No. _____

In the Supreme Court of the United States

KENNETH R. SPIRITO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, prosecutors have an obligation to disclose evidence favorable to the accused, either because it is exculpatory, or because it is impeaching. Federal prosecutors interviewed a key government witness on the eve of the criminal jury trial but failed to disclose to the defense either the fact of the interview or the notes created by the government. While the witness's name arose 118 times during the trial, he was never called to testify.

Long after trial, Petitioner learned for the first time about the interview when the witness provided an affidavit. He averred he told the government Petitioner was not the individual responsible for the series of events that led a local airport authority to guarantee a loan for a startup airline business. That loan guarantee formed the basis for the charges against Petitioner, the witness was intimately involved in the process, and the information he provided would have impeached the testimony of several other government trial witnesses.

Federal prosecutors refused to provide the notes from the meeting to the defense either before or during habeas evidentiary hearing addressing Petitioner's *Brady* claims, and the District Court denied Petitioner's motion to compel production. The Question Presented is:

Whether defendants raising *Brady* violations that can show the government suppressed evidence are entitled to production of that evidence in discovery to meet their burden of proof in a habeas proceeding?

RELATED CASES

- *United States v. Spirito*, No. 4:19-cr-43, U.S. District Court for the Eastern District of Virginia. Judgment entered July 16, 2020, and Amended Judgment entered Oct. 5, 2022.

- *Spirito v. United States*, No. 4:24-cv-00007, U.S. District Court for the Eastern District of Virginia. Judgement entered Dec. 13, 2024.

- *United States v. Spirito*, No. 25-6102, U.S. Court of Appeals for the Fourth Circuit. Judgment entered Oct. 9, 2025.

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The opinion of the court of appeals (App. 1a-2a) is unpublished. *See United States v. Spirito*, No. 25-6102, 2025 WL 2871820, at *1 (4th Cir. Oct. 9, 2025). The ruling of the district court denying Petitioner's motion to vacate, set aside, or correct a sentence (App. 3a-25a) is unreported. *See Spirito v. United States*, No. 4:19-CR-43, 2024 WL 5096485, at *1 (E.D. Va. Dec. 12, 2024).

JURISDICTION

The judgment of the court of appeals was entered on October 9, 2025. (App. 1a). The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

Amendment V, cl. 4, U.S. Constitution provides, in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law[.]"

INTRODUCTION

This petition presents a question of exceptional constitutional importance: whether lower courts may dilute *Brady v. Maryland*, 373 U.S. 83 (1963), by denying discovery of evidence the government concedes it suppressed, thereby extinguishing a defendant's federal due process rights without ever examining the very evidence that *Brady* required be disclosed. If the decision below is allowed to stand, it will not merely deny relief to Petitioner; it will invite

federal prosecutors across the country to erode *Brady's* core protections and permit the Government to benefit from its own suppression of favorable evidence.

The court below required Petitioner to establish materiality under *Brady* by providing a credible witness or credible evidence of the substance of the suppressed information, yet denied Petitioner the opportunity to access critical, potentially corroborating evidence in the possession of the Government. Despite the Government's concession that it conducted an undisclosed interview with a central witness and created notes memorializing statements from the witness, the district court concluded—without ever reviewing the notes—that their contents could not have mattered or lent credibility to the witness's testimony. That ruling turns *Brady* on its head. Due process does not permit courts to assume away the significance of suppressed evidence, nor to reject *Brady* claims based on speculative credibility judgments while the Government continues to withhold the very materials at issue.

This Court has repeatedly emphasized that *Brady* materiality is not a sufficiency-of-the-evidence test, nor an invitation for courts to weigh credibility in the abstract. The question is whether the suppression of favorable evidence undermines confidence in the verdict. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). Here, the suppressed interview notes concern a witness who was deeply embedded in the alleged criminal scheme and referenced repeatedly at trial. According to the witness's affidavit and testimony, his statements to prosecutors would have directly refuted

the Government's claim that Petitioner exercised decision-making authority central to the jury's guilty verdict. To declare such evidence immaterial—without permitting Petitioner an opportunity to review it—cannot be reconciled with Constitutional due process protections.

This Court's prior case law addressing discretionary discovery in habeas proceedings has not been enough to safeguard defendants, such as Petitioner here, from being wholly deprived of the very evidence necessary to meet their burden to prove a *Brady* violation.

Equally troubling, the decision below effectively creates a new rule: that a defendant must "credibly assert" both the existence and the *substance* of suppressed evidence (without the benefit of reviewing the substance of the suppressed evidence), and that the evidence must be "new," before a *Brady* claim may proceed. No such requirement exists in *Brady* or its progeny. To the contrary, this Court has made clear that prosecutors bear an affirmative duty to disclose favorable evidence precisely because defendants often cannot know what was said behind closed doors. By shifting that burden onto the accused, the court below fashioned a regime in which *Brady* violations become self-insulating—immune from review so long as the Government refuses to disclose what it suppressed.

The implications extend far beyond this case. If courts may deny both discovery and relief whenever actual, suppressed evidence contradicts the Government's position on the trial evidence, then *Brady's* promise is illusory. Prosecutors would have every incentive to withhold contradictory statements, secure in the knowledge that courts may later dismiss

Brady claims without ever examining the evidence itself. Countless defendants would be left without a meaningful remedy for due process violations, and public confidence in the fairness of criminal adjudications would be profoundly undermined.

This Court's intervention is necessary to restore fidelity to *Brady*, to reaffirm that materiality decisions cannot be decided by conjecture or credibility shortcuts, and to ensure that defendants are not denied due process based on evidence they were never allowed to see. The petition should be granted.

STATEMENT OF THE CASE

1. Trial, Government's Pretrial Interview of a Key Witness, and Conviction

Petitioner was charged in federal court with offenses arising from an alleged fraudulent scheme. The Government's case hinged on proving Petitioner's role and authority within that scheme—specifically, that Petitioner exercised decision-making control over the funding of accounts central to the alleged fraud. Establishing this theory depended heavily on testimony concerning Petitioner's interactions with, and authority over, other participants.

Immediately before Petitioner's criminal jury trial in February 2020, federal prosecutors conducted an undisclosed interview with Michael Morisi, a key participant in the alleged scheme. Mr. Morisi had just been sentenced on related criminal charges and appeared on the Government's witness list throughout the pendency of Petitioner's trial. At the time of the interview, the Government had offered Mr.

Morisi, on the record during his sentencing proceeding in federal court, an opportunity to cooperate against Petitioner and to testify at trial. For the first time, prosecutors and federal agents elicited detailed information from Mr. Morisi regarding Petitioner's role in the transactions that formed the basis of the fraud charges and took notes memorializing his statements.

Despite maintaining Mr. Morisi on its witness list, the Government never disclosed to defense counsel that this interview had occurred, never produced any notes or reports of the meeting, and ultimately never called Mr. Morisi as a witness at trial. The jury convicted Petitioner. On direct appeal, the court of appeals affirmed the conviction, concluding that the Government had presented sufficient evidence to support the jury's verdict regarding Petitioner's role in the alleged scheme.

2. Post-Conviction Disclosure of the Suppressed Interview

Long after trial, Mr. Morisi contacted Petitioner to ask whether Petitioner had been aware that prosecutors met with him immediately before trial and whether Petitioner knew that Mr. Morisi had been willing to testify on Petitioner's behalf. Mr. Morisi subsequently executed an affidavit explaining that, during his pretrial meeting with the Government, he made statements that directly contradicted the prosecution's theory of Petitioner's authority and culpability and would have provided valuable impeachment information against witnesses for the Government.

Petitioner thereafter sought habeas relief under 28 U.S.C. § 2255, alleging that the Government violated *Brady v. Maryland*, 373 U.S. 83 (1963), by suppressing the interview and the notes memorializing Mr. Morisi's statements. During those proceedings, the Government expressly conceded the following facts:

a. the prosecution team interviewed cooperating witness Michael Morisi in February 2020, immediately before the start of Petitioner's jury trial;

b. the prosecution team took notes of that interview;

c. the Government never disclosed the interview to the defense and never produced any notes or reports of the meeting;

d. Mr. Morisi remained on the Government's witness list throughout the trial; and

e. the Government later moved for a reduction of Mr. Morisi's sentence under Federal Rule of Criminal Procedure 35 based on his participation in the interview the government regarding Petitioner in February 2020.

Notwithstanding these concessions, the Government continued to refuse to produce the interview notes before the evidentiary hearing. Petitioner filed a motion to compel their production in preparation for the habeas hearing, explaining that review of the notes was essential to developing and proving the *Brady* claim.

3. District Court's Denial of Discovery and Resolution of the Brady Claim Without Reviewing the Suppressed Evidence

The district court denied Petitioner's motion to compel discovery and his *Brady* claim, without reviewing the suppressed evidence. The Government submitted no affidavits, documents, or testimony from any prosecutor or agent regarding what Mr. Morisi said during the interview. Instead, the district court said that Mr. Morisi's recitation of his statements was not credible because it was not corroborated by evidence. Yet, the district court declined to review the interview notes itself and declined to order their production to Petitioner or his counsel.

On November 20, 2024, the district court conducted a hearing ostensibly to address Petitioner's *Brady* claim. Despite labeling the proceeding an evidentiary hearing, the court did not hear from any Government witnesses regarding the interview and resolved the claim without ever examining the suppressed notes. The court rejected Petitioner's claim on the grounds that he had not "credibly assert[ed]" suppression and that, in any event, the evidence was not material—reasoning that rested on abstract credibility assessments of Mr. Morisi and selective reliance on the Government's version of events.

4. Appellate Disposition and Present Posture

Petitioner sought appellate review of the district court's denial of habeas relief. The Fourth Circuit summarily affirmed the district court's decision.

Petitioner seeks this Court's review to correct these departures from *Brady* and Due Process Clause

jurisprudence, to clarify the limits of judicial discretion in resolving discovery disputes when the Government acknowledges it suppressed evidence, and to prevent the continued erosion of fundamental due process protections guaranteed by the Constitution.

REASONS FOR GRANTING THE PETITION

The fact pattern presented here does not often rise to this Court's attention, precisely because federal prosecutors typically turn over the material that is subject to a *Brady* violation voluntarily and without requiring a district court to rule on a motion to compel. That did not happen here – the Government continued to suppress the notes of the interview and argued they did not matter because Petitioner could not prove what they contained.

If permitted to stand, the decision below authorizes district courts to replace *Brady's* materiality inquiry with the onerous requirement that criminal defendants prove the contents of actual, suppressed evidence[1] without the benefit of seeing the evidence. That precedent warrants this Court's review.

[1] This is different than an allegation of a *Brady* violation when the defendant cannot show that the suppressed evidence exists. Here, Petitioner had met his burden to demonstrate the existence of the evidence he sought and the Government conceded the evidence existed and had not been disclosed.

I. THE DECISION BELOW CONTRAVENES THE DUE PROCESS PROTECTIONS OWED TO HABEAS PETITIONERS SEEKING RELIEF FROM THE GOVERNMENT'S *BRADY* VIOLATIONS.

Without reviewing the evidence to confirm his claims, the district court determined the Mr. Morisi's recitation of what he told the Government during the pre-trial interview had "little to no credibility"[2] and that the Government notes of the interview would not have been material exculpatory or impeachment evidence. (App. 15a). That conclusion misstated the governing standard under *Brady* and its progeny, denied Petitioner his constitutional right to due process and a fair trial in habeas proceedings, and contradicts the standards set forth by other federal circuit courts.

a. To meet his burden of proving a *Brady* violation, a habeas petitioner is entitled to have the district court compel the Government to disclose any actual, suppressed evidence.

In *Brady*, this Court held that "the suppression by the prosecution of evidence favorable to an accused

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[2] The district court discounted Mr. Morisi's statements based on minor date discrepancies, the fact that he had not kept contemporaneous notes of the interview, and conflicts with testimony from his attorney during the hearing that her notes did not reflect that he made those statements to the government. (*See* App. 12a-15a). Notably, that latter point shows only that his attorney may not have written down statements he made that would have undermined the Government's case against Petitioner. Instead, she may have been recording only those statements she believed would have support a motion for reducing his sentence based on cooperation.

upon request violates due process where the evidence is material either to guilt or to punishment." 373 U.S. at 87 (1963). A defendant establishes a *Brady* violation by showing that (1) the evidence is favorable, either because it is exculpatory or impeaching; (2) the evidence was suppressed by the Government, willfully or inadvertently; and (3) "prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). The "touchstone of materiality is a 'reasonable probability' of a different result . . . [t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (citing *United States v. Bagley,* 473 U.S. 667, 680 (1985)).

Here, the Government did not dispute that it withheld information. The district court, instead of ordering the production of that information, required Petitioner to move forward in the evidentiary hearing shouldering the entire burden of proving materiality of evidence it was prevented from examining. (*See* App. 16a ("Even if the Petition did allege that the Government suppressed evidence, he has not proven that the evidence was material.")). "[W]here specific allegations before the court show reason to believe that [a habeas] petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." *Bracy v. Gramley*, 520 U.S. 899, 908-09 (1997) (citing *Harris v. Nelson*, 394 U.S. 286, 300 (1969)).

The "necessary facilities and procedures" can expressly include discovery in habeas proceedings. Rule 6(a) of the Rules Governing § 2254 Cases provides the District Court "may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure." But, this discretionary authority cannot be withheld when the district court is considering a *Brady* violation where the Government actually suppressed evidence. *See East v. Scott*, 55 F.3d 996, 1001 (5th Cir. 1995).The Fifth Circuit has recognized that this discretion has bounds, holding that denying discovery is an abuse of discretion where the discovery demanded is indispensable to the development of the facts. *Id.*

If the facts were fully developed here, the suppressed statements from a key government witness deeply involved in the alleged scheme would have – according to the witness's sworn testimony – directly contradicted the Government's claim that Petitioner exercised decision-making authority central to the jury's verdict. Had the district court followed this Court's decision in *Bracy* and took note of the Fifth Circuit's observations about the abuse of discretion for blanket denials of discovery, it would have ordered production of the suppressed evidence.

But the district court did not follow this Court's decision in *Bracy*. Instead, the district court expressed hesitation at crediting the sworn account of a witness that had been convicted in a related criminal scheme over the Government's objection. That hesitation is precisely why disclosure of the *Government's* notes and report of the interview was so critical to the Petitioner's presentation of evidence in the *Brady* hearing. The Government's characterization of Mr.

Morisi's statements within the notes may have corroborated his affidavit and testimony, Petitioner may have gleaned important information about the Government's decision not to call Mr. Morisi as a witness, and Petitioner may have had grounds to question federal agents present during the interview about the manner and mechanism for documenting – or, not documenting – the conversation with a key government witness.

Criminal defendants' rights to disclosure of material under *Brady* is not about a right to discovery, but about a right to information necessary to ensuring they receive a fair trial. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). Denying Petitioner access to the actual, suppressed evidence – once Petitioner was alerted by an outside party to its existence – denied Petitioner the ability to present his position properly at the habeas evidentiary hearing that suppression of this evidence had denied Petitioner his right to a fair trial.

b. Other federal circuits have determined that precisely this kind of suppressed evidence is a material *Brady* violation.

Other federal circuits considering this kind of suppressed evidence determined it amounted to a *Brady* violation, demonstrating the critical importance of requiring the Government to produce the suppressed evidence in advance of considering the merits of a *Brady* claim.

The Fifth Circuit found a *Brady* violation where the government failed to disclose that they had conducted an interview with an individual who was not called as a witness at trial. *United States v. Fisher*,

106 F.3d 622, 634-35 (5th Cir. 1997). The court held that witness would have undermined the credibility of a different witness whose testimony was key to one of the counts of conviction. *Id.* Similarly, the Second Circuit reversed a criminal conviction where the government failed to disclose an agent's notes from a proffer session with a cooperating witness, which contained information favorable to defendant. *United States v. Triumph Cap. Grp., Inc.*, 544 F.3d 149, 165 (2d Cir. 2008).

The Third Circuit determined the government had violated *Brady* by failing to disclose evidence of a key witness's criminal background as impeachment, expressing dismay that "prosecutors, so long after *Brady* became law, still play games with justice and commit constitutional violations by secreting and/or withholding exculpatory evidence from the defense." *Breakiron v. Horn*, 642 F.3d 126, 133 fn.8 (3d Cir. 2011).

Petitioner's *Brady* claims are just as persuasive and the Government's suppression of the evidence here just as alarming, yet the district court refused to allow Petitioner to create the record presented to the Second, Third, and Fifth Circuits.

II. THE QUESTION PRESENTED IS OF EXCEPTIONAL IMPORTANCE.

The Court often emphasizes the importance of a prosecutor's "affirmative duty to disclose" *any* favorable information to a defendant, even if such information was not actually requested by the defendant. *Kyles,* 514 U.S. at 436. "By requiring the prosecutor to assist the defense in making its case, the *Brady* rule represents a limited departure from a pure

adversary model." *Bagley*, 473 U.S. at 675 n.6. This is because "the prosecutor's role transcends that of an adversary: the prosecutor 'is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *Id.* (citation modified) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

Where, as here, the Government has admitted to suppressing evidence of a key witness interview prior to trial, and remains, to this date, steadfast in its refusal to produce that evidence, the Government has not acted as a sovereign with an interest that justice shall be done. Instead, the Government has adopted a "win-at-all-costs" mindset at the expense of defendants' Constitutional due process rights.

This Court should establish a rule that requires disclosure of the suppressed material whenever a *Brady* claim can show the material exists and was not disclosed to the defense prior to trial or sentencing. Doing so allows a criminal defendant, whether in the substantive proceedings or on habeas review, to fully meet his burden to show the suppressed evidence was favorable and material to his defense. Such a rule would divest the Government of any incentive to engage in the kind of gamesmanship in disclosing evidence that is antithetical to its duty to "transcend" its role as "an adversary." *Bagley*, 473 U.S. at 675 n.6.

CONCLUSION

This Court has sent strong signals that the district court here should have ordered production of the suppressed interview notes under the test set forth in *Bracy*. However, as Petitioner's case demonstrates,

district courts need clear instruction that constitutional due process protections require the disclosure of actual, suppressed evidence to the defendant to shoulder his burden of proof under *Brady*. Otherwise, federal prosecutors will continue to suppress information they worry weakens their criminal case, and federal judges will continue to deny defendants the tools necessary to redress those constitutional discovery violations.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED OCTOBER 9, 2025

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 25-6102

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KENNETH R. SPIRITO,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. Raymond A. Jackson, Senior District Judge. (4:19-cr-00043-RAJ-DEM-1; 4:24-cv-00007-RAJ)

Submitted: September 12, 2025
Decided: October 9, 2025

Before GREGORY, THACKER, and RICHARDSON, Circuit Judges.

Dismissed by unpublished per curiam opinion.

PER CURIAM.

Appendix A

Kenneth R. Spirito seeks to appeal the district court's order denying relief on his 28 U.S.C. § 2255 motion. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(B). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists could find the district court's assessment of the constitutional claims debatable or wrong. *See Buck v. Davis*, 580 U.S. 100, 115-17 (2017). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the motion states a debatable claim of the denial of a constitutional right. *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

We have independently reviewed the record and conclude that Spirito has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NEWPORT NEWS DIVISION, FILED DECEMBER 12, 2024

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

CRIMINAL ACTION NO. 4:19-CR-43

KENNETH R. SPIRITO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Filed December 12, 2024

MEMORANDUM OPINION AND ORDER

Before the Court is Kenneth R. Spirito's ("Petitioner") Motion to Vacate, Set Aside, or Correct a Sentence Pursuant to Title 28, United States Code, Section 2255 ("§ 2255 Motion"). ECF No. 181 ("Pet'r's Mot."). The Government filed a Response in Opposition and Petitioner replied. ECF No. 190 ("Resp. Opp'n"); ECF No. 191 ("Pet'r's Reply"). The Court held a hearing on Petitioner's

alleged *Brady* violation, and this matter is now ripe for judicial determination. ECF No. 194. For the reasons below, Petitioner's Motion is **DENIED.**[1]

I. FACTUAL BACKGROUND

On September 9, 2019, Petitioner was named in a 24-count Superseding Indictment. ECF No. 29. Counts One through Eleven and Nineteen charged Petitioner with Conversion and Misapplication of Property from Organization Receiving Federal Funds, in violation of 18 U.S.C. §§ 666(a)(1)(A) and 2. *Id.* Counts Twelve through Seventeen charged Petitioner with Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity, in violation of 18 U.S.C. §§ 1957 and 2. *Id.* Count Eighteen charged Petitioner with Falsification of Records in Federal Investigations, in violation of 18 U.S.C. § 1519. *Id.* Counts Twenty through Twenty-three charged Petitioner with Perjury, in violation of 18 U.S.C. § 1623(a). *Id.* Count Twenty-four charged Petitioner with Obstruction of Justice, in violation of 18 U.S.C. § 1503. *Id.*

Petitioner retained Attorney Trey Kelleter in 2019. *See* ECF No. 11. A ten-day jury trial began on February 25, 2020. ECF No. 56. On March 10, 2020, a jury found Petitioner guilty on all Counts except Count Twenty-two. ECF Nos. 86-87.

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1. Petitioner also moved to strike the factual allegations the government made in its Response and to compel the production of discovery information. The Court ruled from the bench and both Motions are **DENIED.**

Appendix B

According to the Presentence Investigation Report ("PSR"), Petitioner misapplied and laundered money from The Peninsula Airport Commission between June 11, 2014, and November 2015. Present. Investig. Rep. ¶ 6. The Peninsula Airport Commission (PAC) was created by the Virginia Legislature to establish and operate the Newport News/Williamsburg International Airport ("PHF"). *Id.* ¶ 7. The PAC handled economic development and the day-to-day affairs of the airport. *Id.* Petitioner was the PAC's Executive Director from January 4, 2009, to May 15, 2017. *Id.* ¶ 8.

Amid changes at PHF that resulted in approximately a 50% decrease in passenger traffic, Petitioner and the PAC Board searched for solutions. *Id.* ¶ 11, 16. Michael Morisi set out to start a new low-cost airline called People Express Airlines ("PEX"). *Id.* ¶ 12. In 2014, Defendant devised a plan for a loan guaranty that benefited PEX. *Id.* ¶ 25. Shortly after acquiring the loan, PEX defaulted, and the PAC was left responsible for PEX's obligations to TowneBank. *Id.* ¶ 42, 45. Petitioner misapplied funds and then used these funds to make payments on the loan. *Id.* ¶ 50.

On April 21, 2020, Petitioner moved for Judgment of Acquittal. ECF No. 98. On July 10, 2020, this Court granted Petitioner's Motion on Count Twenty-four and denied the Motion on the remaining Counts. ECF No. 123. On July 16, 2020, Petitioner was sentenced to 48 months' probation and restitution in the amount of $2,511,153.16. *See* ECF Nos. 127-129. Petitioner appealed. ECF No. 132. On October 5, 2022, this Court amended its Judgment

after the United States Court of Appeals for the Fourth Circuit Vacated Count 19. ECF No. 171.

Petitioner filed the instant motion pursuant to 28 U.S.C. § 2255 on January 9, 2024. On February 20, 2024, this Court ordered Attorney Kelleter, Attorney Littel, and Assistant Federal Public Defender Kmet ("AFPD Kmet") to provide affidavits in response to Petitioner's § 2255 Motion. ECF No. 185. On April 29, 2024, the Government responded to Petitioner's Motion. ECF No. 190. On May 20, 2024, Petitioner replied. ECF No. 191. On November 20, 2024, the Court held a hearing to determine the credibility of Petitioner's alleged *Brady* violation. ECF No. 194.

II. LEGAL STANDARD

A. Section 2255

Section 2255 allows a federal prisoner "claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . [to] move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255. In a § 2255 motion, the petitioner bears the burden of proving his or her claim by a preponderance of the evidence. *See Miller v. United States*, 261 F.2d 546, 547 (4th Cir. 1958).

When deciding a § 2255 motion, the Court must promptly grant a hearing "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b). Motions under

§ 2255 generally "will not be allowed to do service for an appeal." *Sunal v. Large*, 332 U.S. 174, 178-79 (1947). For this reason, issues already fully litigated on direct appeal may not be raised again under the guise of a collateral attack. *United States v. Dyess*, 730 F.3d 354, 360 (4th Cir. 2013). Issues that should have been raised on direct appeal are deemed waived, procedurally defaulted, and cannot be raised on a § 2255 Motion. *United States v. Mikalajunas*, 186 F.3d 490, 492 (4th Cir. 1999).

However, an individual may raise a procedurally defaulted claim if he or she can show (1) "cause and actual prejudice resulting from the errors of which he complains;" or (2) that "a miscarriage of justice would result from the refusal of the court to entertain the collateral attack. . . . [meaning] the movant must show actual innocence by clear and convincing evidence." *Id.* at 492-93. To demonstrate cause and prejudice, a petitioner must show the errors "worked to [his or her] actual and substantial disadvantage, infecting [his or her] entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982). Ineffective assistance of counsel claims should generally be raised in a collateral motion instead of on direct appeal and constitute sufficient cause to review a procedurally defaulted claim. *See United states v. Benton*, 523 F.3d 424, 435 (4th Cir. 2008); *Mikalajunas*, 186 F.3d at 493.

B. *Brady* Violation

The suppression of evidence favorable to the accused violates due process when the evidence is material either

to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83, 86 (1963). A court must vacate a conviction and order a new trial if the prosecution suppressed materially exculpatory evidence. *United States v. King*, 628 F.3d 693, 701 (4th Cir. 2011) (citing *Brady*, 373 U.S. at 83). To secure relief under *Brady*, a defendant must: (1) identify the existence of material evidence favorable to the accused; (2) show that the Government suppressed the evidence; and (3) demonstrate that the suppression was material. *Id.* at 701. When a *Brady* violation is alleged, the burden of proof rests with the defendant. *Id.* at 701-02 (citing *United States v. Stokes*, 261 F.3d 496, 502 (4th Cir. 2001)).

C. Ineffective Assistance of Counsel

A viable ineffective assistance of counsel claim arises when "the counsel's conduct so undermined the proper functioning of the adversarial process that the trial did not result in a just outcome." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To prove a claim of ineffective assistance of counsel, a petitioner must make two showings.

First, a petitioner must show that counsel's performance was deficient ("performance prong"). *Id.* at 687. Counsel's errors must have been so serious that he or she was not actually functioning as counsel as guaranteed by the Sixth Amendment. *Id.* To demonstrate deficient performance, a petitioner must show "that counsel's representation fell below an objective standard of reasonableness" under the prevailing norms of the legal community. *Id.* at 688.

"Judicial scrutiny of counsel's performance must be highly deferential," so "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. That presumption is even greater when counsel's decisions represent strategic, tactical decisions requiring "assessment and balancing of perceived benefits against perceived risks." *United States v. Terry*, 366 F.3d 312, 317 (4th Cir. 2004). A petitioner bears the burden of rebutting this presumption. *Strickland*, 466 U.S. at 689.

Second, a petitioner must show that the deficient performance prejudiced the defense ("prejudice prong"). *Id.* at 687. In other words, counsel's errors must have been so serious that the petitioner was deprived of a fair trial with a reliable result. *Id.* To demonstrate prejudice, a petitioner must prove 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. The Supreme Court defined a reasonable probability as "a probability sufficient to undermine confidence in the outcome." *Id.* In short, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgement of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691.

III. DISCUSSION

In his § 2255 Motion, Petitioner raises two grounds for relief. First, Petitioner asserts that the Government committed a *Brady* violation by suppressing the report of

their pre-trial interview with Michael Morisi ("Morisi"). Pet'r's Mot. at 1 and 5. In support of his *Brady* claim, Petitioner attaches the sworn Declaration of Michael Morisi ("Declaration") Pet'r's Mot. at Ex. 1. Morisi was sentenced to two years in prison after pleading guilty to charges stemming from his time as the President of People Express Airlines. Pet'r's Mot. Ex. 1 ¶ 2. The Declaration summarizes conversations Morisi alleges he had with attorneys following his sentencing. *See id.* Morisi also outlines his prospective testimony if he would have been called to testify at Petitioner's trial. *See id.* Petitioner argues that the Government suppressed the report of this interview in violation of *Brady.* Pet'r's Mot. at 5.

Second, Petitioner asserts Ineffective Assistance of Counsel based on Attorney Kelleter's trial strategy.[2] He alleges that if Attorney Kelleter would have introduced certain exhibits, properly cross-examined the Government's witnesses, and called witnesses in defense, the jury would have had different evidence to weigh. *See id.* Petitioner asserts four Ineffective Assistance of Counsel claims based on: trial counsel's failure to (1) introduce critical exhibits at trial, (2) subpoena and call critical witnesses in his defense, (3) cross-examine critical witnesses for the Government to elicit key pieces

2. Petitioner also retained Attorney David Littel. ECF No 54. The Court has reviewed his affidavit. Attorney Littel is a civil attorney who could not, and did not, provide substantive legal advice in this criminal action. Attorney Littel represented Petitioner in a limited capacity. Hearing Transcript at 92. For that reason, the Court is focusing on Attorney Kelleter's trial strategy in analyzing Petitioner's Ineffective Assistance of Counsel claim.

of evidence for the defense, and (4) object to the entry of an order for restitution and to the entry of a preliminary order of forfeiture and money judgment. *Id.* He alleges that exhibits, lines of questioning, and witness testimony would cast doubt on the Government's theory of the case and would lend "substantial support" to defense positions. *Id.*

A. Claim 1: *Brady* Violation

Petitioner alleges that at sentencing the Government offered to file a motion to substantially reduce Morisi's sentence if he agreed to meet about Petitioner's trial. Pet'r's Mot. at 5; ECF No. 181, Ex. 1 ¶ 4. Petitioner states the contents of the meeting were not disclosed to the defense. *Id.* at 6. Allegedly, the information Morisi provided at the meeting was material and could have been used to exculpate Petitioner and impeach the Government's witnesses. *Id.* at 7-8.

The Government disputes that Morisi made the statements in the Declaration. Resp. Opp'n at 9. The Government argues that even if Morisi made the statements at the meeting, they were not material and would not have impacted the trial outcome. *Id.* Further, the Government argues that the record, Attorney Kmet's affidavit, and Morisi's sentencing transcript either negates Morisi's claims or was information contained in a 2018 report that was turned over in discovery. *Id.* at 17. Lastly, the Government argues that even if Morisi's statements are accurate, they offer Petitioner no relief because it was either already disclosed or would not have produced a different verdict. *Id.* at 17-18.

Appendix B

As noted above, to secure relief under *Brady*, a defendant must first identify the existence of material evidence favorable to the accused. *United States v. King*, 628 F.3d at 701. And as Petitioner's counsel for this Motion correctly notes, "[t]he burden the [Petitioner] has is to show that the government was in possession of information they should have disclosed[.]" Hearing Transcript at 104. This requires the Court to determine the veracity of Petitioner's allegations.

The Court has doubts about the accuracy of Morisi's Declaration and testimony. First, Morisi claims, both in his Declaration and at the hearing, that on the day of his sentencing Assistant United States Attorney Samuels ("AUSA Samuels") told the Court that he would file a Rule 35 motion to reduce Morisi's sentence if he met with AUSA Samuels. Pet'r's Mot. Ex. 1 ¶ 4; Hearing Transcript at 46. Second, Morisi claims that he met with the Government on February 22, 2020. Pet'r's Mot. Ex. 1 ¶ 6; Hearing Transcript at 11. Morisi claims to have met with four attorneys, a Special Agent from the Internal Revenue Service, and "approximately 10 other individuals with the Government." Mot. Ex. 1 ¶ 6. Paragraph seven of Morisi's Declaration states that he discussed four topics at the meeting. *Id.* ¶ 7(a-d). Paragraph eight of Morisi's Declaration states that AUSA Samuels wanted to have another meeting on Monday (February 24, 2020) for "witness prep." *Id.* ¶ 8.

Regarding Morisi's first claim, AUSA Samuels makes no mention of a Rule 35 motion in Morisi's sentencing transcript. *See USA v. Morisi*, 4:19-cr-44, ECF No. 42

(E.D. Va.). AUSA Samuels confirmed this at the hearing. Hearing Transcript at 46. Additionally, Assistant Federal Public Defender Kmet ("AFPD Kmet") stated in her affidavit that Morisi's statements regarding AUSA Samuels filing a Rule 35 motion are incorrect. ("Kmet Am. Aff."); ECF No. 189. Kmet Am. Aff. ¶ 5.

Second, Morisi claims that he met with the Government on Friday, February 22, 2020, but February 22, 2020, was a Saturday. Pet'r's Mot. Ex. 1 ¶ 6. AFPD Kmet's notes state that the meeting was held Monday, February 24, 2020. Kmet Am. Aff. ¶ 6. At the hearing, Morisi originally testified that he met with the government on February 22, 2020, but then clarified that he must have made a mistake. Hearing Transcript at 11; Hearing Transcript at 47. Morisi then claims that the Government asked him to "come the following day for a witness prep meeting." *Id.* at 13. If he first met with the Government on February 24, 2020, (as all the evidence indicates) and was asked to come in the next day for witness preparation, then that is inconsistent with his Declaration stating he was asked to come in for witness preparation on February 24, 2024. The testimony is also inconsistent with the statement that the two meetings took place days apart.

And while Morisi claims to have met with several individuals from the government, AFPD Kmet states that only her, the Government's attorneys, and the Special Agent were present. Kmet Am. Aff. ¶ 4; Hearing Transcript at 61. Further, AFPD Kmet states that her notes do not contain the information that Morisi provided in paragraphs seven and eight of his Declaration. Kmet

Am. Aff. ¶ 7. Morisi's Declaration and testimony are riddled with inconsistencies and directly conflict with the testimony and affidavit of his attorney. During the hearing, Morisi was asked about how he gathered the information in his Declaration. Hearing Transcript at 48. Morisi replies that he did not take any notes of the meeting because "[t]here are certain things that happen in our lives that we don't forget the details, and I don't forget the details of what happened that day." *Id.* But Morisi seems to misremember the date of the meeting, and much of what he drafted in his declaration conflicts with what his own attorney recorded that day.

Attorney Kelleter's testimony at the hearing, paired with AFPD Kmet's affidavit, casts more doubt on Morisi's Declaration. On cross-examination, Attorney Kelleter noted that he receives *Jencks* materials that are reports of government witnesses in advance of trials. Hearing *Id.* at 87. Attorney Kelleter further testified that there are "plenty of times that [the Government has] prepared a witness and didn't produce more *Jencks* because there was nothing different" between an initial meeting and witness prep. *Id.* at 88. Next, Attorney Kelleter identified a document with a *Jencks* number on it and confirmed that he received the document. *Id.* at 88-89. Petitioner has failed to establish through witnesses that Morisi presented any new information at the February 24, 2020, meeting.

Another glaring issue with Morisi's Declaration is how it was drafted. At the hearing, AUSA Samuels asked Morisi how he put together the Declaration. Hearing

Transcript at 52. Morisi testified that "[t]he initial draft was made by [Petitioner's Counsel]" in this matter. *Id.* Morisi further testified that, after an hour and a half conversation, Petitioner's counsel "simply summarized everything that [Morisi] said." *Id.* He further testified that he "went through and edited and added things and removed some things and fixed it." *Id.* When asked whether he remembers what he changed, Morisi said he does not remember. *Id.* Morisi does not know which portions of the Declaration are his own words and which portions Petitioner's counsel "summarized." It is impossible for the Court to know either.

This information taken together suggests the parties only met once, on February 24, 2020, and that Morisi did not divulge the information he claims in his Declaration. Put simply, after considering the sentencing transcript, and the testimony of Attorney Kelleter and AFPD Kmet, Morisi's Declaration is unconvincing. Morisi has little to no credibility, and Petitioner does not credibly assert that the Government suppressed or withheld evidence from Petitioner's defense counsel.

Morisi then asserts that if he would have been called to testify, he would have testified to information that, in Petitioner's view, was material and exculpatory. Pet'r's Mot. Ex. 1 ¶ 9(a-j); Pet'r's Mot. at 7-8. He does not assert in his declaration that he shared this information with the parties at the meeting. He does not establish that the Government suppressed or withheld evidence from Petitioner's defense counsel. Thus, Petitioner has failed to meet his burden under *Brady*.

Even if Petitioner did allege that the Government suppressed evidence, he has not proven that the evidence was material. Evidence is material if there is a "reasonable probability that its disclosure would have produced a different result." *United States v. Parker*, 790 F.3d 550, 558 (4th Cir. 2015) (quoting *United States v. Bartko*, 728 F.3d 327, 340 (4th Cir. 2013)). The question is "whether in [the suppressed evidence's] absence [the defendant] received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Juniper v. Davis*, 74 F.4th 196, 210 (4th Cir. 2023) (citing Kyles v. Whitley, 514 U.S. 419, 434 (1995)). A court "do[es] not ignore other evidence presented at trial" in determining its confidence in the outcome. *Id.* Instead, courts "evaluate the whole case, taking into account the effect that the suppressed evidence, had it been disclosed, would have had on the evidence considered at trial." *United States v. Ellis*, 121 F.3d 908, 918 (4th Cir. 1997).

This Court concluded, and the Fourth Circuit agreed, that Petitioner was solely responsible for deciding how to fund the accounts. *See United States v. Spirito*, 36 F.4th 191, 200 (4th Cir. 2022) ("[T]he Government presented adequate evidence to support the jury's conclusion that the Defendant . . . was responsible for allocating restricted funds for a loan guarantee to [People Express]."). The Fourth Circuit concluded "[t]o be clear, the PAC executed the loan guaranty, but [Petitioner] single-handedly decided how to fund the collateral accounts that were pledged in support of the loan." *Id.* Nothing in Morisi's Declaration relates to the facts that supported the jury's guilty verdict. This Court concluded that the Government presented

adequate evidence to support the jury's conclusion. Evidence that is unrelated to the jury's conclusion would have no effect on the evidence considered at trial.

AFPD Kmet's testimony reveals a similar story. AFPD Kmet testified that she thought that Morisi was not called as a witness because "they had already gotten the information that they needed from another witness" and that "Morisi's testimony would have been duplicative." Hearing Transcript at 67. Further supporting the Court's conclusion that the evidence the Government allegedly withheld was not material, Attorney Kelleter testified that Morisi did not come up frequently at trial because "[t]he jury trial focused on how the loan guarantee was funded, and that really didn't have anything to do with Mr. Morisi." *Id.* at 78.

When a *Brady* violation is alleged, the burden of proof rests with the defendant. *United States v. King*, 628 F.3d at 701-02 (citing *United States v. Stokes*, 261 F.3d 496, 502 (4th Cir. 2001)). Petitioner has failed to meet that burden. Petitioner does not credibly assert that the Government had and suppressed evidence from defense counsel. Even if Petitioner did credibly assert this, the evidence Petitioner presents is not material because it is not reasonably probable that its disclosure would have produced a different result. Accordingly, Petitioner's *Brady* claim is unsuccessful.

B. Claim 2: Ineffective Assistance of Counsel

For the following reasons, Petitioner's first three Ineffective Assistance of Counsel claims do not satisfy

the performance prong of the *Strickland* test. Petitioner's Ineffective Assistance of Counsel claim regarding the restitution order is not cognizable under § 2255, and his claim regarding the forfeiture money judgment was raised on appeal. Therefore, as explained further below, each of the Petitioner's Ineffective Assistance of Counsel claims lack merit.

i. Failure to Introduce Exhibits at Trial, Failure to Cross-Examine Witnesses for the Government, and Failure to Call Witnesses for the Defense

Petitioner alleges that he was not afforded effective assistance of counsel at trial. The first three claims allege that Attorney Kelleter unjustifiably omitted exhibits, evidence, and witnesses that fit the defense's theory. Pet'r's Mot. at 19. Stated differently, each of these claims takes issue with Attorney Kelleter's trial strategy. Accordingly, these three claims will be consolidated into one analysis.

First, Petitioner alleges that Attorney Kelleter's strategy focused on demonstrating that members of the PAC, not Petitioner, had made the decision to provide the loan guaranty and to allocate PAC funds to a specific account. *Id.* at 9. Petitioner argues that Attorney Kelleter failed to introduce exhibits that would have provided direct evidence of those theories and that other members of the PAC had a conflict of interest. *Id.*

Second, Petitioner alleges trial counsel's failure to introduce the exhibits from claim one prevented Petitioner

from cross-examining several Government witnesses. *Id.* at 15. He argues that this failure, and the subsequent failure to cross-examine witnesses, would have supported the defense's theory. *Id.* Petitioner claims that trial counsel could have used the exhibits from claim one to elicit points from witnesses on cross-examination. *Id.*

Third, Petitioner alleges that trial counsel should have called seven witnesses that would have provided support to the defense theories. *Id.* at 16. In sum, Petitioner claims that trial counsel focused on demonstrating that other members of the PAC, not petitioner, were making decisions and that trial counsel did not implement a strategy to reflect that theory. *See id.* at 9, 11-13, 15, 17, 18.

The Government argues that defense counsel implemented a sound trial strategy, and that Petitioner cannot demonstrate it was objectively unreasonable. Resp. Opp'n at 22. The Government argues that the trial theory, as outlined in Attorney Kelleter's Affidavit, was not the theory that Petitioner alleges. ("Kelleter Aff."); Resp. Opp'n Ex. 1. Instead, the Government argues that "[t]he theory at trial was that 'no one committed a crime and no one acted inappropriately, not [Petitioner] and not the PAC." Resp. Opp'n at 21. The Government further argues that any documents consistent with trial counsel's theory was already presented to the jury, and any remaining evidence is inconsistent with the theory and at odds with the theory Petitioner presented at trial. Resp. Opp'n at 20.

Attorney Kelleter's Affidavit and the trial transcript supports the Government's argument that trial counsel

implemented an objectively reasonable trial strategy. Attorney Kelleter stated in his opening statement that "nobody involved in this committed a crime." Trial Transcript at 115, ECF No. 112. Attorney Kelleter further noted that he did not "want to give the impression that in saying that other people did certain things" that he was "pointing the finger and saying . . . they did something wrong." *Id.* at 114-15.

Strickland requires that reviewing courts afford counsel wide latitude to make strategic decisions. *Cox v. Weber*, 102 F.4th 663, 676 (4th Cir. 2024). And "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690. Attorney Kelleter was mindful of the effect of duplicative evidence on juries. Kelleter Aff. at 4. Petitioner claims that not calling a particular witness was a critical misstep. Pet'r's Mot. at 17. Petitioner contends that calling this witness would have exposed the witness's "obvious, material conflict of interest" and the witness's had first-hand knowledge of transaction, making it clear that Petitioner did not play a role in bringing the parties together. *Id.* Attorney Kelleter's strategic decision not to call a particular witness makes sense: probing a witness about his ethics and simultaneously asking him to support the defense's narrative may not be useful. Instead, Attorney Kelleter chose to pursue the same point in a different way. *Cox*, 102 F.4th at 676. Attorney Kelleter pursued the theory that no one was acting inappropriately, which would be fundamentally at odds with calling witnesses to testify about their conflicts.

Attorney Kelleter also used documents to support this theory in his closing statements. The Court inquired as to whether these documents were in evidence, and Attorney Kelleter responded that all the documents he was referencing were in evidence. Trial Transcript at 1660-61.This fits the Government's argument that any documents referenced by habeas counsel that are consistent with the trial theory are duplicative of what was already introduced into evidence and presented to the jury. Attorney Kelleter also references an email the Government used in their closing to suggest Petitioner was "leading efforts on the loan guaranty." *Id.* at 1663. Attorney Kelleter then refutes this evidence by stating the testimony in the case demonstrated the email had nothing to do with the loan guaranty. *Id.* Petitioner's criticism of Attorney Kelleter's decisions at trial may be fair, "[b]ut we must still give it deference under *Strickland.*" *Cox v. Weber*, 102 F.4th at 676.

Attorney Kelleter has demonstrated a sound trial strategy. He has demonstrated that he understood that presenting evidence of members of the PAC's wrongdoing was at odds with a theory that no one committed a crime or acted inappropriately. He also introduced exhibits to bolster his trial theory. After investigating the laws and facts relevant to plausible options, Attorney Kelleter made a series of strategic decisions to which the Court must afford high deference. Because counsel's representation does not fall below an objective standard of reasonableness, Petitioner has not satisfied the performance prong outlined in *Strickland.* Accordingly, Petitioner's Ineffective Assistance of Counsel claim is unsuccessful.

ii. Failure to Object to the Government's Restitution Order and Preliminary Order of Forfeiture

Finally, Petitioner argues that counsel was ineffective because he failed to object to the Government's request to enter an order for restitution and to object to the preliminary order of forfeiture and money judgment. Pet'r's Mot. at 20. Petitioner argues that trial counsel failed to raise the issue of a money judgment or the amount of restitution during sentencing. *Id.* at 21. He argues that as a result he had no actual notice that the Court entered a judgment against him. *Id.* Petitioner further alleges that trial counsel failed to argue that Federal Rule of Criminal Procedure 32.2(b)(1)(A) requires the Court to "determine what property is subject to forfeiture under the applicable statute" and "whether the Government has established the requisite nexus between the property and the offense." *Id.* Petitioner argues that he could have challenged the constitutionality of the forfeiture if counsel raised the issue. *Id.*

The Government argues that to the extent the claims were raised and decided on direct appeal, they cannot be raised here. Resp. Opp'n at 22. The Government also argues that the claims are not cognizable as a collateral attack. *Id.* Finally, the Government claims that Petitioner is challenging non-custodial aspects of his sentence that are not subject to challenge under § 2255. *Id.* at 22-23.

Appendix B

a. Order of Restitution

The statutory text of § 2255 precludes Petitioner's challenge to the restitution order. Indeed, "virtually all federal courts of appeals to address the issue have concluded that challenges to restitution orders are not cognizable under § 2255." *United States v. Mayhew*, 995 F.3d 171, 183 (4th Cir. 2021). Petitioners cannot use § 2255 motions to obtain relief from restitution orders. *See id.* (affirming the dismissal of a petitioner's claim that his counsel provided ineffective assistance of counsel when he failed to object to a restitution calculation).

By its plain terms, § 2255 provides no avenue to challenge a restitution order. *Id.* at 183. Therefore, Petitioner's Ineffective Assistance of Counsel claim is unsuccessful.

b. Forfeiture Money Judgment

A § 2255 petitioner may not "recast, under the guise of a collateral attack, questions fully considered" on direct appeal. *Boeckenhaupt v. United States*, 537 F.2d 1182, 1183 (4th Cir. 1976). A Petitioner cannot "circumvent a proper ruling . . . on direct appeal by []raising the same challenge in a § 2255 motion." *United States v. Dyess*, 730 F.3d 354, 360 (4th Cir. 2013).

Petitioner argues that he had no actual notice of the judgment against him because of trial counsel's errors. The Fourth Circuit already fully considered this question and determined that "[Petitioner] had notice

that forfeiture would be a part of his case through the issuance of a Presentence Investigation Report, motion for a preliminary order of forfeiture, and preliminary order of forfeiture—the latter two of which noted the precise forfeiture amount." *Spirito*, 36 F.4th at 213. Petitioner cannot relitigate this issue and his Ineffective Assistance of Counsel claim fails.

IV. CONCLUSION

For the reasons set forth above, Petitioner's Motion to Vacate, or Correct a Sentence Pursuant to 28 U.S.C. § 2255 is **DENIED.** ECF No. 181

This Court may issue a certificate of appealability only if the applicant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b)(1). This means that Petitioner must demonstrate that "reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)); *see United States v. Swaby*, 855 F.3d 233, 239 (4th Cir. 2017). Petitioner's claims are based upon incorrect interpretations of statutory provisions and judicial precedent. As such, Petitioner fails to demonstrate a substantial showing of a denial of a constitutional right, and a Certificate of Appealability is **DENIED.**

In addition, the Court **ADVISES** Petitioner that he may appeal from this Final Order by forwarding a

written notice of appeal to the Clerk of the United States District Court, United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510. The Clerk must receive this written notice within sixty (60) days from this Order's date. The Court **DIRECTS** the Clerk to provide a copy of this Order to all Parties.

The Court **DIRECTS** the Clerk to mail a copy of this Order to counsel for Petitioner and Respondent.

IT IS SO ORDERED.

Newport News, Virginia
December 12, 2024

s/ Raymond A. Jackson
United States District Judge

APPENDIX C — EXCERPTS OF TRANSCRIPT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NEWPORT NEWS DIVISION, DATED NOVEMBER 20, 2024

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

CRIMINAL ACTION NO. 4:19cr43

UNITED STATES OF AMERICA,

v.

KENNETH R. SPIRITO,

Defendant.

- - - - - - - - - - - - - - - - - -

CIVIL ACTION NO. 4:24cv7

KENNETH R. SPIRITO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Appendix C

TRANSCRIPT OF PROCEEDINGS

November 20, 2024

BEFORE:

THE HONORABLE RAYMOND A. JACKSON
United States District Judge

[3][TABLES INTENTIONALLY OMITTED]

* * *

MORISI, M. – DIRECT

[11]A. Right. I recall the Judge said, I understand that there is going -- there's going to be a meeting to get together and talk about this other case, and she thought that was a good thing, and he said yes.

THE COURT: I take it you are going to get to the point at some point?

MS. HARRIGAN: Yes, Your Honor.

BY MS. HARRIGAN:

Q. Did you meet with the government the day of your sentencing?

A. No.

Q. Do you remember when you met with the government?

A. It was a couple of days later, I think the 22nd -- maybe the 22nd. It was a couple of days after the sentencing.

Q. Do you remember where the meeting was?

A. It was in Mr. Samuels' offices in Newport News.

Q. Do you remember who was at the meeting?

A. Mr. Samuels was there, Mr. Keel -- Ms. McKeel among her -- she was introduced. There were probably eight or ten people in the room. Some were introduced. I think Chris Waskey was there. I don't remember everyone was there. Ms. Kmet was there with me.

Q. Do you remember seeing anyone taking notes at that meeting?

A. I don't know. I don't recall.

* * *

MORISI, M. – CROSS

[46]Q. Mr. Morisi, you claim that you were asked to sit down with us after the trial, correct, sir?

A. Yes.

Q. And in the declaration that you prepared and -- I'm not offering this as evidence, but just to orient you, you claim that I told the Judge that we would file a Rule 35 for you and reduce your sentence by 50 percent?

A. If that -- I don't know if that's what is written. It was not you that ever indicated 50 percent. It was Kirsten Kmet who told me that it would be a 50 percent.

Q. You claim that Brian Samuels told the Judge that he would file a Rule 35 if I agreed to a meeting with him regarding the upcoming trial of Kenneth Spirito?

A. That's correct. You said that in the trial -- in the sentencing. As I recall, she said, I understand you guys are going to get together and meet about the case, and you said yes, and she said, then I'll be expecting a ruling or filing or Rule 35. That's when Kirsten came out and explained to me what all that meant.

Q. So if I made an offer to file a Rule 35 for you, it should be in that sentencing transcript that we looked at? A. When the case was over, I was halfway out the door, so I don't know if it's in the sentencing transcript or not. I haven't read it.

Q. Okay. Mr. Morisi, do you recall that after your [47] sentencing, you were not happy with the two years that you received, so we didn't meet the next day, we met on Monday, February 24th?

A. Yes.

Q. Do you remember that, sir?

A. I do.

Q. Because in your declaration you say we met on Friday, February 22nd.

A. Forgive me. I was -- recollection, so if it was incorrect, then it was incorrect.

Q. February 22nd was actually a Saturday, sir?

A. Okay. So then it's clear to you that that was just a mistake.

Q. Well, this is important, Mr. Morisi, because this is what I have as the basis for what you are claiming that the government failed to do something. Do you understand that, sir?

A. Completely understand.

Q. Mr. Morisi, in this declaration that you put together, this was done, and you laid out some things at a meeting that occurred on February 24th, 2020, at the U.S. Attorney's office, right?

A. Yes.

Q. Did you take notes from that?

A. I didn't.

[48]Q. These things that you claimed on direct examination that you told us, is there any other documentation that we have of that other than your book?

A. Perhaps your record of the meeting.

Q. You didn't take any notes, sir?

A. I did not.

Q. And so when you put this together, this was your best estimate of what was said?

A. There are certain things that happen in our lives that we don't forget the details, and I don't forget the details of what happened that day.

Q. And Ms. Harrigan went through some things that you said. Are you telling us that that's all you said at that meeting?

A. Well, I answered the questions that I was asked.

Q. Do you remember what else you said at the meeting?

A. I remember that I made it clear to you guys, everyone at the table, that I didn't think that it was -- that it was right that Mr. Spirito was charged, and when I said the -- when I made the comment about the attorneys all agreeing that it was legal, one of you at the table said, the attorney told him it was legal to secure the loan but not to pay it, which sounded ridiculous to me, because once funds are committed, then you don't have any choice and control over them anymore. There were questions asked -- well, I'll just let you ask the questions.

Appendix C

* * *

[52]day?

A. Am I okay to open it and read it?

Q. You don't remember offering the declaration, sir?

A. I do.

Q. How did you put that together?

A. I sat down, wrote it.

Q. Anybody help you write it? Were there any drafts? That is two questions. Anybody help you write it?

A. No one else made -- write the final. The initial draft was made by Ms. Harrigan.

Q. Wait a minute. Wait a minute. Ms. Harrigan put together a draft declaration for you, sir?

A. After an hour and a half conversation, she simply summarized everything that I said, because I didn't know the format, and so -- and that was sent to me, but it was really just exactly what I had told her on the phone.

Q. Are these her words, then, in the declaration, or your words, sir?

A. They are all mine now because I went through and edited and added things and removed some things and fixed it -- the final one, and you see that I signed as my words.

Q. She took the first pass and sent it to you?

A. She did.

Q. Do you remember what you changed?

A. Oh, no, I don't. When I had the conversation, it was

* * *

KMET, K. – DIRECT

[61]A. It was Mr. Morisi, of course, myself, Mr. Samuels, Ms. McKeel, and Special Agent Waskey, from my recollection.

Q. Do you recall anyone else in the room?

A. No, I do not.

Q. Do you remember where the meeting took place?

A. It was at the Newport News U.S. Attorney's office.

Q. Do you remember who took notes in the meeting?

A. I know I took notes. I can't speak for anybody else.

Q. Had you had any meetings with Agent Waskey on other cases, in your experience?

A. I believe I had a case after Mr. Morisi's case and maybe one before, but I cannot say for a hundred percent the one before. I can say for a hundred percent the one after Mr. Morisi's matter.

Q. Have you ever been in another interview setting with Agent Waskey?

A. I don't believe so.

Q. Did you ever receive any report of that interview from the government after the meeting?

A. I don't remember.

Q. Have you maintained your notes?

A. I have.

Q. How did you take them?

A. On a legal pad.

Q. Did you ever transcribe them or are they just on the

* * *

Appendix C

[67]Paragraph 5.

A. Okay.

Q. And if you could read that paragraph to yourself.

A. Yes.

Q. Okay. And then if you could also read Paragraph 7 to yourself, please, on Page 3 of that document.

A. Yes.

Q. Reviewing those two paragraphs, does that refresh your recollection at all about whether the government had communicated to you about Mr. Morisi testifying as a witness in Mr. Spirito's trial?

A. I think ultimately they didn't call him because they had already gotten the information that they needed from another witness. So I think Mr. Morisi's testimony would have been duplicative. But I do remember the information now relative to Mr. Spirito -- Mr. Morisi giving information during the debrief that Mr. Spirito was the one that came up with the idea about the loan. He came to Mr. Morisi about that.

Q. So that's your recollection of that statement. Was that captured in your notes contemporaneously at the time?

A. Yes.

Q. When you were -- you just testified that you believed that the government didn't call Mr. Morisi because his testimony would have been duplicative. Who told you that?

A. Mr. Samuels.

[68]Q. How?

A. I think it was after he wasn't called, or maybe it was -- I don't remember when it was, but I do remember that another witness was able to testify as to whatever the information was, and I don't know what the information was.

Q. Did you -- but when I said how, I should have been more specific. How did he communicate that to you? In a phone call? In an e-mail? In a text communication?

A. I don't remember.

Q. You said that the timing of that was after that witness had testified. Was it in the middle of the trial or after the trial?

A. I don't remember. And if I said that it was after the trial, I misspoke. I don't remember when it was. I just know that ultimately the decision was made by the government to not call Mr. Morisi.

Q. But you don't recall whether you were holding out the possibility of having to go to court while your client testified at trial? You're not sure if you held that on a calendar?

A. I don't remember.

Q. Do you maintain your calendar entries from that period of time?

A. Yes.

Q. Do you remember a time after the Rule 35 motion from [69]when -- I'm sorry. Let me rephrase and be more specific. Did Mr. Morisi ever approach you about testifying as a witness for Mr. Spirito's defense?

A. Yes. I don't remember how it came to fruition, but I was reminded of contact from Mr. Morisi about being a witness for Mr. Spirito.

Q. And when did that occur?

A. I believe it was 2021.

Q. At that point were you -- did you continue to serve as counsel for Mr. Morisi?

A. Yes. I believe that there was some compassionate release motions that were either pending or -- I still believe I was counsel of record.

Q. If you could, in that same binder, the one with the white cover, to be clear, if you could turn to tab B, please.

A. Okay.

Q. Do you recognize that communication?

A. I do.

Q. And what is that?

A. This is an e-mail that I authored to Mr. Morisi relative to the contact that he brought to my attention.

Q. And what is the date of that e-mail?

A. May 10, 2021.

MS. HARRIGAN: In that message -- I'm sorry, Your Honor, if I could offer that, please, move for that to be

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[87]have a specific recollection one way or the other.

MS. HARRIGAN: I have nothing further, Your Honor.

THE COURT: All right. You can return those notes.

MR. SAMUELS: Your Honor, if I can just have a moment I can -- or if the Court wants to take a break now, I may be able to really trim this down.

Appendix C

THE COURT: Well, I'm going to give you a chance to do brief examination that you're going to do, and then we will take the break.

MR. SAMUELS: Yes, sir. I understand, Your Honor.

CROSS-EXAMINATION

BY MR. SAMUELS:

Q. Good afternoon, Mr. Kelleter.

A. Good afternoon.

Q. Mr. Kelleter, you've been practicing in federal court for a good number of years, sir?

A. Yes, since 2005, I believe.

Q. And you've done a good number of jury trials already?
A. Yes.

Q. Okay. Mr. Kelleter, in jury trials, you know that you commonly get what we call *Jencks* materials that are the government's reports of witnesses in advance of the trial?

A. Correct.

Q. And then the government will meet with its witnesses, and if the information obtained in those meetings is not [88]different than the reports, then sometimes you don't get anything from those meetings; is that right?

A. Well, I don't know what happens at the government's end. I just know that in my end there have been plenty of times where I did get additional *Jencks* material, I guess you could say.

Q. As a result of witness preparation sessions?

A. Well, correct. I don't know if the government is prepping their witnesses, but I assume that they are, if they are good lawyers, and they are, and I'm aware that it's not all that often that I get follow-up *Jencks* material.

So I can only make the extrapolation that there are plenty of times that they have prepared a witness and didn't produce more *Jencks* because there was nothing different.

How is that?

MR. SAMUELS: And let me just show you. I think I really am going to be done quickly, Your Honor.

If I could show Mr. Kelleter Government's Exhibit 1, and this you will, hope, recognize, sir.

Pull that up. It's coming up, Your Honor. Thank you.

BY MR. SAMUELS:

Q. Mr. Kelleter, you may recognize this as the same document that Ms. Harrigan showed you, an MOI or memorandum of interview of Mr. Morisi, sir?

[89]A. Yes.

Q. And the reason I show this to you is do you see down below, bottom right, how it's got a Bates number on it?

A. Yes. It's *Jencks* with a number, yes.

Q. And is it common when you get *Jencks* materials or other discovery materials from the government that it will have a number on it documenting that the government provided it to you?

A. Yes. Refer to the Bates number?

Q. Yes, sir.

A. I see it all the time.

Q. And this is an interview that was provided to you. Seeing that *Jencks* number on it, can you confirm that you would have gotten this memorandum of interview of Mr. Morisi?

A. Yes.

Q. And would you have reviewed the memorandum of interview in connection with your preparation for the case?

A. Yes.

Q. Did you review any witness statements provided by the government to you?

A. Yes. To turn around, I can't think of any time that I have not reviewed a witness statement given to me by the government. I always review them.

Q. Mr. Kelleter, are there times when the government will give you more witness statements than the witnesses that are

* * *

[96]excused, sir.

THE WITNESS: Yes.

(Witness excused.)

MR. SAMUELS: Your Honor, based on the testimony that has been provided today and the record that has been developed, we'd ask the Court to find that the defendant has not established the basis for a *Brady* claim here. There has been no information or evidence introduced that there has been evidence that's been favorable to the accused, favorable to Mr. Spirito.

There has been no evidence that the government suppressed any information that was favorable to Mr. Spirito. There is information that the government provided a memorandum of interview of Mr. Morisi, but the testimony of Ms. Kmet, that she disagreed with the testimony of Mr. Morisi in terms of whether his declaration, in terms of what he claimed he provided, and that she agreed with the Rule 35 motion that was filed

by the government, which did recite the information that Mr. Morisi provided at the February 24th, 2020, meeting.

Additionally, Your Honor, there has been no indication at all that any information, even if you take it at face value, was prejudicial to Mr. Spirito. Any information must be material such that it puts the trial verdict in a different light, such that it would undermine [97]confidence in the verdict.

There has been nothing that indicates that any information provided by Mr. Morisi, who was, by his own admission, not involved with how the loan was put together, in any way affects the jury's verdict in determining that it was Mr. Spirito and Mr. Spirito alone who determined what funding was used to collateralize the loan, as the Fourth Circuit found in this case.

Based on the evidence that's been produced today, Your Honor, the government would move for a dismissal on the *Brady* claim because the threshold has not been satisfied.

THE COURT: All right.

MR. SAMUELS: Thank you, Judge.

THE COURT: Counsel.

MS. HARRIGAN: Thank you, Your Honor. I actually have motions that I would like to make. So first, Your Honor, and I've briefed this previously, but I would

like to renew it based on the evidence today. I would like to move to compel the government to produce the records they do have regarding the meeting with Mr. Morisi and the contemporaneous notes that the government has indicated are in their possession so that we can review those notes and make an independent decision about whether or not this information would have been material to the impeachment of witnesses at trial, as Mr. Kelleter indicated.

[98]THE COURT: That motion is denied. You should have made that motion before you decided this hearing. You need to respond to what he just argued. You should have made that request long ago. If you believe they have withheld something on this, you should have made that motion.

MS. HARRIGAN: Your Honor, excuse me, but I did. I filed a written motion to compel the production of discovery information based on the government's response because Ms. McKeel, the government proffered in their response, they do, in fact, have notes, and I did make that motion, Your Honor.

THE COURT: All right. Accept that you made your motion, but in this hearing, what you were required to do, which has not been done, was, number one, to identify, since you've said, and if you filed a declaration to help your client with, that there had been a *Brady* violation, meaning the government has withheld some evidence favorable to the defendant that's of a material nature and prejudicial.

You had the responsibility to establish what that was. You did not. You did not. The Court was sitting here waiting to find out what *Brady* information was withheld. You filed a declaration. You called a witness. The Court hasn't heard anything about what was the *Brady* information that was withheld. Now you are saying to the Court, filed the motion so they would tell us what they had. But you [99]made the allegation that it was withheld and filed a declaration in here.

MS. HARRIGAN: Yes, Your Honor. So, to be clear, there is a difference, and the government is trying to rely entirely on a difference of opinion between Mr. Morisi, who says he recalls very clearly what he shared with the government that day, and Ms. Kmet, who said she does not recall very clearly and hasn't reviewed her notes before today. And we do have independent witnesses that were there. It's Ms. McKeel and Special Agent Waskey. And Special Agent Waskey is there and did not create notes. Ms. McKeel was there and did create contemporaneous notes. None of that has ever been produced to the defense. To this day we do not have that information.

We do not have the communications of agents that were made contemporaneously with the meeting with Mr. Morisi, their representations about what he said, whether he was going to be a witness or not. That is impeachment material that was due to the defense, Your Honor.

THE COURT: You are in here on a suspicion. So what you raised is a suspicion that there was a *Brady* violation, because you haven't seen anything, so you think

the government has something that would prove there was a *Brady* violation.

[100]When you bring a *Brady* violation, you need to be able to show that there is something that has been withheld as a material nature to the defendants, either his defense or on the merits or sentencing or something. You did not establish what has been withheld. You got the cart before the horse. You come in here now and say, well, I think they have something that has been withheld. You filed this motion, this 2255, suggesting there was a *Brady* violation.

Even your own witness here has no clear recall what is allegedly different or what is withheld. He's speculating about what was said.

MS. HARRIGAN: Your Honor, respectfully, I cannot show you what is different without -- there is a difference in recollection between what Mr. Morisi said and the government's representations in the Rule 35 motion. There is an independent and contemporaneous record maintained by the government, and they did not disclose the facts of the interview or the existence of those notes, and they kept Mr. Morisi on their witness list.

There is no disagreement about these things, Your Honor, because I think it's important to talk about what the government agrees. The government agrees they had a meeting and interviewed Mr. Morisi on February 24th, 2020. They also -- and I don't think this is uncont -- I don't think this is contested at all, but I'm sure Mr.

Samuels will [101]correct me. They did not produce to the defense a single record or shred of evidence, information, or communication about the meeting they had with Mr. Morisi on February 24th, 2020.

There is no disagreement about this fact. Again, Mr. Samuels will correct me if I'm wrong about this. The government maintains Mr. Morisi on a witness list the entirety of trial, and they did not communicate to the defense that they did not intend to call him.

THE COURT: You allege that there is some exculpatory notes -- don't shake your head -- exculpatory notes that were withheld or not provided. Now, how did you reach the conclusion that there was some exculpatory notes without seeing these exculpatory notes? You had Mr. Morisi up here. Even his own lawyer testified that what he alleges in his declaration is inconsistent with the notes that she had. So how do you say there is some exculpatory evidence of something that's been withheld if you've never seen anything?

MS. HARRIGAN: Well, first, Your Honor, I want to be clear that it's not just exculpatory information that is due to the defense and is covered by *Brady*. It is also impeachment material, and it also goes, Your Honor – it can -- it is information that could lead to the discovery of exculpatory or impeachment information. And, Your Honor, I [102]can only prove to you what I have in front of me, when the government concedes if it is not exculpatory and is not impeachment, they should then disclose that so that -- so that this Court can assess it.

I understand that Mr. Samuels brought the notes with him today, and so if that information -- then -- but, Your Honor, I have a declaration from an individual who says, I told the government these things.

THE COURT: Based on his recall with no notes, and you drafting the first version of the declaration.

MS. HARRIGAN: And I do want to -- Your Honor, I want to be clear and address that, since Mr. Samuels intimated something about that. Your Honor, I was a federal prosecutor. I was a state prosecutor before that. I understand about *habeas* practice and procedure. I had a staff member present. Mr. Morisi shared information. Someone contemporaneously took notes. A summary of those typed notes was sent to Mr. Morisi. He edited it and averred, and he confirmed that today, and, Your Honor, that is practice. That is practice from when I was a prosecutor defending *habeas* petitions from indigent defendants.

So, Your Honor, there is nothing untoward. There is no words I'm putting in his mouth. That is his recollection of that meeting. Ms. Kmet sat on the stand and said she doesn't have much of a recollection, she just has a [103] handful of notes that she reviewed.

THE COURT: What he said, some of it is inconsistent with her recall and her notes.

MS. HARRIGAN: Your Honor, there are agents -- there are government witnesses available. If Mr. Samuels,

Ms. McKeel, or Agent Waskey wanted to come on the stand and say, here is -- Ms. Kmet's recollection, she has -- and, candidly, Your Honor, in the record she had to amend an affidavit she submitted because she didn't recall an e-mail communication she had. She denied something ever happened.

THE COURT: It's your burden to show there is a violation, and you can argue all day long, but what you have done here does not meet the test. Mr. Morisi, he has no credibility. The Court can't find him to be a credible witness. That's one problem you have here. He's not credible. No judge with sanity would find him credible. He's not credible, and you've not met your burden. This whole argument about the government withholding something from you so you really can't establish something, it falls on deaf ears.

The Court finds you have failed to meet your burden. You have failed to meet your burden, and the Court heard your arguments, but that's it in a nutshell.

MS. HARRIGAN: Your Honor, are you also denying the motion to compel production, the discovery information?

[104]THE COURT: Motion to compel discovery is denied.

MS. HARRIGAN: Okay. Thank you, Your Honor. And I do, for the record, I want to make sure I preserve this argument on the record about the credibility of Mr.

Morisi, because, Your Honor, that is a credibility issue that should have been weighed by the jury. That goes to the weight of that potential evidence.

And, Your Honor -- I did not have to establish here today that Mr. Morisi would have been called as a witness and that he would have testified and that he would have then convinced the jury to change their minds. So it's not the burden that the defendant has.

The burden the defendant has is to show that the government was in possession of information that they should have disclosed, and that information would have led to the discovery of information material to the defense, whether it be impeachment of other witnesses the government called, or whether it be the discovery of other witnesses. I don't have to vouch for Mr. Morisi's credibility and whether he would have won a jury over at the end of the day.

THE COURT: Counsel, you are missing the point. This has nothing to do with his credibility before a jury. The Court has to make a determination about the conflict between his allegations or Mr. Spirito's allegations there is a *Brady* violation versus the government's position. [105] That's the credibility thing that the Court's addressed, not what the jury would have decided had he been in the courtroom. The Court is saying he has no credibility with this Judge in terms of what he's testifying to, and that's a decision the Court has to make, and I think the Court is on solid ground.

MS. HARRIGAN: And, Your Honor, I would argue --

THE COURT: You've argued enough.

MS. HARRIGAN: I'm sorry, Your Honor? I'm sorry. I did not hear. I'm sorry. I did not mean to speak over you. I apologize.

THE COURT: Whatever you have to say, I've indicated that you have failed to meet your burden. I'm just being candid with you, the way you are going on about this.

MS. HARRIGAN: I appreciate your candor, Your Honor. I do also want to put on the record --

THE COURT: It's on the record. Everything that has been said here today is on the record.

MS. HARRIGAN: Thank you. Your Honor, I want to make sure I point to the fact the government has not offered an alternative version of events for Mr. Morisi. They have not. The government has not -- you are -- Your Honor, there actually is no evidence submitted by the government to show that their notes don't corroborate what Mr. Morisi said on [106]the stand today.

There is actually no evidence that suggests that those notes wouldn't have corroborated exactly what he said. We don't have them, and they have not proffered any evidence, and I would move -- I will make another motion, Your Honor, which is to strike the factual allegations the

government made in its response, because they had an opportunity today to present evidence, and they did not.

And so I would ask that you strike those factual representations they made in their responsive briefing before this Court because it shouldn't be considered as facts. They did not offer any facts to counter the narrative that Mr. Morisi had about what was said that day.

THE COURT: Mr. Morisi has not offered anything to establish the damage on exculpatory information withheld or that he would provide something exculpatory about Mr. Spirito, period.

Now, maybe we are into different hearings here, Counsel, but he has not. The Court waited for you to get to it. You never got to it. Now, that's the end of it. Thank you very much.

MS. HARRIGAN: Thank you, Your Honor.

THE COURT: Anything else?

MR. SAMUELS: No, Your Honor. Thank you.

THE COURT: The Court will be in recess.

[107](Hearing adjourned at 1:44 p.m.)