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App. 1

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-2059

UNITED STATES OF AMERICA

v.

VICTOR GATES,

Appellant

(E.D. Pa. No. 2:17-cr-00564-001)

SUR PETITION FOR REHEARING

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

The petition for rehearing filed by Appellant in the above-captioned 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/Stephanos Bibas
Circuit Judge

Dated: October 18, 2022
Lmr/cc: All Counsel of Record

CLD-234

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. No. 22-2059

September 13, 2022

UNITED STATES OF AMERICA

v.

VICTOR GATES,
Appellant

(E.D. Pa. No. 2:17-cr-00564-001)

Present: AMBRO, SHWARTZ, and BIBAS, Circuit Judges

Submitted is Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1) in the above-captioned case.

Respectfully,

Clerk

ORDER

Appellant's request for a certificate of appealability is denied because he has not made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). For substantially the same reasons given by the District Court, jurists of reason would agree without debate that Appellant has not made an arguable showing that he was denied effective assistance of counsel. See Strickland v. Washington, 466 U.S. 668, 688, 694 (1984).

By the Court,

s/Stephanos Bibas
Circuit Judge

Dated: September 13, 2022
Lmr/cc: All Counsel of Record

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	**CRIMINAL ACTION NO. 17-564**
v.	
VICTOR GATES	

ORDER

AND NOW this 26th day of MAY 2022, upon careful and independent consideration of Victor Gates' motion to vacate, set aside, or correct a sentence under 28 U.S.C. § 2255 (Doc. No. 157), the United States' response in opposition (Doc. No. 163), and the Report and Recommendation of U.S. Magistrate Judge Richard A. Lloret, after consideration of Defendant's Objections thereto (ECF #186) it is **ORDERED** that

1. The Report and Recommendation of Magistrate Judge Richard A. Lloret is **APPROVED** and **ADOPTED**.

2. Mr. Gates' motion (Doc No. 163) is **DENIED** and **DISMISSED WITH PREJUDICE** by separate Judgment, filed contemporaneously with this Order. *See* Federal Rule of Civil Procedure 58(a); Rules Governing Section 2255 Proceedings for the United States District Courts, Rule 12.

3. No certificate of appealability shall issue under 28 U.S.C. § 2253(c)(1)(B) because "the applicant has [not] made a substantial showing of the denial of

a constitutional right[,]" under 28 U.S.C. § 2253(c)(2), since he has not demonstrated that "reasonable jurists" would find my "assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000); see United States v. Cepero, 224 F.3d 256, 262-63 (3d Cir. 2000), abrogated on other grounds by Gonzalez v. Thaler, 565 U.S. 134 (2012); and,

4. The Clerk of Court shall mark this file closed.

BY THE COURT:

/s/ Wendy Beetlestone

WENDY BEETLESTONE, J.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	
v.	:	CR. NO. 17-cr-00564-WB
VICTOR GATES	:	

JUDGMENT

In accordance with the Court's separate Order, filed contemporaneously with this Judgment, on this 26th day of MAY, 2022,

JUDGMENT IS ENTERED

DENYING AND DISMISSING WITH PREJUDICE Victor Gates' Motion to Vacate, Set Aside, or Correct a Sentence Under 28 U.S.C. § 2255 (Doc. No. 489).

BY THE COURT:

/s/ Wendy Beetlestone, J.
HON. WENDY BEETLESTONE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	
Respondent	:	
v.	:	
VICTOR GATES,	:	**No. 17-cr-00564-WB**
Petitioner	:	

REPORT AND RECOMMENDATION

RICHARD A. LLORET **April 27, 2021**
U.S. MAGISTRATE JUDGE

INTRODUCTION

A jury convicted Victor Gates, a former Philadelphia police officer, of honest services mail fraud conspiracy, in violation of 18 U.S.C. §§ 1341, 1346, and 1349 (Count 1); honest services mail fraud, in violation of Section 1341 and 1346 (Counts 2 through 15); and making false statements within federal jurisdiction, in violation of 18 U.S.C. § 1001 (Counts 16 and 17). Doc. No. 43 (signed verdict).

After an unsuccessful appeal, Mr. Gates filed a 101-page (including 56 pages of exhibits) motion to vacate his sentence under 28 U.S.C. § 2255. Doc. No. 157 ("Mot."). The case was referred to me for a Report and Recommendation. Doc. No. 159. The government responded to Mr. Gates' motion (Doc. No. 163) ("Resp.")

and Mr. Gates filed a 105-page reply ("Reply"). Doc. No. 167. I held a hearing and took evidence.

Mr. Gates makes eight claims, seven of which are that his trial attorney was constitutionally ineffective. He argues that trial counsel:

failed to call character witnesses – 46 of them – at trial (Mot. at 8[1], Reply at 42);

2) failed to make an opening statement (Mot at 13, Reply at 52);

3) did not call and prepare Mr. Gates as a witness at trial, or call witnesses suggested by Mr. Gates (Mot. at n, 17, Reply at 61);

4) did not properly disclose in discovery a defense exhibit used to cross-examine a government witness, which resulted in the exhibit being excluded from evidence (Mot at 31, Reply at 83);

5) did not disclose to Mr. Gates that trial counsel was an active philanthropic supporter of the Philadelphia Police Department (PPD) (Mot at 36, Reply at 95);

6) rendered cumulative ineffective assistance of counsel that resulted in a forfeiture judgment against Mr. Gates (Mot. at 38, Reply at 98); and

7) did not argue to the jury that Detective Patrick Pelosi, the recipient of Gates' bribe payments,

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[1] Page references to the motion refer to the pagination assigned by the ECF system.

did not himself make entries to the National Crime Information Center (NCIC) (Mot. at 39, Reply at 100).

8) In addition, Mr. Gates claims that the government failed to disclose evidence of a romantic relationship between a Federal Bureau of Investigation ("FBI") special agent and a PPD inspector who testified as a witness (Mot. at 34, Reply at 90).

Because none of Mr. Gates' claims warrant relief, I recommend that his motion be denied.

STATEMENT OF FACTS

Mr. Gates, a retired police officer, operated a business recovering stolen rental cars. When a rental car is reported stolen to the police, they enter the car's identity information in the National Crime Information Center (NCIC) database. Before a recovered rental ear can be rented out again by the rental-car company, the car must be deleted by the police from the NCIC database. *United States v. Gates*, 803 Fed. Appx. 640, 641-42 (3d Cir. 2020). A car reported stolen and placed into the NCIC database, once recovered, cannot be removed from the database until the PPD investigates, which includes a physical examination of the car. Tr. 6/4/18 (Doc. No. 51) at 59-60. The delay in deleting the car from NCIC costs the rental-car company lost income. Tr. 6/5/18 (Doc. No. 161)[2] at 10.

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[2] There are two trial transcripts dated 6/5/18 in the record, one found at Doc. No. 52, and one found at Doc. No. 161. They

For years Mr. Gates, a former police officer, bribed Detective Pelosi, a detective assigned to the police district encompassing the Philadelphia Airport and tasked with the responsibility of reporting stolen sirs to NCIC. Gates bribed Pelosi to release rental cars from NCIC before the cars were properly inspected by a police officer. Tr. 6/5/18 (Doc. No. 161) at 41-42, 55-60. While Mr. Gates was with the PPD, he trained Det. Pelosi. *Id.* at 51. Det. Pelosi cooperated with the government, entered a plea of guilty, and testified against Gates at trial. Gates paid Pelosi about $25,000 in bribes over the course of the fraud scheme. *Gates*, 803 Fed. Appx. at 642.

David Evans, a witness from Avis/Budget, testified that Mr. Gates would assist Avis in getting recovered cars removed from stolen status in NCIC. Tr. 6/5/18 (Doc. No. 161) at 11-12. Because of Mr. Gates' relationship with Pelosi, Avis' rental cars were removed from NCIC on an expedited basis upon Evans' request to Gates. *Id.* at 19-24. Pelosi rarely, if ever, physically examined the vehicles before removing them from NCIC. *Id.* at 36-37. Mr. Gates knew, as a former police officer, that this was a violation of PPD policy – "this don't fly," as he said in an email. *Id.* at 26, 27. Avis paid Mr. Gates over $700,000 during the scheme. *Id.* at 105.

Mr. Gates lied to the FBI agents who questioned him about the scheme. Gates denied employing Det.

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concern different witnesses. For clarity's sake I will include a reference to the different docket numbers when referring to the trial transcripts.

Pelosi and denied making any payments to him. Tr. 6/4/18 (Doc. No. 51) at 76-81. The FBI questioned Det. Pelosi at the same time as they questioned Mr. Gates, but at a separate place. Det. Pelosi lied at first, but then admitted the scheme and agreed to cooperate with the FBI. Tr. 6/5/18 (Doc. No. 161) at 60-71. After his interview with the PBI, Mr. Gates spoke with Det. Pelosi and learned that Pelosi had admitted to receiving payments. *Id.* at 67-68. Mr. Gates then called the FBI and admitted he had made payments, but lied again, telling the agent the payments were for physical work Det. Pelosi did recovering cars. Tr. 6/4/18 (Doc. No. 51) at 83-84.

LEGAL STANDARDS

Section 2255(b) of Title 28, United States Code, provides that "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." Vague and conclusory allegations may be disposed of without a hearing. *United States v. Thomas*, 221 F.3d 430, 437-38 (3d Cir. 2000) (citing to *United States v. Dawson*, 857 F.2d 923, 928 (3d Cir. 1988)). In deciding whether to hold a hearing, I must accept the truth of Mr. Gates' factual allegations unless they "are clearly frivolous on the basis of the existing record." *United States v. Tolliver*, 800 F.3d 138, 141 (3d Cir. 2015) (internal quotations and citations omitted).

Where there are factual disputes, I must hold an evidentiary hearing. *Id.* at 142.

Mr. Gates is barred from relitigating issues that have already been decided on direct appeal. *See Withrow v. Williams,* 507 U.S. 680, 720-21 (1993); *United States v. DeRewal*, 10 F.3d 100, 105 n.4 (3d Cir.1993). Issues that could have been raised, but were not, on direct appeal are procedurally defaulted and forfeited unless Mr. Gates shows cause for the default and actual prejudice. *DeRewal*, 10 F.3d at 103 (citing to *United States v. Frady*, 456 U.S. 152, 167 (1982)). Mr. Gates may raise claims of ineffective assistance of counsel because such claims are ordinarily not adjudicated on direct appeal. *Id.* at 103-04.

To sustain a claim of ineffective assistance of counsel, Mr. Gates "must show that counsel's performance fell 'outside the wide range of professionally competent assistance' and that his performance caused the defendant prejudice, *i.e.*, deprived the defendant of 'a trial whose result is reliable?" *Id.* at 104 (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 690 (1984)). Where Mr. Gates alleges counsel was ineffective for failing to raise an underlying claim, but the underlying claim is meritless, "counsel cannot be deemed ineffective for failing to raise [the] meritless claim." *Ross v. District Attorney of Allegheny*, 672 F.3d 198, 211 n.9 (3d Cir. 2012) (quoting *Werts v. Vaughn*, 228 F.3d 178, 202 (3d Cir. 2000)); *see also Lafler v. Cooper*, 566 U.S. 156, 167 (2012) (failure to raise a meritless objection, or present perjured testimony, cannot be the basis for an ineffective assistance of counsel claim).

DISCUSSION

1. Trial counsel's decision not to call character witnesses was an appropriate strategic decision.

Mr. Gates alleges that he "had numerous character witnesses who were available to testify as to his good reputation in the community as a peaceful and law-abiding person and as a truthful and honest person." Reply, at 42. He contends that trial counsel James Binns was ineffective for not calling character witnesses. Mot. at 11. Gates claims that Mr. Binns had "no good tactical or strategic reason not to do so." *Id.* at 10. I disagree.

Gates argues that his counsel's failure precluded the jury from learning that Gates was a 30-year veteran of the PPD, as well as specific instances of good conduct, including commendations and decorations for alleged heroism. Mot. at 3. Specific instances of good conduct are generally not admissible. Fed. R. Evid. 404(a) and 405(a) permit character testimony only in limited circumstances, and then only by reputation or opinion testimony. Counsel was not ineffective for failing to circumvent the rules of evidence.

Mr. Gates likely could have put on at least some character witnesses to testify that he had a law-abiding and truthful character. The rules allow a defendant in a criminal case to "offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it." Fed. R. Evid. 404(a)(2)(A). A character trait for being law-abiding is

always pertinent, in a criminal prosecution. *In re Sealed Case*, 352 F.3d 409, 412 (D.C. Cir. 2003); *United States v. Hewitt*, 634 F.2d 277, 279 (5th Cir. 1981). In a fraud case, a character for truthfulness is pertinent. *In re Sealed Case*, 352 F.3d at 412. If counsel had chosen to do so, he could have put on some witnesses to testify to Mr. Gates' reputation in the community for being law abiding and truthful. He made a strategic decision not to do so. Tr. 5/4/2021 at 7. He explained that he wanted the cross-examination of the government's cooperating witness to be the focus for the jury, undistracted by defense character witnesses. *Id.* He also explained that in his 57-years of experience as a criminal defense attorney, *id.* at 8, the testimony of character witnesses "in large part was ineffective." *Id.* at 7-8.

A reasonable strategic decision by counsel warrants significant deference under *Strickland*. 466 U.S. at 681. I find counsel's strategic decision reasonable, especially because of the dubious benefit of reputation or opinion testimony about defendant's character, unconnected to the facts of Mr. Gates' conduct in this case. Long years of trial experience teach that character testimony, usually presented by witnesses without any knowledge of the facts of the case, is rarely decisive in a federal criminal case.

Mr. Gates' lies made character witnesses a particularly bad choice in this case. The prosecutor could and would have asked of a witness who testified to a favorable opinion of Mr. Gates' law-abiding character and truthfulness whether that opinion would change if the witness knew that Mr. Gates lied repeatedly to

criminal investigators. *See United States v. Kellogg*, 510 F.3d 188, 196 (3d Cir. 2007) (permitting "guilt assuming" cross examination question of an opinion character witness), This is the kind of question a cross-examiner dreams of asking. There is no good answer. Whether the witness said "yes" or "no," any benefit from the witness' direct testimony would have turned to ashes on cross.

The same effect would have been achieved by asking a reputation witness if the community's definition of "law-abiding" or "truthful" character included the willingness to lie to authorities during an investigation.[3]

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[3] This is not a "guilt assuming" hypothetical. *Dicta* in *Kellogg* suggests that a "guilt assuming" hypothetical is not permitted of a reputation character witness, in contrast to an opinion character witness. 510 F.3d at 195-96. "Because a reputation character witness, by definition, can only provide testimony about the defendant's reputation in the community, a person testifying regarding the defendant's reputation at the time of the crime can only speculate about how information regarding the crime would affect the community's assessment of the defendant, and a witness's speculation in that regard is of no probative value at all." *Id.* But a question that asks the content of the relevant community's definition of "law abiding" character is appropriate of a witness who purports to be familiar with the defendant's reputation in the community for being law abiding. The question asks the witness what the phrase "law abiding" means, in the relevant community. If the witness answers that lying during a criminal investigation is not part of the meaning of "law abiding" in the community, the jury is entitled to weigh the reputation evidence against the evidence of what happened in the case. If the witness cannot answer the question, the jury is justified in ignoring the testimony. If the witness answers that the meaning of "law abiding" in the relevant community condones and includes lying

Jurors reasonably assume that counsel will put on the best witnesses available during a trial. Putting on a witness who does not advance your case carries the considerable risk of convincing a jury you do not have much of a case to advance. This is especially true when all you have to offer are character witnesses, who under the rules will not be testifying about the facts of the case, but about the defendant's character, and that by reputation or opinion only. It does no good to recite the familiar legal standard that character witnesses alone can suffice to create a reasonable doubt in *a* jury's mind. Reply, at 44-45. The existence of a legally recognized possibility does nothing to answer the question, in a particular case, whether the character witnesses stand much of a likelihood of swaying the jury.

Contrary to Mr. Gates' categorical assertion, *Id.* ("Where can be no objective reason not to call character witnesses in a case of this nature"), there are cases in which calling a character witness is a bad idea, and this was one of them. I find that the proffered character witnesses would not have swayed the jury. Not only was the government's evidence of defendant's guilt strong, Mr. Gates compounded the effect of the government's evidence by lying to the FBI about his conduct. Those lies have consequences.

Whatever the character witnesses might have said about defendant's character, Gates – a long time police officer – had indisputably lied about his conduct during

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during a criminal investigation, the reputation evidence is unlikely to help the defendant.

an FBI investigation. A material lie permits an inference of specific intent to defraud. *See United States v. Maxwell*, 579 F.3d 1282, 1301-1302 (11th Cir. 2009) (inferring intent to defraud from false statements); *United States v. Stewart*, 185 F.3d 112, 126 (3d Cir. 1999) ("The government can meet its burden of proving fraudulent intent not only by showing that a defendant knowingly lied but also by proving beyond a reasonable doubt that he acted with deliberate disregard of whether the statements were true or false or with a conscious purpose to avoid learning the truth."); *United States v. Boyer*, 694 F.2d 58, 59 (3d Cir. 1982) ("it is proper to charge that the specific intent to deceive maybe found from a material misstatement of fact made with reckless disregard of the facts.").

A material lie also permits an inference of consciousness of guilt. *United States v. Hart*, 273 F.3d 363, 373-74 (3d Cir. 2001). In this case the inference was all but unavoidable. A jury might believe that an average Joe lied because he was frightened of the FBI and did not understand what was at stake, or what was being asked. An experienced police officer such as Mr. Gates could not expect a jury to believe anything except that he knew he was guilty and was trying to hide it by lying. His lies were damning evidence of guilt, and damning evidence of his character for untruthfulness.

Not calling character witnesses was a reasonable strategic decision. It was neither deficient lawyering, nor did it cause Mr. Gates any prejudice.

2. Counsel's choice not to make an opening statement did not prejudice Mr. Gates

Mr. Binns made a strategic decision not to make an opening statement at the outset of the trial, but to reserve opening until after the government rested. He explained his decision in some detail. Tr. 5/4/21 at 8-10, 67-68. The law permits a defendant to make his opening statement either immediately after the government's opening statement or immediately before the defense puts on its case. *See Jackson v. Calderon*, 1997 WL 855516, at *32-33 (C.D. Cal. 1997); *United States v. Zareck*, 2021 WL 4391393, at *25 (W.D. Pa. 2021); Third Circuit Model Jury Instructions, Criminal, § 1.07 ("The defendant's lawyer may make an opening statement after the prosecutor's opening statement or the defendant may postpone the making of an opening statement until after the government finishes presenting its evidence. The defendant is not required to make an opening statement."). Mr. Binns' decision to make an opening after the close of the government's evidence was well within his discretion and does not constitute ineffective assistance of counsel *Jackson*, 1997 WL 855516, at *32-33.

Mr. Binns sought to make opening argument at the end of the government's case, even though he decided not to put on any evidence. Tr. 5/4/21 at 9-10. The court precluded that. *Id.* at 9. Mr. Binns then chose to proceed with closing argument, without putting on any witnesses, while the memory of the cooperating witness' cross-examination was still fresh in the jury's mind. *Id.* at 10, 40. He was encouraged at how well the

cross-examination had gone; he believed the government's case had been "shattered." *Id.* at 10. I credit his testimony. His strategic decision to dispense with calling character witnesses, and "opening," was not unreasonable.

Trial strategy is not graven in stone. It must be fluid and responsive to the twists and turns that are part of most trials. At the outset of the trial Mr. Binns wanted to wait and see how the government's case went in before opening, a tactic that had been "very effective" for him in the past. *Id.* at 9. Confronted with what he perceived to be a significant benefit in the form of a poor performance by the government's cooperating witness, Mr. Binns was also confronted with a dilemma, in the form of an adverse ruling by the trial judge. He could either put on witnesses, and by this device get the benefit of an opening statement after the government rested, or he could dispense with putting on witnesses and plunge into closing argument immediately on the heels of a helpful cross-examination. He chose the latter. This was not an unreasonable decision, given the downside to putting on character witnesses in this case, which I have already explained, and the downside to other witnesses suggested by Mr. Gates. *See* Part 3, below.

The calamity of offering up witnesses to be cross-examined with unanswerable questions highlighting Mr. Gates' conduct would also have distracted the jury from the cross-examination of the government's cooperator. Instead of being fresh from having watched the cooperator get roughed up on cross, the jury would

have last seen a defense witness, or two, or 46, get "shattered," to paraphrase Mr. Binns. And to have Mr. Gates' lies remorselessly trotted out, witness by witness, would have been the opposite of a good trial strategy.

I reject the notion that Mr. Binns should have put on a character witness for the sake of whatever ephemeral benefit he would have gained by "opening" right before the prosecutor began his first closing argument. The downside of calling even one of the problematic witnesses suggested by Mr. Gates would have undone any extra juice Mr. Binns could squeeze from closing twice. Criminal defense is chock-full of hard choices. Mr. Binns made a reasonable choice, under difficult circumstances created by his client's fraud and compounding lies. Mr. Binns' choice was not deficient lawyering, and it certainly did not prejudice Mr. Gates.

I recommend this claim be denied.

3. Not calling witnesses at trial was not ineffective assistance of counsel.

Mr. Gates argues that his attorney was ineffective for not properly preparing him to testify and putting him on the stand. Reply, at 61. He also argues that his attorney was ineffective for not putting on witnesses suggested by Mr. Gates. *Id.* This argument assumes that Mr. Binns should have called Mr. Gates, and others, as witnesses. It also assumes that Mr. Binns kept Mr. Gates from testifying. Finally, it assumes the other

witnesses would have been helpful. None of these assumptions are warranted.

A. It was reasonable to recommend that Mr. Gates not testify.

Mr. Binns testified that Mr. Gates made the decision not to testify at trial. Tr. 5/4/21 at it Mr. Binns recommended against Mr. Gates testimony, "but it was up to him." *Id.* Mr. Binns explained that Mr. Gates had lied to the FBI during the investigation, and that would be "problematic" on cross-examination. *Id.* at 11, 12-13. Mr. Gates told the judge it was his decision during a colloquy at trial. *Id.* at 13; Tr. 6/5/18 (Doc. No. 52) at 43-45. Gates told the district judge he was satisfied with counsel's representation. *Id.* at 45.

I find Mr. Binns' testimony credible because it makes sense. Mr. Gates' habeas theory boils down to a contention that bribing a police officer is not illegal because "in all the years since 1968, the police department did not object to Avis rewarding officers who recovered stolen cars." Pet. at 17-18. The unanswerable questions for Mr. Gates on cross-examination would have been why he lied to the FBI about having a relationship with Detective Pelosi, and making payments to Detective Pelosi, if he believed the payments from Avis were legal. There are no good answers to these questions.

Mr. Gates also assumes that a jury would have found his testimony, and that of Mr. Cochetti, about a "tacit agreement" between Avis and the police

department permitting payment of an "award" to a police officer who recovered stolen cars for Avis, convincing. Mr. Binns thought that trying to make a distinction between a "good note" (a payment to a police officer for doing his job) versus a "bad note," pressed on him by Mr. Cochetti, was a terrible idea. Tr. 5/4/21 at 56. It was tantamount to a defense that "everybody does this," and Mr. Binns "was not going to present that to a jury." *Id.* at 31, 56. Mr. Binns "made a professional decision to disregard" Mr. Cochetti. *Id.* at 56. I agree with Mr. Binns' evaluation of the "good note/bad note" distinction.

Mr. Binns' explanation of why he recommended against Mr. Gates' testimony is reasonable. He did not want his client, or Mr. Cochetti, to take the stand and get pummeled during cross examination. Mr. Gates took Mr. Binns' advice, which was a good decision.

I further find Mr. Mims' testimony credible because it went unrebutted by Mr. Gates, who opted not to testify in this habeas proceeding. Mr. Gates initially requested an evidentiary hearing, seeking to put on many witnesses. Doc. No. 158. I held a hearing on May 4, 2021, at which Mr. Binns testified. Doc. No. 176 (transcript). I received further briefing from the parties about whether additional witnesses were necessary. Doc. No. 175 (Order); 180 (Petitioner's Motion); 181 (Government's Response). concluded that I did not need to hear from Mr. Gates' many character witnesses, for reasons I have explained. I concluded I did not need to take testimony from Mr. Cochetti, whose affidavit was enough to convince me that putting him

on as a witness at trial would have been a disaster for Mr. Gates. *See* Doc. No. 182. I also explained that Mr. Gates violated my procedural orders concerning witnesses, including Mr. Cochetti, and for that additional reason I precluded the witnesses from testifying. *Id.* I scheduled a hearing on October 6, 2021, to take Mr. Gates' testimony. Counsel for Mr. Gates then filed a notice seeking to have his client excused from testifying, which I granted. Doc. No. 183 (motion); 184 (Order granting motion and cancelling evidentiary hearing).

The sum of all this is that Mr. Gates elected not to testify in this habeas case. The irony of Mr. Gates' refusal to testify in his habeas proceeding, while complaining that his attorney prevented him from testifying at his criminal trial, does not escape me. Mr. Gates' free, counseled decision not to testify leaves me with no reason to discredit Mr. Binns' testimony.

Habeas is a civil remedy, and a petitioner bears the burden of proving that there was a Federal Constitutional violation. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (civil remedy); *Gains v. Brierley*, 464 F.2d 947, 949 (3d Cir. 1972) (burden of proof on petitioner). Petitioner may choose not to testify, but his failure to testify in a civil case permits an adverse inference to be drawn. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) ("the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them"); *United States v. Stelmokas*, 100 F.3d 302, 310-11 (3d Cir. 1996) (adverse inference in deportation proceedings); *Bean v. Calderon*, 166 F.R.D.

452, 454 (E.D. Cal. 1996) (adverse inference in habeas proceeding).

Here I need not draw a conclusive adverse inference. I need not, for instance, find that Mr. Gates avoided testifying because he is conscious that his story is false. I simply credit Mr. Binns and draw inferences favorable to the government from Mr. Binns' testimony. I also discredit anything said by Mr. Gates in his petition, because he refused to testify under oath and submit to cross-examination. Mr. Gates' "silence given no more evidentiary value than [is] warranted by the facts surrounding his case" that is, "a realistic reflection of the evidentiary significance of the choice to remain silent." *Baxter*, 425 U.S. at 318.

I found Mr. Binns' testimony credible. Mr. Binns was plain spoken, obviously experienced, and his testimony about why he recommended against Mr. Gates taking the witness stand made sense. I had no reason to doubt his testimony. I therefore credit Mr. Binns' explanation of why he recommended that Mr. Gates not testify at trial, and I credit his testimony that Mr. Gates knowingly and freely chose not to testify at trial. Mr. Binns' explanation of what happened is consistent with Mr. Gates' colloquy with the district judge at trial. Tr. 6/5/18 (Doc. No. 52) at 43-45.

I also find that Mr. Gates' decision not to testify at trial was a reasonable one, and that had he testified at trial he would not have helped his cause but hurt it. I

find that the absence of his testimony did not prejudice Mr. Gates.

I recommend that this claim be denied.

B. It was reasonable not to call Mr. Cochetti to testify.

The "good note/bad note" distinction advanced by Mr. Gates purportedly would have proven, through Mr. Cochetti, that in 1968 an Avis employee stated to a police inspector that she intended to "award twenty-five dollars to any police officer would [sic] help to retrieve stolen ears." Pet. at 20. In response, Mr. Cochetti said, the Inspector stated "that he could not officially approve such an award, but that he could not tell [the Avis representative] how to run her business. Thus, a tacit agreement was reached that a reward for helping recover rental autos, which had been established in 1968, was continued through 2015." *Id.* at 20-21. I ruled I did not need to hear from Mr. Cochetti, after reviewing his affidavit. Doc. No. 181 (order); *see* Doc 180-3 (Cochetti affidavit). I did not need to see and hear Mr. Cochetti from the stand to know this story was doomed to fail. Some things are obvious on their face.

First, the conversation was presumptively hearsay and inadmissible. Mr. Gates has not explained how he would overcome a hearsay objection. Second, even if the conversation were admitted into evidence, I do not agree that a jury would have found this testimony compelling. To the contrary, I find that a reasonable jury

would have found this story quite appalling, especially if true. The notion has come up before, in federal corruption trials involving Philadelphia government officials, that "tips" are somehow not bribes. *U.S. v. Urban*, 404 F.3d 754, 759 (3d Cir. 2005). The claim that an "award" system was in place among the police for 50 years is yet another iteration of this profoundly corrupt notion. It is not a convincing argument to reasonable jurors, who seem to understand that government officials, such as police officers, cannot accept "tips" or "awards" from private citizens for doing their jobs. In fact, experience persuades me that the ordinary person in a jury box finds the suggestion outlandish and offensive.

It seems worth explaining why, at the risk of stating the obvious. Public servants have a duty to provide government services fairly and equitably to all citizens. The payment of bribes, or "tips" or "awards," as they are euphemistically called by wayward government officials, is antithetical to this duty. Jurors get this A "tip" is a powerful motive to treat the tipster more favorably than the non-tipping citizen. That is why tips are commonly permitted in ordinary commerce, when there is no duty to treat all customers equally. That is why "tips" are called "bribes" when they are paid to public servants, and why they are widely outlawed. The fact that Mr. Gates and Mr. Cochetti do not see things this way does not make their story a good defense strategy, nor does it make Mr. Binns ineffective for rejecting their strategy. Mr. Gates' and Mr. Cochetti's steadfast advocacy of the "good

note/bad note" distinction[4] would have made them terrible witnesses under cross-examination.

I find that the decision not to call Mr. Cochetti was reasonable, and did not prejudice Mr. Gates.

C. Other witnesses recommended by Mr. Gates would have prejudiced him.

As for other witnesses proposed by Mr. Gates, I find credible Mr. Binns' testimony that Mr. Campione "didn't know anything about the case." Tr. 5/4/21 at 48. Mr. Campione had no knowledge of the payments by Gates to Pelosi. *Id.* Neither did Joyce Fineberg, another witness suggested by Mr. Gates. *Id.* at 49. These and other witnesses were rejected by Mr. Binns as unhelpful because they would talk about details of how the police released cars from stolen status but were unaware of the payments made between Gates and Pelosi. *Id.* at 49-55. What they had to say was "irrelevant," in Mr. Binns' words. *Id.* at 53.

I credit Mr. Binns' assessment. I find that the witnesses would not have helped Mr. Gates. Talking about

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[4] Mr. Cochetti attaches to his affidavit an excerpt from The Pennsylvania Crime Commission's March, 1974 "Report on Police Corruption and the Quality of Law Enforcement in Philadelphia." Doc. No. 180-3 at 27-29. He does so as support for his contention that the "good note/bad note" distinction was a viable defense that he explained to Mr. Binns. *Id.* at 4. This is mystifying, and evidence of just how problematic Mr. Cochetti would have been as a witness. The Report clearly regards the notion of a "good note" as evidence of a culture of corruption whereby officers "rationalize their own misconducts." *Id.* at 29.

exactly how cars were taken out of stolen status would not have addressed why Gates was paying Pelosi to do it and lying about the payments. The absence of these witnesses did not amount to deficient lawyering by Mr. Binns.

Other witnesses called to establish that taking "awards" from Avis for recovering stolen cars was a time-honored custom in the PPD (Reply at 61) would have been problematic, for the same reasons I explained when assessing Mr. Cochetti as a witness. I credit Mr. Binns' opinion that such testimony would have been unhelpful to the defense. Tr. 5/4/21 at 72-73. Mr. Gates has not demonstrated that the decision to avoid having these witnesses testify was deficient lawyering, or that it prejudiced him.

I recommend that this claim be denied.

4. A defense exhibit used to cross-examine a government witness, which was not disclosed in discovery, was inadmissible and would have been excluded even if it had been properly disclosed.

Mr. Gates complains that Mr. Binns did not properly turn over in discovery a defense exhibit used to cross-examine a government witness, which resulted in the exhibit being excluded from evidence. Mot. at 31; Reply at 83. It is true that Mr. Binns did not turn over the defense exhibit in discovery. It is not true that the failure to turn over the document in discovery resulted in it being excluded from evidence. Neither is

it true that the failure to introduce the document into evidence so prejudiced Mr. Gates that relief should be granted under *Strickland.*

The document in question was purportedly an authorization for outside employment of Victor Gates, dated August 3, 1993. Tr. 6/4/18 (Doc. No. 51) at go. Mr. Binns used the document to attempt to impeach Officer Chester O'Neill, who on direct examination testified he had searched PPD records and had not found any such form for either Gates or Pelosi. *Id.* at 87-90. The government pointed out that Mr. Binns did not turn over the document in reciprocal discovery. *Id.* at 90. Mr. Gates complains that "as a result, the defense could not present the form. This was critical testimony . . . " Mot. at 31.

Mr. Gates does not explain why this testimony was "critical." He asserts that Mr. Binns was "ineffective for not providing this in advance to the Government so it could be presented to the jury." *Id.* The court did not rule on the government's motion to exclude the document. Tr. 6/4/18 (Doc. No. 51) at 92. Mr. Binns apparently elected not to pursue the introduction of the document in his case-in-chief.

Mr. Gates' argument is meritless. If the document was to be introduced as a defense exhibit in the defendant's case-in-chief, it had to be turned over in pre-trial discovery under Fed. R. Crim. Pro. 16(b)(i)(A). But satisfying Fed. R. Crim. Pro. 16 was the least of Mr. Gates' problems in getting this document introduced. The more fundamental problems, unaddressed by Mr. Gates in

his briefing, were how to authenticate the document under Fed. R. Evid. 901 and how to establish the foundation of a hearsay exception under Fed. R. Evid. 801-804.

Fed. R. Evid. 901(a) requires that the party Offering a document must introduce evidence "sufficient to support a finding that the item is what the proponent claims it is." Officer O'Neill did not and would not establish the foundation for authentication. Tr. 6/4/18 at 87. Instead, he cast doubt on the authenticity of the document. *Id.* at 89. Mr. Gates chose not to testify, eliminating the most logical and straightforward way of authenticating the document as part of defendant's case. In that sense, Mr. Gates' complaint about the failure to introduce the document is swallowed up by his decision not to testify at trial, which was reasonable and, most importantly, his own decision. Mr. Gates does not suggest how else he could have authenticated the document, besides testifying himself. My review of Fed. R. Evid. 901-902 does not suggest any likely alternative methods.

Nor does Mr. Gates demonstrate how the document would have avoided the ban on hearsay under Fed. R. Evid. 802, even if it could be authenticated. The document was an out-of-court statement being offered for its truth. It was hearsay. Fed. R. Evid. 801(a)-(c). The document did not qualify under the definitional exemptions listed in Fed. R. Evid. 801(d). Mr. Gates does not explain whose testimony would have satisfied the demanding foundations for admitting hearsay under the most likely exceptions, Fed. Evid. 803(6) (business

records) and 803(8) (public records). In short, Mr. Gates has failed to demonstrate how he would have overcome the barriers to admissibility posed by the authentication and hearsay rules, given his own decision not to testify.

Even if Mr. Gates were somehow to have produced a witness who could satisfy Fed. R. Evid. 901 and 801-803, the document had little, if any, probative value, and would likely have been excluded under Fed. R. Evid. 403. After all, this was a case about Mr. Gates bribing Mr. Pelosi during the period 2008-2015. Doc. No. 1, at 3, ¶ 10. Whether Mr. Gates had permission to work outside his PPD duties in 1993 had little – if anything – to do with whether Gates was allowed to pay Pelosi in 2015. Allowing a trial within a trial on whether Mr. Gates was permitted to do outside work in 1993, and the scope of that work, would have qualified as "confusing the issues" and "wasting time," under Fed. R. Evid. 403, and those dangers would have substantially outweighed whatever minimal probative value the document had to the case.

Finally, not introducing the document as part of defendant's case did not prejudice the defendant. To show prejudice, Mr. Gates "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome? *Strickland*, 466 U.S. at 694. The failure to introduce the document in Mr. Gates' case does not undermine my

confidence in the outcome. A reasonable jury would not have given the document much, if any, weight.

5. Mr. Gates knew that trial counsel was a philanthropic supporter of the PPD, and that support did not compromise counsel's effectiveness or prejudice Mr. Gates.

Mr. Gates complains that Mr. Binns did not disclose to him that Mr. Binns was an active philanthropic supporter of the PPD, and that this alleged conflict of interest prejudiced Mr. Gates. Mot. at 36, Reply at 95. 1 find that he has not met his burden of proof as to either of the two *Strickland* prongs.

Mr. Gates' election not to testify in this habeas proceeding leaves me with no reason to discredit Mr. Binns' testimony, and with a sound reason to disregard the allegations in Mr. Gates' petition. I find, based on Mr. Binns' testimony, that Mr. Gates knew of Mr. Binns' philanthropic support for the PPD. Tr. 5/4/21 at 15-19, 65-66. I find that the issue was discussed, *id.* at 19, and that Mr. Binns' charitable activities were fully disclosed to Mr. Gates. *Id.* at 65-66. Mr. Gates has not pointed to any actual conflict, in the form of representation of the PPD or witnesses called by the government. "[T]he possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980).

Mr. Binns denied any such conflict. *Id.* at 15-19, 65-66. I credit Mr. Binns' testimony that he did not forego questioning of police witnesses to avoid embarrassing them. *E.g.*, *id.* at 20. I find that the Mr. Gates has not borne his burden to show there was a conflict, defective lawyering, and prejudice, under *Strickland.* 466 U.S. at 694.

I recommend denying this claim as meritless.

6. There was no cumulative ineffective assistance of counsel that resulted in a forfeiture judgment against Mr. Gates.

Mr. Gates alleges that cumulative ineffective assistance of counsel resulted in the entry of a forfeiture judgment against Mr. Gates. Mot. at 38, Reply at 98.

Cumulative error is a doctrine that permits a court to aggregate two or more individually harmless errors and evaluate whether the errors, taken together, had a substantial and injurious effect on the outcome of the proceeding. *Albrecht v. Horn*, 485 F.3d 103, 139 (3d Cir. 2007). The application of cumulative error analysis in the context of a Sixth Amendment ineffectiveness of counsel claim is "murky." *Williams v. Superintendent, SCI Greene*, 2012 WL 6057929, at *1-2 (E.D. Pa. 2012). However murky the legal standard, Mr. Gates does not meet it.

For there to be cumulative error, there must be errors to accumulate. As I have not found any ineffective assistance of counsel by Mr. Binns, I do not find that

there is cumulative ineffective assistance of counsel. I also find that there is no reasonable probability that, but for counsel's actions, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. Given the conviction, the forfeiture was properly entered.

I recommend denying this claim.

7. Mr. Rims was not ineffective for failing to argue that neither Mr. Gates nor Mr. Pelosi made false entries in the NCIC.

Mr. Gates complains that Mr. Binns was ineffective for failing to argue that there was insufficient evidence that Pelosi or Gates "did anything with NCIC other than going through the normal procedures of removing stolen vehicles by notifying PCIC." Mot. at 39. Mr. Gates acknowledges that the charges in this case involved mail fraud, not the making of false entries in the NCIC. Reply at 100. He nevertheless contends that Mr. Binns should have argued that Pelosi and Gates, themselves, did not make entries in the NCIC. *Id.* at 100-101. Mr. Gates does not cite to any case law suggesting that this would be a defense to the charges in the indictment. *Id.* That's because it's not. This is the type of conclusory and unsupported allegation that should be dismissed without a hearing under Rule 4(b) of the Rules Governing Section 2255 Proceedings ("2255 Rules"). *Thomas*, 221 F.3d at 437-38.

The argument is not only undeveloped. It is meritless on its face. In his first interview with the FBI on September 11, 2015, Mr. Gates explained that

> GATES worked with PELOSI ten years ago, but currently deals with him when rental vehicles are stolen from car rental companies in southwest Philadelphia. When that occurs, GATES contacts PELOSI and provides him with paperwork so PELOSI can enter the stolen vehicles into NCIC.

Doc. No. 169-2. Gates understood that Pelosi, as a police Detective, had access to NCIC that Gates, as a layperson, did not. Whether Pelosi typed information directly into NCIC or gave the information to someone else to type is immaterial. Mr. Gates' claim is meritless. Counsel cannot be ineffective for failing to raise a meritless claim. *Ross*, 672 F.3d at 211 n.9 (quoting *Werts*, 228 F.3d at 202).

I recommend this claim be denied as conclusory, under 2255 Rule 4(b), and as meritless.

8. A relationship between a Federal Bureau of Investigation ("FBI") special agent and a Philadelphia Police Department inspector who testified as a witness, if it existed at the time of trial, was not material.

Mr. Gates claims the government violated *Brady v. Maryland*, 373 U.S. 83 (1963) by not disclosing a romantic affair between a police witness and the FBI case agent. Mot. at 34; Reply at go. Defendant learned

of the ostensible affair after trial. *Id.* at 92. The government asserts that the affair began after the trial was over. Resp. at 33. The government also argues the affair is immaterial. *Id.* I find that Mr. Gates has not borne his burden of demonstrating that the affair existed before or during trial, and that the government suppressed its disclosure. I further find that the alleged affair is immaterial.

I must address a procedural question before resolving the claim. The government argues that this claim, though cloaked as a 2255 motion, should have been brought as a motion for new trial, based on newly discovered evidence, under Fed. R. Crim. Pro. 33. Resp. at 32-33. I disagree. "A defendant whose argument is not that newly discovered evidence supports a claim of innocence, but instead that he has new evidence of a constitutional violation or other ground of collateral attack, is making a motion under § 2255 (or § 2254) no matter what caption he puts on the document." *United States. v. Evans*, 224 F.3d 670, 674 (7th Cir. 2000). Mr. Gates does not make a claim of actual innocence as part of his claim, Pet. at 34, so the claim does not qualify for treatment under Rule 33. *Evans*, 224 F.3d at 674. Neither does Mr. Gates claim that Mr. Binns was ineffective for failing to uncover the supposed romance, so this is not a Sixth Amendment claim of ineffective assistance of counsel. Pet. at 34; Reply at 93. Mr. Gates merely claims that the government failed to disclose the supposed romantic liaison to the defense. *Id.* This is a claim that the government violated *Brady.*

The government has an affirmative duty to disclose *Brady* evidence known to the government, which may include evidence known only to police. *Dennis v. Secretary, Pennsylvania Department of Corrections*, 834 F.3d 263, 284 (3d Cir. 2016) (citing *Strickler v. Greene*, 527 U.S. 263, 280 (1999) and *Kyles v. Whitley*, 514 U.S. 419, 438 (1995)). Evidence which must be disclosed includes evidence that may materially affect the "credibility of a crucial prosecution witness." *Id.* (quoting *United States v. Starusko*, 729 F.2d 256, 260 (3d Cir. 1984) (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972))). To prove a *Brady* violation, Gates must show the evidence was (1) exculpatory or impeaching; (2) suppressed by government, either willfully or inadvertently; and (3) material – that is, the suppression resulted in prejudice. *Dennis*, 834 F.3d at 284-85. Materiality means there is a reasonable probability of a different result. *Id.* at 285 (citing *Kyles*, 514 U.S. at 434). A reasonable probability is one that undermines confidence in the outcome of the trial. *Id.*

Mr. Gates has alleged but not shown that the romantic affair started during or before his trial. Pet at 34. He says "[i]t is believed that they started at some point a romantic relationship." *Id.* Mr. Gates relies on a vague allegation by Mr. Cochetti that he heard from another police officer. – whose name is not disclosed – that he saw the FBI agent and the police inspector "together" under unspecified circumstances before trial. Reply at 94. There is no elaboration of any specifics in Mr. Cochetti's affidavit, submitted in response to my order. *See* Doc. No. 180-3, 1-14. That is not enough to

warrant an evidentiary hearing on the subject. Vague and unsubstantiated hearsay allegations from an undisclosed third party do not satisfy the requirement of my order that Mr. Gates produce affidavits from witnesses or an explanation why an affidavit is not forthcoming and a proffer of the expected testimony. Doc. No. 175. Nor do vague and unsubstantiated allegations warrant a hearing in a 2255 case. 2255 Rule 4(b); *Thomas*, 221 F.3d at 437-38. The government asserts that the relationship began after trial. Resp. at 33. I find that Mr. Gates has failed to bear his burden to demonstrate that the government suppressed impeaching information before or during trial.

I do not need to resolve a factual dispute about when the relationship began for another reason. I find that even if the relationship began before or during Mr. Gates' trial, its disclosure would not be material. It would not undermine confidence in the outcome of the trial. Mr. Gates cites to no caselaw that suggests otherwise.

The police inspector's testimony amounted to an authentication and explication of the PPD's written policy, which was clear. Tr. 6/4/18 (Doc. No. 51) at 35-60. If Mr. Gates were able to substantiate that a romantic relationship existed between the police inspector and FBI agent before or during trial, I find that it would not have undermined the fact or impact of the written PPD policy. The policy was not created by the testifying police inspector and the inspector was not the only witness available to the government to authenticate and testify to the policy. Whatever "bias"

could be shown would not change the language or reality of the PPD policy, which prohibited Gates' payments to Pelosi and prohibited Pelosi from releasing cars in stolen status without ensuring they were physically inspected. The existence of a written PPD policy means that bias allegations against the witness who acknowledged the text of the written policy from the stand are not material in the sense required under *Dennis*. There is no reasonable probability – one that undermines confidence in the outcome – of a different trial result, had the supposed impeaching information been disclosed to the jury. *See Dennis*, 834 F.3d at 284-85.

I recommend this claim be denied.

RECOMMENDATION

Based upon the discussion above, I respectfully recommend that Mr. Gates' petition be dismissed with prejudice. I recommend that no certificate of appealability issue because "the applicant has [not] made a substantial showing of the denial of a constitutional right[,]" under 28 U.S.C. § 2253(e)(2), because he has not demonstrated that "reasonable jurists" would find my "assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see United States v. Cepero*, 224 F.3d 256, 262-63 (3d Cir. 2000), *abrogated on other grounds by Gonzalez v. Thaler*, 565 U.S. 134 (2012).

Parties may object to this report and recommendation under 28 U.S.C. § 636(b)(1)(B) and Local Rule of

Civil Procedure 72.1 within fourteen (14) days after being served with the report and recommendation. An objecting party shall file and serve written objections that specifically identify the portions of the report or recommendations to which objection is made and explain the basis for the objections. Failure to file timely objections is likely to constitute waiver of any appellate rights. *See Leyva v. Williams*, 504 F.3d 357, 364 (3d Cir. 2007).

A party wishing to respond to objections shall file a response within 14 days of the date the objections are served.

BY THE COURT:

s/ Richard A. Lloret

RICHARD A. LLORET
U.S. Magistrate Judge

803 Fed.Appx. 640
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. See also U.S.Ct.
of Appeals 3rd Cir. App. I, IOP 5.1, 5.3, and 5.7.
United States Court of Appeals, Third Circuit.

UNITED STATES of America
v.
Victor GATES, Appellant

No. 19-1866
|
Submitted Under Third Circuit
L.A.R. 34.1(a) January 23, 2020
|
(Opinion filed: March 5, 2020)

Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. Criminal Action No. 2-17-cr-00564-001), District Judge: Honorable Wendy Beetlestone

Attorneys and Law Firms

Eric L. Gibson, Esq., Sarah L. Grieb, Esq., Joseph F. Minni, Esq., Elizabeth M. Ray, Esq., Office of United States Attorney, Philadelphia, PA, for Plaintiff-Appellee

Samuel C. Stretton, Esq., West Chester, PA, for Defendant-Appellant

Before: AMBRO, MATEY, and ROTH, Circuit Judges

OPINION*

AMBRO, Circuit Judge

A jury found Victor Gates guilty of honest services mail fraud conspiracy in violation of 18 U.S.C. §§ 1341, 1346, and 1349 (Count 1), honest services mail fraud in violation of §§ 1341 and 1346 (Counts 2 through 15), and making false statements within a federal jurisdiction in violation of 18 U.S.C. § 1001 (Counts 16 and 17). After his conviction, the District Court ordered Gates to forfeit the proceeds he received from the fraud in the amount of $653,319.10. He asserts several errors on appeal. We disagree with his arguments and affirm the District Court's judgment.[1]

The charges stem from a seven-year scheme in which Gates, a former Philadelphia police officer, used his friend, Detective Patrick Pelosi at the Philadelphia Police Department, to maintain Gates' lucrative auto recovery business. Gates contracted with rental agencies to recover cars that were stolen from them. All stolen cars are placed in the National Crime Information Center database and, once recovered, must be deleted from the database by an authorized official before the rental agencies can rent them out again. There is often a delay in removing the recovered cars from the database because, per Philadelphia Police Department policy, the detective in charge of the database

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

[1] It exercised jurisdiction under 18 U.S.C. § 3231. We have jurisdiction per 28 U.S.C. § 1291.

must confirm formally that the cars were recovered. This requires that the detective physically identify the recovered car.

Detective Pelosi was that detective for southwest Philadelphia. Accordingly, Gates would pay Pelosi $300-$400 per month (about $25,000 total) to remove the cars he had recovered from the database whenever needed, even without validating their recovery. Gates used his ability to have cars removed expeditiously from the database as a selling point to rental agencies. The FBI eventually uncovered the scheme and an indictment followed.

A three-day trial resulted in a guilty verdict on all counts. The District Court then determined that the proceeds subject to forfeiture from the scheme were $653,319.10 and ordered Gates to forfeit that amount.

I. Ineffective Assistance of Counsel

Gates first raises an ineffective-assistance-of-counsel claim. He contends that his trial counsel was constitutionally ineffective for failing to give an opening statement and for not calling any character witnesses. We do not entertain ineffectiveness claims on direct appeal where the record is insufficient to allow determination of the issue. *See Massaro v. United States*, 538 U.S. 500, 505, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003); *United States v. Thornton*, 327 F.3d 268, 271–72 (3d Cir. 2003). The record is insufficient here—it contains no evidence regarding strategic decisions made by Gates's counsel or how any prejudice may

have resulted. Gates can properly raise his claims in a petition for collateral relief under 28 U.S.C. § 2255, where he may seek an evidentiary hearing.

II. Insufficient Evidence

Gates next argues that the evidence at trial was insufficient to support a guilty verdict on all counts. The bar is very high to overturn a jury's verdict. Our review of evidence sufficiency is "highly deferential," and a "verdict must be upheld as long as it does not 'fall below the threshold of bare rationality.'" *United States v. Caraballo-Rodriguez*, 726 F.3d 418, 430–31 (3d Cir. 2013) (en banc). As a principle of process, we must not "usurp the role of the jury by weighing credibility and assigning weight to the evidence." *United States v. Brodie*, 403 F.3d 123, 133 (3d Cir. 2005).

That evidence indicated Gates had specific knowledge that Philadelphia Police Department policy required an officer to confirm a stolen vehicle's return before removing it from the system and barred outside employment without consent. He nonetheless paid Detective Pelosi $300-$400 per month (in checks sent through the mail that Pelosi then deposited) to violate this policy and remove the vehicles whenever asked, validation notwithstanding. Moreover, the evidence showed that Gates kept secret these payments and acknowledged that what he was doing "don't fly." App. 522. Yet he used his relationship with Pelosi as a selling point to generate additional business. From this a rational juror could conclude that Gates knowingly

devised or participated in a scheme and intended to defraud the public of its intangible right to honest government services. *See* Pattern Crim. Jury Instr. 3d Cir. § 6.18.1341 (2015); *cf. United States v. Carbo*, 572 F.3d 112, 118 (3d Cir. 2009) ("If the evidence is sufficient for a reasonable jury to conclude that the [private citizen] defendant participated in a scheme to assist a public official in hiding a conflict of interest, and that the defendant knew that the law forbade the official from engaging in that form of undisclosed conflict of interest, a conviction for honest services mail fraud should be upheld."). The same evidence supports the conspiracy count.[2]

As for false statements, the Government pointed to substantial evidence that Gates lied about having made the payments to an FBI agent when explicitly asked about them. Three witnesses, including the FBI agent herself, testified as to Gates's false statements to a federal agent. They are material because the payments to Pelosi form the basis of the honest services mail fraud charges.

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[2] An agreement to engage in honest services mail fraud "need not be explicit, and the public official need not specify the means that he will use to perform his end of the bargain." *McDonnell v. United States*, ___ U.S. ___, 136 S. Ct. 2355, 2371, 195 L.Ed.2d 639 (2016). "A jury could, for example, conclude that an agreement was reached if the evidence shows that the public official received a thing of value knowing that it was given with the expectation that the official would perform an 'official act' in return." *Id.*

III. Convictions as Against the Weight of the Evidence

Gates further contends that we should reverse his convictions as against the weight of the evidence. Our standard is even higher here. We will only reverse if the conviction would result in a "miscarriage of justice." *United States v. Johnson*, 302 F.3d 139, 150 (3d Cir. 2002). Gates's claim for a new trial is reviewed for plain error because he did not make a motion for a new trial before the District Court under Federal Rule of Criminal Procedure 33. An error that is plain must be obvious and affect the substantial rights of the defendant. *Johnson*, 302 F.3d at 153. Because Gates relies on the same arguments as his sufficiency-of-the-evidence claim, our rationale is the same for denying it here.

IV. The District Court's Forfeiture Determination

Finally, Gates argues that the District Court erred in ordering him to forfeit $653,319.10, claiming instead the correct amount is $21,750. He contends that the Court's forfeiture calculation erred because it reflected the "gross figure from all his towing business," whereas the suggested lower figure represents only his profits from cars recovered for Avis in southwest Philadelphia—Pelosi's division. Appellant's Br. 69.

This argument fails for two reasons. First, the forfeiture amount does not reflect Gates's gross proceeds; rather, the District Court subtracted his direct costs in

revising down the forfeiture amount from the Government's initial request of $704,785. While Gates contends that overhead should have been deducted, the applicable statute—18 U.S.C. § 981(a)(2)(B)—specifically states that overhead expenses are not included in direct costs.

Second, in *United States v. Ofchinick*, 883 F.2d 1172, 1183 (3d Cir. 1989), we held that a defendant must forfeit property that "would not have been acquired 'but for'" his criminal activity. Here, the evidence, particularly through the testimony of the Avis security manager, tended to show that, but for Gates's connection to Pelosi, Avis would not have continued its relationship with Gates, which included paying for recovered cars *beyond* southwest Philadelphia. Further, the Government showed that Gates used Pelosi's access to remove cars found outside his division of southwest Philadelphia. Accordingly, the District Court did not err, clearly or otherwise, in determining that the honest services fraud was the but for cause of the Avis revenue.

* * * * *

For these reasons, we affirm in full the District Court's judgment.