶⁴ FBI Agent Poulton explained, and the Court accepts, that she and her fellow intelligence agents do not, as a matter of course, seek to investigate or question the background of every individual who provides information because such an approach could deter individuals from freely providing information to the FBI. Tr. 11/15/17, 146-48 (Poulton). FBI Agent Poulton encounters numerous individuals who report possible national security information to the FBI. Her role, and the role of her fellow intelligence agents who gather intelligence, is to receive that information and document it. *Id.* at 68, 81 (Poulton).

interviews because, as he explained, “I had no assurances. I just knew that I was not doing anything wrong.” Tr. 9/25/17, 73-75 (Waltzer); see Tr. 9/18/17, 75-78 (Delinsky).

d. Because the FBI treated Waltzer simply as a citizen reporting information as discussed above, FBI Agent Poulton did not consider Waltzer to be lying or conducting himself in a dishonest or deceptive manner when Waltzer did not voluntarily disclose his criminal history or tell the FBI about his crimes with Georgiou. FBI Agent Poulton likewise considered Waltzer to be truthful about the national security information that he provided. Tr. 11/15/17, 108-10, 149-50 (Poulton).

e. Waltzer also testified, credibly and repeatedly, that he truthfully reported to FBI Agent Poulton information he had received from others when he was involved in legitimate business dealings in the Middle East; and that he was truthful, and not deceptive, in not disclosing his criminal past to the FBI because his past was not a subject of the interviews, and FBI Agent Poulton did not ask him about it. Tr. 9/25/17, 65-67, 69, 82-83 (Waltzer).⁶⁵

***55** f. The information that Waltzer provided to FBI Agent Poulton related to potential national security matters, and did not have anything to do with Waltzer’s class action fraud or Georgiou. To the extent that Waltzer mentioned any individuals who also had been involved in fraud, he did so simply as background to explain the source of his national security information. These interviews cannot be read as Waltzer disclosing his prior fraudulent activity and somehow failing to mention Georgiou. For example,

⁶⁵ Although issues relating to Waltzer’s alleged drug use and mental health have been previously litigated and are not cognizable here, since Georgiou has repeatedly tried to inject these issues into the proceedings, the Court also finds that Waltzer did not lie to or mislead the FBI by not volunteering that he was a social user of cocaine or that he was taking medication for anxiety and panic disorder. There is no evidence that he was ever questioned about those matters. See also Tr. 9/25/17, 70 (Waltzer) (“I did not consider myself to be medicated on psychiatric drugs. Paxil was for anxiety and panic disorder”).

Waltzer explained that in referencing Brett Salter or Rascal's Comedy Club, he was not reporting Salter "to the FBI for his securities dealings... The point of these meetings and the only information I provided [about] him was historical." Tr. 9/25/17, 150-51 (Waltzer); Id. at 154 ("This was a national security meeting. The only reason Brett Salter was brought up was because I had to give them historical relevance as to how I came upon this information."). See also Tr. 11/15/17, 158-59 (Joanson) (In response to Georgiou questioning FBI Agent Joanson and stating that the meetings with national security agents involved Waltzer providing information on securities fraud, Joanson explained, "when he was speaking with national security agents ... he was talking about national security matters because that would have been what they would have been asking him about.").

g. The information that Waltzer provided to law enforcement concerning potential national security matters related to potential activities and proposals of others and did not involve criminal conduct by Waltzer. FBI Agent Poulton and the FBI, as well as Agent Dugan, did not conclude from any of these interviews that Waltzer was engaged in any misconduct in connection with the national security information he was providing. Tr. 11/15/17, 83, 101, 150 (Poulton). Indeed, Agent Dugan testified that "if an individual is calling up to give information to a federal agency, I don't think that individual is breaking the law. He came forward with information to say that he may know of some people who want to engage in that activity...." Tr. 9/18/17, 308 (Dugan). Agent Dugan further testified, "I cannot answer why Mr. Waltzer came forward with this information ... but I do know if I received this phone call from Mr. Waltzer in my field office, the target of this investigation would have been the company in San Jose." Id. at 312-13. Likewise, Waltzer specifically testified concerning the potential export transaction that he was "not contemplating" engaging in this activity, but was simply reporting to Agents Poulton and Dugan a "plan that they were proposing for my involvement." Tr. 9/25/17, 148-49 (Waltzer); id. at 158-59 ("I wasn't intending upon it anyway. So it's as simple as that").

h. The Court has reviewed the information provided by Waltzer on October 26, October 30, and November 9, 2006, as well as the information provided by Waltzer's attorney, Delinsky, on November 28, 2006, and Waltzer's interview with Agent Dugan on February 15, 2007, all set forth in the composite report entered into evidence as Hearing Exhibit H25. The reports reflect, as the witnesses discussed above credibly testified, that Waltzer was providing national security information to the FBI based on information provided by others about matters in which Waltzer was not criminally involved. He was not reporting on other frauds, and was not disclosing his own criminal conduct. The reports reflect a short period of time during which Waltzer provided national security information and do not reflect active cooperation or cooperation over an extended period of time. The reports do not reflect any dishonesty from Waltzer. As to each of these points, there was no evidence presented at the evidentiary hearing to the contrary. I credit the testimony of the witnesses discussed above, which is consistent with all of the documentary evidence. I discredit Georgiou's versions of these events to the extent that they are inconsistent with the witnesses.

i. The report of Delinsky's telephone call with FBI Agent Poulton states that Waltzer had been charged in connection with a traffic stop of a vehicle he was driving because dogs smelled drugs. Hearing Ex. H25 at 10. That information about the stop was incorrect. Waltzer was not charged and did not engage in any misconduct as he was not driving his own vehicle. Tr. 9/25/17, 49, 153 (Waltzer).

***56** j. The Court finds that, based on the record, there is no evidence that Waltzer was untruthful or deceptive, and no reason to believe that a jury would have concluded otherwise. There is nothing impeaching in the reports that the government did not produce to Georgiou before trial.

k. Considering the hearing testimony of Waltzer and the agents, if Waltzer had been cross-examined at trial about alleged misconduct or dishonesty based on the reports, he would have denied engaging in any misconduct. There is nothing of record that would

contradict Waltzer, and the defense would not have been permitted to cross-examine him with any extrinsic evidence (if any existed). See Georgiou, 777 F.3d at 145 (finding that the Court imposed a “reasonable limit on the scope of cross-examination” in allowing Georgiou to question Waltzer about alleged criminal acts, but not allowing further examination if Waltzer denied the alleged act). The defense would not have been able to successfully impeach Waltzer in any fashion based on these reports, particularly because they do not reflect that Waltzer was dishonest or engaged in any wrongdoing and Waltzer would not have testified to any wrongdoing.

1. In addition, the government did not rely on Waltzer’s pre-June 2007 interviews with the FBI or the related reports in requesting a downward departure or variance for Waltzer at sentencing based on his cooperation. The AUSAs were unaware of these interviews at the time of sentencing, and they did not substantially assist in the investigation or prosecution of another person. The information that Waltzer provided related to overseas activity that the FBI was unable to pursue. See Tr. 9/18/17, 192-93 (Cohen).

13. Waltzer did not perjure himself at trial in describing his cooperation with the government as beginning in June 2007. Likewise, the prosecutors and agents did not allow false testimony to stand by not “correcting” Waltzer. It was clear from the context of Waltzer’s trial testimony that, in stating he began cooperating in 2007, Waltzer was accurately and honestly describing his decision to proffer and actively cooperate with the government beginning in June 2007 regarding fraudulent activity in which Waltzer and others engaged. Tr. 1/26/10, 210-14 (Waltzer). The Court makes this finding based on the context of the particular statement of Waltzer, as well as the Court’s general credibility determination that (1) Waltzer testified truthfully at trial and at the evidentiary hearing; and (2) the prosecutors and agents testified truthfully at the evidentiary hearing when they explained that they were not aware of Waltzer’s 2006 interviews with the FBI.

b. Waltzer's *Mens Rea*

14. Georgiou contends that he could have used the reports of Waltzer's interviews with the FBI beginning in October 2006 to show that Waltzer's *mens rea* changed from that of a criminal to that of a cooperator. Therefore, Georgiou concludes that Waltzer could not have engaged in a conspiracy or scheme with Georgiou during the time that Waltzer's *mens rea* changed and that he was unable to make that argument at trial because the government did not produce the interview reports. The Court makes the following factual findings in connection with this allegation.

15. From the time that the IRS first confronted Waltzer in June 2006 until he presented himself to the government for his formal proffer in June 2007, Waltzer was considering whether to confess and cooperate with the government. He made the final decision to cooperate shortly before appearing for his proffer. Waltzer testified to these facts at trial. Tr. 1/26/10, 210-13 (Waltzer). The defense and the jury were well aware of Waltzer's incentive and desire to begin considering cooperation in June 2006 when he was first confronted by the IRS and thought, "it's over." *Id.* at 211. Indeed, as set forth below, counsel for Georgiou both questioned Waltzer about such motives and argued to the jury that, rather than committing crimes with Georgiou, Waltzer was simply trying to set up Georgiou.

*57 16. Waltzer did not begin to actively cooperate with the government and take direction from the government until shortly after his proffer of June 6, 2007.

17. At various times from June 2006 through June 2007, Waltzer was continuing to participate in his fraud activity with Georgiou. Waltzer had substantial funds "tied up" in the schemes with Georgiou, and thus concluded that he could not just walk away from a scheme that Georgiou controlled. Tr. 9/25/17, 232-33 (Waltzer).

18. As a factual matter, Waltzer could, and did, intend to commit crimes with Georgiou at the same

time that he reported national security information to the FBI. Id. Georgiou's former attorney, Pasano, who despite admitting that he remained loyal to Georgiou, Tr. 9/19/17, 27, also recognized the factual limitations of Georgiou's "*mens rea*" theory: Georgiou asked, "Mr. Pasano, when somebody is an informant or providing or dealing with the government, is that consistent or inconsistent with conspiratorial *mens rea*?" Tr. 9/19/17, 63 (Pasano). Pasano answered, "Sadly, people can be cooperators and still be criminals." Id. at 93. In fact, as set forth above, before June 2007, Waltzer was not even a cooperator; he was simply providing information to the FBI. Georgiou's appellate counsel, Scott Splittgerber ("Splittgerber"), agreed that Waltzer could be "simultaneously committing crimes with the intent to commit crimes and giving information to the FBI." Tr. 9/25/17, 40 (Splittgerber).

19. At trial, Georgiou also fully exploited the facts known to him that Waltzer was considering cooperation soon after the IRS initially confronted him in June 2006. In other words, Georgiou did question Waltzer about his *mens rea* and argued that theory to the jury. At trial, the defense questioned Waltzer:

Q. Now you began cooperating with the FBI, I think you indicated around June of 2007, is that right?

A. June or July of 2007 would be correct.

Q. You told us, I think, that you had gotten a visit from some IRS agents in June of 2006, is that right?

A. Yes, it is.

Q. I think you had said you got a lawyer and then you met with these IRS agents, right?

A. Yes, sir.

Q. Then after the visit from those IRS agents you said you hired more lawyers, right?

A. Yes, sir.

...

Q. You told us that you worked with all of these lawyers going through your records and your hard drive which had all of these e-mails on it, right?

A. Yes.

Q. You were working up your finances, right?

A. Yes.

...

Q. All with the idea eventually that you were going to walk into the government and cooperate, right?

A. That is a decision that was made later on.

...

Q. Yeah. After going through everything with your lawyers and looking at how big a mess you were in ... and how unlikely it was you could avoid detection because the IRS had come knocking ... you came to an understanding that it was in your best interest to go into the government and start cooperating?

A. I agree with that statement.

Tr. 1/28/10, 48-51.

20. Continuing this questioning later in the cross-examination, counsel asked Waltzer about an episode in which Waltzer admitted that he was trying to sell stock involved in the schemes and profit from the sales. Georgiou and one of his co-conspirators, Vince DeRosa, were upset with Waltzer, and according to Waltzer, DeRosa threatened him. Counsel then questioned Waltzer, asking, “Your response to the so-called threat is to ask for Vince’s contact information, and you make some jokes?” Tr. 1/29/10, 83. Waltzer then admitted that he was motivated, at least, in part, to gather information against Georgiou and his co-conspirators, responding, “Yes. I asked for Vince’s contact information *because I believed in November of ‘06 that I eventually would be turning over Vince’s information to the authorities.*” Id. at 83 (emphasis added). Counsel then followed up, “*So this is already part of your plan of cooperation?*” Waltzer responded, “*It’s something I had on my mind.*” Id. at 83-84 (emphasis added).⁶⁶

⁶⁶ Trial counsel also knew that Waltzer had business dealings in the Middle East, and he asked Waltzer about that in cross-examination: “[P]art of the conversations that you had with Mr. Georgiou in the years 2004 to 2007 involved dealings that you claimed you had in the middle-east, correct?” Waltzer answered, “Yes, I definitely had

*58 21. Counsel for Georgiou also argued, in closing, that Waltzer was a self-interested liar who spent his time from June 2006 through June 2007 putting together his false story to sell to the government:

He spent over a million dollars of dirty money, hired the best lawyers he could find, gathered every document he could make fit a story he was going to tell and after a year when he was ready he comes into the government and he sells them the story and they buy it. He is that good of a conman and that good of a liar.

Tr. 2/9/10, 146.

22. Counsel similarly argued, in closing, that, after hearing from the IRS in 2006, Waltzer tried to make as much money as possible by taking advantage of Georgiou, while at the same time, Waltzer was positioning himself to cooperate against Georgiou and others:

June of 2006, Kevin Waltzer gets that visit from the IRS, and he knows the clock is ticking. It is just a matter of time. So he is going to get his affairs in order.

He is going to cash out as much as he can cash out, and then when he is ready he is going to sell the story to the government....

Once he has got his money, George Georgiou, his mark, [Waltzer] does not stop there because when Kevin Waltzer has to cooperate he has got to come in with something.

He comes in with as much as he can. He is going to

(cont'd)

conversations with him about that at various times." Tr. 1/28/10, 114. In response to further questioning from counsel on this issue, Waltzer testified that his deals in the Middle East were "not frauds." Tr. 1/29/10, 91-92. Counsel could not have done more if he knew about the FBI national security interviews (which involved dealings in the Middle East) and tried to use them against Waltzer since Waltzer stated that he was acting legally. See Georgiou, 777 F.3d at 144-45 (holding that district court properly prohibited testimony and extrinsic evidence regarding allegations of fraud perpetrated by Waltzer).

be the best cooperator ever. He makes up his list ... and one of the names on that list, George Georgiou.

Id. at 148-49.

23. These excerpts from the trial record illustrate that Georgiou had the ammunition, which he used, to present his theory to the jury that Waltzer was deceiving Georgiou from June 2006 through June 2007, in order to make money and gather evidence to cooperate against the innocent man, Georgiou. As a factual matter, the 2006 FBI national security interviews would have been, at best, cumulative evidence of Waltzer's desire to help himself once he was confronted by the IRS in June 2006 and began collecting evidence to mitigate the damage of his criminal behavior.

24. At the evidentiary hearing, former counsel for Georgiou, Pasano, testified about the evidence relating to Waltzer's contacts with the FBI prior to June 2007. Pasano credibly explained that, as an advocate, he would want as much evidence as possible to consider using in impeaching a witness. Tr. 9/19/17, 39-40 (Pasano). He also recognized that, along with his obligation to testify truthfully, he felt a continuing "duty of loyalty" to Georgiou as his former client. Id. at 17. Pasano explained:

I am extremely sympathetic to the things I've read in your pleadings about things you say you weren't provided because I believe I could have used some of those things. So with me as a witness, you're going to get me always agreeing with you. I wanted it all. Good defense lawyers want it all. Whether we can use it all is a different issue. Whether the court will find it cumulative is a different issue. Whether it ultimately affects a jury's verdict, that's a decision for the Court to make.

Tr. 9/19/17, 39-40. Likewise, Georgiou's appellate counsel, Splittgerber, explained that, as an "advocate," he would make whatever arguments he could about the significance of the suppressed evidence, but, ultimately, the Court as factfinder would determine whether it would have mattered. Tr. 9/25/17, 27, 37. Both Pasano and Splittgerber failed to articulate any

concrete basis on which the missing evidence would have had any impact on the trial or appeal.

c. Alleged Government Concealment of Evidence

***59** 25. Georgiou claims that there was a vast government conspiracy to hide evidence of Waltzer's pre-June 2007 interviews with the FBI and convict an innocent man. He claims that the AUSAs, the FBI agents working in national security, the FBI agents assigned to Georgiou's case, and the IRS agent all conspired to hide this evidence from him. Specifically, Georgiou has attempted to show that the government intentionally concealed from him Waltzer's contacts with the FBI preceding his June 2007 formal proffer, as well as the other reports prepared by FBI Agent Poulton relating to Waltzer's national security interviews. The testimony of the witnesses overwhelmingly establishes that the government did not try to conceal any evidence from Georgiou. The AUSAs' failure to produce this information, to whatever extent it was discoverable, was inadvertent because the AUSAs were unaware of Waltzer's pre-June 2007 contacts with the FBI. Specifically, to address Georgiou's contentions, the Court finds as follows:

26. Sometime around May 2007, Waltzer's lawyers contacted Peter Schenck, then the Chief of the Fraud Unit for the U.S. Attorney's Office in this District, and advised him that they wanted to present their client for a proffer in which he would disclose a major fraud he perpetrated and fully cooperate with the government. Tr. 11/15/17, 37 (Vaira).

27. On June 6, 2007, Waltzer appeared in the U.S. Attorney's Office and proffered, admitting to his extensive fraud activity and agreeing to cooperate proactively for the government. At this time, Waltzer also provided information about numerous other frauds involving Waltzer and others, including information about Georgiou's stock fraud activity. Waltzer also provided information about possible national security matters. These interviews were attended by Waltzer's attorneys (Delinsky, Ursula Knight, Peter Vaira, and Jack L. Gruenstein), AUSAs (Cohen and Paul Shapiro), and federal agents (IRS

Agent Kauffman and FBI Agent Joanson). Hearing Ex. H3.

28. IRS Agent Kauffman prepared two memoranda of interview from this proffer session. The first memorandum summarizes the information Waltzer provided about his criminal history, primarily concerning Waltzer's class action fraud, as well as other frauds, such as stock fraud involving Georgiou. Hearing Ex. H3. This memorandum ends with the comment, "At the end of the interview, Waltzer stated that he believes that he has some information that may be of interest on the war on terrorism. This information is summarized in another memo." Hearing Ex. H3 at 16. The government provided this first memorandum to Georgiou as part of pretrial discovery.

29. The second memorandum prepared by IRS Agent Kauffman arising from the June 6, 2007, proffer includes a summary of the national security information that Waltzer provided. Hearing Ex. H3A (redacted). The government did not provide this memorandum to Georgiou in pretrial discovery because it determined that it did not contain Brady or Giglio information and was not otherwise discoverable. The information also related to potential ongoing investigations which could be compromised if disclosed. The Court has reviewed the substance of this memorandum, which is set forth in Hearing Exhibit H9 (discussed below). The information provided by Waltzer did not have anything to do with Georgiou, is not exculpatory as to Georgiou, and did not involve any misconduct by Waltzer. The report was not discoverable. Furthermore, in providing the first report to Georgiou (Hearing Ex. H3), the government disclosed to the defense that Waltzer had provided national security information. The substance of Waltzer's disclosures on national security were of no relevance to Georgiou's defense.

30. Following Waltzer's proffer and IRS Agent Kauffman's preparation of the reports, FBI Agent Joanson provided a copy of Kauffman's second report (Hearing Ex. H3A) to FBI Agent Poulton. She copied the substance of the report in its entirety to place it in the database for FBI national security reports. The

report was labeled, “classified.” As part of the habeas proceeding, several years later, the FBI declassified the report in a redacted format so that it could be provided to Georgiou. Hearing Ex. H9.

***60** 31. On June 7, 2007, FBI Agent Poulton met with Waltzer about the national security information, mostly related to currency stolen from Iraq, and then she prepared a report at a later date. Hearing Ex. H7. The information provided by Waltzer did not have anything to do with Georgiou, is not exculpatory as to Georgiou, and did not involve any misconduct by Waltzer. The report was not discoverable.

32. On July 27, 2007, Waltzer met with the government for another proffer session. Waltzer provided information on his fraud activity, including information about Georgiou’s stock fraud. FBI Agent Riley prepared a memorandum summarizing the proffer which the government produced in a redacted form to Georgiou before trial. Hearing Ex. H16.

33. On the same day, Waltzer provided follow-up information to FBI Agent Joanson about a national security matter (relating to stolen currency in Iraq) that Waltzer first presented to the FBI in June 2007. FBI Agent Joanson then telephoned FBI Agent Poulton to deliver that information to her. Poulton prepared a brief “classified” report about this matter. Hearing Ex. H8. This report was not produced to Georgiou in pretrial discovery. It had nothing to do with Georgiou, was not exculpatory as to Georgiou, and did not involve any misconduct by Waltzer. The report was not discoverable. As part of the habeas process, the FBI declassified the report in a redacted format so that it could be provided to Georgiou.

34. FBI Agent Joanson, whose testimony the Court finds credible in all respects, explained that he mistakenly failed to obtain from classified FBI files, and provide to the AUSAs, the 2006 FBI reports. This was a completely innocent mistake and was not designed to deprive Georgiou of information for his trial. The Court makes this finding based on the evidentiary hearing testimony and its review of the reports. The government witnesses all testified consistently that they did not try to hide this

information from Georgiou, and there would have been no reason for them to do so. The information in the reports had nothing to do with Georgiou and, for all the reasons discussed here, would not have helped him at trial. The Court makes the following specific additional factual findings in this regard:

a. FBI Agent Joanson was assigned to the Waltzer investigation in June 2007 when Waltzer appeared for his formal proffer. Around that time, FBI Agent Joanson found Waltzer's name in FBI databases and learned of Waltzer's contacts with the FBI national security agents. Tr. 11/15/17, 156 (Joanson). Joanson assumed that Waltzer had interviewed with national security agents, but he did not access the reports. The reports were classified, and Joanson did not have the clearances to review them. Id. at 187. Instead, he reached out to FBI Agent Poulton, who was listed as having interacted with Waltzer, to advise her that Waltzer had now appeared on the fraud investigation. Id. at 162, 182-83.

b. Beginning in June 2007, Waltzer cooperated extensively with the government in numerous investigations and prosecutions. Around 2009, when the government was preparing for trial in Georgiou's case, FBI Agent Joanson was involved in providing FBI documents to the AUSAs for discovery. At that time, Joanson did not recall Waltzer's 2006 interactions with the FBI because he was focused on the criminal investigation and related discovery rather than Waltzer's prior national security interviews. Thus, he did not seek to obtain the national security interview reports for the prosecutors to review for discovery. Tr. 11/15/17, 174, 178-80; Tr. 11/16/17 13-14 (Joanson). When Joanson took the appropriate steps for discovery to search for Waltzer interview reports in the FBI databases, the national security reports did not appear because the case management system did not reveal the existence of the classified reports where Waltzer's true name was removed. Tr. 11/15/17, 181, 187; Tr. 11/16/17, 10-11 (Joanson).

*61 c. The FBI case management system changed in 2012. When FBI Agent Joanson searched the FBI databases for Waltzer interviews, at the request of the U.S. Attorney's Office in connection with this habeas

litigation and Georgiou's requests for this information, Joanson found notations to the 2006 reports of the national security interviews. Tr. 11/15/17, 187 (Joanson). FBI Agent Joanson then uncovered the reports, and as he did, he provided them to Lappen of the U.S. Attorney's Office, who then provided them to Georgiou. Tr. 9/26/17, 89-90 (Lappen).

35. The Court finds that the government did not intentionally conceal evidence of Waltzer's 2006-2007 contacts with the FBI on national security matters. Tr. 9/26/17, 138, 142 (Lappen) (explaining that government did not intentionally conceal evidence from Georgiou); Tr. 9/18/17, 290 (Cohen) (same); Tr. 11/16/17, 49 (Joanson) (same). The Court further credits the testimony of the witnesses who explained that the prosecutors who were responsible for providing discovery to Georgiou were not aware of Waltzer's pre-June 2007 provision of national security information:

a. FBI Agent Maureen Poulton – “I didn’t have any contact with the U.S. Attorney’s Office for these records....” Tr. 11/15/17, 134.

b. FBI Agent David Joanson – The first time the AUSAs learned of Waltzer’s 2006 contacts with the FBI “would have been during the habeas petitions.” Tr. 11/15/17, 203. Joanson never discussed Waltzer’s 2006 provision of terrorism information with the AUSAs prior to the habeas proceedings. Id.

c. IRS Agent Thomas Kauffman – “I believe nothing [regarding Waltzer speaking with the FBI in 2006] was turned over to the U.S. Attorneys about this until I started digging in the records getting ready for this trial [sic (habeas evidentiary hearing)].” Tr. 9/25/17, 291. Regarding Waltzer’s 2006 provision of national security information, Kauffman testified, “I have heard that there’s a memo out there. I’ve never seen it. I’ve never had access to it.... I wasn’t aware that he even actually came in until that point in time.... I don’t know whether Waltzer ever came in or Delinsky came in.” Id. at 292-93.

d. FBI Agent Corey Riley – “The first time I heard about anything related to national security is when I

was called by the U.S. Attorney's Office here I believe earlier this year or last year indicating that I would have to testify. But prior to that, no, I heard nothing related to national security." Tr. 9/19/17, 181-82.

e. "Charlie" (the undercover FBI agent) – Charlie testified that he was unaware that Waltzer had given national security information to the FBI in 2006, and never discussed the topic with other case agents. Tr. 9/26/17, 44.

f. Kevin Waltzer – "What I understand is that when I provided information to the FBI regarding national security I understand that that had nothing to do with the U.S. Attorney's Office. And to this day, I don't believe that the U.S. Attorney's Office had any knowledge that I provided that information in '06 and '07, and that when I started proffering in June it was clean slate. I did not tell them, nor I believe did my attorneys tell them that this took place. It didn't lead to anything and it didn't seem like it would help me in any way." Tr. 9/25/17, 161; see also id. at 109 (Waltzer stating that he did not intend to conceal from the prosecutors his interviews with the FBI).

g. AUSA Derek Cohen – The first time that AUSA Cohen became aware that Waltzer had provided national security information to the FBI in 2006 was "[w]ithin the context of these [habeas] proceedings." Tr. 9/18/17, 201. "I was unaware that Mr. Waltzer had provided any information." Id. at 205.

***62** h. AUSA Louis Lappen – Lappen first became aware of Waltzer's 2006 provision of national security information to the FBI "[i]n connection with this habeas litigation." Tr. 9/26/17, 74. "I didn't know about the 2006 interviews that Kevin Waltzer had with the FBI." Id. at 78.

i. Paul Shapiro – "[W]ell, if you're asking me when I learned that [Waltzer] was providing information to the FBI prior to the proffer meetings ... that was in preparation for this hearing." Tr. 9/19/17, 251. "I have no memory of ever learning until just in preparation for this hearing that [Waltzer] had had any contact with the FBI prior to that first proffer session...." Id. at 268.

j. Peter Schenck – The fact that Waltzer had provided national security information to the FBI in 2006 did not come up when AUSA Schenck spoke with Waltzer’s attorneys in approximately May 2007. Tr. 9/25/17, 251-53.

k. Stephen Delinsky – “I remember having no conversations about Waltzer’s prior cooperation on national security issues with Mr. Lappen or Mr. Cohen.” Tr. 9/18/17, 165. With regard to his initial meeting with his law partner Leroy Zimmerman and then U.S. Attorney Patrick Meehan seeking guidance on where to go with the national security information Waltzer possessed, Delinsky said that Waltzer’s name was not provided to Meehan. Id. at 46 (“[M]y memory is Kevin Waltzer’s name was never disclosed.”).

l. Peter Vaira – “I did not learn [that Waltzer had spoken to the FBI in 2006] until sometime after I had taken him to the United States Attorney [on June 6, 2007]. I can’t recall when it was. And it was just a vague, in passing, because it meant nothing to me. It had nothing to do with my transaction.” Tr. 11/15/17, 6; id. at 26 (“I had no idea that there was a cooperation situation going on, if there was.”).

m. Mark Cedrone – *After Georgiou’s trial concluded*, Waltzer was sentenced. Defense counsel Cedrone’s sentencing memorandum referenced Waltzer’s earlier contacts with the FBI. It was not a centerpiece of his sentencing memorandum. Cedrone explained that he did not discuss the prior FBI contacts with the prosecutors, did not discuss that aspect of the sentencing memorandum with them, and did not raise the issue at Waltzer’s sentencing hearing. Tr. 12/1/17, 38-39, 42-43, 45-46; see also Tr. 9/26/17, 94-95 (Lappen) (explaining that the government did not discuss with Cedrone the reference in the sentencing memorandum to Waltzer’s earlier contacts with the FBI; it was not important relative to the sentencing issues, and the reference to an earlier date for cooperation appeared to be a typographical error).

n. Daniel Koster – When asked if he was aware that Waltzer spoke to the FBI in 2006, Koster responded, “I have no knowledge of when Mr. Waltzer did speak to the government or didn’t speak to the government.”

Tr. 11/16/17, 67.

36. As discussed in the Conclusions of Law below, the Court finds that the evidence that the government failed to produce was not favorable or material. The Court finds, as it has repeatedly in this case, as a factual matter, that the evidence against Georgiou was overwhelming and that the new evidence neither undermines confidence in the outcome of the trial nor would have made any difference in cross-examining Waltzer or any other witness.

***63** 37. The Court also accepts the hearing testimony of Daniel Koster, whom it finds credible in all respects, that after reviewing the missing evidence of Waltzer's pre-June 2007 interviews with the FBI, if Koster had such evidence at the time of trial, it would not have changed his trial testimony. Koster explained that his testimony did not depend upon the credibility of Waltzer, as it was based on objective, independent evidence. Tr. 11/16/17, 133-34. This testimony is also consistent with Koster's trial testimony, which I also credit, concerning the basis of his analysis. At trial, Koster explained that he based his analysis on financial and trading records and other objective evidence and his testimony reflected that. Tr. 2/2/10, 252-56; Tr. 2/3/10, 69-70. As a factual matter, considering the entire hearing and trial records, the Court finds that there is nothing in any reports which were not provided pretrial to Georgiou that would have had any impact on Koster's testimony.

d. Waltzer's Communications with AUSAs During Investigation

38. Georgiou contends that Waltzer's communications with the AUSAs were improper and that he was deprived of the opportunity to present that to the jury. Waltzer began actively cooperating in numerous undercover fraud investigations during the summer of 2007. His cooperation involved making over 1,000 recorded telephone calls, and attending recorded meetings, with numerous subjects and targets, only one of which was Georgiou.

39. The AUSAs assigned to the undercover

operations involving Waltzer, Lappen (who replaced Paul Shapiro) and Cohen, worked closely and actively with Waltzer and the assigned FBI Agents, Joanson and Corey Riley. The AUSAs and agents frequently worked on these matters together at the United States Attorney's Office. Tr. 9/26/17, 57-58 (Lappen); 11/16/17, 33 (Joanson); Tr. 9/18/17, 219-21 (Cohen).

40. During the undercover operations, there is no dispute that Waltzer communicated with the AUSAs and the agents on the telephone and that Waltzer's telephone records reflect numerous calls from Waltzer to the cellular and office telephone numbers of the AUSAs. See § 2255 Pet., Ex. 6 (telephone records).

41. The telephone records do not show whether any particular call resulted in the parties speaking, Waltzer leaving a voicemail, or Waltzer hanging up because nobody answered the call. In fact, the records reflect numerous calls of only one or two minutes in duration, many of which easily could have been calls in which the parties did not speak. The records also do not show who participated in any particular phone call, whether there was more than one person on the phone call, or whether the call had anything to do with Georgiou. See § 2255 Pet., Ex. 6.

42. The Court credits the testimony, highlighted below, of Waltzer, the agents, and the AUSAs who testified consistently and credibly about the calls with Waltzer and makes the following specific findings:

a. Many of the calls (if the parties connected at all) were brief and involved only ministerial matters. See, e.g., Tr. 9/18/17, 258-59 (Cohen) ("So I can't say on a particular call what the topic was, I can't say who was on the line, I can't say if the call actually occurred, if it was a one minute thing. I can tell you that, generally speaking, there would be logistical things, but if there was something significant, then we would try to make sure that we had an agent there."); id. at 219-20 (Cohen); Tr. 9/26/17, 62 (Lappen) ("I know Waltzer might call us and say he's going to meet at a certain time and say I'm going to be there in ten minutes.... if he was going to call about anything of any substance, we would try to get agents on the phone.").

b. Many of the calls involved matters unrelated to Georgiou because the government was investigating numerous other subjects and targets unrelated to Georgiou. Tr. 9/18/17, 258 (Cohen) (“I spoke to [Waltzer] with regard to investigations involving dozens of people. It wasn’t – it wasn’t just Mr. Georgiou.”); *id.* at 221 (Cohen); Tr. 9/26/17, 57 (Lappen) (the AUSAs and agents “worked very closely on a daily basis on [Georgiou’s case] as well as literally dozens of other matters that would arise in connection with Kevin Waltzer’s cooperation”).

*64 c. To the extent that a call involved substantive issues, the AUSAs generally had the agents participate in the call, either in person, if they were working in person together at the time of the call, or by connecting via a conference call. Tr. 9/18/17, 259 (Cohen) (“[I]f there was something significant, then we would try to make sure that we had an agent here.... I don’t recall an instance where something that would have been significant occurred that we didn’t get agents involved.”); *id.* at 219-20 (Cohen); Tr. 9/26/17, 62 (Lappen) (“[I]t was certainly my practice if [Waltzer] was going to call about anything of substance, we would try to get agents on the phone....”); *id.* at 56-57 (“There’s no way that there were hundreds of one on one conversations with Kevin Waltzer.... [W]e worked very closely together on this case, along with the agents. It was very much a team effort.”).

d. The agents and AUSAs worked together as a team so that, regardless of who participated in a call, they made decisions as a team about the undercover operations involving Georgiou or any other target or subject. Tr. 9/18/17, 255 (Cohen) (“To the extent we were giving instructions, we were working as a team and we would discuss with each other.”); Tr. 9/26/17, 62 (Lappen) (“[W]e, as an investigative team, talked to Waltzer [about investigative matters] ... if anything had any substantive, meaty issue, those conversations involved multiple participants from the U.S. Attorney’s Office and the FBI talking to Waltzer.”); Tr. 11/16/17, 48 (Joanson) (the agents and AUSAs worked closely together in the undercover operation involving Waltzer). Additionally, the AUSAs and agents did not

give Waltzer instructions to do anything improper. Tr. 9/18/17, 282 (Cohen).

43. Thus, based on this testimony, which the Court credits, the Court rejects Georgiou's repeated factual allegation that there were "hundreds of one-on-one calls" between Waltzer and the AUSAs. Likewise, the Court rejects Georgiou's implications that any such calls with AUSAs involved any matter of substance related to Georgiou's case, and that there was something improper about those communications. I discredit Georgiou's reading of the telephone records, which is self-serving and not supported by the evidentiary hearing testimony. Also, to the extent that Georgiou claims that there was a secret communication arrangement between the AUSAs and Waltzer, we reject this claim.

44. In addition, as several witnesses testified credibly, there is nothing out of the ordinary or improper in the criminal investigative process about an AUSA communicating with a cooperating witness during an undercover operation, even if those communications are "one on one." Tr. 9/25/17, 259-61 (Schenck); Tr. 9/18/17, 142 (Delinsky). Notably, Georgiou's former counsel, Pasano, also explained that there is nothing improper about AUSAs speaking with cooperators during ongoing investigations, that it "happens all the time," and that he never would want to call an AUSA to the stand to testify about his contacts with a cooperator. He said that he saw "no tactical advantage in this case to pursuing any of those issues." Tr. 9/19/17, 101-02 (Pasano).

45. The government provided in pretrial discovery the Waltzer telephone records that form the basis of these claims of improper contacts. Thus, they were available to the defense for whatever argument counsel could make. Tr. 9/19/17, 98 (Pasano).

46. Pasano credibly conceded that he did not know if he could have been able to make any argument at trial based on Waltzer's contacts with the AUSAs even if he knew what they said in their conversations. As a strategic matter, he would have preferred to argue that Waltzer was lying rather than try to make some argument based on instructions that the AUSAs were

giving Waltzer. He also recognized that many of the calls listed in the records were brief and may not have resulted in any conversation at all. Tr. 9/19/17, 26-28, 99-100 (Pasano).

***65** 47. The agents and AUSAs also did not provide a script for Waltzer to prepare him for meetings, calls, emails, or other communications with Georgiou. They orally gave Waltzer general direction about the communications. The primary direction that the AUSAs and agents gave to Waltzer was to allow Georgiou to speak about his historical and ongoing fraud activity. Tr. 9/25/17, 193 (Waltzer) (agents and AUSAs gave “framework on what to accomplish.... There was nothing scripted”); id. at 186 (agents and AUSAs instructed Waltzer generally in the investigation and told him to let the target or subject speak); Tr. 11/16/17, 34-35, 49-50 (Joanson) (agents and AUSAs did not script communications for Waltzer; they gave general direction); Tr. 9/19/17, 188-89 (Riley) (same).

48. In particular, the AUSAs and agents did not script Waltzer’s communications with Georgiou near the end of August and beginning of September 2008, when the parties were arranging for the test trade of Northern Ethanol stock. Tr. 9/19/17, 187-89 (Riley). As a related point, in light of the claims raised by Georgiou, the Court finds that the record is unclear about whether Waltzer possessed the FBI recording device during the test trade, and for the reasons addressed in the Conclusions of Law, resolution of this matter is of no factual or legal significance. The witnesses testified consistently that they recalled Waltzer possessing the recording device most of the time, but could not be certain whether he possessed the device on that particular occasion.

e. The Decision by Counsel to Forego Use of Expert at Trial

49. Georgiou contends that former counsel were ineffective for failing to engage and use an expert at trial. The Court accepts and credits former counsel’s testimony that, working closely with Georgiou, he made a wise, strategic decision not to call an expert.

50. In the months preceding trial, Georgiou worked closely with counsel in formulating a strategy to defend the case. He remained an active participant during the trial and played a significant role in decisions about his defense. Georgiou was a highly intelligent and sophisticated client who was also extremely knowledgeable about securities matters. Tr. 9/19/17, 76-78, 111-12 (Pasano).

51. Before trial, Georgiou and his counsel discussed the possibility of engaging an expert witness in the field of securities to testify at trial. Counsel took the additional step of speaking with a securities expert and discussed the issues in the case with him, but concluded, as a strategic matter, that it would be disadvantageous to call an expert: “I made a determination that if we tried to call a securities expert, the government’s cross examination of that witness, their ability to use emails, their ability to use recordings, none of which the witness would have a basis to say much about ... would give the government ... a second closing argument ... at the end of the trial and just before Mr. Georgiou’s testimony.” Tr. 9/19/17, 110. All of Georgiou’s attorneys and Georgiou agreed that the defense should not call an expert witness because, as a strategic matter, it did not make sense to call such a witness and instead, they “focused on George as a witness” to defend the charges. Id. at 112.

52. The Court credits Pasano’s testimony and agrees with him that, as a factual matter, an expert would not have benefitted Georgiou. An expert could not have explained away the mountain of incriminating evidence against Georgiou, including, *inter alia*, the devastating testimony from witnesses, the recordings, the emails, the trading and financial records, Georgiou’s self-recorded confession. The government’s cross-examination of such an expert would have only highlighted and repeated for the jury the numerous examples of blatant stock manipulation perpetrated by Georgiou. The government would have turned a defense securities expert into a witness for the government as such an expert would have had to concede that significant aspects of the case involved Georgiou and others engaging in stock fraud. Counsel wisely chose to use his cross-examination skills to attack the

testimony of Koster and other witnesses, present the defense case through Georgiou, and forego calling an expert.

***66** 53. Counsel thoroughly and effectively cross-examined Koster at trial and did his best to discredit Koster's handling of the independent evidence establishing Georgiou's guilt. Because much of Koster's testimony merely involved summarizing this objective evidence that connected Georgiou and his coconspirators to the fraud activity, counsel had a difficult, if not impossible task, in trying to undermine Koster's testimony. See Gov't Trial Ex. 305. An expert could not have helped Georgiou.

54. Separately, Georgiou has repeatedly argued that Koster's analysis was flawed. His argument suggests both that a securities expert and a more vigorous cross-examination of Koster would have discovered these flaws and would have revealed the falsity of Waltzer's testimony and changed the outcome of the trial. (See Doc. No. 380, 20-21.) Relying on a summary chart that he created, Georgiou claims:

There were essentially NO market dealings between Waltzer and Georgiou in YEAR 1 [(2004)] of the alleged conspiracy.... Waltzer was a net seller YEAR 2 [(2005)], and a net seller YEAR 3 [(2006)] (during which time he was an FBI informant) There was NEVER a time Waltzer was buying up and holding Neutron shares to "soak up the float."

(Id. at 20.) Georgiou has failed to prove that: counsel were ineffective; a securities expert would have helped him; and there is a reasonable probability that, but for Pasano's decision not to engage a securities expert, the result of the trial would have been different.

55. First, Georgiou has failed to establish the accuracy or completeness of his summary. Second, assuming that it is accurate and complete, it does not begin to undermine the evidence establishing his guilt. The government proved the stock manipulation schemes through, among other evidence, Waltzer's testimony and exhibits showing Georgiou directing Waltzer's trading in a manner that was reflective of a manipulation scheme (regardless of how Waltzer

bought and sold); through the independent and objective trading records, financial records, and other objective evidence that Koster presented that showed Georgiou and his co-conspirators manipulating stock; through other witnesses who testified about Georgiou's manipulative activity and fraudulent dealings in the Target Stocks;⁶⁷ and through the numerous incriminating recordings of Georgiou. None of this evidence from numerous different sources depended upon whether Waltzer was selling more Neutron than he was buying at any particular point in the conspiracy. Counsel thoroughly cross-examined Koster on his summary presentation and suggested that Koster was biased in favor of the government and selective in his presentation of certain trades, and that Georgiou's good faith established his innocence. See, e.g., Tr. 2/3/10, 70 (Counsel asking Koster, "Now, in making this slide ... you engaged in – in a certain selection as to what you wanted to put on this...."); id. at 204 (Counsel pointing out to Koster, that to prove a manipulation, "there has to be the intent to deceive?"). Counsel also suggested in cross-examining Waltzer that Waltzer was a frenetic stock trader acting on his own in buying and selling Neutron, Avicena, and other stocks without any direction from Georgiou. Tr. 1/29/10, 9-28. Waltzer also admitted on cross-examination that he was buying Neutron stock (at least \$500,000) before meeting Georgiou and that, throughout their scheme together, Waltzer was trying to make money by selling stock at a profit. Tr. 1/28/10, 139-40, 143, 146; Tr. 1/29/10, 9-10. Thus, Counsel did attack Waltzer on his alleged independent trading and profiting in these stocks. He could not have changed the jury's view of the evidence with additional questions about Waltzer's stock sales during the time that Waltzer was engaged in manipulative activity with Georgiou. No additional cross-examination of Koster or any other witness concerning Waltzer's trading activity, with or without the aid of an expert,

⁶⁷ See, e.g., Tr. 2/2/10, 258-59 and Gov't Ex. 305 (Koster explaining that he identified numerous trades in Avicena and Neutron involving accounts associated with Georgiou and his coconspirators in which there was no change of beneficial ownership, and trades near the end of the day, "marking the close").

would have helped Georgiou. Georgiou failed to present any evidence at the evidentiary hearing or elsewhere, much less prove, that counsel were ineffective in his cross-examination or in failing to engage an expert and failed to prove that he was prejudiced.

2. Georgiou's Attempt To Present False Testimony

*67 56. During the evidentiary hearing, Georgiou sought to call federal inmates Jeffery Bellamy, Adam Lacerda, and Michael Vandergrift as witnesses based upon affidavits and information Georgiou submitted to the Court allegedly from these witnesses.

57. Among other things, Georgiou claimed that Bellamy would testify that Waltzer had confessed to Bellamy in prison that Georgiou had never engaged in criminal conduct with Waltzer, and that Waltzer had framed Georgiou and lied at trial.

58. Instead, Bellamy appeared at the hearing and testified as set forth below. The Court finds Bellamy's testimony in all respects credible and consistent with other evidence adduced at the hearing and at trial.

59. Bellamy said that he and Georgiou had recently spoken, and that Bellamy had acknowledged to Georgiou that he, Waltzer, and another federal inmate, Michael Vandergrift, had been housed together at one point. Bellamy told Georgiou that he had spoken with Waltzer during the time they were housed together. Tr. 9/19/17, 142 (Bellamy).

60. Bellamy testified that Georgiou had offered him \$10,000 to testify for Georgiou at the evidentiary hearing and provided Bellamy with an affidavit to sign. Id. at 143. Specifically, Bellamy testified, "You told me that Mr. Waltzer framed you, you got arrested, and you were willing to pay me if I'd be a witness for you." Id. at 143.

61. Bellamy, who has signed a cooperation plea agreement in an unrelated federal case, did not sign the affidavit prepared by Georgiou, immediately turned the affidavit over to his attorney, and notified one of the AUSAs prosecuting his unrelated case of the incident. Id. at 143-44; Hearing Ex. H14 (Bellamy

cooperation plea agreement).

62. At the hearing, Bellamy testified that all of the information contained within the affidavit that Georgiou wanted him to sign and testify to was false, except some background facts such as Bellamy having been housed with Vandergrift and Waltzer, and Bellamy having recently met Georgiou. Bellamy explained that all the information in the affidavit about statements that Waltzer had purportedly made to Bellamy about Waltzer's wrongdoing and Georgiou's alleged innocence was false. Id. at 148-56; Hearing Ex. H13 (Bellamy Affidavit). Some of the falsehoods to which Georgiou asked Bellamy to testify in exchange for \$10,000 were:

a. Bellamy was "familiar with Georgiou's name, because Waltzer had spoken to [Bellamy] about him on many occasions[.]" Hearing Ex. H13, ¶ 4.

b. "Waltzer admitted to [Bellamy] that he lied in Georgiou's case. Waltzer admitted there was no illegal conduct between him and Georgiou. Waltzer admitted that he used Georgiou to 'get a lot of money,' and then he had to 'finesse' his testimony to make it seem like their dealings were criminal[.]" Id. ¶ 9.

c. "Waltzer admitted to me that he was addicted to cocaine, and continued using cocaine through-out the time he was working undercover, but had to be careful when making recordings for the government. Waltzer admitted that 'there is a way' to fool targets and 'play with the recordings.' Waltzer explained that he was 'flushing' to beat the drug tests, because cocaine only stays in the system for 72 hours, and, that he was buying and taking products from GNC to cleans [sic] his system[.]" Id. ¶ 12.

*68 d. "Waltzer spoke non-stop about his efforts to obtain and provide the Government with terrorism information. He claimed this had been going on for ten years. He said some of what he reported was made up, to keep the government interested. Waltzer admitted that he would create a story around a piece of information, often something he read or heard from someone else." Id. ¶ 13.

e. "Waltzer told Adam Lacerda everything. Lacerda

knows all of Waltzer's schemes and lies...." Id. ¶ 14.

f. "I have not been offered, nor have I asked, for any compensation for this affidavit." Id. ¶ 15.

63. The Court finds Bellamy to have testified credibly regarding his interactions with Waltzer and Georgiou. The Court bases this finding on the evidence presented at the trial and the evidentiary hearing, as well as its observations of Bellamy as a witness. The facts that Georgiou had attempted to present through Bellamy, which Bellamy denied, are entirely inconsistent with the evidence presented throughout the proceedings in this case. It is not credible, considering the record as a whole, that Waltzer would have said to fellow prisoners that he fabricated his testimony against Georgiou.

64. On the other hand, the Court finds Georgiou's conduct with regard to Bellamy to be consistent with his conduct at trial in trying to persuade another witness, Alex Barrotti, to lie for him. Tr. 2/8/10, 303-305.

65. The Court also finds that the facts set forth in the false affidavit prepared by Georgiou match closely, in tone and substance, with the baseless factual allegations that Georgiou has repeatedly been pursuing in this case, further supporting the testimony of Bellamy that Georgiou fabricated the affidavit.

66. The Court also credits the testimony of Waltzer who, consistent with Bellamy, testified at length regarding the falsity of material portions of the Bellamy affidavit prepared by Georgiou. Tr. 9/25/17, 235-39.

67. Consistent with his approach with Bellamy, Georgiou also sought to call to testify federal inmates Adam Lacerda and Michael Vandergrift. Georgiou submitted an affidavit from Vandergrift and contended that he and Lacerda would also testify that Waltzer admitted to them that he fabricated his testimony against Georgiou. The affidavit and representations about Lacerda were similar in tone and substance to the affidavit that Georgiou submitted purporting to be from Bellamy. (Doc. No.

443, Ex. 1 (Vandergrift Affidavit).) Lacerda and Vandergrift did not appear to testify, and instead, through their attorneys, asserted their Fifth Amendment rights to remain silent.

68. Angie Halim (“Halim”), counsel for Adam Lacerda, and Michael Giampietro (“Giampietro”), counsel for Michael Vandergrift, appeared before the Court on September 18, 2017, on behalf of their clients.

a. Halim advised that “[i]f asked any questions regarding interactions with, communications with, conversations with Mr. Waltzer, Mr. Lacerda would assert his Fifth Amendment privilege not to testify.” Tr. 9/18/17, 6 (Halim). Following a further *ex parte* communication with the Court at sidebar, the Court found that if called to testify, Mr. Lacerda would raise “his Fifth Amendment privilege and that he would have a valid reason for doing so.” Id. at 9.

b. Giampietro, after reviewing an affidavit given to Vandergrift by Georgiou, and signed by Vandergrift, advised the Court that if his client were to testify “he would be subjecting himself to ... obstruction of justice.” Id. at 11; see id. at 25 (Giampietro) (“I believe there is a potential obstruction of justice charge.”). Based upon what Mr. Giampietro relayed to the Court in open court, and *ex parte* at sidebar, the Court found that Vandergrift would have “a valid exercise of the Fifth Amendment” if called to testify. Id. at 26.

***69** 69. Thus, while Georgiou claimed that witnesses would appear on his behalf and support his sweeping allegations that Waltzer and the government manufactured a case against him and concealed exculpatory evidence, there was no such testimony presented.

70. The Court need not, and does not, rely on these facts relating to the testimony of Bellamy and matters relating to the other prisoner witnesses, in resolving any of the specific claims presented by Georgiou in this § 2255 petition. However, since Georgiou injected these matters into the proceedings, the Court does not ignore the facts as the Court has found them and notes that they reflect poorly on Georgiou’s credibility

and certainly fail to support any of his claims.⁶⁸

B. CONCLUSIONS OF LAW

Georgiou's first series of claims arise from his general complaint that the government failed to disclose Kevin Waltzer's contacts with the government at certain times between June 2006, when Waltzer was first confronted by the IRS, and June 2007, when Waltzer admitted to his criminal activity and began proffering and actively cooperating with the government. Georgiou contends that (1) the government suppressed Brady material in not disclosing information to Georgiou about Waltzer's contacts with the government between June 2006 and June 2007;⁶⁹ and (2) Waltzer did not act with the *mens rea* of a co-conspirator during the time of his alleged secret cooperation, and thus the charges in the indictment in which Waltzer was identified as a co-conspirator during that period should have been dismissed.

1. Georgiou also alleges that the government violated [Napue v. Illinois, 360 U.S. 264 \(1959\)](#), by knowingly eliciting and failing to correct the following allegedly false testimony from Waltzer: (1) that Waltzer first began cooperating with the government in June 2007, and not in 2006 as Georgiou alleges; (2) that Waltzer received instructions "solely" from FBI agents, when he also received instructions from the AUSAs; (3) that the government instructed Waltzer on his "pitch" to Georgiou about "legitimate dealings in the Middle East," when supposedly the government did not so instruct him; (4) that Waltzer helped Georgiou, as part of their stock fraud scheme, to "soak up the float," *i.e.*, purchase outstanding shares of Neutron stock; (5) that Waltzer would lose the benefits of his plea agreement if he lied to the jury, when supposedly he

⁶⁸ In his "Summary of Evidentiary Hearing, Appendix 1," Georgiou summarized Bellamy's testimony as "Bellamy provided no relevant testimony pertaining to the due process violations before the Court's consideration (pp. 137-160)." (Doc. No. 556, app. 1.)

⁶⁹ We reiterate that our discussion of Brady includes Georgiou's arguments pertaining to Giglio material. We will refer to all of the arguments, collectively, as Georgiou's Brady claims.

later testified that he would gain leniency even if he “believe[ed] differently from his testimony”; and (6) that Waltzer always possessed the recording device throughout the undercover operation, when post-trial Waltzer supposedly testified differently stating that there may have been times when he did not possess the device. (Doc. No. 542, Attachment A, N-1 through N-6.)⁷⁰ For the reasons set forth below, Georgiou’s Brady and Napue claims fail procedurally and on the merits.

1. The *Brady* And *Napue* Claims Are Procedurally Defaulted

*70 2. In order to obtain collateral review on a procedurally defaulted claim, a habeas petitioner must show either (1) cause for the procedural default and actual prejudice, or (2) that he or she is actually innocent. See [Bousley, 523 U.S. at 622](#); [Hodge, 554 F.3d at 378-79](#). Georgiou claims that he is actually innocent, but for all of the reasons previously set forth, and which will be set forth below, we reject his claim that he is factually innocent. See [Sweger, 294 F.3d at 523](#) (“Actual innocence means ‘factual innocence, not mere legal insufficiency.’”). Therefore, Georgiou can only cure his procedural default by establishing “cause and prejudice.”

a. The *Brady* Claims

3. Regarding Brady, the government has conceded, and testimony from the evidentiary hearing supports, that the government did not inform Georgiou of, or provide the FBI reports concerning, Waltzer’s pre-June 2007 national security interviews with the FBI.

⁷⁰ Georgiou’s Napue claims are raised both in his initial [§ 2255](#) Motion and his Motion to Amend Habeas Petition. (Doc. Nos. 307, 542.) Although we denied Georgiou’s Motion to Amend the Habeas Petition, we will address the additional Napue claims here as additional examples of the alleged Napue violations raised by Georgiou in his [§ 2255](#) Motion. Georgiou made broad claims of Napue violations in his initial Motion, the Court conducted an evidentiary hearing, and Georgiou was able to rely on any of that evidence to support his broad claims, even those on which he sought permission to amend his [§ 2255](#) Motion.

4. As described above in the Findings of Fact, the prosecutors did not provide this information or the reports to Georgiou because they were unaware of the existence of the interviews or report until this habeas proceeding. Findings of Fact, supra ¶¶ 34-35.

5. In light of the above, Georgiou has established the requisite cause. See Pelullo, 399 F.3d at 223.

6. Even though Georgiou has shown cause for his failure to bring his Brady claims, he cannot show prejudice because the claims lack merit.

7. To establish prejudice, a petitioner must not merely show that there were errors that created a possibility of prejudice, but that the errors “worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.” Holland v. Horn, 519 F.3d 107, 112 (3d Cir. 2008) (quoting United States v. Frady, 456 U.S. 152, 170 (1982)).

8. “The analysis of prejudice for the procedural default of a Brady claim is identical to the analysis of materiality under Brady itself.” Albrecht v. Horn, 485 F.3d 103, 132 (3d Cir. 2007) (quoting Slutzker v. Johnson, 393 F.3d 373, 385 (3d Cir. 2004)). “If the withheld evidence was not material to [Petitioner’s] trial, then barring his federal habeas claim on procedural grounds would not create prejudice.” Id. (citing Slutzker, 393 F.3d at 385).

9. Thus, our discussion of materiality under Brady will also be our discussion of prejudice for the procedural default. As will appear, we find that Georgiou has not shown materiality; therefore, there was no prejudice. Consequently, we conclude that Georgiou has not demonstrated prejudice to excuse his procedural default as to his claims regarding the government’s failure to produce evidence of Waltzer’s pre-June 2007 contacts with the government.

b. The Napue Claims

10. Georgiou’s claims under Napue also fail procedurally:

a. Georgiou first argues that Waltzer lied about his

interactions with the FBI. Georgiou contends that Waltzer should have testified that he first started proffering with the FBI in 2006, not in 2007, when he actually began cooperating. (Doc. No. 542, Attachment A, N-1.) Assuming, for argument only, that Georgiou could establish cause based upon the FBI composite report that was not disclosed until this habeas proceeding, Georgiou still cannot establish prejudice. The evidence before the Court is clear, and provides no support for Georgiou's claim that Waltzer began cooperating with the government in 2006 when he provided national security information to the FBI on a few occasions. To the contrary, considering the record as a whole, Waltzer truthfully answered questions about his cooperation which began on June 6, 2007. See Findings of Fact, *supra* ¶¶ 12-16. As Georgiou's claim is entirely lacking in merit, he suffered no prejudice. This Napue claim is procedurally defaulted.

*71 b. Georgiou next alleges that Napue was violated when Waltzer testified that he was taking directions "solely" from the FBI, when he also received instructions from the AUSAs. (Doc. No. 542, Attachment A, N-2.) This claim arises from Georgiou's analysis of telephone records that were in his possession prior to trial; therefore, he cannot establish cause for failing to timely raise this claim. Likewise, Georgiou cannot establish prejudice because he fails to demonstrate that this claim worked to his actual and substantial disadvantage infecting his entire trial with error of constitutional dimensions. Moreover, the record is clear that Waltzer was taking instruction from both the AUSAs and agents who were working on his investigation, and that all interactions between the AUSAs, agents, and Waltzer were proper. Findings of Fact, supra ¶¶ 42-44, 47. Similarly, it is clear from the record that Waltzer testified truthfully at trial about taking direction from the government and never said that the AUSAs did not participate in guiding him in the undercover operation. Georgiou cannot establish prejudice based upon a meritless claim. This Napue claim is procedurally defaulted.

c. Georgiou also contends that Waltzer lied when he testified that the government instructed Waltzer on his "pitch" to Georgiou about "legitimate dealings in

the Middle East,” when supposedly the government did not so instruct Waltzer. (Doc. No. 542, Attachment A, N-3.) Georgiou was aware, prior to trial, that Waltzer had business dealings in the Middle East. If Georgiou believed Waltzer was lying about the legitimacy of the business dealings, he could have cross-examined him on that point or raised some other claim. Thus, Georgiou cannot establish cause for failing to timely raise this claim. More importantly, it is irrelevant whether the government instructed Waltzer to mention those dealings, or whether Waltzer merely mentioned the dealings in the course of conversation. There is no evidence that Waltzer’s business dealings in the Middle East were criminal, and they had nothing to do with Georgiou’s case. Georgiou could not have impeached Waltzer with this pointless line of attack and could not have used this to overcome the overwhelming evidence of his guilt. Because Georgiou’s claim is lacking in merit, he cannot establish prejudice. This Napue claim is procedurally defaulted.

d. Georgiou next claims that Waltzer testified falsely that Waltzer helped Georgiou, as part of their stock fraud scheme, to “soak up the float,” *i.e.*, purchase outstanding shares of Neutron stock. (Doc. No. 542, Attachment A, N-4.) This claim is based upon trading data turned over to Georgiou in discovery; therefore, he possessed this information pre-trial. He cannot establish cause. As discussed below, Georgiou’s substantive claim regarding Waltzer “soaking up the float” is entirely without merit. Conclusions of Law, infra ¶ 48d. There is no evidence that Waltzer lied about purchasing this stock at Georgiou’s direction, at times, to “soak up the float.” Even if Georgiou had been able conduct additional cross-examination of Waltzer, or any other witness, on the issue of “soaking up the float,” and what Georgiou believed to be errors in the government’s analysis, it would not have affected the outcome of the trial. Additional cross-examination on this meritless point could not have overcome the mountain of incriminating evidence against Georgiou. Georgiou cannot establish prejudice. This Napue claim is procedurally defaulted.

e. Georgiou also contends that Waltzer lied when he

testified that he would lose the benefits of his plea agreement if he lied to the jury, when supposedly he later testified that he would gain leniency even if he “believe[ed] differently from his testimony.” (Doc. No. 542, Attachment A, N-5.) This claim is not only incoherent, but it is rooted in Georgiou’s disproven refrain that Waltzer lied repeatedly before, during, and after trial. There is no evidence of record to support Georgiou’s claim that Waltzer lied to the jury. Indeed, at trial, Waltzer’s testimony was corroborated with voluminous objective trading records, witness testimony, and recordings of Georgiou. Even if Georgiou could establish cause as to this claim, he cannot establish prejudice. This Napue claim is procedurally defaulted.

***72 f.** Finally, Georgiou claims that Waltzer lied when he testified that he always possessed the recording device throughout the undercover operation, when post-trial Waltzer supposedly testified that there may have been times when he did not possess the device. (Doc. No. 542, Attachment A, N-6.) This claim is procedurally defaulted. Georgiou had access to all reports relating to his case regarding Waltzer’s possession of a recording device prior to trial. In addition, Waltzer’s attorneys were aware of the arguments that another defendant against whom Waltzer was cooperating, James Hall, was making about Waltzer’s alleged failure to record exculpatory calls. Tr. 9/26/17, 102-03. At the evidentiary hearing, trial counsel testified that he was aware of the reports that he could have used to argue that Waltzer did not possess the recording device during the time that Georgiou was discussing the test trade. Counsel explained that he, instead, chose to make a consistent argument to the jury that Waltzer was selectively recording and trying to manipulate the evidence against Georgiou. Tr. 9/19/17, 31, 135-36 (“It’s better if he has equipment and he’s not recording than if he doesn’t have equipment.”). Georgiou and his attorneys could have raised whatever arguments they thought were appropriate concerning Waltzer’s alleged failure to possess the device, particularly in connection with the test trade, but they chose not to do so. Counsel’s strategic decisions were sound, and additional cross-examination in this area would not have had any

impact on the trial. Thus, any claim relating to Waltzer's possession of the recording device is procedurally defaulted, and Georgiou cannot establish prejudice.⁷¹

2. The *Brady* And *Napue* Claims Fail On The Merits

a. The *Brady* Claims

11. Even if Georgiou's *Brady* claims were not procedurally defaulted, they fail on the merits.

12. To prove a *Brady* violation, a defendant must show the evidence at issue meets the following three critical elements: (1) it must be favorable to the accused, either because it is exculpatory or impeaching; (2) it must have been either willfully or inadvertently suppressed; and (3) it must have been material such that prejudice resulted from its suppression. [Dennis, 834 F.3d at 284-85](#) (citations omitted).

13. *Brady* requires disclosure of information actually known to the prosecution and “all information in the possession of the prosecutor’s office, the police, and others acting on behalf of the prosecution.” [Wilson, 589 F.3d at 659](#). “[A] *Brady* violation may be found despite a prosecutor’s ignorance of impeachment evidence.” [United States v. Risha, 445 F.3d 298, 306 \(3d Cir. 2006\)](#).

14. “Evidence is favorable if it is exculpatory or impeaching.” [Rivera v. Penn., 187 F. App’x 240, 245 \(3d Cir. 2006\)](#) (citing [Bagley, 473 U.S. at 674](#)). “Evidence of slight, trivial or hypothetical favorability obviously does not sway us as much in our materiality analysis as does evidence of a clearly impeaching or

⁷¹ To the extent that Georgiou makes a universal argument that the procedural default rule does not apply because his prior counsel were ineffective, this argument fails. As discussed, we find Georgiou’s claims groundless; therefore, we, likewise, deny his claim of ineffective assistance, as counsel cannot be ineffective for failing to raise a meritless claim. [See Strickland, 466 U.S. at 691](#) (finding that failure to pursue “fruitless” claims “may not later be challenged as unreasonable”).

exculpatory nature.” Id.

15. “[E]vidence 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.” Turner, 137 S. Ct. at 1893 (quoting Cone v. Bell, 556 U.S. 449, 469-70 (2009)). “Materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant’s acquittal ... [Rather], [a] ‘reasonable probability’ of a different result is ... shown when the government’s evidentiary suppression undermines confidence in the outcome of the trial.” Dennis, 834 F.3d at 285 (alterations in original) (citation omitted). Materiality of withheld evidence must be considered collectively. Id. at 312.

16. Regarding the issue of materiality, the Third Circuit in Georgiou, explained:

“The materiality of Brady material depends almost entirely on the value of the evidence relative to the other evidence mustered by the state.” Suppressed evidence that would be cumulative of other evidence or would be used to impeach testimony of a witness whose account is strongly corroborated is generally not considered material for Brady purposes. Conversely, however, undisclosed evidence that would seriously undermine the testimony of a key witness may be considered material when it relates to an essential issue or the testimony lacks strong corroboration.

*73 Georgiou, 777 F.3d at 139 (quoting Johnson v. Folino, 705 F.3d 117, 129 (3d Cir. 2013)).

17. As set forth in the Findings of Fact, the testimony at the evidentiary hearing undisputedly demonstrated that the government did not willfully suppress any evidence from Georgiou and that any such suppression was inadvertent. Agent Joanson, who was not involved in Waltzer’s pre-2007 FBI interviews, inadvertently failed to advise the prosecutors that those interviews occurred and did not provide reports of those interviews to the prosecutors. Findings of Fact, supra ¶¶ 25, 34. Thus, the prosecu-

tors were not in a position to produce to Georgiou any information concerning those interviews. See id. ¶ 35.

18. Since the AUSAs were unaware of the existence of the reports, there is no record as to the AUSAs' assessment of whether any of the information in the reports would have been discoverable, declassified, or produced to Georgiou. Moreover, the substance of the reports had nothing to do with Georgiou and were not impeaching as to Waltzer. It is possible that the government could have been required to advise the defense that Waltzer provided national security information in 2006, which would have allowed Georgiou to question Waltzer further about his mental state in 2006.

19. For the purpose of completing the Brady analysis here, this Court presumes, without deciding, that the reports of Waltzer's pre-June 2007 interviews would have been declassified in the redacted format that was provided to Georgiou during the habeas proceedings. As such, the materials were in the possession of the "prosecution team" and were not made available to Georgiou. Thus, the first prong of the Brady analysis is satisfied.

20. Georgiou has made substantial efforts to show that, if he possessed these reports or the information contained in them at trial, he would have used that to undermine Waltzer's credibility and change the entire complexion of the trial. The Court disagrees. Having presided over this trial, reviewed the reports, and considered the testimony from the evidentiary hearing, the Court finds that Georgiou failed to establish that the reports are either favorable or material under Brady.

21. First, the information contained within the reports is entirely unrelated and irrelevant to Georgiou or the securities fraud case brought against him. Waltzer and FBI Agent Poulton both testified credibly that Waltzer met with the FBI to provide information he had obtained relating to national security. Findings of Fact, supra ¶ 12. The reports themselves reflect that reality. Waltzer did not mention Georgiou and did not provide information on other frauds, as he did extensively when he began to

cooperate with the government in June 2007. The nature of Waltzer's disclosures to the FBI also did not suggest anything impeaching in Waltzer's failure to mention Georgiou. Waltzer was simply reporting on national security matters, which had nothing to do with Georgiou.⁷² Thus, Georgiou could not have advanced his defense by using these reports to cross-examine Waltzer for failing to mention Georgiou.

***74** 22. Second, the information provided by Waltzer and the accompanying reports do not reflect additional misconduct that Georgiou could have used to cross-examine Waltzer at trial. Waltzer reported to the FBI on information he had received from others about potentially improper international deals and other such matters. Waltzer was not reporting on anything improper or illegal in which he was engaging. Thus, Georgiou could not have advanced his defense by cross-examining Waltzer on the basis that he engaged in additional misconduct reflected in the reports.

23. Georgiou tried this line of attack at trial and it failed. Georgiou knew that Waltzer had business dealings in the Middle East, and his counsel asked Waltzer about that in cross-examination: “[P]art of the conversations that you had with Mr. Georgiou in the years 2004 to 2007 involved dealings that you claimed you had in the middle-east, correct?” Waltzer

⁷² As set forth in the Findings of Fact, Georgiou failed in his effort to transform Waltzer's interviews with the FBI about national security matters into interviews about his prior frauds. Waltzer testified, and the other evidence consistently showed, that he mentioned the names of certain individuals who had been involved in fraud as background to explain how he became involved in the national security matters on which he was reporting. Findings of Fact, supra ¶ 12f. Waltzer did not discuss those frauds, and the agents did not ask him to do so. Tr. 9/25/17, 65-67, 82-83 (Waltzer). Those incidental references to individuals involved in fraud did not create any meaningful impeachment material. For example, Georgiou could not have used those passing references to suggest to the jury that Waltzer was lying at trial about Georgiou because, if Waltzer were telling the truth, he would have told the FBI about Georgiou in 2006. Georgiou fails on this theory to establish that the information was favorable or material.

answered, “Yes, I definitely had conversations with him about that at various times.” Tr. 1/28/10, 114. In response to further questioning from counsel on this issue, Waltzer testified that his deals in the Middle East were “not frauds.” Tr. 1/29/10, 91-92.

24. Once Waltzer denied engaging in fraud in connection with any allegation that Georgiou could have manufactured from these reports, counsel could not have impeached Waltzer with the actual reports or other extrinsic evidence. See Georgiou, 777 F.3d at 144-45 (finding district court properly prohibited testimony and extrinsic evidence regarding allegations of fraud perpetrated by Waltzer following Waltzer’s denials).

25. Third, the testimony at the evidentiary hearing, which I have credited, was uncontroverted that Waltzer was not lying when he was speaking to law enforcement prior to June 2007. Waltzer testified that he provided the FBI with truthful information. Likewise, FBI Agent Poulton testified that she considered Waltzer to be truthful. Findings of Fact, supra ¶¶ 12d, 12g-12h; see infra n.73. Again, as a legal matter, Georgiou could not have relied on extrinsic evidence to suggest otherwise, and Georgiou failed to produce any evidence that would suggest otherwise. Georgiou could not have advanced his defense by using these reports to accuse Waltzer of lying to the FBI.⁷³

⁷³ Georgiou also fails in trying to advance his impeachment theory with the claim that the prosecutors rejected Waltzer’s effort to cooperate in national security matters in 2007. The prosecutors and agents did not conclude Waltzer was lying. They simply concluded that others may have misled Waltzer and that his cooperative efforts were better directed to more productive matters that the government could investigate and prosecute domestically. Tr. 9/26/17, 104-05 (Lappen) (“We had our hands full” with information about defendants engaged in fraud “that we could build cases on. We were not going over to the Middle East.... [T]here was no determination ever made by anybody that Waltzer was lying.... His information was credible.”); Tr. 9/18/17, 192 (Cohen) (“[T]his wasn’t ... actionable information.... [L]et’s focus on all of the other crimes.”); Tr. 11/15/17, 217 (Joanson) (it had “nothing to do with his credibility” that Waltzer was discouraged from further

*75 26. Fourth, if Georgiou had known of Waltzer's contacts with the government before 2007, he could not have used this information to advance his defense or further cross-examine Waltzer based on his theory that Waltzer did not possess the *mens rea* of a criminal. Georgiou has numerous theories in this regard, and for the reasons listed below, they are all without merit.

27. Georgiou argues that Waltzer's contacts with the government from June 2006 through June 2007 rendered Waltzer incapable of participating in a conspiracy with Georgiou during that time because Waltzer was acting as a cooperator for the government and, therefore, did not have the *mens rea* of a co-conspirator. (Pet'r's Br. 2.)

28. Georgiou is correct that a conspiracy cannot exist between a defendant and a government agent. “[A]s it takes two to conspire, there can be no indictable conspiracy with a government informer who secretly intends to frustrate the conspiracy.” [Sears v. United States, 343 F.2d 139, 142 \(5th Cir. 1965\)](#); see also [United States v. Corson, 579 F.3d 804, 811 \(7th Cir. 2009\)](#); [United States v. Lively, 803 F.2d 1124, 1126 \(11th Cir. 1986\)](#); [United States v. Escobar de Bright, 742 F.2d 1196, 1198 \(9th Cir. 1984\)](#); [United States v. Moss, 591 F.2d 428, 434 n.8 \(8th Cir. 1979\)](#); [United States v. Chase, 372 F.2d 453, 459 \(4th Cir. 1967\)](#).

29. However, as set forth in the Findings of Fact, this Court rejects Georgiou's contention that Waltzer was acting as a government agent or cooperator at any time between June 2006 and June 6, 2007. Findings of Fact, supra ¶¶ 15-16. Georgiou vastly exaggerates the period of time that Waltzer was engaged with the FBI before June 2007 in an attempt to bolster his claim, and thus vastly overstates the legal implications of his theory of relief.

_____ (cont'd)

pursuit of national security information; the government found “Waltzer to be incredibly credible.”). The government's decision to have Waltzer cooperate in domestic fraud investigations was of no value to Georgiou. Georgiou likely could not have even pursued this line of questioning with Waltzer or any other witness, and certainly could not have made any headway with it.

30. The testimony at the hearing was consistent and unambiguous. At the time that Waltzer was providing national security information to the FBI, he was not cooperating with the FBI or acting at its direction. Findings of Fact, *supra* ¶¶ 15-16. He was continuing to work with his lawyers to determine whether to confess his crimes and proactively cooperate. As a factual and legal matter, he was not an agent of the government; he was an individual who voluntarily provided information to the FBI about national security matters without any deal or arrangement with the FBI.

31. Prior to June 2007, Waltzer could, and did intend to, commit crimes with Georgiou even if, on certain occasions during that period, he spoke to the FBI about unrelated national security matters. Findings of Fact, *supra* ¶ 18. Waltzer credibly testified, and the evidence at trial overwhelmingly reflected, that he was engaged in a long-term conspiracy with Georgiou and did not suddenly exit that conspiracy by reporting unrelated information to the FBI.

32. Georgiou's *mens rea* theory also legally fails because former counsel did question Waltzer at trial about his *mens rea* and any further questioning on these points would have been, at best, cumulative. As discussed in the Findings of Fact, counsel explored with Waltzer his motives to collect evidence and cooperate beginning when the IRS confronted him in June 2006. Counsel used the reports and evidence provided in discovery to confront Waltzer with the defense theory that, beginning in June 2006, Waltzer was trying to collect evidence to manufacture a false case against Georgiou and others. Waltzer admitted that he was motivated to collect evidence against Georgiou in 2006. Counsel for Georgiou also argued, in closing, that Waltzer was a self-interested liar who spent his time from June 2006 through June 2007 putting together his false story to sell to the government.

***76** 33. Considering any and all arguments that Georgiou could raise concerning the usefulness at trial of evidence that the government did not provide, Georgiou cannot show that he was denied material evidence because no additional information or cross-examination on these points could possibly have made

a difference at trial. It was abundantly clear to the jury that Waltzer committed crimes on a grand scale, and then cooperated on a grand scale in an effort to secure leniency. The additional particulars of his discussions with the FBI in 2006 add nothing to that known narrative.

34. On multiple occasions during the post-trial litigation, this Court has held that additional impeachment of Waltzer would not have made a difference at trial. This Court explained,

Waltzer's version of the relevant events conforms with the staggering physical evidence in this case. As such, we conclude that even if the jury had found Waltzer to be unreliable, Georgiou's trial nevertheless resulted in a verdict worthy of confidence, considering the totality of the circumstances and all of the evidence introduced at trial.

(Doc. No. 218 at 12; Doc. No. 266 at 39-40.)

35. The FBI captured Georgiou in numerous recordings committing crimes in real time, as he struck a deal to use "Charlie" to engage in a massive securities fraud scheme with Northern Ethanol stock. In these recordings, Georgiou also described his historical and ongoing manipulation of Avicena, Neutron, and HYHY Stocks. This evidence also included Georgiou accidentally recording himself discussing with his co-conspirator, Vince DeRosa, their fraud against Caledonia, as he described inflating stocks and destroying a brokerage firm.

36. The recordings also included numerous instances of Georgiou asking if the undercover FBI agent was a "cop," and by discussing plans to speak in code and otherwise conceal the nature of their activity. The evidence also established that Georgiou sent incriminating emails furthering his scheme in the name of a fictional lawyer, Andreas Augland, and in the name of one of his fronts, Ron Wyles. Georgiou also tried to procure false testimony from Alex Barrotti.

37. The financial and trading records showed that Georgiou and his co-conspirators were doing exactly what Waltzer testified they were doing and exactly what Georgiou described in the recorded conversa-

tions. The numerous emails and documents found on Georgiou's computer and elsewhere, and the testimony of other government witnesses, were all consistent with Waltzer's testimony and the recordings of Georgiou, and overwhelmingly established his guilt.

38. Finally, the story that Georgiou told from the witness stand that he was conducting his own secret investigation of Kevin Waltzer was so unbelievable that no reasonable juror could have believed him (and the empaneled jury emphatically did not). Georgiou's testimony alone could have convicted him. See United States v. Jiminez, 564 F.3d 1280, 1285 (11th Cir. 2009) (holding that a defendant's own testimony supported his convictions because the jury was permitted to reject that testimony and consider it as substantive evidence of guilt). This Court previously found that Georgiou perjured himself, and that finding is reiterated here.⁷⁴

***77** 39. In sum, the government did not violate

⁷⁴ This Court also rejects Georgiou's suggestion, Doc. No. 380, at 4, that if he possessed the additional cross-examination material concerning Waltzer's interviews with the FBI, he would not have testified in his defense. This position is factually incredible and legally unavailing. As explained here, the matter regarding Waltzer's discussions with agents in 2006-2007 is so limited in relation to the scope of Waltzer and Georgiou's criminal activity that it is not remotely plausible that Georgiou would have viewed that information as undermining the government's entire case and relieving him of the need to explain the government's abundant evidence. Rather, Georgiou obviously chose to try to defeat the charges with his version of the recordings and other evidence. At the evidentiary hearing, trial counsel testified that Georgiou wanted to testify. Tr. 9/19/17, 80 ("I gave Georgiou my strong opinion that in this kind of case, given those tapes, in order to win the case, he had to testify. My recollection is he wanted to testify"). Indeed, Pasano further testified that the theory of the defense relied upon Georgiou testifying and demonstrating his good faith, and the jury believing him – "The key event in the trial was [Georgiou's] testimony." Tr. 9/19/17, 109; see also 81 ("George, as a witness, was a key part of winning the case."). Additional cross-examination of Waltzer could not have changed the calculus of that decision for Georgiou and his counsel.

Georgiou's rights in connection with the disclosure of evidence concerning Waltzer's alleged cooperation and mental state before June 2007. None of the information, in the hands of the defense, would have affected the legal viability of any charges and would not have affected the jury's consideration of the evidence. The additional information could not have made a difference at trial.⁷⁵ Georgiou fails to sustain his burden of proving that the government's failure to produce evidence prejudiced him.

40. This Court recognizes that former counsel testified at the evidentiary hearing, understandably, that they would have wanted to know about Waltzer's contacts with the government before June 2007, but that this Court would determine whether this information would have mattered at trial. See Tr. 9/19/17, 39-40 (Pasano); Tr. 9/25/17, 36-37 (Splittgerber). Counsel and Georgiou have failed to establish that the defense could have used this information in any helpful manner.

41. Accordingly, this information is not favorable to Georgiou. At most, it is merely cumulative of voluminous impeachment evidence in the possession of the defense that was used at trial to portray Waltzer as a self-interested liar.

42. "We of course do not suggest that impeachment evidence is immaterial with respect to a witness who has already been impeached with other evidence." Turner, 137 S. Ct. at 1895. In the context of this trial, however, with respect to Waltzer, we conclude that the cumulative effect of the withheld evidence is insufficient to undermine confidence in the jury's verdict.

⁷⁵ While Georgiou focused his arguments about the use of the missing evidence or the effect that evidence would have had on his cross-examination of Waltzer, he also suggested that the evidence would have helped him with other aspects of his defense, including the cross-examination of Koster. Any and all such claims are untenable. The evidence would not have had any impact on the trial. After reviewing the missing evidence, Koster testified at the evidentiary hearing that it would not have changed his trial testimony. See Findings of Fact, supra ¶ 37.

43. Considering the overwhelming evidence establishing Georgiou's guilt at trial, even if there were any impeachment value to the suppressed information, it could not be considered material. That is, there is not a reasonable probability that, had the withheld records been disclosed, the result of Georgiou's trial would have been different.

44. Because the previously undisclosed evidence of Waltzer's contacts with the FBI prior to June 6, 2007, is neither favorable nor material to Georgiou, Georgiou has not established a Brady violation.⁷⁶

b. The Napue Claims

45. As noted above, Georgiou alleges that the government violated Napue by knowingly eliciting and failing to correct the following allegedly false testimony from Waltzer: (1) that Waltzer first began cooperating with the government in June 2007, and not in 2006 as Georgiou alleges; (2) that Waltzer received instructions "solely" from FBI agents, when he also received instructions from the AUSAs; (3) that the government instructed Waltzer on his "pitch" to Georgiou about "legitimate dealings in the Middle East," when supposedly the government did not so instruct him; (4) that Waltzer helped Georgiou, as part of their stock fraud scheme, to "soak up the float," *i.e.*, purchase outstanding shares, of Neutron stock; (5) that Waltzer would lose the benefits of his plea agreement if he lied to the jury, when supposedly he later testified that he would gain leniency even if he "believ[ed] differently from his testimony;" and (6) that Waltzer always possessed the recording device throughout the undercover operation, when post-trial Waltzer supposedly testified that there may have been times when he did not possess the device. (Doc. No. 542, Attachment A, N-1 through N-6.)

*78 46. As discussed above, Georgiou's Napue claims

⁷⁶ To the extent that Georgiou raises an ineffective assistance of counsel claim based on his counsel's failure to find the Brady material, it is rejected as meritless because counsel acted objectively reasonably and Georgiou has not suffered any prejudice. See Strickland, 466 U.S. at 690, 695.

are procedurally defaulted. Significantly, the claims also are entirely without merit.

47. The burden of establishing false testimony is on the defendant. See [United States v. Scarfo, 711 F. Supp. 1315, 1322 \(E.D. Pa. 1989\)](#), aff'd sub nom. [United States v. Pungitore, 910 F.2d 1084 \(3d Cir. 1990\)](#). To prevail under [Napue](#), Georgiou must show (1) that Waltzer committed perjury, (2) that the government "knew or should have known that the testimony was false, (3) [that] the false testimony was not corrected, and (4) [that] there is a reasonable likelihood that the perjured testimony could have affected the judgment of the jury." [Haskell v. Superintendent Green SCI, 866 F.3d 139, 146 \(3d Cir. 2017\)](#) (citing [Lambert v. Blackwell, 387 F.3d 210, 242 \(3d Cir. 2004\)](#)).

48. Georgiou cannot prevail on any of his [Napue](#) claims because he cannot establish that any witness, other than himself, committed perjury while testifying either at trial or at the habeas evidentiary hearing. Regarding Georgiou's specific [Napue](#) claims, the Court finds as follows:

a. As discussed above, the evidence at the habeas evidentiary hearing established that Waltzer was not cooperating with the government prior to June 6, 2007, the date on which he presented himself for his first proffer with the government and confessed to the class action claims fraud in which he was involved. Waltzer testified truthfully both at trial and at the recent evidentiary hearing when he testified that his cooperation began in June 2007. As such, Georgiou can neither establish that Waltzer committed perjury, nor that the government knew or should have known that the testimony was false and that the government failed to correct the false testimony. This [Napue](#) claim is denied.

b. Georgiou next claims that Waltzer lied, and the government allowed his lies to stand, when Waltzer testified at trial about receiving instructions "solely" from FBI agents. (Doc. No. 542, Attachment A, N-2.) It is clear from the record that, to the extent Waltzer was testifying about receiving instructions from the FBI agents, he was making the point that he was not

simply a lone wolf doing whatever he wanted to do and not saying that only FBI agents guided him. Tr. 9/18/17, 283-89 (Cohen). Waltzer never testified that he did not receive guidance from the AUSAs. Throughout the trial, Waltzer testified that he received general direction from the government and that he followed it. See, e.g., Tr. 1/28/10, 19-20 (“I am only acting at the direction of the FBI. I don’t make any decisions myself like that.”); Tr. 1/29/10, 91 (“I am pitching [Georgiou] that I am flush. I am following the advice of the United States government.”); Tr. 1/26/10, 224 (“I had specific parameters which I was supposed to work under, and I was working in undercover operations. So I was given specific instructions.... I really followed the instructions that I was given.”); Tr. 1/26/10, 224 (“When I first engaged the target, there was one thing I was supposed to do, discuss the past, discuss the present and discuss the future, let the subjects talk.”); Tr. 1/29/10, 32 (on cross-examination, Waltzer testified that that the “government gave [me] instructions about how to record and who to record;” and further testified that after he identified “potential scams to the government, and then they gave specific instructions on what I was to do from there”). There was nothing false or misleading about this testimony that the government failed to correct. In addition, it would have been insignificant to the jury whether Waltzer received instructions from agents, AUSAs, or both. The evidentiary hearing record is replete with consistent and credible testimony that the agents and AUSAs worked together in guiding Waltzer in the undercover operation, and that there was nothing improper about their handling of Waltzer. This Napue claim is denied.

*79 c. Georgiou also claims that Waltzer lied when he testified that the government instructed Waltzer on his “pitch” to Georgiou about “legitimate dealings in the Middle East,” when supposedly the government did not so instruct him. Georgiou’s theory seems to be that Waltzer was acting at the direction of the FBI, but that, post-trial, Waltzer admitted that he mentioned these legitimate dealings on his own and without direction from the FBI. (Doc. No. 542, Attachment A, N-3.) This claim is frivolous. The testimony at the evidentiary hearing was clear that the FBI’s

direction of Waltzer did not include scripting any conversations. Findings of Fact, supra ¶¶ 47-48. With Georgiou, in particular, the government instructed Waltzer to allow Georgiou to do most of the talking. See Tr. 9/25/17, 229 (“[T]he government would tell me, you know, let him talk about his illegal activities.”). The Court finds that Waltzer did not commit perjury with regard to this testimony. Moreover, there is nothing about the testimony in question that would have had any effect whatsoever on the jury. This Napue claim is denied.

d. Georgiou next alleges that Waltzer lied about “soak[ing] up the float” of Neutron stock. (Doc. No. 542, Attachment A, N-4.) This claim is based upon Georgiou’s untenable theory about Waltzer’s trading that the Court has independently found lacking in merit in the context of his claim that counsel was ineffective for failing to call an expert witness in securities matters. See Findings of Fact, supra ¶¶ 54-55; see supra n.49. Based upon all of the evidence presented at trial and at the evidentiary hearing, the Court finds that Waltzer did not commit perjury when testifying about “soaking up the float.” Whether Waltzer was a “net seller” in the aggregate as Georgiou claims is beside the point. The evidence was clear and uncontested at trial that at various points Waltzer worked at Georgiou’s direction in a stock fraud scheme to purchase outstanding shares of stock, or “soak up the float.” Waltzer did not commit perjury. This Napue claim is denied.

e. Georgiou also appears to claim that Waltzer lied when he testified that he would lose the benefits of his plea agreement if he lied to the jury, when supposedly he later testified that he would gain leniency even if he “believ[ed] differently from his testimony.” (Doc. No. 542, Attachment A, N-5.) As the Court has found that Waltzer did not perjure himself at any point, this claim is without merit and has no basis in fact. This Napue claim is denied.

f. Finally, Georgiou contends that Waltzer lied at trial when he testified that, shortly after he began actively cooperating, he always possessed the recording device. Georgiou claims that at the evidentiary hearing Waltzer testified differently stating that there

may have been times when he did not possess the device. (Doc. No. 542, Attachment A, N-6.) Georgiou cannot establish that Waltzer's testimony, or that of any other witness, regarding the recording device, came close to constituting perjury. Testimony regarding the recording device was credible and consistent throughout the trial and the habeas evidentiary hearing. All witnesses testified that to the best of their recollection, Waltzer had the recording device most or all of the time, with the exception, perhaps, of when the device was swapped out and another device was not immediately available to replace it. The witnesses could not say for certain whether Waltzer had the device at the time of the test trade. Tr. 9/26/17, 105-07 (Lappen recalls that Waltzer had device all or most of the time and that there was no decision made that Waltzer should not have the device at any particular time); Tr. 9/18/17, 233-34 (Cohen was not aware of any time that Waltzer was without the recording device); Tr. 11/16/17, 29-30 (Joanson recalls that Waltzer had recording device all or most of the time and assumed he had it during test trade); Tr. 9/25/17, 204-09 (Waltzer thought he had device during test trade period and possessed it the "vast majority of the time...."; Waltzer said that during the test trade period he was mostly communicating with Georgiou by pin at Georgiou's direction). While Waltzer testified, at trial, that he recalled always possessing the device, he also explained that he may have inadvertently failed to record some calls, he may have had battery problems, there may have been some calls that were dropped, and that some calls could have gone to voicemail. Tr. 1/26/10, 218-21; Tr. 1/29/10, 35-40, 44, 48-50. If Waltzer and the other government witnesses did not perfectly recall every detail about this matter, that does not make them liars or mean that the government failed to correct perjured testimony. To the contrary, there is absolutely no evidence that any testimony regarding the recording device was purposely false, or that the government knowingly failed to correct the false testimony. This Napue claim is denied.

***80** 49. Georgiou also cannot establish materiality under Napue for any of his claims. Perjured testimony is presumed to be material under Napue. Here,

however, the evidence is clear that there was no perjured testimony. Waltzer did not lie in the ways that Georgiou asserts, and did not lie about anything during the trial. Even if somehow Waltzer testified incorrectly about any of the points alleged by Georgiou, the government would overcome the presumption of materiality because of the overwhelming evidence presented against Georgiou at trial. Additionally, testimony concerning the recording device is not material because counsel strategically chose to forego pursuing any claim that Waltzer did not possess the recording device; it was more effective to argue that Waltzer intentionally chose not to record certain exculpatory calls with Georgiou. Georgiou's Napue claims are without merit.

3. Other Miscellaneous *Brady* Claims Are Without Merit

50. In keeping with his general approach to this case, during the habeas proceedings, Georgiou has tried to interject additional arguments and vastly expand his attack on the government. Georgiou's approach has been false and misleading and this Court rejects it. Georgiou has, for example, continued to insist that documents which witnesses have testified do not exist are actually continuing to be suppressed by the government. Similarly, he has taken information contained in one document, and broken the information out line by line, to give the impression that the government continues to suppress vast amounts of pertinent information from him.

51. Recently, on February 13, 2018, Georgiou filed a motion to amend his § 2255 Motion to add Brady claims. (Doc. No. 542.) On February 14, 2018, the Court denied the motion and held that it would consider any alleged new claims as support for his existing claims. (Doc. No. 544.) Georgiou included as part of this request a list of items that he deems a substantial body of "suppressed evidence." For the sake of completeness, the Court will briefly address each item on Georgiou's list, although the Court addressed many of these items elsewhere in these Findings. The evidence listed does not establish that the government failed to disclose a substantial body of evidence and does not show a Brady or other legal

violation. Rather, the list speaks to Georgiou's effort to exaggerate the significance of the government's inadvertent failure to produce reports relating to Waltzer's interviews with the FBI before June 2007, as well as his persistent effort to revisit failed claims and manufacture a claim for relief. In its proposed Conclusions of Law, the government enclosed a chart entitled "Items of Alleged Suppressed Evidence." (See Doc. No. 557.) I have extensively reviewed this chart, and I adopt the government's suggested responses.⁷⁷

ITEMS OF ALLEGED SUPPRESSED EVIDENCE

BR-1 *	06.____.06	<p>US Attorney's Office ("USAO") subpoenas to Waltzer's bank [Kauffman.Tr.09.26.17 at 3] Note: The US Attorney's Office refuses to explain how there can be subpoenas to Waltzer's banks, signed by AUSA Richard Goldberg, from December 2004 (ECF.No.527.Ex.2--Hard Copy in Chambers)</p> <p>Georgiou has failed to show, much less prove, how these subpoenas are relevant or material to his case or his current claims. The defense was aware that IRS Agent Kauffman first approached Waltzer in June 2006 with questions about his bank accounts that were connected to Waltzer's claims fraud. The defense vigorously cross-examined Waltzer about his confrontation with IRS Agent Kauffman. If the government issued subpoenas to Waltzer's banks in December 2004 preceding Kauffman's visit to Waltzer, that would not be a surprising or significant fact. Such information would have added nothing to any impeachment of Waltzer or otherwise had any relevance to Georgiou's trial. These subpoenas cannot be considered "suppressed" and are not favorable or material. They do not support Georgiou's <u>Brady</u> claims or any other claim for relief.</p>
BR-2 *	06.27.06	<p>IRS Memorandum (contact with Attorney Delinsky) (Ev.Hr.Gov.Ex.H-17) [June 2017]</p> <p>In the Findings of Fact above, the Court addressed these IRS reports relating to IRS Agent Kauffman's telephone conversations with Waltzer's attorney, Stephen Delinsky. They were irrelevant and not discoverable. These reports cannot be considered "suppressed" evidence and are not favorable or material. They do not support Georgiou's <u>Brady</u> claims or any other claim for relief.</p>
BR-3 *	07.19.06	<p>IRS Memorandum (contact with Attorney Delinsky) (Ev.Hr.Gov.Ex.H-11) [June 2017]</p> <p>Same as BR-2 above.</p>
BR-4 *	08.22.06	<p>IRS Memorandum (contact with Attorney Delinsky) (Ev.Hr.Gov.Ex.H-12) [June 2017]</p>

⁷⁷ Georgiou's claims are set forth in bold as he states them, which includes his citations, and my response follows.

		Same as BR-2 above.
BR-5 *	08.30.06	IRS Memorandum (contact with Attorney Delinsky) (Ev.Hr.Gov.Ex.H-18) [June 2017] Same as BR-2 above.
BR-6 *	09. __.06	Waltzer's attorneys (Delinsky & Zimmerman) meet with US Attorney Patrick Meehan for referral to FBI [Government Letter to the Court, September 01, 2017] In the Findings of Fact above, the Court addressed the insignificance of Delinsky meeting with Patrick Meehan to ask him how he should proceed with an unnamed client who had national security information. This meeting did not result in the prosecutors learning anything about Waltzer. There were no relevant facts relating to this meeting that the government did not provide to Georgiou. It adds nothing to the Court's analysis concerning the government's inadvertent failure to provide the reports about Waltzer's pre-June 2007 interviews with the FBI. Information about this meeting cannot be considered "suppressed" evidence and is not favorable or material. It does not support Georgiou's <u>Brady</u> claims or any other claim for relief.
BR-7 *	10.26.06	FBI Report (meeting with Waltzer) (Ev.Hr.GOV.Ex.H-25, pg.1) [June 2017] This composite report relating to Waltzer's pre-June interviews with the FBI is addressed in detail throughout these Findings. Georgiou breaks up the report into multiple "suppressed items" as part of his effort to exaggerate the significance of the evidence that the government failed to provide. That approach is misleading and does not add to the weight or strength of Georgiou's <u>Brady</u> claims. As discussed throughout these Findings, the reports and information relating to the national security interviews were not favorable to Georgiou and not material. The Court has determined that the government did not violate <u>Brady</u> in failing to produce this report.
BR-8 *	10.30.06	FBI Report (meeting with Waltzer) (Ev.Hr.GOV.Ex.H-25, pg.5) [June 2017] Same as BR-7 above.
BR-9 *	11.09.06	FBI Report (meeting with Waltzer) (Ev.Hr.GOV.Ex.H-25, pg.8) [June 2017]

		Same as BR-7 above.
BR-10 *	_____.06	<p>IRS “liaison” communications between IRS Case Agent Kauffman, and FBI Joint Terrorism Task Force [Kauffman.Tr.09.25.17 at 298-290, 293, 298-299; Kauffman.Tr.09.26.17 at 8, 13, 19]</p> <p>At the evidentiary hearing, IRS Agent Kauffman credibly testified that he was not certain, but that sometime after August 2006, he may have spoken with an IRS liaison with the FBI's counterterrorism squad who may have told him that Delinsky contacted the FBI about information that Waltzer possessed relating to a foreign terrorist. He was not sure whether Waltzer or Delinsky ever even provided any information to the FBI. Tr. 9/25/17, 288-89, 293, 298; Tr. 9/26/17, 19. Kauffman further explained that he then spoke with the assigned AUSA at the time, Paul Shapiro, and that they agreed to “hold off a little bit” to see if anything developed from Delinsky’s possible dealings with the FBI. Tr. 9/25/17, 289-91, 298-99. As it turned out, Kauffman was just collecting information from banks at that time and thus did not even delay any aspect of his investigation before concluding that nothing about Delinsky’s contact with the FBI should affect his investigation. Tr. 9/25/17, 293; Tr. 9/26/17, 22-23. The IRS liaison at that time, Chris Houston, had no recollection of Kevin Waltzer or speaking with Kauffman about this matter. Tr. 11/15/17, 53-56. Paul Shapiro also had no recollection of engaging with Kauffman concerning the subject of Delinsky or Waltzer providing national security information to the FBI. Tr. 9/19/17, 247-51.</p> <p>There is nothing in this vague information about a possible meaningless pause in the investigation of Waltzer that could be considered significant to Georgiou’s case or any claims for relief. This information would not have added to any cross-examination of Waltzer or any other trial witness. Again, this Court has addressed the <u>Brady</u> claim as it relates to the missing reports of Waltzer’s pre-June 2007 interviews with the FBI. This vague information from Kauffman adds nothing to that calculus and should not be considered “suppressed evidence.” It is not favorable or material and does not support Georgiou’s <u>Brady</u> claims or any other claim for relief.</p>
BR-11 *	11._____.06	<p>Unknown quantum of evidence provided by Waltzer and his attorneys to FBI (reviewed by Court in-camera) (Ev.Hr.GOV.Ex.H-10, H-25, H-7) [Existence disclosed June 2017; evidence itself still suppressed]</p> <p>As Georgiou notes, the Court has already reviewed this information and determined that it was not discoverable. It would not have added to any cross-examination of any witness or support any argument. It has</p>

		nothing to do with the charges in Georgiou's case. It is not favorable or material and cannot be considered "suppressed evidence" or support any claim for relief.
BR-12 *	11. __.06	Waltzer's hand written notes of events from November 11-18, 2006, provided to the FBI (Ev.Hr.GOV.Ex.H-25, pg.9) [Notes still suppressed] The government does not possess any such notes if they even exist. There is also no basis in the record to conclude that the notes would have any relevance to this case or have added to any cross-examination of any witness or support any defense argument. These notes cannot be considered "suppressed evidence" and cannot be considered favorable or material to Georgiou. They do not support Georgiou's <u>Brady</u> claims or any other claim for relief.
BR-13 *	11.28.06	FBI Report (call with Waltzer's attorney Delinsky) (Ev.Hr.GOV.Ex.H-25, pg.9) [June 2017] This is another example of Georgiou trying to increase the number of suppressed items by listing as a separate item another part of the same report he has broken up into multiple items above. <u>See</u> BR-7 above. The Court has addressed all claims relating to this report and has rejected them.
BR-14 *	12. __.06	AUSA Shapiro appointed to Waltzer case/Opens file (ECF.No.390) [July 11, 2017] The fact that AUSA Shapiro was originally assigned to the Waltzer investigation is of no significance. Shapiro testified at the evidentiary hearing and had no knowledge of any facts of significance in this habeas litigation. Tr. 9/19/17, 236-73. Georgiou cannot establish that information about Shapiro handling the Waltzer case or opening the file constitutes favorable or material information or that the government "suppressed" it. This information does not support Georgiou's <u>Brady</u> claims or any other claim for relief.
BR-15*	___. __.06	IRS Agent Kauffman's notes memorializing AUSA asking him to delay investigation until FBI info evaluated (Ev.Hr.GOV.Ex.H-10)[June 30, 2017] See BR-10 above.
BR-16*	___. __.06	IRS Agent Kauffman's notes recording that Waltzer and his counsel were providing information to the FBI (Ev.Hr.GOV.Ex.H-10)[June 30 2017]

		<p>Again, Georgiou is breaking up a single document into multiple items. In any event, these notes of IRS Agent Kauffman mostly recount facts about Waltzer's claims fraud that were provided to Georgiou pretrial and that Georgiou used to cross-examine Waltzer at trial. The notes also mention Delinsky contacting the FBI about national security issues. That portion of the report is addressed above at BR-10.</p> <p>Kauffman did not share this information with the assigned AUSAs who were handling discovery. This Court has found that the reports about Waltzer's national security interviews were not favorable or material and thus that the government did not violate <u>Brady</u> in failing to produce the reports. Kauffman's notes do not add anything meaningful to or support Georgiou's <u>Brady</u> claims. They are not favorable or material under <u>Brady</u>.</p>
BR-17 *	_____.06	<p>Unknown amount of IRS records, internal memos, etcetera (reviewed by Court in-camera) (ECF.No.433) [Existence disclosed June 30, 2017; evidence still suppressed]</p> <p>As Georgiou notes, the Court has already reviewed this information and determined that it was not discoverable. It would not have added to any cross-examination of any witness or support any argument. It is not favorable or material and cannot be considered "suppressed evidence" or support Georgiou's <u>Brady</u> claims or any other claim for relief.</p>
BR-18 *	12.07.06	<p>FBI Report (FBI-JTTF / Department of Commerce, re: Waltzer) (Ev.Hr.GOV.Ex.H-25, pg.10) [June 2017]</p> <p>See BR-7 above. Again, Georgiou is breaking out sections from a single report to exaggerate the significance of his claims. Here, he is focused on the insignificant events relating to the Department of Commerce. The composite report (H25) includes a notation that FBI Agent Poulton had Waltzer speak with Agent Dugan from the Department of Commerce about a possible export violation. The information is not favorable or material. As discussed in the Findings of Fact, Agent Dugan was simply receiving information from Waltzer about a possible export violation that others were asking Waltzer to participate in. There was no evidence that Waltzer was involved in any improper activity. Poulton then had Waltzer present the information to Agent Dugan because his agency handled those types of matters. This information is not favorable or material and does not support Georgiou's <u>Brady</u> claims or any other claim for relief.</p>
BR-19 *	02.15.07	<p>FBI Report (Waltzer interview with Dept. of Comm. Agent, Robert Dugan) (Ev.Hr.GOV.Ex.H-25, pg.11) [June 2017]</p>

		See BR-7 and BR-18 above.
BR-20 *	02.26.07	<p>Department of Commerce Notes reflecting “anticipated undercover operation” involving Waltzer (Ev.Hr.GOV.Ex.H-24) [Government Letter to the Court, September 07, 2017]</p> <p>See BR-18 above. In addition, Georgiou tried to capitalize on the insignificant notation in Agent Dugan’s report about a potential undercover operation, but Agent Dugan explained at the evidentiary hearing that this notation simply reflected a possibility based on the nature of the information he was receiving. He could not recall whether he discussed this with FBI Agent Poulton and it was clear that Waltzer was not “signed up as any kind of official informant or cooperator” and did not participate in any undercover operation. Tr. 9/18/17, 318-19. Agent Dugan’s notes are not favorable or material and cannot be considered “suppressed evidence” or support any of Georgiou’s <u>Brady</u> claims or any other claims for relief.</p>
BR-21 *	03.02.07	<p>“45 pages” of USAO/IRS subpoenas re: Waltzer (partial suppression) [Waltzer.Tr.09.25.17 at 160]</p> <p>Georgiou concedes that he received copies of subpoenas that Waltzer received as part of the investigation of Waltzer’s claims fraud, but thinks he did not receive all of them because Waltzer referred to them as including “45 pages,” which may have included attachments. Georgiou cannot show that he was denied any relevant information. The government provided more than sufficient discovery on Waltzer’s claims fraud activity, and the defense vigorously cross-examined Waltzer about it. Any additional subpoena information, if it even exists, may not be considered “suppressed evidence” and is not favorable or material under <u>Brady</u>. This alleged information does not support Georgiou’s claims for relief.</p>
BR-22 *	04. — .07	<p>Peter Vaira’s contact with USAO x 2 (Ev.Hr.GOV.Ex.H-10) [June 30, 2017]</p> <p>See BR-15 and BR-16 above. Again, Georgiou is breaking out portions of a single document to exaggerate the amount of allegedly suppressed evidence. The contacts with Vaira reflected in IRS Agent Kauffman’s notes are insignificant as they refer to Vaira requesting additional time to respond to subpoenas and advising the government that he was going to produce his client, Kevin Waltzer, for a proffer on the claims fraud. The government produced in pretrial discovery to Georgiou the reports on Waltzer’s proffers on his fraud activity. Nothing about these brief contacts with Vaira shortly before Waltzer appeared and proffered are of any significance. This information may not be considered</p>

		information that Waltzer provided during his proffer on June 6, 2007. It does not reference the pre-June 2007 interviews. The government advised Georgiou, through the production of the other IRS report of the June 6 interview, that Waltzer provided national security information that day. The government did not disclose the substance of the information that he was providing. For all the reasons discussed in these Findings, that national security information was not favorable or material and does not support Georgiou's <u>Brady</u> claims or any other claims for relief.
BR-27 *	06.07.07	FBI Report (Waltzer interview) (Ev.Hr.GOV.Ex.H-7) [July 2017] As discussed in the Findings of Fact, Hearing Exhibit H7 is FBI Agent Poulton's report of her meeting with Waltzer about national security information on June 7, 2007, one day after he began formally proffering with the government. It does not reference the pre-June 2007 FBI interviews. The government advised Georgiou, through the production of the other IRS report of the June 6 interview, that Waltzer provided national security information that day. The government did not disclose the substance of the information that he was providing. FBI Agent Joanson explained that he did not find the Poulton reports when he was searching the FBI databases for Waltzer interviews. For all of the reasons discussed in these Findings, the national security information was not favorable or material and does not support Georgiou's <u>Brady</u> claims or any other claims for relief.
BR-28 *	06. __.07	FBI instructions/admonishments to Waltzer [Waltzer.Tr.9.25.17 at 177-178] [Still suppressed] Waltzer testified at the evidentiary hearing that around the time that he began actively cooperating in 2007, he thought he signed an agreement about his obligations as a cooperator - that he must tell the truth and provide complete information to the government. Tr. 9/25/17, 177-78. When Georgiou pressed Waltzer on whether his recollection was accurate, Waltzer said, "I think so." The government is not aware of the existence of such a document and no other witness recalls Waltzer ever signing such a document. <u>See</u> Tr. 11/15/17, 240-41 (Joanson stating credibly that he does not recall Waltzer signing such a document and that no such document exists in his files). Waltzer did sign a guilty plea agreement which also required him to provide complete and truthful information to the government and in court. The government disclosed the plea agreement to Georgiou in pretrial discovery, Waltzer testified at trial concerning his obligations as a cooperator under the terms of the plea agreement, and the plea agreement was introduced into evidence. Tr. 1/26/10, 192-96. Georgiou has failed to establish that this additional agreement exists, and even if it did, he cannot show that

		it would have added any relevant information to Georgiou's trial. The jury was well aware of Waltzer's obligations as a cooperator. The government did not suppress any evidence in this regard because it did not exist, and even if it did exist, it would not be favorable or material. It does not support Georgiou's <u>Brady</u> claims or any other claim for relief.
BR-29 *	06.07.07	Waltzer's communications and notes provided to FBI-Agent Joanson (Ev.Hr.GOV.Ex.H-7) [Still suppressed] Hearing Exhibit H7 is discussed above at BR-27.
BR-30 *	06.27.07	Department of Commerce Notes confirming Waltzer will not pursue export controlled transaction (Ev.Hr.GOV.Ex.H-24) [September 07, 2017] Hearing Exhibit H24 is Agent Dugan's brief notes (one half page). The notes state that Dugan opened a file on information provided by Waltzer, that Waltzer later terminated his dealings with the individuals who were proposing an illegal export transaction, and that there would not be any undercover activity in this matter. These notes are completely irrelevant to Georgiou's case. They are not favorable or material and do not support Georgiou's <u>Brady</u> claims or any other claim for relief. See also discussion at BR-7 and BR-18 above.
BR-31 *	07. __.07	AUSA request of Steven Delinsky to have direct contacts with Waltzer, without counsel present [Delinsky.Tr.09.18.17 at 140-141; 143-144] As discussed throughout the Court's Findings, numerous witnesses (including Georgiou's former counsel) testified during the evidentiary hearing that it is entirely ordinary in an undercover operation that AUSAs have direct contacts with cooperating witnesses. The government did not engage in any misconduct and did not deprive Georgiou of any relevant information. There was nothing for the government to provide Georgiou, and nothing about this information that can be considered favorable or material. These facts do not support Georgiou's <u>Brady</u> claims or any other claim for relief.
BR-32 *	07. __.07	Instructions from AUSA Cohen to Waltzer, to disengage from pursuing national security information [Cohen.Tr.09.18.17 at 179,180,192, 199; Waltzer.Tr.09.25.17 at179; Lappen.Tr.09.26.17 at 104-105] As discussed in the Findings of Fact, the witnesses testified consistently and credibly at the evidentiary hearing that the government was

		<p>concerned that Waltzer might not have been receiving accurate information about overseas activity, and that even if he were, the government wanted him to focus on the fraud activity it could investigate and prosecute in this District. Waltzer's national security information was provided to the FBI agents working in that arena, and they followed their procedures to input the information in their databases. Neither the agents working national security nor the other federal agents or AUSAs working with Waltzer concluded that Waltzer was lying. To the contrary, Waltzer presented himself in the investigation, at trial, and in the evidentiary hearing as a credible witness, truthfully reporting on information he had collected. The fact that the agents and AUSAs advised Waltzer to focus on the fraud investigations under these circumstances was of no significance or relevance to Georgiou's case. That information cannot be considered "suppressed evidence" and was not favorable or material. It does not support Georgiou's <u>Brady</u> claims or any other claims for relief.</p>
BR-33 *	07. __.07	<p>"Strategy" sessions between Undercover Agent, Charlie, Waltzer and Prosecution Team Members ["UA Charlie".Tr.09.26.17 at 36]</p> <p>FBI Undercover Agent "Charlie" recalled that when he became involved in the undercover operation with Waltzer, he met with Waltzer, the case agents, and possibly a prosecutor to learn about Waltzer's interactions with Georgiou. Charlie referred to the meeting as a "strategy" and "introductory" meeting. Tr. 9/26/17, 35-38. FBI Agent Joanson explained that there were no reports prepared of this or any other similar meeting since Waltzer was not providing any new information that was not already contained in FBI reports about Waltzer's prior dealings with Georgiou. Likewise, during such strategy meetings, the agents did not provide any written instructions to Waltzer. Tr. 11/15/17, 241-45.</p> <p>Georgiou received copies of the FBI 302s relating to Waltzer's disclosures about Georgiou and received all recordings of his interactions with Waltzer and Charlie, all of which counsel used at trial. There is nothing about any introductory meeting with Charlie that gave rise to a discovery obligation for the government. The government did not deprive Georgiou of any favorable or material information, and this allegation does not support Georgiou's <u>Brady</u> claims or any other claim for relief.</p>
BR-34 *	07.-.07	<p>Waltzer's statements about the criminal activities of others provided to Undercover FBI Agent Charlie ["UA Charlie".Tr.09.26.17 at 42]</p> <p>See BR-33 above. Charlie testified that Waltzer told him about his</p>

		extensive fraud activity “that [Georgiou] and [Waltzer] and others were involved in.” Tr. 9/26/17, 42. The record in this case establishes that the government provided Georgiou with all of Waltzer’s information that he proffered concerning Georgiou’s extensive fraud scheme. Georgiou fails to show that Charlie was referring to anything other than that which the government produced. This information does not constitute “suppressed evidence” and does not support Georgiou’s <u>Brady</u> claim or any other claims for relief.
BR-35 *	07.27.07	FBI Report (call between FBI-Agent Joanson and JTTF Agent Poulton) (Ev.Hr.GOV.Ex.H-8) [July 2017] As discussed in the Findings of Fact, Hearing Exhibit H8 is FBI Agent Poulton’s July 27, 2007, report of her telephone conversation with FBI Agent Joanson about follow-up information she had requested concerning a national security matter about which Waltzer had provided information. The government advised Georgiou, through the production of the other IRS report of the June 6 interview, that Waltzer provided national security information that day. The government did not disclose the substance of the information that he was providing because it was classified and was not discoverable. Agent Joanson explained that he did not find the Poulton reports when he was searching the FBI databases for Waltzer’s interviews. For all the reasons discussed in these Findings, that national security information was not favorable or material and does not support Georgiou’s <u>Brady</u> claims or any other claims for relief.
BR-36 *	—.08	Recording device Chain of Custody reports (ECF.No.355, 511, 533) [#355 Pretrial; #511 and #533–November 2017] As discussed in these Findings of Fact and Conclusions of Law, the government provided the chain of custody reports relating to Georgiou’s case pretrial. Those reports included the ones that allowed Georgiou to make the argument that Waltzer did not possess the recording device during the period of the test trade, which Georgiou now suggests would have helped him. Chain of custody reports from other investigations were not relevant, as this Court has found in denying Georgiou’s request to make them part of the record in this case. Those reports from other cases would not have helped Georgiou undermine the mountain of incriminating recordings introduced against him. This Court has likewise addressed the failure of Georgiou’s other claims concerning the recording device. In particular, Georgiou cross-examined Waltzer and argued at trial that Waltzer was able to manipulate the process by not recording exculpatory calls with Georgiou. It would not have mattered on any

		<p>particular date if Waltzer did not possess the device. The government witnesses have all consistently testified that once the government gave Waltzer a recording device to keep at home, Waltzer had the device all or most of the time, as best they could recall, and that the practice was to always give him a new device when taking away one to collect the evidence.</p> <p>Trial counsel essentially agreed that these reports would not have mattered. He testified at the evidentiary hearing that, with the chain of custody reports he possessed relating to Georgiou's case, he was able to argue that Waltzer did not possess the device during the test trade period, but elected to pursue a different strategy. Counsel chose to make a consistent argument to the jury that Waltzer was a fraudster who was selectively recording Georgiou to try to manipulate the evidence against him. "It's better if he has equipment and he's not recording than if he doesn't have equipment." Tr. 9/19/17, 31, 135-36.</p> <p>These chain of custody reports from other investigations are not favorable or material and do not support any of Georgiou's <u>Brady</u> or other claims.</p>
BR-37 *	—.08	<p>Undercover Waltzer Recordings of Sandy Lipkins discussing Georgiou (ECF.No.453 at 5) [Became known May 2017; still suppressed]</p> <p>The Court has previously denied Georgiou's request (Doc. No. 407) for recordings of Sandy Lipkins (Doc. No. 453), and there is no evidence that there are any such recordings that have anything to do with any matter at issue in Georgiou's case. Georgiou has claimed, without any support, that Lipkins "is at the cross-roads of matters pertaining to Waltzer," including securities trading and obtaining terrorism information. Waltzer testified that Lipkins was a friend who occasionally made stock purchases for Waltzer when Georgiou needed Waltzer to purchase stock and Waltzer's accounts were closed. Tr. 1/27/10, 23-24. Lipkins' involvement was insignificant. The government also advised in its response to Georgiou's motion for the Lipkins recordings (Doc. No. 426) that it reviewed the recordings and there was no <u>Brady</u> or <u>Giglio</u> material and no information that would advance any of Georgiou's claims. Georgiou also sought to call Lipkins as a witness at the § 2255 hearing, but Georgiou was unable to show, even after a defense investigator reached out to Lipkins, that Lipkins had any relevant testimony to provide. The Court denied Georgiou's request to call an irrelevant witness. (Doc. No. 495). Lipkins is entirely irrelevant. The Lipkins recordings do not constitute "suppressed evidence" and do not support Georgiou's <u>Brady</u> claim or any other claims for relief.</p>

BR-38 *	_____.08	<p>Hundreds of calls with AUSAs (DEF.2255. ECF. No.307.Ex.6) [Details still suppressed]</p> <p>As addressed above in the Findings of Fact and Conclusions of Law, Waltzer's calls with the AUSAs were an ordinary part of the undercover investigation of Georgiou and numerous other targets and subjects. The AUSAs and agents worked closely together in these investigations. The AUSAs engaged with the agents whenever conversations with Waltzer involved substantive issues. Numerous witnesses have testified during the evidentiary hearing about the AUSAs' communications with Waltzer and they are of no significance to any issue. Georgiou has failed to prove that any information about these calls was favorable or material. They do not constitute "suppressed evidence" and do not support his <u>Brady</u> claims or any other claims for relief.</p>
BR-39 *	_____.08	<p>Hundreds of text messages and emails between Waltzer and FBI Agents (DEF.2255. ECF. No.307.Ex.6) [Still Suppressed; Riley.Tr.09.19.17 at 173; Waltzer.Tr.09.25.17 at 224]</p> <p>Post trial, Georgiou contended that the government violated <u>Brady</u> and the Jencks Act by failing to produce information relating to text messages and emails between Waltzer and the AUSAs and Waltzer and the agents. Georgiou possessed the telephone records that reflected these communications. This Court denied Georgiou's claims. The Court accepted the representations of the government that there were no email or text communications in which Waltzer was receiving instructions or communicating his impressions of meetings with Georgiou, and that the government produced all discoverable communications between Waltzer and the government. This Court also held that Georgiou could not establish that any alleged communications qualified as <u>Brady</u> material. Mar. 18, 2011, op. at 6-17; <u>see also</u> Dec. 12, 2011, op. at 14-17 (denying Georgiou's Motion for Reconsideration). This Court thus has found previously and maintains here that the "electronic evidence was not suppressed . . ." (Doc. No. 240 at 16.)</p> <p>Multiple government witnesses also testified at the evidentiary hearing that the electronic communications between Waltzer and the AUSAs were generally ministerial and that whenever any substantive discussions needed to occur, the AUSAs and agents participated together in dealing with Waltzer. <u>See, e.g.</u>, Tr. 9/26/17, 63-64 (Lappen – text messaging was ministerial and substantive conversations involved participation of agents); Tr. 9/18/17, 258-59 (Cohen – significant communications involved AUSAs and agents; logistics may</p>

		have been “one on one”). The record reflects that there simply was no information from any electronic communication of any significance that the government failed to provide to Georgiou. The government did not suppress any evidence and these allegations do not support any <u>Brady</u> , Jencks Act, or other claim. ⁷⁸
BR-40 *	_____.08	Text messages between Waltzer and AUSA Cohen (2255.ECF.No.307.Ex.6) [Waltzer.,Tr.09.25.17 at 223] See BR-39 above.
BR-41 *	_____.08	AUSA fact based rough notes of contacts with Kevin Waltzer during the undercover operation [Still suppressed] There is no evidence that the government suppressed any such notes concerning the undercover operation or that such notes exist or ever even existed. There is, likewise, no evidence that such notes, if they did exist, would be favorable or material. This allegation is purely speculative and does not establish any suppression of evidence and does not support Georgiou's <u>Brady</u> claims or any other claim.
BR-42 *	08._____.08	IRS Memoranda of interviews of witnesses related to Waltzer's class action frauds (EGF. No.419) [November 2017] Georgiou has failed to show how interview reports from any witness connected to Waltzer's class action frauds has anything to do with this case. Georgiou has failed to prove these interview reports were favorable or material. They do not constitute “suppressed evidence” and do not support Georgiou's <u>Brady</u> claims or any other claim for relief.
BR-43 *	08.29.08	IRS Memoranda of Andrew Farber x 2 (Ev.Hr.DEF.Ex.17) [November 2017] Georgiou attached to his Reply to the Government's Response in Opposition to Disclose Evidence [Doc. No. 474] two IRS Memoranda of Interview of Andrew Farber. Andrew Farber was an attorney who worked with attorney Deborah Rice, whom Waltzer used in his claims fraud. The government charged Rice in connection with that scheme

		and she pleaded guilty. The interview reports reflect that, as part of the investigation of the claims fraud scheme, the government also sought to determine whether Farber had participated in the scheme in a criminal way. Farber denied any criminal involvement and was not charged. Georgiou has alleged that Waltzer was trying to "entrap" Farber, and thus that the government should have provided these reports to him. Georgiou has failed to establish that there was any such "entrapment," and has failed to establish any relevance of the Farber reports. Georgiou did not raise an entrapment defense at trial nor was there any basis to do so. The trial record is replete with evidence of Georgiou's eager and active participation and leadership in numerous stock fraud schemes. There is nothing about the government's engagement with Andrew Farber that remotely relates to any part of the case against Georgiou. Georgiou has failed to prove that any information about these interview reports was favorable or material. They do not constitute "suppressed evidence" and do not support his <u>Brady</u> claims or any other claim for relief.
BR-44 *	_____.08	SEC notes of contacts with Waltzer (reviewed by the Court in-camera)(*6) [Still suppressed] This claim was the subject of post-trial and appellate litigation. This Court and the Court of Appeals rejected Georgiou's <u>Brady</u> claims based on the government's alleged failure to produce SEC notes relating to Waltzer's meetings with the SEC. See <u>Georgiou</u> , 777 F.3d at 141-42 (SEC documents do not contain <u>Brady</u> material). This Court also reviewed these notes in camera and determined that they were irrelevant to any claim and do not support Georgiou's theory that Koster somehow based his testimony on Waltzer. The record here is replete with evidence that Koster based his testimony on the independent, objective financial evidence, trading records, and other records in this case. The Court will not revisit all of the arguments and rulings here rejecting claims based on the SEC notes. They are part of the record in this case. Any current claim in this regard is previously litigated and meritless. Any effort to bolster a <u>Brady</u> claim based on this also fails. There was no suppression and the notes are not favorable or material.
BR-45 *	02.____.09	Waltzer's plea colloquy (psychiatric history and medications, and Court Ordered counseling)(*6) [2011] This complaint was the subject of extensive post-trial and appellate litigation. This Court and the Court of Appeals rejected Georgiou's <u>Brady</u> claims based on the government's alleged failure to produce <u>Brady</u> material relating to Waltzer's mental health and substance abuse. The Court will not revisit all of the arguments and rulings here rejecting these claims. They are part of the record in this case. Any current

		claims in this regard are previously litigated and meritless. See <u>Georgiou</u> , 777 F.3d at 139-41 (holding that evidence concerning Waltzer's mental health and drug use was neither favorable nor material under <u>Brady</u>). The plea colloquy was not "suppressed evidence," and cannot be considered favorable or material. It does not support any <u>Brady</u> claim or other claim for relief.
BR-46 *	_____.09	Waltzer's bail report reflecting long psychiatric history and prescribed psychiatric medications (*6) [2011] See BR-45 above.
BR-47 *	_____.09	Waltzer's Court Ordered substance-abuse counseling sessions with Barbara Dusckas(*6) [2011] See BR-45 above.
BR-48 *	11.23.09	James Hall's Sentencing Memorandum and Exhibits of unrecorded calls by Waltzer (Ev.Hr.DEF.Ex.14) As set forth in the Findings of Fact and Conclusions of Law, there was nothing favorable or material in Hall's Sentencing Memorandum or telephone records. There is no evidence in the record that Waltzer intentionally failed to record, or destroyed the recordings, of these supposed exculpatory calls. Trial testimony established that Waltzer could only turn on and turn off the recorder. He could not erase recordings. The FBI reviewed the recordings to make sure that Waltzer was not turning off the recorder during a conversation. There was no evidence of his tampering with the recorder. Tr. 2/2/10, 99-102 (Joanson). There were numerous explanations for the fact that certain calls that appeared on telephone records were not recorded. Waltzer may have missed a call, a call on the phone records may have been a hang up, and there may have been brief periods when Waltzer did not have a recording device. There was no evidence that Waltzer was manipulating calls to hide exculpatory evidence or frame innocent people. However, to the extent that Georgiou wanted to make the argument that Waltzer was manipulating evidence, he was able to do that in his own case. Georgiou possessed the telephone records that showed allegedly missing recordings. Georgiou would not have advanced his defense by trying to somehow present to the jury allegations in another case that Waltzer had missed some recordings, especially when this defendant (Hall) and every other charged defendant against whom Waltzer cooperated, pleaded guilty. Engaging in such an exploration of other cases would have shown that Waltzer was recording guilty people, not

		<p>innocent ones.</p> <p>Information and allegations from Hall's case cannot be considered "suppressed evidence" and it is not favorable or material. It does not support Georgiou's <u>Brady</u> claim or any other claim for relief.</p>
BR-49 *	03.09.10	<p>Waltzer's Sentencing Memorandum (Ev.Hr.DEF.Ex.2) (2255.ECF.No.307.Ex.1)</p> <p>Waltzer was sentenced and his sentencing memorandum was filed after Georgiou's trial ended. Georgiou learned of the hearing (because counsel was present) and began making arguments in this Court and the Court of Appeals concerning matters that arose during the hearing. The government did not suppress the memo because the government did not possess it before trial. The memo also does not add anything significant to the facts relating to FBI reports of Waltzer's pre-June 2007 interviews with the FBI. The memo does not advance Georgiou's <u>Brady</u> claims or any other claim.</p>
BR-50 *	09.19.17	<p>FBI Agent Riley testimony, interpreting, for the first time, that the chain of custody reports support that Waltzer was without the device [Riley.Tr.09.19.17 at 199]</p> <p>As discussed in these Findings of Fact and Conclusions of Law, the government provided pretrial the chain of custody reports relating to Georgiou's case. The discovery included the reports that allowed Georgiou to make the argument that Waltzer did not possess the recording device during the test trade. Trial counsel testified that he was aware of this option. Counsel chose instead to make a consistent argument to the jury that Waltzer was selectively recording and trying to manipulate the evidence against Georgiou. Tr. 9/19/17, 31, 135-36. Thus, it is clear that there was nothing for the government to interpret for the defense, which made a strategic decision to argue the issue as it did. The government did not suppress any evidence and FBI Agent Riley's testimony does not support Georgiou's <u>Brady</u> claims or any other claim for relief.</p>
BR-51 *	11.15.17	<p>FBI Agent Joanson testimony, revealing that recording equipment was not always available for informants [Ev.Hr.Tr.11.15.17 at 253]</p> <p>See BR-50 above. Defense counsel was equipped to make whatever argument he wanted about the recording device, and the government provided the discovery that allowed the defense to make those arguments. Counsel chose to argue consistently that Waltzer was a manipulator and a fraud, and not that he did not possess the recording device on a particular occasion. The government did not suppress any</p>

		<p>evidence, and there is nothing in this regard that is favorable or material. Agent Joanson's testimony does not support Georgiou's <u>Brady</u> claims or any other claim for relief.</p>
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[WestLaw Editor's Note: The preceding image contains the reference for footnote⁷⁸]

⁷⁸ "The Jencks Act obliges the Government to disclose any witness statement 'in the possession of the United States which relates to the subject matter as to which the witness has testified.' " [Georgiou, 777 F.3d at 142](#) (quoting [18 U.S.C. § 3500\(b\)](#)). As stated above, we previously addressed Georgiou's Jencks Act claim regarding text messages, as well as emails, and we were affirmed by the Third Circuit. [Id. at 142-43](#). Thus, Georgiou's Jencks Act claim is previously litigated, and we decline to reconsider it.

*81 52. Georgiou also has claimed that the government's failure to provide information regarding Waltzer's pre-June 2007 interaction with the FBI deprived him of the ability to offer an accurate defense theory jury instruction and thereby violated his right to due process. (Pet'r's Br. 5.) This claim is entirely without merit.

53. The Court's charge to the jury included, for example, an instruction that, in order to convict Georgiou of the frauds charged in the indictment, the government was required to prove beyond a reasonable doubt that Georgiou acted with the specific intent to defraud, and that if Georgiou "acted in good faith, that would be a complete defense to these charges." Tr. 2/12/10, 45. The Court reminded the jury, repeatedly, that the burden of proving all charges beyond a reasonable doubt was on the government, and that the defendant, Georgiou, did not have the burden of proving good faith:

If you find from the evidence that the defendant acted in good faith as I have defined it, or if you find for any other reason that the government has not proved beyond a reasonable doubt the defendant acted with intent to defraud, you must find the defendant not guilty....

Id. at 46.

54. The Court also advised the jury that, because Waltzer was a cooperating witness, it should consider Waltzer's testimony "with great care and caution." Tr. 2/12/10, 52. The Court fully instructed the jury on the law of conspiracy, including the requirement that "at least one alleged co-conspirator shared a unity of purpose towards those objectives or goals." Id. at 17-24. The defense cross-examined Waltzer on his mental state and desire to collect evidence to cooperate in the future and argued, in closing, that Waltzer was manipulating Georgiou in this fashion. The jury instructions were more than sufficient to allow the jury to accept Georgiou's view of the case. Obviously, given the overwhelming evidence to the contrary,

_____ (cont'd)

Notably, the current state of the record neither changes our prior reasoning nor the Third Circuit's analysis.

including the fact that the conspiracy was far broader in time and in number of participants than simply Georgiou and Waltzer conspiring together during some short period of time, the jury did not accept Georgiou's view of the facts. This Court did not deprive Georgiou of any jury instruction, much less a jury instruction that would have made a difference in the outcome of the trial.

55. Georgiou's Brady and Napue claims regarding the government's failure to disclose information concerning Waltzer's pre-June 2007 provision of national security information to the FBI are denied.

56. Georgiou's subsidiary claims that the government's Brady violation resulted in his not getting an appropriate defense theory instruction, as well as the other subsidiary claims referenced above, are denied both because the Court has denied Georgiou's underlying Brady claim, and because the claims are independently without merit.

57. Georgiou's additional Napue claims relating to Kevin Waltzer's testimony are also denied as lacking in merit.

4. The AUSAs Did Not Have Improper Contacts With Kevin Waltzer And Were Not Necessary Fact Witnesses At Trial

58. As discussed throughout these Findings, Georgiou also has alleged a series of claims based upon his general assertion that Waltzer had improper "one-on-one" contacts with the AUSAs who prosecuted his case.

59. More specifically, Georgiou contends that the AUSAs "were inextricably intertwined as participants with Waltzer during the undercover operation, having hundreds of private, one on one calls, without Waltzer's FBI handlers or counsel present." (Pet'r's Br. 25.)

*82 60. Based upon this general assertion, Georgiou argues that he was denied his right to due process and a fair trial because: (1) this alleged conduct created a conflict of interest for the AUSAs in prosecuting Georgiou; (2) relatedly, the AUSAs became necessary

witnesses at trial; and (3) these offending contacts with Waltzer should have been disclosed to the defense as Brady material. (Pet'r's Br. 23-41.)

61. Georgiou has procedurally defaulted these claims. He bases these claims on telephone records that the government produced in pretrial discovery. Georgiou could have raised this issue pretrial, post-trial, or on direct appeal, but he failed to do so.

62. Georgiou cannot establish cause for his default, as the records that form the basis of his claims were in his possession prior to trial.

63. As set forth below, even if Georgiou could establish cause to overcome his procedural default, he cannot establish prejudice.

64. The testimony and evidence presented at the evidentiary hearing demonstrated that following his decision to cooperate with the government in June 2007, Waltzer had frequent contact with the AUSAs and agents investigating and prosecuting Georgiou, as well as numerous other targets and subjects of unrelated investigations. Findings of Fact, supra ¶ 40-42.

65. Georgiou contends that telephone records, which show numerous calls to and from the office and cellular phones of AUSAs Lappen and Cohen, substantiate his claims of improper contacts.

66. As addressed in the Findings of Fact, the telephone records evidence nothing other than a call being placed. Findings of Fact, supra ¶ 41. It cannot be gleaned from the phone records alone whether an actual call took place or whether the call was a hang-up or a voicemail was left; who the parties to the call were; or what was discussed during the call. The evidence is clear that Waltzer was cooperating against numerous targets during the same time frame he was cooperating against Georgiou. It is impossible from the phone records alone to determine whether any given call even pertained to Georgiou.

67. Moreover, based upon the evidence and testimony presented at the evidentiary hearing, and discussed above, this Court finds that the level of

contact that Waltzer had with the AUSAs was routine and entirely consistent with what would be expected under the circumstances. No witness confirmed Georgiou's unsupported accusations that the AUSAs were acting improperly in their interactions with Waltzer. To the contrary, all of the witnesses testified that the AUSAs had entirely appropriate conduct with Waltzer, which would, obviously, have been meaningless to the jury's consideration of the case.

68. The Court finds that AUSAs Lappen and Cohen acted professionally and ethically, and that their interactions with Waltzer legally comported with what one would expect of prosecution interaction with a witness cooperating in the high number of investigations in which Waltzer was cooperating.

69. The Court further finds Georgiou's allegations of wrongdoing by AUSAs Lappen and Cohen to be entirely unsupported by the record. Neither AUSA undertook any action that would have made either of them a fact witness and necessitate their recusal from the trial. Additionally, as discussed above, counsel strategically would not have wanted to make the AUSAs witnesses at trial.

70. Georgiou's allegations of improper contacts between the AUSAs and Waltzer are entirely without merit and, therefore, denied.⁷⁹

5. Ineffective Assistance Of Counsel Claim – Failure To Engage A Securities Expert For The Defense

*83 71. Georgiou claims that a “[f]ailure to utilize securities experts in a case of this kind, was prejudicially ineffective.” (Pet'r's Br. 65.) He argues that a securities expert would have uncovered the errors in Koster's claims and conclusions. (*Id.*)

72. During the September 19, 2017 evidentiary

⁷⁹ Insofar as Georgiou alleges that counsel were ineffective for failing to raise the issue of Waltzer's inappropriate contacts with the AUSAs, that claim is denied. The Court has found that there was no inappropriate contact, and counsel cannot be found ineffective for failing to raise a meritless claim. See [Strickland, 466 U.S. at 691](#).

hearing, Georgiou's trial attorney, Pasano, testified about this specific issue. When cross-examined by the government about his reason for not engaging a securities expert, Pasano succinctly stated as follows:

Q. Yeah, and now I want to turn to your reasons for not calling a securities expert. You considered using a securities expert?

A. Yes.

Q. And what was your concern with using a securities expert?

A. A couple things were going on. I believe, but I'll leave to Mr. Welsh or Ms. Recker what they recall about what contacts they had —

Q. And certainly I only want your contacts.

A. Right. I had reached out to a lawyer at the Trenam Firm in Tampa who is a securities expert I've used before and had discussions with him about the case. But in discussing the issues with him and in examining where we thought the case was going and particularly the focus on Waltzer and on George as a witness, I made a determination that if we tried to call a securities expert, the government's cross-examination of that witness, their ability to use emails, their ability to use recordings, none of which the witness would have a basis to say much about, except to accept that on the fact that's what they said, would give the government, in essence, a second closing argument right at the end of the government's — right at the end of the trial and just before Mr. Georgiou's testimony. So, in balance, it made little tactical sense to call a securities expert.

Q. And that was a strategic decision on your part?

A. It was.

Q. And did you — you did speak to a securities expert

—

A. Yes.

Q. — as you testified? And you found that, based upon what he said, he likely would not be helpful?

A. It would have taken a lot of work to get him comfortable with the things that I was looking to

establish, because it wasn't just what's a wash sale or what's a mass trade or what does mark to market mean? It was how do you apply those concepts to the security witness' testimony in this case and what the document showed? And, ultimately, without getting into what were my work produce discussions with that man, I decided even if I wanted to call an expert, he wasn't the one, and I ultimately decided that it made no sense to call an expert.

Q. And you had discussions with Mr. Georgiou about all of this?

A. We did. George was always interested in having a securities expert. In a lot of ways, I was lucky to have George as my client to work with because we did extensive analyses of the trade records and plotted them out and had charts and diagrams, all of which, you know, ultimately I had available and then I made my decision as to which pieces of it to use with Koster. But at the end of the day the decision that, as a group, we reached, and I do believe that Welsh & Recker were involved in that as well, was not to seat an expert.

Q. And the defendant was included in that group who decided that you weren't going to call an expert?

A. Well, these are tactical choices. So I mean George I think would have liked to have lots of witnesses who would have said wonderful things that would have helped win the case. But, as lawyers, we made judgments as to how valuable those witnesses could be and whether they would accomplish the goal. And the more we focused on George as witness, the less it became sensible as a tactical matter for us to seat an expert.

*84 Q. Right, and you couldn't find an expert that would accomplish the goals that your client wanted to meet?

A. I was not able to.

Tr. 9/19/17, 109-12.

73. It is clear from Pasano's testimony that he exercised reasonable professional judgment when he decided not to engage a securities expert after careful

consideration of the issue. See [Strickland, 466 U.S. at 691](#) (stating that “counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary”).

74. The issue of whether to engage a securities expert was investigated by Pasano when he contacted the attorney from the Trenam Firm, who is a securities expert that he had used before, and had discussions about the case with him. After discussing the case with the securities expert and other defense counsel, Pasano states that, from a tactical point of view, “I ultimately decided that it made no sense to call an expert.” Tr. 9/19/17, 111. Pasano also states that he was unable to find an expert who would accomplish the goals that Georgiou wanted to meet. [Id. at 112.](#)

75. As Pasano explained, he used reasonable defense tactical decisions in not engaging a securities expert given the facts of the case. Pasano’s assessment that it made little tactical sense to call a securities expert with the government’s cross-examination of that witness giving it, essentially, a second closing argument right at the end of trial and just before Georgiou’s testimony was reasonable.

76. “[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.” [Strickland, 466 U.S. at 690](#). “Because advocacy is an art and not a science, and because the adversary system requires deference to counsel’s informed decisions, strategic choices must be respected ... if they are based on professional judgment.” [Id. at 681](#); see also [Rolan, 445 F.3d at 682](#) (“Only choices made after a reasonable investigation of the factual scenario are entitled to a presumption of validity.”).

77. Pasano’s tactical choice to not engage a securities expert was designed to achieve a successful defense, and was eminently reasonable. Therefore, this choice did not rise to the level of an error, much less error of such a magnitude that Georgiou is entitled to habeas relief. Such strategic decision-making is within the scope of constitutionally competent representation

under the Sixth Amendment.

78. Since Georgiou has not established that Pasano's performance was deficient, we need not address whether he suffered prejudice. However, we note that Georgiou fails to establish prejudice because he has not made any showing, whatsoever, that there is a reasonable probability that, but for Pasano's decision not to engage a securities expert, the result of the trial would have been different. See Strickland, 466 U.S. at 694.

79. Georgiou's claim of ineffective assistance of counsel pertaining to defense counsel's failure to engage a securities expert must fail and, therefore, is denied.

V. CUMULATIVE ANALYSIS

Georgiou generally argues that all of the alleged errors cumulatively prejudiced him. "The cumulative error doctrine allows a petitioner to present a standalone claim asserting the cumulative effect of errors at trial that so undermined the verdict as to constitute a denial of his constitutional right to due process." Collins v. Sec'y of Pa. Dep't of Corr., 742 F.3d 528, 542 (3d Cir. 2014); see also Gibson, 718 F. App'x at 135. This claim appears to be procedurally defaulted; however, even assuming the cumulative error claim does warrant further review, it is without merit. Significantly, as just discussed, we have concluded that none of Georgiou's assertions regarding error have merit. See Morris v. Pa., No. 15-1352, 2017 WL 345626, at *12 (E.D. Pa. Jan. 24, 2017) ("Because the individual errors alleged by Petitioner are without merit, there can be no cumulative error that undermined the verdict to the degree that Petitioner was denied his constitutional right to due process."). Whether considering Georgiou's claims separately or together, we find that none of the claims resulted in any prejudice. That is, Georgiou's claim fails because there is no likelihood that the cumulative impact of the alleged errors "had a substantial and injurious effect or influence" on the jury's verdict. See id.

VI. CERTIFICATE OF APPEALABILITY

*85 Finally, we must determine whether a certificate of appealability should issue. See Third Circuit Local Appellate Rule 22.2. Pursuant to 28 U.S.C. § 2253(c)(2), a certificate of appealability is appropriate only if the petitioner “has made a substantial showing of the denial of a constitutional right.” Georgiou must “demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” Slack v. McDaniel, 529 U.S. 473, 484 (2000). Under the facts of this case, we conclude that Georgiou has shown neither the denial of a constitutional right nor that reasonable jurists would disagree with this Court’s resolution of his claims. Accordingly, we will not grant Georgiou a certificate of appealability with respect to any of his claims.

VII. CONCLUSION

As discussed above, Georgiou has no viable claim on any of the grounds raised. Therefore, Georgiou’s request for habeas relief pursuant to 28 U.S.C. § 2255 is denied. Also, Georgiou’s request for a certificate of appealability is denied.

An appropriate Order follows.

APPENDIX C
**UNITED STATES COURT OF APPEALS,
FOR THE THIRD CIRCUIT**

Nos. 18-2953 & 18-3168

UNITED STATES OF AMERICA

v.

GEORGE GEORGIOU,

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal Action No. 2-09-cr-00088-001)
District Judge: Honorable Robert F. Kelly

Present: SMITH, Chief Judge, McKEE, AMBRO,
CHAGARES, JORDAN, HARDIMAN,
GREENAWAY, Jr., SHWARTZ, RESTREPO,
BIBAS, PORTER, MATEY, and PHIPPS,
Circuit Judges

SUR PETITION FOR REHEARING

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court *en banc*, is denied.

BY THE COURT,

s/ Patty Shwartz

Circuit Judge

Dated: June 9, 2020