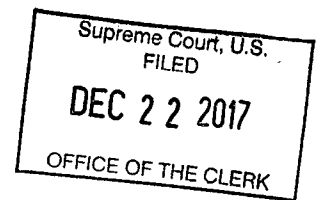


MARIJAN CVJETICANIN

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#65437-050, FCI Ft.Dix, Bld. 5803, 3d Fl, BOX 2000, Joint MDL Base, NJ 08640

December 20, 2017

The Honorable
Samuel A. Alito, Jr.
Justice, Supreme Court of the
United States of America
One First Street
Washington, DC 20543-0001

RE: MARIJAN CVJETICANIN V. UNITED STATES OF AMERICA
Individual Justice Application Based on U.S. Court of Appeals
for the Third Circuit Case Number 16-1422 (based on Order and
Judgment of the District Court of New Jersey, 3:14-cr-00274-MAS)

INDIVIDUAL SUPREME COURT JUSTICE APPLICATION PURSUANT TO
28 U.S.C. SECTION 2101(f) AND RULES 22 AND 23 OF THE RULES OF
THE SUPREME COURT OF THE UNITED STATES - STAY REQUESTED DUE
TO THE BIGGEST JUDICIAL SCANDAL IN THE HISTORY OF NEW JERSEY

1) JURISDICTION OF THE COURT AND PROCEDURAL MATTERS

This Application is filed pursuant to the provisions of the 28 U.S.C. Section 2101 (f), and Rules 22 (Individual Justice In Chamber Application), and 23 (Stays) of the Rules of the Supreme Court of the United States. The applicant humbly asks the Honorable Justice Alito, as a Third Circuit Justice, to stay the mandate and enforcement of blatantly and extraordinarily unlawful

judgment of the U.S. Court of Appeals for the Third Circuit, which, on direct appeal, affirmed the Judgment of the U.S. District Court for New Jersey, involving, as detailed below, one of the biggest, if not the biggest, judicial scandal in the history of New Jersey.

The U.S. District Court for the District of New Jersey issued Order and Judgment of Conviction in the above captioned matter on March 28, 2016, and the U.S. Court of Appeals for the Third Circuit affirmed on July 21, 2017. Petition for Rehearing En Banc was denied on October 2, 2017. Finally, on November 14, 2017 the Third Circuit Court of Appeals denied the applicant's Motion to Stay Pending the Filing of Certiorari with this court. This in-chamber Application to Individual Justice followed. Copies of all previous judgments and orders, including the Third Circuit's most recent denial of the Motion to Stay are provided in the Appendix "A" in the chronological order.

In addition to the stay orders, pursuant to the provisions set forth at 18 U.S.C. Section 3143(b)(1), the applicant also sought Bail Pending Appeal from both the U.S. District Court for New Jersey and the U.S. Court of Appeals for the Third Circuit. Both lower courts rejected applicant's bail motions under the artificially created judicial pretext that the applicant filed them "pro se" while still represented by his previous CJA attorney. In reality, the applicant's CJA attorney, Ms. Lorraine Gauli Rufo, acting as de facto Government's agent, even after specifically promising to file bail and stay motions declined to do so with no explanation, heartlessly leaving her client (the applicant), incarcerated and with no alternative but to proceed "pro se" with both bail and stay motions. Proof of timely filing of bail motions with both district court and Third Circuit Court of Appeals are provided in the Appendix "B".

Therefore, the application meets the requirements of the Rule 23 of the Rules of the Supreme Court, as the applicant diligently sought and was unable to obtain relief from the lower courts regarding the stay and bail orders, and no further form of relief is available to him from the lower federal courts.

Based on direct appeal grounds in this matter, the applicant plans to file shortly a Petition for the Writ of Certiorari to the Supreme Court with the following four questions:

- (1) Does the Mail Fraud Statute, 18 U.S.C. 1341, unambiguously reach contracts and established private and commercial contractual relationships?
- (2) In the biggest judicial scandal in the history of New Jersey, didn't the outrageous government misconduct violate the Petitioner's Sixth Amendment right to jury trial and Fifth Amendment due process rights, and shouldn't this court exercise its supervisory powers to vacate Petitioner's conviction and sentence, when the Government, in violation of the Local Rules of the Court, secretly removed the exculpatory evidence from the courtroom after District Court took the possession of evidence, making the evidence unavailable for jury review and deliberations?
- 3) Doesn't it violate the Petitioner's Sixth Amendment right to jury trial and Eighth Amendment right to be free from cruel and unusual punishment, when a trial judge, while engaging in judicial fact finding, determines what constitutes criminal conduct and increases the amount of loss for sentencing purposes by 2000%, thus changing the entire legal landscape of the case, independently from, and regardless of, any jury determinations?
- 4) Doesn't it represent an unwarranted expansion of the Mandatory Victim Restitution Act (M.V.R.A.) and the violation of the Petitioner's Fifth Amendment due process rights, when an intervening, uninvited, third party, a law firm, well after the commission of the crime, voluntarily performs claimed remedial legal services for the victims of the offense, is considered by the sentencing judge as "directly harmed" victim for M.V.R.A. restitution purposes, especially in the mail fraud statutory context in which "the property obtained" was not in the hands of such a party?

While the Applicant strongly believes that, in addition to involving numerous circuit splits, all four of the above referenced questions represent issues of extraordinary national importance, for

the purposes of this Application, the applicant brings to the attention of the Honorable Justice Alito only the question under item number two (2) - the "worst of the worst" and the most alarming legal issue - one of the biggest, if not the biggest, judicial scandal and unprecedented courtroom treachery which occurred in the courtroom of the federal District Court in Trenton, New Jersey.

The rest of the certiorari questions are provided herein as evidence of the seriousness of the entire Petition for the Writ of Certiorari in this matter.

2) RELIEF REQUESTED

Based on the Rules 22 and 23 of the Rules of the Supreme Court of the United States, 28 U.S.C. Section 2101(f), as well as Supervisory Powers of the Supreme Court (*U.S. v. Hasting*, 461 U.S. 499, 76 L. Ed. 2d 96, 103 S. Ct. 1974), the applicant herewith, Mr. Marijan Cvjeticanin, prays for the following relief:

A) THAT, the Honorable Justice Alito grants a stay of mandate of the judgment of the U.S. Court of Appeals for the Third Circuit, and orders release of the applicant from the custody of the U.S. Bureau of Prisons to home confinement, pending the filing and resolution of the applicant's Petition for the Writ of Certiorari to the Supreme Court;

B) THAT, the Honorable Justice orders any further equitable relief, as considered necessary and just in this matter;

3) STATEMENT OF THE FACTS

Certiorari Question Presented: In the biggest judicial scandal in the history of New Jersey, didn't the outrageous Government misconduct violate the petitioner's Sixth Amendment right to jury trial and Fifth Amendment due process rights, and shouldn't this court exercise its supervisory

powers to vacate petitioner's conviction and sentence, when the Government, in violation of the Local Area Rules of the district court, secretly removed the exculpatory evidence from the courtroom, after district court took the possession of evidence, making the evidence unavailable for jury review and deliberations?

The Third Circuit has failed to see and appreciate the following Government's evil-minded scheme:

During the entire trial, the Government claimed that the applicant committed mail fraud by falsely billing his employer's large corporate clients, ADP and Broadridge, for non-existent services, as the applicant, allegedly, did not run immigration advertisements for which he billed ADP and Broadridge. This was "central" to the Government's case.

On the first day of the trial, district court judge issued "jury scheduling instructions" telling the jurors that due to the "rush hour traffic madness" in Trenton, New Jersey, he prefers to end all courtroom proceedings by 3:30 PM (6/22/15, Tr.4:1-4). The Government quickly took advantage of this unnecessary judicial remark, practically pressuring the jury to finish its business by 3:30 PM, particularly when conducting fraud trial with 9 counts of indictment and over 250 trial exhibits.

On the last day of the trial, June 25, 2015, defense and Government agreed, by stipulation, to admit significant exculpatory evidence, consisting of hundreds of copies and original newspaper advertisements, which were indeed run and paid for by the applicant, into trial evidence and the defense then rested (6/25/15, Tr.108:11-13, Appendix "C").

Shortly thereafter, the first of the two Assistant U.S. Attorneys who tried the case, Dennis Carletta, stated on record, reassuring both the defense and the judge, that all newspapers and magazines admitted into evidence and other trial exhibits were physically present in the courtroom and ready for jury's perusal. On visual inspection, numerous banker's boxes with

copies and original newspapers and magazines were really neatly lined up on the first line of the courtroom seats located just to the right from the jury box, and after the Government agreed, by stipulation, to admit the defense's exculpatory evidence, there was apparently no need for any evidentiary doubts (6/25/15, Tr.114, court noted Mr. Carletta's "reassurance" on Tr. 115, Appendix "C"). At that point, district court took the possession of the evidence.

In its closing statement, the defense informed the jury that the advertisements actually existed, that the Government's claim against the applicant is basically fake and unsubstantiated, and relying on the Government's previous assurance, defense counsel informed the jury that all the advertisements were ready for the jury's review, all conveniently located right next to the jury box. Jury was able to see boxes of evidence neatly lined up in the courtroom. The defense specifically invited the jury to look into the evidence, verify the existence of advertisements and find the applicant not guilty.

At 12:07 PM, soon after the closing statements, jury was excused from the courtroom to begin deliberations (6/29/15, Tr. 86:8-9).

At 1:10 PM, almost immediately after starting its deliberations, jury took the defense for its promise, and requested to see newspaper advertising evidence for the indictment counts one and five (this is known as jury communication #1).

At 2:07 PM, fully one hour after receiving jury's first note, as the court reconvened after the lunch break, district court judge informed defense and Government counsels regarding the existence of the jury note and placed the note on record (6/29/15, Tr. 88:3-6). After a brief discussion, it was agreed to provide requested evidence to the jury with no additional comments. Still unaware of any problems and not suspecting Government's "ambush", defense counsel started searching for the newspaper evidence for indictment counts one and five, as requested by the jury, so that the courtroom deputy can physically take the evidence to the jury deliberation room which was located on the same floor, adjacent to the courtroom.

At 2:38 PM, while still searching for evidence, district court received a second communication from the jury. The restive jury, naturally assuming that the advertisement evidence was located in the courtroom next to the jury box, after full ninety minutes of waiting, started protesting long waiting time by saying "What is going on? We have been waiting for over an hour!" This is considered jury communication #2. Copies of all jury notes are attached in the Appendix "D". However, the search for the evidence so gallantly promised by the defense to the jury continued and the evidence remained elusive (6/29/15, Tr. 88:17-20).

At 2:42, the court reconvened again and placed that second jury communication on record. Rightfully concerned, district court judge inquired into the status of the evidence requested by the jury, which at that point, was outstanding for almost two (2) hours. Only at that time did the defense counsel, ambushed, humiliated and shell-shocked, learned that some (or all?) of the defenses' key exculpatory pieces of evidence was, at some previous point, secretly removed by the Government from the courtroom and made unavailable for jury deliberations. Answering a direct question from the judge, now the second of the two Assistant U.S. Attorneys present in the courtroom, Francisco Navarro, in no uncertain terms informed the court that all the evidence was located, but not yet sent to the jury room, "except for one newspaper that we are getting from the U.S. Attorney's Office. I think it was inadvertently taken back there." (6/29/15, Tr.90:09-13). The "inadvertently" taken evidence was, of course, highly exculpatory evidence for the indictment count five - for which the applicant had all the required advertisements.

No different game was played by the Government with the jury's request for other count evidence (number one), which apparently was located in the courtroom or was brought back to the courtroom before judge asked about it. Remembering judge's previous 3:30 PM "scheduling instructions" to the jury, the Government deliberately procrastinated with finding and delivery of that second piece of evidence for as long as they could. They even took a page from the standard police "good cop-bad cop game". Once again, it first started with Mr. Carletta's hollow promises ("good cop" - the first of two Assistant U.S. Attorneys prosecuting this matter).

At 2:11 PM, Mr. Carletta went on record, promising to the judge and the defense that ALL the evidence requested by the jury will go to the jury "RIGHT NOW" (6/29/15, Tr.88:02), emphasis added. However, full one hour later, at 3:09 PM, the second Assistant U.S. Attorney, Mr. Navarro, once again playing the role of a "bad cop", informed the judge that the evidence even for that, presumably "available", count had yet to be taken to the jury room (6/29/15, Tr.90:09). Why and how did it take well over one hour to deliver to the room next door one page of newspaper classified advertising tearsheets remains a mystery. It is needless to say that the evidence for that count was also fully exculpatory, as the applicant indeed had all the required advertisements. If it were any different one should have no doubts that the Government would have acted much faster.

At 2:42 PM, with the defense counsel still speechless and flabbergasted, realizing the seriousness of the drama developing in his courtroom, district court judge instructed the Government to try to find the missing evidence and "to move as quickly as possible" (6/29/15, Tr.89:08-09), but all in vain.

At 2:57 PM, still short of any requested evidence, no longer willing to wait and clearly no longer believing the defense counsel's assertion regarding the existence of any exculpatory evidence, jury made up its mind and sent its third note stating "we have a verdict" (jury communication #3). The case was over and the applicant's fate was sealed. The Government's foul game of removing and hiding exculpatory evidence and procrastinating in delivering it to the jury paid off handsomely.

At 3:09 PM, the court placed jury's third communication on record, and in a misguided "abundance of caution attempt" still insisted, even AFTER the jury had already reached the verdict, on sending missing advertisements to the jury room, but with no curative instructions. Rightfully concerned, district court judge even stated on record that he, initially, DID NOT

accept the jury's verdict, presumably until the jury at least had a chance to review the requested evidence (6/29/15, Tr. 90:20-21). But this was too little too late.

At 3:35 PM, uninterested in considering previously requested evidence (particularly in the absence of any curative instructions from the judge as the jury did not hear him saying that he would NOT accept the verdict), visibly upset jury issued its fourth and final communication. It was "spiced" with huge block letters and screaming exclamation points "WE HAVE A VERDICT!!!", finding the applicant guilty on all counts. District Court judge's confusing talk about first not accepting the verdict, followed by his complete "about the face" few moments later, created some additional courtroom distraction, but ultimately just added to the treachery of the day (6/29/15, Tr. at 89:20, 90:7).

While the main issue was the Government's secret removal of evidence from the courtroom, judge's "scheduling instructions" in order to avoid Trenton's "rush hour madness" were not helpful either and played a prominent role in the Government's scheme. The jury rushed to complete its work and leave Trenton courtroom by 3:30 PM, or as soon as possible, sealing the applicant's fate in a matter of two hours without ever reviewing any evidence, including the one subject to its own request.

Based on the record, it is undeniable that the jury never had a chance to see the defense evidence for the count number five, which represents 50% of the requested evidence. From the context of the colloquy transcripts (6/29/15, Tr. 90-91), it is also obvious that evidence for the count number one (the other 50% of the requested evidence), was either not delivered at all before jury reached the verdict, or was delivered so late that it became meaningless or worse. This is particularly true in a fraud trial in which "the devil is in detail", and while jury wanted to give the defense a benefit of the doubt by requesting to see the exculpatory evidence, by non-delivery of the evidence, this chance was brutally foreclosed.

In the aftermath of this scandalous ordeal, the defense filed Federal Rules of Criminal Procedure Rule 33 Motion for the new trial, but the district court judge, previously so burdened by the thoughts of the "Trenton rush hour madness" and leaving courtroom at 3:30 PM, was completely unconcerned by the Government's secret removal of trial evidence from his own courtroom, not to mention regarding the applicant's constitutional fair trial and due process rights. Unwilling to be embarrassed by the high drama and scandal which occurred in his courtroom, district court judge simply denied the the defense's request for a new trial and even found a time to rebuke the defense counsel for some alleged "mischaracterization" of facts.

The Government, predictably pleased with the outcome, decided to preserve status quo at all costs and started trading unprofessional barbs with the defense counsel and even assuming the applicant of some new unrelated crimes, just to divert the attention of the court from their own misconduct. Since the jury requested evidence for only two counts of indictment (one and five), neither the presence in the courtroom, nor possible delivery to the jury, of any other evidence such as other newspapers or magazines (which did not occur anyhow), mentioned by the Government in its response to the defense's new trial motion, had any relevance and just represented the Government's diversionary tactic. The only relevant evidence - the one requested by the jury, was not delivered.

The Government's evil scheme ultimately worked. Yet another successful conviction and a favorable statistic for the Government, and if obtained at "all costs" and in contravention to the constitutional jury trial and fair trial guarantees, does not matter. Government just happily screamed "next"!

Many troubling factual questions remain unresolved and should be subject of both the stay order and a remand for District Court's evidentiary hearing before any further legal analysis is undertaken. Just to name few.

- 1) Since there were a total of nine counts of indictment and exculpatory evidence (newspaper advertisements) existed for all nine counts, how did it happen that the jury picked and requested the evidence exactly for the count for which the evidence was secretly removed from the courtroom (count number five)?
- 2) What was the statistical chance that the jury would, with the incredible "surgical precision" pick and chose to request the evidence for exactly the count missing from the courtroom, exactly the one out of nine?
- 3) After secretly removing the evidence, did someone maybe also secretly tip one of the the jurors to request the evidence for exactly the count of indictment for which the evidence was removed from the courtroom, out of all other eight available counts? Or was it the case that indeed more evidence was missing from the courtroom, making it statistically almost certain that almost whatever (exculpatory) evidence jury requested it would not have been available for review?
- 4) Moreover, if the evidence was presumably missing for only one specific count of indictment (number five), why did it take well over an hour a deliver evidence for the other requested count (number one), which, apparently, was available in the courtroom? Or was that one also brought in from the outside, just a bit more timely, so the Government managed to avoid disclosing that fact before the court inquired?
- 5) Since the district court judge initially did not accept the jury's verdict, given the fact that no curative instructions were given and there was no change in courtroom circumstances, on what factual basis did the judge, just few moments later, made about a face and suddenly decided to accept the jury's verdict?
- 6) On what factual basis did the Assistant U.S. Attorney Carletta, who tried the case and was present in the courtroom at all times, assure, on record, both the court and the defense counsel

that all the admitted evidence was located in the courtroom and why was that false "assurance" even necessary, since the court took the possession of the evidence, if not to purposefully lull the unsuspecting defense counsel in the erroneous belief regarding the true location of the exculpatory evidence?

7) When and how did the second Assistant U.S. Attorney Navarro, who also tried the case and was present in the courtroom during the entire time, learn that the evidence was indeed removed from the courtroom? Who provided that information to him, and once he became aware of it, why did he wait for the judge to specifically question him about the status of the evidence delivery, and waste invaluable jury time in the process, instead of disclosing that fact to the court and defense counsel at the time he became fully aware about the "missing" evidence?

8) Who actually physically removed the evidence from the courtroom after court took the possession of the evidence? Was it a federal government special agent in charge of the case, any other agents working with him, one of the paralegals assisting U.S. Attorneys in the courtroom, one of Assistant U.S. attorneys themselves, or an unknown, third, person with the access to the courtroom during or after hours?

9) Why was the "inadvertently" removed evidence taken to the U.S. Attorney's Office and not to the Clerk of the Court, as mandated by the Court's rules, and why was the Trial Court judge and defense not informed of the removal of the evidence?

10) Why was there absolutely no one left in the courtroom to handle jury communications and inform the court regarding the pending jury notes during the one hour "lunch break" between 1 PM and 2 PM, making the jury unnecessarily wait for at least one hour just to receive and process jury's initial simple request?

Unresolved factual issues galore.

Finally, when the Third Circuit affirmed the district court's judgment and found "no error" here, the travesty and miscarriage of justice was complete. The "Jersey Shore" Soprano-style trial has ended.

4) ARGUMENT

Due to its exceptional nature, denial of in-chambers stay application is the norm; relief is granted only in "extraordinary cases", *Rostker v. Goldberg*, 448 U.S. 1306, 101 S. Ct. 1, 65 L. Ed. 2d 1098 (1980), (*Brennan, J., in chambers*).

Specifically, the applicant must demonstrate (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction; (2) a fair prospect that a majority of the Court will conclude that the decision below was erroneous; and (3) a likelihood that irreparable harm will result from the denial of stay, *Conkright v. Frommert*, 556 U.S., 129 S. Ct., 173 L. Ed. 2d 865 (2009) (*Ginsburg, J., in chambers*).

A) Sufficiently meritorious issue

There are at least two substantial reasons producing a "reasonable probability" that four Justices will consider the above referenced issue sufficiently meritorious to grant certiorari or note probable jurisdiction.

The first reason is the immense value of personal liberty and the legal and social significance of constitutional protections of personal liberty interests at stake in this matter. The second one is the level of outrageous government misconduct and the need for the Supreme Court to send a clear message to prosecutors throughout the country that they do not rule nation's courtrooms and cannot violate constitutional standards with impunity.

As for the first reason, the meaning of personal liberty and its deep historical and constitutional roots cannot be overemphasized. Under the current U.S. constitution, if it still holds, there is no value more sacred than the individual liberty. This is particularly true, as in this matter, when a grave deprivation of personal liberty stems from:

(a) violation of the constitutionally guaranteed right to jury trial (Article III, Section 2, Clause 3 of the U.S. Constitution),

(b) right to impartial jury (Sixth Amendment to the U.S. Constitution),

and

(c) both procedural and substantive due process rights (Fifth Amendment to the U.S. Constitution).

"The right to jury trial in criminal cases is fundamental to the American system of justice", *Duncan v. Louisiana*, 391 U.S. 145, (1968), as these are "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions", *Powel v. Alabama*, 287 U.S. 415 (1932). The right to fair trial is one of the fundamental rights "implicit in the concept of ordered liberty", *Palko v. Connecticut*, 302 U.S. 319 (1937).

Government's secret removal of evidence from the Trenton's federal courtroom violated the applicant's constitutionally guaranteed right to jury trial, as such a guarantee includes, DE MINIMIS, the right of jury to review, without obstruction or undue delay, the evidence it requested, and to be allowed to properly function as a true and knowledgeable trier of fact. However, in the applicant's case, the jury was physically prevented from orderly discharging its constitutional duties as it was oppressively deprived of the basic tool of its trade - documentary trial evidence which it requested to review several hours earlier and which the jury, due to the circumstances of the trial, reasonably believed was readily available.

Since "a conviction in the federal courts, the foundation of which is evidence OBTAINED in disregard of liberties deemed fundamental by the Constitution cannot stand", *McNabb v. U.S.*, 318 U.S.332, 87 L. Ed. 819 (1943) (emphasis added), equally a conviction in the federal courts, the foundation of which is evidence ILLEGALLY REMOVED from the eyes of the jury, cannot stand.

The Government's action also violated the applicant's U.S. Constitution Sixth Amendment right to impartial jury, as the lack of availability and a lack of presentation and perusal of admitted trial evidence, particularly exculpatory evidence, prevented the jury from viewing and correctly balancing and evaluating trial evidence. This naturally tilted the jury in one direction over the other, making the jury "partial", unfairly favoring and supporting one party in the criminal litigation over the other. Jury was so much interested in reviewing documentary evidence that it requested it not once but twice. The first jury communication was followed by the second one reiterating jury's previous evidentiary request. When unreasonably long waiting time is added to deliberate non delivery of a portion of the requested evidence, jury even reacted in writing with additional notes full of exclamation marks. "In connection with constitutional right to trial by impartial jury, impartiality is not static concept, but can be defined only in relation to specific facts and circumstances" *Farese v. U.S.*, 428 F 2d 178 (5th Cir. 1970). This principle is so rooted in our nation's legal history that "if only one juror is improperly influenced, defendant in criminal case is denied his Sixth Amendment right to impartial jury", *Styler v. State*, 417 A 2d 947 (1980, Del). The chance that at least one juror, if not all of them, was adversely influenced by non-delivery of evidence is extremely high under the described circumstances and should be at least a subject of evidentiary hearing.

"The jury's overriding responsibility is to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction" *U.S. v. Goetz*, 746 F. 2d 705 (11th Cir.1984). In its rebuttal motion the Government claimed that the applicant suffered no prejudice as some of the requested evidence was allegedly inculpatory and not exculpatory, so

presumably would not have helped him. However, it is for the jury and not for the Government to make such a determination. Due to the Government's action, jury in the applicant's case was physically deprived of its ability to function as a jury and without the requested evidence was practically "left in dark." Even if factually correct, the Government's argument legally fails, as even in the case of the existence of some circumstantial, or overwhelming, evidence against the accused, "there is no reason to deny the defendant the right to a jury determination when the evidence seems overwhelmingly in favor of the Government....An accused person has the same right to have 12 laymen pronounce upon the truth or falsity of each material averment of the indictment", *Goetz at 706*. However, as any practitioner knows, it would be highly unusual for the Government to remove inculpatory evidence from the courtroom.

Moreover, "sixth Amendment must be liberally construed" *U.S. ex rel Whitaker v. Henning*, 15 f. 2d 760 (9th cir. 1926). Second Circuit, creating a potential circuit split with the Third Circuit, recently determined that even a simple misleading statement by the prosecutor to the jury is sufficient to violate Sixth Amendment, *U.S. v. Whitten*, 610 F.3d 168 (2d Cir. 2010). Such a violation pales in comparison to the act of the Government's secret removal of exculpatory evidence specifically requested by the jury. This Court has also emphasized time and time again that "failure to afford such Sixth Amendment guarantees as public trial, IMPARTIAL JURY, notice of charges, or compulsory service can ordinarily be cured by providing those guaranteed rights in new trial" *Strunk v. U.S.*, 412 U.S. 434, 37 L. Ed. 2d 56 (1973). However, these rights were flatly denied to the applicant.

The Government's removal of evidence also violated the applicant's constitutional fair trial guarantee (procedural and substantive due process clause of the Fifth Amendment), as if the applicant's judgment stands it will have a "chilling effect" on other defendants intending to go to trial, knowing that the other interested party in action (Government) can single handedly, secretly, and suddenly, violate and shape federal court rules as it sees fit. Even overzealous law enforcement cannot justify violating established federal court or due process rules, because as Justice Frankfurter told us over half a century ago "a democratic society, in which respect for the

dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crimes is not in itself an assurance of soberness of judgment" *McNabb v. U.S.*, 318 U.S. 332, 87 L. Ed. 819 (1943).

Last but not the least we need to seriously examine the Government's conduct in this matter. The scandalous affair that occurred in the courtroom of the Trenton, New Jersey, district court, represented not only a clear violation of the applicant's numerous constitutional rights, but also an act of grave and manifest injustice and government misconduct, which if unchecked, will turn into a critical public policy issue of immense legal importance. The issue can be summarized as follows - Is it really possible that the Hobbs' American Leviathan has reached the point that the Government's control of the nation's courtrooms goes so far as to allow the Government to commit gross and open violations of the federal court rules with impunity and suffer absolutely no consequences in the process?

Rule 79.1 of the Local Area Rules (L.A.R.) of the federal District Court of New Jersey clearly states the following:

"Custody of Original Papers, Records and Exhibits:

- (a) NO original papers or records SHALL BE TAKEN from the Clerk's office or the COURTROOM (except in the custody of the Clerk) WITHOUT an order from a Judge.
 - (b) Unless the Court otherwise directs, each exhibit admitted into evidence prior to disposition of any matter SHALL BE HELD IN THE CUSTODY of the Clerk.
 - (c) UNLESS the Court otherwise directs in civil matters, the Clerk shall permit only the parties to the action or their attorneys to EXAMINE or COPY exhibits in the Clerk's custody."
- (Emphasize added, copy of the Rules provided in the Appendix "E").

The rules are short, concise and clear. The purpose of the rules is to protect constitutional rights of both parties in action, particularly constitutionally guaranteed fair trial rights.

Even in the light most favorable to the non-moving party (Government), if we turn a "blind eye" and naively presume that the secret, undisclosed, removal of the evidence from the courtroom was truly inadvertent or unintentional, and over two hours of procrastination to bring simple newspaper tearsheets to the jury room is somehow considered "brief", nothing can hide the fact that there was a violation of the federal court rules and that the violation was committed by one of the parties in action, the omnipotent and omnipresent U.S. Government.

Moreover, based on the facts presented above, even the most gullible person would have concluded that it was a carefully planned and orchestrated scheme which did not occur accidentally or inadvertently. Coupled with the Government's later cover up and excuses, this event made a mockery of numerous provisions of the U.S. Constitution and its nominal guarantees and protections.

Due to the level of Government misconduct, the applicant's matter is a textbook case where "the limitations of the due process clause of the Fifth Amendment come into play only when the Government activity in question violates some protected right of the defendant", *Hampton v. U.S.*, 425 U.S. 484, 96 S. Ct. 1646 (1976). Also correctly predicting that "while we may some day be presented with a situation in which a conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the Government from invoking judicial process to obtain a conviction" *U.S. v. Russell*, 411 U.S. 423, 935 S. Ct 1637 (1973).

Believing that such a day has arrived, the applicant hopes that there is at least a "reasonable probability" that at least four Supreme Court justices would consider this issue sufficiently meritorious to grant a certiorari, or note probable jurisdiction in this matter.

B) Erroneous Decision

"Since in a jury trial the primary finders of fact are the jurors", *U.S. v. Martin Linen Supply Company*, 430 U.S. 564 (1977), and the jurors in this matter were clearly deprived of the key tool

and instrument for the fact finding - documentary evidence which they requested to review, it is equally hard to accept that there is no even a fair prospect that a majority of the Court will conclude that the Third Circuit's decision, allowing such a blatant lawlessness in the nation's courtrooms, was not erroneous.

Even if considered minor or marginal, "the court may not ignore a violation of constitutional right because it is relatively not as bad as it might have been", *Patton V. U.S.*, 281 US 276, 74 L Ed 854 (1930) (ovrld in part on other grounds by *Williams v. Florida*, 339 US 78, 26 L Ed 2d 446 (1970)).

In addition to missing the essence of the Government's scheme and misconduct, the Third Circuit's decision is also clearly erroneous as the Third Circuit failed to conduct a harmless error analysis prior to affirming lower court's judgment. Based on the facts presented above, the Government's misconduct raises to the level of the structural error requiring automatic reversal, described by this Court in *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246 (1991). However, since the defense properly objected by timely filing Rule 33 new trial motion, Third Circuit should have at least conducted a harmless error analysis.

Third Circuit should have properly determined whether, whatever transpired in that Trenton courtroom, was indeed harmless and "harmless beyond a reasonable doubt", *Fulminante* at 279, and whether the issue of removed evidence, made unavailable to the jury for its deliberations, "so infected the entire trial that the resulting conviction violates due process" *U.S. v. Frady*, 456 U.S. 152 (1982). As the jury and not the Government is a trier of fact, factual issues such as whether the jury delivery delay was just "brief" or "inadvertent", etc, and whether the events tainted the whole trial, should be reviewed from the jury point of view, preferably at the evidentiary hearing or appellate court remand to properly conduct harmless error analysis.

In this respect the applicant believes that there is a fair prospect that a majority of the Court (five judges) will conclude that the Third Court's decision is erroneous.

C) Irreparable Harm

"Freedom from imprisonment, government custody, detention, or other forms of physical restraint lies at the heart of liberty due process clause of federal constitution's Fifth Amendment protections; Government detention violates that clause unless detention is ordered (1) in proceedings with adequate procedural protections..." *Zadvydas v. Davis*, 533 U.S. 678, 150 L. Ed. 2d 653 (2001).

No such adequate protections were afforded to the applicant herewith. Not only that nominally existing constitutional guarantees did not deter Government's execution of its unethical and illegal evidence handling scheme and the trial court judge went along with that, but even a three judge panel of the Third Circuit's appellate court could not find "any" error there.

Since the applicant was deprived of his liberty interest due to lack of such "adequate protections", and has been incarcerated since March 2016, any further deprivation of his liberty would cause immense irreparable harm to him and his family. Wrongful incarceration is one of the worst violations of individual's constitutional due process rights, just a notch below the death penalty. Both short and long term effects and consequences of the applicant's incarceration daily cause irreparable and irreversible emotional, familial, social and financial harm to his spouse, children, businesses, previous clients, business partners and the society as a whole, and all of it is based on the judgment which is a product of gross Government misconduct.

The fact that the applicant has been separated from his family for over eighteen (18) months cannot be undone, as his children are growing up without a father, spouse is struggling financially to stay afloat in New York, his license to practice law was revoked solely due to the said conviction, and financial and economic consequences of this ordeal are immeasurable.

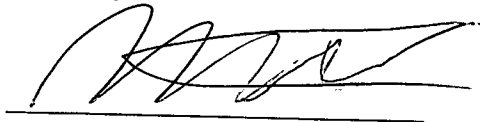
While all of these consequences are permanently irreparable, at least the Honorable Court now has a chance to issue a stay order and admit the applicant on home confinement pending the resolution of the Petition for the Writ of Certiorari, thus preventing ever mounting and further irreparable harm from reaching insufferable conditions.

5) CONCLUSION

By virtue of the foregoing, the applicant strongly believes that, due to the circumstances of the case, his Application qualifies for the issuance of the stay of mandate based on satisfying of all three case law requirements - (a) reasonable probability and sufficiently meritorious issue, (b) erroneous judgment and (3) irreparable harm done to him.

In this respect, the applicant pleads for the Honorable Justice to issue a stay order and appreciate your time and consideration of this matter.

Sincerely,



Marijan Cvjeticanin,

#65437-050

Federal Correctional Institution

Bldg. 5803, 3d Floor,

BOX 2000

Joint Base MDL, NJ 08640