21-6222

No. ______________ ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
NOV - 4 2021
OFFICE OF THE CLERK

Marc E. Bercoon — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals For the Eleventh Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Marc E. Bercoon #66081-019
(Your Name)

FPC - Maxwell A.F.B.
(Address)

Montgomery, AL 36112
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

(1) Whether Petitioner's rights under the Grand Jury Clause of the Fifth Amendment were violated when:

(a) a timely filed motion under Federal Rules of Criminal Procedure 12(b)(2) asserting that prejudicial false evidence that constitutes due process violations under Napue v. Illinois, 360 U.S. 264 (1959) was presented to the grand jury; and

(b) the motion was denied applying plain error review when there had been no prior de novo review of the record?

(2) Whether due process violations in the grand jury arising from prosecutorial misconduct should be reviewed under the harmless error standard articulated in Chapman v. California, 386 U.S. 18 (1967) rather than that set forth in Bank of Nova Scotia v. U.S., 487 U.S. 250 (1988), which by its terms is limited to non-constitutional violations?

(3) Whether an indictment that does not satisfy the criteria in Costello v. U.S., 350 U.S. 359 (1956) creates subject matter jurisdiction in a Federal District Court over a capital criminal case?

LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

- U.S.A. v. William A. Goldstein, Marc Bercoon No. 1:15-cr-00022-LMM-JFK, U.S. District Court For the Northern District of Georgia. Judgment entered July 25, 2018
- U.S.A. v. William A. Goldstein, Marc Bercoon No. 18-13321, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered Feb. 25, 2021

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* See first page of Appendix D For a special table of contents for this 528 page attachment.

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TABLE OF AUTHORITIES

CASES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[X] reported at 989 F. 3d 1178 (11th Cir. 2021); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix ______ to the petition and is

[ ] reported at ______________________; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished. The district court did not issue an opinion on this matter that was first raised on appeal.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix ______ to the petition and is

[ ] reported at ______________________; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the ______________________ court appears at Appendix ______ to the petition and is

[ ] reported at ______________________; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was February 26, 2021.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: June 10, 2021, and a copy of the order denying rehearing appears at Appendix B.

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

This Petition is filed within 150 days of June 10, 2021, which is timely pursuant to this Court's Order related to the pandemic.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FIFTH Amendment to Constitution

18 U.S.C. §3500

Federal Rules of Criminal Procedure: 12(b)(2); 12(b)(3); 52(a); 52(b)

The full text of each of the above is presented in Appendix F

STATEMENT OF THE CASE

In January 2015, Petitioner, Marc Bercoon ("Bercoon"), his business partner, William Goldstein ("Goldstein"), and Peter Veugeler ("Veugeler") were indicted on six counts arising from an alleged stock manipulation/"pump and dump" involving the stock of MedCareers Group, Inc. ("MCGI"), a publicly-traded company. Specifically, two manipulations were charged; one in early March 2010 and one in early May 2010. Bercoon and Goldstein were also charged, in the same indictment, with 13 fraud counts related to sales of stock in a private company known as Find.com. (The indictment is Appendix C)

All three defendants pleaded not guilty and were released on bond. In February 2016, Veugeler passed an "NSF" check, which violated his bond, and he was incarcerated. In May 2016, Veugeler was released after agreeing to cooperate with the Goverment. In November 2016, Veugeler pleaded guilty to one count in the indictment.

Bercoon and Goldstein were scheduled for trial on September 11, 2017. In mid-August 2017, the Government produced documents pursuant to 18 U.S.C. § 3500 ("Jencks"), which included the transcript ("Transcript") of William Cromer's ("WC") January 21, 2015, grand jury testimony. WC was the FBI's lead case agent on Bercoon's investigation. The trial was then postponed until February 5, 2018, because of a medical emergency.

In reviewing the Transcript, the context indicates that WC is likely the first and only grand jury witness. This is evident because the jurors are unfamiliar with every person mentioned in testimony and the indictment was returned the same day as WC's testimony.

A substantial amount of WC's testimony is hearsay based upon information provided to the Government by two cooperating sources, Alan Weiner ("AW") and Marc Rosenberg ("MR"). AW and MR both worked with Bercoon and Goldstein in limited capacities during the relevant time periods. WC's testimony also contained several instances of false testimony that the prosecutor knew was false.

There were additional instances of misconduct in which the prosecutor: (1) elicited improper opinion testimony on matters for which WC is not an expert; (2) allowed WC to testify as to conclusions to be drawn from WC's testimony; and (3) requested that grand jurors refrain from asking questions because the prosecutor had scheduled 90 minutes for her presentation and she was behind schedule at this point in the proceeding.

Bercoon's trial counsel refused to raise any of the grand jury misconduct issues before or during trial. Trial counsel's justification was: "What happens in the grand jury does not matter." Bercoon and Goldstein were convicted on 12 of 13 counts after an eight day trial and three days of deliberations. (The 19 counts in the indictment were reduced by dismissals.) Bercoon and Goldstein were each sentenced to 120 months.

After sentencing, Bercoon's trial counsel withdrew and the court appointed Bercoon counsel for his direct appeal. Bercoon timely filed a notice of direct appeal with the U.S. Court of Appeals for the Eleventh Circuit ("11th Circuit"). Bercoon's appellate counsel refused to raise any of the grand jury issues in her appellate brief because none of these issues were in the District Court record.

The 11th Circuit heard oral argument on the direct appeal on January 31, 2020. In February 2020, Bercoon attempted to file a pro se motion pursuant to

Federal Rule of Criminal Procedure ("FRCP") 12(b)(2) in which Bercoon challenged the District Court's subject matter jurisdiction ("SMJ") over Bercoon's case on the basis that: the Constitutional violations in the grand jury, caused by the prosecutorial misconduct, were so pervasive and prejudicial, they created defects so fundamental to the grand jury's purpose that the indictment cannot be deemed as having been issued from a grand jury, as contemplated by the Grand Jury Clause of the Fifth Amendment. Accordingly, the 12b2 Motion reasons that without an indictment issued from a grand jury, the District Court could not have SMJ and Bercoon had a right not to be tried. [The 12b2 Motion is Appendix D. The Transcript is Exhibit A to Bercoon's declaration "Declaration," which was filed with the 12b2 Motion and is included in Appendix D.]

The 11th Circuit clerk refused to accept the 12b2 Motion until September 1, 2020, when the 11th Circuit permitted the filing. (See Appendix E) The 12b2 Motion presents in detail several instances of prosecutorial misconduct in the grand jury. Some violations are Constitutional while others are not. The evidentiary record is established through the Declaration.

The 12b2 Motion also provides objective supporting documentation of the prosecutor's knowledge of false testimony, where applicable.

The Government never filed a response to the 12b2 Motion. The 11th Circuit affirmed all convictions and denied the 12b2 Motion on February 26, 2021. (Appendix A) The 11th Circuit reviewed the 12b2 Motion for plain error because the grand jury issues were raised for the first time on appeal, citing U.S. v. Vallejo, 297 F.3d 1154 (11th Cir. 2002). Unlike Bercoon's case, Vallejo involved alleged prosecutorial misconduct that were non-constitutional violations. 1

In its review, the 11th Circuit stated that it applied the standard for dismissing an indictment for prosecutorial misconduct in the grand jury established by this Court in Bank of Nova Scotia v. U.S., 487 U.S. 250 (1988). This holding, however, expressly applies to non-constitutional violations.

In denying the 12b2 Motion, the 11th Circuit states that

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1 All references to the 11th Circuit's opinion in this petition are fully contained in Section II (h) on pages 17-18 of Appendix A. No other parts of the opinion relate to the 12b2 Motion. Bercoon notes for this Court that: Footnote 3 in the opinion is incorrect. Donna Levy was indicted on matters unrelated to MCGI in late 2010. Goldstein and AW met with Donna (and David) Levy in 2009; and to the extent footnote 4 in the opinion implies that Cusimano pled guilty to a crime involving Bercoon and Goldstein, Bercoon believes this is false.

many of Bercoon's arguments rely on an "unfair reading" of the Transcript. Based upon the examples cited by the 11th Circuit, this finding of Bercoon's unfair reading is clear error.

In support of its finding, the 11th Circuit cites an example of Bercoon's "unfair reading" when he claims that WC testified falsely by relating to the grand jury information from AW when the prosecutor knew the information was false. The 11th Circuit dismisses Bercoon's argument claiming that Bercoon ignored the fact that the prosecutor elicited testimony from WC about parts of AW's story "that sound not quite right." However, this exchange was presented by Bercoon as an example of the prosecutor using false testimony to mislead the grand jury about AW's credibility, not false testimony alone.

In this example, AW explained to the Government how the alleged MCGI "scheme" worked. After WC related the story to the grand jury, WC responded to the prosecutor's question about which parts "sound no quite right." WC then explains how every aspect of the story is wrong, but by using euphemisms such as: "not quite right" "There's a couple of things... he's [AW] a little bit off on" "It's a real simple version of it [the scheme]". Bercoon does claim this is false testimony because its clear intent is to mislead the grand jury and hide AW's lack of credibility, as AW's information is the source of much of WC's testimony. (See Item 3A, page 12 of Exhibit G to 12b2 Motion. This specific example is discussed on page 14 to said Exhibit G and is found at pag29 line 11 - page 30 line 11 of the Transcript.)

The 11th Circuit also misread the 12b2 Motion when the 11th Circuit called WC's testimony: he [WC] observed Goldstein trading out of one of MR's accounts, an innocent mistake that "any reasonable person would interpret as a statement about what AW [not WC] had seen." However, this testimony relates to the alleged manipulation in MARCH 2010. As will be shown below, the prosecutor and WC both know AW did not see Goldstein trading out of an MR account as AW claimed and WC related to the grand jury. Additionally, WC was asked by the prosecutor: "So you observed Goldstein and Veugeler trading stock ...?" WC responded: "Yes."

WC is an experienced FBI Agent who knows he did not observe anything. This is hearsay testimony. This testimony occurred immediately after a pause during which the prosecutor requested that all juror questions be held until she completed her presentation. WC's response could confuse jurors into thinking WC has first hand knowledge which would possibly add false credibility to WC's testimony. Since jurors are holding back questions, any confusion will continue for the remaining 75% (approx.) of the presentation. Neither WC nor the prosecutor correct WC's false response.

At no time does the 11th Circuit make any mention of two of the most glaring examples of false testimony that the prosecutor knows are false.

1A) WC provided testimony that in early March 2010, AW, Goldstein, and Veugeler were together and AW observed Veugeler and Goldstein each trading MCGI stock on their own laptop computers. WC further testified that AW observed that Goldstein was trading MCGI stock out of MR's Scottrade account. These events are described in the indictment as "Overt Acts of the MedCareers Conspiracy" - See Appendix C item 64.

The prosecutor **knows** this is false testimony as the Government has MR's Scottrade account statement which shows no MCGI trades during the relevant March 2010 period. The Government knows AW's story is false.

(See 12b2 Motion item 2 commencing on page 23-Appendix D)
The Government also knows WC's testimony and AW's story is False because WC later testified that the only MCGI trades From an MR account during the MARCH 2010 period of alleged manipulation were From MR's Morgan Stanley account, not Scottrade as AW claimed to have observed. (See Transcript page 52, lines 1-9) (See also Section 66 of indictment - Appendix C.)

B) WC also testifies that Goldstein and Bercoon had the online access codes For MR's Morgan Stanley account. This testimony perpetuates the Government's claim that Goldstein was trading out of an MR account in MARCH 2010. This is known False testimony as the Government had in its possession a September 2010 letter from Morgan Stanley stating that: MR's account was not set up for online trading so there were no access codes to trade in the account. Thus, Goldstein was not trading stock out of an MR account at all in March 2010 as AW claimed to have observed. (See 12b2 Motion, page 26, line 12 or Transcript page 36 lines 21-23.)

C) WC testified that MR transferred MCGI stock from his Morgan Stanley account to his Scottrade account in early March 2010. This testimony relates to a scenario presented that is unrelated to the March 2010 alleged Goldstein trading, but this is false testimony as this transfer of shares took place on March 25, 2010 - not early March. This further shows the Government's knowledge that it knew what AW told the Government he observed was false. (See Transcript Page 37, lines 21-25 and Scottrade account statement at Exhibit F to Declaration within Appendix D). AW could not have observed Goldstein trading out of an MR account in early March 2010 and the Government knows it.

2A) With respect to the second alleged manipulation event presented in the indictment and to the grand jury, WC testified that AW and Goldstein travelled to Florida to meet Veugeler, and AW observed similar side by side trading on laptop computers. This meeting with Veugeler allegedly took place at an Orlando, FL hotel. WC testifies that meeting took place on May 10, 2010, based on the testimony that upon arrival, Veugeler said he had just been served with a complaint by the SEC.

WC also testifies that he confirmed that Veugeler was served by the SEC on MAY 10, 2010, in the evening.

This is false testimony as AW told the Government that this meeting occurred MAY 4, not May 10. Also, AW's interview notes reveal only that AW said Veugeler claimed he was being "investigated" by the SEC, not that he had been "served" by the SEC. (See Exhibit B to Declaration in Appendix D, page 4 third full paragraph of said Exhibit B)

B) The Government unilaterally changed AW's May 4 date because there is no significant trading in MCGI until MAY 10, 2010. Also, the Government maintains that Veugeler and Goldstein trade side by side during the alleged manipulations, yet Veugeler was served on May 10 in the evening. MCGI trading closes at 4pm. Goldstein and Veugeler cannot possibly trade MCGI side by side on May 10, if they did not meet until evening. The SEC complaint was filed (but not served) on MAY 4, 2010. This could explain how Veugeler knew he was an SEC subject.

c) WC is supposed to be providing hearsay testimony. The prosecutor has allowed WC to change AW's statements and present them to the grand jury under oath as AW's true information

In both of these examples, WC has provided several instances of false testimony and created a false picture of events to the grand jury. The prosecutor has all of the documentation to know of these falsehoods. The prosecutor never clarified or corrected the false testimony. These two scenarios are in the indictment and go directly to Bercoon's alleged guilt and a finding of probable cause. The 11th Circuit makes no mention of either of these clear due process violations which is clear error even in plain error review.

In another instance, the 11th Circuit notes Bercoon's lack of legal authority suggesting that prosecutor's request that jurors withhold questions is improper. The 11th Circuit found that after numerous "interruptions" the request facilitated the presentation of evidence.

This finding, however, runs contrary to the 11th Circuit's stated reliance on Bank of Nova Scotia v. U.S, (supra) which bases its opinion, in relevant part, on Kotteakos v. U.S., 328 U.S. 750 (1946).

Kotteakos requires that incidents be reviewed in the context of the record as a whole, as what may be harmless in one case may not be harmless in another. Accordingly, strict adherence to stare decisis is not the guiding force as the 11th Circuit's comment implies. Also, the 11th Circuit's use of the word "interruptions" implies that the proceeding is the prosecutor's "show" when, in fact, it is the grand jury's investigation/show.

In Bercoon's case, the jurors asked a question or made some type of remark 32 times in the first 23 pages of the Transcript. At this point, the request to hold questions is made. Then, there are no questions or remarks for the next 60+ pages of Transcript. At this point, the presentation is completed and jurors ask a question or make a remark a total of 10 times and the entire proceeding ends.

Upon making the request to withhold questions, the prosecutor notes: 1) there is a "ton of information" that is "unusual"; and 2) she budgeted 90 minutes for the presentation and she is "running long." The 11th Circuit's need for precedent is misplaced when the circumstances show that the prosecutor's request that questions be held stifled the investigation and prevented, possibly, the juror's understanding of the alleged evidence. (See 1262 Motion, page 28, item 3 - Appendix D)

The 11th Circuit summarily dismissed the most prejudicial known false testimony in the proceeding and did so by clearly misreading the Transcript. WC provided testimony about David and Donna Levy ("Levys"), a married couple living in Florida, who are presented in testimony as unindicted co-conspirators of Bercoon and Goldstein and in the indictment. (See Appendix C section 48-50. The Levys are Traders A and B.) This testimony is very early in the proceeding (page 13 of the Transcript) and a juror asks: Who are the Levys and why did Goldstein and AW travel to Florida to meet them? WC's response is:

> "I'm not sure exactly. We haven't figured out yet how they first got introduced to the Levys. Again, we're just relying on Mr. Weiner [AW] saying they went down there and had this meeting with the Levys to learn about this. You know subsequently, the Levys themselves were indicted for participating in numerous stock manipulations over many years, including the activities related to this MedCareers [MCGI] stock. They [Levys] were indicted up in New York and they went to trial and they were found guilty. So they're currently in jail." [Emphasis added] [See Transcript Page 14, Line 14]

This is false testimony. The Levys' trial in New York in 2013 had no connection to MCGI. Neither the Levys' respective indictments nor convictions mentioned MCGI. (See Exhibit D to Declaration in Appendix D.)

The prosecutor knows this testimony is false as Donna Levy's indictment is referenced in the prosecutor's wiretap application in Bercoon's case. Further, the Government clearly knows the Levys are in Federal prison. The prosecutor had to have inquired why Bercoon's alleged co-conspirators were sentenced.

The 11th Circuit dismisses this obviously prejudicial due process violation as a harmless incidental comment by WC in response to a juror question, which is not part of the Government's affirmative case. The 11th Circuit's support is that the words: "I'm not sure exactly" at the beginning of WC's reply to the juror's question "couched" his [WC's] response in uncertainty which provided the grand jury with enough information to weigh Cromer's [WC's] stated belief about the Levys.

This finding is clear error. The cited language clearly relates to how Goldstein was introduced to the Levys or learned of them. This uncertainty is clarified by the prosecutor a few pages later in the Transcript at Page 19, line 18: "To be clear, we're unsure how they [Goldstein and AW] got first introduced to the Levys." The prosecutor never clarifies that the Levys' convictions are not related to MCGI activities.

The 12b2 Motion calls out WC's testimony that: a court-authorized wiretap was granted in this case, as false testimony.

"... it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued." "... [I]f the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false..." suppression is appropriate. U.S. v. Leon, 468 U.S. 897, 922-923 (1984).

Since the prosecutor and FBI know the wiretap application relies on on many of the same false statements as contained in WC's known false testimony, there are no reasonable grounds to believe the wiretap was properly issued. Thus, testimony that there is a court-authorized wiretap in Bercoon's case is false testimony. (See 12b2 Motion item 8, page 53 in Appendix D.) [The wiretap was not suppressed in a pre-trial motion. Trial counsel never revisited or raised new issues based on new evidence that was disclosed by the Transcript.]

The FBI's affidavit in support of the Government's wiretap application is contained within Exhibit E to the Declaration in Appendix . The affidavit contains the following false statements:

1) "These coordinated trades by Goldstein and Veugeler [in March 2010] were market manipulation, and as such constituted mail and wire fraud."

2) "When possible, C-2's [AW] information has been checked and corroborated to the extent possible and practical."

[See item 59 and Footnote 13 in affidavit]

In starting its summing up, the 11th Circuit relies on its opinion that: an indictment should not be dismissed when an agent unintentionally testifies falsely and it is not sufficiently prejudicial. U.S. v. Garate-Veraga, 942 F.2d 1543, 1550 (11th Cir. 1991) amended sub nom. U.S. v. Lastra, 991 F.2d 662 (11th Cir. 1993). In this case, unlike Bercoon's, an evidentiary hearing was held to better assess the facts. Also, in this case, there is no allegation or proof that the prosecutor knew that the Agent's testimony was false. In Bercoon's case the prosecutor knows the testimony is false.

The 11th Circuit concludes its opinion with an observation that the grand jury proceeding was a miniature version of the trial, with overwhelming evidence presented at trial and the grand jury. This conclusion ignores the fact that Veugeler testified at trial after pleading guilty. Lost in this significant difference is that Veugeler may have pleaded to an indictment that should never have issued - if Bercoon's reasoning is found valid.

The 11th Circuit also relies on U.S. v. Flanders, 752 F.3d 1317 (11th Cir. 2014), which holds that the guilty verdicts cure all ills in the grand jury and demonstrate that there was probable cause to indict Bercoon. This case is a descendant of U.S. v. Mechanik, 487 U.S. 66 (1986). However, Mechanik's reasoning of looking at what transpires at trial for reviewing misconduct in the grand jury was replaced by Bank of Nova Scotia v. U.S., (supra). Also, both of these cases involve non-constitutional violations, unlike Bercoon's case.

The Government did seek superceding indictments in Bercoon's case, but any of them that did not rely on the prosecutorial misconduct presented in the 12b2 Motion occurred, if at all, after the statute of limitations ran. The 12b2 Motion asserts that the Government cannot toll this statute with the original "bad" indictment.

Bercoon timely filed a petition for rehearing or rehearing en banc with respect to the denial of the 12b2 Motion. This petition was denied on June 10, 2021. (Appendix B)

REASONS FOR GRANTING THE PETITION

This Court should grant this petition for writ of certiorari pursuant to Supreme Court Rule 10(c) because the 11th Circuit has decided Petitioner's case in a manner which: a) effectively abolishes the Grand Jury Clause of the Fifth Amendment; and b) ignored the court's obligation to confirm that the District Court had subject matter jurisdiction over Petitioner.

This Court also needs to provide guidance on whether its decision in Bank of Nova Scotia v. U.S. (supra), which was expressly limited to non-constitutional violations in the grand jury, should be applied in cases where the prosecutorial misconduct in the grand jury includes constitutional violations.

ESTABLISHMENT OF DUE PROCESS VIOLATIONS

The due process violations in Bercoon's grand jury are established by the clear language of the Transcript and the evidentiary record created by the Declaration. The Government never filed a response to refute the Declaration. (Appendix D contains the Declaration)

1) WC testified that the Levys were convicted at an earlier trial of MCGI stock manipulation. There can be no debate that this is false testimony. (Exhibit D to Declaration contains the charges and verdicts from the Levys' trial.)

The prosecutor knows this is false testimony. Donna Levy's indictment is noted in the prosecutor's wiretap application. This indictment has no MCGI charges. The Levys are presented as unindicted co-conspirators in Bercoon's indictment and to the grand jury in WC's testimony. Logically, the Levys are "unindicted" because they are in prison when the grand jury convened in 2015. The prosecutor surely knows why the Levys are in prison, which is not for MCGI. Even if one were to believe that somehow WC's testimony was the first time the prosecutor heard of the Levys' convictions, the prosecutor would have researched the trial to better prepare for Bercoon's case.

This Court may find that the prosecutor was deemed to know the truth about the Levys' convictions.

> "The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government." Giglio v. U.S., 405 U.S. 150, 154 (1972).

Similarly, the Levys were prosecuted by the Federal Government. Knowledge about the outcome of the trial is attributable to the Government. The Government has never denied that it had knowledge that the Levys' convictions are unrelated to MCGI. Also, the prosecutor never corrected this false testimony, which she had a duty to do even if she did not solicit the false testimony. This combination of facts establish a Fifth Amendment due process violation per the criteria this Court established in Napue v. Illinois, 360 U.S. 264 (1959).

2) WC testified that AW was an eye-witness to Goldstein and Veugeler sitting side by side, in early March 2010, with each trading MCGI stock on their own laptop computers. This testimony includes a statement that AW observed that Goldstein was trading out of MR's Scottrade account.

The Government has MR's Scottrade account statement which shows no MCGI trading in early March 2010. Thus, the Government knows that Goldstein was not observed by AW or anyone trading MCGI stock out of MR's Scottrade account as WC testified. The prosecutor never corrected this false testimony. (See Exhibit F to Declaration)

WC later testified that all MCGI trades out of an MR account in early March 2010 were in MR's Morgan Stanley account. WC also testified the Bercoon and Goldstein had the online access codes to trade in MR's Morgan Stanley account.

The Government knows there are no access codes for MR's Morgan Stanley account since the account was never set up for online trading. The Government has a September 2010 letter from Morgan Stanley on this point. (See Exhibit G to Declaration) Also, since Goldstein was not trading out of the Scottrade or Morgan Stanley accounts on his laptop in early March 2010, there is no evidence that Goldstein was trading at all. None of this false testimony was corrected by the prosecutor. These facts establish a due process violation.

3) WC testified that Vevgeler, AW, and Goldstein met at a Florida hotel in May 2010. The testimony is that AW, once again, observed Goldstein and Vevgeler sitting side by side trading MCGI stock on their laptops. However, on this trip, the trading did not begin until after Vevgeler told AW and Goldstein that Vevgeler had just been served with a complaint by the SEC. WC testified that he confirmed that the SEC served Vevgeler on the evening of May 10, 2010.

According to the Government's interview notes with AW, that were produced as Jencks, AW said this meeting occurred on May 4, and that Vevgeler indicated he was being "investigated" by the SEC. Vevgeler apparently did not indicate he was "served." The SEC's complaint was filed, but not yet served, on May 4. Vevgeler may have been referring to this action. (See Exhibit B to Declaration)

This is false testimony because WC is providing hearsay testimony. WC cannot rewrite AW's statements and present them under oath to the grand jury as AW's information. There are no Jencks materials indicating AW changed his prior statements and the grand jury is not told that AW's statements were edited. Lastly, the testimony has to be false because Veugeler was served on May 10 in the evening. Neither Veugeler nor Goldstein could trade MCGI on May 10 after Veugeler was served because trading closed at 4pm. Trading hours are in the public domain, so the Government knows this is false testimony. The Government cannot deny knowing that WC changed AW's information. Again, Bercoon has established a due process violation.

APPLICABLE HARMLESS ERROR STANDARD

This Court placed the burden on the defendant to show that a non-constitutional violation in the grand jury from prosecutorial misconduct prejudiced the defendant and was not harmless. BANK of Nova Scotia v. U.S, supra However, for a constitutional error in a trial, this Court shifted the burden to the Government, which must show that the constitutional violation was harmless.

beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24 (1967). This shifting of burden is consistent with this Court's constitutional interpretations. Specifically,

"...the Constitution does not tell citizens what they can or cannot do. It mostly tells governments what they can or cannot do. The Constitution thereby sets limits confining government action." Breyer, Stephen "The Authority of the Court and the Peril of Politics" (2021)

In Chapman, the Government violated the Constitution during a trial. Since the Government did what they "cannot do" and exceeded the limits of permitted actions under the Constitution, the Government had a very tough burden to show the violation was harmless. This burden reflects the sacredness of the Constitution.

This Court did burden a defendant with showing an alleged constitutional violation "had a substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637 (1993). Brecht is a habeas action. This Court reasoned that the Government had to carry the Chapman burden at trial and all levels of appeal, including a petition for writ of certiorari. Habeas is a collateral review and, therefore, this Court deemed it just to shift the burden and apply the harmless error standard in Kotteakos v. U.S., (supra).

Although Bercoon's case is constitutional violations in the grand jury, as opposed to a trial, the Chapman harmless error standard is appropriate. Bercoon raised the issue on direct appeal and the Government has never had to carry the burden of proof for its actions beyond the constitutional limits of permitted acts. This conclusion is consistent with Brecht as well since Bercoon's case is not a collateral review.

Although Bercoon's case is a grand jury with a probable cause standard to indict, Bercoon is entitled to a grand jury proceeding free from constitutional violations. If said violations occur, the Government should have to carry the burden that they did not impact the grand jury's decision to indict, beyond a reasonable doubt.

If the standard in Chapman v. California, (supra) is the correct rule, this Court must either remand or rule on the merits itself. "The duty of this Court to make its own independent examination of the record when Federal constitutional deprivations are alleged is clear, resting, as it does, on our solemn responsibility for maintaining the Constitution inviolate." Napue v. Illinois, at 271 (supra) internal cites omitted

If this Court decides that the harmless error standard in Bank of Nova Scotia v. U.S, supra applies to Bercoon's case, the 11^{th} Circuit's review and analysis of the 12b2 Motion are clear error, as it never acknowledged any of the false testimony.

Petitioner Satisfies Harmless Error Burdens

1) The false testimony involving the Levys amounts to: an FBI Agent testifying to the grand jury that Bercoon's co-conspirators in the scheme to manipulate MCGI stock have already been indicted and convicted at trial of MCGI stock manipulation. A grand juror would be derelict of his duty to not find probable cause to indict on this false testimony alone. Bank of Nova Scotia v. U.S., (supra) requires that this Court not look at whether the grand jury would have indicted Bercoon even if the violation did not occur. The correct inquiry, by application of the harmless standard in Kotteakos v. U.S., at 765 (supra), is: "[W]hat effect the error had or reasonably may be taken to have had upon the jury's decision."

2) The false testimony involving the March 2010 trading event is essentially that: the grand jury hears testimony that an eye-witness [AW] observed Veugeler and Goldstein trading MCGI stock side by side on laptop computers. According

to the Government, this scenario constitutes stock manipulation and mail and wire fraud. (Statement from FBI affidavit referenced above - P.18) The credibility of this eye-witness account is enhanced by the additional detail that the eye-witness observed that Goldstein was trading out of MR's Scottrade account. This statement is the bolstered by false testimony that MR transferred MCGI stock from his Morgan Stanley account to the Scottrade account in early March 2010, which coincides with AW's observation.

Again, an eye-witness account of crimes, listed in the indictment, when presented by an FBI Agent have credibility. The jurors take for granted that the FBI has done some level of fact checking. This false testimony would create grave doubt the decision to indict was free from the influence of this prejudicial false testimony. AW could not have observed Goldstein trading in MR's Scottrade account and Goldstein could not trade in MR's account online with a laptop computer. The grand jury is not aware that there is actually no evidence that Goldstein was trading at all, so no crime was observed.

This false testimony warrants dismissal of the indictment, especially when cumulative effect is considered.

3) The May 2010, in the ears of the grand jury, is a replica of the March 2010 trading episode. This is a second eye-witness account from a source that should have little credibility, but this fact has been hidden behind false testimony.

4) The prosecutor's asking jurors to refrain from asking questions until her presentation was completed, on its face, appears reasonable, as the 11th Circuit points out. However, in analyzing this request, to hold questions, in the context of Bercoon's grand jury, a different conclusion seems appropriate.

At the time the prosecutor asked that questions be held, a juror had asked a question or made a remark 32 times in the first 23 pages of a 95 page Transcript. The questions show a lack of familiarity with every person mentioned; lack of understanding of the securities laws and markets;

and a sincere interest in trying to stay engaged in the presentation so jurors can fulfill their duties.

The prosecutor then proceeds through more than 60 pages of presentation with no questions or comments. Then, when the presentation is completed, there are a total of 10 comments and the proceeding is over. There is not one question on FIND.COM which was not introduced until page 75.

The prosecutor commented that the material was "unusual." A logical conclusion is that the jurors disengaged and were effectively "steam-rolled" by the prosecutor. This is not a constitutional violation, but the prosecutor did impose her will on the grand jury. This misconduct unduly influenced the fact-finding aspect of the investigation. The grand jurors are supposed to conduct the investigation, but, in reality, they defer to the Government. The prosecutor took advantage of her power, maybe not intentionally, but the result was the same. The impetus was that Bercoon's liberties warranted only

90 minutes of the Government's time. When added to all of the instances cited in the 12b2 Motion, there is grave doubt the decision to indict was free from the influence of the Government misconduct.

FRCP 52(a) vs. 52(b)

"Federal Rule of Criminal Procedure 52(b), which governs on appeal from criminal proceedings, provides a court of appeals a limited power to correct errors that were forfeited because not timely raised in district court." U.S. v. Olano, 507 U.S. 725, 731 (1993).

A motion filed under FRCP 12(b)(2) is timely so long as it is filed while the case is pending. Bercoon's case was pending when the 12b2 Motion was filed. Distinguished from this is a motion filed under FRCP 12(b)(3), which must be filed before trial. Bercoon should not be penalized with plain error review when the 12b2 Motion was timely filed, even though it was never filed with the district court.

The 12b2 Motion challenges the court's jurisdiction. Plain error review implies a different result could be achieved with a de novo review. This is an absurd consequence as it is the court's duty, not Bercoon's to confirm jurisdiction exists. Bercoon merely put the 11th Circuit on notice that jurisdiction needed to be reviewed. The 11th Circuit never discussed the jurisdictional issues raised by the 12b2 Motion. The 11th Circuit treated the 12b2 Motion as a non-constitutional grand jury misconduct situation. This is clear error.

Regardless of whether plain error review is applied, the 11th Circuit made findings that conflict with this Court's holding in U.S. v. Olano, (supra). In terms of plain error:

1) There was error in the grand jury - the multiple due process violations and other misconduct;

2) The errors are "clear" based on the record created by the Declaration;

3) The errors affected Bercoon's substantial rights as the errors influenced the decision to indict, which affected Bercoon's freedom.

The analysis of the should be the same under FRCP 52(a) and 52(b). The difference is who bears the burden of proving prejudice, which is defined as "affecting substantial rights. U.S. v. Olano, at 734 (supra). As shown above, Bercoon has carried or satisfied the burden.

THE GRAND JURY CLAUSE AND SMJ

> The Fifth Amendment provides in relevant part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." Midland Asphalt v. U.S., 489 U.S. 794, 802 (1989).

The indictment is what gives a Federal Court jurisdiction to make a defendant answer or defend criminal charge(s) in a trial. Without an indictment from a grand jury, one has a constitutional right not to be tried.

> "That does indeed confer a right not to be tried... when there is no grand jury indictment." Midland Asphalt v. U.S., at 802 (supra).

In Midland, this Court covers a spectrum of grand jury issues that distinguish between an indictment that should be dismissed, yet did not give rise to a right not to be tried. Bank of Nova Scotia v. US, (supra) is an example where the indictment could possibly be dismissed, but the defendants did not have the right not to be tried. Even some constitutional violations may be deemed harmless under Chapman v California, standard.

"Only a defect so fundamental that it causes the grand jury no longer to be a grand jury, or the indictment no longer to be an indictment, gives rise to the constitutional right not to be tried." Midland Asphalt v. U.S. at 802 (supra).

The 12b2 Motion, if thoroughly reviewed, illustrates in detail how the Government created a narrative, based on false testimony and improper opinion testimony, that clearly presented probable cause. This Petition highlights only a fraction of the misconduct. The 11th Circuit's refusal to have an evidentiary hearing trivialized the important constitutional issues raised.

Costello v. U.S., 350 U.S. 359 (1956) has gained broad acceptance for the secrecy of grand jury operations and preventing the examination of indictments. However, Costello's focus is on the grand jury's operations. "If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. Costello v. U.S., at 363 (supra).

Bercoon is not questioning what the grand jury did. Bercoon is challenging the Government's conduct. False evidence is not incompetent, it is not evidence.

Had the Government, in an extreme example, threatened the grand jurors with harm unless they returned an indictment, clearly the indictment would not qualify as an indictment for purposes of the Grand Jury Clause. Bercoon believes his case is not to that extreme, but one that fails the Grand Jury Clause. Bercoon had a right not to be tried.

Bercoon is not looking to expand disclosure of grand jury proceedings or testimony. However, when disclosure is made and misconduct is evident, the Government must be held accountable, and, depending upon the violation, this Court must act when constitutional violations are ignored.

In Chief Justice Roberts' 2019 year-end report, he encourages his judicial colleagues to promote public confidence in the judiciary. If the Government conduct in Bercoon's grand jury continues to be ignored or supported by appellate courts, confidence in the judiciary is undermined. (See Exhibit D of 12b2 Motion for 2019 year-end report)

Criminal trials and indictments affect everyone from individuals to large corporations. This Court needs to act on this far-reaching constitutional issue.

CONCLUSION

This petition for a writ of certiorari should be granted.

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Respectfully submitted

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