No. ________________________

IN THE

SUPREME COURT OF THE UNITED STATES

ANDREW HACKETT, PETITIONER,

vs.

UNITED STATES, RESPONDENT.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, through counsel, asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed in forma pauperis. Counsel was appointed in the court of appeals under the Criminal Justice Act, 18 U.S.C. § 3006A(b). This motion is brought pursuant to Rule 39.1 of the Rules of the Supreme Court of the United States.

Respectfully submitted,

August 24, 2026

s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law

No. ____________________

IN THE

SUPREME COURT OF THE UNITED STATES

ANDREW HACKETT, PETITIONER,

vs.

UNITED STATES, RESPONDENT.

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Attorney for the Petitioner

QUESTIONS PRESENTED

A. Whether a district court may order restitution after a 90-day deadline set in 18 U.S.C. § 3664(d)(5) when the district court did not make clear prior to the deadline that it was going to order some restitution.

B. Whether a defendant has a Sixth Amendment right to counsel for a colorable motion for new trial filed while his direct appeal is pending.

PARTIES TO THE PROCEEDING

Petitioner, Andrew Hackett, is an individual. The Respondent is the United States of America.

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STATUTES AND RULES

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Andrew Hackett petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

I.
OPINIONS BELOW

The memorandum disposition of the court of appeals, which is unpublished, is included in the appendix as Appendix 1. The district court's order imposing restitution and a docket page with an entry reflecting denial of a motion to vacate the order are included as Appendix 2. The order denying Petitioner's motions for new trial and for appointment of counsel, which was recorded only in a docket entry, are reflected in the docket page included as Appendix 3.

II.
JURISDICTION

The judgment of the court of appeals was entered on May 27, 2026. *See*

App. A001. The jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U.S.C. § 1254(1).

III.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

18 U.S.C. § 3664(d)(5) provides:

> If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing.

Rule 33(b)(1) of the Federal Rules of Criminal Procedure provides:

> Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case.

The Sixth Amendment to the Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

IV.

STATEMENT OF THE CASE

A. JURISDICTION IN THE COURTS BELOW.

The district court had jurisdiction under 18 U.S.C. § 3231. The court of appeals had jurisdiction under 28 U.S.C. § 1291.

B. FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED.

1. Charges, Other Bad Acts, and Conviction.

a. Charges.

Petitioner and four codefendants were charged with one count of conspiracy to commit securities fraud and one count of substantive securities fraud. *See* Dist. Ct. Dkt. #1.[1] The indictment alleged a "pump-and-dump" scheme with the stock of a company initially named First Harvest Corp. but then renamed Arias Intel Corp, and also known by its "ticker symbol" of ASNT. *See* Dist. Ct. Dkt. #1, at 2. The scheme was to artificially inflate the price of the stock and then engage in manipulative trading. *See* Dist. Ct. Dkt. #1, at 2-3. Petitioner was alleged to have loaned the company money in exchange for notes convertible into company stock, engaged call room operators to promote the stock, and engaged in manipulative trading. *See* Dist. Ct. Dkt. #1, at 4-5.

[1] "Dist. Ct. Dkt." refers to the docket in *United States v. Hackett* (C.D. Cal. No. 2:15-cr-00407-TJH). "Dkt.(23-595)" refers to the docket in *United States v. Hackett* (9th Cir. No. 23-595). "Dkt.(25-2247)" refers to the docket in *United States v. Hackett* (9th Cir. No. 25-2247).

b. Other bad acts.

The specific "pump-and-dump" scheme alleged in the indictment was not the only such scheme the government claimed Petitioner had been involved in. In a motion in limine filed prior to trial, it claimed there were multiple other securities which Petitioner and other defendants had schemed to "pump and dump." Dist. Ct. Dkt. #172, at 2, 4-7. These other securities had been discussed in conversations Petitioner and his codefendants had with an informant who was being used in the investigation. *See* Dist. Ct. Dkt. #172, at 4-7.

Based on these discussions being "contemporaneous," Dist. Ct. Dkt. #172, at 10, as well as other factors, the government argued the discussions were admissible in the charged case. The government argued the evidence was "inextricably intertwined" and "intrinsic evidence" of the charged scheme, so Federal Rule of Evidence 404(b) did not apply. Dist. Ct. Dkt. #172, at 2. Alternatively, it argued the evidence was admissible under Rule 404(b) "because it shows defendants' knowledge, plan, and modus operandi." Dist. Ct. Dkt. #172, at 2. The district court initially assigned to the case agreed with the government, at least in part, and the district court that ultimately tried the case also agreed. *See* Dkt.(25-2247) #6.1, at 4 (opening brief collecting citations to record).

c. Trial and conviction.

The government ultimately chose to present evidence of just the charged scheme, using an informant, a cooperating codefendant, and a cooperating witness charged in a different case. *See* Dkt.(25-2247) #6.1, at 6-11 (summarizing testimony). The government also introduced some bank records and text message evidence. *See* Dkt.(25-2247) #6.1, at 11-12. After a trial lasting a little more than a week, the jury found Petitioner guilty of both the conspiracy count and the substantive securities fraud count. *See* Dist. Ct. Dkt. #301.

2. Sentencing and Restitution Order.

Prior to sentencing, the government filed a sentencing memorandum indicating it intended to seek restitution, but "request[ing] . . . that a restitution hearing be calendared for approximately 45 days after the initial sentencing hearing, given the nuanced analysis necessary to properly calculate victim-by-victim losses here." App. A013. The district court wondered in a subsequent hearing whether it would have jurisdiction once it had sentenced Petitioner, but the government assured the court it would have jurisdiction. *See* App. A015-17. The probation officer confirmed this, telling the court that 18 U.S.C. § 3664(d)(5) "allows you to set a restitution hearing 90 days after sentencing to fully determine the restitution and square that away." App. A018.

The court then held a sentencing hearing on June 9, 2022. *See* Dist. Ct. Dkt. #412. It imposed a custody sentence of 46 months and a supervised release term of three years. *See* Dist. Ct. Dkt. #413. It put off the question of restitution, as the prosecutor and probation officer had suggested. It asked the prosecutor, "With respect to restitution, what is the government's request in terms of the timing of the restitution hearing?," and the prosecutor responded:

> I think 45 days out, or approximately, would be great. We can go ahead and gather up the victim impact statements that we've received so far. The office will receive those until the day I retire. But it gives us a chance to accumulate at least as many as we can get. We'll accumulate those, present the restitution analysis to the defense, hopefully work something out. If we can't, we'll come to you to settle it.

App. A020-21.

The court scheduled a hearing for August 12, 2022, but, when defense counsel filed a motion stating, "Defendant Andrew Hackett has been in transit within the Bureau of Prisons and [defense] counsel has been unable to communicate with Defendant concerning this matter," Dist. Ct. Dkt. #429, at 1, the court continued the hearing to September 16, 2022. *See* Dist. Ct. Dkt. #430. The hearing was then continued again, to November 18, 2022, "[o]n the Court's own motion, due to the defendant having not been transported to the Southern District [of California]," Dist. Ct. Dkt. #446.

In the meantime, the government filed a motion seeking restitution of $67,184.91. *See* Dist. Ct. Dkt. #437. Petitioner's attorney did not file a written response, but did object at the hearing. Among the arguments he made was that there was insufficient evidence to tie any losses at all to Petitioner's conspiracy.

> There is no evidence that any of the so-called victims purchased their shares during the pump portion or the dump portion, because we have no indication when they purchased, and their victim impact statements did not identify – do not all identify when they purchased. And I've reviewed them.
>
> Also as the Court recalls, there were periods in which the price went down significantly of the stock and people purchased – may have purchased during that period. So at this point, we have no analysis when their purchase date

was.

App. A032.

After hearing this argument, the court told the prosecutor, “I will take you up on your offer to submit a proposed order,” and said, “I’ll take this matter under submission.” App. A038. He told Petitioner’s attorney, “any additional submissions, if you choose to make them, I would ask that you submit those within the next two weeks. And you can expect – both parties can expect an order to follow after that two-week time period has elapsed.” App. A038-39. But the court issued an order in less than two weeks and before Petitioner’s attorney’s additional submissions, ordering the full $67,184.91 restitution requested by the government. *See* App. A007-09.

With the order already issued, Petitioner’s attorney filed a motion to vacate the order. *See* App. A042-48. Again he argued that “[t]he Government has not met its burden in calculating the losses of the victims, nor in attributing such losses to the defendant.” App. A048. The government filed an opposition, *see* Dist. Ct. Dkt. #477, and the district court eventually denied the motion, but not until five months after the restitution hearing and more than nine months after the original sentencing, *see* App. A010 (ECF 479).

3. <u>Discovery of Second Informant and Motion for New Trial.</u>

Petitioner had immediately appealed his conviction and sentence after the custody sentence was imposed, *see United States v. Hackett*, 123 F.4th 1005 (9th Cir. 2024); *United States v. Hackett*, No. 22-50142, 2024 WL 5153650 (9th Cir. Dec. 18, 2024) (unpublished), and filed a separate appeal of the restitution order, *see* Dist. Ct. Dkt. #480, which proceeded separately from the first appeal. While these appeals were pending, national newspapers published articles about an informant who had given the FBI false information about President Biden and/or President Biden's family. App. A052. The informant's name was Alexander Smirnov, App. A052, and he was subsequently indicted for making false statements to the FBI about President Biden and/or President Biden's family, App. A056; *see United States v. Alexander Smirnov*, No. 2:24-cr-00091-ODW (C.D. Cal. Nov. 1, 2024), ECF No. 1.

Based in part on discovery and in part on his own recollection from the time he was being investigated, Petitioner realized that Mr. Smirnov was the same person as an "Alex" who had contacts with him about a security whose "ticker symbol" was WRIT. *See* App. A053, A069. This was one of the securities the government had identified in its motion in limine as "inextricably intertwined," "intrinsic evidence," and "show[ing] defendants' knowledge, plan, and modus operandi surrounding pump-and-dump schemes." App. A058-59. At the time of Petitioner's trial, the government had never identified "Alex" as a government informant and had provided no recordings or reports of his separate contacts with Petitioner. *See* App. A057, A060-63, A069-70. Indeed, in one report the government did provide because it was a contact that included the ASNT informant, the government described "Alex" as "Alex last name unknown." App. A062, A080.

Based on his conclusion that "Alex" was in fact a government informant, Petitioner filed a motion for appointment of counsel to file a motion for new trial – on March 24, 2024. *See* App. A049-51. Two weeks later, he supplemented that motion with an exhibit that was a letter from his appellate counsel to the government. *See* Dist. Ct. Dkt. #493. This letter explained Petitioner's conclusion that the "Alex" who made contact with him was a government informant and asked for all recordings, reports, or notes of the informant's contact with Petitioner. *See* App. A069-70. An Assistant United States Attorney replied to appellate counsel's letter a month later with an assertion that "the United States complied with its obligations under Rule 16, Brady, Jencks, and Giglio." App. A072. But this was not because the "Alex" who had contacted Petitioner was not a government informant. Another government attorney in an SEC civil proceeding against Petitioner had confirmed "Alex" was Alexander Smirnov. App. A053.

The district court did not act on Petitioner's motion for appointment of counsel in any way. With the three-year deadline for a motion for new trial based on newly discovered evidence, *see* Fed. R. Crim. Pro. 33(b)(1), approaching, Petitioner filed, on July 5, 2024, a pro se "Motion for New Trial Based on Newly Discovered Evidence and Prosecutorial Misconduct." App. A052-83. The motion explained "Alex" was a government informant who had made contact with Petitioner about the WRIT security during the ASNT investigation, App. A053, A060-62; suggested this contact should have produced recordings, reports, and/or notes, as well as records of any WRIT trades, and such material had not been disclosed, App. A062-63; and pointed out the government itself had argued the discussions of WRIT were "inextricably intertwined," "intrinsic evidence," and "show[ed] defendants' knowledge, plan, and modus operandi surrounding pump-and-dump schemes," App. A058-59. The motion went on to argue that this newly discovered evidence warranted a new trial. *See* App. A060-65. The motion included the report that referred to "Alex" as "Alex last name unknown." *See* App. A061-62, A080. It also included a transcript of an undercover recording in which the informant who had testified in Petitioner's trial said he "assume[d] that uh, WRIT, is uh, is [Alex's] deal" and was told that was correct. App. A061, A075.

Even with the substantive motion filed, the district court failed to act. It did not grant a new trial. It did not appoint counsel. It did not even order a response from the government. Petitioner's appeal of his convictions was still pending and remained pending until it was decided on December 18, 2024. *See United States v. Hackett*, No. 22-50142, 2024 WL 5153650 (9th Cir. Dec. 18, 2024). This was more than eight and a half months after the motion for appointment of counsel was filed and more than five months after the motion for new trial was filed. And the restitution appeal remained pending.

A year after the motion for appointment of counsel was filed, and still without requiring any response from the government, the district court denied both the motion for appointment of counsel and the substantive motion for new trial. *See* App. A011 (ECF 499). The court gave no explanation and did not even issue a freestanding order. It issued only a docket entry stating:

> MINUTE ORDER Denying 492 Motion to Appoint Counsel as to Andrew Hackett (1); Denying 496 Motion for New Trial as to Andrew Hackett (1). (no document attached)

App. A011 (ECF 499).

4. Present Appeals.

After the order denying the motions for new trial and appointment of counsel, Petitioner filed a third appeal. *See* Dist. Ct. Dkt. #500. This appeal was separately briefed from the restitution appeal, but consolidated with the restitution appeal for argument and judgment, as reflected in the memorandum opinion which is the subject of this Petition.

Among the arguments made in the restitution appeal was an argument that the district court did not have authority to issue its restitution order. *See* Dkt.(23-595) #14.1, at 11-14. Petitioner pointed to a 90-deadline set by 18 U.S.C. § 3664(d)(5) and argued Petitioner's case differed from *Dolan v. United States*, 560 U.S. 605 (2010), where this Court held an order after the 90-day deadline was permissible. *See* Dkt.(23-595) #14.1, at 11-14. Petitioner pointed out the district court in *Dolan* had made clear some restitution would be ordered, the *Dolan* opinion had relied on this fact, and the district court here had not made clear some restitution would be ordered. See Dkt.(23-595) #14.1, at 11-14. The court of appeals rejected this argument on the ground that Petitioner "fails to demonstrate how any delay prejudiced him," without addressing *Dolan*. App. A003.

Among the arguments made in the new trial motion appeal was an argument that refusing to appoint counsel violated Petitioner's Sixth Amendment right to counsel because there is a right to counsel for a motion for new trial filed while an appeal is pending. *See* Dkt.(25-2247) #6.1, at 19-28. Petitioner acknowledged a split in the circuits on this issue, but argued the court should follow the authority recognizing a right to counsel. *See* Dkt.(25-

2247) #6.1, at 22-25. The court of appeals assumed there was a right to counsel, but also assumed the right does not attach if the motion has "no colorable basis in fact or law," App. A004, and found no colorable basis here, *see* App. A005.

V.

<u>REASONS FOR GRANTING THE PETITION</u>

A. THE COURT SHOULD GRANT THE WRIT TO RESOLVE THE QUESTION OF WHETHER A DISTRICT COURT MAY ORDER RESTITUTION AFTER THE 90-DAY DEADLINE SET IN 18 U.S.C. § 3664(d)(5) WHEN THE DISTRICT COURT DID NOT MAKE CLEAR IT WAS GOING TO ORDER SOME RESTITUTION.

In *Dolan v. United States*, 560 U.S. 605 (2010), this Court considered the impact of a district court's failure to meet the deadline for ordering restitution set in 18 U.S.C. § 3664(d)(5). That statute provides:

> If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing.

A five-member majority in *Dolan* held, over a dissent by Chief Justice Roberts, that § 3664(d)(5) does not create an absolute bar on an order of restitution after the deadline has passed. The Court explained there are three types of statutory time limits and concluded this deadline was neither a jurisdictional deadline nor a "claims-processing" deadline, but "a time -related directive that is legally enforceable but does not deprive a judge or other public official of the power to take the action to which the deadline applies if the deadline is missed." *Dolan*, 560 U.S. at 610-11. The Court then held, "The fact that a sentencing court misses the statute's 90-day deadline, even through its own fault or that of the Government, does not deprive the court of the power to order restitution." *Id.* at 611.

This holding came with an important caveat, however. The holding, as summarized at the very beginning of the opinion, was:

> [A] sentencing court that misses the 90-day deadline nonetheless retains the power to order restitution – *at least where, as here, the sentencing court made clear prior to the deadline's expiration that it would order restitution, leaving open (for more than 90 days) only the amount*.

Id. at 608 (emphasis added). The Court did not expressly address whether restitution may be ordered where the district court has *not* "made clear prior to the deadline's expiration that it would order restitution, leaving open (for more than 90 days) only the amount."

1. The Circuits Are Divided on Whether the "at Least" Caveat in *Dolan* Precludes an Order of Restitution When the District Court Did Not Make Clear It Was Going to Order Some Restitution.

Multiple circuits have given weight to the caveat in *Dolan*. The Third Circuit in *United States v. Ottaviano*, 738 F.3d 586 (3d Cir. 2013), characterized *Dolan* as holding that § 3664(d)(5) "does not divest the District Court of the authority to order restitution in situations such as this one, where the sentencing court made clear prior to the deadline's expiration that it would order restitution." *Id.* at 599 n.4. The Fourth Circuit has directly quoted *Dolan*'s caveat, albeit in unpublished opinions. *See United States v. Crandon*, No. 21-4230, 2022 WL16960910, at *1 (4th Cir. Nov. 16, 2022) (unpublished) (quoting "made clear that restitution was applicable" portion of holding). *See also United States v. Hargrove*, No. 22-4296, 2024 WL 489477, at *2 (4th Cir. Feb. 4, 2024) (unpublished) (quoting full *Dolan* holding); *United States v. Welebir*, 433 Fed. Appx. 177, 178 (4th Cir. 2011) (unpublished) (same). *Cf. United States v. Curry*, Nos. 21-4457, 21-4713, 2023 WL 5842300, at *6 (4th Cir. Sept. 11, 2023) (unpublished) (reading *Dolan* as having left question open and not deciding question because any error was not plain), *cert. denied*, 144 S. Ct. 1076 (2024). The Fifth Circuit has quoted *Dolan*'s holding with the caveat, *see United States v. Gurrola*, 898 F.3d 524, 542 (5th Cir. 2018), and has stated on its own that missing the deadline does not preclude restitution "if, as was true in this case, the defendant was on notice of the court's intention to do so," *United States v. Cheetham*, 527 Fed. Appx. 556, 557 (5th Cir. 2013) (unpublished).

And there are more. The Seventh Circuit has stated, citing *Dolan*, that "yet if the district judge timely makes clear that he will order restitution, he retains the power to set the restitution amount after the 90-day deadline." *United States v. Bour*, 804 F.3d 880, 888 (7th Cir. 2015). The Eighth Circuit has similarly recognized this limit, stating, "If the District Court at least makes clear at sentencing that it plans to order restitution, the fact that it 'misses the statute's 90-day deadline, even through its own fault or that of the Government, does not deprive the court of the power to order restitution.'"

United States v. Adejumo, 848 F.3d 868, 870 (8th Cir. 2017) (quoting *Dolan*, 560 U.S. at 611). The Eleventh Circuit, like the Fourth, *see Crandon*, quoted *supra*, has highlighted the *Dolan* caveat, stating, "As the Supreme Court has explained, 'a sentencing court that misses the 90-deadline nonetheless retains the power to order restitution' if it 'made clear prior to the deadline's expiration that it would.'" *United States v. Gatlin*, 90 F.4th 1050 (11th Cir. 2024) (quoting *Dolan*, 560 U.S. at 608), *cert. denied*, 145 S. Ct. 1065 (2025).

Indeed, even the Ninth Circuit, despite its unpublished decision in this case, has given weight to the *Dolan* caveat. It quoted the *Dolan* holding with the caveat in *United States v. Fu Sheng Kuo*, 620 F.3d 1158 (9th Cir. 2010), stating that "the Supreme Court held that 'a sentencing court that misses the 90-deadline nonetheless retains the power to order restitution – at least where, as [in *Dolan*], the sentencing court made clear prior to the deadline's expiration that it would order restitution, leaving open (for more than 90 days) only the amount.'" *Fu Sheng Kuo*, 620 F.3d at 1163 (quoting *Dolan*, 560 U.S. at 608). The Ninth Circuit then applied the caveat to vacate a post-deadline order in *United States v. Hymas*, 584 Fed. Appx. 361 (9th Cir. 2014) (unpublished), where the district court "took the entire 'issue of restitution' under advisement." *Id.* at 362. The unpublished disposition in this case creates an intra-circuit conflict with *Hymas*, but that does not detract from the fact that the Ninth Circuit has at least suggested the *Dolan* caveat is a real limit.

On the other side of the coin, at least one circuit has held the *Dolan* caveat simply left the issue open and held restitution may be ordered after the deadline even without any prior warning to the defendant. This was the Second Circuit in *United States v. Avenatti*, 81 F.4th 171 (2d Cir. 2023), *cert.*

denied, 144 S. Ct. 2598 (2024). It reasoned:

> *Dolan* does not hold that a court is barred from awarding restitution more than 90 days after sentencing *unless* it "made clear prior to the deadline's expiration that it would order restitution." It states only that the court retains the power to award restitution more than 90 days after sentencing "*at least where*" it made its intent to award restitution clear within 90 days of sentencing. *Id*. (emphasis added). In other words, *Dolan* identifies the clearest – not the exclusive – circumstance for a court to continue to exercise its [Mandatory Victims Restitution Act] restitution authority past the statutory 90-day period.

Avenatti, 81 F.4th at 204 (emphasis in original).

This places the Second Circuit in conflict with the other circuits' repeated quotation of the *Dolan* caveat as if it is a real limit. While the other circuits usually went on to find there had been sufficient notice, their continued emphasis on the caveat makes it more than just passing dictum. Granting the petition here will resolve whether the caveat stated in *Dolan* was a real limit, as suggested by the other circuits' continued repetition, or just leaving the question open for another day, as the Second Circuit read it.

2. <u>It Is Important to Resolve the Circuit Split.</u>

It is important to resolve the circuit split because there are cases in which a district court leaves open the entire question of restitution rather than just its amount. This case is one illustration. The Second Circuit *Avenatti* case is another.

And there are still others. As one example, the defendant in *United States v. Thunderhawk*, 860 F.3d 633 (8th Cir. 2017), sought to rely on the caveat, "argu[ing] that *Dolan* should not apply because the district court in this case did not make the initial determination that restitution was owing until more than ninety days after sentencing." *Thunderhawk*, 860 F.3d at 636. As another example, the Fourth Circuit in *United States v. Curry*, Nos. 21-4457, 21-4713, 2023 WL 5842300 (4th Cir. Sept. 11, 2023), *cert. denied*, 144 S. Ct. 1076 (2024), recognized "[t]he question of whether this difference – that the restitution amount was no longer left open and had to be amended – makes *Dolan* inapplicable." *Curry*, 2023 WL 5842300, at *6.[2]

3. The Present Case Is an Excellent Vehicle for Resolving the Question.

The present case is an excellent vehicle for resolving the question, because it squarely presents the question. First, this does not even approach being a case where the district court made clear it was going to order some restitution. All there was here were (1) an inquiry by the district court about "the government's request in terms of the timing of the restitution hearing," with agreement to a suggestion by the prosecutor of 45 days, App. A020, which was later extended; (2) a statement by the prosecutor that he would "present the restitution analysis to the defense, hopefully work something out [, and] [i]f we can't, we'll come to you to settle it," App. A020-21; and (3) a judgment that says nothing about restitution other than, "*If* ordered to pay restitution, the defendant must notify the court and United States Attorney of

[2] The court avoided deciding the question in *Curry* because its review was limited to plain error review and it found any error not clearly obvious. *See id*.

any material change in the defendant's economic circumstances," App. A022 (emphasis added). The district court did not state that at least some restitution would be due and the hearing was just to determine the amount, and, when the hearing took place, defense counsel argued there should be no restitution at all.

This is thus a case where (a) the district court gave no indication at all that it was definitely going to order some restitution and (b) there was a dispute about the question.

4. Force Should Be Given to the *Dolan* Caveat.

Finally, the view that force should be given to the *Dolan* caveat is the better view. While the reasons for enforcing the § 3664(d)(5) deadline that Chief Justice Roberts gave in his dissent did not carry the day in *Dolan*, where the district court had made clear some restitution would be ordered, they should carry the day where the district court did not make clear some restitution would be ordered. At least three of Chief Justice Roberts's concerns are even stronger then.

First, the general rule that a sentence may not be modified after it is imposed is a "bedrock rule[ ]" to which § 3664(d)(5) is a "limited exception." *Dolan*, 560 U.S. at 623 (Roberts, C.J., dissenting). And an exception to a bedrock rule should be "read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *United States v. Texas*, 507 U.S. 529, 534 (1993) (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952)). *See also Portalatin v. Blatt, Hasemiller, Leibsker & Moore, LLC*, 900 F.3d 377, 385

(7th Cir. 2018) (applying principle that courts "construe statutes in derogation of common law strictly and narrowly" and citing *United States v. Texas*). It is bad enough that *Dolan* found the limit in § 3664(d)(5) can be ignored when it is just the *amount* of restitution that is left open. It goes much further to ignore § 3664(d)(5) when the threshold question of *whether* there will be restitution is left open.

Second, extending *Dolan* to the question of *whether* there will be restitution goes even further in overriding the statutory language. As Chief Justice Roberts explained, "'no legislation pursues its purposes at all costs,' and 'it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.'" *Dolan*, 560 U.S. at 625 (Roberts, C.J., dissenting) (quoting *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam)) (emphasis in original). And the further the statute is extended beyond its plain language, the more this is true.

Third, extending *Dolan* to the question of *whether* there will be restitution is even more disrespectful of the balance Congress chose to strike. As Chief Justice Roberts explained, "Congress had to balance against the interest in restitution the contrary interest in promptly determining the defendant's sentence" and "[t]he balance struck was clearly set forth in the statute." *Dolan*, 560 U.S. at 625 (Roberts, C.J., dissenting). *Dolan* has already "overrid[den] the balance [Congress] struck," *id.*, at 626, and extending it further overrides that balance even more.

In sum, the concerns expressed in Chief Justice Roberts' *Dolan* dissent carry even more weight here, and the difference is enough that they should prevail here. The caveat in *Dolan* that a restitution order may be made after the deadline "at least where, as here," the district court has made clear it would order some restitution should be treated the way most circuits have viewed it – as limiting the district court's authority to those circumstances.

B. THE COURT SHOULD GRANT THE WRIT TO RESOLVE A SPLIT IN THE CIRCUITS ABOUT WHETHER A DEFENDANT HAS A SIXTH AMENDMENT RIGHT TO COUNSEL FOR A MOTION FOR NEW TRIAL WHILE A DIRECT APPEAL IS STILL PENDING.

1. <u>There Is an Explicit Split in the Circuits on the Question of Whether a Defendant Has a Sixth Amendment Right to Counsel for a Motion for New Trial While a Direct Appeal Is Still Pending.</u>

The courts of appeals generally agree there is a right to counsel for a motion for new trial filed before judgment. *See Rodgers v. Marshall*, 678 F.3d 1149, 1158 (9th Cir. 2012) (collecting cases), *rev'd on other grounds*, 569 U.S. 58 (2013). They also generally agree there is no right to counsel for such a motion filed after the appellate process has ended. *See United States v. Harrington*, 410 F.3d 598, 600 (9th Cir. 2005) (collecting cases).

But there is a clear and explicit split on the question presented here – whether there is a right to counsel for a motion for new trial after judgment but while an appeal is pending, as opposed to after the appeal is over. The first circuit to consider the issue was the Seventh Circuit in *Kitchen v. United States*, 227 F.3d 1014 (7th Cir. 2000). It held the constitutional right to counsel did attach to a motion for new trial filed while the defendant's appeal was pending. It explained:

> [T]he nature of a motion for a new trial supports Kitchen's right to counsel: in a Rule 33 proceeding, a defendant must face an adversary proceeding that – like a trial – is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented defendant – like an unrepresented defendant at trial – is unable to protect the vital interests at stake. Kitchen could not have presented his new evidence for the first time in his direct appeal without having first fully pursued his Rule 33 motion. The outcome of Kitchen's motion for a new trial (including the outcome of an appeal from an adverse judgment) could have had a substantial impact on the course of his criminal proceedings. It would not have, under any circumstances, entitled him to release, but were the motion to be granted, Kitchen would have received a second trial and an opportunity to present a (presumably) enhanced defense.

Id. at 1018 (cleaned up).

Kitchen also explained why cases cited by the government were distinguishable. "[T]he government overlooks the fact that [*United States v.*] *Tajeddini*[, 945 F.2d 458 (1st Cir. 1991)], [*United States v.*] *Lee*[, 513 F.2d 423 (D.C. Cir. 1975)], and [*United States v.*] *Birrell*[, 482 F.2d 890 (2d Cir. 1973),] addressed only Rule 33 motions that were decided *after* the decisions in the respective defendants' direct appeals. *See Tajeddini*, 945 F.2d at 460; *Lee*, 513 F.2d at 424; *Birrell*, 482 F.2d at 891-92." *Kitchen*, 227 F.3d at 1019 (emphasis in original). And:

> [I]t is wide of the mark to label a pre-appeal motion for a new trial as a "collateral attack." We have noted the converse proposition that when made following the outcome of the direct appeal, a Rule 33 motion plainly is 'collateral' in the usual sense of that term. Here, however, Kitchen's direct appeal had not yet been decided, so his motion for a new trial clearly did not follow the outcome of his direct appeal. Instead we can say that his motion for a new trial was in aid of the appeal of the conviction and sentence. The conclusion that Kitchen's motion for a new

> trial was not a collateral attack is further supported by the procedural consideration that, had Kitchen's counsel filed a notice of appeal from the denial of the motion, the Rule 33 appeal could have been consolidated with Kitchen's direct appeal. It would make no sense to label a pre-direct appeal Rule 33 motion as a "collateral attack" on the conviction, when the appeal from such a proceeding could be consolidated with the direct appeal of the conviction. A properly denominated collateral attack on a defendant's conviction – like a § 2255 motion – could never be consolidated with the direct appeal, and is not even part of the criminal proceeding itself. Therefore, because Kitchen's motion for a new trial was decided before our decision in his direct appeal, it may not be deemed a "collateral attack" on his conviction, and Kitchen had a right to counsel in prosecuting such a motion and in taking an appeal from its denial.

Id. (cleaned up).

The other circuit which has considered the right to counsel for a motion for new trial filed while an appeal is pending is the Fourth Circuit in *United States v. Williamson*, 706 F.3d 405 (4th Cir. 2013). *Williamson* first noted that "once the direct appeal has been decided, the Sixth Amendment right to counsel comes to an end." *Id.* at 416. It cited *Pennsylvania v. Finley*, 481 U.S. 551 (1987), in which this Court held there is no Sixth Amendment right to counsel in postconviction proceedings after appeal. *See Williamson*, 706 F.3d at 416.

Williamson then reasoned, "As a corollary, a petitioner has no Sixth Amendment right to counsel in order to mount a collateral challenge to his conviction." *Id.* It went on to point to cases holding a motion for new trial does not toll the statute of limitations for a 28 U.S.C. § 2255 motion because it is "not part of the direct appeal." *Id.* at 417 (citing *Johnson v. United States*, 246 F.3d 655, 657 (6th Cir. 2001); *Trenkler v. United States*, 268 F.3d 16, 22 (1st Cir. 2001); and *Barnes v. United States*, 437 F.3d 1070, 1079 (11th Cir.

2006)). It concluded:

> If a motion is not part of the direct appeal, then the motion is "collateral" in the usual sense of that word. Petitioners have no Sixth Amendment right to counsel for collateral proceedings. Accordingly, we find that Williamson had no Sixth Amendment right to counsel to pursue his Rule 33 motion in the trial court, made as it was nearly three years after he noticed his appeal.

Williamson, 706 F.3d at 417-18 (citation and footnote omitted.). The court recognized *Kitchen* held differently, but declined to follow it. *See Williamson*, 706 F.3d at 418.

There are also other cases that are distinguishable but are in tension with *Kitchen* and so suggest other circuits may not follow *Kitchen*. Those are four cases – from four other circuits – that, as argued by the government in its briefing below, have labeled motions for new trial a form of "collateral attack." *See United States v. Redd*, 562 F.3d 309, 312-13 (5th Cir. 2009); *Barnes*, 437 F.3d at 1079; *Trenkler*, 268 F.3d at 20; *Johnson*, 246 F.3d at 658. *See also* Dkt.(25-2247) #18.1, at 28 (government brief citing and quoting foregoing cases). These cases are distinguishable in that they were addressing the different issue of whether a new trial tolls the statute of limitations for 28 U.S.C. § 2255 motions, *see Redd*, 562 F.3d at 311; *Barnes*, 437 F.3d at 1077; *Trenkler*, 268 F.3d at 20; *Johnson*, 246 F.3d at 657, and two of them are additionally distinguishable because the new trial motions were filed after the defendants' direct appeals had ended, *see Trenkler*, 268 F.3d at 18-19; *Johnson*, 246 F.3d at 656. Still, these cases do conflict in using the "collateral attack" label that *Kitchen* rejected.

In sum, there is a direct conflict between two circuits and an arguably greater conflict if the language in other cases is taken into account. Review by this Court will resolve the conflict.

2. <u>It Is Important to Resolve the Split in the Circuits.</u>

It is important to resolve the split in the circuits because a new trial motion can be critical in a criminal case. It is one of two last chances a defendant has to challenge his conviction. The other is a 28 U.S.C. § 2255 motion, but 2255 motions have limits. First, a 2255 motion "may only be used to collaterally attack a conviction and sentence 'upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States.'" *United States v. Berry*, 624 F.3d 1031, 1038 (9th Cir. 2010) (quoting § 2255). Second, "short of proof of actual innocence, claims solely based on new evidence are generally not cognizable on habeas." *Berry*, 624 F.3d at 1038. It is only through a motion for new trial that a defendant can develop and present new evidence short of "actual innocence." *See* Fed. R. Crim. Pro. 33(b)(1) (allowing motion for new trial "grounded on newly discovered evidence").

Counsel is invaluable in litigating a new trial motion, moreover. First, trained counsel will have greater experience and resources in conducting the factual investigation necessary to (a) fully develop the newly discovered evidence and (b) make an effective presentation of that evidence to the district court. *See, e.g.,* Dkt.(25-2247) #6.1, at 29-32 (opening brief discussing ways in which counsel could have more effectively investigated in this case); Dkt.(25-2247) #23.1, at 12-13 (reply brief discussing same). Second, trained counsel will understand the law those facts must be fit within – which in Petitioner's case was the highly complex law of securities fraud.

This suggests counsel will be just as much help in litigating a new trial motion as in litigating the original trial. As the Ninth Circuit explained in *Menefield v. Borg*, 881 F.2d 696 (9th Cir. 1989):

> An effective motion for a new trial ordinarily requires a lawyer's understanding of legal rules and his experience in presenting claims before a court. The presence of trained counsel at this stage ensures that the most favorable arguments will be presented and "that the accused's interests will be protected consistently with our theory of criminal prosecution."

Id. at 699 (quoting *United States v. Wade*, 388 U.S. 218, 227 (1967)).

3. <u>This Case Is an Excellent Vehicle for Resolving the Split Despite the Court of Appeals Disposition on Other Grounds.</u>

This case is an excellent vehicle for resolving the right to counsel question, because the question was clearly preserved and presented to the district court. Petitioner asked for counsel as soon as he discovered the new evidence – on what appears to be a district court form. He then supplemented the request with a letter from his appellate counsel to the government that explained the new evidence. He eventually filed his substantive motion pro se, but that was only because the district court had not yet acted and the statutory deadline for filing a motion was approaching, *compare* App. A052 (motion filed July 5, 2024) *with* Dist. Ct. Dkt. #301 (verdict entered August 2, 2021). And the motion provided additional detail showing a need for counsel. As a result of all this, the right to counsel question was squarely teed up and presented in the district court.

The government might argue this case is not a good vehicle because the court of appeals resolved the appeal on the ground there was no "colorable basis" for a new trial motion, *see supra* p. 12. This should not preclude review because it is clearly wrong. The new evidence was evidence about an informant's false statements about the President of the United States and the President's family that drew national publicity and led to criminal false statement charges against the informant. Motions filed in the informant's case, which were described in Petitioner's opening brief, suggested multiple possible forms of government negligence. In some instances, this was evident from just the motions' titles, referring to problems such as "handling agent's alleged mistakes" and "alleged defects in the prosecution." *See* Dkt.(25-2247) #6.1, at 30. Petitioner's opening brief also described a conclusion to the informant's case that was exceedingly suspicious. This was a government concession of error on appeal that was rejected both by the district court in denying a motion for bail pending appeal and the court of appeals in denying a motion for summary reversal. *See* Dkt.(25-2247) #6.1, at 31 (collecting citations to record in informant's cases). There was thus a real "smell" around this informant.

While the court of appeals correctly noted that "[the informant] and Hackett were allegedly involved in a different securities-fraud scheme," App. A005, that ignores what the government – and district courts – recognized about the other scheme's relevance. Evidence of the other scheme was relevant and admissible under both the "inextricably intertwined" theory the government argued and the alternative Rule 404(b) mens rea theories the government argued. If the evidence was "inextricably intertwined" and "necessary to . . . offer a coherent and comprehensible story," Dist. Ct. Dkt. #172, at 9 (quoting *United States v. Anderson*, 741 F.3d 938, 949 (9th Cir. 2013)), for the government's proof "on offense," it was "inextricably intertwined" and necessary to tell the full story for the defense. And just as the government may introduce evidence of "other acts" under Rule 404(b), a defendant may introduce what some courts have labeled "reverse 404(b) evidence."[3] This includes using the "knowledge," "intent," and "plan" theories of Rule 404(b), *see* Fed. R. Evid. 404(b)(2) (including "intent," "plan," and "knowledge" in list of "[p]ermitted [u]ses"), to show a defendant lacked the required mens rea.[4]

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[3] *E.g., United States v. Montelongo*, 420 F.3d 1169, 1175 (10th Cir. 2005); *United States v. Lucas*, 357 F.3d 599, 605 (6th Cir. 2004); *United States v. Wilson*, 307 F.3d 596, 601 (7th Cir. 2002); *United States v. Stevens*, 935 F.2d 1380, 1402 (3d Cir. 1991).

[4] S*ee, e.g., United States v. Espinoza*, 880 F.3d 506, 515 (9th Cir. 2018) (other acts evidence "may be admissible to prove, *inter alia*, knowledge, motive, and opportunity" and, in case at bar, made it more likely neighbor set up defendant as "blind mule"); *United States v. Hayes*, 219 Fed. Appx. 114, 116 (3d Cir. 2007) (unpublished) (other acts evidence relied upon "to rebut allegations of criminality or criminal intent"); *Montelongo*, 420 F.3d at 1173 (other acts evidence admissible because "tends to make it less probable that the Defendants knowingly possessed the marijuana or that they knowingly and voluntarily involved themselves in a drug conspiracy"); *United States v. Cohen*, 888 F.2d 770, 776 (11th Cir. 1989) (other acts evidence showed cooperating witness "had the opportunity and ability to concoct and conduct the fraudulent scheme without the aid or participation of the Cohens"); *United States v. Aboumoussallem*, 726 F.2d 906, 912 (2d Cir. 1984) (other acts evidence "tends to make the existence of a consequential fact, [the defendant's] knowledge, less probable"); *United States v. McClure*, 546 F.2d 670, 672-73 (5th Cir. 1977) (other acts evidence admissible "to show lack of criminal intent by a defendant").

This theory of relevance certainly satisfies the minimal "colorable basis" standard the court of appeals used. The case therefore remains an excellent vehicle for resolving the circuit split on the question presented.

4. The Seventh Circuit Side of the Split Is the Better View.

Finally, the view taken in the Seventh Circuit's *Kitchen* case that there is a right to counsel for a new trial motion when the defendant's appeal is still pending is the better view. First, the cases relied on in *Williamson*, the Fourth Circuit case rejecting *Kitchen*, are cases about tolling of the 28 U.S.C. § 2255 statute of limitations, which is a completely different question than the right to counsel. Second, the reasons *Kitchen* gives for recognizing a right to counsel – the adversary nature and "intricate rules" of a Rule 33 motion for new trial proceeding and the potential of including the new trial issues in the direct appeal, *see supra* pp. 21-22 – are highly persuasive.

Finally, drawing the line between motions for new trial filed while the appeal is pending and motions for new trial filed after the appeal has concluded is consistent with this Court's rationale for the line it drew in *Finley*. The Court held there was no right to counsel for a motion seeking postconviction relief in *Finley* because:

> Postconviction relief . . . is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature. (Citation omitted.) It is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of his conviction.

Finley, 481 U.S. at 556-57.

This description of postconviction relief contrasts with a motion for new trial. A motion for new trial is not civil in nature but governed by the rules of criminal procedure. *See* Fed. R. Crim. Pro. 33. It also occurs just as frequently, if not more frequently, before direct review of the conviction is complete – as it did here, did in *Kitchen* and *Williamson*, and did in two of the 2255 tolling cases. A motion for new trial is therefore very different than the postconviction proceedings after appeal that the Court considered in *Finley*.

In sum, the reasons *Williamson* gave for rejecting *Kitchen* lack merit. *Kitchen* is the better view, and this Court should say so.

VI.
CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

DATED: August 24, 2026

s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law

A P P E N D I X 1

NOT FOR PUBLICATION

FILED

MAY 27 2026

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. ANDREW HACKETT, Defendant - Appellant.	Nos. 23-595 25-2247 D.C. No. 3:18-cr-03072-TWR-1 MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Todd W. Robinson, District Judge, Presiding

Argued and Submitted April 22, 2026
Pasadena, California

Before: FRIEDLAND and MILLER, Circuit Judges, and SCARSI, District Judge.**

A federal jury convicted Defendant Andrew Hackett of conspiracy to commit securities fraud and securities fraud, and this court upheld his convictions on appeal. *United States v. Hackett*, 123 F.4th 1005, 1006 (9th Cir. 2024).

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Mark C. Scarsi, United States District Judge for the Central District of California, sitting by designation.

Defendant now appeals the district court's order of restitution and order denying his pro se motions for appointment of counsel and for a new trial. We have jurisdiction under 28 U.S.C. § 1291. We affirm.

1. Defendant argues that the district court erred by ordering restitution more than 90 days after sentencing, by including victims' losses outside the time frame alleged in the indictment, and by failing to make explicit findings addressing his disputes over the restitution calculation. "[W]e review de novo a restitution order and the district court's valuation methodology." *United States v. Solakyan*, 119 F.4th 575, 594 (9th Cir. 2024), *cert. denied*, 146 S. Ct. 91 (2025). "[T]he restitution calculation is reviewed for abuse of discretion, with any underlying factual findings reviewed for clear error." *Id.* (quoting *United States v. Gagarin*, 950 F.3d 596, 607 (9th Cir. 2020)).

The district court entered its order of restitution more than five months after sentencing, beyond the 90 days prescribed by the Mandatory Victims Restitution Act. *See* 18 U.S.C. § 3664(d)(5). Although Defendant argues he lacked notice of the court's intent to order restitution, he "does not claim that any documents or witnesses had become unavailable after the 90-day period elapsed," "that his financial status changed," or that "the delay caused any prejudice to his defense whatsoever." *United States v. Moreland*, 622 F.3d 1147, 1173 (9th Cir. 2010). Thus, even if the district court erred in ordering restitution after the 90-day period elapsed, Defendant's challenge fails because he fails to demonstrate how any delay prejudiced him. *See id.* (affirming restitution order entered over 90 days after sentencing where "the district court's error in failing to comply with the 90-day time limit was harmless"); *United States v. Cienfuegos*, 462 F.3d 1160, 1163 (9th Cir. 2006) ("[B]ecause the procedural requirements of section 3664 were designed to protect victims, not defendants, the failure to comply with them is harmless error absent actual prejudice to the defendant.").

Next, Defendant challenges the inclusion of victims' losses through April 2018 in the restitution order on the ground that the indictment referred to a conspiracy that continued "until on or about January 2018." We reject that argument. The district court appropriately ordered restitution for losses to victims harmed in the course of the conspiracy to commit securities fraud, even if the losses were realized outside the time scope of the charged conduct. 18 U.S.C. § 3663A(a)(2); *see United States v. Anieze-Smith*, 923 F.3d 565, 573 (9th Cir. 2019) (recognizing § 3663A(a)(2) "permits restitution for acts outside the reach of the indictment," including conduct beyond its time scope and "outside the statute of limitations").

Finally, Defendant's third challenge concerns the district court's failure to make explicit factual findings on several issues. Even if the district court should have made factual findings to address Defendant's disputes over the calculation, we may affirm the restitution order because "the basis of the district court's calculation"—that is, the Government's restitution briefing—"is clear," and Defendant fails to show that the factual underpinnings of the calculation are clearly erroneous. *United States v. Yeung*, 672 F.3d 594, 604 (9th Cir. 2012) (citing *United States v. Peterson*, 538 F.3d 1064, 1077–78 (9th Cir. 2008)), *abrogated on other grounds by Robers v. United States*, 572 U.S. 639 (2014).

2. Defendant contends that he was entitled to appointment of counsel to prosecute a new trial motion in the district court while his direct appeal was pending. "Whether a defendant was denied his Sixth Amendment right to counsel during a proceeding is a question of law to be reviewed de novo." *United States v. Hantzis*, 625 F.3d 575, 582 (9th Cir. 2010).

For purposes of this disposition, we assume that counsel did not represent Defendant in the district court when Defendant submitted his pro se motions for appointment of counsel and for a new trial. We also assume, as Defendant's counsel conceded at oral argument, that if a defendant has a Sixth Amendment right to counsel to develop a new trial motion while the direct appeal is pending, the right does not extend to every new trial motion the defendant might want to pursue, such as those with no colorable basis in fact or law.

Here, Defendant's proposed new trial motion lacked a colorable basis. Defendant initially moved for appointment of counsel to file a new trial motion based on the discovery of unidentified "[n]ew evidence that was not turned over . . . by the Government." In the motion for a new trial he ultimately filed, Defendant asserted that the Government wrongfully withheld the information that a person named Alexander Smirnov was an FBI informant who had been indicted for providing false information to the FBI. Smirnov and Hackett were allegedly involved in a different securities-fraud scheme; evidence related to that scheme was produced in discovery but not admitted at trial. Defendant's arguments are meritless because Smirnov and his interactions with Defendant played no role in either party's trial presentation and had little if any relation to the charged conduct. Evidence tending to show Smirnov was an unreliable informant does not "undermine confidence in the outcome" of the trial, *Strickland v. Washington*, 466 U.S. 668, 694 (1984), nor could it "in any reasonable likelihood have affected the judgment of the jury," *Napue v. Illinois*, 360 U.S. 264, 271 (1959).

Accordingly, even accepting Defendant's contention that there is a right to counsel when there is a colorable basis for a motion for a new trial while a direct appeal is pending, Defendant was not entitled to counsel. Similarly, the district court did not abuse its discretion in denying the motion for appointment of counsel. *United States v. Harrington*, 410 F.3d 598, 600 (9th Cir. 2005). Whether its order is subject to review de novo, *United States v. Price*, 566 F.3d 900, 907 (9th Cir.

2009), or for abuse of discretion, *United States v. Reyes-Alvarado*, 963 F.2d 1184, 1188 (9th Cir. 1992), the district court also did not err in denying a new trial.

All pending motions are denied as moot.

AFFIRMED.

APPENDIX 2

FILED

NOV 28 2022

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. ANDREW HACKETT, Defendant.	Case No.: 18CR3072-TWR ORDER OF RESTITUTION

WHEREAS, an indictment was filed in the Southern District of California on June 29, 2018, charging defendants, including Andrew Hackett ("Defendant"), with conspiracy, in violation of 18 U.S.C. § 371, and securities fraud, in violation of 15 U.S.C. §§ 78j(b), 78ff, and Title 17, C.F.R., § 240.10b-5.

WHEREAS, after trial, a jury delivered a verdict of guilty on both counts against Defendant on August 2, 2021.

WHEREAS, Defendant was sentenced to a total of 46 months' incarceration on June 9, 2022.

WHEREAS, victims of Defendant's offenses may recover some or all of their losses through other litigation or negotiation arising from the fraudulent conduct that gave rise to the charges in this case, including through distributions to victims in *SEC v.Giguiere, et al.*, S.D. Cal. Case No. 18-CV-1530-WQH-JLB (the "SEC Case").

WHEREAS, the Court accepted briefing from the parties, and held a hearing on November 18, 2022, regarding the Government's motion for restitution.

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. Pursuant to 18 U.S.C. § 3663A(a)(1), Defendant shall pay restitution in the amount of $67,184.91 as a result of his convictions. The outstanding restitution balance shall be paid to the victims identified in Attachment A hereto, in the amounts specified in Attachment A.

2. Restitution is to be paid to these victims on a pro rata basis based on each victim's total loss amount set forth in Attachment A.

3. Defendant's restitution obligations shall be joint and several with Kevin Gillespie and Kuldeep Sidhu, who are co-defendants in this case and may be ordered to pay restitution for the same losses.

4. Pursuant to 18 U.S.C. § 3664(j)(2), any amount paid to victims, in connection with the SEC Case or any other related civil case or dispute, as compensatory damages for the same loss that serves as the basis for restitution in this case, shall be credited to the restitution judgment. To obtain a credit to the restitution judgment for such payments, Defendant shall present supporting documents to the Asset Recovery Section of the United States Attorney's Office ("ARS") demonstrating that such payments were made.

5. Defendant shall make a bona fide effort to pay restitution in full as soon as practicable.

6. After considering the factors set forth in 18 U.S.C. § 3664(f)(2), the Court finds that the Defendant has the ability to pay the restitution as set forth in accordance with the following payment schedule:

a. During any period of incarceration, Defendant shall pay restitution through the Inmate Financial Responsibility Program at the rate of 50% of Defendant's income, or $25.00 per quarter, whichever is greater.

b. Upon release from custody, Defendant shall pay restitution at the rate of at least $250 per month, subject to modification upon further agreement of the parties or order of the Court.

7. This payment schedule does not foreclose the United States from exercising all legal actions, remedies, and process available to collect the restitution judgment, including but not limited to remedies pursuant to 18 U.S.C. §§ 3613 and 3664(m)(1)(A).

8. Defendant shall forward all restitution payments, by bank or cashier's check or money order payable to the "Clerk, U.S. District Court," to:

Clerk of the Court
United States District Court
Southern District of California
333 West Broadway, Suite 420
San Diego, CA 92101

9. The Court has determined that Defendant does not have the ability to pay interest. The interest requirement is waived pursuant to 18 U.S.C. 3612(f)(3)(A).

10. Until restitution has been paid, Defendant shall notify the Clerk of the Court and the United States Attorney's Office of any change in Defendant's economic circumstances that might affect Defendant's ability to pay restitution no later than thirty days after the change occurs. *See* 18 U.S.C. § 3664(k).

11. Until restitution has been paid, Defendant shall notify the Clerk of the Court and the United States Attorney's Office of any change in mailing or residence address, no later than thirty days after the change occurs. *See* 18 U.S.C. § 3612(b)(1)(F).

IT IS SO ORDERED.

DATED: 11/28/22

Todd Robinson
HON. TODD W. ROBINSON
United States District Judge

		Government's oral motion to dismiss without prejudice- Granted.. Signed by Judge Barry Ted Moskowitz (sjt) (Entered: 01/20/2023)
01/24/2023	474	Judgment Returned Executed as to Kuldeep Sidhu on 1/24/2023, re 472 Amended Judgment. (sjt) (Entered: 01/24/2023)
01/24/2023	475	Judgment Returned Executed as to Kevin Gillespie on 1/24/2023, re 473 Amended Judgment. (sjt) (Entered: 01/24/2023)
01/25/2023	476	ORDER for Restitution as to Kuldeep Sidhu, Kevin Gillespie. Signed by Judge Barry Ted Moskowitz on 1/25/2023. (sjt) (Entered: 01/25/2023)
01/27/2023	477	RESPONSE in Opposition by USA as to Andrew Hackett re 470 MOTION to Vacate *Courts Restitution Order* (Attachments: # 1 Exhibit 1)(Arnzen, Aaron) (cxl1). (Entered: 01/27/2023)
02/16/2023	478	The financial section in the Clerks Office did not receive the original recorded trust deed nor is therea copy of the recorded trust deed on the docket. Since there is no recorded trust deed available fromthe Clerks Office, no documents were forwarded to the US Attorneys Office from the FinancialDepartment.(sxc) (Entered: 02/16/2023)
03/21/2023	479	The Court has reviewed defendant Andrew Hackett's 470 Motion to Vacate Court's Restitution Order and the government's 477 Response in Opposition to that motion. The 470 Motion to Vacate is DENIED. Signed by Judge Todd W. Robinson on 3/21/2023. (no document attached) (Robinson, Todd) (Entered: 03/21/2023)
04/03/2023	480	NOTICE OF APPEAL by Andrew Hackett re 479 Order on Motion to Vacate, (Filing fee $ 505 receipt number ACASDC-17726144.) (Notice of Appeal electronically transmitted to US Court of Appeals.) (Nurik, Marc) (smy1). (Entered: 04/03/2023)
04/06/2023	481	USCA Case Number as to Andrew Hackett 23-595 for 480 Notice of Appeal to 9th Circuit filed by Andrew Hackett. (Attachments: # 1 Appellate Mentoring Program)(smy1) (Entered: 04/06/2023)
04/06/2023	482	USCA Time Schedule Order for 480 Notice of Appeal to 9th Circuit : (NOTICE TO PARTIES of deadlines regarding appellate transcripts: Appellant shall file transcript designation and ordering form with the US District Court, provide a copy of the form to the court reporter, and make payment arrangements with the court reporter on or by 4/24/2023 (see Ninth Circuit Rule 10-3.2); Due date for filing of transcripts in US District Court is 5/24/2023.). (smy1) (Entered: 04/06/2023)
06/20/2023	483	APPELLATE COMMISSIONER ORDER of USCA as to Andrew Hackett re 480 Notice of Appeal to 9th Circuit. (cc: Presiding Magistrate Judge for the Southern District of California)(jrd) (Entered: 06/21/2023)
06/29/2023	484	TRANSCRIPT DESIGNATION AND ORDERING FORM by Andrew Hackett as to Andrew Hackett, Annetta Budhu, Vikram Khanna, Kuldeep Sidhu, Kevin Gillespie for proceedings held on 9/19/22; 11/18/22; 1/9/23 re 480 Notice of Appeal to 9th Circuit. (Gunn, Carlton) (Entered: 06/29/2023)
07/06/2023	485	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Restitution Hearing as to Kuldeep Sidhu and Kevin Gillespie for date of 9/19/2022 before Judge Barry Ted Moskowitz, re 480 Notice of Appeal to 9th Circuit. Court Reporter/Transcriber James C. Pence-Aviles. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER or the Court Reporter/Transcriber. If redaction is necessary, parties have seven calendar days from the file date of the Transcript to E-File the Notice of Intent to Request Redaction. The following deadlines would also apply if requesting redaction: Redaction Request Statement due to Court

APPENDIX 3

		public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER or the Court Reporter/Transcriber. If redaction is necessary, parties have seven calendar days from the file date of the Transcript to E-File the Notice of Intent to Request Redaction. The following deadlines would also apply if requesting redaction: Redaction Request Statement due to Court Reporter/Transcriber 12/9/2024. Redacted Transcript Deadline set for 12/19/2024. Release of Transcript Restriction set for 2/18/2025. (jcp)(jrd) (Entered: 11/18/2024)
01/10/2025	498	MANDATE of USCA as to Andrew Hackett re 414 Notice of Appeal to 9th Circuit, (Attachments: # 1 USCA Memorandum, # 2 USCA Opinion)(All non-registered users served via U.S. Mail Service)(mjw) (Entered: 01/13/2025)
03/26/2025	499	MINUTE ORDER Denying 492 Motion to Appoint Counsel as to Andrew Hackett (1); Denying 496 Motion for New Trial as to Andrew Hackett (1).(no document attached) (jao) (Entered: 03/26/2025)
04/07/2025	500	NOTICE OF APPEAL by Andrew Hackett re 499 Order on Motion to Appoint Counsel, Order on Motion for New Trial, Fee not paid (Notice of Appeal electronically transmitted to US Court of Appeals.) (Attachments: # 1 Motion In Support of Motion to Proceed In Forma Pauperis)(All non-registered users served via U.S. Mail Service)(mjw) (Entered: 04/07/2025)
04/07/2025	501	USCA Case Number as to Andrew Hackett 25-2247 for 500 Notice of Appeal to 9th Circuit, filed by Andrew Hackett. (Attachments: # 1 Attorney Appeal Case Opening, # 2 Pro Se Appeals Case Opening, # 3 Ninth Circuit Appellate Mentoring Program)(All non-registered users served via U.S. Mail Service)(mjw) (Entered: 04/08/2025)
04/07/2025	502	USCA Time Schedule Order for 500 Notice of Appeal to 9th Circuit, : (NOTICE TO PARTIES of deadlines regarding appellate transcripts: Appellant shall file transcript designation and ordering form with the US District Court, provide a copy of the form to the court reporter, and make payment arrangements with the court reporter on or by 4/28/2025 (see Ninth Circuit Rule 10-3.2); Due date for filing of transcripts in US District Court is 5/28/2025.) (All non-registered users served via U.S. Mail Service)(mjw) (Entered: 04/08/2025)
06/11/2025	503	NOTICE OF ATTORNEY APPEARANCE: Kimberly Sigrid Hackett appearing for Andrew Hackett (Hackett, Kimberly)Attorney Kimberly Sigrid Hackett added to party Andrew Hackett(pty:dft) (sjt). (Entered: 06/11/2025)

A P P E N D I X 4

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. ANDREW HACKETT (1), Defendant.	Case No. 18CR3072-TWR Date: February 9, 2022 Time: 2:30 p.m. **UNITED STATES' SENTENCING MEMORANDUM**

The UNITED STATES OF AMERICA, by and through its counsel, Randy S. Grossman, United States Attorney, and Aaron P. Arnzen and Andrew J. Galvin, Assistant U.S. Attorneys, hereby files this Sentencing Memorandum regarding Defendant Andrew Hackett.

I
INTRODUCTION

Defendant Andrew Hackett conspired to defraud investors in a classic pump-and-dump scheme. He and his conspirators gained control over the free trading shares of ASNT stock, pumped up the price through penny stock newsletters, a phone room that used high pressure sales tactics, and (they hoped) an internet stock promotion website called TheMoneyStreet.com. They also had plans to dump the stock at inflated prices on innocent investors. The scheme was uncovered, and evidence of the scheme was captured, because Michael Forster, who served as the conspirators' connection with TheMoneyStreet.com, Gillespie, Sidhu, and Budhu – pleaded guilty. Gillespie and Sidhu put themselves in position to testify at trial, and Gillespie was called to the witness stand.

To be clear, though, the primary factor leading to a more serious sentence for Hackett is his aggravated role, as discussed above, and his failure to accept responsibility for his crime. This is also borne out in the recommended § 2B1.1 loss calculation in addition to the recommended leader/organizer role. The Government's recommended loss figure is significantly higher than it was for Hackett's co-conspirators, because Hackett made near unilateral decisions about promoting ASNT, and exercised total control over selling his overvalued stock to unwitting investors. A telling example is described above: Hackett outright lied to his co-consprirators about the scope and extent of his fraud by telling them that he had nothing to do with the first Nando's List promotions in September 2017, when the evidence is perfectly clear that he was fully responsible for newsletters.

All that said, the Government seeks a sentence that varies significantly from the Guidelines range, and recommends that the Court reduce Hackett's sentence to 72 months under § 3553(a) based on the need to avoid unwarranted sentencing disparities.

C. KINDS OF SENTENCES AVAILABLE

Probation - If the recommendation of the United States is accepted, Defendant's adjusted offense level of 35 falls within Zone D of the Guidelines Sentencing Table; taking into account his Criminal History Category I, the Guidelines range is 168-210 months. Given the serious nature of the offense, the Guidelines do not contemplate a probationary sentence. U.S.S.G. § 5B1.1, comment (n.2).

Restitution - The government seeks restitution from Defendant. It requests, however, that a restitution hearing be calendared for approximately 45 days after the initial sentencing hearing, given the nuanced analysis necessary to properly calculate victim-by-victim losses here.

APPENDIX5

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff,	Case No. 18cr3072-TWR
VS.	San Diego, California
ANDREW HACKETT, Defendant.	Monday, April 4, 2022 3:22 p.m.

REPORTER'S TRANSCRIPT Of PROCEEDINGS

SENTENCING HEARING

BEFORE THE HONORABLE TODD W. ROBINSON
UNITED STATES DISTRICT JUDGE

For the Government: RANDY S. GROSSMAN, Acting U.S. Attorney
BY: AARON ARNZEN, Esq.
ANDREW GALVIN, Esq.
Assistant U.S. Attorney
880 Front Street
San Diego, California 92101

For the Defendant: MARK STEVEN NURIK
Attorney at Law
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Los Angeles, California 90024

Reported By: CAMERON P. KIRCHER
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pulled sentencing-related documents for today's hearing.

MR. NURIK: And I apologize, Your Honor. I know these have been done late in the game, but there is a massive amount of material to review. We tried to get it done as soon as possible.

THE COURT: I just -- my only intent is to make sure that I have a full understanding of all the issues. And, unfortunately, having sat here all afternoon, I don't with those two.

So we have two options at this point. We can take a recess, and I can review those. Based on all the other filings, they weren't particularly voluminous, and I can put them into context pretty quickly, I think. If the parties are willing to give me that indulgence, I'd be happy to take a look at them now.

MR. ARNZEN: That would be the United States' preference, Your Honor.

MR. NURIK: Yes. Thank you, Your Honor.

THE COURT: Okay. Before we do that, I had another procedural question, and this one came to my attention when I was reviewing the sentencing documents and the government's request for a restitution hearing 40 days after today's date. And not being particularly familiar with restitution hearings, I went to the statute, 18 United States Code Section 3664, which sets out the procedure for restitution-related proceedings, and that seems to involve probation and notice prior to the presentence report being prepared.

And my concern in that regard is that restitution is part of the sentence imposed, and if I impose sentence today, I lose jurisdiction over the case, don't I?

I know that Judge Moskowitz is doing restitution hearings, and perhaps Judge Hayes -- I don't know who else has a piece of this case -- and I've seen on the docket sheet that they are doing it post the imposition of sentence.

How does that work, and I'm not sure exactly how that works?

MR. NURIK: And let me -- just to aid the Court in that regard. My client has engaged, and I think it's referred to in the presentence report, an appellate attorney, and I believe it's his intention to appeal the conviction in this matter. And so if you sentence today, and then he files his notice of appeal --

THE COURT: Within 14 days.

MR. NURIK: -- within 14 days, then you do lose jurisdiction.

MR. ARNZEN: There is a specific provision in the statute, Your Honor, that speaks to exactly this. It says that the Court retains jurisdiction for 75 days after the date on which the original sentencing hearing takes place. I apologize. I don't have that in front of me. I cite it each and every time I do a brief on this.

In addition, the Ninth Circuit has come down with an opinion that says that that rule, despite its language, is not even jurisdictional. If the Court before that 75 days is up says, I find that restitution is appropriate, but I need more evidence to determine the amounts of restitution, then the 75 days can extend even well beyond that. That is what is going on in the courtrooms of Judge Moskowitz and Judge Hayes and perhaps another judge, too.

THE COURT: Okay. Mr. Nurik, are you familiar with that provision and do you agree or disagree?

MR. NURIK: Your Honor, I've only experienced restitution matters in cases where there have been pleas, so I haven't dealt with this problem per se in a trial that results in an appeal. I have no reason to doubt Mr. Arnzen's representation.

My only concern is that if you set a restitution hearing in the future as suggested, and my client is incarcerated, which I think undoubtedly you will sentence him to incarceration, then I lose the opportunity to work with him, especially if he's outside of this district. And he, as you know, has been very actively involved in the defense of his case on all matters, so I will need his assistance on the restitution matter as well.

THE COURT: Okay. From probation.

MS. SCOTT: Good morning, Your Honor.

I'm going to direct you to the PSR, Paragraph 39. There is a typographical error, I have 3663. It is under 18 USC 3664(d)(5), and that allows you to set a restitution hearing 90 days after sentencing to fully determine the restitution and square that away.

THE COURT: It does, indeed. Thank you. I found the statute, but I didn't read that far into it, so I appreciate that.

Okay. So it looks like I can do the restitution as requested by the government, and we're not going to run afoul of any loss of jurisdiction. So if the parties will give me a few moments to review those additional documents, we'll take a recess.

MR. NURIK: As long as the Court needs.

MR. ARNZEN: Thank you, Your Honor.

THE COURT: Sure.

MR. ARNZEN: Your Honor, I apologize. There is also an addendum to the the PSR that was filed at 1:00 p.m.

THE COURT: Yes. I did get that one, too. I caught that one.

MR. ARNZEN: Thank you.

(Recess, 3:31 p.m. to 3:43 p.m.)

THE COURT: Okay. I have had a chance to take a

APPENDIX6

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	Case No. 18-cr-3072-TWR
VS.	)	San Diego, California
ANDREW HACKETT,	)	Thursday, June 9, 2022
Defendant.	)	11:05 a.m.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

SENTENCING HEARING

BEFORE THE HONORABLE TODD W. ROBINSON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government: RANDY S. GROSSMAN, U.S. ATTORNEY
BY: AARON ARNZEN,, ESQ.
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For the Defendant: MARC S. NURIK
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believe that you have violated a condition or conditions of your supervised release and that evidence of such violation will be found in the area or areas to be searched. A search under this condition may only be conducted at a reasonable time, at a reasonable place and in a reasonable manner.

Based on the record that I have before me, I find that you have an inability to pay a fine, and I will impose no fine. You did -- you do stand convicted of two felony counts. For each one of those counts, I will impose a $100 penalty assessment as required by statute.

With regard to both the time in custody and the supervised release term, I impose that as to each count of conviction and I order that they be run concurrent with one another.

With respect to restitution, what is the government's request in terms of the timing of the restitution hearing?

MR. ARNZEN: Thank you, Your Honor.

I think 45 days out, or approximately, would be great. We can go ahead and gather up the victim impact statements that we've received so far. The office will receive those until the day I retire. But it gives us a chance to accumulate at least as many as we can get. We'll accumulate those, present the restitution analysis to the defense, hopefully work something out. If we can't, we'll come to you to settle it.

THE COURT: Mr. Nurik?

MR. NURIK: That's fine, Your Honor.

THE COURT: Okay. Ms. Ortiz, may we have a date approximately --

THE CLERK: Eight weeks out?

THE COURT: Sure.

THE CLERK: That will be August 12th at 2:30 p.m.

THE COURT: Does that date and time work for you, Mr. Arnzen?

MR. ARNZEN: I think it does. Thank you, Your Honor.

THE COURT: Mr. Nurik?

MR. NURIK: Your Honor, I may have a conflict, but I don't know yet. If it does come up, can I advise the Court and we can pick a different date?

THE COURT: If the parties can come to a joint agreement and clear that with Ms. Ortiz.

MR. NURIK: Thank you.

THE COURT: Yes. Mr. Nurik, with respect to the sentence imposed, is there anything else that I need to address?

MR. NURIK: Yes, Your Honor.

I would request that the defendant -- the Court make a recommendation on the judgment that the defendant be

APPENDIX 7

AO 245B (CASD Rev. 1/19) Judgment in a Criminal Case

FILED
JUN 10 2022
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA
V.
ANDREW HACKETT (1)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 3:18-CR-03072-TWR

Marc Steven Nurik
Defendant's Attorney

USM Number 71342-298

☐ -

THE DEFENDANT:

☐ pleaded guilty to count(s) -

☒ was found guilty on count(s) 1-2 of the Indictment
after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offense(s):

Title and Section / Nature of Offense	**Count**
18:371; 18:981(a)(1)(C) and 28:2461(c) - Conspiracy To Commit Securities Fraud. Criminal	1
15:78j(b), 78ff and 17 C.F.R. 240.10b-5; 18:981(a)(1)(C) and 28:2461(c) - Securities Fraud.	2

The defendant is sentenced as provided in pages 2 through 5 of this judgment.
The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) is dismissed on the motion of the United States.

☒ Assessment: $200.00 ($100.00 as to each count) imposed

☐ JVTA Assessment*: $
-

*Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

☒ No fine ☐ Forfeiture pursuant to order filed , included herein.

IT IS ORDERED that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of any material change in the defendant's economic circumstances.

June 9, 2022
Date of Imposition of Sentence

Todd Robinson

HON. TODD W. ROBINSON
UNITED STATES DISTRICT JUDGE

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:
46 months as to each count 1 and 2 to run concurrent for a total of 46 months

☐ Sentence imposed pursuant to Title 8 USC Section 1326(b).

☒ The court makes the following recommendations to the Bureau of Prisons:
1. Residential Drug Abuse Program (RDAP)
2. Designation to a facility in the Southwest region to participate in RDAP and accommodate family visits.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant must surrender to the United States Marshal for this district:

- ☐ at ____________ A.M. on ____________________
- ☐ as notified by the United States Marshal.

☐ The defendant must surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ on or before
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on ____________________ to ____________________

at ____________________ , with a certified copy of this judgment.

____
UNITED STATES MARSHAL

By ____________________
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant will be on supervised release for a term of:
3 years as to each count 1 and 2 to run concurrent for a total of 3 years

MANDATORY CONDITIONS

1. The defendant must not commit another federal, state or local crime.
2. The defendant must not unlawfully possess a controlled substance.
3. The defendant must not illegally possess a controlled substance. The defendant must refrain from any unlawful use of a controlled substance. The defendant must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter as determined by the court. Testing requirements will not exceed submission of more than 4 drug tests per month during the term of supervision, unless otherwise ordered by the court.
   ☐The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (check if applicable)
4. ☐The defendant must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. (check if applicable)
5. ☒The defendant must cooperate in the collection of DNA as directed by the probation officer. (check if applicable)
6. ☐The defendant must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where the defendant resides, works, is a student, or was convicted of a qualifying offense. (check if applicable)
7. ☐The defendant must participate in an approved program for domestic violence. (check if applicable)

The defendant must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of the defendant's supervised release, the defendant must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for the defendant's behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in the defendant's conduct and condition.

1. The defendant must report to the probation office in the federal judicial district where they are authorized to reside within 72 hours of their release from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.

2. After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when the defendant must report to the probation officer, and the defendant must report to the probation officer as instructed.

3. The defendant must not knowingly leave the federal judicial district where the defendant is authorized to reside without first getting permission from the court or the probation officer.

4. The defendant must answer truthfully the questions asked by their probation officer.

5. The defendant must live at a place approved by the probation officer. If the defendant plans to change where they live or anything about their living arrangements (such as the people living with the defendant), the defendant must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant must notify the probation officer within 72 hours of becoming aware of a change or expected change.

6. The defendant must allow the probation officer to visit them at any time at their home or elsewhere, and the defendant must permit the probation officer to take any items prohibited by the conditions of their supervision that he or she observes in plain view.

7. The defendant must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment the defendant must try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about their work (such as their position or their job responsibilities), the defendant must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. The defendant must not communicate or interact with someone they know is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, they must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

9. If the defendant is arrested or questioned by a law enforcement officer, the defendant must notify the probation officer within 72 hours.

10. The defendant must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

11. The defendant must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

12. If the probation officer determines the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant must comply with that instruction. The probation officer may contact the person and confirm that the defendant notified the person about the risk.

13. The defendant must follow the instructions of the probation officer related to the conditions of supervision.

SPECIAL CONDITIONS OF SUPERVISION

1. Not engage in the employment or profession of broker, dealer, or issuer for purposes of issuing, trading, or inducing or attempting to induce the purchase or sale of any stock.

2. Submit your person, property, house, residence, vehicle, papers, [computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media,] or office, to a search conducted by a United States probation officer. Failure to submit to a search may be grounds for revocation of release. The offender must warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that the offender has violated a condition of his supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

3. Provide complete disclosure of personal and business financial records to the probation officer as requested.

4. Notify the Collections Unit, United States Attorney's Office, of any interest in property obtained, directly or indirectly, including any interest obtained under any other name, or entity, including a trust, partnership or corporation.

5. Notify the Collections Unit, United States Attorney's Office, before transferring any interest in property owned, directly or indirectly, including any interest held or owned under any other name, or entity, including a trust, partnership or corporation.

6. Be prohibited from opening checking accounts or incurring new credit charges or opening additional lines of credit without approval of the probation officer.

//

APPENDIX 8

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	Case No. 18-cr-3072-TWR
VS.	)	San Diego, California
ANDREW HACKETT,	)	Friday, November 18, 2022
Defendant.	)	2:35 p.m.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

RESTITUTION HEARING

BEFORE THE HONORABLE TODD W. ROBINSON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government: RANDY S. GROSSMAN, U.S. ATTORNEY
BY: AARON ARNZEN,, ESQ.
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Reported by: Cameron P. Kircher
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San Diego, California - Friday, November 18, 2022

2:35 p.m.

THE CLERK: Calling Matter 24, 18-cr-3072, U.S.A. vs. Andrew Hackett for restitution hearing.

Counsel on the phone, please state your appearance first.

MR. NURIK: Good afternoon. This is Marc Nurik on behalf of the defendant, whose appearance has been waived.

THE COURT: Good afternoon.

MR. ARNZEN: And good afternoon, Your Honor. Aaron Arnzen for the United States on this matter.

THE COURT: Good afternoon.

Okay. It's my understanding that the parties were unable to come to a mutual agreement as to the restitution in this matter.

MR. ARNZEN: That is correct, Your Honor.

THE COURT: Mr. Arnzen, do you wish to go first, or, Mr. Nurik, do you wish to go first?

MR. ARNZEN: Your Honor, I'm fine to hear Mr. Nurik out. I think we've set forth our logic and argument in the papers that we've filed. We do not have an opposition brief on file. I don't have the benefit of understanding defendant's position here.

THE COURT: Okay. Mr. Nurik.

MR. NURIK: Well, Your Honor, obviously the government does have the burden of proof in this case by a preponderance of the evidence, but nevertheless, they do have the burden. But by me going forward now, I'm in no way conceding any burden on our part.

Our problem is with the government's calculation of the restitution. And it starts off with the government picking an ending date for determining their calculation, which is beyond the date of the conspiracy alleged in the indictment and, arguably, proven at trial.

The government, according to its -- what I'll call summary witness -- Peter Melley, uses a date of April of '18, April 2nd of 2018, rather than the date of the conspiracy alleged in Count 1 of the indictment, which is January of 2018. There was no evidence at trial that the conspiracy actually extended beyond that date.

What the government appears to be relying upon is the fact that an individual by the name of Bob Farrill, who was a friend of the defendant, the government alleges sold some shares up until April of 2018. The problem is that there was no evidence at trial that Bob Farrill was, in fact, as the government terms it in its moving papers, a nominee of the defendant. There was no evidence at trial that Bob Farrill was part of the conspiracy. He wasn't even alleged to be a co-conspirator.

There was no evidence at trial that Bob Farrell's sales, in any way the money from those sales went to the defendant or to the benefit of the defendant. And there was no evidence at trial that Bob Farrill sold any of his shares in a match trade to any of the victims or so-called alleged victims in this particular matter.

And, of course, there is no evidence presented of either of these issues in the actual moving papers by the government. In fact, what there was at trial was testimony from a Kara Kennedy, who was a transfer agent, if the Court recalls, and Your Honor did have the benefit of being the trial judge on this matter.

Kara Kennedy testified that Mr. Farrill had his shares on deposit at Wilson Davis and interacted with two different brokerage houses. No evidence has been presented, not at trial or even in the government's moving papers, that any of those shares from any of those particular brokerage houses were sold to any of the victims in this matter; nor is there any evidence at trial or in any of the moving papers of what the government loosely refers to in their moving papers as manipulative trading by Mr. Farrill or even by the defendant. No evidence that the defendant sold any of the shares to any of these individuals.

The problem is that Mr. Melley in his analysis does not give us any of the dates of the purchase or sale of these individual victims. If you note in the exhibits, which is the declaration of Peter Melley, which is Exhibit 1 to Document 437 in the docket, which is the government's motion. In his attached chart, which is entitled Victim Impact Statement Analysis, there is no indication of the dates.

So the problem is we have no way of determining whether or not his analysis, which renders a figure of $67,000 and change, includes sales or purchases even that were beyond the date of the indictment or beyond any reasonable date that the Court could infer should be part of a restitution analysis.

So I would submit that the government has failed to sustain their burden by a preponderance of evidence of proving that that amount is a legitimate amount.

I also want to note that there was no evidence in any of the analysis by Mr. Melley that the purchases were as a result of this particular scheme as alleged and as the jury found the defendant guilty of. And I want to point out that, as the Court recalls, the defendant was found guilty of a conspiracy to commit this scheme. The substantive counts that he was found guilty of related to misrepresentations in a Section 144 form.

This was not a completed conspiracy. If the Court recalls, part of our defense or a big feature of our defense was arguably that there was no meeting of the minds. And certainly as the Court recalls, at some point in 2017, Mr. Hackett ceased participating with any of the others.

There is no evidence that any of the so-called victims purchased their shares during the pump portion or the dump portion, because we have no indication when they purchased, and their victim impact statements do not identify -- do not all identify when they purchased. And I've reviewed them.

Also as the Court recalls, there were periods in which the price went down significantly of the stock and people purchased -- may have purchased during that period. So at this point, we have no analysis when their purchase date was.

And, finally, Your Honor, some of these victims were likely victims of a separate scheme. If the Court recalls, during the trial, during the cross-examination, my cross-examination of Mr. Wolfson, I believe that I proved beyond a reasonable doubt that some of Mr. Wolfson's own salespeople were conducting their own separate fraud, fraud on the defendant and fraud on the victims, by selling their own shares that they purchased under fictitious names to some of these people.

We have no indication from the records whether or not Mr. Melley did any analysis of that. Certainly, we would submit that those particular victims, as they are called, their purchases should not be included, to the extent that they were the subject of these phoney purchases by members of Mr. Wolfson's squad.

So ultimately, Your Honor, I would submit that the government has at this point failed to prove by a preponderance of the evidence that this Court should order restitution in the amount stated in their motion.

THE COURT: Okay. Thank you very much, Mr. Nurik.

Mr. Arnzen.

MR. ARNZEN: Thank you so much, Your Honor.

I believe that Mr. Nurik is in error in his argument with respect to a couple of things. And I'll just take them in order.

We do propose an end date for purposes of calculating restitution; that is, in April of 2000 -- I'm sorry. I think it's '17, but I just want to make sure. 2018.

At trial, we proved that Bob Farrill, Robert Farrill, sold shares all the way until April 2018. We did that through stock transaction records. We also presented evidence -- it's not zero evidence -- it's evidence through testimony of Mr. Gillespie, when he was on the stand, and when he was dealing with Mr. Farrill and transferring shares to Mr. Farrill, he believed -- Mr. Gillespie believed, the CEO of the company believed, that he was doing so on behalf -- that Farrill was doing so on behalf of Mr. Hackett.

That's consistent with the tape recordings that we heard that Mr. -- that we played through Mr. Forster on the stand, and it's also consistent with the documentation that proves that at some points Mr. Farrill was in place on stock purchase agreements from Ms. Budhu, another co-conspirator. Mr. Farrill was at times a counterparty. And then it was switched out to Mr. Hackett and/or vice versa.

And so there is substantial evidence in the record. We argue that -- in closing, we argued at sentencing that those sales by Mr. Farrill were on behalf of Mr. Hackett. Mr. Hackett used Mr. Farrill as a nominee. And we stick to that position.

We need not prove that the transactions at issue here, for purposes of these victims, were through manipulative trades, insider trades, part of the pump, part of the dump. We only need to prove that they purchased during a fraudulent period; in other words, they purchased ASNT stock when ASNT stock was artificially high in price and volume, and it was artificially high because of the scheme carried out by the conspirators here.

Secondly, I don't think it really matters for the analysis, but just for the record, Mr. Hackett was convicted on the conspiracy count and the substantive count. The substantive count was the entire scheme. It was not just misrepresentations in the stock deposit process that Ms. Kara

Kennedy testified to. The substantive count was under 10(b)(5) of the Exchange Act. It was the entire scheme from soup to nuts. So I just wanted to correct that on the record, Your Honor.

The victims here -- thirdly, the victims here that we've put forth in Exhibit 1 -- or Exhibit A to the motion, all of these victims purchased stock during that fraudulent period. They weren't holders of stock that just happened to flow into the fraudulent period and have the value of their stock impacted.

As the declaration sets out and our motion sets out, the stock transaction records obtained by FINRA, the expert there, indicate that each and every one of those victims purchased during that period. So these specific names that Mr. Nurik says we don't know when they purchased; we do. We know they all purchased during the point in time when the stock was artificially inflated.

And lastly, Mr. Nurik has been making much of the testimony and his cross-examination of Mr. Wolfson. It might be the case that Mr. Wolfson sold some stock through his call center, through his boiler room to his own customers. I said at closing, I've said throughout the trial and ever since, I don't understand how that's quite relevant to anything. If he thinks that some of these victims are Wolfson customers, I think those victims are still -- those customers are still victims of the scheme.

If it mattered at all, Mr. Nurik could have certainly brought some evidence to prove that point beyond mere speculation. He's had victim impact statements that support the numbers on our exhibit for months, and I have seen or heard nothing from him about any of these customers, any specific customers -- I'm sorry. Any specific victims being customers of Mr. Wolfson that were engaged in an extra level of fraud.

I think we have carried our burden. If the Court is inclined to order restitution, I would propose to the Court that we would be allowed to submit a proposed order that sets forth the proper amount of restitution consistent with the exhibit. We create a payment schedule for Mr. Hackett. We give Mr. Hackett the benefit of making his judgment joint and several with two other defendants who we expect to move for restitution in short order. Those are Defendants Gillespie and Sidhu. And that Mr. Hackett also get credit for any payments that he makes to the SEC in a parallel SEC case in which disgorgement or civil monetary judgments are imposed.

So with those in mind, Your Honor, I would submit, unless the Court has any questions.

THE COURT: Okay. Mr. Nurik, any last words?

MR. NURIK: Yes, Your Honor.

Crediting everything that the government says, even though I don't agree, obviously, there is one point that they rely upon that I think is illustrative of what I'm trying to point out to the Court.

They reference the fact that regardless of who sold and regardless of whether or not the period is extended beyond the indictment, they say that there is evidence that these particular victims purchased the stock during the period that it was artificially high, artificially high as a result of the pump portion of the scheme.

The problem is, although Mr. Arnzen says they believe that to be the case, or even he knows that to be the case, there is no evidence of that before the Court. There is no evidence of that before the Court during the trial, because, if you recall, there was only one victim who even testified, and she testified via video. None of the other victims were produced during trial.

And there is no reference whatsoever in Mr. Melley's summary report or in anything else that the government has presented as part of this restitution argument to show when these particular people purchased their stock and whether or not it was during a period that was artificially high or not. Because as the Court may recall, during the trial, there was evidence that the stock dropped significantly, and it jumped and then it came down.

We don't know when these people purchased. There is no indication in Mr. Melley's report. So for all we know, they may have purchased during a low period, and certainly not a victim of any of the actions of the defendants; in this case, Mr. Hackett.

So at this point, unfortunately, though the government may believe that to be the case, they do have the burden of proof, they have to prove by a preponderance of the evidence, and they have failed to do so for the purposes of stating the $67,000 that they are requesting.

THE COURT: Okay. Mr. Arnzen, can you point me to where in the record the victim purchases were made?

MR. ARNZEN: The record indicates when the purchases were made through the blue sheet data. There was much discussion in litigation, throughout trial and at sentencing concerning the blue sheet data.

I'm not sure it was actually introduced as an exhibit; however, it was relied upon by experts. Mr. Nurik used it to cross-examine I think -- I'm almost sure he used it to cross-examine Mr. Wolfson when on the stand. That's where the data comes from. It's been fully available to the defendants since well before trial.

THE COURT: Okay. Mr. Arnzen, I will take you up on your offer to submit a proposed order. I will take a look at it. I'll take this matter under submission.

Mr. Nurik, any additional submissions, if you choose to make them, I would ask that you submit those within the next two weeks. And you can expect -- both parties can expect an order to follow after that two-week time period has elapsed.

MR. NURIK: Okay. Your Honor, may I point out, if the Court is inclined to grant restitution, I understand that the two co-defendants -- not co-defendants -- yes, two co-defendants, Mr. Gillespie and Mr. Sidhu, are scheduled for their restitution hearing on the 28th.

Is that right, Mr. Arnzen?

MR. ARNZEN: Sounds like it might be right.

THE COURT: It's not before me, so I don't know, Mr. Nurik. I believe --

MR. NURIK: That's right.

THE COURT: I believe Judge Moskowitz retained --

MR. ARNZEN: I think you're right, Your Honor.

MR. NURIK: That's correct. And I'm only concerned about what I would submit might be inconsistent results.

And so I would ask before the Court rules on this matter, one way or the other, that the Court be mindful of Judge Moskowitz's order. It would seemingly be inconsistent if the government uses a different methodology when they have argued the same thing in their motions with respect to Mr. Gillespie and Mr. Sidhu.

THE COURT: Okay. I think that's a fair point.

Mr. Arnzen.

MR. ARNZEN: I do, too, Your Honor.

I'm unconcerned with it. Our submission will be based on exactly the same methodology. And, indeed, we were in there in another case for another defendant before Judge Moskowitz on a fraud case. The exact same analysis and methodology was used, Judge Moskowitz adopted it, and we got an order immediately thereafter based on exactly this methodology.

THE COURT: Okay. So within the next two weeks, if the government -- I'm assuming paperwork has been submitted to Judge Moskowitz or will be submitted to Judge Moskowitz. To the extent that any analysis of the victims' loss differs, the methodology differs from that utilized in this court, the government is ordered to provide me with the difference in the analysis, if there is any difference in the analysis, within that two-week time period.

MR. ARNZEN: Yes, sir.

THE COURT: Okay. All right. Mr. Nurik, thank you very much. Mr. Arnzen, thank you very much.

If there is nothing else, we'll be in recess on this matter.

MR. ARNZEN: Thank you, Your Honor.

MR. NURIK: Thank you, Your Honor. Thank you for allowing me to appear by phone.

THE COURT: You're welcome. I know how pleasant L.A. traffic is on a Friday.

MR. NURIK: You're right. Thank you.

(Proceedings concluded at 2:52 p.m.)

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C E R T I F I C A T I O N

I hereby certify that I am a duly appointed, qualified and acting official court reporter for the United States District Court; that the foregoing is a true and correct transcript of the proceedings had in the aforementioned cause; that said transcript is a true and correct transcription of my stenographic notes; and that the format used herein complies with the rules and requirements of the United States Judicial Conference.

DATED: July 10, 2023, at San Diego, California.

S/CAMERON P. KIRCHER
CAMERON P. KIRCHER

APPENDIX 9

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ANDREW HACKETT.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, *vs.* ANDREW HACKETT (1) Defendant.	Case No.: 18CR3072-TWR **DEFENDANT'S MOTION TO VACATE COURT'S RESTITUTION ORDER AND RESPONSE TO GOVERNMENT'S MOTION FOR RESTITUTION**

I.

REQUEST TO VACATE RESTITUTION ORDER

On November 18, a restitution hearing was held in this matter, At the conclusion, the Court stated that it would defer ruling and gave defense counsel 2 weeks to file any supplemental brief on the matter. As such, defendant's supplemental brief is due, Friday December 2, 2022. However, this Court entered its restitution Order before defendant's supplemental brief was due. Defendant now requests that this court vacate its order as untimely and review Defendant's supplemental brief which is presented below. The Government has advised that it does not oppose this request.

II.

THE GOVERNMENT HAS FAILED TO PROVE THAT THE "VICTIM'S" TRADES ALL OCCURRED WITHIN THE RELEVANT TIME PERIOD

The main thrust of defendant's opposition to the Government's Motion was that the Government through its summary witness analysis of the "victim" trades failed to identify the dates of purchase and sales of HVST stock. Defendant submits that the Government did not prove a conspiracy beyond the dates alleged in the indictment. As there is no way to tell from the Government's presentation of the "victims" trades as to the dates they occurred there is no way to determine which "victims" losses would properly fall within the time period from September 2017 to January 2018, as alleged in the indictment

The witness's declaration merely states that these trades all occurred between September 2017 and April 2018. However The indictment in this matter alleged a conspiracy beginning on September 2017 and ending on or about January 2018 The analysis conducted by the Government's summary witness, Peter Melley, of the trades of the "victims in HVST stock includes a period beyond the ending date of the conspiracy until April 2018. The Government's sole justification for this extended time is the unsupported allegation that Robert Farrill was a nominee of Defendant Hackett and conducted trades of HVST stock until April 2018. This argument fails for several reasons.

First, there was no credible evidence at trial supporting the claim that Farrill was a co-conspirator or a nominee of Hackett's. The Government seems to rest its claim on the un corroborated hearsay statements of a witness. Saying that Farrill was working with Hackett. Notably, Farrill wasn't charged or even listed as an unindicted co-conspirator, nor was he included in the SEC's complaint, nor the subject of any forfeiture proceeding. At the previous restitution hearing on November 19th, 2022, the Government argued that they presented evidence through the testimony of Kevin Gillespie, "when he was on the stand that he was dealing with Mr. Farrill, [and] that he believed he was doing so…that Farrill was doing so on behalf of Mr. Hackett." The Defendant submits that the Government erroneously characterizes what was on the record at trial. During the testimony of Gillespie, the following was said:

Q. Let's break down each one.

So with the marketing, what money are you talking

about that they wanted you to use for marketing?

A. The capital that he invested in the company.

Q. And this is whose capital?

A. Andrew Hackett.

Q. And, again, even though he was not on that note, you're saying this was Mr. Hackett's capital?

A. I believed it to be, yeah.

MR. NURIK: Objection as to speculation.

THE COURT: Sustained. The answer is stricken.

See Jury Trial Day 2 Transcript pg. 147-148. The Government relies on a statement made by Gillespie that was stricken from the record at trial due to it being pure speculation. Speculation is exactly what the Government is using to argue that Robert Farrill's transactions are for the benefit of the Defendant.

Second, obtained from the SEC HVST/ASNT Blue Sheet Data (introduced in evidence at trial) and isolated on the chart marked EXHIBIT L, trades from the Toronto, Canada firm "Mackie Research" are the trades of Robert Farrill during the scope of the indictment. These trades begin on 9/11/17 and continue until the end of January 2018. These shares are not from the 750,000 shares that Farrill obtained through the Convertible Promissory Note entered into evidence at trial. *See Government Trial EXHIBIT 219*. As testified by government witness Kara Kennedy, Farrill did not deposit the 750,000 shares until March 9th, 2018. *See Government Trial EXHIBIT 224*. The trades by Farrill out of the Mackie Research account include both purchases and sales in the open market. **No evidence was presented at trial showing that these trades were**

for the benefit of the defendant. Moreover, Farrill invested $300,000 into the First Harvest company as consideration for the 750,000 shares issued through the Convertible Promissory Note. *See Jury Trial Transcript Day 2, pg. 146.* However, the sales of Farrill shown on the "ASNT Blue Sheet Data" total $62,516.21, a substantial -$237,483.79 loss. *See EXHIBIT L.*

The Government also argues that the purchases of the victims were made while the market price was artificially inflated. Robert Farrill deposited the 750,000 shares in question on March 9, 2018. At this point in time, the market was significantly deflated, despite the government's argument, falling from the $4.00-$5.00 range to $1.00 and under. *See EXHIBIT L*. This is due to two factors outside of the defendant's control. First, the manipulative trading scheme of Lee and Page ending in January of 2018. Second, the Auctus Fund LLC., or as referenced during trial, one of the "toxic debt holders" began selling their large position into the open market beginning on February 23, 2018 and continuing until the end of the HVST/ASNT Blue Sheet Data provided in discovery. As the Auctus Fund began selling their large position, the stock price fell under $1.00 and continued to do so each day of their selling. The victims sold into this extremely deflated market, which does not subject them to the scheme in question.

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III.

THE GOVERNMENT HAS FAILED TO PROVE THAT ALL OF THE "VICTIMS'" LOSSES WERE THE RESULT OF DEFENDANT'S CRIMINAL ACTS

Beginning in October 2017- January 2018, as proven during trial by defense, the sales representatives from David Wolfson's call-room were engaging in manipulative trading unbeknownst to the defendant. *See defense trial EXHIBITS A and C*. The sales representatives Christopher Lee and Renardo Page purchased the HVST/ASNT stock in multiple smaller buy orders and sold on the same day (churning the stock), even taking losses. *See EXHIBIT L*. These individuals participated in this manipulation to not only create artificial volume on the stock, but to also bill the defendant for sales being created using fictitious investor names. A total of 16 victims from the government's victim list purchased the stock during this period. Moreover, the government argues that the victims purchased the stock while the market was artificially inflated by the defendant; However, the defendant submits that during this period the market was artificially inflated by Lee and Page through their manipulative trading scheme without his knowledge, nor the knowledge of David Wolfson, as proven during trial. *See Jury Trial Transcript Day 3, pg. 386-387.* During the cross-examination of David Wolfson, he had testified that he himself was unaware of the manipulative trading of Lee and Page. The government has failed to prove that the defendant sold any of his shares directly to any of the victims. Moreover, there are specific instances where victims' buy orders match with the sale orders of Page and Lee (ex. John Wilde's trades 10/26/17; Chris Filipek's trades 1/25/18). The defendant should not be responsible for restitution for the trades of the victims during the manipulative trading scheme of Lee and Page. The market to which the victims purchased the stock was artificially inflated at the hands of Lee and Page, and the market to which the victims sold was significantly deflated due to the sales of Auctus Fund LLC. Therefore, the defendant should not be responsible for restitution based on the undisputable trading information, and testimony at trial from the government's witnesses

IV.

CONCLUSION

The Government has not met its burden in calculating the losses of the victims, nor in attributing such losses to the defendant.

Dated this 2nd day of December 2022.

Respectfully Submitted:

LAW OFFICE OF MARC S. NURIK

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APPENDIX 10

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FILED
MAR 26 2024
CLERK. U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY ____ DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff(s), v. **ANDREW HACKETT**, Defendant(s).	Case No.: **18-cr.-3072** **REQUEST FOR APPOINTMENT OF COUNSEL**

I, **ANDREW HACKETT**, move for the appointment of counsel. To support this motion, I declare under penalty of perjury that (check one):

- ☒ I have been granted, or have applied for, permission to proceed *in forma pauperis*.
- ☐ I have attached an affidavit demonstrating my inability to pay the cost of an attorney.

I have made the following diligent efforts to obtain legal counsel but have been unsuccessful because of my poverty (describe below, include information for each attorney you contacted):

Attorney: FEDERAL DEFENDERS

When: 03/25/2024

Where: SAN DIEGO

How (by telephone, in person, etc.): TELEPHONE

Why attorney was not employed to handle your claim:

Office represented one of my co-defendants in the same matter and advised that the office is unable to represent myself. Office advised me to seek appointment of counsel from the Court.

Attorney: MARC NURIK

When: 7/21/2022

Where: SAN DIEGO

How (by telephone, in person, etc.):

Telephone/email correspondence through my spouse while I was incarcerated.

Why attorney was not employed to handle your claim:

Attorney represented myself during my criminal trial, and filed a notice of appeal, and subsequent notice of withdraw and to appoint new counsel. Attorney is unable to represent me without compensation.

Attorney:

When:

Where:

How (by telephone, in person, etc.):

Why attorney was not employed to handle your claim:

I need appointed counsel to assist me because (describe below):

New evidence that was not turned over to myself by the Government in this case has been discovered over the weekend. I need an attorney to advise of my rights in light of these recent events. Moreover, I require an attorney to assess any next steps that must be taken to preserve my rights in this criminal proceeding. In light of this evidence not being turned over to me, I am seeking an attorney to file a motion for new trial with this Court.

I am currently unrepresented in this criminal proceeding. I am unable to pay for the previous counsel that I had during my original trial, nor able to pay for any new representation. I have contacted the Federal Defenders Office of San Diego that advised me that they are unable to represent me in this matter due to a conflict by their representation of one of my co-defendants, and they advised me to petition the Court for the appointment of counsel.

03/25/2024
Date

A.H.
Signature

ANDREW HACKETT
Printed Name

A P P E N D I X 11

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA Plaintiff, vs. ANDREW HACKETT Defendant.	Case No.: 3-18-cr-03072-TWR-1 **DEFENDANT'S MOTION FOR NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE AND PROSECUTORIAL MISCONDUCT**

The defendant, Andrew Hackett, hereby submits this Motion for New Trial on the basis of newly discovered evidence and prosecutorial misconduct.

I

INTRODUCTION

In or around late February and early March of 2024, articles pertaining to a newly revealed to be "rogue" Federal Bureau of Investigations ("FBI") Confidential Human Source ("CHS") accused of entrapping the current President of the United States were published by the Washington Post[1], Associated Press[2], The Guardian[3], and other news outlets. These articles have identified the CHS in question to be Alexander Smirnov. Based on select relevant discovery turned over to the Defendant, the Defendant was able to recently make the connection that the alleged rogue FBI CHS Smirnov, discussed in the articles, may have been an individual by the name

[1] https://www.washingtonpost.com/politics/2024/03/09/alexander-smirnov-fbi-biden-impeachment/
[2] https://apnews.com/article/hunter-biden-fbi-informant-smirnov-ukraine-impeachment-113c1104052dbdc9302606f6d42c9939
[3] https://www.theguardian.com/us-news/2024/mar/14/company-paying-fbi-informant-trump-connections

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"Alex (Last Name Unknown)" as identified in the discovery turned over to the defendant regarding a "similar act deal" known as "WRIT," which the Government exhaustively argued was "*intrinsic evidence of the crimes for which Defendants are charged*" in the present matter before the Court. (Dkt. 172, p.8:21-27).

The Alex identified in the defendant's discovery was recently confirmed to be CHS Smirnov by the Securities and Exchange Commission ("SEC") in their parallel civil case against the Defendant:

> "*...the SEC already confirmed during the May 14 [2024] hearing **its** understanding based on information provided by the **United States Attorney's Office** that Smirnov was the "Alex" on a recorded call provided to Hackett during criminal discovery; thus this issue is not in dispute*," (3:18-cv-01530, Dkt. 213, p. 7:16-19).

Mr. Smirnov's contacts with the defendant would have produced either recordings of their conversations, or reports and notes summarizing the conversations, trading reports pertaining to WRIT, trading reports authorizing CHS Smirnov to purchase or sell WRIT, all FBI reports pertaining to CHS Smirnov and brokerage reports and conversations with CHS Smirnov's broker/associate Denis, which were not produced to the defendant in discovery prior to trial.

In light of this revelation, Defendant, through his appellate counsel sought the relevant CHS Smirnov discovery from the United States Attorney's Office. However, in response to Defendant's appellate attorney's request for discovery, Assistant United States Attorney ("AUSA") Janaki Chopra declined to produce further discovery, despite the SEC confirming that the US Attorney's Office is aware of CHS Smirnov's identity and his relationship to this matter before the Court.

Defendant would be entitled to recordings, reports, or notes even now if they are potentially exculpatory, and he would have been entitled to recordings, including the aforementioned evidence obtained by CHS Smirnov, that were simply "relevant" at the time of trial, under Rule 16(a)(1)(B)(i) of the Federal Rules of Criminal Procedure.

Disclosure would also be consistent with what the Supreme Court has described as the prosecution's broader duty "to set the record straight," *Banks v. Dretke*, 540 U.S. 668, 676 (2004).

II

RELEVANT BACKGROUND

On August 15, 2021, Defendant filed his Motion for New Trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. (Dkt. 315) On March 28th, 2022, Defendant filed his Supplemental Motion for New Trial ("Supplemental Motion") (Dkt. 388) with additional newly discovered grounds, that the Government failed to disclose to the defense the existence of certain relevant evidence, in violation of the ruling in *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. The Supplemental Motion primarily argues that the Government failed to produce to the Defendant several recorded conversations and messages material to the matter before the Court, and in violation of Defendant's right to a fair trial and Due Process of Law.

On April 18, 2022, the Government filed a Supplemental Brief in Opposition to the Defendant's Supplemental Motion (Dkt. 398), in addition to a Declaration of FBI Special Agent Jeremy R. Tarwater (Dkt. 398-1). In Agent Tarwater's declaration, he identified that a text exchange between the co-operating witness, and one of the Defendant's co-conspirator's "***was not included** on the [FBI] Index, and **does not appear** in the repository folder on the FBI's system… [and] the Custodial Agent believes **this was an oversight**…*" (Dkt. 398-1, pg. 7:9-21).

On May 11, 2022, the Court held an evidentiary hearing regarding the Defendant's Supplemental Motion. CHS Michael Forster ("CHS Forster") was produced to provide testimony regarding the missing evidence. During the hearing, CHS Forster was questioned by defense counsel regarding the missing evidence not produced by the Government. CHS Forster confirmed that he deleted thousands of text messages during the relevant period, many of which would have been text exchanges with the Defendant. (Dkt. 419, p.13:7-25; p.14:1-8). Moreover, in providing reasoning for the missing evidence, CHS Forster provided two different explanations between the time of trial and the evidentiary hearing. (Dkt. 419, p.16:21-23). Additionally, CHS Forster confirmed that Agent Tarwater, nor any other member of the FBI ever pointed out to CHS Forster that missing portions of evidence were not turned over by CHS Forster. (Dkt. 419, p.27:6-17). When CHS Forster was questioned on why he lied to Defendant's co-conspirator about the "deal" being "alive" when at that point in time the deal was "dead," CHS Forster confirmed that his false representations were his "instructions or what [he] was following." (Dkt. 419, p. 61:1-4). On June 9, 2022, the Court denied Defendant's Supplemental Motion for New Trial.

III

LEGAL STANDARD

Under Federal Rules of Criminal Procedure, Rule 33, "upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." (Fed Rules of Crim. Procedure R. 33(a)). Moreover, "any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty." (Fed Rules of Crim. Procedure R. 33(b)(1)).

The 9th Circuit has held that the proper standard in granting a motion for new trial under Rule 33 on the ground of negligent nondisclosure of evidence by prosecutor, "should call for a new trial wherever nondisclosed evidence might **reasonably** have affected the jury's judgment **on some material point, without necessarily requiring a supplementary finding that it also would have changed its verdict.**" *United States v. Butler*, 567 F.2d 885, 890 (9th Cir. 1978) (*emphasis added*).

Moreover, "reversal follows whether the findings are interpreted as establishing bad faith or simply misinterpretation of the defense request… even if the court's findings were found only to establish negligent or unintentional instead of willful nondisclosure of the prosecution's dealings... **reversal of the order denying a new trial would still be required.**""" *United States v. Butler* (1978), 567 F.2d 885, 889.

Additionally, the Supreme Court has explained that "...there are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request. *United States v. Agurs* (1976), 427 U.S. 97, 110. Moreover, the Supreme Court has explained that "...the fact that such evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial." *Agurs*, 427 U.S. 97, 110-111. Thus, it is "[f]or that reason the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal." *Id* at 111.

IV

ARGUMENT

A. Negligent Non-Disclosure by Prosecutor Standard

1. Newly Discovered Evidence

On March 24th, 2024, the Defendant became aware of the identity of a former CHS named Mr. Alexander Smirnov, through his indictment in the Central District of California. Case No. 2:24-cr-00091-ODW. The indictment alleges one count of providing false statement to a government agent, 18 U.S.C. §1001, and one count of falsifying records in a federal investigation, 18 U.S.C. §1519. More specifically, the indictment alleges the following: "*... when the Defendant was authorized to engage in illegal activity for investigative purposes, he was further admonished that 'Under no circumstances may the CHS ... Participate in an act that constitutes obstruction of justice (e.g., perjury, witness tampering, witness intimidation, entrapment, or fabrication, alteration, or destruction of evidence, unless such illegal activity has been authorized).' When the Defendant was given this admonishment, he signed an FBI form that contained this statement.*" Case No. 2:24-cr-00091-ODW, page 2 of

37. However, no such form nor confirmation of his authorization to engage in WRIT dealings were provided to the defendant.

Additionally, Mr. Smirnov has several ties to foreign countries such as Israel, Ukraine, Austria, and Czech Republic, among others. Upon the Defendant's review of the SEC's trading data for the relevant stock to this matter, "ASNT" several individuals are listed trading the relevant stock from brokerage accounts located in these foreign countries during the relevant time period. (Def. Trial Exhibits C, D).

In light of this new information, Defendant, through his appellant counsel Mr. Carl Gunn, reached out to AUSA Mark Rehe, requesting the following: "*evidence that is potentially exculpatory and may have been subject to disclosure under Rule 16 of the Federal Rules of Criminal Procedure…regarding a man named Alexander Smirnov, who was recently publicly revealed as a long-time FBI informant when he was indicted in connection with false statements made in the Hunter Biden investigation and there was subsequent extensive media coverage.*" (Exhibit A) In response to Mr. Gunn's request, AUSA Janaki Chopra provided the following response: "*I received the attached letter from AUSA Mark Rehe. I am assigned to the Hackett case in our office now. I have reviewed the case and your letter and made an inquiry regarding the allegations in your letter. Based on this, I believe the United States complied with its obligations under Rule 16, Brady, Jencks, and Giglio. As a result, there is no further discovery we anticipate producing in this case.*" (Exhibit B)

However, contrary to AUSA Chopra's representations, the SEC confirmed Defendant's suspicions that CHS Smirnov was the individual identified as Alex whom Defendant spoke with during the relevant investigation with the Government's primary trial witness CHS Forster.

Therefore, the declarations from the SEC, the criminal complaint against Mr. Smirnov, and the numerous news articles constitute newly discovered evidence.

2. Newly Discovered Evidence Is Highly Material to The Issues at Trial

The Government produced in discovery a recorded call between Defendant, a now known to be CHS Smirnov, CHS Forster, and "Denis" (an associate of CHS Smirnov). The conversation surrounds the "deal" "WRIT," and a transcript created by the FBI, along with the audio recording of the call (recorded by CHS Forster) was produced to the Defendant in discovery. (Exhibit C) The materiality of CHS Smirnov and WRIT is underscored in the Government's Motion in Limine.

On September 4, 2019, the Government, in its' Motion in Limine to "Admit the conspirators' references to other penny stock "deals" in describing the ASNT scheme," which included WRIT, stated the following:

> "*When discussing the contours of the ASNT conspiracy, the conspirators and Forster occasionally spoke about other deals as reference points.* ***These references to other deals are intrinsic evidence of the charged ... the evidence should be admitted because it shows defendants' knowledge, plan, and modus operandi surrounding pump-and-dump schemes."*** (Dkt. 172, p. 2, 19-28; 3:1-4).

Moreover, the Government underscores the materiality of the 404(b) evidence:

> "*The conspirators' references to other deals to describe aspects of the ASNT deal* ***constitute direct evidence of the conspiracy and securities fraud alleged in the indictment****.*" (Dkt. 172, p.8:5-8)
>
> "*Dumping shares of* ***ASNT****, ...* ***WRIT*** *into an undercover agent's purported broker network. Hackett and Forster often discussed these stocks collectively in fluid conversation. Because the conspirators discussed each of these stocks in connection with, and to illuminate, the conspirators' plans and* ***actions with respect to ASNT, they are intrinsic evidence of the crimes for which Defendants are charged...***" (Dkt. 172, p.8:21-27).
>
> "*... Such intrinsic evidence includes evidence constituting a part of the transaction that serves* ***as the basis for the criminal charge****. ... Intrinsic evidence, however, also includes evidence that is necessary to permit the*

prosecutor to offer a coherent and comprehensible story regarding the commission of the crime. ... ***This is because the jury cannot be expected to make its decision in a void—without knowledge of the time, place, and circumstances of the acts which form the basis of the charge****. ... This includes circumstantial evidence explaining the general nature of a defendant's business activity and* ***providing a context*** *in which the transactions at issue took place."* (Dkt. 172, p. 9:2-8)

Furthermore, the Government connects the references to WRIT with ASNT in stating that discussions about WRIT provide evidence of the Defendant's requisite state of mind necessary for the jury to reach a verdict at trial:

"The conspirators discussed the contours of their agreement – <u>the same agreement that forms the basis for the conspiracy alleged in count 1 of the Indictment</u> – by referring to these deals*.* ***<u>Their discussion of these deals is therefore inextricably intertwined with the ASNT scheme</u>****.* ***Introduction of these conspiratorial discussions will <u>provide the jury with "knowledge of the time, place, and circumstances" surrounding the ASNT scheme</u>, and allow for a "coherent and comprehensible story regarding the commission of the crime.*** *... "* (Dkt. 172, p. 9:11-18)

"The evidence undoubtedly proves several material points – Defendants' intent, knowledge of, and plan to perpetrate the ASNT scheme, the scope of their conspiratorial agreement, and their modus operandi surrounding pump-and-dump schemes ... ***Second, the discussions were not remote in time. In fact, the discussions were contemporaneous with the conspiratorial discussions about ASNT****. This is exactly why the United States seeks to introduce this evidence; the references to other deals were made to articulate, explain, and illuminate the ASNT scheme. As for the deals themselves, recorded calls make clear that Hackett was working on the ...* ***WRIT deals during the same period***

he was engaged in active discussions regarding the ASNT scheme, i.e., October 2017 through at least January 2018." (Dkt. 172, p. 10:4-6,11-17)

Thus, as heavily argued by the government, discussions of WRIT are highly material to the charges against the defendant, yet Defendant was not provided the documentation such as WRIT brokerage records and other reports that the Government would have in their possession, from CHS Smirnov, yet denied providing these records to the defendant. Thus, being an example of prosecutor misconduct.

3. The Newly Discovered Evidence Might Reasonably Have Affected the Jury's Judgment On Some Material Point

Throughout the trial, the Government solely provided circumstantial evidence of the defendant's alleged criminal conduct, to which the jury was positioned to make inferences regarding the defendant's guilt. The core of the Government's case against Defendant focuses on the alleged participation in a manipulative trading scheme ("match trading"). However, as the Government stated during the motion in Limine hearing on November 20, 2019, "***We do not have forensic evidence about trades and match trades*** *with respect to --* ***and we haven't sought it****...*" (Dkt. 205, 35:15-16). This is a prime example of prosecutorial misconduct. The Government knows that CHS Smirnov was involved with WRIT and trading the WRIT stock in connection to the investigation of the defendant, yet the Government did not disclose to neither the defendant, nor the Court that such forensic evidence was available to the Government through FBI CHS Smirnov. Defendant was not a shareholder, nor selling stock of WRIT, since WRIT was CHS Smirnov's deal, as confirmed by CHS Forster:

> "AH [Hackett]: Yeah we got myself, Andrew, [CHS], Denis and Denis's uh, client sorry wha- what's his name again?
>
> D [Denis]: Alex.
> AH [Hackett]: Alex.
> D [Denis]: Yes, so we're all on so— CHS: I thin-I think [OV]

D [Denis]: -so it's-it's actually good timing [CHS] because uh, he actually just had stopped by my office. So it's actually perfect timing cause' he's-so anything we-questions you have, he's here uh, so you're not getting it second hand.

CHS [Forster]: Oh okay, I-I imagine I-I then have to assume that uh, WRIT is uh, is his deal so uhm,--

D [Denis]: Yes." (Exhibit C)

Not only has the Government withheld CHS Smirnov's identity, the Government, through the FBI, additionally falsely reports that Alex' last name is unknown. The Government intentionally reports this falsity to justify the non-disclosure of relevant evidence to the defendant and allows the Government to lie to the court. The Government had access to "forensic evidence" of CHS Smirnov's WRIT trading records, yet the non-disclosure of such forensic evidence to Defendant constitutes prosecutorial misconduct. However, now knowing CHS Smirnov is an FBI informant, Exhibit D which is a WRIT match trading report, is misleading. Nowhere in the report does the FBI show CHS Smirnov's trades of WRIT. Such evidence would show point blank if a "matched trade" occurred. Non-disclosure of this fact allows the Government to continue their false narrative that Defendant was conducting illegal trades, while concealing the definitive facts and misrepresenting to the Court that it did not seek forensic evidence. Below is the document title of Exhibit D, an FBI report alleging to document Defendant's match trades with CHS Forster in WRIT:

'D-1057 (Rev. 5-8-10)

OFFICIAL RECORD

UNCLASSIFIED

FEDERAL BUREAU OF INVESTIGATION

Electronic Communication

Title: (U) Document match trading between UCE and ANDREW HACKETT in "WRIT" **Date:** 02/20/2018

(Exhibit D, p. 1)

Contained within Exhibit D, the FBI outlines CHS Smirnov's involvement with WRIT:

> WRIT News Releases:
>
> As documented elsewhere, HACKETT, ALEX last name unknown (described as a company executive at WRIT), and "DENIS" (a broker known to be JOSEPH PADILLA) had previously discussed with CHS a list of WRIT news releases ready to be disseminated in coordination with stock promotion and/or liquidity campaigns. A list of news releases was provided by DENIS/ALEX (proton user names not ascertained) to HACKETT to CHS via proton on 1/11/2018 (see attached).

(Exhibit D, p. 4).

In the portion of exhibit D, depicted above, the FBI states that CHS Smirnov's username was not "ascertained." However, CHS Smirnov, as an FBI CHS would have been obligated to provide all his email/encrypted messaging accounts to the FBI, especially while engaging with targets of FBI investigations. Yet, the FBI had an obligation to obtain CHS Smirnov's account information certainly after appearing on a recorded call with another CHS, and after being documented in an FBI report during an investigation. This example of concealment of information pertaining to its own CHS by the FBI during its investigation of the defendant should have been presented to the jury to cast doubt on the credibility of its investigation of the defendant. Nevertheless, evidence documented from CHS Smirnov's involvement with WRIT, the defendant, and CHS Forster reasonably would have affected the jury's judgment and most certainly, as stated by the Government, was important for the alleged criminal accusation. In the example of WRIT, CHS Smirnov controlled the WRIT shares, and the FBI would have had access to his shares and trading records or reports of his conduct with WRIT and all other communications CHS Smirnov had pertaining to WRIT. The man referenced as Denis was CHS Smirnov's broker who had access to sell the WRIT shares for CHS Smirnov, yet no recordings or documents of their communication, no records of any sort, no reports were disclosed to Defendant by the Government. This is prosecutorial misconduct at its finest. The referenced agreement with the FBI and CHS Smirnov classifies this as "Obstruction of justice." This evidence could have been so damaging to the Government's theory of Defendant's intent that the Government purposely did not disclose such evidence to the defendant in order to maintain its misleading theory that relies solely on circumstantial evidence rather than forensic evidence the Government had available. CHS Smirnov would have authorization to conduct WRIT trades, communicate with targets such as the defendant and CHS Smirnov's associate Denis, and would have to provide documentation to the FBI regarding his involvement with WRIT and or the ASNT/HVST scheme. Yet, none of this was turned over to Defendant.

The best evidence of Defendant's state of mind would have been produced through CHS Smirnov's reports, recordings, records and most importantly brokerage records collected while working with the FBI and conducting trades of WRIT and having CHS Forster "promote" WRIT by having the FBI conduct buy orders of the stock. However, even though both parties involved with trading WRIT in this instance were informants with the FBI, the Government only provided the buy orders of WRIT (Exhibit E, p. 23, 28), and if CHS Smirnov did not sell WRIT shares then that exculpatory evidence needs to be turned over to the defendant in the form of brokerage records. Again, this allowed the Government to maintain its misleading case against the defendant by presenting solely circumstantial evidence at trial, rather than forensic trading records it had access to. Essentially, only providing the defendant a misleading report produced by the FBI and the fact the Government continues to refuse to disclose the relevant documents is clearly prosecutorial misconduct.

During its Motions in Limine, the Government submitted a substantial and thorough argument as to why discussions of WRIT should be presented to a jury at trial. However, the Defendant should also have been afforded the same opportunity to introduce relevant evidence in support of his defense—that the defendant does not possess the requisite state of mind for both charges alleged by the Government.

The Government's closing remarks to the jury at trial describe the significance of the transfer agent form, which states in pertinent part that the defendant did not make nor propose to make any payment in connection with the offer or sale of the shares being deposited. (Dkt. 345, p. 722: 22-24). The Government stated that misrepresenting "*on that and that alone, ladies and gentlemen, you can convict Andrew Hackett for securities fraud. It is a misrepresentation or omission in connection with* ***the sale or purchase of securities****. That and that alone is a basis to convict... This is enough. It's also enough to convict on the conspiracy count...*" (Dkt. 345, p.724:18-25)

However, CHS Smirnov's WRIT trades would have been the only forensic evidence provided to the jury during trial to show that the defendant's lack of the requisite state of mind required for both securities fraud and conspiracy charges. Such forensic evidence would have reasonably affected the jury's judgment on whether the defendant misrepresented on the transfer agent form—on the highly material point that Defendant did not make and did not propose to make any payment in connection with the offer or sale of the shares being deposited and would have created serious doubt about the Government's theory of the case at trial for the jury. Instead, prosecutorial misconduct was the easier route for the Government, in order to present a misleading case to the jury. The Government continues this by not disclosing the evidence collected by CHS Smirnov to the defendant.

V

CONCLUSION

The materiality of the newly discovered evidence is undeniable, as is the standard set by the 9th Circuit. The test applicable to claims of negligent prosecutorial non-disclosure of evidence essential for or at least useful to the full presentation of the defense requires a new trial whenever the non-disclosed evidence *might* reasonably have affected the jury's judgment on *some* material point. *Butler*, 567 F.2d 885, 890 (9th Cir. 1978). As the Government has said in its own words, the WRIT deal in and of itself is intrinsic evidence of Defendant's state of mind regarding both charged counts concerning ASNT. This is more than a mere material point, rather, this evidence, as the Government vehemently stated is the modus operundi of both charges against the defendant. The heart of the Government's allegations against the defendant surrounds his intent to engage in manipulative trading through a match trading scheme. However, Defendant and CHS Smirnov's interactions and reports concerning WRIT would have reasonably affected the jury's judgment on whether the Defendant sold his stock in connection with any proposed sales. Instead, the intentional non-disclosure of such evidence allowed the Government to mislead the jury, deceive the Court during its Motions in Limine, and provide a false presentation of the facts at trial. Additionally, the defendant was denied evidence that was, at a minimum, useful to his defense at trial. The decision of whether to call CHS Smirnov as a witness in the defendant's defense was his decision to make, not the Government's. The Government purposely continues to withhold disclosure of such evidence, in violation of the defendant's due process rights.

For the reasons stated above, the defendant respectfully requests that this Court grant Defendant's Motion for New Trial.

Dated:

/s/ Andrew Hackett
Andrew Hackett (pro se)
Defendant
Email: andrewyge@gmail.com

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA Plaintiff, vs. ANDREW HACKETT Defendant.	Case No.: 3-18-cr-03072-TWR-1 **DECLARATION OF ANDREW HACKETT IN SUPPORT OF DEFENDANT'S MOTION FOR NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE AND PROSECUTORIAL MISCONDUCT**

DECLARATION OF ANDREW HACKETT

I, Andrew Hackett, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am the defendant in this action before the Court. I submit this declaration in support of the Defendant Andrew Hackett's Motion For New Trial Based On Newly Discovered Evidence And Prosecutorial Misconduct.
2. Attached as Exhibit A is a letter from Defendant's Appellate Attorney, Carl Gunn, dated May 4, 2024, addressed to the Assisstant United States Attorney's Office.
3. Attached as Exhibit B is an email from Assistant United States Attorney, Janaki Chopra, dated May 8, 2024, in response to Carl Gunn's letter dated May 4, 2024.
4. Attached as Exhibit C is an excerpt of a FBI transcript of a recorded call on January 10, 2024, between Defendant, CHS Forster, Denis, and CHS Smirnov.
5. Attached as Exhibit D is an FBI report regarding "WRIT" dated February 20, 2018.

6. Attached as Exhibit E is excerpts of FBI's brokerage account records detailing the "buy" orders of "WRIT" (Bates No. SC14-REPORTS-000129).

San Diego, California
July 5th, 2024

/s/ Andrew Hackett

Andrew Hackett

EXHIBIT A

CARLTON F. GUNN
ATTORNEY AT LAW
1010 North Central Ave., #100
Glendale, California 91202
323-474-6366

April 4, 2024

Mark Rehe
Assistant United States Attorney
United States Attorney's Office
880 Front Street, Room 6293
San Diego, CA 92101

re: *United States v. Andrew Hackett*

Dear Mr. Rehe:

While Mr. Hackett's pro se motion for appointment of counsel for a motion for new trial (District Court Dkt. #492) is pending, I am writing on his behalf and on behalf of whatever counsel may end up representing him in the district court. The reason I am writing is to request evidence that is potentially exculpatory and may have been subject to disclosure under Rule 16 of the Federal Rules of Criminal Procedure. It is regarding a man named Alexander Smirnov, who was recently publicly revealed as a long-time FBI informant when he was indicted in connection with false statements made in the Hunter Biden investigation and there was subsequent extensive media coverage.

During the time of the undercover investigation of Mr. Hackett, he had contact with a man using the first name of "Alexander" who had an associate named Nayflish, whom media coverage suggests is an associate of Alexander Smirnov. Based on this, it appears likely that the "Alexander" with whom Mr. Hackett had contact is Alexander Smirnov and it seems reasonable to also infer that he was acting as an informant on behalf of the FBI at the time.

It further seems likely – or at least reasonably possible – that Mr. Smirnov's contacts with Mr. Hackett would have produced either recordings of their conversations – if he had instructions similar to the informant who actually testified in Mr. Hackett's trial – or reports or notes summarizing the conversations. Assuming that is the case, Mr. Hackett would like to have those recordings, reports, or notes. He would be entitled to recordings, reports, or notes even now if they are potentially exculpatory, and he would have been entitled to recordings that were simply "relevant" at the time of trial, under Rule 16(a)(1)(B)(i) of the Federal Rules of Criminal Procedure. Disclosure would also be consistent with what the Supreme Court has described as the prosecution's broader duty "to set the record straight," *Banks v. Dretke*, 540 U.S. 668, 676 (2004).

I am hoping your office will agree to inquire into the existence of evidence such as I describe and either you or some other appropriate AUSA will make the inquiry. Please let me know if that is correct as soon as you can. I am hoping the inquiry can be made promptly because, absent some sort of tolling, the three-year deadline for a motion for new trial based on newly discovered evidence will run by August 2 of this year.

Thank you for your consideration, and please let me know if you have any questions.

Sincerely,

Carlton F. Gunn

Carlton F. Gunn

AUSA 2 Ltr.wpd

EXHIBIT B

From: Chopra, Janaki (USACAS)
To: cgunnlaw@gmail.com
Subject: Andrew Hackett
Date: Wednesday, May 8, 2024 10:05:31 AM
Attachments: AUSA 2 Ltr (signed).pdf

Dear Mr. Gunn,

I received the attached letter from AUSA Mark Rehe. I am assigned to the Hackett case in our office now. I have reviewed the case and your letter, and made an inquiry regarding the allegations in your letter. Based on this, I believe the United States complied with its obligations under Rule 16, Brady, Jencks, and Giglio. As a result, there is no further discovery we anticipate producing in this case.

Sincerely,
Janaki

Janaki Gandhi Chopra
Assistant United States Attorney
Southern District of California
880 Front Street
San Diego, CA 92101
(619) 546-8817

EXHIBIT C

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

10385 Vista Sorrento Parkway
San Diego, California 92121

File Number:	[redacted]
Requesting Official(s) and Office(s):	SA Jeremy Tarwater
Task Number(s) and Date Completed:	01-10-2018_054258PM,
Name and Office of Typist(s):	SD 76478, San Diego
Name and Office of Reviewer(s):	SA Jeremy R. Tarwater 3/30/2018

Source File Information
Name of Audio File or CD:
-CD: Out_sdcitation9492393587_01-10-2018_054258PM [00.22.26]
-Telephone recording

Participants:

CHS:	Citation
AH:	Andrew Hackett
A:	Alex
D:	Denis

Abbreviations:

[UI]	Unintelligible
[PH]	Phonetic
[OV]	Overlapping Conversation

File Number: [redacted]
Task Number: 01-10-2018_054258PM
Recording Date: 01/10/2018

AH: Yep.

CHS: Okay.

D: [UI]

AH: Is that-[UI] Denis?

D: Hey, Denis-Denis and Alex here.

CHS: Hey Denis, [CHS's] here [OV]—

AH: And then I got- I got my friend on as well.

D: Who's on?

AH: Okay—

D: Who's on?

AH: Yeah we got myself, Andrew, [CHS], Denis and Denis's uh, client sorry wha-what's his name again?

D: Alex.

AH: Alex.

D: Yes, so we're all on so—

CHS: I thin-I think [OV]

D: -so it's-it's actually good timing [CHS] because uh, he actually just had stopped by my office. So it's actually perfect timing cause' he's-so anything we-questions you have, he's here uh, so you're not getting it second hand.

CHS: Oh okay, I-I imagine I-I then have to assume that uh, WRIT is uh, is his deal so uhm,--

D: Yes.

EXHIBIT D

FD-1057 (Rev. 5-8-10)

UNCLASSIFIED

FEDERAL BUREAU OF INVESTIGATION

Electronic Communication

Title: (U) Document match trading between UCE and ANDREW HACKETT in "WRIT"

Date: 02/20/2018

From: SAN DIEGO
SD-WC1
Contact: [redacted]

Approved By: SSA Mark Kolenda

Drafted By: [redacted]

Case ID #: [redacted]

DOCUMENT RESTRICTED TO CASE PARTICIPANTS
This document contains information that is restricted to case participants.

Synopsis: (U) Document match trading between UCE and ANDREW HACKETT on 2/9/2018 and 2/13/2018 in issuer "WRIT"

Enclosure(s): Enclosed are the following items:
1. (U) SEC non-objection regarding "WRIT"
2. (U) WRIT proton emails, press releases and trading backup
3. (U) SEC non-objection 2/16/2018 to sell WRIT shares

Details:

UCE [redacted] (the "UCE") participated in the following match trades with ANDREW HACKETT ("HACKETT"):

February 09, 2018:

As arranged per separately documented consensually monitored communications:

UNCLASSIFIED

Title: (U) Document match trading between UCE and ANDREW HACKETT in "WRIT"
Re: [redacted] 02/20/2018

UCE placed a limit buy order at $0.219 for 20,000 shares of WRIT MEDIA GROUP INC., OTC ticker "WRIT", headquartered in Beverly Hills, California 90211 (herein "WRIT"). The order was filled at approximately 11:23 a.m. New York time at between $0.195 and $0.20 per share.

UCE placed a second limit buy order at $0.219 for 15,000 shares of WRIT that was filled at approximately 11:37-11:38 a.m. New York time at between $0.195 and $0.20 per share.

UCE placed a third limit buy order at $0.219 for 15,000 shares of WRIT that was filled at approximately 11:54-11:55 a.m. New York time at between $0.195 and $0.20 per share.

Total purchased 2/09/2018: 50,000 shares of WRIT at a cost of approximately $9,962.50 (plus brokerage commissions).

February 13, 2018:

As arranged per separately documented consensually monitored communications:

UCE placed a limit buy order at $0.195 for 20,000 shares of WRIT that was filled at approximately 12:35 p.m. New York time at between $0.18695 and $0.194 per share.

UCE placed a second limit buy order at $0.194 for 20,000 shares of WRIT that was filled at approximately 12:53-12:54 p.m. New York time at between $0.17155 and $0.18 per share.

UCE placed a third limit buy order at $0.18 for 10,000 shares of WRIT that was filled at approximately 1:03 p.m. New York time at $0.18 per share.

Total purchased 2/13/2018: 50,000 shares of WRIT at a cost of approximately $9,240.76 (plus brokerage commissions).

Kickback Owed:

Title: (U) Document match trading between UCE and ANDREW HACKETT in "WRIT"
Re: [redacted] 02/20/2018

Based on prior consensually recorded communications, HACKETT agreed to pay a 30% "commission" for shares purchased (and "put away") by UCE's purported network of fund managers and brokers. HACKETT also agreed to pay CHS [redacted] (the "CHS") a 5% referral fee for the referral to UCE.

For the above referenced share purchases made 2/9/2018 and 2/13/2018:

30% "commission" owed by HACKETT to UCE: Approximately $5,760.98

5% referral fee owed by HACKETT to CHS: Approximately $960.16

On 2/11/2018, CHS sent via proton email to HACKETT and UCE a spreadsheet tracking shares purchased by UCE, "commission" owed by HAKCETT to UCE, and 5% referral fee due by HACKETT to CHS. The proton email and spreadsheet are attached.

Note, HACKETT utilizes proton email account freelifeinvestmentsinc@protonmail.com, CHS utilizes troutflyfish@protonmail.com, and UCE utilizes delmarcapital@protonmail.com.

On 2/13/2018 CHS sent another proton email to HACKETT and UCE adding to the WRIT tracking spreadsheet the 2/13/2018 trades noted above. This spreadsheet, which is attached, listed the "commission" owed by HACKETT to the UCE and the 5% referral fee due by HACKETT to CHS. The proton email is attached. This spreadsheet reflected 100,000 shares of WRIT thus far "put away" by UCE's purported network.

For information, writer was advised that on 2/14/2018, a wire was received in the approximate amount of $6,719 to a covert FBI bank account. HACKETT confirmed he sent the above described wire in payment of the "commission" and referral fees owed for trades done in WRIT on 2/9/2018 and 2/13/2018.

Covert FBI Account:

Title: (U) Document match trading between UCE and ANDREW HACKETT in "WRIT"
Re: [redacted] 02/20/2018

For information, UCE utilized covert FBI brokerage account ending 6376 to effect the above noted trades. (Printouts attached).

SEC Trade Review Request:

As previously documented, SEC New York had provided its non-objection to certain proposed trades in WRIT, including the above described trades. This trade review was conducted per the FBI-SEC MOU. (SEC non-objection email(s) attached).

WRIT News Releases:

As documented elsewhere, HACKETT, ALEX last name unknown (described as a company executive at WRIT), and "DENIS" (a broker known to be JOSEPH PADILLA) had previously discussed with CHS a list of WRIT news releases ready to be disseminated in coordination with stock promotion and/or liquidity campaigns. A list of news releases was provided by DENIS/ALEX (proton user names not ascertained) to HACKETT to CHS via proton on 1/11/2018 (see attached).

On 2/9/2018, after HACKETT had previously requested a news release be disseminated by WRIT, writer observed that a WRIT press release from the 1/11/2018 list was in fact disseminated. WRIT news article printout attached.

♦♦

EXHIBIT E

Print

Print in landscape for best results.

Trade > Order Status

All Orders Orders With Fills Open Today's Canceled Extended Hours

4 orders

For: All Securities - 4 order(s) Remember

Get All Quotes

WRIT WRITERS GROUP FILM C

Get a Quote

Action	Quantity	Price	Timing	Time & Date (ET)
Buy	100 Shares	Limit $0.05	Day Only	10:48 AM 02/09/2018
Canceled	100			10:48 AM 02/09/2018
CLOSED Canceled		Reinvest Dividends: View	Order #: 42778154	Resubmit
Buy	20,000 Shares	Limit or Better $0.219	Day Only	11:23 AM 02/09/2018
Bought	2,500	$0.195	Settles 02/13/2018	11:23 AM 02/09/2018
Bought	17,500	$0.20	Settles 02/13/2018	11:23 AM 02/09/2018
CLOSED Filled			Reinvest Dividends: View/Edit	Order #: 42880217
Buy	15,000 Shares	Limit or Better $0.219	Day Only	11:37 AM 02/09/2018
Bought	2,500	$0.195	Settles 02/13/2018	11:37 AM 02/09/2018
Bought	12,500	$0.20	Settles 02/13/2018	11:38 AM 02/09/2018
CLOSED Filled			Reinvest Dividends: View/Edit	Order #: 42846263
Buy	15,000 Shares	Limit or Better $0.219	Day Only	11:54 AM 02/09/2018
Bought	2,500	$0.195	Settles 02/13/2018	11:54 AM 02/09/2018
Bought	12,500	$0.20	Settles 02/13/2018	11:55 AM 02/09/2018
CLOSED Filled			Reinvest Dividends: View/Edit	Order #: 42954591

(0817-785A)

Brokerage Products: Not FDIC Insured • No Bank Guarantee • May Lose Value

Account: XXXX-X376
Today's Date: 12:18 PM ET, 02/13/2018

Print

Print in landscape for best results.

Trade > Order Status

All Orders Orders With Fills Open **Today's** Canceled Extended Hours

3 of 7 orders Show all orders

For: All Securities - 7 order(s) Remember

Get All Quotes

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Get a Quote

Action	Quantity	Price	Timing	Time & Date (ET)
Buy	20,000 Shares	Limit or Better $0.195	Day Only	12:35 PM 02/13/2018
Bought	2,500	$0.18695	Settles 02/15/2018	12:35 PM 02/13/2018
Bought	5,000	$0.194	Settles 02/15/2018	12:35 PM 02/13/2018
Bought	5,000	$0.1939	Settles 02/15/2018	12:35 PM 02/13/2018
Bought	7,500	$0.194	Settles 02/15/2018	12:35 PM 02/13/2018
CLOSED Filled			Reinvest Dividends: View/Edit	Order #: 44967936
Buy	20,000 Shares	Limit or Better $0.194	Day Only	12:53 PM 02/13/2018
Bought	2,500	$0.17155	Settles 02/15/2018	12:53 PM 02/13/2018
Bought	17,500	$0.18	Settles 02/15/2018	12:54 PM 02/13/2018
CLOSED Filled			Reinvest Dividends: View/Edit	Order #: 44993823
Buy	10,000 Shares	Limit $0.18	Day Only	1:01 PM 02/13/2018
Bought	10,000	$0.18	Settles 02/15/2018	1:03 PM 02/13/2018
CLOSED Filled			Reinvest Dividends: View/Edit	Order #: 44973145

(0817-785A)

Brokerage Products: Not FDIC Insured • No Bank Guarantee • May Lose Value

Account: XXXX-X376
Today's Date: 01:04 PM ET, 02/13/2018

A083

No. ________________________

IN THE

SUPREME COURT OF THE UNITED STATES

ANDREW HACKETT, PETITIONER,

vs.

UNITED STATES, RESPONDENT.

CERTIFICATE OF SERVICE

I, Carlton F. Gunn, hereby certify that on this 24th day of August, 2026, a copy of the Petitioner's Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit were mailed postage prepaid, to the Solicitor General of the United States, Department of Justice, Room 5614, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001, counsel for the Respondent.

Respectfully submitted,

August 24, 2026

s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law