EXHIBIT A
MEMORANDUM AND ORDER DENYING
MOTION UNDER 28 U.S.C. § 2255
ECF DOC. NO. 520

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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CHRISTIAN GEROLD TARANTINO,
Petitioner,

-against-

MEMORANDUM AND ORDER
08-CR-0655 (JS)

UNITED STATES OF AMERICA,

Respondent.
----------X
APPEARANCES
For Petitioner: Todd G. Scher, Esq.
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1722 Sheridan Street, No. 346
Hollywood, Florida 33020

For Respondent: Charles N. Rose, Esq.
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SEYBERT, District Judge:

Christian Gerold Tarantino ("Petitioner") moves this Court to vacate, set aside, or correct his conviction and sentence pursuant to 28 U.S.C. § 2255 (hereafter, the "Petition"). (See Petition, ECF No. 510.) He contends that his trial counsel was ineffective due to various failures. The Government opposes the Petition. (See Opp'n, ECF No. 513.) Petitioner also requests discovery relating to his § 2255 claims (hereafter, the "Discovery Motion") (see ECF No. 518), which the Government also opposes (see Discovery Opp'n, ECF No. 519). For the following reasons, the Petition and Discovery Motion are **DENIED.**

BACKGROUND

I. The Underlying Crimes[1]

On June 23, 1994, two individuals, Julius Baumgardt ("Baumgardt") and his partner, were armored car guards working for Mid-Island Check Cashing Company ("MidIsland"). As they began their workday, the guards exited their armored car when Petitioner and Louis Dorval ("Dorval") approached them. At the time, Petitioner was armed with a shotgun and Dorval was armed with a pistol; a third man, Scott Mulligan ("Mulligan"), sat nearby as a look-out. Petitioner and Dorval ordered Baumgardt and his partner to the ground. Though Baumgardt complied, Dorval shot and killed him with the pistol.

After the murder, Petitioner, Dorval, and Mulligan fled and dumped the pistol in a self-storage facility. The pistol, registered in Dorval's name, was recovered by Nassau County Police shortly after Baumgardt's death.

Petitioner became concerned that Dorval might eventually cooperate with police and implicate Petitioner in the Baumgardt murder. Therefore, as he confided in Mulligan and another person,

[1] The Court assumes the parties' familiarity with the facts of this case. For the reader's convenience, it provides this factual background, which is drawn from the Indictment (ECF No. 1) and Petitioner's 2011 and 2012 criminal trials before this Court and as were previously set forth in the Court's Memorandum & Order ("M&O") denying Petitioner's motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. (See Rule 33 M&O, ECF No. ECF No. 404; see also Mot. New Trial, ECF No. 388).

Vincent Gargiulo ("Gargiulo"), he resolved he would "take care of the problem." Thereafter, in the summer of 1994, Petitioner told Mulligan that Dorval had been killed and that he needed to dispose of Dorval's body. Mulligan complied: He contacted an acquaintance to borrow a boat, which Mulligan and Petitioner used the next day to take Dorval's body, then stuffed into a tool bin, off the Long Island shore and threw it into the Atlantic Ocean.

For years, the state of affairs remained unchanged. Then, in the fall of 2000, Gargiulo secretly tape-recorded Petitioner, who admitted to his involvement in the Baumgardt and Dorval murders (hereafter, the "Gargiulo Tape"). Thereafter, Gargiulo threatened to blackmail Petitioner,[2] claiming that if Petitioner did not pay Gargiulo, then Gargiulo would turn the Gargiulo Tape over to the police. Petitioner refused Gargiulo's demand; instead, he hired his business associate, Justin Bressman ("Bressman"), to kill Gargiulo, which Bressman did on August 18, 2003.

On September 23, 2008, a four-count Indictment charged Petitioner with: (1) Count One: the 1994 murder of Baumgardt; (2) Count Two: the 1994 murder of Dorval; (3) count Three: conspiracy to commit the obstruction-of-justice murder of Gargiulo; and (4) Count Four: the 2003 murder of Gargiulo. A jury trial commenced

[2] Apparently, Gargiulo was under financial pressures following the downfall of his gym business.

before this Court on March 28, 2011. On May 23, 2011, the jury convicted Petitioner of Counts One and Two of the Indictment, i.e., the Baumgardt and Dorval murders. The jury, however, did not reach a verdict on Counts Three and Four.

On April 23, 2012, a re-trial commenced on Counts Three and Four of the Indictment. A jury subsequently convicted Petitioner on Count Three, the "Conspiracy to Commit the Obstruction-of-Justice Murder" of Gargiulo, but acquitted him on Count Four, the "Obstruction-of-Justice Murder" Vincent Gargiulo. On April 24, 2013, Petitioner was sentenced to life imprisonment for his convictions on Counts One, Two, and Three, with the sentences to run concurrently. (See Sent'g Min. Entry, ECF No. 427.) Judgment entered on April 26, 2013. (See J., ECF No. 428.)

II. Procedural History

On June 8, 2012, Petitioner filed a motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. (See Mot. New Trial, ECF No. 388.) Petitioner claimed that his first trial counsel, James R. Froccaro, Esq. ("Froccaro"), operated under a conflict of interest. Petitioner further requested a hearing to demonstrate that Froccaro received benefactor payments from Mulligan that adversely affected Froccaro's performance as Petitioner's attorney. (Id. at 7-8.) The Court denied Petitioner's motion on procedural grounds finding that Froccaro's purported conflict did not excuse Petitioner from

filing a timely motion for a new trial, and the proper avenue to pursue this argument was on appeal. (Rule 33 M&O, ECF No. 404, at 13-14.)

On November 14, 2014, Petitioner appealed his conviction and sentence to the Second Circuit Court of Appeals; the Circuit affirmed this Court's Judgment. See United States v. Tarantino, 617 F. App'x 62 (2015). It held that: (1) the Indictment sufficiently alleged a violation of 18 U.S.C. § 33; (2) there was sufficient evidence to sustain Petitioner's conviction for Dorval's murder; (3) Petitioner implicitly waived his right to be present at two court teleconferences; (4) an incriminating audio recording was not inadmissible under the Omnibus Crime Control and Safe Streets Act of 1968, and that this Court did not abuse its discretion in denying an evidentiary hearing; (5) the Government did not deny Petitioner of his due process rights by pursuing purportedly inconsistent theories with respect to Dorval's murder; (6) this Court acted within its discretion by denying Petitioner's motion for a new trial; and (7) this Court properly denied Petitioner's motion to disqualify one of the Assistant U.S. Attorneys on the case. Id. at 64-66.

In his appeal, Petitioner also renewed his claim, originally raised in his Rule 33 Motion, of ineffective assistance of counsel on the grounds that Froccaro bore a conflict of

interest. However, the Circuit declined to hear the claim, preserving it for collateral review. Id. at 65-66.

On June 27, 2016, Petitioner filed a pro se petition pursuant to 28 U.S.C. § 2255 bringing three claims: (1) that his 18 U.S.C. § 33 conviction was unconstitutionally vague; (2) that the Government pursued inconsistent theories regarding Dorval's murder; and (3) ineffective assistance of counsel on the grounds that Froccaro operated under a conflict of interest. (Original Section 2255 Petition, ECF No. 500, at 4-5.) On June 27, 2017 and through counsel, Petitioner filed a supplemental Section 2255 petition raising numerous ineffective assistance of counsel claims based on the following alleged failures: (1) Froccaro failed to argue that the Government did not prove the jurisdictional element required by 18 U.S.C. § 33; (2) Froccaro operated under an undisclosed benefactor conflict; (3) Froccaro excluded Petitioner from pre-screening of jurors; (4) re-trial counsel failed to seek the Court's recusal for bias; and (5) re-trial counsel failed to seek the exclusion of allegedly inadmissible evidence. (See First Supp. Petition, ECF No. 503, at 3-44.) On July 14, 2017 and with leave of the Court, Petitioner filed his second counseled supplemental Section 2255 Petition. (See Second Supp. Petition, ECF No. 505.)

On September 19, 2019, the Court directed Petitioner to "file one document that shall serve as [Petitioner's] operative

submission in this matter." (Sept. 19, 2019 Elec. Order.) In compliance, on October 4, 2019 and through newly retained counsel, Petitioner filed his "Amended Motion to Vacate,"[3] which effectively renewed the claims asserted in the Supplemental Petitions, and articulated the additional claim that trial counsel was ineffective for failing to permit Petitioner to testify during the motion to suppress the Gargiulo Tape. (See generally Petition; see id. at 29-30.) On November 25, 2019, the Government filed its Opposition (see ECF No. 513), to which Petitioner replied on February 14, 2020 (see ECF No. 516).

On September 14, 2020, Petitioner filed his Discovery Motion (see ECF No. 518); the Government opposed the Discovery Motion on January 29, 2021 (see Discovery Opp'n, ECF No. 519). The Court rules on both the Petition and Discovery Motion herein.

DISCUSSION

I. Legal Standard

To obtain relief under Section 2255, a petitioner must demonstrate "a constitutional error, a lack of jurisdiction in the sentencing court, or an error of law or fact that constitutes a fundamental defect which inherently results in a complete miscarriage of justice." Cuoco v. United States, 208 F.3d 27, 30 (2d Cir. 2000) (internal quotation marks and citations omitted).

[3] The "Amended Motion to Vacate" (ECF No. 510) has previously been defined herein as the "Petition". (See supra at 1.)

A petitioner must also show that the error had "substantial and injurious effect" that caused "actual prejudice." Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (internal quotation marks and citations omitted); Underwood v. United States, 166 F.3d 84, 87 (2d Cir. 1999) (applying Brecht to a § 2255 motion).

To "obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal." United States v. Frady, 456 U.S. 152, 166 (1982). A Court must exercise its discretion sparingly because Section 2255 applications "are in tension with society's strong interest in the finality of criminal convictions." Elize v. United States, No. 02-CV-1530, 2008 WL 4425286, at *5 (E.D.N.Y. Sept. 30, 2008) (internal quotation marks and citation omitted); see also Brecht, 507 U.S. at 633–34.

II. Analysis

A. Ineffective Assistance of Counsel

For Petitioner to prevail on his ineffective assistance of counsel claims, he must "(1) demonstrate that his counsel's performance 'fell below an objective standard of reasonableness' in light of 'prevailing professional norms,' and (2) 'affirmatively prove prejudice' arising from counsel's allegedly deficient representation." United States v. Cohen, 427 F.3d 164, 167 (2d Cir. 2005) (quoting Strickland v. Washington, 466 U.S.

668, 688, 693 (1984)). When considering counsel's alleged errors, the Court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. If a petitioner is able to establish an error of constitutional magnitude, he must next establish that he was prejudiced by counsel's performance, meaning that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

1. 18 U.S.C. § 33 Claim

Petitioner claims that defense counsel from his first trial, Froccaro, was ineffective for failure to raise a jurisdictional challenge to Count One of the Indictment. For the reasons that follow, Petitioner's claim fails.

Title 18 of the United States Code, Section 33 provides:

> (a) Whoever willfully, with intent to endanger the safety of any person on board or anyone who he believes will board the same, or with a reckless disregard for the safety of human life, damages, disables, destroys, tampers with, or places or causes to be placed any explosive or other destructive substance in, upon, or in proximity to, any motor vehicle which is used, operated, or employed in interstate or foreign commerce, or its cargo or material used or intended to be used in connection with its operation; or
>
> Whoever willfully, with like intent, damages, disables, destroys, sets fire to, tampers with, or places or causes to be placed any explosive or other destructive substance in,

> upon, or in proximity to any garage, terminal, structure, supply, or facility used in the operation of, or in support of the operation of, motor vehicles engaged in interstate or foreign commerce or otherwise makes or causes such property to be made unworkable, unusable, or hazardous to work or use; or
>
> Whoever, with like intent, willfully disables or incapacitates any driver or person employed in connection with the operation or maintenance of the motor vehicle, or in any way lessens the ability of such person to perform his duties as such; or
>
> Whoever willfully attempts or conspires to do any of the aforesaid acts--
>
> shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 33. Count One of the Indictment charged Petitioner as follows:

> On or about June 23, 1994, within the Eastern District of New York, the defendant CHRISTIAN GEROLD TARANTINO, together with others, willfully and with a reckless disregard for the safety of human life, disabled and incapacitated Julius Baumgardt and John Doe 1, who were drivers and persons employed in connection with the operation of a motor vehicle used, operated and employed in interstate commerce, to wit: A Mid-Island armored van, and lessened the ability of such persons to perform their duties, which offense resulted in the death of Julius Baumgardt.

(Indictment at ¶ 18.)

As an initial matter, Petitioner has previously filed multiple motions with respect to Count One. Prior to trial, Froccaro moved to dismiss Count One of the Indictment for failure

to allege an intent element under 18 U.S.C. § 33; that motion was denied by this Court. (See Dec. 15, 2010 M&O, ECF No. 116.) After Petitioner's first trial, and his conviction on Count One, re-trial counsel, Stephen Rosen, Esq., filed another motion to dismiss Count One for failure to state an offense under 18 U.S.C. § 33; that motion was also denied. (See Nov. 21, 2012 M&O, ECF No. 408.)

On appeal, Petitioner again attacked his Count One conviction on the basis that the Indictment was defective for (1) failure to allege that Petitioner acted with intent to endanger the safety of any person on board, and (2) failure to allege that Petitioner acted with intent to either damage a motor vehicle or to incapacitate its driver or employee while "on board" or "while operating" the vehicle. Tarantino v. United States, No. 13-1799-CR, 2014 WL 6602157, at *44-56, App. Br. (2d Cir. Nov. 10, 2014) (hereafter, "Tarantino Appellate Brief"). The Second Circuit rejected Petitioner's claim finding this Court properly denied Petitioner's motions to dismiss the Indictment, and that the Indictment "plainly tracked the language of the statute, contained the elements of the offense charged [], and fairly informed Tarantino of the charge against him." Tarantino, 617 F. App'x at 64.

In his latest iteration attacking his Count One conviction, Petitioner argues that Froccaro was ineffective for failing to object to this charge on jurisdictional grounds, arguing

that the evidence at trial was insufficient to demonstrate that the armored car operated by Baumgardt on June 23, 1994 was "used, operated, or employed in interstate or foreign commerce." (Petition at 1-4.) Petitioner's claim is without merit.

At trial, Frank Fede ("Fede"), MidIsland's owner, testified:

> Question: And how did you use the armored van?
>
> Answer: To deliver payrolls to certain companies around Long Island in Queens.
>
> Question: In addition to Long Island and Queens, did you service any companies outside of New York State?
>
> Answer: No.
>
> Question: Did you ever service companies in the Port of Newark?
>
> Answer: Yes.
>
> Question: In the Port of Newark, what kind of companies did you serve?
>
> Answer: We did the tankers that came in from foreign countries, and we would service the ships.

(Tr.[4] 808:10-21.) Later, Fede also testified:

[4] "Tr." refers to the trial transcript from Petitioner's first trial, which began on March 28, 2011 and concluded on May 23, 2011. "Re-trial" refers to the trial transcript from Petitioner's re-trial on Counts Three and Four of the Indictment, which took place from April 23, 2012 through May 14, 2012.

Question: You said the vans would bring payroll to companies. Would these be commercial companies?

Answer: Yes.

Question: And is it fair to say these were large companies?

Answer: Yes, sir.

Question: National companies?

Answer: Yes.

Question: One of your customers in or about 1994 was Airborne Express?

Answer: Yes, sir.

Question: And that was, I guess, for lack of a better term, a competitor to FEDEX or UPS?

Answer: Yes.

(Tr. 809:7-19.) Fede went on to testify that Baumgardt, a MidIsland employee and victim of the June 23, 1994 robbery and murder, was assigned to a payroll route servicing several businesses on Long Island, including Airborne Express, on the day he was killed. (Tr. 812:18-813:8, 817:5-13.)

To demonstrate jurisdiction under Section 33, the Government must prove that the motor vehicle in question was "used, operated, or employed" in interstate or foreign commerce. Section "33 requires no more than proof that the vehicles were used in furtherance of or in conjunction with the interstate activities of entities employing the vehicles." United States v. Lowe, 65 F.3d

1137, 1147-48 (4th Cir. 1995). Further, it is not necessary that the implicated vehicle be traveling interstate at the time of the crime. See United States v. Heightland, 865 F.3d 94, 95 (6th Cir. 1989).

Here, the Government met its burden establishing jurisdiction under Section 33. Fede testified that MidIsland serviced businesses in New York and businesses in the Port of Newark, New Jersey, and specifically tankers that came in from foreign countries. This testimony demonstrated that MidIsland was engaged in interstate commerce, if not also foreign commerce. Hence and in accordance with the teachings of Lowe, the MidIsland vehicle Baumgardt was driving at the time he was robbed and murdered fell under the purview of Section 33. Thus, Froccaro was not ineffective for failing to object to Count One on jurisdictional grounds.

Petitioner argues that, but for counsel's deficient performance, a pre-trial investigation would have revealed that MidIsland vans were only ever registered in New York. However, Petitioner's claims, and attached exhibits demonstrating New York registration, do not refute the trial testimony that the vans were used to service the Port of Newark, i.e., in conjunction with the interstate activities of MidIsland. Section 33 does not require that the motor vehicle in question be registered in multiple states, but only that they be used, operated, or employed in

conjunction with interstate commerce. See Lowe, 65 F.3d at 1147 ("[T]he vehicles must be used in connection with or in furtherance of the interstate market activities of the entities operating or employing the vehicles."). Accordingly, counsel's representation was not deficient for purportedly failing to come upon MidIsland's vehicle registration history; nor did the lack of such documentation prejudice Petitioner in any way.[5]

Accordingly, the Court rejects Petitioner's this claim of ineffective assistance of counsel.

2. Conflict of Interest Claim

Petitioner asserts that counsel Froccaro was ineffective because of a conflict of interest. As part of this claim, Petitioner argues that Froccaro operated under an actual conflict due to (1) "joint representation" of Petitioner and Mulligan, and (2) undisclosed benefactor payments made by Mulligan for Petitioner's legal representation. (Petition at 20-24.) Petitioner contends that Froccaro failed to shift blame to Mulligan for the Baumgardt and Dorval murders because of this conflict; therefore, Froccaro operated under an actual conflict. In turn,

[5] Petitioner also advances an argument that because Fede testified that "we did the tankers that came in from foreign countries, and we would service the ships," he was referencing another of the businesses he owned. However, given the line of questioning asked of Fede, which specifically targeted MidIsland's services, Petitioner's argument is speculative.

prejudice is presumed warranting the convictions on all counts be vacated. For the following reasons, this claim is without merit.

To demonstrate a denial of effective representation due to the trial lawyer's conflicting loyalties, Petitioner must meet a two-pronged test. First, Petitioner must show that "counsel actively represented conflicting interests." Cuyler v. Sullivan, 446 U.S. 335, 350 (1980); see also United States v. Aiello, 814 F.2d 109, 112 (2d Cir. 1987). Petitioner has the burden of showing that his lawyer had an actual conflict of interest; "the possibility of conflict is insufficient to impugn a criminal conviction." Cuyler, 446 U.S. at 350.

Second, Petitioner must demonstrate that the conflict of interest "adversely affected his lawyer's performance," Cuyler, 446 U.S. at 348, and that the conflict caused a "lapse in representation." United States v. Iorizzo, 786 F.2d 52, 58 (2d Cir.1986) (quoting Cuyler, 446 U.S. at 349). "To prove a lapse in representation, a defendant must demonstrate that some plausible alternative defense strategy or tactic might have been pursued, and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." United States v. Malpiedi, 62 F.3d 465, 469 (2d Cir. 1995).

In support of this claim, Petitioner provides an affirmation from Attorney Eliza D. Stahl.[6] (Stahl Aff., ECF No. 505-1.) Stahl states that she has known Petitioner since middle school, and, that at Petitioner's request, she assisted Froccaro in preparing for Petitioner's defense between 2008 and 2011. (Id. at ¶ 2.) However, Stahl was not Petitioner's attorney of record.[7] Stahl further "affirmed": Mulligan paid Petitioner's $150,000 retainer fee to Froccaro, as well as other legal fees over time (see id. at ¶ 3); Froccaro told her that "during the time period 2008-2011," he was also representing Mulligan, who was a suspect in the crimes for which Petitioner was charged (id. at ¶ 5); and "when Mulligan was in town from Florida," Froccaro would consult with Mulligan (id.).

Petitioner further supports his claim by arguing that Froccaro operated under an undisclosed benefactor conflict. Petitioner argues that because Mulligan paid a portion of his legal fees, Froccaro's loyalties were divided and prevented him from

[6] Stahl also provided a second affirmation in which she averred that her basis of knowledge for Froccaro's dual representation of Petitioner and Mulligan is her multiple conversations with Froccaro, and that while Froccaro did not have a retainer agreement with Mulligan, neither did he have one for Petitioner. (Stahl Reply Aff., Ex. B, attached to Reply, ECF No. 516 at ECF pp. 28-30, ¶¶ 4, 6.)

[7] When she filed the First Supplemental Petition on June 27, 2017, Stahl also filed her Notice of Appearance, thereby becoming attorney of record. (See ECF No. 501.)

pursuing a defense strategy that implicated Mulligan. In support of his argument, Petitioner cites United States v. Locasio, where counsel was found to be operating under an actual conflict as a result of receiving "benefactor payments." 6 F.3d 924, 932 (2d Cir. 1993).

In Locasio, the Government moved to disqualify John Gotti's attorney, which motion the district court granted. See id. at 932 (citing United States v. Gotti, 771 F. Supp. 552 (E.D.N.Y. 1991)). It did so for three reasons. First: There was strong evidence that Gotti paid significant sums of money for legal services rendered to others; thus, "by receiving 'benefactor payments' from Gotti to represent others in the crime enterprise," the attorney "acted as 'house counsel' to the Gambino Crime Family." Id. Second: Because the attorney had "participat[ed] in government-taped conversations at which illegal activity was discussed," the attorney's representation of Gotti would be impaired, with his "mere presence at trial . . . mak[ing] him an 'unsworn witness' before the jury in explaining his own conduct and interpreting Gotti's conversations on the tape." Id. (citation omitted). Third: In a taped conversation, Gotti implied he had paid his attorney "under the table" and "[t]his made [the attorney] a potential accomplice as well as a potential witness to Gotti's tax fraud." Id. The Circuit Court affirmed the district court's disqualification ruling and, in doing so, agreed with the three

grounds upon which the district court based its ruling. See id. at 932-34.

The facts of this case are distinguishable from to those in Locasio. Mulligan's contribution to Petitioner's legal fees, without more, does not establish Froccaro as "house counsel" for Petitioner and Mulligan's criminal activities or render him an unsworn witness. Further, Petitioner fails to demonstrate how Mulligan's contribution to Petitioner's legal fees caused a divergence of interests between Petitioner and Froccaro.[8]

Moreover, Petitioner is unable to demonstrate that Froccaro operated under an actual conflict. Stahl's affirmation does not establish that Froccaro was simultaneously represented Mulligan and Petitioner; instead, in a conclusory fashion, she states that Froccaro was representing Mulligan between 2008 and

[8] Stahl's affirmation includes a statement suggesting Froccaro may have destroyed Garguilo's blackmail letter to Mulligan (hereafter, the "Letter"). (See Stahl Aff. ¶¶ 11-12.) By way of background: The issue of a potential conflict was first raised by defense counsel at Petitioner's re-trial during an evidentiary argument. (Re-trial 7:4-11.) Because the Letter itself was missing, the Government sought to introduce secondary evidence regarding its contents through testimony from Mulligan's wife, Manon Mulligan, who received the Letter. A mutual friend of both Petitioner and Mulligan, Keith Pellegrino, told Manon that he intended to deliver the letter to Mulligan's attorney at the time, Froccaro. (Re-trial 10:24-11:25.) After Mulligan became a cooperating witness, he waived attorney-client privilege to allow Froccaro to respond to a Government subpoena seeking production of the Letter. Froccaro's response was that he never received it. (See ECF No. 357 at 3 n.1.) Thus, Stahl's affirmation is insufficient to demonstrate that Froccaro's interests diverged from those of his client, Petitioner.

2011. However, the record demonstrates that Froccaro represented Mulligan in an unrelated drug matter from 2001, for which Mulligan pled guilty in May 2002. (Re-trial 1572:13-23.) Therefore, Froccaro's representation of Mulligan was resolved in 2002, six years prior to being retained by Petitioner in the instant matter. Further, Mulligan was not arrested for the crimes at issue here until December 2011 (Re-trial 1613:6-10), after Petitioner's first trial concluded in May 2011. In August 2011, Froccaro sought to be relieved from representing Petitioner, and his motion was granted by the Court. (See ECF No. 268.) Additionally, upon his December 2011 arrest, Mulligan retained counsel in Florida where he was arrested and was not represented by Froccaro in this matter. (Re-trial 1638:11-16.)

Accordingly, Petitioner fails to demonstrate an actual conflict. While Stahl's affirmation includes a number of conclusory allegations that Froccaro believed he was representing Mulligan, they are not enough to demonstrate that Froccaro jointly represented Petitioner and Mulligan during Petitioner's first trial. In sum, the possibility of conflict is insufficient to impugn Petitioner's criminal conviction. See Cuyler, 446 U.S. at 350 ("[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.").

Even assuming arguendo that an actual conflict existed, Petitioner's alternate defense strategy is simply not plausible. Petitioner proffers examples of opportunities where Froccaro could have shifted the blame for Baumgardt and Dorval's murders to Mulligan; however, the evidence elicited at trial does not support Petitioner's argument. Rather, the trial evidence demonstrated that Petitioner and Mulligan were, in fact, co-conspirators rather than alternative suspects in the murders. (Tr. 624:19-23, 638:21-639:5, 640:1-14, 902:21-903:14, 908:1-7, 1187:19-23, 1191:15-1193:5, 1198:7-1199:9.) Accordingly, Petitioner is unable to demonstrate a lapse in representation.

As such, Petitioner's conflict of interest claim is unavailing.

3. Exclusion of Petitioner Claim

Petitioner argues that he is entitled to relief on the grounds that Froccaro wrongfully excluded him from two pretrial telephone conferences regarding juror screenings. (Petition at 24-25.) For the following reasons, Petitioner's claim is denied.

On March 17 and 21, 2011, telephone conferences were held in which the Court and counsel participated to pre-screen anonymous jurors on the basis of hardship and cause. (See generally Mar. 17, 2011 Tr., ECF No. 468-6; Mar. 21, 2011 Tr., ECF No. 483.) Prior to the telephone conferences, the Court directed Froccaro to review the jury selection questionnaires with

Petitioner to ascertain the type of jury Petitioner would like impaneled. (Mar. 15, 2011 Tr. 40:13-21, ECF No. 464-4.) Now, Petitioner avers "[m]y first trial counsel never met with me before jury selection to review the questionnaires completed by potential jurors." (Petitioner Aff., ECF No. 505-2, at ¶ 2.)

Petitioner raised the crux of this claim on direct appeal, arguing that his right to be present during the pre-qualification of jurors was violated as he never waived that right. Tarantino Appellate Brief, 2014 WL 6602157, at *70-76. As he does here, Petitioner argued that Froccaro did not review the juror questionnaires with him prior to the two telephone conferences. Id. at *74-75. The Second Circuit disagreed, and held that, even assuming he had a right to be present, Petitioner impliedly waived that right. Tarantino, 617 F. App'x at 64-65. Although Petitioner now raises the same claim, albeit cast as an ineffective assistance of counsel claim, the "so-called mandate rule bars re-litigation of issues already decided on direct appeal." Yick Man Mui v. United States, 614 F.3d 50, 53 (2010) (citing Burrell v. United States, 467 U.S. 160, 165 (2d Cir. 2006)) (relying upon the mandate rule to bar ineffective assistance of counsel claims raised in habeas petitions where the factual predicates of those claims were resolved on direct appeal).

Accordingly, Petitioner's claim that counsel was ineffective for failure to include Petitioner in juror screening is rejected as barred.

4. Failure to Seek Court's Recusal Claim

Petitioner asserts that re-trial counsel provided ineffective assistance of counsel for failure to seek recusal of the Court. (Petition at 25-27.) Petitioner's claim is without merit.

Following his first trial, Petitioner moved pro se seeking the Court's recusal prior to his re-trial. (See Recusal Motion, ECF No. 410.) Petitioner argued that the Court demonstrated bias in its handling of cooperating witness Mulligan. (Id.) The Court denied Petitioner's recusal motion finding that his claims were wholly without merit. (See Recusal M&O, ECF No. 413.)

Petitioner now seeks habeas relief on the grounds that re-trial counsel was ineffective for failing to join Petitioner's pro se motion and seek the Court's recusal. The Court is unpersuaded.

It is unclear what benefit there would have been in re-trial counsel having joined Petitioner's recusal motion or otherwise filing a recusal motion, especially in light of the Court's ruling that "[t]here [wa]s nothing erroneous about the Government's indictment of Mulligan, and that this Court presided

over [Petitioner]'s criminal trial in which Mulligan testified against [Petitioner] does not objectively raise any doubt that justice would be done absent recusal." (Recusal M&O at 5.) In other words, Petitioner has not demonstrated how he was prejudiced by the re-trial counsel's not moving for recusal, especially since he, himself, sought recusal. In any event, Petitioner's arguments here are little more than regurgitations of his original recusal arguments, i.e., that the Court somehow assisted the Government in making its case against Petitioner by way of its ruling. (See Petition at 25, 27.) The Court already rejected Petitioner's "own subjective arguments," which are little more than disagreements with judicial rulings,[9] and "not evidence of extraneous bias." (Recusal M&O at 5.) See also Litkey v. United States, 510 U.S. 540, 555 (1994) ("[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion." (citing United States v. Grinnel Corp., 384 U.S. 563, 583 (1966)). As the

[9] As succinctly stated by the Government:

> [T]he defendant's motion to recuse is based on no evidence of extrajudicial data, opinions, or evidence of any bias whatsoever. The motion rests solely upon the defendant's disappointment that the Court made judicial findings, and considered and rejected an earlier motion regarding the applicability of 18 U.S.C. § 33. That judicial ruling is not a valid basis for recusal.

(Recusal Opp'n, ECF No. 409, at 2.) The same is true regarding the present Petition.

Government aptly argues here, "it . . . was certainly not unreasonable for counsel not to advance a recusal claim on a wholly speculative basis." (Opp'n, ECF No. 513, at 9; see also id. at note 9 ("The government submits that if no lawyer was willing to file a good faith certificate previously on the [Petitioner's pro se] recusal motion, re-trial counsel did not act unreasonably in failing to file a recusal motion in the absence of a good faith basis.").) The Court agrees. Given the record of this action, the decision of re-trial counsel not to seek the recusal of the undersigned fell well within the wide range of reasonable professional assistance and does not demonstrate deficient performance. Therefore, Petitioner's failure-to-seek-recusal argument is unavailing and, accordingly, is rejected.

5. Inadmissible Evidence Claim

Petitioner contends that re-trial counsel was ineffective for failure to object to inadmissible evidence. Specifically, Petitioner argues that, but for counsel's failure to object to a post-mortem statement regarding an individual name "Matty Roth" and the client identification evidence from attorney Melvyn Roth, the evidence to convict Petitioner on Count Three at the re-trial would have been insufficient. (Petition at 27-29.) Petitioner's claim fails.

At the re-trial, Pablo Amador ("Amador") testified regarding his role in Garguilo's murder, stating: he was Bressman's

brother-in-law; in August 2003, Bressman told Amador that his Synergy Gym boss, Mattie Roth ("Mattie"), was going to pay him (Bressman) $35,000 to kill Garguilo (Re-Trial 942:24-943:6); if he acted as a lookout, Bressman would pay him $3,500; he agreed to the lookout offer; and, Bressman shot and murdered Garguilo on August 18, 2003. (Re-trial 944:25-945:4.) Thereafter, on August 21, 2003, Bressman told Amador that he (Bressman) had just been released from a Manhattan police precinct after N.Y.P.D. detectives picked him up for questioning, but that Mattie had gotten him a lawyer. (Re-trial 966:1-8.)

Melvyn Roth ("Roth"), an attorney who represented Petitioner from time to time, testified that he received a call from Petitioner on August 21, 2003. (Re-trial 1126:15-22.) Petitioner asked Roth to represent Bressman, who was being questioned by police; Roth then contacted the precinct, told police he represented Bressman, and instructed the police to cease questioning Bressman. (Re-trial 1126:23-7.)

During summation, the Government stated:

> And you saw yourself, Mel Roth coming here, get up on the stand and tell all of you that he was directed to call the NYPD that day; that he was directed to break up the interview of Justin Bressman by the defendant.
>
> And why is that relevant? Two reasons. First, it shows you that indeed there is no Mattie Roth. It is just a lie told by Bressman. Mattie Roth is actually Chris Tarantino, Bressman's actual boss at Synergy, the person

> who offered Bressman $35,000 to assassinate Vinnie.
>
> Second, Mel Roth's testimony shows the defendant's consciousness of guilt. It shows the defendant wanted to control Bressman. He didn't want Bressman telling the NYPD the truth that he had killed Garguilo and that he had been hired to do it by that man, the defendant. And when Mel Roth did the defendant's bidding and broke up the interview, the NYPD detectives released Bressman.

(Re-trial 1875:11-1876:5.)

Petitioner argues that re-trial counsel was ineffective for failing to object to the following evidence as being inadmissible: (1) Bressman's post-mortem statement regarding Mattie hiring a lawyer; and (2) Roth's testimony identified Petitioner as his client. He further contends re-trial counsel was ineffective for not objecting to the Government's summation comments regarding Mattie and Roth's testimony.

Petitioner fails to demonstrate that Bressman's post-mortem statements regarding Mattie are inadmissible. During re-trial, the Court admitted testimony from Amador regarding statements made by Bressman pursuant to Rule 801(d)(2)(E) of the Federal Rules of Evidence as statements made during the course of and in furtherance of a conspiracy. While Petitioner seems to support his claim by arguing that the conspiracy had concluded by the time Bressman was questioned by police, Bressman's statements were, nonetheless, admissible pursuant to Evidentiary Rule 804,

since Bressman was unavailable as a witness.[10] Accordingly, Petitioner cannot demonstrate that re-trial counsel's performance was deficient for failure to object to admissible testimony.

At the first trial, and prior to Roth's testimony, the Court ruled that Roth's testimony regarding the identity of the individual who contacted him to represent Bressman, and any fees associated with his representation of Bressman, was not privileged information. (Tr. 1883:18-22, 1884:18-23, 1866:7-10, 1876:12-21.) Thus, at both trial and re-trial, Roth's testimony was admitted. Now, Petitioner contends that this testimony was privileged as it incriminated Petitioner by "inserting the last 'direct link' to convict petitioner casting him as co-conspirator 'Matty Roth.'" (Petition at 28.) Petitioner relies on United States v. Goldberger & Dublin, P.C., 935 F.2d 501 (2d Cir. 1991), to advance his argument that where "disclosure of client-identifying information would directly incriminate the client by providing direct linkage in an existing chain of evidence presented against the client" a special circumstance exists under which the client's identity would be privileged. (Petition at 18.) However, Roth's testimony was not the last direct link, but rather corroborative of other

[10] Anticipating Roth would move to quash the Government's trial subpoena compelling him to testify, the Government submitted a letter to the Court asserting, inter alia, that Bressman's whereabouts were unknown; neither friends nor family had heard from Bressman since October 2003, and he did not appear in any database searches for any possible arrests. (See ECF No. 213.)

evidence establishing Petitioner's guilt. Therefore, the disclosure of Petitioner's client identity was not privileged and was properly admitted in this case. Thus, it follows that re-trial counsel's performance was not deficient for failure to object to proper testimony.

Last, Petitioner argues that the Government's summation comments "trumpeted the relevance of the patently inadmissible evidence." (Petition at 28.) Not so. As discussed, the evidence referenced by the Government in its summation was admissible. Moreover, as the Government states:

> Given the testimony of Melvyn Roth at retrial, in which he admitted that he was asked by the petitioner to "represent an individual who was being questioned by detectives in Manhattan," the idea that the government's inferential argument that the petitioner did so to break up the interview, and underscores the petitioner's consciousness of guilt, cannot by any means be deemed an objectively reasonable basis to object.

(Opp'n at 10.) Accordingly, Petitioner cannot show deficient performance for failure to object to the Government's summation commentary.

Furthermore, Petitioner cannot demonstrate prejudice that, but for admission of the aforementioned testimony, he would have been acquitted of Count Three. As the Government aptly argues, "[e]ven assuming that the [P]etitioner could show that the post-mortem statement was inadmissible and that counsel should

have reasonably objected to its admission, the evidence of the [P]etitioner's guilt was overwhelming." (Id.)

Because Petitioner is unable to demonstrate either deficient performance or prejudice regarding the alleged inadmissible evidence, his cannot maintain his ineffective assistance of counsel claim on this basis.

6. Failure to Allow Petitioner to Testify Claim

Petitioner claims that both trial counsel and re-trial counsel rendered ineffective assistance when they failed to proffer Petitioner's testimony in support of their motions to suppress the Garguilo Tape. The Court is unconvinced.

Petitioner contends counsel misadvised him that if he should testify at a suppression hearing regarding the Tape, that testimony would be used against him at trial. (Petition at 29-30.) Petitioner argues that, but for counsel's misadvice, his testimony would have provided the "linchpin" to suppress the tape. (Id. at 30.) However, the only testimony proffered by Petitioner was that Garguilo began extorting him "shortly" after the tape was made; he provides no further details. It is also noteworthy that in support of this claim, Petitioner renews – almost verbatim – his arguments raised in multiple prior motions to demonstrate corroboration of Petitioner's proffered testimony. (See Suppression Motion, ECF No. 356.) Specifically, Petitioner argues that Garguilo was experiencing financial hardship at the time he

recorded his conversation with Petitioner, which hardship was Garguilo's motivation to create the Tape to impermissibly use for blackmail purposes. (See Petition at 29 ("Gargiulo did begin to extort cash from [Petitioner] with the threat of disclosure of the [T]ape to police shortly after he [created] it, evidencing his contemporaneous intent to misuse the [T]ape to extort from the outset . . . ."); see also id. at 29-30.) Thus, Petitioner's proffered testimony does not provide any new evidence to the Court. And, as the Government argues, "it strains the bounds of credulity to believe that the petitioner never advised his trial or retrial counsel that he could have testified or even offered an affidavit regarding Gargiulo's alleged primary intent." (Opp'n at 10.)

In any event, the Court previously ruled, prior to both trials, that the Garguilo Tape was admissible. (ECF Nos. 116, 223, 404.) Further, on appeal, Petitioner raised the issue of the Garguilo Tape, arguing it was improperly admitted as evidence at both trials. See Tarantino Appellate Brief, 2014 WL 6602157, at *76-84. The Second Circuit rejected this argument, holding there was "no error, much less clear error, in the District Court's finding that Garguilo did not intercept the communication 'for the purpose of committing any criminal or tortious act,' so as to render it inadmissible under Title III of the Omnibus Crime Control and Safe Streets Act of 1968." Tarantino, 617 F. App'x at 65 ("Although Garguilo later used the recording for blackmail, it is

far from clear that blackmail was his 'primary motivation' or 'a determinative factor' at the time he made the recording."). Accordingly, Petitioner's claim is barred by the mandate rule. Yick Man Mui, 614 F.3d at 53. Despite now proffering his testimony that Garguilo's extortion purportedly began "shortly" after the Tape was made, all of the alleged corroborating evidence Petitioner now proffers had previously been before this Court and the Second Circuit. As such, re-litigating this issue will not be had, even through the lens of an ineffective assistance claim, as the factual predicate was upheld on direct appeal. Id.

Thus, Petitioner's claim fails.

B. Discovery Motion

Petitioner also moves to expand the record seeking -- what he describes as -- "limited" discovery: (1) regarding Count One, 18 U.S.C. § 33, to establish that he is legally innocent of said charge; (2) to establish unwaivable benefactor conflict; and (3) to establish that Froccaro (a) wrongfully excluded him from pre-trial juror screening, and (b) failed to request a theory-of-defense jury instruction as to the murder of Dorval. Because the Court denies Petitioner's habeas Petition, finding Petitioner is not entitled to habeas relief, there is no need for the requested

additional discovery. However, even if that were not the case, the Discovery Motion would be denied for the reasons stated herein.

"A habeas petitioner bears a heavy burden in establishing the right to discovery because, unlike the usual civil litigant in federal court, he is not entitled to discovery as a matter of ordinary course." Batista v. United States, No. 14-CV-0895, 2016 WL 4575784, at *1 (E.D.N.Y. Aug. 31, 2016) (citing Bracy v. Gramley, 520 U.S. 899, 904 (1997)). Thus, a petitioner must show "good cause" to demonstrate he is entitled to discovery. See Bracy, 520 U.S. at 908-09. "However, a court may choose to deny a request for discovery should a petitioner simply be engaging in a 'fishing expedition' without showing specific facts that would support a habeas corpus petition." Batista, 2016 WL 4575784, at *1 (citing Charles v. Artuz, 21 F. Supp. 2d 168, 169 (E.D.N.Y. 1998)).

1. Count One Discovery

Petitioner now seeks records of business transactions of Fede's businesses on or about June 23, 1994, to support his theory that Fede could have been referring to other businesses he owned when he testified that "we" provided service to Newark, New Jersey. He has submitted documents he contends supports this theory. However, as previously discussed, Petitioner's theory is based upon pure speculation. (See supra note 5.) Moreover, the proffered documents do not undermine Fede's

trial testimony. In sum, Petitioner has failed to show "good cause" for additional discovery since he has not presented specific allegations that would give this Court reason to believe Petitioner may, if the facts are fully developed, be able to demonstrate that he is entitled to relief. See Bracy, 520 U.S. at 908-09. Petitioner's request is no more than an impermissible fishing expedition; as discussed supra, there was sufficient evidence demonstrating jurisdiction to support the conviction pursuant to 18 U.S.C. § 33. Hence, Petitioner is not entitled to expand the record further with respect to Count One. Accordingly, this discovery request is denied.

2. Undisclosed Benefactor Discovery

> As the government pointed out in its opposition to the petitioner's habeas motion, the petitioner was afforded Curcio counsel prior to the start of the first trial and would have been fully aware of his right to conflict-free counsel. Furthermore, the petitioner further admits that, at his request, Eliza Stahl, Esq.[,] was a member of the defense team prior to the first trial and was fully aware of the purportedly undisclosed benefactor conflict.

(Discovery Opp'n at 3.) The Court agrees and finds that Petitioner is not entitled to expand the record further as to his undisclosed benefactor claim. Petitioner's discovery request seeks only to corroborate the arguments already before the Court; as such, Petitioner fails to demonstrate "good cause" warranting granting

his habeas-related discovery request. Accordingly, this discovery request is also denied.

3. Juror Screening Discovery

Petitioner is unable to demonstrate "good cause" to expand the record with respect to his claim that he was wrongfully excluded from the pre-trial juror screening. The Second Circuit already determined that Petitioner implicitly waived his right to be present at the pre-trial juror screenings. In any event, Petitioner is unable to demonstrate prejudice. "[G]iven the overwhelming evidence of the [P]etitioner's guilt, there is no reasonable probability that but for Froccaro's alleged ineffective assistance of counsel on this issue, that the [P]etitioner would not have been convicted at trial." (Discovery Opp'n at 3.) Thus, the Court agrees with the Government that "any discovery on this issue is without 'good cause'." (Id.) Therefore, Petitioner's request for discovery as to this issue is denied, as well.

4. Defense Theory Instruction Discovery

Petitioner seeks to expand the record to support a claim that Froccaro was ineffective for failing to "seek a defense theory instruction that jurors had a legal duty to acquit petitioner if they found the evidence only sufficiently proved he was an 'accessory-after-the-fact' of the murder." (Discovery Motion at 10.) He argues that the Garguilo Tape supported his actual innocence, i.e., that an inaudible portion of the Tape played at

trial was recently discovered to be exculpatory upon amplification. (Id.) Specifically, Petitioner contends that upon amplification, he can be heard stating the person who killed Dorval, to wit, Pistone. (Id. at 11.) He maintains that Froccaro was ineffective for failing to seek amplification of the purportedly exculpatory portion of the tape and allowed a "mistranscribed" portion to misguide the jury. (Id.) Petitioner now requests discovery to aid in demonstrating that his involvement was limited to corpse-concealment after the murder.

Given the Court's intimate knowledge of this case, it concurs with the Government that "the admissible evidence from the [T]ape was properly disclosed, heavily litigated pre-trial, addressed at two separate trials and litigated on appeal." (Discovery Opp'n at 3.) Moreover, the Court is hard-pressed to find Petitioner's self-serving declaration that his "own words on tape would have proven [his] actual innocence of the murder of Louis Dorval" meets his "good cause" burden warranting habeas-related discovery. To the contrary, upon the record presented, there is no reason to believe that Petitioner may, if the facts are fully developed, be able to demonstrate that he is entitled to habeas relief. See Bracy, 520 U.S. at 908-09. Therefore, Petitioner's request for discovery on this basis is denied.

5. Court Recusal Discovery

Similarly, Petitioner is unable to demonstrate "good cause" for his discovery request regarding recusal. Petitioner proposes interrogatories to the court and the Government seeking to demonstrate the Court's bias regarding cooperator Mulligan.

The Court has already ruled on Petitioner's pro se Recusal Motion made upon the same basis, having found it to be without without merit. (See Recusal M&O, ECF No. 410.) Specifically, this Court held that "[t]here is nothing erroneous about the Government's indictment of Mulligan, and that this Court presided over [the Petitioner's] criminal trial in which Mulligan testified against [the Petitioner] does not objectively raise any doubt that justice would be done absent recusal." (ECF No. 413, at 5.) In view of this ruling and the absence of any specific allegations that would give the Court reasons to believe further facts would entitle Petitioner to habeas relief, this discovery request is denied.

***

In sum, Petitioner's requests to expand the record are DENIED.

CONCLUSION

For the reasons set forth above, **IT IS HEREBY ORDERED** that Petitioner's Petition (ECF No. 510) is **DENIED** in its entirety;[11]

IT IS FURTHER ORDERED that Petitioner's Discovery Motion (ECF No. 518) is **DENIED** in its entirety;

IT IS FURTHER ORDERED that, because there can be no debate among reasonable jurists that Petitioner was not entitled to habeas relief, the Court does not issue a Certificate of Appealability. 28 U.S.C. § 2253(c); see also Middleton v. Att'ys Gen., 396 F.3d 207, 209 (2d Cir. 2005); and

IT IS FURTHER ORDERED that the Clerk of the Court mark CLOSED the corresponding civil case, Case No. 16-CV-3770.

SO ORDERED.

/s/ JOANNA SEYBERT
Joanna Seybert, U.S.D.J.

Dated: May 5, 2022
Central Islip, New York

[11] The Clerk of Court is also directed to terminate Petitioner's original Section 2255 Petition (ECF No. 500), First Supplemental Petition (ECF No. 503), and Second Supplemental Petition (ECF No. ECF No. 505).

AMENDED SUPPLEMENTAL MOTION UNDER 28 U.S.C. § 2255
ECF DOC. NO. 510

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CHRISTIAN GEROLD TARANTINO,

Petitioner,

vs.

Case No.: 2:08-cr-00655-JS
(Related Case: 2:16-cv-03770-JS)

UNITED STATES OF AMERICA,

Respondent.

_____/

AMENDED SUPPLEMENTAL MOTION UNDER 28 U.S.C. §2255 TO VACATE/SET ASIDE ILLEGAL CONVICTIONS/SENTENCES FILED BY A PERSON IN CUSTODY OF THE UNITED STATES

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AMENDED SUPPLEMENTAL MOTION UNDER 28 U.S.C. §2255 TO VACATE/SET ASIDE ILLEGAL CONVICTIONS/SENTENCES FILED BY A PERSON IN CUSTODY OF THE UNITED STATES

Petitioner Christian Tarantino (hereinafter, "Petitioner"), through his undersigned counsel, hereby files this amended supplemental motion pursuant to 28 U.S.C. §2255 seeking to vacate/set aside his unconstitutional convictions and sentences. The instant petition is being filed in accordance with the Court's electronic paperless orders dated August 21, 2019, and September 19, 2019, and is intended to be the operative petition, supplementing and amending the original §2255 motion filed *pro se* on June 27, 2016, the same day that the United Supreme Court denied certiorari review,[1] and the supplemental petition filed on July 14, 2017 (DE:505).[2]

Introduction

In addition to incorporating herein all of the documents, evidence, and testimony that are part of the extensive record in Petitioner's case, Petitioner also expressly incorporates herein by

[1] *See Tarantino v. United States,* 136 S.Ct. 2526 (2016).

[2] When Petitioner filed his prior supplemental petition in July 2017, the Court required him to re-file it with a 30-page limitation. The present submission contains the same issues as did the July 2017 submission, but adds an additional argument. Thus, because the Court has granted Petitioner leave to file any supplemental issues, the instant submission, is, by necessity, in excess of 30 pages. By separate motion, Petitioner is seeking leave to exceed the page limitation.

specific reference the exhibits and attachments that have been previously filed in connection with the July 14, 2017, supplemental pleading (*see* attachments to DE: 505). Petitioner did not want to over-burden the Court or the docket with re-filing the very same exhibits and attachments twice. However, if the Court wishes the exhibits to be re-filed as attachments to the present submission, Petitioner will do so. Moreover, this submission presumes familiarity with Petitioner's case, and thus does not contain discussion of the procedural history or a detailed factual statement of the evidence from the Petitioner's two trials; instead, it discusses only the facts relevant to the issues being raised herein.

Petitioner was convicted of an offense under 18 U.S.C. § 33 without jurisdiction as a result of the ineffective assistance that was delivered by his first trial counsel

As to Count One charging Petitioner with a violation of 18 U.S.C. §33, dispassionate analysis of the jurisdictional element required to convict under §33 leads to the conclusion that the Petitioner was convicted of the offense without jurisdiction, *as the trial evidence showed that* ***Mid-Island Check Cashing Corp. armored vans were only "used" within the state of New York***. Mid-Island Check Cashing Corp. (Mid-Island) was a domestic New York company that never registered to do business in New Jersey - a fact that would have been discovered prior to trial had trial counsel complied with their professional duty to investigate state corporate records. *See Strickland v. Washington*, 466 U.S. 668 (1984).

On March 29, 2011, the government presented the testimony of Frank Fede (Fede), owner of Mid-Island in June 1994, when two of its employees were robbed, and one of them was killed. Mid-Island records introduced at trial showed that the armored van involved was ***only used within New York***, *see* Exhibit A (Trial Exhibit 3-FF) (June 23, 1994 vehicle route showing only ***intra***state stops within New York), ***and*** Fede testified that Mid-Island armored vans ***only serviced New York***, ***disproving*** jurisdiction under §33. *See* Exhibit B (March 29, 2011 transcript) at p.808 ("AUSA:

And how did you ***use*** the armored vans? Fede: To deliver payrolls to certain companies around Long Island [and] Queens. AUSA: In addition to Long Island and Queens, did you service any companies outside of New York State? A. ***No.*** AUSA: Did ***you ever*** service companies in the Port of Newark? Fede: Yes. AUSA: In the Port of Newark, what kind of companies did ***you*** serve? Fede: We did the tankers that came in from foreign countries, and we would service the ships.") (emphasis and brackets added); *but see* Exhibit C (Indictment) at p.1, ¶1 (alleging that "Mid-Island owned and operated armored vans that served as mobile check-cashing outlets for the employees of Mid-Island's customers, which included businesses located on Long Island, New York ***and in New Jersey***") (emphasis added). ***No Mid-Island vehicle*** ever serviced New Jersey businesses. Records consistently show that "***Mid-Island Check Cashing Corp***." registered only as a domestic corporation in New York (from 1973 to 1995), and recent "no records" certificates establish that "***Mid-Island Check Cashing Corp***." never registered in New Jersey. *See* Composite Exhibit D (Mid-Island records issued by New York and "no records" certificates issued by New Jersey). Petitioner was unlawfully convicted despite the corroborated trial testimony of a company owner that ***Mid-Island armored vans*** were **only** "**used**" within New York.

Petitioner was convicted without jurisdiction as the evidence adduced at trial ***disproved*** the jurisdictional element of 18 U.S.C. §33. To convict a defendant of an offense prosecuted under 18 U.S.C. §33, the government must prove the essential jurisdictional element found within the statute, requiring that the alleged offense conduct involve a "motor vehicle which is used, operated, or employed in interstate or foreign commerce." *See* 18 U.S.C. §33(a). The jurisdictional element is set forth in the first "whoever" clause of the statute. Given this requirement, the third "whoever" clause of 18 U.S.C. §33(a) must therefore be read as follows: "Whoever with like intent, willfully disables or incapacitates any driver or person employed in connection with the operation or

maintenance of the motor vehicle ['which is used, operated, or employed in interstate or foreign commerce']... ." The jurisdictional language is unambiguous. An offense mischarged under §33 cannot be salvaged by misapplying the "*de minimis*" effect on commerce analysis that is applicable to language found in other statutes. Had the government timely charged the 1994 robbery as a violation of the Hobbs Act, 18 U.S.C. § 1951(a) ("Whoever *in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery*") (emphasis added), the jurisdictional element *under that statute* could have been proven if the robbery committed merely created a realistic probability of a "*de minimis*" effect on commerce. *See United States v. Celaj*, 649 F.3d 162, 168 (2nd Cir. 2011).

Under 18 U.S.C. §33, a motor vehicle must be "used, operated, or employed in" interstate commerce, not just have some "*de minimis*" effect on commerce. The Supreme Court has noted that Congress has repeatedly recognized the "distinction between legislation limited to activities '***in commerce***,' and an assertion of its full Commerce Clause power so as to cover all activity substantially ***affecting interstate commerce***." *See United States v. American Bldg. Maint. Indus*., 422 U.S. 271, 280 (1975) (emphasis added). The phrase "in interstate commerce" is a much more restrictive jurisdictional requirement than the phrase used in the Hobbs Act ("affects interstate commerce or the movement of any article or commodity in commerce"). Had Congress wanted to include language in §33 to cover vehicles that are merely used to "affect" commerce, they could have done so. *See, e.g.,* 18 U.S.C. §844(i) (covering motor vehicles "used in interstate or foreign commerce ***or in any activity affecting interstate or foreign commerce***") (emphasis added).

The jurisdictional phraseology "used, operated, or employed in" interstate commerce also appears in 18 U.S.C. §32, enacted with §33 in 1956. Section 32 authorizes prosecution of anyone who "sets fire to, damages, destroys, disables, or wrecks ... any civil aircraft used, operated, or

employed in interstate, overseas, or foreign air commerce." Sections 32 and 33 both adopted language from 18 U.S.C. §1992, which authorizes prosecution of ***terrorist attacks*** by anyone who "willfully derails, disables, or wrecks any train, engine, motor unit, or car used, operated, or employed in interstate or foreign commerce by any railroad." Section 33 extended protection ***only*** to motor vehicles "used, operated, or employed in interstate or foreign commerce." The trial record shows clear evidence that Mid-Island armored vans had ***not*** been "used, operated, or employed in" interstate commerce. The jurisdictional language of §33 cannot be misapplied to reach any vehicle *ever* owned by one ostensibly engaged in interstate commerce, ***where the "use" of the Mid-Island armored vans was confined to New York only.*** *See* Exhibit B (Fede testimony) at p.808.

Due to the dearth of law construing the interstate commerce language of 18 U.S.C. §33, the court should consider cases interpreting 18 U.S.C. §§32 and 1992, as both use the same "used, operated, or employed in" language. In *United States v. Hume*, 453 F.2d 339 (5th Cir.1971), construing Section 32, the court found that an airplane operated in interstate commerce because the airplane had been crop-dusting in New Mexico during the morning of the day that the airplane was shot while dusting in Texas. In *United States v. Altenburger*, 549 F.2d 702 (9th Cir.1977), the court applied Section 1992 to a case involving an interstate train. Petitioner does ***not*** argue that the Mid-Island van had to have crossed a state line on June 23, 1994 (which it did not), but Petitioner does submit that ***the evidence showed that Mid-Island vans were ONLY "used" within New York***, and therefore he was convicted ***without jurisdiction***.

The prosecution described the jurisdictional element to the jury as follows: "***[Y]ou must find that the government has proven beyond a reasonable doubt that the motor vehicle was used by a company that operated or did business in interstate or foreign commerce***." *See* Exhibit E (May 4, 2011 transcript) at p.2878 (emphasis and brackets added). The Court instructed the jury

to decide the jurisdictional element, as follows: "***It is sufficient if the government proves beyond a reasonable doubt that the motor vehicle was used by a company that operated in interstate or foreign commerce***." *See* Exhibit F (May 5, 2011 transcript) at pp.3130-3131 (emphasis added). Because counsel rendered ineffective assistance, the prosecution was able to claim in its closing summation that there was ***no dispute*** that "***Mid-Island Check Cashing Corporation operated in interstate commerce***." *See* Exhibit E at p.2880. But for the deficient performance of counsel, the §33 charge would have been dismissed on a pretrial motion or a Rule 29 motion, as Mid-Island was a domestic corporation only operating vans in New York. Mid-Island did ***not*** "operate" vans in New Jersey. *See* Exhibit C at p.1, ¶1 (Indictment charging that Mid-Island operated vans in New Jersey).

Petitioner's trial counsel never argued that the prosecution failed to prove the jurisdictional element, and there is no basis on the record to treat such an omission as a strategic choice. Petitioner respectfully submits that the Court should conclude that the conviction under 18 U.S.C. § 33 was obtained without jurisdiction, vacate the conviction under Count One of the Indictment, and dismiss the charge ***with prejudice***. At a minimum, the Court should conduct an evidentiary hearing.

Petitioner's first trial counsel operated under an undisclosed benefactor conflict adversely affecting the defense as counsel delivered ineffective assistance at trial

Petitioner's first trial counsel, James Froccaro (Froccaro), operated under an undisclosed benefactor conflict that adversely affected his trial performance, as Froccaro's divided loyalties prevented him from pursuing a defense of Petitioner ***compelled*** by the evidence that incriminated Scott Mulligan (Mulligan). The ***simultaneous*** representation of Mulligan damaged the defense. Through these §2255 proceedings, petitioner can amply "demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *See Cuyler v. Sullivan*, 446 U.S. 335, 348

(1980). The Second Circuit concluded that the trial court "failed to develop the record" and "preserve[d] this issue for collateral review." *See United States v. Tarantino*, 617 Fed.Appx. 62, 65-66 (2d Cir. 2015) (brackets added). Facts that were *dehors the record* are now ripe for review.

The Affidavit submitted by lawyer Eliza Stahl (Stahl) reveals the undisclosed conflict under which Froccaro operated during the first trial. The trial court did not "develop the record" because Froccaro inexcusably failed to disclose that he ***simultaneously*** represented Mulligan before and during trial (receiving a $150,000 check and cash payments arranged by Mulligan).[3] In her declaration, Stahl avers that Froccaro admitted that he had ***destroyed*** the extortion letter that was sent by Vincent Gargiulo (Gargiulo) to Mulligan only months before Gargiulo was killed. By destroying evidence showing Mulligan's motive to cause the murder of Gargiulo, Froccaro showed his ***complicity*** with Mulligan, which disqualified him from defending Petitioner at the trial, as Mulligan was implicated in all of the offenses charged against petitioner. Irrespective of the complicitous destruction of criminal evidence, Froccaro unreasonably failed to inculpate Mulligan given evidence that would have ***compelled*** conflict-free counsel to inculpate Mulligan in order to defend Petitioner. Froccaro's trial performance was adversely affected as to each count tried.

COUNT ONE: The sidewalk robbery of June 23, 1994 that resulted in a death

As to Count One charging Petitioner with the robbery that resulted in the death of guard Julius Baumgardt, Froccaro knew that Mulligan was a target/suspect as of 1994. *See* Exhibit I (February 16, 2011 transcript) at p.361 (FBI file showed that Mulligan was a target/suspect in the

[3] During the *Curcio* hearing held days before the first trial started, Froccaro twice claimed that another conflict of interest (involving the simultaneous representation of Lucchese crime family members who took credit for committing the August 1994 murder charged against the petitioner) "*honestly* slipped [his] mind." *See* Exhibit G (March 15, 2011 transcript) at p.5. Froccaro failed to disclose his benefactor conflict, as he also represented Mulligan before and during petitioner's first trial. *See* Stahl Affidavit.

murders of Julius Baumgardt and Louis Dorval); *id*. at p.363 (Mulligan's DNA was *subpoenaed*).[4] The conflict led to prejudicial error as counsel failed to elicit a description suggesting ***Mulligan*** played a part in the robbery ***instead of Petitioner***,[5] and even objected to linking ***Mulligan*** to the cache of weapons.[6]

COUNT TWO: The murder of Louis Dorval in 1994

As to Count Two charging Petitioner with the obstruction of justice murder of Louis Dorval (Dorval), who was found floating at sea in a toolbox trunk days after he was indicted in New Jersey with several Lucchese crime family members in August 1994, Froccaro knew that Mulligan was a target/suspect in the murder of Dorval as of 1994. *See* Exhibit I at p.361 (FBI investigative file showed that Mulligan was already a target/suspect as of 1994 in the homicides of Julius Baumgardt *and* Louis Dorval).

With the evidence adduced at trial only proving that Joseph Pistone had murdered Dorval, the prosecution submitted to the jury in its final summation that Petitioner had "***aided and abetted***" Joseph Pistone, the murderer. *See* Exhibit E (May 4, 2011) at p.3065. In support of his motion under Rule 29, Fed.R.Crim.P., Froccaro argued that the tape evidence (of a conversation between Vincent Gargiulo and Petitioner) "more appropriately" showed that Petitioner had been implicated in the murder of Dorval as an "accessory after the fact." *See* Exhibit L (April 27, 2011 transcript) at p.2793 ("…the only statement in there that could potentially be argued to implicate him in the

[4] Stahl also avers that Froccaro celebrated the case agent's testimony given at the *Mastrangelo* hearing suggesting that Mulligan's DNA was excluded by the FBI as of the hearing date. *Id*. at p.363. Froccaro took credit for "clearing" Mulligan at the *pre-trial* hearing. *See* Stahl Affidavit.

[5] *See* Exhibit J (FBI case agent affidavit) at pp.3-4, ¶4 & n.4 (two (2) witnesses who were standing "a few feet" from the robbery saw two (2) assailants; one of the assailants was Louis Dorval, and Mulligan fit the description of the other assailant who wielded a shotgun, identically matching his height ("six-foot-one-inch") and "heavy build".

[6] *See* Exhibit K (March 30, 2011 transcript) at pp.899-917 (Froccaro objecting to any trial testimony that Mulligan was seen entering storage unit on June 24, 1994; weapons allegedly used during June 23, 1994 robbery were found when the same storage unit was searched on June 24, 1994); *id.* at p.932 (Petitioner was never seen at storage facility).

murder or being an accessory -- ***I think more appropriately being an accessory after the fact***, where there is a claim that it is Mr. Tarantino speaking, and there is a conversation to the extent that he cut his finger on the toolbox") (emphasis and brackets added). During their deliberations, jurors focused on that portion of the tape implicating Petitioner in dumping Dorval's body at sea. *See* Exhibit M (May 9, 2011 transcript) at p.3211 (trial court reading the jury's specific request "to hear the enhanced version of the designated area of the Gargiulo recording at the parts pertaining to the trunk, skin, finger"). That tape portion was *played and replayed* upon jury request. *Id*. at p.3213. The transcript used at trial for that portion of the recording reads as follows:

> ***Gargiulo: "What about, remember the trunk and your finger? You told me something, you squished your finger?***
>
> ***Petitioner: Yeah [UI].***
>
> ***Gargiulo: There was no skin on that, right?***
>
> ***Petitioner: Buddy, no way [UI]. I was in the middle of the fuckin' Atlantic Ocean and the body was found floating two days later or better. There was one piece of skin on a fuckin' rock, can't believe it's been floating in the ocean.***
>
> ***Gargiulo: Yeah, no way.***
>
> ***Petitioner: No fucking way.***
>
> ***Gargiulo: Fish would eat it and stuff.***
>
> ***Petitioner: The bottom line, it would just float away, you know what I mean? It wouldn't stay jammed on a rock? If it was here, yeah; but in the water- saltwater, for fuckin' two days, no fuckin' way.***
>
> ***Gargiulo: How bad is SCOTT taking this?***
>
> ***Petitioner: He's all right now because we sat around and kicked it around...***

See Exhibit N (government trial exhibit "RS-39") at pp.20-21 (emphasis added).

"As a general proposition, a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor."

Mathews v. United States, 485 U.S. 58, 63 (1988). Given that Petitioner's taped statements provided sufficient evidence for a reasonable jury panel to have found that Petitioner was an "accessory after the fact," who had dumped the corpse at sea [*after the murder* was committed by Joseph Pistone inside of a vehicle as *corroborated* by the FBI], Froccaro was ineffective for failing to request a theory of defense instruction. *See United States v. Varelli*, 407 F.2d 735 (7th Cir. 1969) (distinguishing the criminal conduct of accessories after the fact and aiders and abettors to conclude that defendants were accessories after the fact and could not be convicted as aiders and abettors in a case involving stolen merchandise).

Froccaro should have requested a legal theory of defense instruction that the jury had a ***duty to acquit*** Petitioner charged as a principal in the murder of Dorval, if the jury found that the trial evidence only showed beyond a reasonable doubt that he was an "accessory *after the fact*." The legal theory was fully supported by the tape, *see* Exhibit N (government trial exhibit RS-39) (tape transcript), *supra*, at pp.20-21, but the instruction was not presented in the court's charge to the jury because counsel did not request it. Froccaro raised the point in his Rule 29 motion, but counsel did not attempt to present the defense theory supported by the evidence to the jury.

It was unreasonable for counsel to pose a defense to the jury that was ***in denial*** of the taped statements that "more appropriately" showed that the Petitioner was an "accessory after the fact," as submitted in support of the Rule 29 motion. *See* Exhibit L (April 27, 2011 transcript) at p.2793; *compare* Exhibit E (May 4, 2011) at p.3055 (Froccaro's summation challenging the integrity of the tape and relying on the testimony of Peter Pistone) ("…[t]hat he and his brother Joseph and no one else disposed of Mr. Dorval's body at sea in a black bullet riddled toolbox. ...And that live, first-hand, eyewitness account of about who was there and what happened to Louis Dorval totally demolishes the integrity of the tape that came from nowhere, totally. How can Chris be twisting

his finger on the box if he is not there?"). Still ***in denial*** about the tape, Froccaro "*doubled-down*" on Peter Pistone's testimony that excluded the petitioner from any involvement. *Id*. at 3055-3056 ("His live, first-hand eyewitness account totally demolishes the integrity of the tape that came from nowhere because Chris had nothing to do with the murder of Louis Dorval and the disposal of his body at sea."). Petitioner's voice was on the tape, but Froccaro attacked "the integrity of the tape" arguably inculpating Mulligan as a principal in the Dorval murder and exculpating Petitioner as an accessory after the fact.[7]

Certain portions of the taped conversation between Petitioner and Gargiulo would have ***compelled*** any conflict-free trial counsel to inculpate Mulligan to defend Petitioner. Gargiulo criticized "Scott" (Mulligan) for going "on the lam." *See* Exhibit N (trial exhibit RS-39) (tape transcript) at p.6. Froccaro turned a blind eye to Petitioner's taped response, stating that Mulligan was "not a saint in all of this. You're taking X amount of time. And I'm taking X." *Id*. The references to Mulligan's flight would have ***compelled*** any conflict-free counsel to inculpate Mulligan by arguing that his flight suggested that Mulligan had a greater concern as he aided and abetted the murder of Dorval, and that Petitioner was an accessory after the fact who consistently did not flee from the same investigation that had collected his DNA two months earlier. *Id*. at p.3.

The consensus of opinion was consistent with Mulligan's greater culpability. *Id*. at p.18 (Gargiulo: "You know what the bad thing is SCOTT going on the run. He makes you guys look so bad though …As soon as you guys get busted, they're going to find SCOTT in no time. ...Because you know how much media they'll put on him. He'll be ***number one's most wanted***. He won't be able to move. Petitioner: Right, right") (emphasis added). Froccaro did not use the tape to exculpate Petitioner as an accomplice after the fact and inculpate Mulligan as a principal

[7] The tape was so damaging that retrial counsel ***conceded*** that the known existence of the tape provided "motive." *See* Exhibit O (May 9, 2012 transcript) at p.1919. But Froccaro "buried his head in the sand" due to his divided loyalties.

in the murder due to his divided loyalties. Froccaro submitted that the tape "more appropriately" showed Petitioner was an accessory after the fact, and the prosecution responded that the testimony of Gaetano Fatato (Fatato) supported "a fair inference that Mr. Dorval was last with Mr. Tarantino before his death." *Id.* at p.2797. Fatato's testimony[8] posed no impediment to instructing the jury to acquit if it found that Petitioner was an accessory after the fact in the murder.

Petitioner's statements implicated him only in dumping Dorval's body at sea and provided evidence for a reasonable jury to conclude that Petitioner may have been an "accessory after the fact." The evidence available to counsel showed that (1) Petitioner dumped Dorval's body at sea, *see* Exhibit N at pp.20-21, (2) ***after the murder*** had already been committed by Joseph Pistone inside a vehicle, as ***corroborated*** by the FBI. *See* Exhibit I at pp.450-454 (FBI case agent testifying that AUSA represented to a federal judge that Peter Pistone was ***inside the vehicle*** when Joseph Pistone shot Dorval in the head; FBI case agent confirmed that bullet came from a revolver as reported; FBI case agent confirmed that the vehicle had been damaged from weight of corpse as reported; FBI case agent confirmed that the vehicle was returned to Joseph Pistone´s girlfriend with a brand new interior as reported, and that it had been a relative of Pistone who had installed new interior). Froccaro was ineffective for failing to request the correct legal theory of defense jury instruction supported by the evidence that Joseph Pistone had murdered Dorval inside a vehicle and the tape evidence implicating Petitioner only in dumping Dorval's dead body at sea (i.e., *after-the-fact*). There is a reasonable probability that the jury would have acquitted Petitioner (who was charged as a principal in the murder) if Froccaro had sought the correct legal theory of

[8] During trial, Fatato admitted that he had given different versions of his last contact with Dorval since 1994. *See* Exhibit P (April 5, 2011 transcript) at pp.1335-1337 (Fatato told FBI Agent Greco on September 13, 1994, within one month of Dorval's death, that Dorval was at his residence the last time he phoned Dorval, and Dorval told Fatato that he was going to visit Tarantino later that evening). Fatato's lack of credibility is a matter of record. *See* Exhibit Q (Doc. 171) (Case No. 08-655 (JS)) ("United States District Judge Jack B. Weinstein stated that Fatato was 'not unbelievable as a matter of law, just that his veracity is so slender as to suggest the court wouldn't believe him.'").

defense instruction that the jury had a duty to acquit petitioner if the jury reasonably concluded that the trial evidence presented only proved beyond a reasonable doubt that he was an "accessory after the fact." Froccaro had an actual conflict of interest adversely affecting his defense of Petitioner, and also rendered prejudicially deficient performance. See *Cuyler v. Sullivan*, 466 U.S. 335 (1980); *Strickland v. Washington*, 466 U.S. 668 (1984).

COUNTS THREE AND FOUR

The conspiracy to murder and the murder of Vincent Gargiulo in 2003

As to Counts Three and Four respectively charging Petitioner with conspiring to commit the obstruction of justice murder of Vincent Gargiulo (Gargiulo) and with the obstruction of justice murder of Gargiulo, who was killed in Manhattan during the early morning of August 18, 2003, Froccaro ***destroyed evidence*** showing that Mulligan had a motive to hire the murder of Gargiulo, when he destroyed the extortion letter that was mailed by Gargiulo to Mulligan earlier in 2003 at a time when Froccaro had also represented Mulligan in a drug prosecution. *See* Stahl Affidavit. Irrespective of his destruction of evidence, Froccaro failed to inculpate Mulligan with evidence that would have ***compelled*** conflict-free trial counsel to inculpate Mulligan to defend Petitioner. Even if Froccaro had not clearly operated under an actual conflict, prejudicial error was committed. Froccaro failed to object to inadmissible hearsay ***and*** failed to preclude Petitioner's former attorney Melvyn Roth (Roth) from providing the "***direct link***" to convict Petitioner at trial as the gym owner known as "Matty Roth," who allegedly conspired to murder Gargiulo. ***But for the inadmissible post-mortem hearsay or the trial testimony of Petitioner's former attorney that should have been precluded, there was insufficient evidence, requiring final acquittals that would have barred the retrial held on these mistried counts under the double jeopardy clause***.

On April 5, 2011, the government filed a letter regarding its *subpoena* to call Petitioner's

former attorney Melvyn Roth (Roth) to testify. *See* Exhibit R (Doc. 213) (Case No. 08-655(JS)). The prosecution knew that attorney Roth and Petitioner had an attorney-client relationship that extended to this federal prosecution. *Id*. at p.1 ("Since 1991, Mr. Roth has represented Tarantino in numerous unrelated state and federal criminal matters. Roth also represented Tarantino briefly during the grand jury investigation preceding the current indictment").

The government letter proffered the mosaic of evidence relevant to Counts Three and Four, *id*. at p.2, as follows:

> On August 18, 2003, a government witness observed Justin Bressman shoot and kill Gargiulo. That witness, Pablo Amador, will testify that while he did not know the defendant, he was enlisted by Bressman to be a look-out during the murder of Gargiulo, which had been ordered by Bressman's Synergy gym employer, "Matty Roth." Personnel and business records obtained from Synergy reveal that no "Matty Roth" worked at or operated the Synergy gyms run by Tarantino.
>
> On August 21, 2003, three days after Gargiulo's murder, NYPD homicide detectives visited Bressman at a Synergy gym owned by Tarantino on W. 23rd Street in Manhattan, the same gym from which Amador observed Bressman retrieve, among others, the weapon used to kill Gargiulo. Bressman accompanied the detectives back to a local precinct station house. Shortly after the interview began, Mr. Roth telephoned the NYPD and spoke to one of the detectives interviewing Bressman. Mr. Roth asserted that he represented Bressman and demanded that the questioning stop. The detectives then asked Bressman if he was represented by a Melvyn Roth. Bressman responded that although he knew who Roth was, he denied that Roth represented him. When detectives asked Roth for additional details about his representation, Roth said that he had been retained by "a very concerned party."
>
> Telephone records for August 21 show that after Bressman left the Synergy gym with NYPD detectives, Roth's office in Garden City, New York received an incoming call from one of Tarantino's Synergy gyms on Long Island. Roth's office then called Roth's cell phone, and after a subsequent call, Roth called the NYPD station house where Bressman was being questioned. Thereafter, Roth again called one of Tarantino's Long Island Synergy gyms.
>
> Later that evening, Amador saw Bressman who had been released by the NYPD some hours earlier. Bressman told Amador, in sum and substance, that he had been "picked up" by the NYPD, but that "Matty Roth" had gotten him a lawyer to stop the questioning.

See Exhibit R (Doc. 213) at p.2. Since Amador testified in lockstep with the proffer, Petitioner submits that Froccaro failed to object to inadmissible *post-mortem* hearsay not in furtherance of the conspiracy that came to an end with the murder and failed to preclude Petitioner's attorney Roth from impermissibly providing the "***direct link***" to cast Petitioner as the alleged co-conspirator "Matty Roth." Without the *post-mortem* hearsay that Amador purportedly heard from missing alleged murderer Bressman that "Matty Roth" got Bressman an attorney, or without the identity testimony provided by attorney Roth inserting the "***direct link***" to suggest that Petitioner was the person who obtained counsel for Bressman, Petitioner could not have been cast as "Matty Roth," the gym owner who allegedly conspired to murder Gargiulo. *See id*. at p.3 ("The anticipated testimony that Tarantino asked Mr. Roth to stop the NYPD's questioning of Bressman is relevant in this case ***to identify the defendant as the "Matty Roth" who hired Bressman to kill Garguilo***.") (emphasis added). The referral of Roth as counsel was spun into evidence of guilt, *id*. at p.3 ("Tarantino's effort to halt the questioning of his coconspirator is also probative of Tarantino's consciousness of guilt"), but Roth never testified that Petitioner attempted to halt the questioning.

On April 6, 2011, Froccaro said that he would move to quash the *subpoena* to call Roth. The court requested that Froccaro submit his position by Friday, April 8, 2011, and he committed to submit his position by then, *see* Exhibit S (April 6, 2011 transcript) at pp.1448-49, 1582, but Froccaro shirked his duty to file a researched position. On April 11, 2011, Salvatore Marinello appeared as counsel for attorney Roth. Marinello stated that he did not know the case evidence and advised Roth to invoke the Fifth Amendment after the court ruled that fee and client identity testimony was not excludable under the attorney-client privilege. *See* Exhibit T (April 11, 2011 transcript) at pp.1859-1904. Prior to coming to court, Roth advised AUSA Miskiewicz that he would invoke attorney-client privilege. *Id*. at pp.1863-64. Arguing that the privilege did not apply,

AUSA Miskiewicz stated: "[W]e are not interested in any communications. ***We are interested only in the person who contacted him and told him to call the NYPD, end of story***." *Id*. at pp.1873-74 (emphasis and brackets added). Roth was asked two questions in the absence of the jury panel ("Q. On or about August 21st, 2003, who asked you to contact the NYPD with respect to that agency's interview of Justin Bressman? Q. And who paid you to assert or enter an appearance with respect to Mr. Bressman on or about that date?"), and he invoked the Fifth Amendment following counsel's advice. *Id*. at pp.1900-1901. The trial court directed Roth to answer or ***face contempt***. *Id*. at pp.1901-03. Roth was forced to identify Petitioner as the person who asked him to contact the NYPD with respect to Bressman. *See* Exhibit T at pp.1903-04 ("no one" paid attorney Roth). Linking Roth's client identity testimony with the inadmissible *post-mortem* hearsay provided by Amador that Bressman told him "Matty Roth" got Bressman an attorney, the Prosecutor stated: "***Now we know who Mattie Roth is*** … ***this is all part and parcel of co-conspirator statements as Mr. Bressman is concerned, and Mr. Amador being told***...") (emphasis added). Therefore, the government cannot seriously dispute that Roth provided the last "direct link" to convict Petitioner.

Froccaro failed to object to the inadmissible hearsay, and he also failed to articulate the correct legal objection to preclude Roth's trial testimony that impermissibly provided the "***direct link***" to cast petitioner as "Matty Roth," without which the chain of evidence presented would have resulted in judgments of acquittal for insufficient evidence as to the mistried counts. Froccaro delivered ineffective assistance during trial. *See* Exhibit T at pp.1877, 1884 (Froccaro: "I don't think the privilege applies… I don't know whether it applies"). Froccaro also failed to object to an inadmissible *post-mortem* statement made three days after the charged conspiracy ended with the murder on August 18, 2003. A conspiracy ends when its central criminal purpose has been achieved, *see Krulewitch v. United States*, 336 U.S. 440, 442 (1949), and a conspiracy to commit

murder comes to an end when the murder has been committed. *See United States v. McKinney*, 945 F.2d 471, 475 (7th Cir. 1992); *United States v. Silverstein*, 737 F.2d 864, 867 (10th Cir.1984). In *Silverstein*, the Tenth Circuit wrote:

> The hearsay exception of Fed.R.Evid. 801(d)(2)(E) applies only to statements made in the course and in furtherance of a conspiracy. Thus, a declaration made after the termination of the conspiracy does not fall within the exception. The time at which the conspiracy ends depends upon the particular facts of the case. Generally, however, a conspiracy terminates when its central criminal purposes have been attained. If there was a conspiracy in the instant case, its central criminal purpose was the murder…. ***The duration of a conspiracy does not extend to attempts to conceal the crime***. …The district court therefore erred in ruling that hearsay testimony was admissible pursuant to Fed.R.Evid. 801(d)(2)(E).

Id. at 867 (emphasis added; citations omitted). A conspiracy to murder was charged, and its goal was accomplished on August 18, 2003. The *post-mortem* conversation of August 21, 2003, when Bressman purportedly told Amador that "Matty Roth" got him counsel during questioning, did not contribute to committing the murder. *See United States v. Floyd*, 555 F.2d 45, 48 (2nd Cir. 1977) ("To include in the conspiracy an event, no matter how proximately related, occurring after the main objectives of a conspiracy have been accomplished would unnecessarily blur the relatively clear line drawn by the Supreme Court's decisions on this subject").

Without the erroneously admitted *post-mortem* hearsay, there was insufficient evidence, and the court would have had to enter final acquittals as to Counts Three and Four, but for counsel's prejudicial failure to object. In *Floyd*, the Second Circuit found that the arson of the getaway car used in the armed robbery of a bank on the day after the robbery fell outside the bounds of the conspiracy to commit the bank robbery, and any co-conspirator statements made in conjunction with that event were not admissible evidence against Floyd. Following the opinion in *Floyd*, Roth's intervention during the questioning of Bressman three days after the murder also fell outside the temporal bounds of the murder conspiracy, and therefore the alleged *post-mortem*

hearsay connected with that event was inadmissible against petitioner. Froccaro's failure to object was prejudicial, as there was insufficient evidence to convict without the inadmissible hearsay.

The client identity testimony provided by attorney Roth impermissibly inserted the last "direct link" without which the chain of trial evidence presented would have been unable to cast petitioner as alleged co-conspirator "Matty Roth." *See United States v. Goldberger & Dubin, P.C.*, 935 F.2d 501, 505 (2d Cir. 1991) (special circumstances under which client identity would be privileged exist when disclosure of client-identifying information would directly incriminate the client by providing direct linkage in an existing chain of evidence presented against the client). Petitioner would have also been entitled to acquittals ***but for*** his attorney's testimony erroneously admitted due to counsel's failure to raise the "direct linkage" exception to bar the testimony.

Amador testified in accordance with the government proffer that Bressman told him that "Mattie Roth" got Bressman an attorney when detectives questioned Bressman ***three days after the murder was committed***. *See* Exhibit U (April 21, 2011 transcript) at pp.2239, 2272, 2288. Detective Jeff Salta of the NYPD testified that the interview of Bressman was halted by a call from Roth who "said he was called and contacted by a concerned party." *Id*. at 2300. And, Roth testified that petitioner had asked him to call the NYPD with regard to Bressman, providing the last "direct link" without which the chain of evidence could not have cast petitioner as "Mattie Roth." *Id.* at p.2305. Without the client identity testimony impermissibly provided by attorney Roth *or* without the admission of the inadmissible *post-mortem* hearsay, there would have been insufficient evidence to convict Petitioner under Counts Three and Four as the identity of the alleged co-conspirator "Matty Roth" would have remained an enigma.[9]

[9] AUSA Flynn admitted that Bressman tried to "keep Amador in the dark as much as possible with regard to the murder and who he was working for." *See* Exhibit E (May 4, 2011 transcript) at p.2932 (explaining role switch).

Although Scott Mulligan was a partner in all of the Synergy gyms, Froccaro failed to elicit that fact to show that Mulligan was also a "boss" to Bressman who was portrayed as the murderer hired by "Matty Roth," his "boss" at the Synergy gyms. *Compare* Exhibit V (April 25, 2011 transcript) at pp.2332-36 (CPA Scott Flynn, accountant for Synergy gyms, ***not*** asked by counsel if Mulligan or others were gym owners) *and* Exhibit W (May 2, 2012 transcript) at pp.1122-24 (CPA Flynn revealing during retrial cross-examination that the gym [where Bressman worked] was owned and operated by Brett Holzer and Eric Holzer); Exhibit X (May 7, 2012 transcript) at p.1547 (Mulligan was a partner in all of the Synergy gyms); *id*. at p.1654 (Mulligan admits that he and Brett Holzer were also Bressman's bosses). Mulligan had a motive[10] to hire the murder, and he was also Bressman's "boss," but Froccaro allowed jurors to believe petitioner was Bressman's only "boss." All of Froccaro's omissions favored Mulligan, who was "next on the chopping block" as stated by the prosecutor early during the first trial. *See* Exhibit Y (April 7, 2011 transcript) at p.1627.

There is more than just a reasonable probability that, but for counsel's errors, the result of the proceedings as to Counts Three and Four would have been different. *See Strickland v. Washington*, 466 U.S. 668 (1984). There is a certainty that Petitioner would have been entitled to acquittals for insufficient evidence as the *post-mortem* hearsay was inadmissible, and the client identity testimony of Roth was also inadmissible as the testimony impermissibly inserted the "direct link" to convict petitioner casting him as co-conspirator "Matty Roth." There is no rational basis to contend that counsel's failure to seek exclusion of the inadmissible *post-mortem* hearsay

[10] *See* Exhibit V at p.2372 (FBI agent reading pseudonymous letter from Gargiulo seeking "reward for information and audiotapes leading to the arrest and conviction of Scott Mulligan, Chris Tarantino and others in the 1994 armored car robbery where a guard was shot dead, and the death of one of the robbers named Louis was also shot dead and found floating off Long Island"); *see also* Stahl Affidavit (Froccaro destroyed extortion letter from Gargiulo to Mulligan).

or exclusion of attorney Roth's testimony under the "direct link" exception was a valid legal strategy. Counsel's unreasonably deficient and prejudicial failures allowed government counsel to parlay the inadmissible *post-mortem* hearsay and attorney Roth's improper client identity testimony into a final summation that trumpeted the relevance of the patently inadmissible evidence:

> Why is that relevant? Two reasons: One, it shows you that in fact ... Mattie Roth is actually Chris Tarantino, Bressman's actual boss at Synergy Gym, the person who offered Bressman $35,000 to kill Vinnie. Second, Mel Roth's testimony shows the defendant's consciousness of guilt. It showed the defendant wanted to control Bressman. Tarantino didn't want Bressman telling the NYPD the truth, that he had killed Gargiulo, and that he had been paid to do it and hired to do it by that man."

See Exhibit E (May 4, 2011 transcript) at p.2939. Counsel rendered prejudicially deficient performance under the Sixth Amendment.

Froccaro's undisclosed benefactor conflict warrants post-conviction relief

On March 13, 2011, the prosecution requested that the court conduct an inquiry pursuant to *United States v. Curcio*, 680 F.2d 881, 888-890 (2d Cir. 1982), *see* Exhibit H (Doc. 189) (Case No. 08-655 (JS)), representing that it had filed a letter "under seal" on November 4, 2010, advising defense counsel of information provided by a confidential informant who heard that Salvatore Cutaia of the Lucchese crime family was one of Dorval's killers and that Cutaia's father had bragged that his son had "done a beautiful piece of work with that kid Louie." *Id*. at p.2. Petitioner was charged with the murder of Dorval, so government counsel had to concede that an "actual conflict of interest exists because Mr. Froccaro simultaneously represents both Tarantino and Salvatore Cutaia. Similarly, Mr. Rosen currently represents both Tarantino and Domenico Cutaia." *See* Exhibit H at p.5. On March 15, 2011, days before the first trial started, Judge Seybert

accepted Petitioner's waiver of the disclosed conflict,[11] but Petitioner submits it is the undisclosed benefactor conflict under which Froccaro operated that warrants relief.

On April 23, 2012, new counsel, Stephen Rosen, disclosed for the first time that there had been a "very difficult" conflict involving first trial counsel Froccaro's ***simultaneous*** representation of Scott Mulligan. The undisclosed conflict was not made a part of the *Curcio* hearing. *See* Exhibit AA (April 23, 2012 transcript) at pp.6-13. The prosecution proffered the testimony of Manon Mulligan, wife of Scott Mulligan, as to her receipt in 2003 of an extortion letter threatening that the FBI would receive a tape incriminating her spouse and the petitioner unless $500,000 would be received by the letter's author (understood to be Gargiulo who was murdered months later). Retrial counsel argued that Froccaro should testify about the letter that went missing after Manon Mulligan forwarded it to Froccaro, who also represented Mulligan in 2003. On May 1, 2012, retrial counsel reiterated that Froccaro was a witness with material testimony to provide about the missing letter and noted the existence of "similar issues here concerning dual loyalty by Mr. Froccaro." *See* Exhibit BB (May 1, 2012 transcript) at pp.918-919; *see also* Stahl Affidavit (Froccaro admitted that he destroyed the letter); Exhibit CC (May 2, 2012 transcript) at pp.1175-1176, 1193-1196 (Manon Mulligan testifying that the extortion letter was sent to Froccaro in 2003). The trial court preserved the conflict of interest issue for post-conviction review.

Petitioner submits that the benefactor conflict under which Froccaro operated involved the undisclosed *simultaneous* defense of Mulligan during Petitioner's trial as evidenced by his lapses in the representation of Petitioner. Froccaro's superior loyalty to Mulligan explains all of the trial "choices" that prevented him from abiding by his Sixth Amendment obligation of providing

[11] Dorval was found dead within days of being indicted with Lucchese crime family members, to which the Cutaias belonged, and who had the motive to commit the obstruction of justice murder of Dorval charged against petitioner. *See* Exhibit Z (April 4, 2011 transcript) at pp.1206-1207 (newspaper report published about New Jersey indictment in August 1994 charging Dorval along with "a bunch of" Lucchese crime family members).

effective representation to Petitioner. Froccaro's disqualifying loyalty to Mulligan also explains his ***destruction of evidence*** that Gargiulo attempted to extort Mulligan months before a hired murderer killed Gargiulo. Froccaro was hired with a $150,000 check and cash payments arranged by Mulligan, *see* Stahl Affidavit (attaching check), and delivered a defense of Mulligan's conflicting interests to all of the counts rather than an effective defense inculpating Mulligan to exculpate Petitioner as the trial evidence would have ***compelled*** conflict-free counsel to present.

Prejudice is presumed where a Petitioner can show that his counsel actively represented conflicting interests as to all of the charges tried and that the actual conflict adversely affected his counsel's performance. *See Cuyler*, 446 U.S. at 350; *United States v. Locascio*, 6 F.3d 924, 932 (2d Cir.1993) ("Ethical considerations warn against an attorney accepting fees from someone other than the client. As we stated in a different context, the acceptance of such benefactor payments may subject an attorney to undesirable outside influence and raises an ethical question as to whether the attorney's loyalties are with the client or the payor. *In re Grand Jury Subpoena Served Upon John Doe*, 781 F.2d 238, 248 n.6 (2d Cir.1985) (*en banc*)") (quotation marks omitted). "Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Wheat v. United States*, 486 U.S. 153, 160 (1988). Froccaro placed his benefactor's interests over those of Petitioner's rights. Froccaro twice claimed that the conflict involving the simultaneous representation of Lucchese crime family members who took credit for committing the August 1994 murder charged against petitioner had "honestly slipped [his] mind." *See* Exhibit G (March 15, 2011 transcript) at p.5. The court appeared to question Froccaro's use of the term "honestly" then, and the court should probe this issue at a hearing.

There was an unwaivable risk that Froccaro would favor Mulligan and fail to conduct a rigorous defense of Petitioner. Froccaro placed his pecuniary interests and the conflicting interests of Mulligan's antagonistic defense above Petitioner's right to his effective assistance. The conflict adversely affected counsel's performance, *Cuyler*, 446 U.S. at 348, and Petitioner is entitled to relief as he was prejudiced by the ineffective assistance delivered by counsel. This court should find that "the conflict [wa]s of such a serious nature that no rational defendant would knowingly and intelligently desire that attorney's representation... the attorney [had to] be disqualified, regardless of whether the defendant [wa]s willing to waive his right to conflict-free counsel." *See United States v. Schwarz*, 283 F.3d 76, 95-96 (2d Cir. 2002) (brackets added). Froccaro concealed his conflict to avoid disqualification as the trial court would have found that no rational defendant would knowingly and intelligently waive such a conflict. "The right to effective representation by counsel whose loyalty is undivided is so paramount in the proper administration of criminal justice that it must in some cases take precedence over all other considerations, including the expressed preference of the defendants concerned and their attorney." *See Curcio*, 680 F.2d at 887.[12]

In *United States v. Malpiedi*, 62 F.3d 465 (2d Cir. 1995), the Second Circuit provided the framework applicable to analyzing the disqualifying benefactor conflict found here:

> Although a defendant generally is required to demonstrate prejudice to prevail on a claim of ineffective assistance of counsel, prejudice is presumed when counsel is burdened by an actual conflict of interest. This presumption is "fairly rigid." Moreover, once the defendant establishes that there was an actual conflict, he need not prove prejudice, but simply that a lapse in representation resulted from the conflict. To prove a lapse in representation, a defendant must demonstrate that

[12] Froccaro's destruction of evidence also manifested his disqualifying conflict. *See Government of Virgin Islands v. Zepp*, 784 F.2d 125, 136 (3d Cir.1984) ("Even if not criminally charged for such events, trial counsel could have faced severe disciplinary consequences if it were ever known that he was involved in the destruction of evidence. American Bar Association, *Canons of Professional Ethics;* Canon 15 ... In circumstances such as these, when defense counsel has independent personal information regarding the facts underlying his client's charges, and faces potential liability for those charges, he has an actual conflict of interest … from these facts alone there was an actual conflict of interest which required withdrawal by trial counsel or disqualification by the court.").

> some plausible alternative defense strategy or tactic might have been pursued, and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests.
>
> This is not a test that requires a defendant to show that the alternative strategy or tactic not adopted by a conflicted counsel was reasonable, that the lapse in representation affected the outcome of the trial, or even that, but for the conflict, counsel's conduct of the trial would have been different. Rather, it is enough to show that a conflict existed that was inherently in conflict with a plausible line of defense or attack on the prosecution's case. Once such a showing is made, [the] "fairly rigid" presumption of prejudice applies.

Id. at 469 (citations and quotation marks omitted). As the compromised loyalty of counsel caused demonstrated lapses in representation, Petitioner is entitled to relief under *Malpiedi*.

Petitioner has also shown that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different on all of the counts. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984). The Sixth Amendment was violated due to the ineffective assistance delivered by conflicted counsel.

Counsel entirely excluded Petitioner from pre-screening the anonymous jurors

Petitioner argued on direct appeal that his absence from telephonic hearings held by Judge Seybert and Magistrate Tomlinson shortly before the trial on March 17, 2011 and March 21, 2011 (at which time potential anonymous jurors were pre-screened on the basis of cause and hardship in the presence of his counsel) violated his right to be present during all material stages of the jury trial. The Second Circuit concluded that the petitioner "impliedly waived his right." *Tarantino*, *supra*, 617 Fed.Appx. at 64 (citation omitted). Petitioner had the right to participate in the pre-screening, *see Cohen v. Senkowski*, 290 F.3d 485, 489 (2d Cir. 2002) (pre-screening of prospective jurors is a material stage of trial at which a defendant has the constitutional right to be present), but the Second Circuit concluded that Petitioner had waived his right assuming that Froccaro had complied with a court directive. *See Tarantino* at 64 ("Then, in the presence of Tarantino, the

District Court explicitly directed his counsel to 'go through the jury selection questionnaires' with Tarantino in order to 'see what his desire would be in terms of the type of jury he'd like to be seated'"). However, Froccaro defied the trial court's directive and entirely excluded the Petitioner from the process of pre-screening his jury. *See* Affidavit of Christian Tarantino.

Given the emphasis added by the trial court on the importance of including Petitioner in the pre-screening process before the trial started, *see* Exhibit G (March 15, 2011 transcript) at p.40 (court directive issued after Froccaro questioned whether there was enough time to visit petitioner to review the juror questionnaires) (COURT: "So you're definitely going to do that beforehand and see what his desires would be in terms of the type of jury he'd like to be seated"), Petitioner cannot be faulted for his failure to report his trial counsel's disregard of a direct court order. On March 22, 2011, the trial court stated that "all these questionnaires were reviewed by you folks last week. And then I made certain decisions on Thursday, and again, yesterday Judge Tomlinson reviewed the questionnaires." *See* Exhibit DD (March 22, 2011 transcript) at pp.8-12. The court did not inquire whether Froccaro had reviewed the questionnaires with petitioner as directed on March 15, 2011. Counsel never reviewed the juror questionnaires with Petitioner and Froccaro's defiance of the court directive denied Petitioner his right to participate in the jury pre-screening process. *See Cohen*, *supra*. The exclusion of Petitioner from the entire pre-screening process of reviewing the juror questionnaires disregarding a direct order from the bench requires that the results of the first trial be vacated due to the violation of Petitioner's constitutional right to participate during that material stage of the jury trial proceedings.

Retrial counsel provided ineffective assistance by failing to seek the Court's recusal

28 U.S.C. § 455(a) provides that "[a]ny justice, judge, or magistrate judge of the United States shall disqualify h[er]self in any proceeding in which h[er] impartiality might reasonably be

questioned." Subsection (b)(1) also provides in relevant part: "[Sh]e shall also disqualify h[er]self in the following circumstances: Where [s]he has a personal bias or prejudice concerning a party…" (brackets added). The Supreme Court has emphasized that, where the grounds for recusal are comprised of "judicial rulings [and] routine trial administration efforts," recusal is not usually warranted absent evidence that the judicial actions "display deep-seated favoritism or antagonism that would make fair judgment impossible." *See Liteky v. United States*, 510 U.S. 540, 556 (1994).

Petitioner submits that the Court displayed such "deep-seated favoritism or antagonism" on January 3, 2012, when it accepted a waiver of grand jury indictment for an offense punishable by death, disregarding the Fifth Amendment and Rule 7, Fed.R.Crim.P., but expeditiously securing a witness for the prosecution on the eve of the retrial then scheduled for January 9, 2012. Retrial counsel ineffectively failed to seek recusal resulting in the denial of Petitioner's right to an unbiased judge. The appearance of bias exhibited by the court triggered the duty of counsel to seek her recusal from the retrial.

The ***Information*** filed against the government witness Mulligan on January 3, 2012 tracked the same language used to plead Count One of the ***Indictment*** that was filed against the Petitioner. *See* Exhibit EE at ¶6. Mulligan executed a standard "waiver of indictment" form. *See* Exhibit FF. Judge Seybert allowed the waiver of grand jury indictment in favor of an expeditious information that squarely framed the definition of a capital offense. The Information pled that an offense under 18 U.S.C. § 33 resulted in the death of Julius Baumgardt, which qualifies as a capital charge. *See* 18 U.S.C. § 3592(c)(1) ("Aggravating factors for homicide" include a death that "occurred during the commission … of … an offense under ... section 33 (destruction of motor vehicles or motor vehicle facilities)"). In Petitioner's view, the court's actions ran afoul of the Fifth Amendment ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a

presentment or indictment of a Grand Jury...") and Rule 7(a), Fed.R.Crim.P. ("An offense which may be punished by death shall be prosecuted by indictment"), all to expedite a retrial witness.

A violation of §33 resulting in a death is legally punishable by death. *See* 18 U.S.C. §34; Exhibit EE (Information) (*citing* § 34); Exhibit FF (Waiver of Indictment) (*citing* § 34). On January 3, 2012, within two weeks after the case agent sought and obtained an arrest warrant for Mulligan, the court accepted what Petitioner avers to be an illegal waiver of the indictment thereby aiding a rushed need for Mulligan as a witness for the government at the retrial then scheduled to start on January 9, 2012. The waiver was invalid since the Information pled that a death resulted from the alleged § 33 offense. *See Kees v. United States*, 304 F.2d 661, 663 (7th Cir. 1962) ("Because we conclude that the offense charged was a capital offense, we decide that Rule 7(a) gives no support to the district court's assumption of jurisdiction ...the court had no jurisdiction to try the alleged violation of the Kidnapping Act by information."). Retrial counsel unreasonably failed to seek recusal, as the court's actions showed that her "impartially might reasonably be questioned." *See* 28 U.S.C. § 455(a). Petitioner, like all defendants, had a basic right to an unbiased judge, *see Offutt v. United States*, 348 U.S. 11 (1954) ("[J]ustice must satisfy the appearance of justice"), and the failure of retrial counsel to seek recusal deprived Petitioner of his fundamental right to an unbiased judge, thereby causing structural error that requires vacating the only conviction obtained after the retrial.[13]

Retrial counsel failed to prevent a conviction based on inadmissible evidence

After the retrial, the jury acquitted the Petitioner of Count Four charging the obstruction of justice murder of Gargiulo, but convicted him of the conspiracy to commit the obstruction of

[13] Petitioner maintains that, but for the multiple errors committed by Froccaro, the first trial of the mistried counts related to the alleged conspiracy to murder Gargiulo would have resulted in acquittals barring a retrial under double jeopardy.

justice murder of Gargiulo charged under Count Three. There is a reasonable probability that, but for counsel's errors, the result of the trial proceedings as to Count Three would have been different.

Petitioner would have been clearly entitled to acquittal for insufficient evidence as the *post-mortem* hearsay statement suggesting that "Matty Roth" got an attorney for Bressman during questioning conducted by the NYPD three days after the murder was inadmissible and the identity testimony of Petitioner's attorney Roth was also inadmissible as the testimony impermissibly inserted the last "direct link" to convict petitioner casting him as co-conspirator "Matty Roth." Without the inadmissible *post-mortem* hearsay *or* without the client identity testimony of petitioner's attorney, there would have been insufficient evidence to convict Petitioner as a co-conspirator in the murder. There is no basis to contend that counsel's failure to seek the exclusion of inadmissible evidence was a valid legal tactic. Counsel's deficient performance allowed the prosecution to parlay inadmissible hearsay and attorney Roth's improper client identity testimony into a final summation at the retrial that again trumpeted the relevance of the patently inadmissible evidence:

> And why is that relevant? Two reasons. First, it shows you that indeed there is no Mattie Roth. It is just a lie told by Bressman. Mattie Roth is actually Chris Tarantino, Bressman's actual boss at Synergy, the person who offered Bressman $35,000 to assassinate Vinnie. Second, Mel Roth's testimony shows the defendant's consciousness of guilt. It shows the defendant wanted to control Bressman. He didn't want Bressman telling the NYPD the truth that he had killed Gargiulo and that he had been hired to do it by that man, the defendant. And when Mel Roth did the defendant's bidding and broke up the interview, the NYPD detectives released Bressman.

See Exhibit GG (May 9, 2012 transcript) at pp.1875-76. Retrial counsel rendered prejudicially deficient performance for the same reasons that first trial counsel did. *See infra.* No lawyer objected to inadmissible evidence without which the chain of evidence presented was insufficient to convict. Exacerbating the prejudice that was caused by the repeated failure to object to the

admission of inadmissible evidence at both trials, no lawyer objected to the summations at both trials that mischaracterized attorney Roth's inadmissible testimony to suggest evidence of Petitioner's guilt not adduced at trial, as Roth never testified that Petitioner had "directed" him to "break up the interview" of Bressman as misrepresented in the summations at both trials. *See* Exhibit GG at pp.1875-76 (AUSA retrial summation) (twice misrepresenting that Roth testified that petitioner "directed" Roth to "break up the interview"); Exhibit E (May 4, 2011) at p.2938 (AUSA first trial summation) (misrepresenting that Roth testified that he had been "directed to break up that interview by the defendant"). Ineffective counsel allowed the prosecution to run amok with inadmissible evidence during both trials.

Trial Counsel's Failure to Present Petitioner's Testimony at Motion to Suppress Hearing

At both his trials, Petitioner's counsel had ready access to evidence of Gargiulo's ***contemporaneous intent*** to misuse the incriminating tape that was linchpin evidence (the Gargiulo tape) to extort Tarantino *at the time in late 2000* when Gargiulo taped it. Petitioner proffers he was ***the only witness*** competent to testify that Gargiulo ***did*** begin to extort cash from him with the threat of disclosure of the tape to police shortly after he taped it, ***evidencing his contemporaneous intent to misuse the tape to extort from the outset***, but counsel unreasonably failed to present Petitioner's testimony in support of their motions to suppress the incriminating tape, *unreasonably misadvising* him that his proposed pretrial testimony *would be used against him at trial on the issue of guilt*, contrary to *Simmons v. United States*, 390 U.S. 377, 394 (1968) ("when a defendant testifies in support of a motion to suppress evidence…, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection"). Under these unique circumstances, where Petitioner was an indispensable witness to establish a dispositive fact that would require suppression of the tape evidence, the ineffectiveness of all defense counsel in

denying him his absolute personal right to testify in support of his motion to suppress the tape infected both trials and raises a fundamental issue of constitutional magnitude. The outcomes of both trials were tainted by the inadmissible tape used by Gargiulo to extort Tarantino, starting shortly after it was made. The denial of the right to testify to suppress linchpin evidence is as egregious as a denial of the right to testify at trial.

At a minimum, Tarantino is entitled to an evidentiary hearing pursuant to 28 U.S.C. §2255 to testify in support of this claim and to establish *by a preponderance of the evidence* that Gargiulo´s primary motivation, or that a determinative factor in Gargiulo´s original motivation for recording the conversation, was to commit a criminal or tortious act, which would have required suppression of linchpin evidence. If the reviewing court considers the proffered testimony of Tarantino on the limited issue of Gargiulo's intent to misuse the tape to extort cash from the outset, within the context of all other evidence probative of his intent to misuse the tape to extort cash (even later trying to extract $500,000 from the FBI), then it should conclude that counsel rendered ineffective assistance, even if the recording also "cleared" Gargiulo from involvement in the crimes discussed during the conversations.

THE APPLICABLE STATUTORY FRAMEWORK

18 U.S.C. § 2511(1) generally prohibits both the disclosure and use of intercepted wire, oral or electronic communications. One exception to that general prohibition is found in § 2511(2)(d), which provides:

> ***It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.***

18 U.S.C. §2511(2)(d) (emphasis added).

18 U.S.C. §2515 forbids any use at trial of the contents of an illegally intercepted wire or oral communication, as well as the use of any evidence derived therefrom. The federal statutory framework furnishes the mechanism to invoke the prohibition of §2515, providing that "[a]ny aggrieved person ... may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom ... on the ground that the interception was unlawful." *See* 18 U.S.C. § 2518(10)(a) (brackets added). An "aggrieved person" is any "person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed." *See* 18 U.S.C. § 2510(11). Tarantino clearly had legal standing to seek suppression of the unlawful interception.

OTHER EVIDENCE CORROBORATES TARANTINO

A. THE GRAND JURY INDICTMENT

The indictment itself shows that the grand jury was presented evidence that Gargiulo intended to extort Petitioner under the threat of delivering the tape to the authorities if Petitioner refused to pay him. *See* Indictment at ¶14 (alleging that Gargiulo informed Tarantino he had the tape and threatened to provide it to law enforcement officers unless Tarantino compensated him). Suppression depended on *dating* Gargiulo's intent to extort. *See id.* at ¶14 (alleging that threatening took place "[i]n or about and between December 2002 and August 2003"). Petitioner proffers that he would have testified that Gargiulo extorted him starting shortly after the tape was made in late 2000.

B. GARGIULO´S DEMAND OF $500,000 FROM THE FBI

The case agent received a letter from Gargiulo, identifying himself as "Chucky," days before meeting him on May 29, 2003. The "Chucky letter" was posted on May 21, 2003. *See* First Trial, 4/25/2011, at pp.2370-2372. The case agent read the letter to the jury:

> "I'm writing you to see if there is a reward for information and audiotapes leading to the arrest and conviction of Scott Mulligan, Chris Tarantino and others in the 1994 armored car robbery where a guard was shot dead and the death of one of the robbers named Louis who was also shot dead and found floating off Long Island. To tell me about if and how much the reward is, or just to get in contact with me, please post info on www.craigslist.com... P.S. I was not involved in these crimes and I don't want a deal. ***I just want money***."

Id. at pp.2372, 2375 (emphasis added).

Gargiulo demanded $500,000 for the tape from the FBI. *Id*. at p.2376. Gargiulo attempted to coerce the agent by stating that he would get the cash from Petitioner, if not from the FBI. Gargiulo informed the agent that he had already disclosed the existence of the tape to Petitioner. *Id.* at pp.2379-2380 ("He [Gargiulo] was a little bit on the sarcastic side, but he said he knows, he [Tarantino] knows") (brackets added). Gargiulo´s one sole purpose in contacting the FBI was to attempt to extract money according to the agent. *See* Trial, 4/25/2011, at p.2424; *Mastrangelo* hearing, 2/16/2011, at p.403.

C. <u>TARANTINO´S COMPLAINTS ABOUT "DRY RATTING"</u>

Petitioner also proffers that he was alluding to then-ongoing extortion, when he mentioned that Gargiulo was "dry ratting" to two acquaintances on separate occasions. He complained about the "dry ratting" to Robert Gerrato, and he sought advice on how to handle the situation from Nicholas Pisciotti.

1. NICHOLAS PISCIOTTI

The grand jury heard the testimony of the case agent regarding one Nicholas Pisciotti, described as a cooperating "individual who had some conversations with Tarantino about somebody trying to … 'dry rat' Tarantino[.]" *See* Grand Jury, 8/5/2008, at p.47 (brackets added).

The case agent read from an ***undated*** report prepared by another agent who had interviewed Pisciotti. *Id*., at p.51 ("When Gargiulo´s gym was unsuccessful, Gargiulo threatened to go to the

police about the murder of a security guard if Chris Tarantino did not pay Gargiulo a large sum of money. Chris Tarantino approached the individual, which is Pisciotti, and asked for the individual´s opinion about how to handle the situation. The individual told Chris Tarantino to leave Gargiulo alone since Gargiulo had an alcohol problem. ***Pisciotti also told Chris Tarantino that he might have to pay Gargiulo***.") (emphasis added). In this context, it is clear that "dry ratting" meant extorting payment through the threat of incriminating Petitioner.

2. ROBERT GERRATO

The case agent testified before the grand jury that Petitioner had told Robert Gerrato during Christmas 2002 that Gargiulo was "dry ratting" him. *See* Grand Jury, 9/16/2008, at pp.31-32. The case agent admitted that he had "never heard of the term." *Id*. at p.32.

Gerrato testified that Petitioner told him Gargiulo was "dry ratting" him during Christmas 2001 or 2002. Gerrato testified he was unsure of the year and did not recall if he knew or asked what "dry ratting" meant. *See* Trial, 4/6/2011, at pp.1512-1513. Gerrato testified that Gargiulo was his "best friend." *Id*. at p.1505. Gerrato believed that Gargiulo first mentioned a recording with incriminating evidence against Petitioner "approximately [in] the late 90s." *Id*. at p.1511 (brackets added).

D. <u>THE DEMAND OF $500,000 FROM SCOTT MULLIGAN</u>

In the summer of 2003, Gargiulo told Gerrato about a blackmail letter he had forwarded to Scott Mulligan´s wife seeking to extract $500,000, and that he would also approach the FBI if he was not given the cash demanded. Gerrato understood that Gargiulo had already made Petitioner aware of the existence of the tape. *Id*. at pp.1514-1515, 1539. Gerrato informed the case agent that Gargiulo told Gerrato and "other people" that he taped Petitioner. *See* Grand Jury, 7/15/2008, at p.66 ("the information was out there"). Petitioner submits that all of the other evidence as to

the tape corroborates his proffered testimony that Gargiulo used the tape to extort cash from him, starting shortly after he taped the incriminating conversation.

E. GARGIULO´S CONTEMPORANEOUS FINANCIAL MOTIVE

The defense sought an evidentiary hearing after Gerrato testified at the first trial. *See* Trial, 4/7/2011, at pp.1595-1641. The government's narrative argued that "absent proof that Gargiulo was clairvoyant, the motivation for making the tape in September of 2000 could not have been to blackmail or extort a financial compensation for business losses that did not occur until 17 months later." *Id.* at p.1601. By attaching too much weight to the closing of Gargiulo´s gym during February 2002, government counsel argued that the February 2002 event could not motivate the September 2000 recording. The government claimed that there was no evidence of a dispute between Gargiulo and Petitioner when the tape was recorded in 2000. *Id*. at p.1607. Review of all of the evidence ***along with Tarantino's proffered testimony*** debunks the argument constructed by the government.

The case agent testified before the grand jury that Gargiulo stated he had taped the conversation with Petitioner because he was "***very bitter***" that his relationship with Petitioner and Mulligan had "***gone sour***," *see* Grand Jury, 7/15/2008, at p.59, which disputes are also alluded to during the taped conversation of late 2000. *See* Transcript of "Gargiulo tape" at p.32 ("when all this stuff happened between me and you and the gyms"). The relationship had already gone sour by the time the tape was made, and the contention that an event worthy of motivating Gargiulo only arose after his gym closed in early 2002 is a *red herring*. Gargiulo's financial setbacks shortly before making the tape show his motivation to embark on extortion from the outset and further corroborate Petitioner's proffered testimony. That Gargiulo was experiencing financial setbacks

even *one month before* recording the tape, corroborates Petitioner's claim that the extortion started shortly thereafter.

1. GARGIULO´S DOCUMENTED FINANCIAL SETBACKS

Further corroborating Petitioner's claims are court documents showing a succession of judgments entered against Gargiulo, including but not limited to judgments entered only a month before the making of the tape used to extort cash. *See* DE:356 and attachments. The limited information that FBI agents could obtain from a single fleeting street meeting with Gargiulo in May 2003 did not give the government a complete understanding of the full chronology related to his extortionate use of the incriminating tape.

The trial court offered Petitioner´s first trial counsel a chance to submit additional evidence in support of suppression, *see* Trial, 4/7/2011, at p.1612, noting that the evidence presented up to "th[at] point in time" only showed that "some three years [after the taping]" was "when financially Mr. Gargiulo was hurting[.]" *Id.* (brackets added). Despite an abundance of evidence of Gargiulo's dire straits, first trial counsel conceded that the "[defense] didn't have any evidence about that as well, that he was financially hurting…." *Id*. (brackets added). Together with the *misadvice* provided to Petitioner that his proposed pretrial testimony to support suppression would be used against him as to the question of guilt at trial, first trial counsel's failure to investigate Gargiulo's dire financial straits during the time period *shortly before* the tape was made in late 2000 constitutes ineffective assistance. First trial counsel neither called Petitioner as a witness with indispensable testimony to give on a limited but dispositive fact in support of suppression nor presented any of the evidence of Gargiulo's financial setbacks to show his motive to extort, such as the succession of court judgments entered against him shortly before he recorded the tape and began to extort Petitioner shortly thereafter.

Had first trial counsel met his duty to conduct a diligent investigation of possible motives to use the tape with the intent to extort, the defense would have been able to prove the chronology of Gargiulo´s acute financial stress, including but not limited to the adverse court judgments entered against him approximately one (1) month before Gargiulo taped his conversation with the intent to extort Petitioner. All of the court actions filed against Gargiulo sought to collect from Gargiulo for obligations related to his gym endeavors. The following are known court actions and judgments adverse to Gargiulo:

(i) Life Fitness v. Vincent Gargiulo, S/NY Index No. 602634/99;
S&C filed on 5/28/1999; Amount demanded: $25,000;
Stipulated Settlement ($300-$400/month) dated 7/22/1999;
Defaulted on settlement (4/2000); Default letter sent to Gargiulo (8/8/2000); Default Judgment filed on 8/18/00 (approximately one month prior to "Gargiulo tape" made in or about 9/2000)

(ii) Life Fitness v. Body Sculpt, S/NY Index No. 602639/99;
S&C filed on 5/28/99; Amount demanded: $25,000;
Stipulated Settlement ($300-$400/month) dated 7/22/1999;
Defaulted on settlement and served with notice of default (4/2000);
Default Judgment filed on 8/4/2000;
Restraining notice sent to Gargiulo (8/4/2000) (***approximately one month prior to "Gargiulo tape" made in or about 9/2000***)

(iii) Life Fitness v. Body Sculpt (79th Street), S/NY Index No. 605137/01; S&C Filed 10/26/01; Amount demanded: $100,000 + $250,000 (punitive);

(iv) Lease Corp. of America vs. Vincent Gargiulo d/b/a Body Sculpt,
S/NY Index No. 116664/99; S&C Filed 8/3/1999
Amount demanded: $37,000 + $9,000 in legal fees

(v) Aerobitron v. Body Sculpt, CivCt/NY Index No. CV 2508/00;
S&C Filed 1/24/00; Amount demanded: $4,000-$5,000;
Final Judgment filed on 8/4/2000 (***approximately one month prior to "Gargiulo tape" made in or about 9/2000***)

(vi) People of the State of NY v. Body Sculpt (40th Street),
Summons No. 406906803-0 (Crim Ct/NY);
First offense 4/19/2000; Second offense 5/17/2001
NOTE: These violations involved the failure to obtain costly permits for construction work, ignoring stop work order, etc.

(vii) NRP LLC II v. Body Sculpt Fitness Club 79th Street Inc.,
Civ/NY Index No. L&T 75343/0; Petition for Eviction filed (5/17/2001); Default Judgment filed on 6/13/2001; Warrant of Eviction (6/19/2001); Stipulated Settlement dated 8/6/2001; Rent Default (10/01/2001); Warrant of Eviction Reissued (11/20/2001); Second Stipulated Settlement dated 1/31/2002; Rent Default (6/17/2002)

NOTE: Statement of rent account issued by landlord-plaintiff shows that Gargiulo did not make his $14,250 monthly lease payment in August 2000 (approximately one month prior to "Gargiulo tape" made in or about 9/2000), issued a check with insufficient funds on 11/17/2000, and failed to pay several consecutive months of rent in early 2001.

(viii) Portfolio v. Body Sculpt, et al., S/NY Index No.: 604135/02;
S&C filed 11/13/02; Amount demanded: $60,000.

See DE:356 and attachments. These court filings establish that Gargiulo's financial setbacks started in 1999, with judgments peaking during the month before the making of the tape in September 2000. Gargiulo had ample financial motivation to extort Petitioner, which corroborates Tarantino's proffered testimony in support of suppression.

2. GARGIULO´S "INSURANCE" COLLECTION

The case agent testified that Gargiulo refused to give him a copy of the tape because Gargiulo thought that retaining possession of the tape was his "insurance policy." *See* Grand Jury, 7/15/2008, at p.60 ("He [Gargiulo] thought that was his insurance policy. He stated to me that he would not provide me with the actual tape because that was his ace in the hole, and if he had provided it to me, the federal government wouldn´t need him, and he wanted to hold on to the tape."). Gargiulo was insured against non-payment. While the agent testified before the grand jury that Gargiulo told him that *withholding the tape was his "insurance" against government non-payment*, he gave different testimony at trial as to Gargiulo´s purported "insurance." *See* Trial, 4/25/2011, at p.2375 ("He [Gargiulo] stated that he made the tape as an insurance, an insurance against Christian Tarantino.").

The quantum of evidence corroborating Petitioner's proffered testimony that he was indeed extorted with the tape shortly after its making satisfies the applicable preponderance of the evidence standard that would have required suppression of the linchpin evidence, but for the ineffective assistance rendered by counsel. Petitioner submits that his testimony would have tipped the scales to support finding it was more likely true than not true that Gargiulo made the tape with the intent to extort given that: (1) Gargiulo had begun to experience financial stress shortly before making the recording; (2) Petitioner complained to associates that Gargiulo was "dry ratting" him; and (3) Gargiulo kept possession of the tape as his "insurance" to collect from Petitioner and others (even trying to extract $500,000 from the FBI). *See* Court Order, Doc. 223, 4/19/2011, at p.4 ("***That Gargiulo eventually tried to blackmail Tarantino is undisputed***") (emphasis added)[14] Petitioner's proffered testimony should have been heard and evaluated by the trial court, but defense counsel denied him his right to testify in his own defense in support of his motion to suppress the linchpin evidence, misadvising him that his proposed pretrial testimony that Gargiulo did extort him, starting shortly after making the tape, could be used against him at trial on the question of guilt.

APPLICABLE LEGAL PRINCIPLES

Petitioner had the onus of proving by a preponderance of the evidence "either (1) that the primary motivation, or (2) that a determinative factor in [Gargiulo's] motivation for intercepting the conversation was to commit a criminal [or] tortious ... act." *See In re DoubleClick Inc. Privacy Litigation*, 154 F.Supp.2d 497, 514-515 (S.D.N.Y.2001) (*quoting United States v. Vest*, 639 F.Supp. 899, 904 (D.Mass.1986)) (brackets added); *id.* at 907 (defendant bears the burden of proof

[14] That Gargiulo visited Petitioner's neighbor in the same Manhattan building where Petitioner lived with a then recently made incriminating tape in hand as proof of Petitioner's criminal past also invites an inference that Gargiulo implemented an extortion scheme which defamed him with his neighbors to show his readiness to disseminate the incriminating tape (even to the police).

by a preponderance of the evidence). Without the benefit of the testimony now proffered in this motion, the Court found that "[f]or at least three reasons, … Gargiulo´s motive was mixed, at best." *See* Court Order, Doc. 223, 4/19/2011, at p.5. First, the Court reasoned that "the significant time lapse" between the making of the tape and the "attempts to blackmail Tarantino undermines the idea that Gargiulo´s primary or determining motivation was extortion." *Id*. at p.5. But the Court was only provided part of the chronology – the later attempts to extract a large lump sum from Petitioner, Mulligan and the FBI.

Because counsel did not provide the Court with the full view of Gargiulo´s dire financial condition during the relevant time period, the Court found that "the failure of Gargiulo´s gym suggests that a financial reason for blackmail arose only after the tape was made." *Id*. However, the court did not have the benefit of any testimony from Petitioner at the motion to suppress, nor did counsel submit readily available documents showing that Gargiulo's motive to commit extortion arose even one month before the tape was recorded when judgments were entered against him. The Court relied only on the evidence that suggested "Gargiulo fell on hard times after the tape was made and that he may have partly blamed Tarantino for his financial straits." *Id.* at p.6. The allegations made by Petitioner in this motion establish that Gargiulo started to extort cash from Petitioner with the tape *shortly after* it was made and that Gargiulo was experiencing financial hardship *shortly before* the tape was made with the *contemporaneous intent* to extort cash from Petitioner.

To the extent that Gargiulo may have harbored "mixed" motivations, this Court must "bear in mind that the mere existence of [a] lawful purpose alone does not 'sanitize a[n interception] that was also made for an illegitimate purpose.'" *In re DoubleClick Inc*., 154 F.Supp.2d at 515 (*quoting Sussman v. ABC*, 186 F.3d 1200, 1202 (9th Cir.1999)) (brackets supplied).

THE LEGISLATIVE HISTORY OF 18 U.S.C. § 2511(2)(d)

The Wiretap Act as first drafted did not prohibit interceptions where one party to the communication consented, irrespective of underlying intent. S.Rep. No. 90–1097, 1968 U.S.C.C.A.N. 2112, at 2182 (1968). However, Senator Philip Hart objected to the broad language, for it would permit "surreptitious monitoring of a conversation by a party to the conversation, even though the monitoring may be for insidious purposes, such as blackmail, stealing business secrets, or other criminal or tortious acts in violation of Federal or State laws." *Id*. at 2236. Senator Hart and Senator John McClellan proposed an amendment to the bill that would limit the one-party consent rule to "private persons who act in a defensive fashion." 114 Cong. Rec. 14694 (1968) (emphasis added). The amendment passed and was ultimately codified, in relevant part, at 18 U.S.C. §2511(2)(d).

The legislative record clearly reflects that an element of tortious or criminal *mens rea* is required for a recording to run afoul of the prohibition under § 2511(2)(d). Senator Hart noted that the key distinction between permissible and impermissible one-party consent tapes by private parties was whether the actor's intent in recording was to injure. *Compare* 114 Cong. Rec. 14694-14695 (1968) ("Such one-party consent is also prohibited when the party acts in any way with an intent to injure the other party to the conversation in any other way ... For example, ... for the purpose of blackmailing the other party, threatening him, or publicly embarrassing him") (emphasis added) *with* S.Rep. No. 90-1097 (1968) at 2236-37 ("There are, of course, certain situations in which consensual electronic surveillances may be used for legitimate purposes ... [as with recordings made] without ***intending in any way to harm the nonconsenting party***.") (emphasis added). Petitioner's proffered testimony that Gargiulo extorted him out of cash with

the threat of disclosing the tape shortly after it was made shows that Gargiulo did not act purely in defensive fashion.

The legislative intent underlying 18 U.S.C. §2511(2)(d) makes clear that the criminal or tortious purpose prohibition must be narrowly construed, covering only those tapings accompanied by a specific contemporary intent to commit a crime or a tort. *See Caro v. Weintraub*, 618 F.3d 94, 99-100 (2d Cir. 2010) ("There is a temporal thread that runs through the fabric of the statute and the case law. At the time of the recording, the offender must intend to use the recording to commit a criminal or tortious act."). Here, Gargiulo´s "contemporary intent" was criminal. He harbored criminal intent when he made the tape recording, even if a defensive reason for making the tape was also intertwined with his primary criminal motivation. *See Sussman*, 186 F.3d at 1201-02 ("existence of a lawful purpose does not mean that the interception is not also for a tortious or unlawful purpose … existence of the lawful purpose would not sanitize a tape that was also made for an illegitimate purpose; the taping would violate section 2511."); *Vest*, 639 F.Supp. at 904 ("It is characteristic of human experience that individuals usually — perhaps even always — act with mixed motives."). The Court can ascertain Gargiulo´s primary intent from the proffered testimony of Petitioner and other corroborating evidence. *See United States v. Salameh*, 152 F.3d 88, 143 (2d Cir. 1998) (recognizing that "as a general rule most evidence of intent is circumstantial"); *Mallette v. Scully*, 752 F.2d 26, 32 (2d Cir.1984) ("Commentators agree that it is seldom possible to present testimonial or direct evidence of an accused's state of mind. Intent as a separate item of proof does not commonly exist. … [I]ts existence must be inferred by considering the laws that generally govern human conduct.... Circumstantial evidence of this subjective fact is therefore indispensable.") (citations omitted). The totality of all of the circumstances, now supplemented by

the proffered testimony of Petitioner, militate in favor of finding, by a preponderance of the evidence, that Gargiulo had a criminal purpose at the time of making the tape.[15]

COUNSEL RENDERED INEFFECTIVE ASSISTANCE

Here, if counsel had not unreasonably *misadvised* Tarantino that his pretrial testimony would be used against him at trial as to the issue of guilt, he would have exercised his absolute personal right to testify in support of his motion to suppress to prove that Gargiulo´s intent from the outset was to extort him. *See United States v. Moskovits*, 844 F.Supp. 202 (E.D.Pa. 1993) (retrial granted on §2255 claim that trial counsel rendered ineffective assistance in misadvising that inadmissible prior uncounseled Mexican conviction would be used against defendant at trial if he exercised his personal right to testify). The first prong of the analysis under *Strickland v. Washington*, 466 U.S. 668 (1984), *i.e*., counsel's deficient performance, is shown by the *misadvice* given to Tarantino that his testimony in support of suppressing the linchpin evidence *would be used against him at trial on the issue of guilt*, contrary to well-settled law. *See Simmons v. United States*, 390 U.S. 377, 394 (1968) ("when a defendant testifies in support of a motion to suppress evidence…, his testimony may not thereafter be admitted against him at trial on the issue of guilt

[15] A different result might obtain if Gargiulo had never told Petitioner that he had taped him prior to approaching the FBI. *See United States v. Farrah*, 2000 WL 92349, *3 (D.Conn.2000) ("Finally, there is no evidence to suggest that either Donald Poling or Marilyn Poling had any improper motive for making the tapes. At no time did either of the Polings tell Farrah that they had the tapes and would use them against her if she did not return the money. It stands to reason that if the Polings had recorded the conversations with the intent to extort from Farrah money to which they were not entitled, or with the intent to otherwise coerce or induce her to act, they would have told Farrah that they had the tapes at some point prior to resorting to going to the authorities. The fact that the Polings never told Farrah about the tape recordings is consistent with the conclusion that they never intended to use the tapes to extort money from Farrah or otherwise coerce or induce her to act."); *United States v. Phillips*, 564 F.2d 32, 34 (8th Cir.1977) ("the subsequent failure to [unlawfully] use the tape reinforces the finding that the primary purpose for making it was to obtain a record of what was said. Furthermore, there is no credible evidence of any other purpose."). But that is not the situation here.

unless he makes no objection"). As in *Moskovits*, the second prong of the *Strickland* analysis, *i.e.*, prejudice from said deficient performance, is shown by counsel's interference with defendant's right to provide testimony that would have caused a different court decision. Petitioner submits that the denial of his fundamental right to testify in support of his motion to suppress *linchpin evidence* caused by the ineffectiveness of counsel was prejudicial. This Court should conclude that deficient representation caused Tarantino to not exercise his right to testify, resulting in prejudice, meaning "the decision reached would reasonably likely have been different absent the errors." *Moskovits* at 210 (*quoting Strickland*, 466 U.S. at 696). It is reasonably likely that the tape would have been suppressed based on the proffered testimony.

Petitioner has proffered sufficient evidence to support a conclusion that Gargiulo recorded the conversation with the intent to commit extortion. At a minimum, Petitioner should be granted a §2255 hearing to testify before the Court and have "a full and fair opportunity to meet his [] burden of proof." *See United States v. Phillips*, 540 F.2d 319, 326-327 & n.3 (8th Cir.1976) (trial court should require government to establish legal purpose for interception; if government meets its obligation, defendant must prove by a preponderance of the evidence the existence of one of the exceptions in § 2511(2)(d); risk of non-persuasion remains with defense). The entire chain of other evidence on the issue of Gargiulo's intent to use the tape for personal financial gain corroborates Petitioner's proffered testimony that Gargiulo started to extort cash from him using the threat of disclosing the incriminating tape to law enforcement, shortly after the tape was made, thereby proving his criminal intent from the outset:

> [T]he statute here under consideration plainly declares that recording is permissible in some circumstances and impermissible in others. Also, it plainly includes some provisions aimed at serving the public interest in use of credible evidence to support prosecutions for criminal offenses, but others aimed at protecting privacy and deterring violations, ***even to the extent of using sanctions that sometimes deny use of credible evidence that may be essential to effective prosecution for a crime.***

Vest, 639 F.Supp. at 909 (emphasis and brackets added).

Had Petitioner's proffered testimony been given to this trial court, it is reasonably likely that it would have concluded that the exclusionary sanction under 18 U.S.C. §2515 must be imposed here. *See United States v. Lam*, 271 F.Supp.2d 1182, 1186 (N.D.Cal.2003) (suppressing tapes of unlawfully intercepted conversations pursuant to 18 U.S.C. §2515) (citations omitted). The proffered testimony shows that the taping of the conversation was the first affirmative step taken by Gargiulo in his calculated extortion scheme. But for the ineffectiveness of Petitioner's trial counsel in misadvising him, which kept him off the witness stand, the linchpin evidence would have been suppressed as it was made "for the purpose of committing [a] criminal or tortious act" in violation of 18 U.S.C. § 2511(2)(d). All of the corroborating evidence on the issue of Gargiulo's intent, now supplemented by Petitioner's proffered testimony points to the conclusion that Gargiulo had always intended to extort Petitioner from the moment he pressed "*record*." *See Fischl v. Armitage*, 128 F.3d 50, 55 (2d Cir.1997) ("To establish a fact by a preponderance of the evidence means to prove that the fact is more likely true than not true."); *Ostrowski v. Atl. Mut. Ins. Cos*., 968 F.2d 171, 187 (2d Cir.1992) (remanding and recommending that the district court use the scale-tipping analogy).

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully submits that the Court should vacate all of the convictions, dismissing Count One with prejudice or ordering a retrial, ordering a retrial under Count Two, and dismissing Count Three with prejudice or ordering a retrial. Petitioner also submits that an evidentiary hearing is warranted on the issues raised herein.

Respectfully submitted,

/s/ *Todd G. Scher*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of October 2019, I filed the above pleading with the Clerk via CM/ECF.

/s/ *Todd G. Scher*
TODD G. SCHER

INDICTMENT – ECF DOC. NO. 1

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y
SEP 23 2008
LONG ISLAND OFFICE

RPD:JMM/CC
F.#2003R02020

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA

- against -

CHRISTIAN GEROLD TARANTINO,

Defendant.

- - - - - - - - - - - - - - - - X

INDICTMENT

CR 08 655

Cr. No. _____
(T. 18, U.S.C., §§ 33, 34, 1111, 1512(a)(1)(A), 1512(a)(1)(B), 1512(a)(1)(C), 1512(a)(3)(A), 1512(k), 2 and 3551 et seq.)

SEYBERT, J.

LINDSAY, M.

THE GRAND JURY CHARGES:

INTRODUCTION

At all times relevant to this Indictment, unless otherwise indicated:

The Murder of Julius Baumgardt

1. Mid-Island Check-Cashing Corporation ("Mid-Island") was a check-cashing business located in Massapequa, New York. Mid-Island owned and operated armored vans that served as mobile check-cashing outlets for the employees of Mid-Island's customers, which included businesses located on Long Island, New York and in New Jersey. Mid-Island's armored vans were "motor vehicles" as defined in Title 18, United States Code, Section 31(a)(6).

2. Volt Information Sciences, Inc. ("Volt") was a customer of Mid-Island located in Syosset, New York.

3. Julius Baumgardt ("Baumgardt") and John Doe 1, an individual whose identity is known to the Grand Jury, were persons employed by Mid-Island who jointly operated a Mid-Island armored van.

4. On or about June 23, 1994, Baumgardt and John Doe 1 were assigned to deliver United States currency to Volt. As Baumgardt and John Doe 1 approached the Volt premises, the defendant CHRISTIAN GEROLD TARANTINO ("TARANTINO"), Louis Dorval and John Doe 2, an individual whose identity is known to the Grand Jury, approached Baumgardt and John Doe 1. Baumgardt and John Doe 1 were ordered to lay on the ground and, while John Doe 1 was being handcuffed, Dorval shot and killed Baumgardt. At that time, TARANTINO, Dorval and John Doe 2 seized two briefcases carried by Baumgardt containing the United States currency.

The Murder of Louis Dorval

5. On or about December 3, 1993, TARANTINO, Dorval and others committed a burglary at a Filene's Basement store located in Manhasset, New York, and stole approximately 264 fur and leather coats. Subsequently, Dorval and others conspired to transport and sell, in interstate commerce, the fur and leather coats stolen from the Filene's Basement store (the "Filene's Basement scheme").

6. On or about and between June 23, 1994 and August 9, 1994, TARANTINO learned that Dorval had implicated TARANTINO in the Baumgardt murder in a discussion with John Doe 3, an individual whose identity is known to the Grand Jury.

7. On or about August 10, 1994, a federal Grand Jury sitting in the District of New Jersey returned an indictment entitled United States v. Joseph Giampa, et al., 94-CR-403(AJL), (the "Giampa indictment") charging Dorval and others with federal crimes relating to the Filene's Basement scheme, among other offenses. On or about August 12, 1994, Dorval advised others that he intended to flee and remain a fugitive rather than face incarceration as a result of the Giampa indictment.

8. On or about August 12, 1994, within the Eastern District of New York, TARANTINO, together with others, killed Dorval, placed Dorval's body into a trunk and discarded the trunk in the Atlantic Ocean off the coast of Long Island, New York.

9. On or about August 16, 1994, United States Coast Guard officers found the trunk containing Dorval's body floating in the Atlantic Ocean off the coast of Long Island, New York.

The Government Investigations

10. On or about August 18, 1994, the Federal Bureau of Investigation, Long Island Resident Agency ("FBI-LIRA"), began an investigation into the murders of Baumgardt and Dorval.

In addition, beginning in approximately 1996, successive Grand Jury panels sitting in the Eastern District of New York and in the District of New Jersey investigated the murders of Baumgardt and Dorval and other related crimes. Those investigations are referred to herein collectively as the "Government Investigations."

11. As part of the Government Investigations, in or about July 2000, pursuant to an Eastern District of New York Grand Jury subpoena, TARANTINO provided a DNA sample on a buccal swab for the purpose of DNA analysis.

The Murder of Vincent Gargiulo

12. In or about and between January 2000 and February 2002, Vincent Gargiulo ("Gargiulo"), TARANTINO and others were partners in a fitness club located in New York, New York. Gargiulo suffered financial losses when the business failed.

13. In or about September 2000, Gargiulo surreptitiously recorded a conversation with TARANTINO (the "Gargiulo tape"). During the recorded conversation, TARANTINO acknowledged involvement in the Baumgardt and Dorval murders and stated, in sum and substance, that he was concerned that the DNA sample he provided to the FBI would link him to the Baumgardt murder. TARANTINO explained, in sum and substance, that law enforcement authorities had seized a vehicle used in the Mid-Island robbery and Baumgardt murder. TARANTINO further

commented, in sum and substance, that he had cut his finger during the disposal of Dorval's body in the Atlantic Ocean.

14. In or about and between December 2002 and August 2003, Gargiulo informed TARANTINO that he possessed the Gargiulo tape and threatened to provide it to law enforcement officers unless TARANTINO compensated him for the business losses he sustained because of the failure of the fitness club.

15. On or about and between May 21, 2003 and August 15, 2003, Gargiulo provided information to FBI-LIRA agents about the Baumgardt and Dorval murders and offered to provide them with additional information and the Gargiulo tape.

16. Prior to August 18, 2003, TARANTINO hired John Doe 4, an individual whose identity is known to the Grand Jury, to kill Gargiulo. On or about August 18, 2003, John Doe 4 killed Gargiulo in New York, New York.

COUNT ONE
(Willfully Endangering the Safety of A Commercial Motor Vehicle Operator Resulting in Death)

17. The allegations contained in paragraphs 1 through 16 are realleged and incorporated as if fully set forth in this paragraph.

18. On or about June 23, 1994, within the Eastern District of New York, the defendant CHRISTIAN GEROLD TARANTINO, together with others, willfully and with a reckless disregard for the safety of human life, disabled and incapacitated Julius

Baumgardt and John Doe 1, who were drivers and persons employed in connection with the operation of a motor vehicle used, operated and employed in interstate commerce, to wit: a Mid-Island armored van, and lessened the ability of such persons to perform their duties, which offense resulted in the death of Julius Baumgardt.

(Title 18, United States Code, Sections 33, 34, 2 and 3551 et seq.)

COUNT TWO

(Obstruction of Justice Murder of Louis Dorval)

19. The allegations contained in paragraphs 1 through 16 are realleged and incorporated as if fully set forth in this paragraph.

20. On or about August 12, 1994, within the Eastern District of New York, the defendant CHRISTIAN GEROLD TARANTINO, together with others, did knowingly, unlawfully and with malice aforethought kill another person, to wit: Louis Dorval, with intent to prevent the communication by such person to a law enforcement officer of the United States of information relating to the commission and possible commission of federal offenses, including, but not limited to, the Baumgardt murder, the Filene's Basement scheme and other crimes charged in the Giampa indictment, which killing was a murder as defined in Title 18, United States Code, Section 1111(a), in that the defendant,

together with others, knowingly, willfully, deliberately, maliciously and with premeditation killed Louis Dorval.

(Title 18, United States Code, Sections 1512(a)(1)(C), 1512(a)(3)(A), 1111, 2 and 3551 et seq.)

COUNT THREE
(Conspiracy to Commit the Obstruction of Justice Murder of Vincent Gargiulo)

21. The allegations contained in paragraphs 1 through 16 are realleged and incorporated as if fully set forth in this paragraph.

22. In or about and between December 2002 and August 18, 2003, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant CHRISTIAN GEROLD TARANTINO, together with others, did knowingly, unlawfully and with malice aforethought conspire to kill another person, to wit: Vincent Gargiulo, with intent to: (a) prevent the attendance and testimony of such person in an official proceeding, including, but not limited to, the Government Investigations; (b) prevent the production of a record, document or other object in an official proceeding, including, but not limited to, the Government Investigations; and (c) prevent the communication by such person to a law enforcement officer of the United States of information relating to the commission or possible commission of federal offenses, including, but not limited to, the Baumgardt murder and the Dorval murder, in

violation of Title 18, United States Code, Sections 1512(a)(1)(A), 1512(a)(1)(B) and 1512(a)(1)(C), which killing was a murder as defined in Title 18, United States Code, Section 1111(a), in that the defendant, together with others, knowingly, willfully, deliberately, maliciously and with premeditation commanded, induced and procured another to kill Vincent Gargiulo.

(Title 18, United States Code, Sections 1512(k), 1512(a)(3)(A), 1111, and 3551 et seq.)

COUNT FOUR

(Obstruction of Justice Murder of Vincent Gargiulo)

23. The allegations contained in paragraphs 1 through 16 are realleged and incorporated as if fully set forth in this paragraph.

24. On or about August 18, 2003, within the Southern District of New York, the defendant CHRISTIAN GEROLD TARANTINO, together with others, did knowingly, unlawfully and with malice aforethought kill another person, to wit: Vincent Gargiulo, with intent to: (a) prevent the attendance and testimony of such person in an official proceeding, including, but not limited to, the Government Investigations; (b) prevent the production of a record, document or other object in an official proceeding, including, but not limited to, the Government Investigations; and (c) prevent the communication by such person to a law

enforcement officer of the United States of information relating to the commission or possible commission of federal offenses, including, but not limited to, the Baumgardt murder and the Dorval murder, which killing was a murder as defined in Title 18, United States Code, Section 1111(a), in that the defendant, together with others, knowingly, willfully, deliberately, maliciously and with premeditation commanded, induced and procured another to kill Vincent Gargiulo.

(Title 18, United States Code, Sections 1512(a)(1)(A), 1512(a)(1)(B), 1512(a)(1)(C), 1512(a)(3)(A), 1111, 2 and 3551 et seq.)

NOTICE OF SPECIAL FINDINGS

25. The allegations contained in Counts Three and Four are realleged and incorporated as if fully set forth in this paragraph.

26. As to Counts Three and Four, the defendant CHRISTIAN GEROLD TARANTINO:

a. was 18 years of age or older at the time of the offense (18 U.S.C. § 3591(a));

b. intentionally participated in one or more acts, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than a participant in the offense, and Vincent

Gargiulo died as a direct result of the act or acts (18 U.S.C. § 3591(a)(2)(C));

c. intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act (18 U.S.C. § 3591(a)(2)(D));

d. procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value (18 U.S.C. § 3592(c)(7)); and

e. committed the offense after substantial planning and premeditation to cause the death of a person (18 U.S.C. § 3592(c)(9)).

A TRUE BILL

Eileen Hoffmann
FOREPERSON

BENTON J. CAMPBELL
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

Case 2:08-cr-00655-JS Document 1 Filed 09/23/08 Page 11 of 11 PageID #: 11

SIR:

PLEASE TAKE NOTICE that the within will be presented for settlement and signature to the Clerk of the United States District Court in his office at the U.S. Courthouse, 610 Federal Plaza, Central Islip, New York, on the ___ day of_____, 20_, at 10:30 o'clock in the forenoon.

Dated: Central Islip, New York
_____, 20_____

United States Attorney,
Attorney for _____

To:
_____
_____
_____

Attorney for _____

RECEIVED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.
SEP 23 2008
LONG ISLAND OFFICE

SIR:

PLEASE TAKE NOTICE that the within is a true copy of _____ duly entered herein on the _ day of _____, in the office of the Clerk of the Eastern District of New York,

Dated: Central Islip, New York
_____, 20_____

United States Attorney,
Attorney for _____

To:
_____
_____
_____
_____

Attorney for _____

Criminal Action No.

UNITED STATES DISTRICT COURT
Eastern District of New York

UNITED STATES OF AMERICA

- against-

CHRISTIAN GEROLD TARANTINO,

Defendant.

INDICTMENT

(T. 18, U. S. C., §§ 33. 34, 1111, 1512(a)(1)(A), 1512(a)(1)(B), 1512(a)(1)(C), 1512(a)(3)(A), 1512(k), 2 and 3551 et seq.)

a true bill.

_____
Foreman

Filed in open court this_____day of
_____A.D._____

_____
Clerk

Bail, $_____

_____
James M. Miskiewicz
Assistant U.S. Attorney 631-715-7841

AFFIRMATION OF ELIZA D. STAHL, ESQ. - ECF DOC. NO. 505-1

Affirmation of Eliza D. Stahl

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
CHRISTIAN GEROLD TARANTINO,

Petitioner,

- vs -

UNITED STATES OF AMERICA,

Respondent.
----------X

Case No.: 2:16-cv-03770-JS

AFFIRMATION OF ELIZA D. STAHL

ELIZA D. STAHL, ESQ., an attorney at law duly licensed to practice law in New York, affirms under the penalty of perjury as follows:

1. I am the managing member of The Law Office of Eliza D. Stahl, P.C., and I am personally familiar with the facts and circumstances contained herein.

2. In 2008 through 2011, at the request of petitioner Christian Tarantino (Tarantino), I assisted James Froccaro, Esq. (Froccaro), who was the attorney of record for Tarantino, in preparing the defense of Tarantino. Having known Tarantino since middle school, I was happy to help the defense team prepare for this case, especially since Mr. Froccaro did not have any secretary or paralegals working for him at the time, but rather did everything himself, except for the specific tasks he delegated to Michael Rosen, his second chair on this case.

3. Beginning in October 2008 and continuing throughout his representation of Tarantino, Froccaro discussed his monetary arrangement regarding attorney's fees with me on numerous occasions, in detail, at his office. Froccaro told me that his attorney's fee for this case was $300,000. That fee did not include many additional legal costs, such as co-counsel, investigators, and experts, which added approximately $200,000 more onto the bill. Froccaro told me that Mulligan paid half of his retainer up front with a check from his mother, Marilyn

Mulligan, in the amount of $150,000. The second half of his fee was made in a series of cash payments to Froccaro by Mulligan over time. Additional payments were made to Froccaro by Tarantino's wife and Mulligan to cover the additional legal costs as well.

4. Tarantino eventually reimbursed Mulligan for the original $150,000 check advanced to retain Froccaro by selling his shares of the Long Beach Synergy gym. Tarantino never reimbursed Mulligan for the other $150,000 Mulligan paid toward Froccaro's fee, or the approximately $100,000 paid toward the additional legal costs, nor was he expected to. Mulligan acknowledged this to me himself as well when he complained about it on a few occasions. One occasion in particular I recall was my son's birthday party in August 2009. He and his family were up from Florida for the summer and attended the annual barbeque. When the party was over, a few people stayed, including Mulligan. He had had a few drinks during the day and made more than one thinly veiled "joke" to me about how he got stuck paying Tarantino's bill. He was worried that Tarantino would be unable to return the gesture if Mulligan eventually got arrested and had to provide for his own defense. Manon Mulligan also indicated frustration to me on several occasions about their paying half of Tarantino's attorney's fees and legal costs.

5. Froccaro and I had numerous conversations during the time period 2008-2011, while he was representing Tarantino, in which he acknowledged to me that he was also representing Mulligan, who was a known suspect in all of the crimes for which Tarantino was facing trial and lived under the constant threat of arrest. Froccaro referred to Mulligan as a client. Froccaro told me he regularly consulted with Mulligan when Mulligan came up to New York from Florida. When Mulligan was in town, Froccaro usually ended up referencing having met and consulted with him at some point.

6. Froccaro had previously represented Mulligan in a marijuana case (to the best of my recollection), for which he spent approximately two years in federal prison starting in 2003. Mulligan's arresting case agent on the marijuana case was also FBI Agent Robert Schelhorn.

7. Froccaro shared evidence from Tarantino's case with Mulligan - he played him the tape that was the main evidence against Tarantino in the case, without Tarantino's permission. I specifically recall mentioning to Froccaro in his office at one point that I did not think Froccaro should have played the tape for Mulligan. In response, he did not deny that he played the tape, but he dismissed it as insignificant.

8. On one occasion during a phone call in 2011, I believe it was after the *Mastrangelo* hearings, which I did not attend, Froccaro told me he "cleared Scott." I believe this was in reaction to Agent Robert Schelhorn's testimony that Mulligan's MtDNA was excluded.

9. When Mulligan got arrested in December 2011, I was in Disney World with my kids for my daughter's 11th birthday. On or about December 26 – 28, 2011, I received a phone call from Froccaro, who had just heard Mulligan was being represented by other named attorneys. Froccaro was surprised and exclaimed, "I thought I was representing Scott!"

10. Manon Mulligan forwarded an extortion letter she received from Vincent Gargiulo in January 2003 to Froccaro through another individual.

11. On one occasion in Froccaro's office when we were discussing the blackmail issues surrounding the case, I mentioned that I had heard he had destroyed a blackmail letter from Gargiulo to Mulligan a few years earlier and that I would have liked to have read it, thinking it would support Chris's blackmail argument. While I do not remember his exact words, I recall that he did not deny the allegation nor show any confusion as to what letter I was referring to.

12. To this day, I believe that Froccaro literally sold out Tarantino not only to protect Mulligan's interests, but even more offensively, to protect his own interests.

13. Froccaro was Mulligan's lawyer throughout the entire period of time he represented Tarantino in 2008-2011. Froccaro never proposed or explored any defense that would benefit Tarantino by inculpating Mulligan.

Dated: Deer Park, New York
July 14, 2017

Yours, etc.,

Eliza D. Stahl (2738011)
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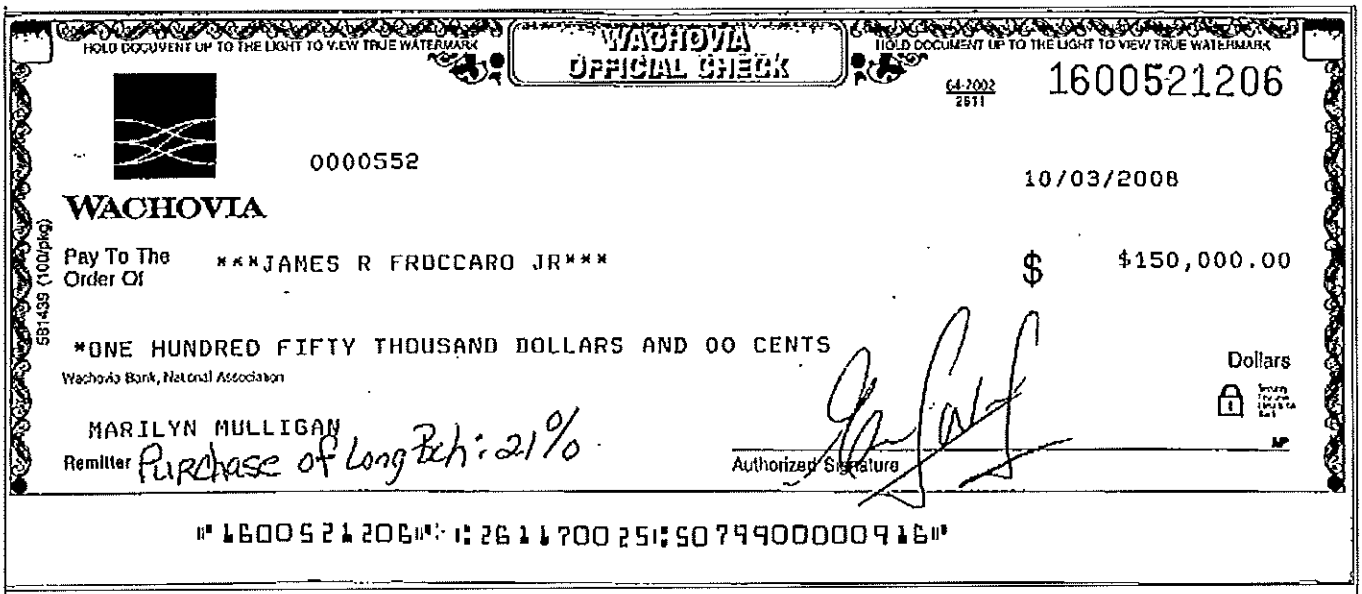

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Pay To The Order Of ***JAMES R FROCCARO JR***

$ $150,000.00

*ONE HUNDRED FIFTY THOUSAND DOLLARS AND 00 CENTS

Dollars

Wachovia Bank, National Association

MARILYN MULLIGAN
Remitter Purchase of Long Path: 21%

Authorized Signature

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AccountNum: 5079900000916
CheckAmt: 150,000.00
SerialNum: 1600521206
ProcDate: 2008/10/09
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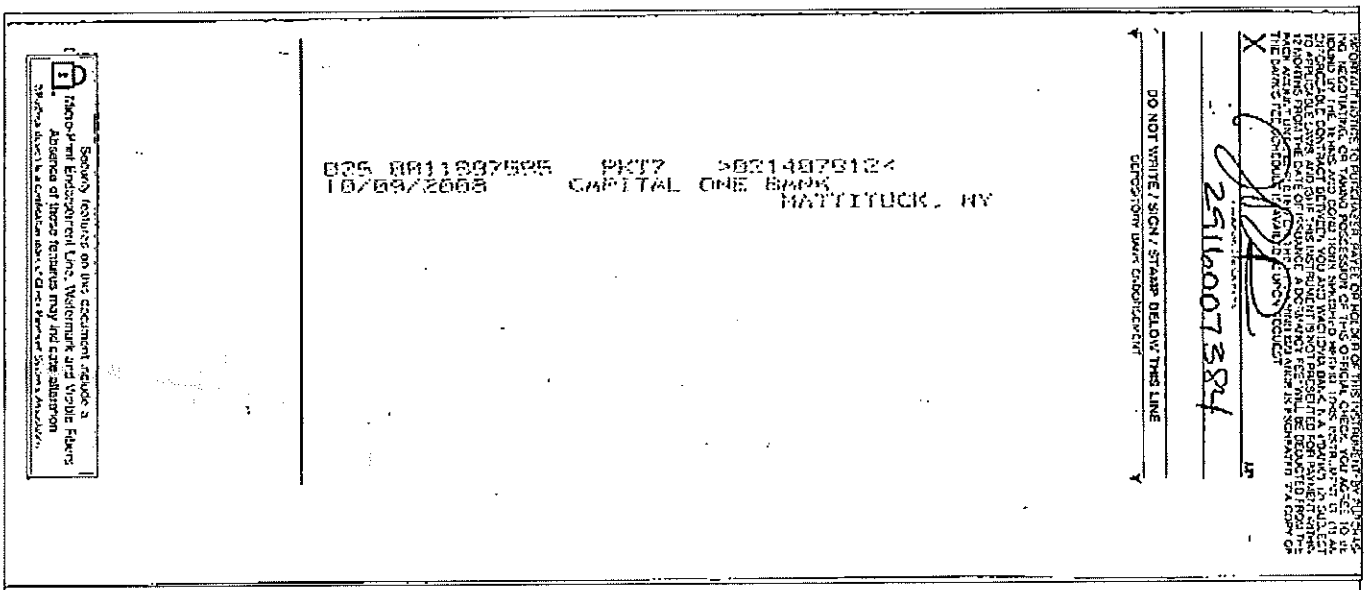

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AFFIDAVIT OF CHRISTIAN TARANTINO - ECF DOC. NO. 505-2

Affidavit of Christian Tarantino

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CHRISTIAN GEROLD TARANTINO,

Petitioner,

vs. Case No.: 2:16-cv-03770-JS

UNITED STATES OF AMERICA,

Respondent.

_____/

AFFIDAVIT OF PETITIONER CHRISTIAN GEROLD TARANTINO

I, Christian Gerold Tarantino, am the undersigned petitioner seeking relief in this case under 28 U.S.C. § 2255, and I state as follows:

1. I am providing this affidavit in support of the attached petition for relief.
2. My first trial defense counsel never met with me before jury selection to review the questionnaires completed by potential jurors.
3. I did not personally object during the first trial because I believed that a defendant represented by counsel cannot speak directly to the court unless the court speaks directly to the defendant.

Pursuant to 28 U.S.C. § 1746, I, Christian Gerold Tarantino, hereby state under penalty of perjury that the foregoing is true and correct.

Christian Tarantino
Reg.No. 14684-050
USP Allenwood
U.S. Penitentiary
P.O. Box 3000
White Deer, PA 17887

Executed on June 13, 2017

EXHIBIT E
MAY 4, 2011 TRANSCRIPT - ECF DOC. NO. 505-7

EXHIBIT “E”

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA, : CR 08 655

v. : U.S. Courthouse
Central Islip, N.Y.

CHRISTIAN TARANTINO, :

TRANSCRIPT OF TRIAL

Defendant. :

May 4, 2011
----------X 10:20 a.m.

BEFORE:

HONORABLE JOANNA SEYBERT, U.S.D.J.
and a jury

APPEARANCES:

For the Government: LORETTA E. LYNCH
United States Attorney
100 Federal Plaza
Central Islip, New York 11722
By: JAMES M. MISKIEWICZ, ESQ.
CARRIE N. CAPWELL, ESQ.
SEAN C. FLYNN, ESQ.
Assistants, U.S. Attorney

For the Defendant: JAMES R. FROCCARO, JR., ESQ.
20 Vanderventer Avenue, Suite 103W
Port Washington, New York 11050
and
MICHAEL ROSEN, ESQ.
61 Broadway, Suite 2602
New York, New York 10006

Court Reporter: HARRY RAPAPORT, C.S.R.
United States District Court
100 Federal Plaza
Central Islip, New York 11722
(631) 712-6105

Proceedings recorded by mechanical stenography.
Transcript produced by computer-assisted transcription.

truth.

How do you know that that really has meaning?

Well, ironically, not because of one of the witnesses we called, but because of the witness Mr. Froccaro called, Peter Pistone. A man who made his deal with the devil. He got three to six years for the commission of an arson he did with his brother Joe. And he was set to put his Joe behind bars, and the murder of Louis Dorval.

Which, by the way, does not in any way exculpate this man for that same murder. Now you know who he aided and abetted, Joe Pistone.

MR. FROCCARO: Judge --

THE COURT: Ladies and gentlemen, it is your recall of the evidence that controls here. More importantly, as you know, what the attorneys say is not evidence.

So if you find that your recollection of the evidence differs from what the government is saying now, or any argument that the government is making, if it does not appear to be reasonable to you, you can act accordingly and ignore those arguments, especially if there is nothing in the evidence to indicate what they are saying is correct.

Thank you.

EXHIBIT G
MARCH 15, 2011 TRANSCRIPT - ECF DOC. NO. 505-9

EXHIBIT “G”

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - X
:
UNITED STATES OF AMERICA

08-CR-00655

TRANSCRIPT OF PROCEEDINGS

-against- :

United States Courthouse
Central Islip, New York

CHRISTIAN TARANTINO,

March 15, 2011

Defendant. : 10:30 a.m.

- - - - - - - - - - - - - - - - X

BEFORE THE HONORABLE JOANNA SEYBERT
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government: LORETTA E. LYNCH
United States Attorney
100 Federal Plaza
Central Islip, New York 11722
BY: CARRIE CAPWELL
JAMES MISKIEWICZ
Assistant United States Attorneys

For the Defendant: JAMES FROCCARO, ESQ.
MICHAEL ROSEN, ESQ.

Also present as advisor: EDWARD JENKS, ESQ.

Court Reporter: Perry Auerbach
100 Federal Plaza
Central Islip, New York 11722
(631) 712-6103

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Transcript produced by computer.

THE CLERK: For conference and Curcio hearing, US versus Tarantino. Your appearances, please.

MS. CAPWELL: Carrie Capwell and Jim Miskiewicz for the government.

MR. FROCCARO: James Froccaro and Michael Rosen for Mr. Tarantino.

MR. ROSEN: Hi, Judge.

THE COURT: Good morning. You've had an opportunity to review the government's letter of March 13th?

MR. ROSEN: Yes, your Honor.

THE COURT: All right.

I also had to review the attachment Exhibit A, a letter that was sent under seal to defense counsel on November 4, 2010, and I've printed out the docket sheet which relates to Dominico.

MR. FROCCARO: Katia.

THE COURT: And also Salvatore Katia.

MR. ROSEN: Yes, your Honor.

THE COURT: They are defendants in a case before Judge Vitaliano and the docket number on that is 10-CR-00010.

So it's my understanding that, Mr. Froccaro, you've represented Mr. Salvatore Katia.

MR. ROSEN: Judge, I have, and I have also

represented the father Dominico as well.

THE COURT: Dominico is currently represented by Mr. Rosen now?

MR. FROCCARO: Yes.

THE COURT: So we're in a situation where there appears to be an actual conflict based upon the letter that the government sent to defense counsel in November of 2010. And pursuant to the obligations that I have under Curcio, I am going to assign Mr. Ed Jenks to speak with the defendant regarding -- Mr. Tarantino -- regarding this conflict.

If you can give me anymore background or explanation as to, one, why at this late date that I'm being advised, I'd ask the government when did you first learn that defense counsel was involved in this other case?

MS. CAPWELL: Your Honor, it was recently, it might have been I don't know, within the last three weeks that an FBI agent who's been helping with this case, he's not case agent or one of the main agents on this case, but he's been helping out.

THE COURT: When you say this case, you're talking about Tarantino.

MS. CAPWELL: The Tarantino case, yes, at one point mentioned that these defense attorneys represented

the Katias, and then upon doing more research and looking at docket sheets, we realized which case it involved, and then went back to look at our November 4th letter and out of an abundance of caution and concern wanted to let the Court know about this situation, and we presume, although we never know that this was something that was discussed back with the defendant in November or maybe even before that, when the government brought to defense counsels' attention this information from the CS.

THE COURT: Mr. Froccaro or Mr. Rosen.

MR. ROSEN: Can I just add the fact, I also represented, back in my younger years, a man named Victor Amuso, I believe that this was in the seventies, maybe the late part of the seventies or the early part of the eighties, there were two trials, one before Judge Weinstein in Brooklyn and also one before Judge Mishler in Brooklyn, so you can just imagine how far back this goes. There were two separate narcotics trials, both times where Amuso was acquitted of the charges, and I don't think I ever spoke or had seen Mr. Amuso again since that, except he went on trial before the late Judge Nickerson and Jerry Shargel was the lawyer, I was brought in to sit during the trial in the event Sammy the Bull testified, that was my assignment because Mr. Shargel had once represented Mr. Gravano, and couldn't cross him, but I sat there and

they never called him. But that's my --

THE COURT: The extent of your representation of Mr. Amuso.

MR. ROSEN: Yes. I don't each think the government today knows that.

THE COURT: This probably happened before some of them were born.

MR. ROSEN: Undoubtedly, yes.

THE COURT: All right. There's the name mentioned in your disclosed letter of November. More importantly, Mr. Froccaro, what's the situation before this, because I am concerned.

MR. FROCCARO: Judge, we had spoken to Mr. Tarantino about it to be honest with you, we have been unable to develop any relevant, relevant -- admissible relevant evidence regarding that. That's why it honestly slipped my mind. Your Honor will recall we made an application to get the name of the confidential source to deny those allegations and you denied it.

THE COURT: Right.

MR. FROCCARO: It honestly slipped my mind, but I wouldn't have brought it up because it's not an avenue we're pursuing. It has nothing to do the fact that I represented --

THE COURT: So the record is clear, and

Mr. Tarantino understands what the potential conflict may be if you continue with you simultaneously representing an individual who, according to the confidential source at one point back in 1994, '95 indicated that the confidential source was the actual shooter --

MR. FROCCARO: No, not the source was the shooter.

THE COURT: The confidential source that Mr. Salvatore Katia was the shooter and that Dominico --

MR. FROCCARO: The father.

THE COURT: Of Salvatore Katia bragged about it at one point, and the motivation for the killing is another important consideration.

So I want Mr. Tarantino to be perfectly clear of any mixed, if you will, loyalties with respect to representation of the Katias.

MR. FROCCARO: I understand.

THE COURT: All right. So Mr. Jenks, if you would take the time and discuss this with Mr. Tarantino and then you can go into any additional Curcio inquiries that may be inquired. You've met Mr. Tarantino.

MR. JENKS: I've just been introduced to him now.

THE COURT: All right. About a half our or so?

MR. ROSEN: Judge, would it be a time saver to

take up some housekeeping rules with your Honor.

THE COURT: I think that the phrase housekeeping rules.

MR. ROSEN: All right. I won't use it again.

THE COURT: The other phrase I don't like is honestly.

MR. FROCCARO: I never said that again, I don't think, Judge, I learned that the first time. And I'll never say again I have one thing to say.

MR. ROSEN: How about ground rules?

THE COURT: Whatever. You want to call it housekeeping let's call it housekeeping.

MR. ROSEN: They can go ahead, I don't want to delay --

THE COURT: All right. Do you want to bring Mr. Tarantino -- are you waiving Mr. Tarantino's appearance for purposes of this additional what would you call it?

MR. ROSEN: I'm afraid to call it anything. Whatever it is, I waive it.

THE COURT: All right.

(Whereupon the defendant leaves the courtroom with Mr. Jenks.)

MR. ROSEN: Judge Seybert, you had asked a while back about certain religious days or certain holidays

EXHIBIT I
FEBRUARY 16, 2011 TRANSCRIPT - ECF DOC. NO. 505-11

EXHIBIT "I"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA, :
08-CR-00655
-against- :
United States Courthouse
CHRISTIAN GEROLD TARANTINO, : Central Islip, New York

Defendant. : February 16, 2011
11:00 a.m.
----------X

TRANSCRIPT OF MASTRANGELO HEARING
BEFORE THE HONORABLE JOANNA SEYBERT
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Government: LORETTA E. LYNCH, ESQ.
UNITED STATES ATTORNEY
610 Federal Plaza
Central Islip, New York 11722
BY: CARRIE N. CAPWELL, ESQ.
JAMES M. MISKIEWICZ, ESQ.
SEAN C. FLYNN, ESQ.

For the Defendant: JAMES R. FROCCARO, ESQ.
20 Vanderventer Avenue, Ste 103W
Port Washington, New York 11050
and
MICHAEL ROSEN, ESQ.
61 Broadway, Suite 1105
New York, New York 10006

Official Court Reporter: Ellen S. Combs, CSR
Harry Rapaport, CSR
100 Federal Plaza - Suite 1180
Central Islip, New York 11722
Phone (631) 712-6107
Fax (631) 712-6123

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back to any individuals identified by the FBI. Correct?
A. Correct.
Q. This investigation is still ongoing, though?
A. Correct.
(Whereupon the tape was played.)
BY MR. MISKIEWICZ:
Q. Again, if I can interrupt.
As of 1994, based on your review of the FBI investigative file, was there a Scott who was identified as a suspect or target in the Baumgardt and Dorval homicides?
A. There was Scott Mulligan.
Q. At some point -- withdrawn.
(Whereupon the tape was played.)
BY MR. MISKIEWICZ:
Q. We just heard the name Ralph.
The Florida license plates that were on the Blazer, did they belong to the Blazer, or was the Blazer stolen?
A. The Blazer was stolen, and the license plates, the license plates didn't match the Blazer itself.
Q. In fact, the license plates were issued to somebody else?
A. Correct.
Q. Was it an individual by the name of Ida Innis?

were you seeking to match -- well, withdrawn.

(Whereupon the tape was played.)

MR. MISKIEWICZ: Just for the record, your Honor, I would like the record to reflect that the tape-recording at this point, approximately 24 minutes into it, I believe that it's completely audible.

But I'll leave that to your Honor's conclusion, that what's heard is the individual saying that; I told Mel in sum and substance, I, Chris Tarantino -- and goes on joking about not knowing anything.

(Whereupon the tape was played.)

BY MR. MISKIEWICZ:

Q. Did you in addition to taking the defendant's DNA in mid-2000, also eventually take Scott Mulligan's DNA?

A. We did.

Q. So today he has been excluded. Correct?

A. That's correct.

Q. And by the way, did Detective Kennedy serve that subpoena on Scott Mulligan to take DNA?

A. That's correct.

Q. At your request or in conjunction with you?

A. Correct.

(Whereupon the tape was played.)

BY MR. MISKIEWICZ:

Q. Again, if I can just interrupt.

States Attorney to advise the Court about the correctness of the defendant's plea. And do you recall Assistant U.S. Attorney, Joseph Conway, now retired, saying to Judge Seybert, just so the record is clear, the government's evidence would show, as Mr. Pistone stated, he was in the car at the time that the murder occurred, although he had no knowledge that it was going to happen. Once it did happen, he helped dispose of the body and then subsequently learned as to the reasons why Mr. Dorval was actually killed.

Do you recall the Assistant U.S. Attorney so advising her Honor?

A I do.

Q There came a point in time, did there not -- withdrawn.

One of the functions that you have, Agent Schelhorn, as a Justice Department personnel in the FBI is to corroborate and confirm certain facts or stories that are given to you to see if there is any kind of truth or backup to somebody's story; is that correct?

A Yes.

Q One of your jobs?

A Yes.

Q And you, Agent Schelhorn, as the case agent, undertook, did you not, to confirm and corroborate, I

think that is a better word, corroborate, what Peter Pistone told Judge Seybert, do you remember that, sir?

A Can you repeat the question?

Q I will try. It is not a great question, but I will try.

You undertook in your role as a special case agent of the FBI to corroborate the various pieces of information that Peter Pistone had given to the Judge or to Mr. Conway, in order to corroborate his truthfulness; is that correct?

A Correct.

Q And Mr. Pistone -- Peter Pistone told you and the government that his brother used a revolver to kill Mr. Dorval. Do you recall that, sir?

A I do.

Q Okay.

And you, Agent Schelhorn, corroborated the fact that there was a bullet -- the bullet that killed Mr. Dorval, quote, came from a revolver; is that correct?

A Correct.

MR. MISKIEWICZ: Objection to the form, revolver.

MR. ROSEN: Something wrong with that?

I will read from the grand jury. I'm falling apart, so let's go.

3500-RS-1, page 42. The grand jury testimony of Agent Schelhorn, April 6th, 2000. Question by Mr. Miskiewicz.

Question: I wanted to talk to you about a couple of things that you've done to corroborate Peter Pistone's information concerning the murder of Louis Dorval.

First of all, he indicated -- you indicated that Peter Pistone indicated that he saw Joe Baldy holding a revolver over his body.

Answer: Correct.

Q You knew what a revolver was when you were asked that by Mr. Miskiewicz, didn't you? And you confirmed a revolver was the weapon that was used; is that correct?

A That is what is stated.

Q That is what is stated.

Now, Mr. Peter Pistone told you, did he not, that there were bullet holes in that toolbox that were fired into the toolbox where Mr. Dorval was placed; is that correct, sir? Sir?

A Correct.

Q And you corroborated and you confirmed that you found the holes; is that correct?

A Yes.

Q And Mr. Peter Pistone told you that when they were

removing Mr. Dorval from the back of the Blazer, the back trunk, or what do you call it, the back gate, whatever you call it, was damaged because of the weight of the body in the box; do you recall that, sir?

A I do.

Q I don't know if you call it a tailgate or whatever word of art it is.

Okay.

You confirmed that that tailgate in that vehicle owned by Joe Pistone's girlfriend was indeed damaged, just the way Peter Pistone told you; is that correct?

A Yes.

Q Peter Pistone told you, did he not, that the plug in the vehicle, or in the Blazer, wherever the poor man lost his life -- and you seized that vehicle -- when I say "you," I mean the FBI, you get a warrant for something and you seize it; is that right?

A Yes.

Q And you took it to your lab --

MR. MISKIEWICZ: Objection.

MR. ROSEN: I will withdraw it. I just don't want to continue getting stopped here. I withdraw it.

MR. MISKIEWICZ: I object to the previous question.

The Blazer where the poor man lost his life.

MR. ROSEN: We are human beings, I'm sorry. I'm talking like a lawyer. I'm sorry, Judge.

THE COURT: You corroborated that there was damage to the back of Joseph Pistone's girlfriend's truck; is that correct?

THE WITNESS: Joseph Pistone's girlfriend's truck, yes, that's correct.

THE COURT: All right.

Q And you also told that there was blood in the vehicle, the truck; is that correct?

A Yes.

Q And you ascertained, did you not, that when the truck was returned to the girlfriend -- Joe Pistone's girlfriend, a whole new interior, everything, carpeting, everything was all new; is that correct?

A Correct.

Q By the way, it was a Pistone relative by the name of Tiny that did the job, correct?

A Yes.

Q You confirmed that, didn't you?

A Yes.

Q And last and not least about the boat, let's talk about the boat.

Peter Pistone had said that this boat was destroyed by fire and left on a vacant piece of land in

EXHIBIT J
COMPLAINT AND ARREST AFFIDAVIT RE: SCOTT MULLIGAN
ECF DOC. NO. 505-12

EXHIBIT “J”

JMM:SCF/CNC
F.#2005R00138

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MJ-11-1252

- - - - - - - - - - - - - - - - - - X

FILED UNDER SEAL

UNITED STATES OF AMERICA

- against -

SCOTT MULLIGAN,

Defendant.

COMPLAINT AND AFFIDAVIT IN SUPPORT OF ARREST WARRANT

(18 U.S.C. §§ 33, 34 and 2)

- - - - - - - - - - - - - - - - - - X

EASTERN DISTRICT OF NEW YORK, SS:

ROBERT F. SCHELHORN, Jr. being duly sworn, deposes and says that he is a Special Agent with the Federal Bureau of Investigation ("FBI"), duly appointed according to law and acting as such.

Upon information and belief, there is probable cause to believe that, on or about June 23, 1994, within the Eastern District of New York, the defendant SCOTT MULLIGAN, together with others, willfully and with a reckless disregard for the safety of human life, disabled and incapacitated Julius Baumgardt and Walter Tully, who were drivers and persons employed in connection with the operation of a motor vehicle used, operated and employed in interstate commerce, to wit: a Mid-Island armored van, and lessened the ability of such persons to perform their duties, which offense resulted in the death of Julius Baumgardt.

(Title 18, United States Code, Sections 33, 34 and 2).

The source of Your deponent's information and the grounds for his belief are as follows:[1/]

1. I have been a Special Agent with the FBI for approximately 16 years. Since late 1999, I have been the lead agent assigned to the investigation of the 1994 murder of Baumgardt, and two subsequent and related murders occurring in 1994 and 2003, as set forth more fully below. The information contained in this Complaint comes from first-hand knowledge, my discussions with witnesses involved in the investigation, my discussions with other law enforcement agents and officers, my review of reports prepared by other law enforcement officers, my review of other evidence, including documents, photographs and recordings related to this investigation, and my training and experience.

A. <u>The Murder of Julius Baumgardt</u>

2. Mid-Island Check-Cashing Corporation ("Mid-Island") was a check-cashing business located in Massapequa, New York. Mid-Island owned and operated armored vans that served as mobile check-cashing outlets for the employees of Mid-Island's

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1/ Because the purpose of this Complaint is to establish only probable cause to arrest, I have not set forth a description of all the facts and circumstances of which I am aware. Where the contents of documents and the actions, statements, and conversations of others are reported herein, they are reported in sum and substance and in part, except where otherwise indicated.

customers, which included businesses located on Long Island, New York and in New Jersey. Mid-Island's armored vans were "motor vehicles" as defined in Title 18, United States Code, Section 31(a)(6). In June 1994, Volt Information Sciences, Inc. ("Volt") was a customer of Mid-Island, and was located in Syosset, New York.

3. Julius Baumgardt ("Baumgardt") and Walter Tully ("Tully"), were persons employed by Mid-Island who jointly operated a Mid-Island armored van. On or about June 23, 1994, Baumgardt and Tully were assigned to deliver United States currency to Volt. As Baumgardt and Tully approached the Volt premises, the defendant SCOTT MULLIGAN ("MULLIGAN"), Christian Tarantino ("Tarantino") and Louis Dorval ("Dorval") approached Baumgardt and Tully, brandished firearms and ordered Baumgardt and Tully to lay on the ground. As Tully lay face-down and handcuffed, Dorval shot and killed Baumgardt. MULLIGAN and his accomplices then grabbed two satchels carried by Baumgardt, which contained the United States currency.

4. Numerous individuals both inside and outside the Volt building witnessed the robbery and murder of Baumgardt. Two such eyewitnesses, John Does 1 and 2,[2/] were standing outside the building - a few feet from Baumgardt and Tully - when the crime

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[2/] I am aware of the identities of all the individuals referenced by aliases in this Affidavit.

occurred. John Does 1 and 2 have previously testified[3/] that they saw two assailants on June 23, 1994. According to John Does 1 and 2, one of those individuals, subsequently identified during the course of the investigation as Dorval, was wearing a dark business suit, a mustache and sunglasses, and was carrying a handgun. The second individual was wearing a rubber mask that covered his entire head. John Doe 1 described this mask as resembling the face of a pig. John Does 1 and 2 testified that this second individual was carrying what both described as a black, pump action, pistol grip shotgun that, as set forth below, was purchased on behalf of Tarantino three days earlier. John Doe 2 further described one of the assailants as a large individual, approximately six-foot-one-inch in height, with a "heavy build".[4/]

5. Jane Does 1 and 2 were employees of Volt, who viewed the events from inside the building through ground-floor

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3/ On May 23, 2011, after a six-week jury trial conducted before the Honorable Joanna Seybert, Tarantino was convicted of participating in the June 23, 1994 murder of Julius Baumgardt, in violation of 18 U.S.C. §§ 33 and 34, and the August 1994 obstruction of justice murder of Dorval, in violation of 18 U.S.C. § 1512. See United States v. Christian Tarantino, 08 CR 655 (JS). John Does 1 and 2, as well as John Doe 5 and Jane Does 1, 2 and 3, referenced infra, testified during that trial.

4/ Your deponent has reviewed surveillance photographs taken of MULLIGAN in the summer of 1994. In those photographs, MULLIGAN looks as if he could have weighed between 210-240 pounds during that period. Additionally, biographical data contained in MULLIGAN's criminal history report indicates that he is six-foot-one-inch tall.

EXHIBIT K
MARCH 30, 2011 TRANSCRIPT - ECF DOC. NO. 505-13

EXHIBIT “K”

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA, : CR 08 655

v. : U.S. Courthouse
Central Islip, N.Y.

CHRISTIAN TARANTINO, :

TRANSCRIPT OF TRIAL

Defendant. :

March 30, 2011
----------X 10:04 a.m.

BEFORE:

HONORABLE JOANNA SEYBERT, U.S.D.J.
and a jury

APPEARANCES:

For the Government: LORETTA E. LYNCH
United States Attorney
100 Federal Plaza
Central Islip, New York 11722
By: JAMES M. MISKIEWICZ, ESQ.
CARRIE N. CAPWELL, ESQ.
SEAN C. FLYNN, ESQ.
Assistants, U.S. Attorney

For the Defendant: JAMES R. FROCCARO, JR., ESQ.
20 Vanderventer Avenue, Suite 103W
Port Washington, New York 11050
and
MICHAEL ROSEN, ESQ.
61 Broadway, Suite 2602
New York, New York 10006

Court Reporter: HARRY RAPAPORT, C.S.R.
United States District Court
100 Federal Plaza
Central Islip, New York 11722
(631) 712-6105

Proceedings recorded by mechanical stenography.
Transcript produced by computer-assisted transcription.

And you mentioned earlier that you applied for a warrant to search unit B-54; is that correct?

A Yes.

Q And was that a look-see warrant again?

A Yes.

Q And on what date did you apply for a look-see warrant?

A June 24th.

Q And was the warrant authorized by a judge on that date?

A Yes.

Q And were you planning to execute the look-see warrant on that date, June 24th?

A Yes.

Q And prior to you going over to 110 Mini Storage to search unit B-54, did anything happen first?

A Yes, I was contacted by Mr. Giersbach again, and saying that there was a subject in a white car entering the unit, B-54, and I should come right over.

MR. FROCCARO: Judge --

THE COURT: Is that an objection?

MR. FROCCARO: Yes.

THE COURT: Your objection is sustained.

MS. CAPWELL: May I?

THE COURT: Yes, come on up.

(Whereupon, at this time the following took place at the sidebar.)

THE COURT: Hearsay?

MR. FROCCARO: Hearsay, yes.

MS. CAPWELL: My response is except for the truth of the matter therein, but to show what Detective Kennedy did with the response with respect to the listener.

MR. FROCCARO: Under 403 the probative value is substantially waived. If somebody is going to say they saw Scott Mulligan going into the B-54 unit -- my understanding is the only testimony we will hear is they saw him around the unit, not going into it. So under 403 it should be excluded for sure.

THE COURT: You are talking about the actual location of Mr. Mulligan never being verified?

MR. FROCCARO: Is that what you were going into?

MS. CAPWELL: My next question is upon receiving that information, what did you do?

Detective Kennedy is going to say, I called my partner Ray Gene to see where he was, and Ray Gene went to the storage unit.

MR. FROCCARO: Nobody puts him into the unit, which is critical here.

MS. CAPWELL: I anticipate Detective Ray Gene will say he saw someone appearing to be Scott Mulligan leaving the door of B-54.

MR. FROCCARO: I object under 403 as to the hearsay.

THE COURT: Giersbach is not going to be called as a witness?

MS. CAPWELL: Harry, can you read back what Detective Kennedy said.

THE COURT: The last question, I'm not sure he saw him in the unit?

MS. CAPWELL: I thought he said in the area.

(Whereupon, the court reporter reads the requested material.)

MS. CAPWELL: I was going to say after he received the call, what did you do?

THE COURT: I will strike, entering the unit.

(Whereupon, at this time the following takes place in open court.)

THE COURT: Ladies and gentlemen, the last response of the witness with respect to seeing an individual entering the unit is struck.

You are to disregard that.

If you ask the question again, we can establish

I will try to go slowly. If there is anything you can't understand -- I have a feeling you will understand everything I ask you. But you tell me and I will try to slow down and rephrase the question, all right?

A Yes.

Q Detective Kennedy, you conducted an investigation into a stolen car ring during the year 1994, which involved the 110 Mini Storage facility in Farmingdale; is that correct?

A Yes.

Q And in connection with that investigation, the employees of 110 Mini Storage were questioned by the police; is that correct?

A Yes.

Q And to your knowledge none of the employees at 110 Mini Storage ever identified Chris as having been at the 110 Mini Storage facility, correct?

A No.

Q And to your knowledge, no Nassau County police officer or FBI agent ever identified Chris Tarantino as having been at that facility; is that correct?

A Right.

Q Now, in connection with your investigation you learned in September of 1993 the rental had expired on one

EXHIBIT L
APRIL 27, 2011 TRANSCRIPT - ECF DOC. NO. 505-14

EXHIBIT “L”

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA, : CR 08 655

v. : U.S. Courthouse
Central Islip, N.Y.

CHRISTIAN TARANTINO, :

TRANSCRIPT OF TRIAL

Defendant. :

April 27, 2011
----------X 10:00 a.m.

BEFORE:

HONORABLE JOANNA SEYBERT, U.S.D.J.
and a jury

APPEARANCES:

For the Government: LORETTA E. LYNCH
United States Attorney
100 Federal Plaza
Central Islip, New York 11722
By: JAMES M. MISKIEWICZ, ESQ.
CARRIE N. CAPWELL, ESQ.
SEAN C. FLYNN, ESQ.
Assistants, U.S. Attorney

For the Defendant: JAMES R. FROCCARO, JR., ESQ.
20 Vanderventer Avenue, Suite 103W
Port Washington, New York 11050
and
MICHAEL ROSEN, ESQ.
61 Broadway, Suite 2602
New York, New York 10006

Court Reporter: HARRY RAPAPORT, C.S.R.
United States District Court
100 Federal Plaza
Central Islip, New York 11722
(631) 712-6105

Proceedings recorded by mechanical stenography.
Transcript produced by computer-assisted transcription.

about Dorval --

MR. FROCCARO: Judge, quickly, in going through the entire record, my recollection is that the only mention of Mr. Dorval during the case was by Mr. Fatato.

And his only statements regarding his disappearance is that he had a phone conversation with Mr. Dorval, where he heard Mr. Tarantino in the background.

And he suggested potentially, Dorval to Fatato, they would come to pick him up in Fire Island, and he was inconsistent with that.

And he agreed on cross-examination he was giving a bunch of inconsistent versions, and I don't think they met the burden necessary to take it to a jury.

That is the only evidence in the trial other than the tape recording of Louis Dorval.

The tape recording itself, my understanding, or my understanding of the tape is that the only statement in there that could potentially be argued to implicate him in the murder or being an accessory -- I think more appropriately being an accessory after the fact, where there is a claim that it is Mr. Tarantino speaking, and there is a conversation to the extent that he cut his finger on the toolbox, that is my understanding of the entire case.

EXHIBIT M
MAY 9, 2011 TRANSCRIPT - ECF DOC. NO. 505-15

EXHIBIT “M”

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA, : CR 08 655

v. : U.S. Courthouse
Central Islip, N.Y.

CHRISTIAN TARANTINO, :

TRANSCRIPT OF TRIAL

Defendant. :

May 9, 2011
----------X 9:55 a.m.

BEFORE:

HONORABLE JOANNA SEYBERT, U.S.D.J.
and a jury

APPEARANCES:

For the Government: LORETTA E. LYNCH
United States Attorney
100 Federal Plaza
Central Islip, New York 11722
By: JAMES M. MISKIEWICZ, ESQ.
CARRIE N. CAPWELL, ESQ.
SEAN C. FLYNN, ESQ.
Assistants, U.S. Attorney

For the Defendant: JAMES R. FROCCARO, JR., ESQ.
20 Vanderventer Avenue, Suite 103W
Port Washington, New York 11050
and
MICHAEL ROSEN, ESQ.
61 Broadway, Suite 2602
New York, New York 10006

Court Reporter: HARRY RAPAPORT, C.S.R.
United States District Court
100 Federal Plaza
Central Islip, New York 11722
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in evidence, and I'm reading from a report.

MS. CAPWELL: That is always the impression they are left with that -- when you refresh the recollection of a witness from any document.

THE COURT: I have no problem with it, Mr. Fatato. I will let it be read in its entirety.

Let's bring the jury out and we will move on.

(The jury enters the courtroom at 2:27 p.m.)

THE COURT: Please be seated, if you would.

Ladies and gentlemen, the note you gave to us earlier this afternoon was as follows:

We would like to hear the enhanced version of designated area of the Gargiulo recording at the parts pertaining to the trunk, skin, finger.

With regard to that request, do you want to hear the enhanced version without the transcripts or one the transcripts, just let me know.

JUROR NO. 4: I would like to have it with the transcript.

THE FOREMAN: It doesn't matter.

THE COURT: Suppose I do it this way:

If you don't want the transcript, it is a very short clip, close your eyes and you will not see the transcript, which will be running up here.

Is that workable? If not come up.

THE COURT: All right.

(Whereupon, at this time the following takes place in open court.)

THE COURT: Everyone has their headsets?

Just make sure you close your eyes when it comes on, especially if it is not as to what you have requested it.

MR. FLYNN: There is a power switch on the side of the headsets.

(Audio recording is played as requested.)

THE FOREPERSON: Can we hear it again?

THE COURT: You want to hear it again?

THE FOREPERSON: Yes.

MR. FLYNN: I will queue it up again.

THE COURT: Sure.

MR. FLYNN: Ladies and gentlemen, if you take your headsets off for a second again, please.

(Whereupon, at this time there was a pause in the proceedings.)

MR. FLYNN: We are ready.

If you would put your headsets on, ladies and gentlemen.

(Audio recording is played as requested.)

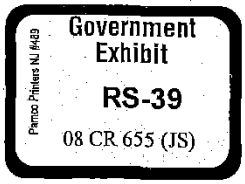
THE COURT: All right.

EXHIBIT N
TAPE TRANSCRIPT - ECF DOC. NO. 505-16

EXHIBIT “N”

TRANSCRIPT

CASE: **U.S. v. CHRISTIAN TARANTINO**
08 CR 655 (JS)



CD NO.: CD - Part II

RUNNING TIME: 0:39:23

PARTICIPANTS: CT – Christian Tarantino
VG – Vincent Gargiulo
UF – Unidentified Female

ABBREVIATIONS: [UI] = Unintelligible
[PH] = Phonetic Spelling

(Elapsed time starting 00:00:26)

CT: So the cops come upstate, you know.

VG: Right. They go all the way upstate?

CT: Yeah, 'bout four of them, right?

So I get a phone call from --

VG: Feds or state?

CT: Both.

VG: Together?

CT: Yeah. So listen, so I go, ah -- I get a call from MEL, you know. Fuckin', ah, KENNY comes to get me. I'm like, what the fuck, you know. So MEL goes, CHRIS, listen, fuckin' U.S. Attorney wants to take DNA from you. You fuckin' botched the armored car up, blah, blah, blah, blah, blah.

VG: They didn't take it, did they?

CT: Listen. So I go, holy fuck; and I ain't giving it to them, you know? He says this. I ain't giving to them. I go, it's gonna come back, you know? So, ah –

VG: From the car [UI]?

CT: Yeah. Listen, I'll tell you about it. Okay. Listen [UI] --

VG: What --

CT: The car we drove up there with Louie.

VG: Yeah, I know. I know. I had the car.

CT: I had the car, remember the other half of the car. The car we drove up in, the car that we pulled up in. We changed tails over here, and we went to a different car and took off, so the [UI] we put on -- the car we pulled up in --

VG: Right.

CT: -- they have it.

VG: And -- and, then what, you didn't have a hat on? What kind of DNA is it, hair?

CT: They go, if the DNA works out different, they did this now -- [UI] be happy to have -- I'm like -- like a [UI].

VG: Maroon, right.

CT: Not anymore, anything they get.

VG: Any hair?

CT: They get.

VG: So you think they have hair?

CT: So listen. So we used the car all winter. And for the most part, I did --

VG: Oh, shit. There's no way ya fucked up.

CT: Definitely, I know. That's what I said. I go, and I went to the city with Mike.

VG: Holy shit.

CT: So listen. I'm like, fuck, you know. I'm shitting bullets. We took a vacuum to the car, you know what I mean, right?

VG: Hey, JENN.

UF: Hey.

CT: Ah, I didn't vacuum the car 'till -- you know what I mean, like we, we, we cleaned it for a couple of hours, you know what I mean?

VG: Right.

CT: The night before (UI) vacuumed it out (UI), but you know big (UI) . like any other (UI), but then you know, I know they had the little (UI), so listen, so (UI) I am not giving it to them. He calls me back, he says you gotta give it to them.

VG: All right. Well, I'll be your [UI].

CT: He said, well [UI]. Here's the deal. He said, if you don't give it to them, the U.S. Attorney is going to call up your fucking parole officer, he's going to call DAN PERRONE. They're going to have you violated immediately. And just so you know, I've been checking it out. He goes, here's the deal. He goes, they can get a fuckin' court order, no fuckin' problem; and they will, okay, CHRIS? Before you get -- and they will. He goes, so if you don't like giving it to them, you're going to be automatically violated because if you give it to them, you're going to get out. Get out. How the fuck is that happening, you know what I mean. I'm like, it's coming back. I'm thinking, what does it take, ten days? Supposedly it takes two to three months.

VG: How long's it been?

CT: Two months and change.

VG: Oh, shit.

CT: Yeah.

VG: Now, it makes more sense that SCOTT'S doing everything. I was going to tell you how long ago SCOTT running [UI].

CT: Nah, nah, don't. But the thing is, I can't imagine it takes fuckin' six weeks. Like it ain't six weeks from then 'till now. You going to let me out?

VG: What?

CT: I think they had to, like, [UI] money or something. So listen, as soon as --

VG: But even with just the car, [UI] it doesn't explain everything. [UI] fucking [UI] fibers [UI] --

CT: I know because who's to say -- listen, the others -- I was thinking about the other thing, but who's to say, the car we pulled up in, did someone take our license plate down? How do they know that was the car that was found down there? Just 'cause it's a red stolen vehicle, it could of been there for a month, you know, but – you know. You know what I'm saying, like --

VG: Right.

CT: I go, you know [UI] how do you know that wasn't the one we pulled up in? Did somebody take the plate? Did someone give a description of the plate? Like were you there at the time I was saying I was there? You know what I'm saying?

VG: Right.

CT: So, but nevertheless, here's how – so the story gets even trickier, all right.

VG: Uh-huh.

CT: So now, they think this -- by the time they come up there, right?

VG: [UI], one other question, CHRIS.

CT: They're up here.

VG: Why are they waiting this long ? What's it, four or five years?

CT: Huh-uh. Six – six, coming up on seven. Let me -- let me -- let me just tell you 'cause, Vince – and you know what, I won't lead you, and I'll let you tell me what you think, all right? Now when these guys come up here, right, now a bunch of other dudes get arrested. [UI] --

VG: Yeah.

CT: Okay, some guy's cousin rats on his cousin, okay? Somebody rats on you and says you killed LOUIE which you totally [UI].

VG: Holy shit.

CT: Yeah, they got him out of jail.

VG: I got to talk. Something strange [UI].

CT: Just listen to this. It gets twisted, right? They got him out of jail. This guy named PISTONE, okay -- remember that PETER PISTONE, okay, running around telling everybody he bumped LOUIE. He got arrested in Brooklyn.

VG: Unbelievable.

CT: He -- him and this guy PISTONE and like five other fuckin', like half fuckin' mozzarellas, all right, got arrested for like some kind of RICO or something, you know what I mean, out on Long Island, all right? So now they had all of their DNA taken too and supposedly dozens of witnesses. CHRIS told me. I go -- and dropped him off in his car, you know. He used his fuckin' cousin's pickup, or whatever, and dropped them off. And there's -- there were blood stains in there. So they took all these guys' DNA also [UI] in

this person's pickup truck. Maybe they find hairs so [UI], and they took seven guys' names. I don't know one of their names, not one. It's like, yeah, JOE MOTARATS, TONY COROLIE; and I'm like, you know. And I'm like, I don't know them [UI]. So these guys are also arrested at the same time, all right? So now – and admit that [UI] – (Laughter).

VG: Go ahead.

CT: [UI] imagine. So now MEL tells me they wanted hair but doesn't want me to take it, right? He's like [UI]. I can't think for about a day, two days. Finally, I'm sketching shit out. For one, eighteen people were in that car. Eighteen. Thinking like JOE CAPATENIE, [UI] like. Like a million – like really never – so I'm like, holy fuck, you know? So, they know that. And I go – [UI] fuckin' DNA's been around forever. That got us fuckin' like –

VG: That's it. I think they're trying to scare you guys into making some type of move and – and get this stupid case with a dead end. So what they're doing now is putting pressure on everyone. See if you get everyone involved into saying that SCOTT'S on the lam. He shouldn't be doing what he's doing.

CT: He's changed, SCOTT, because listen, you're thinking like this, for one. You're not a saint in all of this. You're taking X amount of time, and I'm taking X. So for one, I need a guy on the street in order to fuckin' take care of my shit, you know what I mean, as far as arranging money, as far as handling our business.

VG: But he is going to be so hot if this comes down.

CT: Doesn't matter. Listen, his whole thing is if he can prove to the wife, he

could arrange it. He'll -- he'll turn himself in. He just wants to arrange bail, you know what I mean, and that's it. And he will turn himself in, because --

VG: They're not going to give him bail.

CT: They can arrange it from a long distance. I mean RYAN ROSECO [PH] did it.

VG: Yeah, but RYAN --

CT: They gave – they gave fuckin' MIKEE CARTER gave him bail. He had six fuckin' murders on his case.

VG: Because they kept control of him.

CT: He's got a fuckin' murder out at Staten Island. He's all gangstered up.

VG: The security guard is an innocent guy. They – that's why they will never stop with this. This shit is going to go on for ten years.

CT: So listen – so -- so, ah --

VG: [UI] their interest, in Louie --

CT: Yeah.

VG: Him, they don't give a fuck about. That's what I mean. They don't care about him.

CT: Not anymore.

VG: No.

CT: Fuck them.

VG: It's more the security guard. That's really bad, BUDDY.

CT: I know.

VG: That's really bad.

CT: I know.

VG: Umm, you know what there, I think – just so you know, it's all over Bellmore, that shit SCOTT'S doing.

CT: Yeah.

VG: It comes back to me. I get a call from BOB, who is in a dirt bag bar; and he found out. I go, what the fuck you talking about, SCOTT'S not, you know, on the – you know, basically he's on the lam.

SCOTT'S not on the lam. It is the stupidest thing I ever [UI]. He was on [UI].

CT: Yeah.

VG: Turns out, he's right. He said that. I couldn't believe fuckin' – you know what he's saying, RALPH. He's saying it's some type of a drug bust, though. I thought maybe that thing with LADAGANA was talking about.

CT: We were working from the inside [UI]. Cops were there, asking about Liquid Lab. They were laundering money out of there.

VG: Oh, really.

CT: The fucking place only does breakfast and lunch. How can they make any money? Meanwhile, I would send [UI] thirty thousand [UI] the place [UI].

VG: Fucking CLAUDIA and REM. REM --

CT: Nonetheless, so listen, let me tell you. There is more to the story, right? So the cops come up. By the time they get me, I'm cool. I've -- I've pretty much accepted the fact that [UI] months ago, 40 years', I'm going to do it. I'll go see Dave. I'll go see Al. [UI] fuckin' day. I ain't breaking no matter what, you know, no matter what. Nobody's fuckin' ever turning me out.

VG: Nobody.

CT: Never.

VG: It's fucking rough shoes to be in.

CT: Yeah, no. But [UI] get – it gets to the point, you know, you ran it. And all of a sudden, it's like, well, I hope it goes to the feds. That's an understanding to myself, ya know. It's my fuckin' time. I'm going to go wherever the fuck.

VG: One thing I'm glad about, if the feds are involved, they won't bring you down to torture a confession out of you.

CT: Right.

VG: Suffolk County will do that to you.

CT: Nassau [UI]?

VG: It's Nassau County?

CT: Yeah.

VG: I thought it was found in [UI]. Nassau's even worse.

CT: Yeah.

VG: They are worse. I told you about them.

CT: Now, the guys come up. So by the time I get there, I'm pretty cool. I know I've got to give my shit up, right? So they're doing my palms so -- so what's funny is the guy from Nassau, he's a nice looking Italian guy. He's older, probably fifty. They've got one guy from Nassau, like, ah, who deals with forensic. And they got the other guy who looks like the guy that gets on TV a lot 'cause, you know, we got this guy, like a spokesman you know, head detective. And you got the guy from the feds and another guy from the feds, right?

So, the other guy from the feds was heavy investigation, trying to make a name for himself like from the *Unsolved Mystery*, you know? He, uhm -- he seems to be like this other guy like -- like the Nassau guy is sharp as a fuck – sharp as hell, ya know. He knows what he's doing, you know what I mean? [UI] I felt this motherfucker's presence. The other guy is like New Jack, kind of grey. What, are you talking to me, like I [UI] -- feel like I should show him a fucking letter –

VG: Say no, you're going at it --

(Laughter)

CT: – you know what I mean? I felt like I should school him a little bit. So he's like, ahh, CHRIS, you guys switched over the gyms to Synergy. I'm like, ahh –

VG: And right up your ass, huh?

CT: Yeah. So, ahh, the thing is, they go, ah, CHRIS, listen [UI]. Yeah, yeah –

VG: What did he say? [UI]?

CT: In general, he says, you know, [UI], boot camp?

VG: Oh.

CT: Very military? I'm like, yeah, yeah. We're like niggers, you know? They took my whole hand print, you know? Yeah, pretty good at this, huh, you know. They go and take my [UI]. I give it to them. I give them my shit [UI]. [UI] talk to, you know. They [UI] who you are, right? So they go, so you know what we're up here about, right? I go, yeah, I know what you're up here about.

VG: Why did you say that?

CT: Listen. 'Cause -- did your lawyer -- told us what you're up here about, right?

VG: Oh, okay.

CT: I go, yeah, I know. He goes, your [UI] told us. He goes, ah, you want to tell us what we're up here about? I go, why don't you tell me.

(Laughs)

[UI] why don't you tell me. Then they're like, I think [UI] can see we're not going to get anywhere. He's like, you know? And he didn't mention, I didn't mention, you know. So -- so they start kicking it around. He goes, CHRIS, this is fucking serious. You know, we don't take DNA everyday.

VG: Everyday?

CT: Yeah, they go, we don't take DNA everyday unless it's very serious. And yeah, I don't give it everyday, you know? So I sit down [UI]. I go – and I they start making their pitch, you know. And I ain't [UI] tell right now who [UI] you know. [UI] up here. [UI] seventeen, there is a dead cop involved now. We know you're making legal money now. You're married, blah, blah, blah.

VG: So they don't know JENN was pregnant, right?

CT: They might, you know?

VG: How the fuck do they get all this information?

CT: They know I'm married, and they didn't say JENN was pregnant. And I was almost tempted to say, yeah, my wife's pregnant, you know, like --

VG: Just to see how close [UI] --

CT: Yeah, but they didn't mention it, but they would of. [UI] making legal money now. [UI] I didn't feel like going to them [UI]. See I can't tell on my friends, right. Now when I get out, fuckin' you going to get me like $500,000 a year to cover my fuckin' living. What, am I going to go start stealing again?

(Laughter)

Where the fuck do I go, you know what I'm saying, like [UI]. I'm saying -- like I'm telling SCOTT, who's ever going to talk to me again, like there's no fuckin' -- there's no possibility, you know. It's not like I love my friends. I don't like them. So the other guy, the other guy's like, ah, you know how it ends and ahh – so he says, CHRIS [UI] I really got to tell you -- well, when you think about it, [UI] I go, I don't get it. I go, you know what, I know what I do and I know what I don't do? This fuckin' shit don't add up to me. I go, now the big conspiracies, I go, I don't fuckin' get it. I go – and I know you guys like -- like you know what, I go, I kind of believe in your justice system. I go, I know you guys are fucked up out in Nassau. I go, like, when I got pinched for robbing a car, they locked SCOTT up with it. I go, I did it. You guys got me. And I would have been guilty. I go, SCOTT really didn't. But we were doing other things. I go, but you know what I mean, so -- so – but this shit right here, I go -- I go, I don't -- I don't get it, you know. So I go [UI]. I got -- you know, I got [UI] what am I going to do, tell my friends. He goes, ahh, you know, CHRIS, you don't want to be in a place when you wake up and there is no mirror. [UI] CHRIS, just so you know, he goes, you don't want to be on the back of this train 'cause we're going to be

arresting a lot of people. He goes, you don't want to be in the caboose on this one.

VG: You know what I'm saying, [UI] one thing for sure buddy?

CT: What?

VG: I don't mean to sound fucked up, but I'm so glad I'm not involved in this one.

CT: Listen, he goes, you could be in the big caboose, better than that, right? I'm like [smack sound]. I get up. Uh, uh, I leave, right. So I'm adamant. I'm pretty shook, you know. Fuck, you know. I guess this is it, right? Now, I get a letter from MANON saying they arrested JOHN GOETZ, ah right. Okay, and the U.S. Attorney tells MEL and RICK LIBRETT, don't take this case. You're going to have a conflict of interest, meaning they are going to tie me and SCOTT in with JOHN, which I think is implicating that there is a train which is great.

VG: They don't know if JOHN had nothing to do with it, right?

CT: Listen, no, man. They knew JOHN had nothing to do with it. They locked JOHN up for the GHB.

VG: Right, JOHN [UI] more of a train?

CT: [UI] and end this train. You don't want to be in the caboose, like everyone is going to tell on me again, like --

VG: All right.

CT: -- [UI] for RICHIE, you know.

VG: Right.

CT: So they're like, you don't want to get in the caboose on this one. So they tell MEL and RICK LIBRETT, you know, conflict of interest here, don't do it.

So ahh –

VG: MEL does it, I hope.

CT: Well, of course, MEL does it. He goes, what the fuck you talking about, you know. To make a long story short, I had a – I had a falling out with JOHN. I get to the point where I was going to [UI] Black Jack my shit, he was hiding from [UI]. GHB and it was legal, and I was supposed to make X amount of dollars and then -- and then I thought JOHN was fuckin' – wasn't making any money. I didn't want to believe him.

VG: I knew you weren't happy with him back then.

CT: Yeah, but I didn't want to bleed the kid, you know what I mean? And then I go to the fuckin' wholesalers club where he moves three hundred cases. And I'm supposed to make X amount on a fuckin' bottle. And it's like, twenty, thirty thousand out of my fucking pocket. I'm fuckin' angry, you know. I'm like -- I call him up. I go, yeah, JOHN I got great deal, you know. I need fifty grand, or I'm going to get bubble Buzz. I'm just going to take the fuckin' money. I'm going to Black tack Jack his fuckin' ass, and that was going to be it. You know SCOTT, more of a business man, right?

VG: Well, it's not only that. You just don't want the kid on the -- not on your good side though.

CT: This was then though. This is going back two years ago, okay? So SCOTT goes because he is a business man, he goes, let me handle this, gets JOHN to pay the money. I don't talk to JOHN. I don't invite him to my wedding. I don't talk to him for a fuckin' year. We go to the courthouse. He was there with a lawyer, you know? We finally make up

just before our case gets resolved. I've been hanging in the [UI] gym for fuckin' for two years, okay? They're convinced though that JOHN put a million and half dollars in Jamaica. That's a lot of fuckin' money.

VG: Yeah, well, I read in the papers that he had like $270,000 in the bank.

CT: They fuckin' seized it. They seized another 200,000 in fucking cash.

VG: Holy shit.

CT: Three thousand out of his fuckin' apartment and who knows what else.

VG: I can't believe CLAUDIA got caught up in that.

CT: Yeah.

VG: That's fucked up when your girl's with you.

CT: Yeah.

VG: You know they questioned her as well too.

CT: Huh --

VG: You know they questioned her about that.

CT: Right. It gets better. It gets better. The whole story gets better, right? So

now – and what [UI] I said JOHN did? You know, so I get a visit from fuckin' JENN and my fuckin' brother, who is such a pussy. It makes me fuckin' sick.

VG: Your brother?

CT: Oh yeah, he's such a pussy.

VG: Why?

CT: He is so fuckin' [UI], you know, for somebody who wanting to be like -- you know, for the part, he's like, you know, he'll sock 'em up. But he ain't -- he

ain't going any further than that, you know what I mean? Like for a kid like, well, I got to calm down and talk, not fuckin' people, when I'm thinking like, oh, no, maybe he's -- maybe he's, you know, like when I got to talk him out of doing something, like figuring maybe he would be half serious once in a while, he ain't, you know. The kid is fucking straight soft like baby shit, you know what I'm saying?

VG: Yeah, I know.

CT: Which is good. Yeah, which is good, you know. We shouldn't put that off on him [UI] stuff. But the truth of it, my brother is straight up shorts. He gets all his stories fucked up. You come up there, buddy, and then you shit on yourself, you know what I'm saying. You know with JOHN. Did you ever tell on him? Yeah, [UI] JOHN and I [UI] 24-hour drug dealer. You know what I'm saying?

VG: You didn't do anything with JOHN, did you?

CT: Oh, yeah, I did.

VG: JOHN wasn't involved in this, was he?

CT: No.

Woo, woo, woo, bam. He goes right out of the picture. [UI]. We -- with JOHN and like the thing didn't go down, you know what I'm saying?

VG: But why?

CT: For more than one reason, JOHN wasn't innocent.

VG: You – you didn't get any money? You didn't get any money, did you?

CT: No, I guess the bottom line is he ain't around.

VG: Oh, yeah?

CT: Yeah.

VG: Okay. Give me five minutes to [UI] up.

CT: Five minutes.

VG: But, ah, it's better than nothing, which is nonsense.

CT: [UI]. Do you think the case is about me and SCOTTY? No. And they couldn't charge [UI] this way. Tell us about CHRIS, and we'll let you go home. They told CLAUDINE the same thing. Tell us who [UI]. We know you fuckin' guys –

VG: Involved in the GHB?

CT: Yeah. We knew you fuckin' guys did it. Blah, blah, blah. She's like, listen, her lawyer is KEVIN KEATING, right out of MEL's office.

VG: KEVIN KEATING?

CT: Yeah, lucked out. Right. By accident purely, okay. Tells the cops, listen, we wouldn't let them get involved. They tried to get involved. We wouldn't let them get involved. You're wrong, you know, and as far as LIQUID LAB goes da, da, da; and this is a fuckin' a girl pleading, so they knew they can turn her, you know? So that's good. So I'm like -- when they first got arrested, I'm like [UI] it ain't that bad, you know; but the -- the DNA shit. They took fuckin' seven guys' shit.

VG: What about, ahh – the problem with that is they don't know whose that is. They don't care about that. They just look for your match.

CT: Yeah, I know, but what about the [UI] okay, KEVIN KEATING, DNA [UI] show up 'cause they did all of [UI]. Dude, they would of taken [UI]. I think -- I think that Nassau fucked up that car.

VG: What do you mean, fucked it up? Didn't take anything out of it?

CT: The car that I left there, I think it was dead.

VG: Oh, really.

CT: Yeah, they just fucked it up because, VIN, 'cause we've been a suspect in that since day one – day one, okay. The fuckin' DNA has been around for how many years now? A lot.

VG: Yeah.

CT: It's been around for four.

VG: Yeah.

CT: Right?

VG: I'm convinced that they are trying to get stirred up, trying to make you make some stupid mistake, get SCOTT scared, SCOTT goes on the run, stirring this thing up. It just happens they don't have no leads and now -- yeah, exactly, this was [UI] DNA even happened.

CT: The exact fuckin' place [UI]. They can do it all they want.

VG: But you know what the bad thing is SCOTT going on the run. He makes you guys look so bad though. It – it so much – it so much [UI] if you guys go --

CT: The one thing you got to do, listen, that doesn't matter anymore, trust me.

VG: As soon as you guys get busted, they're going to find SCOTT in no time.

CT: Yeah.

VG: No time at all. Because you know how much media they'll put on him. He'll be number one's most wanted. He won't be able to move.

CT: Right, right.

VG: So it's all a waste of time.

CT: Right.

VG: But, uhm, I'm not saying you shouldn't have did it because you shouldn't have fed into it. You should have just shrugged it off. But, ah --

CT: Nothing we can do now --

VG: No, [UI] the fuckin' losers in Bellmore start knowing that SCOTT'S on the lam, that means everyone knows.

CT: Oh, yeah.

VG: Cops know he's on the lam now.

CT: Oh, yeah.

VG: They know he's running scared. What do you think – now this is between me and you. What do you think? You don't think he's going to tell on you?

CT: Nah.

VG: Really.

CT: You know what it is? He keeps saying things that I'm like, ah -- I don't think -- I don't think SCOTT is as strong as, say, a lot of other guys, whatever, but – two things, one is that SCOTT is smart.

VG: He is smart, right?

CT: He is smart.

VG: Because he was [UI] but what would happen is he was – he'd get a shit load of time, but you'd get more.

CT: He does. Two things, one is that he is smarter now. Two is like, you know what, everyone's got a reason for not doing it. Like if someone tells on me, I ain't tellin' on them anyway. I just ain't doing it. I ain't doing it. And I

ain't fuckin' doing it, you know. And if I like – and -- and I – and I would play it to the max. Like if someone says VINNY's been talking, SCOTT's been talking, I want to see you at trial and I want to see you doing it. And I might be the fuckin' moose brother that killed your mother, but I ain't doing it, you know what I mean? And [UI].

(Grunting sound)

I mean, I'd like to see him do it. I really – I think he could. I think he'll go to hell for doing that.

VG: (Laughs)

CT: I really do, you know what I mean.

VG: I don't think ROB would do it.

CT: Never. Never ROB.

VG: Do you think they were on to him?

CT: Nope.

VG: That puppy was good.

CT: Besides, listen to me. They are so fuckin' wrong with this, that's good, you know? I think, ahh, they're shaking the cherry tree. They're shaking an apple tree.

VG: Now that they know that, now they see what SCOTT did, they must feel pretty confident they're on the right track. I think you're planning on them fucking it up. Maybe they did a long time ago.

CT: Long time ago, yeah. [UI] three [UI].

VG: What about, remember the trunk and your finger? You told me something, you squished your finger?

CT: Yeah [UI].

VG: There was no skin on that, right?

CT: Buddy, no way [UI]. I was in the middle of the fuckin' Atlantic Ocean and the body was found floating two days later or better. There was one piece of skin on a fuckin' rock, can't believe it's been floating in the ocean.

VG: Yeah, no way.

CT: No fucking way.

VG: Fish would eat it and stuff.

CT: The bottom line, it would just float away, you know what I mean? It wouldn't stay jammed on a rock? If it was here, yeah; but in the water – saltwater, for fuckin' two days, no fuckin' way.

VG: How bad is SCOTT taking this?

CT: He's all right now because we sat around and kicked it around, you know? This is like the [UI] -- listen. It's -- for one they are not gonna get it. You know what I am saying? Two, is that like they [UI] confession. I get it.

VG; What now?

CT: Someone knows. You know what I mean? You can't --

VG: They came up and beat the shit out of him, but I'm --

CT: All I'm saying, barring that -- listen, barring, ah, like a pique event to do a fuckin' crime, okay, barring that --

VG: Which is pretty unlikely here. They would beat him up.

CT: Yeah, they would beat him up to admit because, look, listen, one of them would have been involved. Like I was so fuckin' concerned with this thing, you know being announced and everything, I wrote a letter to MEL. I,

CHRIS TARANTINO, don't know a goddamn thing – (laughing) – make a confession. I am fuckin' innocent of any and all crimes. Please notarize this, you know. I sent it out to MEL, and MEL fuckin' sent it back. And he said, CHRIS, I can't do that, but I will make note of it, you know? You know, I was fuckin'– you know, I was up there. And I'm like they're gonna make a fuckin' confession. Fuck that shit, you know. They fuckin' did it then [UI] now, right now. He's like, I ain't telling them shit.

VG: But while you're in jail, you're still covered from your lawyer.

CT: Yeah.

VG: They can't ask for anything. Now that you're out though, I don't know. The same may be being on probation.

CT: They fuckin' did do it while I was in jail. They did fuckin' talk to me.

VG: About – that's only if you want to talk, anything you said can't be used against you.

CT: Yeah, well, I didn't say nothing anyway, you know. I mean I would of [UI], but, uhm –

VG: They [UI] – MEL would have to be involved to get – to release, ah -- ah --

CT: What?

VG: Uhm –

CT: Some kind of statement or whatever.

VG: A statement. I'm pretty sure it might – once you're sentenced, it might stop running there. But I think the whole time you're in jail --

CT: So that's the other thing SAL adds on. It goes like this also – we're all pack animals, okay, and for whatever the reason is someone ain't telling them a

bit about -- like SCOTT doesn't know who the fuck is -- he's out of the gyms, you know what I'm saying? Like he, you know -- he – he just – just there's no fuckin' way, you know what I mean? It's just – it's – it's one of those things that, like, you know, maybe at the last minute it's a possibility, you know. I don't -- I don't think so, you know, no matter what, you know what I'm saying? At the last minute, maybe if like fuckin', you know –- it's all big guys [UI] down so that other [UI] do it. If that were the fuckin' case, you know, but for the most part [UI] fuckin' it's nothing, taking the weight, at all. None.

VG: That's a good thing. All you have to worry about is you and SCOTT.

CT: Yeah.

VG: SCOTT understands that, right?

CT: Yeah, [UI].

VG: I don't know about that.

CT: He is, yeah.

VG: Well, that's a fuckin' good thing. So you really -- you really should just drop it. Don't talk about it with anybody.

CT: I know [UI]. Listen. [UI] talking [UI] nothing, and that's it. I believe that the only thing I said to him [UI]. Let me ask or whatever. And you know, [UI]. Have you ever watched *Unsolved Mysteries*? I go, I'm the unsolved mystery.

(Laughter.)

Wah-woo! Whatever you got, I am.

VG: You got to really beat that into SCOTT'S head.

CT: Yeah, no. He's listening. We went over here, you know, and ahh, like, I said, SCOTT'S smart, and he's fuckin' – we're sitting around – at first, but you know what happens when you -- when you get that first bid [UI] tell me you didn't take the DNA test.

VG: SCOTT?

CT: Yeah, SCOTT'S over there in Farmingdale.

VG: They didn't take SCOTT'S?

CT: Yeah, they did. They go right to his house first. They called me up.

VG: And SCOTT'S on the street?

CT: Yeah, KENNEDY came by and dropped a subpoena off.

VG: Who came by, KENNY?

CT: KENNEDY.

VG: KENNEDY.

CT: And he came by my fuckin' gym a couple of months before because they figure they can get to SCOTT, da, da, da, da, da.

VG: Yeah.

CT: Said he was going to drop a fuckin' subpoena off on fuckin' SCOTT, give it to his wife, knowing that SCOTT didn't answer the door, so I call home. JENN says, hey, we bought a dog, you know. I'm like, great, you know? But right before that I'm in a meeting, you know? I'm talking to these scum bags, you know, dropped by, you know, fucking want DNA whatever. I'm like --

VG: On your shit, right?

CT: [UI] (laughter).

Fuck, you know. Then I get pulled out by the Lieutenant; and up there, it's like the secret squirrel society anyway. And the counselors all know your business. Everybody wants to know what's going on. I got the Lieutenant comes to me. I got MEL calling up there four times, and these fuckin' niggers make like four hundred a week after taxes. I got my attorney calling up, looking, who wants to know your attorney, you know? Like feds coming up here. They're going to [UI] DNA from you, you know what I'm saying? Like, I'm thinking, they're never letting me out of here, and the fact that they're [UI].

VG: And when you're in there, you definitely panicked.

CT: I – you know, like I'm like, they're never letting me out of here. I got to the point where I'm like -- two weeks I would -- I would sleep. I'd sleep like this for four hours. I wake up sweating my balls off.

(Laughter.)

That was it. I was up, you know, four hours a day, maybe, you know. Like, you know, I would get to bed right away, but I'd be up from two o'clock on, you know. Since two I was gone, but I get up, I'm like -- you know? Motherfucker, man. And then, ahh – so when you hear the first shift – [UI], I'm like [UI] finally got DNA. [UI] sleep – sleep. I'm like --

VG: Holy shit, oh.

CT: I go, that's if you got me. [UI], Mel [UI] listening some color hair, there's nothing.

VG: Is that what they said?

CT: Yeah, there's nothing. Now they're going [UI] from me. They're taking

[UI] from me. You come to my fuckin' house, my dog hair was in that fuckin' car, you know what I am saying? It -- it – there's a lot of like [UI] reasons to go down with that shit, you know what I'm saying? But we might of been in the car. We're good friends. You know they picked me up. How many other people were in the car the – there might be fuckin' twenty different people in there. Did they fuckin' hit them all? Fuckin' KENNY was in the car, stole an armored truck. Not that I would ever tell them – tell anybody, but I mean like, he was. He might have been in jail at the time. ALFONSE is done. We didn't kill him, though. So I get fuckin' two open reverse tests. And hopefully they had hair on them.

VG: Right.

CT: [UI] it's -- it's not like anything [UI]

VG: [UI] – hey, you really don't think that they got LOUIE by now?

CT: I think, like, GARRETT knows him. Those guys were all in jail. And GARRETT doesn't know him. And so he tells me, yeah, SCOTT did this, you know. But he's telling me, like, what the other team thinks, you know what I'm saying? And, ahh, the DNA [UI] another two buckets. The DNA comes back and supposedly they say they have a picture at night, and these guys are rolling him right off the bridge – LOUIE off the bridge.

VG: Oh, really. Oh, so you know they are way off --

CT: Yeah, they took ten other guy's DNA, probably because he's there in the car or if his brother's in there or if LOUIE's fuckin' blood was actually in the car. Supposedly it's pig's blood from the barbeques.

VG: When – when – when LOUIE had problems --

CT: What?

VG: How did he get where he got him? It wasn't in the car, was it?

CT: By boat.

VG: No. How did he get to the boat though?

CT: We got back from the [UI] –

VG: No, not [UI] --

CT: And I was thinking about this, if it proves out, I'm thinking, boom. [UI] meanwhile it was in nighttime? Boink. In the daytime.

VG: (Laughter.)

CT: You know, so, ah, [UI], the kid that gave em the score with SCOTT, you know. So SCOTT told ROB, you know what I mean [UI]?

VG: I know him. He's a funny man.

(Laughter.)

CT: You know, like a year or whatever, you know, because of something – da, da, da – and, ah, [UI] LOUIE [UI] so we even checked out like [UI] worry about, I'm like, you know, thinking you know --

VG: He doesn't know any of this stuff happened, does he?

CT: Huh?

VG: Does he know any of this is about? Like. he's a good kid, right?

CT: Really good kid.

VG: [UI] not [UI] in trouble -- in trouble, right?

CT: Nah, nah. I don't think he's a thief [UI] he was on probation for like year or two. We used to sell pot with GREG REIDER, back like on Death Warrant Road, you know? And I mean, like, I was so nervous with [UI] a kid that I

know was right there when this whole fucking thing went down, you know? Like right there. And, ahh, to make a long story short, I said, you know, like JENN, go get Jimmy's fuckin phone number, 'cause I know that JENN [UI] – JIMMY'S phone number cause I was gonna get in touch with him to get a fuckin' statement.

I was ready to go give up everybody's DNA, you know what I'm saying? Like, they probably put like a million people in the car. It would be like, you know -- not that I wouldn't put him there, then and there; but like if this came to trial, I'd be like what about this one, what about this one, like just to fuck up evidence 'cause I didn't think I was getting out, and I've been work the fuckin' – like get a PI involved and start working. I said --

VG: Right.

CT: I said, I work -- I start working in here, you know what I mean. So, ah --

VG: I would slow down though, KILLER.

CT: I'm not doing nothing.

VG: Good.

CT: I ain't doing shit. MEL said, listen, we -- because I went to MEL. I go, we should do this. I want statements from this one. I want statements from this one, blah, blah. He goes, CHRIS – (smack sound) – you know, chill. He goes the feds are fucked up, and they can use everything as evidence. When I say everything, that means everything, CHRIS.

VG: I mean they can even use hearsay, I think.

CT: Buddy, they can use the fact like SCOTT disappeared for a while.

VG: Really?

CT: Yeah, they can use like the most fucked up shit in the goddamn planet, you know what I'm saying? Like they can use fuckin' anything, you know, to make their case. So he's like they get – they can go around saying that you were nervous, you know, and put it like that to the jury and you would get your case [UI] -- (laughter) – you know what I'm saying? So --

VG: And they can too without [UI].

CT: Yeah --

VG: Yeah, they're bad.

CT: Yeah, they really fucked up. So ahh – so – so – you know.

VG: MEL ROTH's son is a member of my gym. I gave him a membership.

CT: Oh, really.

VG: Yeah, he lives in the neighborhood.

CT: Oh, that's cool.

VG: Yeah. He comes in and starts asking questions. I'm like, who are you? MEL ROTH's my father (laughter). I don't know. He looks like an attorney.

CT: Oh, yeah.

VG: I don't know. I didn't even ask him.

CT: I love MEL.

VG: Me too.

CT: That's what they say – they go, do you like your attorney? I go, I love my attorney. (Laughs), you know. I do, you know? The only [UI] about Mel, like if I wouldn't go to trial on something like this, I would get a smoking gun, you know. I would have MEL co-counsel it 'cause he cares about me.

VG: Yeah.

CT: But I would get --

VG: A real strong mouthpiece.

CT: Yeah. Well, I would get someone maybe if not a BRUCE CUTLER or someone like that who is like upper peer or --

VG: I can't believe it's in Nassau County. I thought it was really a Suffolk – in fuckin' Suffolk.

CT: No, the body was found between Suffolk and Jersey.

VG: So what does that make it?

CT: [UI] that doesn't matter.

VG: So what does it make it, though? Who would have the jurisdiction?

CT: The feds. It's a joint investigation between the feds, you know. That's it.

VG: It's got its pros and cons. I think you're better off with the feds.

CT: It's good and bad, you know.

VG: Yeah.

CT: The problem is -- the problem is with the feds --

VG: [UI]

CT: Probably not, because the feds, anything goes. You get a trial, anything goes, you know. And I don't have to do shit like I would act down, you know, try and get a mistrial, fuckin' you know, whatever I would act out and take a shot 'cause I watch everybody else going to trial sitting there quietly fuckin' not gettin anywhere, you know what I mean?

VG: Right. Did you see the one kid that represented himself? The cops chasing him, shooting at him [UI] --

CT: No.

VG: He's a cocky little kid. He acted like his own lawyer. I don't [UI] --

CT: Yeah, he got convicted of everything?

VG: Yeah, but it was – looked like he was really going to walk on it.

CT: Yeah.

VG: But yeah. He actually – he reminded me of you. He was hysterical, this kid.

CT: Yeah?

VG: Yeah.

CT: [UI] could. I tell you, after that, I would have to have an attorney [UI], like a CUTLER, like a MURPHY, someone who would, you know, go [UI] – 'cause the problem I've had with MEL, like if MEL beats the case for me out at Nassau County, they'd fuck him for the rest of his life.

VG: Yeah, he made his reputation out there to be [UI] really – the good boy system would be tough.

CT: He'd never get a fuckin' another plea again, you know?

VG: Right.

CT: And I can't get fuckin' sold out. I need a guy like you and I would talk to AL GRECO and I would say, you know, I told my attorney that this guy is like half a psychopath, you know, testifying against me. He was telling [UI] – I was telling my attorney, get up there and [UI] shit and then stir him up so the fuckin' jury doesn't see this big guy telling a very sweet story and his attorney thought, are you crazy, they're fuckin' [UI] two murders, here – (laughter). I go, I'll fuckin' kill ya. But my point is that if you get a guy like

DAN MORRISSEY or whatever because it's very like – it's not really technical here. It's fuckin' – it's like a cat fight, you know.

VG: Yeah, right.

CT: It's all – he said, she said, da, da, da, da, you know. You know, there's nothing there [UI]. It's a game. It's a game to him.

VG: [UI], when all this stuff happened between me and you and the gyms --

CT: Yeah.

VG: And I was telling SCOTT to, uhh, or maybe I was telling ERIC that I owe you an apology.

CT: Yeah.

* * *

[End of conversation purposely removed]

EXHIBIT P
APRIL 5, 2011 TRANSCRIPT - ECF DOC. NO. 505-18

EXHIBIT “P”

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA, : CR 08 655

v. : U.S. Courthouse
Central Islip, N.Y.

CHRISTIAN TARANTINO, :
TRANSCRIPT OF TRIAL

Defendant. :
April 5, 2011

----------X 10:05 a.m.

BEFORE:

HONORABLE JOANNA SEYBERT, U.S.D.J.
and a jury

APPEARANCES:

For the Government: LORETTA E. LYNCH
United States Attorney
100 Federal Plaza
Central Islip, New York 11722
By: JAMES M. MISKIEWICZ, ESQ.
CARRIE N. CAPWELL, ESQ.
SEAN C. FLYNN, ESQ.
Assistants, U.S. Attorney

For the Defendant: JAMES R. FROCCARO, JR., ESQ.
20 Vanderventer Avenue, Suite 103W
Port Washington, New York 11050
and
MICHAEL ROSEN, ESQ.
61 Broadway, Suite 2602
New York, New York 10006

Court Reporter: HARRY RAPAPORT, C.S.R.
United States District Court
100 Federal Plaza
Central Islip, New York 11722
(631) 712-6105

Proceedings recorded by mechanical stenography.
Transcript produced by computer-assisted transcription.

had this phone call with Mr. Dorval?

A From what I recall, around lunchtime.

Q Early afternoon?

A Yes.

Q You claim during this phone call, you claim you heard Chris Tarantino in the background, and Louis said to you, I don't think it is safe there, meaning for you on Fire Island, I got a boat, I'll come and pick you up.

Is that what you are claiming today?

A Yes.

Q And do you know where Louis was when he -- when you claim he called you?

A No.

Q Since you began cooperating with the government in 1994, would you agree that you have provided the government with different versions of what you claim occurred during your last telephone conversation with Mr. Dorval? Yes or no.

A Yes.

Q Do you recall telling the FBI during one of your first interviews on September 13th, 1994 that when you last spoke to Mr. Dorval by telephone, he was at his residence in Queens and was not with Chris at the time? Do you recall saying that to the FBI about a month after Mr. Dorval died? Yes or no, sir.

A I don't recall.
Q Well, have you ever made a prior statement under oath admitting that during an interview with the FBI on September 13th, 1994, that you told the FBI that the last time you spoke with Mr. Dorval, he was at his residence and he was going to visit Chris later that evening, yes or no, sir?
A I do not recall.
MR. FROCCARO: Lines 14 to 24, your Honor, page 741, GF-134.
Q Mr. Fatato, I will ask you to view this document and see if it refreshes your recollection that you previously admitted under oath that on September 13th, 1994, that you indicated to a Special Agent of the FBI, Raymond Greco, that the last time you spoke to Mr. Dorval was at his residence and that he was going to visit Chris later that evening?
(Handed to the witness.)
Q The answer is after reviewing it, it refreshes your recollection that you made a prior statement under oath that you told that to Agent Greco; is that correct?
A It says reflecting back to a pink --
MR. FROCCARO: I will just read it, if it is all right.
THE COURT: Yes.

Q Mr. Fatato, do you recall being asked this question and giving this answer under oath at a prior proceeding:

Question: I'm asking you to review this document, see if it refreshes your recollection that on September 13th, 1994, you indicated to Special Agent Raymond Greco that the last time you spoke to Mr. Dorval was at his residence, and that he was going to visit Chris later that evening, it is the pink stuff, all the pink stuff. That is what you said to him, right?

Answer: Yes.

Do you recall being asked that question and giving that answer under oath at a prior proceeding, sir?

A Yes, but --

Q And you were being truthful when you gave that answer?

A Yes.

Q And that interview was less than a month after Mr. Dorval's death; is that correct?

A I don't recall exactly the date --

Q If I tell you the interview was around September 13th, 1994, that is about a month after Mr. Dorval's death; is that right?

A Yes.

Q Mr. Fatato, moving on to another subject.

You wound up, I think you testified, serving a

EXHIBIT Q
FEBRUARY 5, 2011 DISCOVERY - ECF DOC. NO. 505-19

EXHIBIT “Q”

U.S. Department of Justice

United States Attorney
Eastern District of New York

United States Attorney's Office
610 Federal Plaza
Central Islip, New York 11722-4454

February 15, 2011

BY HAND & ECF

James R. Froccaro, Jr., Esq.
20 Vanderventer Avenue, Ste. 103 West
Port Washington, New York 11050

Re: United States v. Christian Tarantino
Criminal Docket No. 08-655 (JS)

Dear Mr. Froccaro:

Pursuant to the government's obligations under Giglio v. United States, 405 U.S. 150 (1972), the government discloses the following information with respect to cooperating witness Gaetano Fatato. The information contained in this letter supplements the information contained within the materials the government has provided pursuant to 18 U.S.C. § 3500 and Rule 26.2 of the Federal Rules of Criminal Procedure. The government will provide any additional materials pursuant to 18 U.S.C. § 3500 and Rule 26.2 of the Federal Rules of Criminal Procedure, including any additional Giglio material, should such materials become available.

On June 16, 2005, Fatato was arrested for harassment. A copy of a report by the Amityville Police Department documenting the arrest was previously provided as Government Exhibit 3500-GF-89. While Fatato has advised that he reported the arrest to Special Agent Jack Daly with the Drug Enforcement Administration, Special Agent Daly has no recollection of Fatato advising him of the arrest.

During a colloquy with counsel during the trial in United States v. Carneglia, 08 CR 76 (JBW), United States District Judge Jack B. Weinstein stated that Fatato was "[u]nbelievable, but not as a matter of law. When a witness is, as a matter of law, unbelievable, the Supreme Court has said he can be stricken. But he's not unbelievable as a matter of law, just that his veracity is so slender as to suggest the court wouldn't believe him." Carneglia Trial Tr., Feb. 25, 2009, at

3734. Fatato did not testify in the Carneglia trial, but had testified at trial before Judge Weinstein in United States v. Michael Uvino, et al., 07 CR 725 (JBW), in December 2008.

To date, Fatato has received approximately $197,000 from the FBI, approximately $44,000 of which was received during his period of proactive cooperation.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

LORETTA E. LYNCH
United States Attorney

By: /s/Carrie N. Capwell
Carrie N. Capwell
Assistant U.S. Attorney
(631) 715-7836

cc: Clerk of the Court (JS) (By ECF)
Co-counsel (By ECF)

EXHIBIT T
APRIL 11, 2011 TRANSCRIPT - ECF DOC. NO. 505-22

EXHIBIT "T"

1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA, : CR 08 655

v. : U.S. Courthouse
Central Islip, N.Y.

CHRISTIAN TARANTINO, :
TRANSCRIPT OF TRIAL

Defendant. :
April 11, 2011

----------X 9:40 a.m.

BEFORE:

HONORABLE JOANNA SEYBERT, U.S.D.J.
and a jury

APPEARANCES:

For the Government: LORETTA E. LYNCH
United States Attorney
100 Federal Plaza
Central Islip, New York 11722
By: JAMES M. MISKIEWICZ, ESQ.
CARRIE N. CAPWELL, ESQ.
SEAN C. FLYNN, ESQ.
Assistants, U.S. Attorney

For the Defendant: JAMES R. FROCCARO, JR., ESQ.
20 Vanderventer Avenue, Suite 103W
Port Washington, New York 11050
and
MICHAEL ROSEN, ESQ.
61 Broadway, Suite 2602
New York, New York 10006

ALSO PRESENT: SALVATORE J. MARINELLO, ESQ.
For witness Melvyn K. Roth
55 Mineola Boulevard
Mineola, New York 11501

Court Reporter: HARRY RAPAPORT, C.S.R.
United States District Court
100 Federal Plaza
Central Islip, New York 11722

Mr. Miskiewicz say they would call Salta to testify about statements, Bressman statements, and that will be hearsay as far as I understand.

MR. MISKIEWICZ: Detective Salta will say he received a phone call. And the phone call indicated that somebody identifying him as Mel Roth called and sought to end the NYPD interview.

Detective Salta then went to ask Mr. Bressman, you know -- do you know anybody by the name of Bressman?

He then -- sorry, Bressman said, do you know an attorney by the name of Mel Roth, and he indicated, yes, I know who Mel Roth is. No. He is not my attorney.

In sum and substance, that is going to be the testimony. And that will be after Mr. Amador testified that on August 21st, 2003, he saw pretty much for the last time, or one of the last times, Mr. Bressman after the murder. And that he was told that the cops picked him up but don't worry in essence because Mattie Roth got me a lawyer.

Now we know who Mattie Roth is because we anticipate that Mr. Roth will testify identically as he did this evening.

So I submit this is all part and parcel of co-conspirator statements as Mr. Bressman is concerned, and Mr. Amador being told, don't worry about it, it is

EXHIBIT V
APRIL 25, 2011 TRANSCRIPT - ECF DOC. NO. 505-24

EXHIBIT “V”

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA, : CR 08 655

v. : U.S. Courthouse
Central Islip, N.Y.

CHRISTIAN TARANTINO, :
TRANSCRIPT OF TRIAL

Defendant. :
April 25, 2011

----------X 10:00 a.m.

BEFORE:

HONORABLE JOANNA SEYBERT, U.S.D.J.
and a jury

APPEARANCES:

For the Government: LORETTA E. LYNCH
United States Attorney
100 Federal Plaza
Central Islip, New York 11722
By: JAMES M. MISKIEWICZ, ESQ.
CARRIE N. CAPWELL, ESQ.
SEAN C. FLYNN, ESQ.
Assistants, U.S. Attorney

For the Defendant: JAMES R. FROCCARO, JR., ESQ.
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Port Washington, New York 11050
and
MICHAEL ROSEN, ESQ.
61 Broadway, Suite 2602
New York, New York 10006

Court Reporter: HARRY RAPAPORT, C.S.R.
United States District Court
100 Federal Plaza
Central Islip, New York 11722
(631) 712-6105

Proceedings recorded by mechanical stenography.
Transcript produced by computer-assisted transcription.

Flynn.

SCOT FLYNN,

called as a witness, having been first duly sworn, was examined and testified as follows:

THE CLERK: Please have a seat and state and spell your name for the record.

Please speak into the microphone.

THE WITNESS: Scot P. Flynn, F-L-Y-N-N.

THE COURT: Ready to go.

MR. MISKIEWICZ: Thank you, your Honor.

DIRECT EXAMINATION

BY MR. MISKIEWICZ:

Q Mr. Flynn, who do you work for?

A Lehman, Newman and Flynn, L-E-H-M-A-N, N-E-W-M-A-N and Flynn.

Q And what type of a business is that?

A CPA firm.

Q And are you a CPA?

A Yes, I am.

Q Certified public accountant?

A Yes, I am.

Q How long have you been an accountant?
A Since 1986.
Q And the firm that you work for, you are a partner in that firm?
A Yes, I am.
Q And have you, on behalf of your firm, ever provided accounting services to a company or a corporation by the name -- that goes by the name of Synergy?
A Yes.
Q Synergy Gyms?
A Correct.
Q And which Synergy Gyms have you provided that service for?
A Synergy Fitness, Massapequa, Farmingdale, Baldwin, Levittown, Franklin Square, Synergy Fitness 23rd Street, Astoria and also on 22nd Street.
Q How far or how long ago did you provide accounting services for those Synergy fitness clubs?
A Probably since the year 2000.
Q Okay.

And the 22nd Street I think you mentioned, is that east or west 22nd Street?

A East.
Q Okay.

And did you ever provide services for a business

on West 23rd Street?
A Yes.
Q Was that for a relatively brief period of time when it was open?
A Yes, only a couple of years.
Q Okay.
And in the course of your providing accounting services, have you had an opportunity to look over records of these various locations and this business reflecting the names of employees?
A Yes.
Q Have you had an opportunity to look at records of Synergy Fitness at these different locations reflecting the names of principals, whether managers or stockholders, or licensees or franchisees, or anything like that?
A I have had the opportunity.
Q Prior to your testimony here today, were you served with a subpoena from the U.S. Attorney's Office?
A Yes, I was.
Q Were you requested, as part of that subpoena, to look for any records reflecting the name of Mattie Roth or Matthew Roth being an employee or a manager or an owner of some kind in any of the Synergy fitness clubs that you prepared accounting services for?
A Yes.

Q And have you done that search?
A Yes, I did.
Q And did you find any record reflecting the name Matthew or Mattie Roth being an owner, or even employee or manager or owner in any of the Synergy clubs you provided services for?
A No.
MR. MISKIEWICZ: No further questions.
MR. FROCCARO: I have a few questions, your Honor.
THE COURT: All right.

CROSS-EXAMINATION
MR. FROCCARO:
Q Good morning, Mr. Flynn.
A Good morning.
Q You know who I represent, right?
A Yes.
Q Now, you have been Chris' business and personal accountant for many years; is that correct?
A Yes.
Q Since around the year 2000; is that correct?
A Yes.
Q To your knowledge, Chris was never ever a partner in a gym on 79th Street called Body Sculpt; is that correct?

A No.
Q Never?
A No.
Q To your knowledge, did Chris owe a man named Vincent Gargiulo a half a million dollars?
A Not to my knowledge.
Q To your knowledge, did Chris ever owe Vincent Gargiulo even a single dollar?
A No.
Q Since you know Chris and you know him for many years, have you ever known him to suffer a nervous breakdown?
A No.
Q Since you know him, have you always known Chris Tarantino to be in very good mental health?
A Yes.

MR. FROCCARO: Judge, I have nothing further.

MR. MISKIEWICZ: No redirect.

THE COURT: You can step down, sir. You are done.

The government is going to call their next witness.

MR. MISKIEWICZ: The government calls Special Agent Schelhorn.

THE COURT: All right.

ROBERT SCHELHORN,

A It is postmarked May 21st, 2003.
Q And other than fingerprint tape, or something along those lines, is this in the same or substantially the same condition as when you received it?
A It is.
Q I will put it up on the screen.
(At this time a document was exhibited on courtroom screen.)
Q I'm showing you the letter. Would you read into the record the first paragraph, the one between attention homicide and Chucky.
A I'm writing to you to see if there is a reward for information and audiotapes leading to the arrest and conviction of Scot Mulligan, Chris Tarantino and others in the 1994 armored car robbery where a guard was shot dead, and the death of one of the robbers named Louis was also shot dead and found floating off Long Island.
To tell me about if and how much the reward is, and just to get in contact with me, please post info on WWW.craigslist.com, under missed connections.
Q It is signed Chucky?
A Typewritten.
Q You meant missed connections when you read that, is that correct?
A Yes.

EXHIBIT W
MAY 2, 2012 TRANSCRIPT - ECF DOC. NO. 505-25

EXHIBIT "W"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA, : CR 08 655

v. : U.S. Courthouse
Central Islip, N.Y.

CHRISTIAN TARANTINO, :

Defendant. : TRANSCRIPT OF TRIAL

May 2, 2012
----------X 9:30 a.m.

BEFORE:

HONORABLE JOANNA SEYBERT, U.S.D.J.
and a jury

APPEARANCES:

For the Government: LORETTA E. LYNCH
United States Attorney
100 Federal Plaza
Central Islip, New York 11722
By: JAMES M. MISKIEWICZ, ESQ.
SEAN C. FLYNN, ESQ.
Assistants, U.S. Attorney

For the Defendant: STEPHEN H. ROSEN, ESQ.
100 Almeria Avenue - Suite 205
Coral Gables, Florida 33134

FRANK A. DODDATO, ESQ.
666 Old Country Road
Garden City, New York 11530

Court Reporter: HARRY RAPAPORT
OWEN M. WICKER
STEPHANIE PICOZZI
United States District Court
100 Federal Plaza
Central Islip, New York 11722
(631) 712-6105

Proceedings recorded by mechanical stenography.
Transcript produced by computer-assisted transcription.

OWEN WICKER, RPR
OFFICIAL COURT REPORTER

Q In 2003, were you a CPA licensed to perform accounting services?
A **Yes, I was.**
Q In the state of New York?
A **Correct.**
Q In that period of time, did you do any accounting services for the defendant in this case: Christian Tarantino?
A **Yes.**
Q Did you do any accounting service for his company known as -- or a group of companies under the rubric of Synergy Gyms or Synergy Fitness?
MR. ROSEN: Objection. Assumes facts --
THE COURT: Please approach.
Approach.
(Whereupon, at this time the following took place at the sidebar.)
THE COURT: Number one, he didn't finish the question, all right? So I think the objection is premature.
Number two, what is your objection?
MR. ROSEN: It assumes facts not in evidence. There is no evidence on this record that Christian Tarantino had a portion of any Synergy Gym anywhere.
THE COURT: Okay. Now, this accountant will

testify that the defendant had an ownership interest or provided records with respect to Synergy Gyms; is that correct, Mr. Miskiewicz?
MR. MISKIEWICZ: Yes. Based upon what he said at the last trial, yes.
THE COURT: So I'm overruling your objection at this point. And if he can establish the appropriate foundation, then I'll let it in.
MR. ROSEN: Okay.
(End of sidebar discussion.)
THE COURT: The objection is overruled.
MR. MISKIEWICZ: Your Honor, may we have the last question read back?
THE COURT: Yes. Hold on one second.
Question: Did you do any accounting service for his company known as -- or a group of companies under the rubric of Synergy Gyms or Synergy Fitness?
THE WITNESS: Yes.
BY MR. MISKIEWICZ:
Q What kind of accounting services did you perform?
A **We do bookkeeping services, prepare tax returns.**
Q And in doing those bookkeeping services and tax returns, did -- were you made aware of or provided books and records regarding who the principal partners or owners of the Synergy Fitness Gyms were at that time?

A **Well, a lot of these corporations were C corporations, where there is no attachment as to who the shareholders are and the owners. In a lot of instances, we were not fully aware of who or all of the owners were.**
Q Okay. What about Mr. Tarantino?
A **Are you asking was I aware that he was an owner?**
Q Yes.
A **Yes, I was aware.**
Q And was there one corporation or several that used at least the word "Synergy" in it?
A **Several. Several Synergy Fitness Clubs in various ownership groups.**
Q And were -- what geographic area?
A **New York City and Long Island.**
Q Okay. Would you receive -- I should say prepare, for purposes of tax reporting, either W-2 statements to employees -- let's do that first.
A **Yes.**
Q Okay. What about any other statement, reports of income, to not necessarily employees but principals or partners or anything else like that?
A **Well, it would be W-2s or 1099s.**
Q Explain to the members of the jury what a 1099 is.
A **A 1099 would be -- it's a document sent to the IRS to notify them someone was paid compensation but was not**

considered an employee.
Q All right. And you did this for how many years for Synergy?
A **Oh, since 1998.**
Q Are you still doing it for Synergy?
A **Yes.**
Q In the time since 1998 to the present, have you ever issued a W-2 to an employee by the name of Matty Roth?
A **No.**
Q And have you ever issued a form 1099 to anybody by the name of Matty Roth?
A **No.**
Q Have you ever issued a 1099 or a W-2 to anybody by the name of Matthew Roth?
A **No.**
Q M. Roth?
A **No.**
MR. MISKIEWICZ: No further questions. Thank you very much.
CROSS-EXAMINATION
BY MR. ROSEN:
Q Mr. Flynn, you are the present accountant for Synergy Gyms, correct?
A **Yes.**
Q I want to take you back to 2003 and the summer of

2003, okay?
A Yes.
Q The gym on West 23rd Street, was that gym owned and operated, the Synergy Gym, by Brett and Eric Holzer's group?
A Yes.
Q Who else was in Brett and Eric Holzer's group on the 23rd Street gym, if you recall?
A That's hard to say.
Q I know it's going back a long way. But you clearly remember Brett and Eric Holzer as the owners of the West 23rd Street gym?
A Yes.
Q And there's also a gym on East 22nd Street, between 22nd and 23rd. That is also a Synergy Fitness, correct?
A Correct.
Q And that is also owned by Brett and Eric Holzer, is it not?
MR. MISKIEWICZ: Objection.
I'd seek a clarification for time frame.
THE COURT: At the same time frame?
MR. ROSEN: Yes.
A I don't know if it -- if Eric was an owner, but it was Brett's gym.
BY MR. ROSEN:

Q The two gyms on 23rd Street, on the east and west side, were owned by the Holzers, correct?
A Yes.
Q When you say "owned by the Holzers," did they have the franchise for those two locations?
A Not in a formal sense. I don't know if there was a franchise document. I don't believe there was. But they operated and owned that location.
Q Did you do the books and records for those locations?
A Yes.
Q Did you ever see a W-2 -- withdrawn.
Did you ever create a W-2 or a 1099 for those two gyms for Justin Bressman?
A Uhm, I think so. I think so. I think we, uhm -- I think we did a 1099 for him.
Q Out of which one, the West 23rd or the East 23rd?
A Well, it wasn't specifically from that corporation. We use a corporation to process the payroll or 1099s for the whole group, so I believe that's where this 1099 was issued, out of those companies.
Q Out of one of those two companies?
A Not out of West or East 23rd, but a separate company that would process payments to independent contractors or employees.
MR. ROSEN: Thank you very much.

MR. MISKIEWICZ: Very briefly, if I may, your Honor?
THE COURT: Yes.
REDIRECT EXAMINATION
BY MR. MISKIEWICZ:
Q Preparing things like W-2's for these groups of companies, did you become aware that individual employees might work at different locations, different Synergy Gyms?
A Yes.
Q So if a 1099, or a W-2 in this case -- I'm sorry, a 1099 or W-2 was issued in the name of Justin Bressman at a -- out of a particular address, does that mean he only worked at one address?
A No.
MR. MISKIEWICZ: Okay. No further questions.
THE COURT: Anything else?
MR. ROSEN: No, your Honor.
THE COURT: Thank you.
You may step down.
(Witness excused.)
THE COURT: Next witness.
THE CLERK: Good morning. Step up.
Raise your right hand, and you will be sworn in first.
M E L V Y N R O T H,

called as a witness, having been first duly sworn, was examined and testified as follows:
THE WITNESS: Melvyn Roth, R-O-T-H, M-E-L-V-Y-N.
DIRECT EXAMINATION
BY MR. MISKIEWICZ:
Q Good morning, Mr. Roth.
A Good morning.
Q Mr. Roth, you are an attorney admitted to the bar in the state of New York, correct?
A That's correct.
Q And you have been practicing law for a good period of time, correct?
A Correct.
Q Okay. And from time to time you have represented the defendant in this case, Christian Gerald Tarantino, correct?
A Correct.
Q I want to direct your attention to August 21, 2003.
Do you recall receiving a telephone call from Mr. Tarantino?
A I do.
Q And what, if anything, did Mr. Tarantino ask you to do that day?
A He asked me to represent an individual who was being

EXHIBIT X
MAY 7, 2012 TRANSCRIPT - ECF DOC. NO. 505-26

EXHIBIT “X”

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA, : CR 08 655

v. : U.S. Courthouse
Central Islip, N.Y.

CHRISTIAN TARANTINO, :

TRANSCRIPT OF TRIAL

Defendant. :

May 7, 2012
----------X 9:55 a.m.

BEFORE:

HONORABLE JOANNA SEYBERT, U.S.D.J.
and a jury

APPEARANCES:

For the Government: LORETTA E. LYNCH
United States Attorney
100 Federal Plaza
Central Islip, New York 11722
By: JAMES M. MISKIEWICZ, ESQ.
SEAN C. FLYNN, ESQ.
Assistants, U.S. Attorney

For the Defendant: STEPHEN H. ROSEN, ESQ.
100 Almeria Avenue - Suite 205
Coral Gables, Florida 33134

FRANK A. DODDATO, ESQ.
666 Old Country Road
Garden City, New York 11530

Court Reporter: HARRY RAPAPORT
OWEN M. WICKER
United States District Court
100 Federal Plaza
Central Islip, New York 11722
(631) 712-6105

Proceedings recorded by mechanical stenography.
Transcript produced by computer-assisted transcription.

And Vinnie did some of the construction work for his share.

Q What did you think of the place that Mr. Gargiulo found on 4th and 8th (sic)?

A I thought it was a an okay space. I didn't like the idea of it being a second floor location.

Q To your knowledge, did Mr. Gargiulo have any money of his own to chip into this venture in the mid-90s?

A No.

Q And what was the name of the gym that was established?

A Body Sculpt.

Q And was the partnership between the four or five of you successful at Body Sculpt?

A No.

Q Why not?

A Just we had different opinions how to run the gym.

Q Who is "we"?

A Myself, the defendant, Eric Holzer.

Q You had -- who was -- were there arguments? Did you say there were arguments?

A Just we didn't like the way he wanted to do things. He wanted to run things his own way. And he was hard headed, and we were constantly bumping heads about that.

Q You are using pronouns. Who was hard headed?

A Vincent Gargiulo.

Q Okay.

And did the disputes arise with Mr. Gargiulo with respect to Body Sculpt?

A Yes.

Q Who had disputed with Mr. Gargiulo regarding this first Body Sculpt?

A Myself, the defendant, Eric Holzer.

Q Okay.

And as a result of these disputes, what, if anything, happened?

A Eventually we broke off our partnership with him and just moved on.

Q Okay.

Who broke off the partnership?

A Myself and the defendant.

Q Approximately how long were you partners with Mr. Gargiulo in the mid-90s at this first Body Sculpt, 40th and 8th?

A I'm guessing six or eight months.

Q Okay.

You testified previously that you had fronted some money to Mr. Gargiulo for the gym; is that correct?

A Yes.

Q And to your knowledge had the defendant also fronted

money for the gym?

A Yes.

Q And when you and the defendant removed yourselves from the day-to-day operations of this business, did you or the defendant remove that capital when you left?

A I don't remember either one of us taking any money back from him.

Q So is it fair to say that you left -- you left that money with Mr. Gargiulo at his gym?

A Yes.

Q Was your -- to the best of your recollection, was yours and the defendant's departure from the gym amicable?

A Yes.

Q Were you still friends with Vinnie at that point?

A Yes.

Q Did Mr. Gargiulo's Body Sculpt at 40th and 8th remain open for a period of time after you and the defendant left?

A Yes.

Q Again, why did you disagree again, you and the defendant?

A We didn't like the way he ran the day-to-day operations. And we decided to break off before we ruined our friendship.

Q Okay.

You testified that Body Sculpt remained open for a period of time after you left.

Did that change, to your knowledge, at any point?

A Yes.

Q What happened -- what happened with respect to the Body Sculpt at 40th and 8th?

A It eventually went out of business.

Q Mr. Mulligan, toward the end of the 1990s and into the last decade, the 2000's, did you acquire ownership interest in the a number of additional fitness centers both in Manhattan and Long Island that eventually took the name Synergy?

A Yes.

Q And to your knowledge did the defendant also acquire ownership interest in one or more Synergy centers at this time?

A Yes.

Q And in fact, were you and the defendant partners at certain Synergies?

A We were partners in everything.

Q Sorry?

A We were partners in all the gyms together.

Q Are you currently partners with the defendant?

A No.

A They said that the tape was played of a conversation between my wife and I while I was in prison, GEO, and that they were trying -- that -- but the defense was trying to make it out that I coerced my wife into saying something.

Q Who used the word "coerced"?

A Myself.

Q Did they refer to the tape that was played and the conversation where you tell your wife to remember that you came to Devens and told me about what Chris Tarantino said about not asking questions, and that she said she didn't remember, and that you said to her, is that what they did?

MR. FLYNN: Objection.

THE COURT: Sustained.

A No.

BY MR. ROSEN:

Q At that point in time they went over her testimony with you, correct?

A Somewhat.

Q What does "somewhat" mean?

A I wasn't there to tell you, so I don't know.

Q You weren't where?

A I wasn't there to tell the whole testimony. I heard bits and pieces from the testimony.

Q From the Government, correct?

A From the Government and from my wife.

Q And your wife too.

Did they tell you about what you told her about the incident?

A I'm not sure if they did or my wife did.

Q Well, what did they tell you, meaning the Government prosecutors and agent (indicating)?

A They said I had a conversation with my wife, and I asked her, do you remember the conversation that her and I had up in Devens in regards to her telling me to stop asking questions about Vinnie.

Q And what -- how did she respond about her memory on the tape?

A She wasn't really sure.

Q Wasn't really sure or said to you, I do not remember?

A I really don't remember. I'm not sure. Let me think about it.

I didn't listen to the tape; you did.

Q And then did you tell her what the conversation was you had with her at Devens?

A Yes.

Q So you refreshed her recollection to support what you say here happened between her and Chris Tarantino, correct?

A Yes.

Q Just like you are trying to get the five years, and

you say things like Justin Bressman, Chris was his boss?

MR. FLYNN: Objection.

THE COURT: Sustained.

BY MR. ROSEN:

Q Did you say on direct examination that Justin Bressman's boss was Chris Tarantino?

A Yes.

Q Weren't you his boss as well?

A Yes.

Q Wasn't Brett Holster, Holzer her, whatever his name is, his boss?

A Yes.

Q Why didn't you say that? Why did you pick him out as the only one that was his boss?

A No one asked.

Q You wouldn't be currying favor to the Government, would you?

MR. FLYNN: Objection.

THE COURT: Sustained.

BY MR. ROSEN:

Q In your testimony, you passed up Andy Corino. Tell me about Andy Corino. Who is Andy Corino. What did he have to do with Vince Gargiulo? What did he have to do with you?

MR. FLYNN: Objection.

THE COURT: One question at a time.

What did he have to do with Vinnie Gargiulo?

BY MR. ROSEN:

Q Who is Vince Corino [sic]?

A There is no Vince Corino.

Q I mean Andy.

A Dolphin Fitness.

Q What did he have to do with any of the gyms that you owned with the Holzers, Tarantino and the others?

A He was partners in several locations with us.

Q Talk about him and his relationship with Vince Gargiulo. Did he give him $50,000?

A I was told he did, yes.

Q Why didn't you bring that up when you were discussing the gyms on the upper east side?

MR. FLYNN: Objection.

THE COURT: Sustained.

BY MR. ROSEN:

Q It was Gargiulo's gym that was in trouble, correct?

A Yes.

Q And Corino gave him $50,000, but you didn't mention that before, right?

A Right.

Q Because they didn't ask you. It wasn't part of the script?

EXHIBIT Y
APRIL 8, 2011 TRANSCRIPT - ECF DOC. NO. 505-27

EXHIBIT “Y”

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA, : CR 08 655

v. : U.S. Courthouse
Central Islip, N.Y.

CHRISTIAN TARANTINO, :
TRANSCRIPT OF TRIAL

Defendant. :
April 8, 2011

----------X 10:00 a.m.

BEFORE:

HONORABLE JOANNA SEYBERT, U.S.D.J.

APPEARANCES:

For the Government: LORETTA E. LYNCH
United States Attorney
100 Federal Plaza
Central Islip, New York 11722
By: JAMES M. MISKIEWICZ, ESQ.
CARRIE N. CAPWELL, ESQ.
SEAN C. FLYNN, ESQ.
Assistants, U.S. Attorney

For the Defendant: JAMES R. FROCCARO, JR., ESQ.
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and
MICHAEL ROSEN, ESQ.
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Court Reporter: HARRY RAPAPORT, C.S.R.
United States District Court
100 Federal Plaza
Central Islip, New York 11722
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Proceedings recorded by mechanical stenography.
Transcript produced by computer-assisted transcription.

MR. MISKIEWICZ: I can represent with certainty that that letter that was referenced by Larry Kyatt, as having gone to Mulligan --

THE COURT: Mulligan's wife.

MR. MISKIEWICZ: That Gerrato heard about, your Honor, did not get written or sent until after -- I can represent to the Court that the letter to Mulligan or his wife that was referenced by Gerrato that he had heard about somehow, and there is some indication from the 350000 that Larry Kyatt was asked perhaps to write a letter. And I think he indicated he didn't want to get involved in sending it. And I can only represent to the Court unequivocally that that letter was sent after Bodysculpt failed in 2002.

Again, I'm reluctant to go beyond that and submit the documentation that will prove that. Because that again has to do with preserving the integrity of the investigation, because Mr. Mulligan, as far as I'm concerned, is next on the chopping block. And I don't want to be part of the portion for that investigation. If I have to, I will ask the Court first to read it and see what else we have in terms of grand jury material in camera.

And I can certainly say I could not -- I would not be making this on the record proper if I wasn't

ADDENDUM
DECEMBER 13, 2022 SECOND CIRCUIT DENIAL OF CERTIFICATE OF APPEALABILITY (COA)

E.D.N.Y.-C. Islip
08-cr-655
16-cv-3770
Seybert, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 13th day of December, two thousand twenty-two.

Present:

Robert D. Sack,
Barrington D. Parker,
Michael H. Park,
Circuit Judges.

Christian Gerold Tarantino,

Petitioner-Appellant,

v. 22-1410

United States of America,

Respondent-Appellee.

Appellant moves for a certificate of appealability. Upon due consideration, it is hereby ORDERED that the motion is DENIED because Appellant has not "made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c), or shown "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court