**No. 14-**

IN THE
# Supreme Court of the United States

GEORGE GEORGIOU,
*Petitioner*,
v.

UNITED STATES OF AMERICA,
*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

1. Whether prosecutors are permitted to withhold materials covered by *Brady* v. *Maryland*, 373 U.S. 83 (1963), when it is possible that the defendant may have been able to discover the materials through another source.

2. Whether a court of appeals may conclude that withheld evidence was not material, consistent with *Brady* and its progeny, without viewing the evidence cumulatively and in light of the entire record.

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George Georgiou respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

## OPINIONS BELOW

The Third Circuit's opinion is reported at 777 F.3d 125. Pet. App. 1a-39a. The District Court's memorandum and order denying Georgiou's motion for a new trial are unreported. *Id.* at 40a-57a.[1] The

[1] The District Court's November 9, 2010 memorandum and order were filed under seal, but are publicly available in the Third Circuit's record at 1 C.A. J.A. 50a-51a and 2 C.A. J.A. 52a-65a.

District Court's memorandum and order denying Georgiou's motion for reconsideration and motion to compel the disclosure of evidence are unreported but available at 2011 WL 6150596 and 2011 WL 6153629, respectively. Pet. App. 58a-120a.

## JURISDICTION

The Third Circuit entered judgment on January 20, 2015. Pet. App. 1a. On February 25, 2015, the Third Circuit denied a timely petition for panel rehearing and rehearing en banc. *Id.* at 121a-122a. On May 4, 2015, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including June 25, 2015. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the U.S. Constitution provides: "No person shall * * * be deprived of life, liberty, or property, without due process of law."

## INTRODUCTION

This petition concerns the continuing viability of this Court's landmark decision in *Brady* v. *Maryland*, 373 U.S. 83 (1963), and its progeny. It raises two important questions about how *Brady* claims are analyzed by lower courts. The first question relates to who bears the burden to discover exculpatory and impeachment evidence; the second relates to the proper standard for analyzing whether withheld evidence was material to the defendant's case.

The first question is whether a criminal defendant may be required to seek out other sources for exculpatory and impeachment materials that are in the possession of the government. One might have thought that *Brady* itself, which speaks to the obli-

gations of prosecutors, answered this question. And indeed that was the law for half a century: courts charged the prosecution with the responsibility of disclosing to the defense any exculpatory evidence. Unfortunately, some courts of appeals—including the Third Circuit in this case—have eroded that due process protection by shifting the burden of discovering exculpatory or impeachment evidence to the defense.

This Court should grant certiorari to review this question for three reasons. *First*, nearly every court of appeals has addressed the question, and they are deeply divided. In this case, the Third Circuit held that impeachment evidence is not suppressed where the material was "accessible" to the defendant through other channels. Six federal courts of appeals have adopted a similar rule, while four circuits have rejected it. State courts are also divided. This Court should resolve this split of authority.

*Second*, the Third Circuit's decision is wrong. This Court has never endorsed a rule excusing *Brady* violations when the defendant could have gained access to the evidence from other sources. This Court should reiterate that *Brady*'s protections apply to all defendants, regardless of their diligence—or lack thereof—in seeking out exculpatory or impeachment information from other sources.

*Third*, this question presents a frequently recurring issue of national importance. When exculpatory or impeachment evidence is withheld, it can significantly impede a defendant's ability to mount a vigorous defense. And given the frequency of alleged *Brady* violations, this issue threatens to affect many defendants each year. *See* Walter Pavlo, *Govt Prose-*

*cutors Are Stingy At Sharing Information, Just Ask George Georgiou*, Forbes (Mar. 11, 2015). Finally, excusing prosecutorial misconduct and blaming defendants may undermine public confidence in the criminal justice system.

The second question is sufficiently related to the due diligence question that this Court should review it as well. It addresses how courts must review withheld evidence to determine if it would have been material to the defendant's case. In this case, the Third Circuit's conclusory decision on materiality is rife with errors: it conflated favorability and materiality, two separate components of the *Brady* analysis; it evaluated materiality with respect to each piece of evidence, rather than the cumulative effect of all the withheld evidence; and it relied on the quantum of remaining evidence instead of evaluating whether the undisclosed evidence could have affected the verdict. Viewed properly, the withheld evidence in this case was material to the defendant's case.

For these reasons, certiorari should be granted.

## STATEMENT

George Georgiou is a venture capitalist who helps finance high-risk, start-up companies. In 2009, the U.S. Government charged Georgiou with securities fraud, wire fraud, and conspiracy to commit such fraud. *See* 15 U.S.C. §§ 78j(b), 78ff; 18 U.S.C. §§ 2, 371, 1343, 1349; Pet. App. 2a. The charges arose out of an alleged scheme to artificially inflate the prices of several stocks on the over-the-counter securities market. Indictment at 1-2, No. 2:09-cr-88 (E.D. Pa. Feb. 12, 2009), ECF No. 42. According to the indictment, Georgiou and his co-conspirators caused the stocks' prices to rise by engaging in manipulative

trading. *Id.* at 5-7. They then supposedly profited from their scheme by selling their shares at the inflated prices or using their shares as collateral to obtain large loans. *Id.* at 5.

Each of the charges required the Government to prove beyond a reasonable doubt that Georgiou acted with criminal intent. For the jury to convict Georgiou of securities fraud, for example, the Government had to prove that he "acted wil[l]fully, knowingly and with the intent to defraud." Tr. of Jury Trial, Day 13 (Feb. 12, 2010), at 28, No. 2:09-cr-88 (E.D. Pa. Mar. 29, 2010), ECF No. 183. To obtain a conviction on the wire fraud charges, the Government had to establish the same "intent to defraud." *Id.* at 35-36. And with respect to the conspiracy charge, the Government had to prove that Georgiou "joined the conspiracy knowing of its objectives and intending to help further or achieve those objectives." *Id.* at 20-21.

Trial began in January 2010. The Government's star witness was Kevin Waltzer, an alleged co-conspirator. Waltzer was the only witness who could provide what the Government described as "an insider[']s view into this stock ring by one of its participants." Tr. of Jury Trial, Day 1 (Jan. 25, 2010), at 7, No. 2:09-cr-88 (E.D. Pa. Mar. 29, 2010), ECF No. 171. And during the trial, Waltzer testified directly to Georgiou's mens rea, telling the jury that Georgiou "basically" admitted to him that Georgiou "kn[ew] that the public is going to get fleeced." Tr. of Jury Trial, Day 3 (Jan. 27, 2010), at 138-139, No. 2:09-cr-88 (E.D. Pa. Mar. 29, 2010), ECF No. 173. Based on Waltzer's testimony, a jury convicted Georgiou of all charges. Pet. App. 7a-8a.

Following trial, Georgiou obtained critical material from Waltzer's own criminal proceedings. Waltzer himself had been charged with wire fraud and other federal crimes. Pet. App. 4a n.4. And in early 2009—more than a year before the start of Georgiou's trial—a pretrial services officer prepared a report regarding whether Waltzer should be released on bail. Pet. App. 81a. The bail report addressed, among other things, Waltzer's mental health history. *Id.* at 22a. The report stated that Waltzer had "been diagnosed in the past with Anxiety Disorder, Panic Disorder and Substance Abuse Disorder." *Id.* at 24a. And it noted that he had been taking Paxil for the last ten years for his anxiety. *Id.* at 84a. Georgiou obtained a copy of this bail report for the first time after the end of his trial.

Georgiou also obtained, for the first time following his trial, a copy of the transcript of Waltzer's arraignment and guilty plea hearing. During that hearing, in the presence of an assistant U.S. attorney, Waltzer acknowledged "see[ing] a psychiatrist, psychologist or mental health provider * * * in connection with depression and anxiety." Tr. of Arraignment & Guilty Plea at 7, No. 2:08-cr-552 (E.D. Pa. Aug. 26, 2010), ECF No. 63. Waltzer acknowledged taking "Paxil, 30 milligrams per day, for combination of depression and anxiety."[2] *Id.*; *see also*

[2] Georgiou's defense team obtained two additional key pieces of evidence from Waltzer's sentencing which occurred approximately a month after Georgiou's trial concluded: first, a report by Dr. Luciano Lizzi, who had treated Waltzer for years and concluded that he suffered from, among other things, bipolar disorder and substance abuse problems. Pet. App. 60a-61a. Second, the defense learned that Waltzer

Pet. App. 24a.[3] The judge acknowledged the bail report and noted that Waltzer would be subject to ongoing mental health and/or substance abuse treatment in the period leading up to his testimony in Georgiou's case. *See* Tr. of Arraignment & Guilty Plea at 39, No. 2:08-cr-552 (E.D. Pa. Apr. 1, 2010), ECF No. 47 (recounting the recommendation from pretrial services that Waltzer "be subject to drug treatment or testing if Pretrial Services deems that necessary, same with mental health treatment").

The Government had failed to disclose either the bail report or the plea transcript prior to Georgiou's trial, even though Georgiou had requested "any and

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admitted that he was a drug addict, abused cocaine, and suffered from bipolar disorder during the conspiracy. Tr. of Sentencing at 4, 6, 13, No. 2:08-cr-552 (E.D. Pa. Aug. 26, 2010), ECF No. 55. Because Waltzer's sentencing occurred after Georgiou's trial, Georgiou does not contend that the Government possessed either of these documents prior to Georgiou's trial, but if Georgiou had known of the bail report and plea transcript, defense counsel likely would have further investigated these matters.

[3] Psychotropic drugs like Paxil—*i.e.*, drugs affecting the mental state—can cause memory loss, among other side effects. *See, e.g.*, Food & Drug Admin., Paxil (Paroxetine Hydrochloride) Prescribing Information at 17 (noting that Paxil can cause "difficulty concentrating, memory impairment, [and] confusion"), *available at* http://www.accessdata.fda.gov/drugsatfda_docs/label/2014/020031s071,020710s035lbl.pdf; Jeroen Schmitt, *Non-Serotonergic Pharmacological Profiles and Associated Cognitive Effects of Serotonin Reuptake Inhibitors*, Journal of Psychopharmacology (2001) (reporting results of a study investigating the causes of Paxil's negative effects on long-term memory).

all evidence" that "a government witness or prospective government witness * * * is or was suffering from any mental disability or emotional disturbance." Letter from Defense Counsel to U.S. Attorney's Office at 5 (Mar. 25, 2009), No. 2:09-cr-88 (E.D. Pa. Jan. 14, 2010), ECF No. 104-1. Georgiou had also requested any "[i]nformation concerning Mr. Waltzer's * * * current or past psychiatric treatment or counseling." Letter from Defense Counsel to U.S. Attorney's Office at 11 (June 2, 2009), No. 2:09-cr-88 (E.D. Pa. June 2, 2009), ECF No. 104-1.

Indeed, the record is replete with defense requests for statements by Waltzer and evidence affecting his credibility. Georgiou had requested "[a]ll relevant statements * * * made by any person who is a witness * * * which was given or made * * * in connection with an investigation or proceeding other than this case" and "[a]ny and all written or oral statements or utterances * * * made to the prosecution * * * which otherwise reflect upon the credibility, competency, bias or motive of government witnesses." Letter from Defense Counsel to U.S. Attorney's Office at 4 (Mar. 25, 2009). The defense team had also asked for "[a]ll information concerning Mr. Waltzer's custody status and specifically negotiations concerning his status on release under the Bail Reform Act." Letter from Defense Counsel to U.S. Attorney's Office at 11 (June 2, 2009).

Georgiou moved for a new trial, arguing that the evidence was material to his defense and that the Government's suppression of it violated *Brady*. *See* Mem. of Law in Support of George Georgiou's Mot. for a New Trial Pursuant to Rule 33 of the FRCP and *Brady* v. *Maryland*, No. 2:09-cr-88 (E.D. Pa. Sept. 20, 2010), ECF No. 208; Mot. To Compel Disclosure of

Evidence at 5-6, No. 2:09-cr-88 (E.D. Pa. Apr. 15, 2011), ECF No. 245. In response, the Government conceded that the bail report had been "available for the government's inspection." Pet. App. 82a. The Government also admitted that the information from the plea hearing had been "in its possession." *Id.* at 47a.

The District Court nevertheless denied Georgiou's post-trial motions, concluding that there was no *Brady* violation. *Id.* at 48a, 84a-85a. The court ordered Georgiou to serve 300 months in prison and pay over $55 million in restitution. *Id.* at 8a.

The Third Circuit affirmed. The court acknowledged that "[u]nder *Brady*, the Government is required, upon request, to produce evidence favorable to an accused," but held that the Government has no such obligation where the evidence is accessible to the defendant. *Id.* at 21a, 24a-25a (internal quotation marks and brackets omitted). According to the court, Georgiou could have obtained both the bail report and the plea transcript with reasonable diligence before his trial. *Id.* at 25a.

In rejecting Georgiou's *Brady* claim, the Third Circuit also concluded that the "evidence concerning Waltzer's mental health is neither favorable to [the defense] nor material." *Id.* The court opined that the mental health evidence was "not clearly relevant" to Waltzer's credibility. *Id.* It noted that "all agreed" at the time of his plea hearing that "he was competent to plead guilty." *Id.* at 26a. And it pointed to the "strength of the evidence against [Georgiou]." *Id*.

The Third Circuit denied rehearing en banc, and this petition followed.

## REASONS FOR GRANTING THE PETITION

### I. THIS COURT SHOULD GRANT THE PETITION TO DECIDE WHETHER *BRADY* IMPOSES A DUE DILIGENCE REQUIREMENT.

The Third Circuit's rejection of Georgiou's *Brady* claim raises the important question whether courts may graft onto *Brady* a requirement that the defendant must prove that he could not have discovered the suppressed evidence through his own efforts. This burden is in addition to the three components of a successful *Brady* claim: "The evidence at issue must be favorable to the defendant, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler* v. *Greene*, 527 U.S. 263, 281-82 (1999).

Under the Third Circuit's due diligence rule, evidence is deemed not suppressed if the defendant knew of, or with reasonable diligence could have discovered, the exculpatory or impeaching evidence. Pet. App. 25a (citing *United States* v. *Perdomo*, 929 F.2d 967, 973 (3d Cir. 1991)). In other words, prosecutors were free to withhold Waltzer's bail report and the minutes that explained Waltzer's history of mental illness and treatment simply because that information was also "accessible" to Georgiou. *Id.* at 24a-25a. Relying on the Eighth Circuit's reasoning in *United States* v. *Jones*, 34 F.3d 596 (8th Cir. 1994), the panel concluded that Georgiou "'was in a position of parity with the government as far as access to this material,' * * * and thus, 'the transcript [] was as available to [the defendant] as it was to the

Government.'" Pet. App. 25a (citations omitted). Because Georgiou knew that Waltzer was "the main witness against him" and had pleaded guilty, the Third Circuit concluded that Georgiou could have obtained a copy of the plea transcript with "minimal" diligence. *Id*. For the same reasons, the panel held that the bail report "was not hidden from" Georgiou, and thus that neither piece of evidence was suppressed. *Id*.

The Third Circuit's ruling conflicts with other courts of appeals, state courts of last resort, and the principles underlying *Brady* and its progeny. Because the constitutional guarantee of a fair trial should not vary based on where a defendant is prosecuted, this Court should grant review to resolve this important question.

### A. Federal And State Courts Are Deeply Divided Over The Question Presented.

1. The federal courts of appeals are divided over whether prosecutors are permitted to withhold materials covered by *Brady* when it is possible that the defendant may have been able to discover the materials through another source. The Third Circuit is aligned with the First, Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits in recognizing a "due diligence" exception to *Brady*. In the Fourth Circuit, for example, defendants must demonstrate that the evidence was "known to the government but not the defendant" and did not "lie in a source where a reasonable defendant would have looked." *United States* v. *Catone*, 769 F.3d 866, 872 (4th Cir. 2014) (internal quotation marks omitted) (holding information contained in Department of Labor files available on request not *Brady* material). *See also,*

*e.g.*, *United States* v. *Cruz-Feliciano,* 786 F.3d 78, 87 (1st Cir. 2015) ("*Brady* does not require the government to turn over information which, with any reasonable diligence, the defendant can obtain himself." (internal quotation marks omitted)); *United States* v. *Bernard*, 762 F.3d 467, 480 (5th Cir. 2014) ("A petitioner's *Brady* claim fails if the suppressed evidence was discoverable through reasonable due diligence." (internal quotation marks omitted)); *Petty* v. *City of Chicago*, 754 F.3d 416, 423 (7th Cir. 2014) ("To establish that evidence was suppressed, a plaintiff must demonstrate that: (1) the state failed to disclose known evidence before it was too late for [a defendant] to make use of the evidence; and (2) the evidence was not otherwise available to [a defendant] through the exercise of reasonable diligence." (internal quotation marks omitted)); *United States* v. *Sigillito*, 759 F.3d 913, 929 (8th Cir. 2014) ("One of the limits of *Brady* is that it does not cover information available from other sources * * * ." (internal quotation marks omitted)); *Wright* v. *Sec'y, Fla. Dep't of Corr.*, 761 F.3d 1256, 1278 (11th Cir. 2014) (no *Brady* violation where "the defendant has equal access to the evidence").

On the other side of the split are those circuits that reject the due diligence rule: the Second, Sixth, Ninth, and District of Columbia Circuits. These courts of appeals place the *Brady* duty on prosecutors alone, not on defendants. The diligence or negligence of the defendant in attempting to locate *Brady* material from other sources does not alter the scope of the prosecutor's duty. The Second Circuit, for example, recently rejected arguments that defendants are required to "exercise 'due diligence' to obtain exculpatory evidence" as "contraven[ing]

clearly established federal law as determined by the Supreme Court in *Brady* and its progeny." *Lewis* v. *Conn. Comm'r of Corr.*, __ F.3d __, 2015 WL 3823868, at *4 (2d Cir. June 22, 2015), *superseding and amending* 768 F.3d 176 (2015). The court of appeals explained that the Supreme Court has never placed such a burden on defendants, and the Connecticut habeas court was not free to limit *Brady* in this way.[4] *Id.* at *9.

The Sixth Circuit recently changed course, interpreting this Court's reversal in *Banks* v. *Dretke,* 540 U.S. 668 (2004), as a "rebuke[]" "for relying on such a due diligence requirement to undermine the *Brady* rule." *United States* v. *Tavera*, 719 F.3d 705, 711 (6th Cir. 2013). The Sixth Circuit held that *Banks* "should have ended [the] practice" of "avoiding the *Brady* rule and favoring the prosecution with a broad defendant-due-diligence rule."[5] *Id.* at 712. Instead, the Sixth Circuit has emphasized that "*Brady* requires the State to turn over *all* material

[4] The Second Circuit distinguished cases where *Brady* evidence was deemed not suppressed because the "defendant either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence." *Lewis*, 2015 WL 3823868, at *9 (quoting *DiSimone* v. *Phillips*, 461 F.3d 181, 197 (2d Cir. 2006)). Those cases, the court explained, are not implicated by its rejection of the due diligence rule because they "speak to facts already within the defendant's purview, not those that might be unearthed." *Id*.

[5] Prior to *Tavera*, the Sixth Circuit applied a harsh version of the due diligence rule, denying *Brady* protections to any material "not wholly within the control of the prosecution." *Coe* v. *Bell*, 161 F.3d 320, 344 (6th Cir. 1998).

exculpatory and impeachment evidence to the defense," not "*some* evidence, on the assumption that defense counsel will find the cookie from a trail of crumbs." *Barton* v. *Warden, S. Ohio Corr. Facility*, 786 F.3d 450, 468 (6th Cir. 2015) (granting conditional habeas writ due to *Brady* error).

The Ninth Circuit agrees that the due diligence requirement is unconstitutional. In *Amado* v. *Gonzalez*, it granted habeas relief to a defendant whose *Brady* claim was denied under the due diligence rule. 758 F.3d 1119, 1137 (9th Cir. 2014) (holding that the California Court of Appeal's "requirement of due diligence was 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" (quoting 28 U.S.C. § 2254(d))). Examining this Court's *Brady* jurisprudence, the Ninth Circuit concluded that defense counsel is entitled to "rely on the prosecutor's obligation to produce that which *Brady* and *Giglio* require him to produce" whether or not defense "counsel could have found the information himself." *Id.* at 1136-37.

Finally, the District of Columbia Circuit rejected the government's argument that it "did not breach a disclosure obligation" when the undisclosed "information was otherwise available through 'reasonable pre-trial preparation by the defense.'" *In re Sealed Case No. 99-3096 (*Brady *Obligations)*, 185 F.3d 887, 896 (D.C. Cir. 1999) (quoting *Xydas* v. *United States*, 445 F.2d 660, 668 (D.C. Cir. 1971)). The court of appeals reasoned that "the appropriate way for defense counsel to obtain [*Brady*] information was to make a *Brady* request of the prosecutor." *Id.* at 897 (citing *United States* v. *Iverson*, 648 F.2d 737, 739 (D.C. Cir. 1981) (holding that "the primary obligation

for the disclosure of matters which are essentially in the prosecutorial domain lies with the government")).

2. State courts of last resort are also divided. Many states have adopted a due diligence rule that mirrors the Third Circuit's. Connecticut, for example, applies the rule that evidence is not considered to have been suppressed when it was " 'as available to the defendant as it was to the state, or could have been discovered through reasonably diligent research.' " *State* v. *Giovanni P.*, 110 A.3d 442, 457 (Conn. App. Ct. 2015) (quoting *State* v. *Simms*, 518 A.2d 35 (Conn. 1986)). The Georgia Supreme Court agrees. *Freeman* v. *State*, 672 S.E.2d 644, 647 (Ga. 2009) (requiring the defendant to demonstrate that, in addition to the traditional *Brady* factors of suppression, favorability and materiality, he "did not possess the evidence and could not obtain it himself with reasonable diligence").

The Michigan Supreme Court, on the other hand, recently issued an express rejection of the due diligence requirement as a departure from *Brady*. *See People* v. *Chenault*, 845 N.W.2d 731 (Mich. 2014). There, the court reversed the state court of appeals, which had denied the defendant a new trial because his trial counsel had not exercised due diligence in obtaining videotapes of exculpatory interviews that cast doubt on the recollection of an eyewitness. *Chenault*, 845 N.W.2d at 734-35. Declining to follow the federal courts of appeals on which the intermediate state court had relied, the Michigan Supreme Court concluded that "[n]one of these cases * * * provides a sufficient explanation for adding a diligence requirement to the Supreme Court's three-factor *Brady* test." *Id.* at 736. *Chenault* reversed more than fifteen years of precedent in which Michi-

gan's lower courts applied a due diligence requirement under *People* v. *Lester*, 591 N.W.2d 267 (Mich. Ct. App. 1998).

Because the Third Circuit's decision reflects a clear split among the federal and state courts over whether *Brady*'s protections are conditioned on a defendant's ability to demonstrate that he exercised due diligence, this question warrants this Court's review.

### B. The Third Circuit's Decision Is Wrong.

This Court should grant certiorari because the Third Circuit's decision undermines *Brady*'s animating principles. This Court has never adopted or endorsed a rule excusing *Brady* violations when the defendant could have gained access to the evidence from other sources. To the contrary, this Court's cases have repeatedly emphasized that a defendant's right to a fair trial depends on *Brady*'s disclosure requirements. *See, e.g.*, *Cone* v. *Bell*, 556 U.S. 449, 451 (2009) (describing *Brady*'s disclosure obligations as deriving from the constitutional right to a fair trial); *Kyles* v. *Whitley*, 514 U.S. 419, 439 (1995) (noting *Brady*'s role in ensuring that "justice shall be done"). The elements of a *Brady* violation—suppression, favorability to the defendant, and materiality—focus on the actions of the prosecutor and the content of the evidence. *See Strickler*, 527 U.S. at 281-82. None turns on the diligence of the defendant.

Indeed, this Court has moved away from imposing additional duties on defendants under *Brady*. In *United States* v. *Bagley*, 473 U.S. 667 (1985), for example, this Court rejected the argument that the prosecution's disclosure responsibilities are lightened when the defendant made no disclosure request.

And *Kyles* reaffirmed that "a defendant's failure to request favorable evidence d[oes] not leave the Government free of all obligation." 514 U.S. at 433. These cases show that this Court has carefully avoided placing conditions on the criminal defendant's right to *Brady* material.

*Banks* further confirms that this Court has placed *Brady*'s burdens squarely—and solely—on the prosecution. The question in that case was whether the defendant "should have asked to interview" witnesses who could have provided the exculpatory information the prosecution had failed to disclose. *Banks*, 540 U.S. at 688. This Court could not have rejected the state's burden-shifting arguments in stronger terms: "A rule thus declaring prosecutor may hide, defendant must seek, is not tenable in a system constitutionally bound to accord defendants due process." *Id.* at 696 (internal quotation marks omitted).

Nor is it true that this Court's *Brady* jurisprudence suggests support for a due diligence rule. Some lower courts have pointed to language from this Court's decisions, but they have taken the language out of context. *See, e.g.*, *Mark* v. *Ault*, 498 F.3d 775, 787 n.4 (8th Cir. 2007). *United States* v. *Agurs*, for example, described *Brady* as applying to "the discovery, after trial of information which had been known to the prosecution but unknown to the defense." 427 U.S. 97, 103 (1976), *holding modified by Bagley*, 473 U.S. at 667. And *Kyles* picked up that language, explaining that "showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more." *Kyles*, 514 U.S. at 437. Viewed in context, however, neither reference to evidence "un-

known to the defense" justifies the due diligence requirement. In both cases, the Court appears to have done no more than clarify that no *Brady* violation occurs where the suppressed evidence would add nothing to the case because the defense or the court already knew about it. *See Agurs*, 427 U.S. at 109 n.16 ("'This is not to say that convictions ought to be reversed on the ground that information merely repetitious, cumulative, or embellishing of facts otherwise known to the defense or presented to the court, or without importance to the defense for purposes of the preparation of the case or for trial was not disclosed to defense counsel.'" (quoting *Giles* v. *Maryland*, 386 U.S. 66, 98 (1967) (Fortas, J., concurring))).

### C. The Question Presented Is A Frequently Recurring Issue Of National Importance.

1. The question presented has serious consequences for individual defendants insofar as the due diligence rule deprives defendants of key exculpatory evidence. This case is merely the tip of the iceberg. In *Amado*, for example, the prosecution failed to turn over the probation report on its key witness in a gang-related attack. 758 F.3d at 1127. That report, which defense counsel did not obtain until after trial, revealed that the witness was a member of a rival gang, and at the time he testified, was serving probation for a robbery conviction. *Id.* at 1127-28. Had defense counsel known these facts, he could have impeached the witness, pointing out that his membership in a rival gang and his motivation to avoid violating the terms of his probation suggested that he was biased.

The suppressed evidence in *Tavera* was also a significant deprivation for the defendant's case. There, the defendant was sentenced to 186 months' imprisonment for participating in a conspiracy to distribute methamphetamine. *Tavera*, 719 F.3d at 707. The defense argued that Tavera did not know that there were drugs hidden under the construction materials he was transporting. After trial, Tavera learned that his co-defendant had told the government during earlier plea negotiations that "Tavera had no knowledge of the drug conspiracy"—corroboration that no doubt would have changed the course of the trial if the prosecution had timely disclosed it. *Id.*

Nor are these isolated incidents: The due diligence rule impacts dozens of criminal defendants each year. *See* Kathleen Ridolfi, *et al*., *Material Indifference*: *How Courts are Impeding Fair Disclosure In Criminal Cases* 30 (2014) (stating that, during a five-year period, federal courts applied a burden-shifting rule in approximately three percent of the more than 5,000 *Brady* cases reviewed).

2. The due diligence rule also threatens to undermine public confidence in the criminal justice system. This Court has admonished prosecutors that their interest is not in winning cases, but in doing justice. *See, e.g.*, *Berger* v. *United States*, 295 U.S. 78, 88 (1935). That "special status explains * * * the basis for the prosecution's broad duty of disclosure." *Strickler*, 527 U.S. at 281. Because the prosecutor plays a "special role * * * in the search for truth," a system that places *Brady* burdens firmly on prosecutors is more likely to be fair to criminal defendants who find themselves pitted against the power and resources of the government. *Id.*; *see also* Kate

Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of* Brady *Through the Defendant Due Diligence Rule*, 60 UCLA L. Rev. 138, 175 (2012) (rejecting the argument that "the defense is equal to the prosecution in power and resources" and thus can obtain *Brady* material as easily as the government). The due diligence rule runs counter to those ideals, shielding prosecutors from the consequences of their misconduct and making it more difficult to combat the "epidemic of *Brady* violations abroad in the land." *United States* v. *Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, J., dissenting). When courts excuse errors and willful abuses by blaming the defendant, "[t]hat casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice." *Brady*, 373 U.S. at 88.

These consequences are particularly grave in light of recent scandals involving prosecutorial misconduct. In 2009, *Brady* violations captured national attention when a district court learned that prosecutors had failed to turn over key exculpatory evidence in the corruption prosecution of former Alaska Senator Ted Stevens. Judge Emmet G. Sullivan ultimately appointed a special counsel to investigate the Department of Justice's conduct in the case. In a scathing 514-page report, the special counsel concluded that "[t]he *Brady* disclosure in *Stevens* was not just incomplete"—it contained demonstrably false representations. Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order, dated April 7, 2009, at 503, *In re Special Proceedings*, No. 1:09-mc-198 (D.D.C. Mar. 15, 2012), ECF No. 84.

The violations in Stevens's case, alongside other high-profile prosecutions plagued by *Brady* errors,

undermine public confidence that prosecutors prioritize justice over convictions. *See* Editorial, *Justice After Senator Stevens*, N.Y. Times, Mar. 18, 2012. Inconsistent rules for criminal trials should not be tolerated when, as here, the rules impact both the individual's right to a fair trial and the broader goal of a trustworthy justice system. By granting certiorari, this Court has a unique opportunity to restore public faith in prosecutions.

In sum, the Third Circuit's due diligence rule cannot be squared with *Brady*'s fundamental premise that fairness and the public trust require that all convictions rest on a full airing of the evidence. This Court should grant certiorari to reverse the Third Circuit's departure from this Court's precedent.

## II. THIS COURT SHOULD GRANT THE PETITION TO DETERMINE WHETHER THE THIRD CIRCUIT PROPERLY APPLIED *BRADY* WHEN IT HELD THAT THE SUPPRESSED EVIDENCE WAS NOT MATERIAL.

In addition to imposing a due diligence exception to *Brady*, the Third Circuit decided, in the alternative, that the withheld evidence was not material. The panel reached that conclusion, however, without any meaningful analysis or citation to the record, in an effort so half-hearted that it appears to be little more than an attempt to insulate its holding from Supreme Court review. This Court should grant certiorari on this question in order to clarify that courts of appeals must analyze the materiality aspect under *Brady* with the care reflected in this Court's *Brady* jurisprudence.

### A. The Third Circuit Applied The Wrong Standard.

1. The Third Circuit's cursory discussion conflated two distinct prongs of the *Brady* analysis: materiality and favorability. The panel stated that the mental health evidence was neither favorable nor material, included three sentences addressing favorability,[6] and then tacked on a single perfunctory sentence addressing materiality: "Furthermore, evidence of Waltzer's mental illness was not material because, relative to the strength of the evidence against Appellant, there is not a 'reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' "

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[6] The Third Circuit's analysis of favorability is also baffling. That Waltzer believed his credibility was unaffected and that he was competent to plead guilty, Pet. App. 26a, have no bearing on the ability of defense counsel to impeach him based on his mental health history. *See, e.g., Bagley*, 473 U.S. at 676 (noting that impeachment evidence falls within *Brady*'s purview because, like exculpatory evidence, it is "favorable to an accused"). Moreover, had the evidence been disclosed, it would have led defense counsel to uncover Waltzer's bipolar diagnosis, which also could affect his credibility. *See, e.g., Freeman* v. *United States*, 284 F. Supp. 2d 217, 225 (D. Mass. 2003) (noting that evidence of the key witness's manic depression would have been material); *Gage* v. *Metro. Water Reclamation Dist. of Greater Chi.*, 365 F. Supp. 2d 919, 928 (N.D. Ill. 2005) (noting that a witness's bipolar diagnosis might be relevant because such persons can suffer from "an impaired ability to think clearly and memory difficulties"). Indeed, Waltzer viewed his bipolar diagnosis as so severe that he initially sought a reduced sentence based on his mental illness. *See* Tr. of Sentencing at 4, No. 2:08-cr-552 (E.D. Pa. Aug. 26, 2010), ECF No. 55.

Pet. App. 26a. This conclusion, simply parroting the legal standard, does not identify why the court thought so, or if it simply assumed so because of its conclusion that the evidence was not favorable.

Materiality and favorability are separate prongs of the *Brady* analysis and must be considered individually. In *Smith* v. *Cain*, this Court acknowledged the three separate components of a *Brady* violation and addressed each individually. 132 S. Ct. 627, 630 (2012) (noting that favorability and nondisclosure of evidence impeaching the key witness were not disputed and proceeding to address "the sole question" whether it was material). In *Banks* v. *Dretke*, this Court addressed individually the "three components or essential elements of a *Brady* prosecutorial misconduct claim." 540 U.S. at 691. Conflating favorability with materiality, as the Third Circuit did here, made it impossible for the panel to meaningfully consider whether the suppression of the mental health evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435.

2. The Third Circuit's materiality analysis focused on each individual piece of *Brady* evidence instead of the cumulative effect of all the undisclosed evidence. This Court has time and again emphasized that suppressed evidence must be "considered collectively, not item by item." *Kyles*, 514 U.S. at 436-37 & n.10 (distinguishing between individually reviewing the tendency and force of each piece of evidence, and "its cumulative effect for purposes of materiality at the end of the discussion"); *see also Agurs*, 427 U.S. at 112 (noting that *Brady* "omission[s] must be evaluated in the context of the entire record" in order to be

consistent with "the justice of finding of guilt"). True to this precept, courts of appeals review the materiality of undisclosed evidence by considering its significance in the context of all of the other evidence at trial. For example, in *Harris* v. *Lafler*, the Sixth Circuit considered whether evidence that the police made promises to the key witness was material for *Brady* purposes. 553 F.3d 1028, 1033-34 (6th Cir. 2009). The court exhaustively considered the effect of the nondisclosure, including factors such as the witness's role as the sole eyewitness; the tendency of other government evidence to support his account; defense counsel's attempts to impeach the witness without the undisclosed evidence; and how disclosure of the evidence would have cast the government's entire case in a different light. *Id*.

The Third Circuit made no similar inquiry here. As to the cumulative effect of the evidence, these three sentences constitute the entirety of the Third Circuit's materiality analysis:

> In light of the extensive evidence in the trial record, including recordings of Appellant discussing fraudulent activities, emails between Appellant and co-conspirators regarding manipulative trades, voluminous records of the trades themselves, bank accounts and wire transfers, Appellant's argument that the evidence of Waltzer's substance abuse and mental illness, or his meetings with the SEC, is material for our *Brady* analysis cannot stand. Waltzer's testimony is "strongly corroborated" by recordings of phone calls and meetings, and records of actual trades. [Citation omitted.] Thus, this evidence would "generally not [be] considered material for *Brady*

> purposes" because when considered " 'relative to the other evidence mustered by the state,' " the allegedly suppressed evidence is insignificant. [Citation omitted.]

Pet. App. 27a-28a. This paragraph, simply listing types of evidence, is not consistent with the weighing of the evidence that the materiality analysis requires.[7] The Third Circuit failed to specifically cite a single piece of evidence that "strongly corroborates" Waltzer's testimony. Moreover, the Third Circuit failed to consider the supposedly corroborating evidence in any context. For example, much of the documentary evidence the court referred to—"recordings of phone calls and meetings, and records of actual trades," Pet. App. 28a—carried weight for the jury precisely because Waltzer testified about it. Over more than two days of direct testimony, Waltzer explained the evidence and detailed how the calls and trades were indicative of fraud and fraudulent intent. *See generally* Tr. of Jury Trial, Day 2 (Jan. 26, 2010), Day 3 (Jan. 27, 2010), and Day 4 (Jan. 28, 2010), No. 2:09-cr-88 (E.D. Pa. Mar. 29, 2010), ECF Nos. 172, 173, and 174. Similarly, other explanatory evidence, such as the testimony of SEC

[7] In addition, the Third Circuit failed to acknowledge other evidence in reviewing the cumulative effect of the Government's nondisclosure. For example, reports from Waltzer's court-mandated counseling sessions leading up to Georgiou's trial suggest that Waltzer continued to struggle with substance abuse and mental health problems. *See, e.g.*, Pet. App. 67a-68a (describing Waltzer's ongoing issues with anxiety and stress, "self-medicating with alcohol and cocaine," and becoming aware that "his life has become unmanageable due to alcohol and drugs").

analyst Daniel Koster, who summarized the trade data, also may have relied on Waltzer. *See* Pet. App. 111a-113a. Without the explanatory testimony, the bare evidence of trades and communications may not have supported an inference of criminal intent.

3. The Third Circuit misapplied this Court's precedent in another respect when it summarized the evidence and then stated that the withheld evidence was not material because, viewed relative to the other evidence against Georgiou, it was "insignificant." Pet. App. 28a. The panel apparently concluded that the nondisclosure was not material because there would have been sufficient evidence to convict even if the evidence had been disclosed. *Id*. But this Court emphasized in *Kyles* the "clear" rule that materiality is *not* a sufficiency-of-the-evidence test. A defendant "need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." 514 U.S. at 434-35 & n.8. In *United States* v. *Smith*, the District of Columbia Circuit expressly rejected, as an improper sufficiency-of-the-evidence test, the Government's argument that the withheld impeachment evidence was not material because it was "merely corroborative." 77 F.3d 511, 514 (D.C. Cir. 1996). The proper inquiry, the court held, was to consider not the *amount* of additional evidence, but "whether the undisclosed information could have substantially affected the efforts of defense counsel to impeach the witness, thereby calling into question the fairness of the ultimate verdict." *Id*. The panel's failure to discuss *any* of this Court's precedent in its summary review of whether the undisclosed evidence was material

further suggests that it simply relied on the quantum of other evidence against Georgiou.

In sum, the Third Circuit's conclusory and erroneous treatment of Georgiou's *Brady* claims fails to heed this Court's command that courts reviewing alleged *Brady* violations consider whether there is a "reasonable probability" that, had the evidence been disclosed to the defense, the result of the trial would have been different. *Bagley*, 473 U.S. at 684.

### B. Viewed Properly, The Undisclosed Evidence Was Material.

Had the court conducted a meaningful analysis, it would have concluded that the evidence was material. Courts of appeals that faithfully apply this Court's precedent review materiality questions in painstaking detail, undertaking a detailed review of the evidence presented at trial and carefully considering how the undisclosed evidence might have affected the result had it been disclosed. Had the Third Circuit engaged in the proper analysis, it would have concluded that the *Brady* evidence was material.

Waltzer was the centerpiece of the Government's case: he explained recorded calls and other communications between him and Georgiou that, in his view, showed that Georgiou knew his conduct was illegal and intended to engage in fraud. Waltzer testified that he made trades, at Georgiou's direction, to manipulate stock prices. While other Government witnesses testified about the trades and related financial activity, none of them could speak directly to Georgiou's intent. As the Government acknowledged, Waltzer was the only "insider" to testify, and

thus his assertions with respect to Georgiou's intent would have carried particular weight with the jury.

The evidence about Waltzer's mental health supported the conclusion that Waltzer had longstanding mental health problems and had been under psychiatric treatment for some time. Contrary to the Third Circuit's characterization, Waltzer's mental health issues were not merely garden-variety depression and anxiety: Waltzer had been diagnosed with bipolar disorder and was medicated for it at some point during his cooperation with the Government's investigation of Georgiou, both factors that could have affected his ability to testify truthfully or to perceive and remember events.[8]

As a key witness in the Government's case against Georgiou, Waltzer's credibility was crucial. Had the jury known that Waltzer suffered from nontrivial mental health problems during the period in which he was cooperating with the Government or testifying at Georgiou's trial, it likely would have discounted, at least in part, his credibility as a key witness. *See, e.g.*, *United States* v. *Price*, 566 F.3d 900, 914 (9th Cir. 2009) (noting that "[i]mpeachment evidence

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[8] Indeed, Waltzer's testimony reflects numerous instances of difficulty remembering. *See, e.g.*, Tr. of Jury Trial, Day 5 (Jan. 29, 2010), at 70, No. 2:09-cr-88 (E.D. Pa. Mar. 29, 2010), ECF No. 175 (responding "I don't remember that period" when asked whether Georgiou was difficult to reach during 2006); *id*. at 36 (admitting that he could not remember whether he had instructions not to record certain subjects during April, May, or July of 2008); *id*. at 51-53 (refusing to answer questions about his testimony on the day prior without exhibits to refresh his recollection because otherwise he would be "guessing").

is especially likely to be material when it impugns the testimony of a witness who is critical to the prosecution's case"). Because Waltzer's testimony was the only "insider" evidence of Georgiou's criminal intent, evidence discounting his credibility may well have been "determinative of [Georgiou's] guilt or innocence," *Bagley*, 473 U.S. at 677, and thus the nondisclosure undermines confidence in the verdict. In addition, Georgiou's counsel could have altered the defense strategy in other ways if he had known about Waltzer's problems. This Court should grant review to clarify the importance of considering materiality cumulatively and in the context of the entire record.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 2015

# APPENDIX

**APPENDIX A**

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**PRECEDENTIAL**

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 10-4774, 11-4587, 12-2077

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UNITED STATES OF AMERICA

v.

GEORGE GEORGIOU,

*Appellant*.

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Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Crim. No. 2-09-cr-00088-001)
District Judge: Honorable Robert F. Kelly

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Argued March 19, 2014

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Before: CHAGARES, GREENAWAY, JR., and
VANASKIE, *Circuit Judges*.

(Opinion Filed: January 20, 2015)

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Louis D. Lappen, Esq., [Argued], Office of United States Attorney, Philadelphia, PA, for Appellee.

Scott J. Splittgerber, Esq., [Argued], Bachner & Associates, New York, NY, Hope C. Lefeber, Esq., Philadelphia, PA, for Appellant.

## OPINION

GREENAWAY, JR., *Circuit Judge*.

A federal jury convicted Appellant George Georgiou ("Appellant" or "Georgiou") of conspiracy, securities fraud, and wire fraud for his participation in planned manipulation of the markets of four publicly traded stocks, resulting in more than $55,000,000 in actual losses. The District Court sentenced him to 300 months' imprisonment, ordered him to pay restitution of $55,823,398 and ordered that he pay a special assessment of $900. The Court also subjected Georgiou to forfeiture of $26,000,000.

For the first time on appeal, Georgiou argues that under *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 130 S.Ct. 2869, 177 L.Ed.2d 535 (2010), his securities and wire fraud convictions were improperly based upon the extraterritorial application of United States law. Thus, we must determine as a matter of first impression whether the purchases and sales of securities issued by U.S. companies through U.S. market makers acting as intermediaries for foreign entities constitute "domestic transactions" under *Morrison*. For the reasons set forth below, we find that these transactions are "domestic transactions," and that his conviction was not based upon the improper extraterritorial application of United States law. Georgiou also argues that the District Court erred in denying his motion for a new trial based on purported *Brady* and Jencks Act violations. He also asserts that the District Court erred on several evidentiary and sentencing issues. We find no

error. Thus, we will affirm the District Court's Judgment of Conviction.

## I.

### A. Factual Background

From 2004 through 2008, Georgiou and his co-conspirators engaged in a stock fraud scheme resulting in more than $55 million in actual losses. The scheme centered on manipulating the markets of four stocks: Neutron Enterprises, Inc. ("Neutron"), Avicena Group, Inc. ("Avicena"), Hydrogen Hybrid Technologies, Inc. ("HYHY"), and Northern Ethanol, Inc. ("Northern Ethanol") (collectively, "Target Stocks"). At all relevant times, the Target Stocks were quoted on the OTC Bulletin Board ("OTCBB")[1] or the Pink OTC Markets Inc. ("Pink Sheets").[2]

In order to facilitate their scheme, Georgiou and his co-conspirators opened brokerage accounts in Canada, the Bahamas, and Turks and Caicos. Once opened, the co-conspirators used these accounts to engage in manipulative trading in the Target Stocks. Specifically, by trading stocks between the various

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[1] The OTCBB is "[a]n interdealer quotation system for unlisted, over-the-counter securities. The OTC Bulletin Board or 'OTCBB' allows Market Makers to display firm prices for domestic securities, foreign securities, and [American Depository Receipts] that can be updated on a real-time basis." *OTCBB Glossary*, Financial Industry Regulatory Authority ("FINRA"), http://www.finra.org/Industry/Compliance/Mar ketTransparency/OTCBB/Glossary/P126264 (last visited Jan. 5, 2015).

[2] The Pink Sheets, now known as OTC Market Group Inc., is "an electronic inter-dealer quotation system that displays quotes from broker-dealers for many over-the-counter (OTC) securities." *OTC Link LLC*, SEC, http://www.sec.gov /answers/pink.htm (last visited Jan. 5, 2015).

accounts they controlled, the co-conspirators artificially inflated the stock prices and created the false impression that there was an active market in each Target Stock.

As a result of this manipulation, Georgiou and his co-conspirators were able to sell their shares at inflated prices. In addition, these artificially inflated shares would be used as collateral to fraudulently borrow funds on margin and obtain millions of dollars in loans from Caledonia Corporate Management Group Limited ("Caledonia") and Accuvest Limited ("Accuvest"), both brokerage firms based in the Bahamas. Eventually, these accounts experienced severe trading losses since the assets purportedly serving as collateral proved to be worthless.[3]

In June 2006, unbeknownst to Georgiou, Kevin Waltzer,[4] one of his co-conspirators, began cooperating in an FBI sting operation. Through Waltzer's cooperation, the FBI monitored Georgiou's activities, including many of his emails, phone calls and wire transfers.

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[3] Indeed, Caledonia was forced to liquidate its business, resulting in approximately $25 million in losses. These losses were sustained by the firm's clients, many of whom lost their entire retirement savings.

[4] Waltzer pled guilty to one count of wire fraud, one count of mail fraud, and one count of money laundering, pursuant to a written plea agreement. He was sentenced to a term of imprisonment of 132 months, followed by a term of supervised release, and ordered to pay $40,675,241.55 in restitution.

### 1. Georgiou's Four Manipulation Schemes: Neutron, Avicena, HYHY, and Northern Ethanol

Georgiou and his co-conspirators manipulated the prices of the Target Stocks by creating matched trades,[5] wash sales,[6] and misleading email blasts. They used various alias accounts, nominees, and offshore brokerage accounts to conceal both their ownership of the Target Stocks and their involvement in the fraudulent scheme.

At least some of the manipulative trades were transacted through market makers[7] located in the United States. Georgiou communicated via phone and e-mail with Waltzer about their plans, and also

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[5] "A 'matched trade' is an order to buy or sell securities that is entered with knowledge that a matching order on the opposite side of the transaction has been or will be entered for the purpose of: (1) creating a false or misleading appearance of active trading in any publicly traded security; or (2) creating a false or misleading appearance with respect to the market for any such security." (Indictment ¶ 9.)

[6] "A 'wash sale' is an order to buy or sell securities resulting in no change of beneficial ownership for the purpose of: (1) creating a false or misleading appearance of active trading in any publicly traded security; or (2) creating a false or misleading appearance with respect to the market for any such security." (Indictment ¶ 10.)

[7] "A market maker is a firm that facilitates trading in a stock, provides quotes [for] both a buy and sell price for a stock, and potentially profits from the price spread." (Indictment ¶ 33.); *see also* 15 U.S.C. § 78c(38) (A "market maker means any specialist permitted to act as a dealer . . . and any dealer who, with respect to a security, holds himself out (by entering quotations in an inter-dealer communications system or otherwise) as being willing to buy and sell such security for his own account on a regular or continuous basis.")

had occasional in-person meetings with Waltzer and others in the United States about these schemes. In these communications, Georgiou provided direction on how to implement the manipulative schemes, and demonstrated his role and culpability in orchestrating and perpetrating the fraud. After fourteen months, Georgiou wired $5,000 to the account of an undercover FBI agent as part of a test transaction. Six days later, Georgiou was arrested.

**2. The Caledonia Fraud**

In December 2006, Georgiou opened a margin-eligible account in his wife's name at Caledonia. As a result, Georgiou was able to obtain loans and purchase stock without using his own funds. Georgiou represented to the principals at Caledonia that the margin in his account would be collateralized by approximately $15 million worth of Avicena and Neutron stock, but did not disclose that the value of these securities had been artificially inflated.

In March 2007, Georgiou borrowed approximately $3,394,000 from Caledonia to purchase 1,697,000 shares of Avicena from Waltzer. That loan was secured by Avicena and Neutron stock held in the name of Georgiou's wife at another brokerage firm, and was never repaid.

During the same month, Georgiou borrowed approximately $2.8 million from Caledonia to purchase Neutron stock and to provide financing to Neutron. The loan was ostensibly secured by Avicena and Neutron stock held in a different name at another brokerage firm. This loan was also never repaid. Caledonia was unable to cover the substantial deficits incurred as a result of Georgiou's activities. Ultimately, Caledonia suffered approximately $25 mil-

lion in losses. The firm was later dissolved and liquidated.

### 3. The Accuvest Fraud

In June 2007, Georgiou met with representatives of Accuvest in the Bahamas to discuss opening a brokerage account. In September 2007, Georgiou opened an account at Accuvest in a different name. The trading in the account was handled through William Wright Associates ("Wright"), an Accuvest affiliate based in California. From October 2007 through February 2008, Georgiou deposited HYHY and Northern Ethanol stock into this account, and in return, Accuvest provided a margin loan of ten percent of the value of the account. Georgiou did not disclose that the value of these securities had been artificially inflated. On several occasions in 2008, Georgiou directed Wright, via email, to wire cash from this account to Avicena, or Team One Marketing, a Canadian company associated with Georgiou.

In August 2008, Georgiou instructed Wright to open a second Accuvest account, which was funded with 10 million shares of Northern Ethanol. As had happened before, Georgiou did not disclose that the value of these securities had been artificially inflated. Georgiou failed to repay the money that he had borrowed on margin and in cash loans from Accuvest. The artificially inflated stock did not cover the loans and Accuvest lost at least $4 million.

## B. Procedural History

Following a three-week trial, a jury found Georgiou guilty of one count of conspiracy, in violation of 18 U.S.C. § 371, four counts of securities fraud, in violation of Section 10(b) of the Securities Exchange Act of 1934 (the "Act"), 15 U.S.C. §§ 78j(b) and 78ff,

and four counts of wire fraud, in violation of 18 U.S.C. §§ 1343 and 1349.

Georgiou was sentenced to 300 months' imprisonment, and ordered to pay over $55 million in restitution.

## II.

The District Court had jurisdiction under 15 U.S.C. § 78aa and 18 U.S.C. § 3231. We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

## III.

### A. Extraterritorial Effect of United States Securities Law

#### 1. Standard of Review

For the first time on appeal, Georgiou argues that his securities fraud convictions are improperly based on an exterritorial application of United States law. He asserts that without proof that any securities transactions occurred in the United States, the jury lacked sufficient evidence upon which to convict him. He further asserts that the District Court erred in failing to require that the jury base it verdicts solely on domestic transactions. Georgiou relies on *Morrison*, which held that Section 10(b) of the Act only proscribes "deceptive conduct [made] 'in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered.'" 561 U.S. at 266, 130 S.Ct. 2869 (quoting 15 U.S.C. § 78j(b)).

Because Georgiou raised neither argument below, we review for plain error. Fed. R. Crim. P. 52(b); *Henderson v. United States*, —— U.S. ——, 133 S.Ct.

1121, 1124-25, 185 L.Ed.2d 85 (2013); *United States v. Riley*, 621 F.3d 312, 321-22 (3d Cir. 2010).[8] A finding of "plain error" is warranted if: "(1) there is an 'error'; (2) the error is 'clear or obvious, rather than subject to reasonable dispute'; (3) the error 'affected the appellant's substantial rights, which in the ordinary case means' it affected the outcome of the district court proceedings'; and (4) 'the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *United States v. Marcus*, 560 U.S. 258, 262, 130 S.Ct. 2159, 176 L.Ed.2d 1012 (2010) (quoting *Puckett v. United States*, 556 U.S. 129, 135, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009)); *see also United States v. Andrews*, 681 F.3d 509, 517 (3d Cir. 2012). Georgiou bears the burden of showing that the error affected his substantial rights. *Andrews*, 681 F.3d at 517.

### 2. *Morrison* and Extraterritoriality

Georgiou was convicted of securities fraud pursuant to Section 10(b) of the Act and Section 10(b)'s implementing regulation, SEC Rule 10b-5 ("Rule

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[8] Although *Morrison* was decided after Georgiou's trial, the standard of review remains the same. *See Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) ("[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past."); *see also United States v. Vilar*, 729 F.3d 62, 70 (2d Cir. 2013) ("Plain error review applies equally where the defendant did not object before the trial court because he failed to recognize an error, and where the defendant did not object because the trial court's decision was correct at the time but assertedly became erroneous due to a supervening legal decision."); *United States v. Asher*, 854 F.2d 1483, 1487 (3d Cir. 1988).

10b-5"). 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5; *see also* 15 U.S.C. § 78ff (prescribing penalties for willful violations of the Act). Section 10(b) makes it unlawful:

> [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b).[9]

The Supreme Court has limited the application of Section 10(b) to actors who employ "manipulative or deceptive device[s]" in two contexts: (1) transactions involving "the purchase or sale of a security listed on an American stock exchange," and (2) transactions involving "the purchase or sale of any other security in the United States." *Morrison*, 561 U.S. at 273, 130 S.Ct. 2869. Indeed, Section 10(b) has no extraterritorial reach. *Id.* at 262, 266-67, 130 S.Ct. 2869 (determining that Section 10(b) and Rule 10b–5 had

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[9] Rule 10b-5, promulgated pursuant to Section 10(b), makes it unlawful "for any person . . . (a) [t]o employ any device, scheme, or artifice to defraud . . . or (c) [t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5. "Rule 10b-5 . . . was promulgated under § 10(b), and 'does not extend beyond conduct encompassed by § 10(b)'s prohibition.'" *Morrison*, 561 U.S. at 261-62, 130 S.Ct. 2869 (quoting *United States v. O'Hagan*, 521 U.S. 642, 651, 117 S.Ct. 2199, 138 L.Ed.2d 724 (1997)).

no extraterritorial effect in civil context); *see also Vilar*, 729 F.3d at 74 (making the same determination in the criminal context, reasoning that "[a] statute either applies extraterritorially or it does not"). Thus, we consider here whether any of the relevant transactions Georgiou is charged with have the requisite nexus to the United States under *Morrison* to subject him to liability under Section 10(b).

It is undisputed that the Target Stocks were listed or traded on the OTCBB or Pink Sheets. However, whether the OTCBB or the Pink Sheets constitute "national securities exchange[s]" under *Morrison*, and whether the securities at issue were purchased or sold in the United States, are both disputed.[10] The Supreme Court has not addressed either issue in this context, i.e., whether a foreign entity's purchase of securities listed on the OTCBB or Pink Sheets through American market makers ought be considered a "domestic transaction" for the purposes of Section 10(b).

**a. "National Securities Exchange"**

Under the first prong of *Morrison*, Section 10(b) applies to "the purchase or sale of a security listed on

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[10] The Indictment defines the Pink Sheets as "an inter-dealer electronic quotation and trading system in the over-the-counter ('OTC') securities market," (Indictment ¶ 2) and provides no definition of the OTCBB. The Indictment further states that "[t]he United States Securities and Exchange Commission (the 'SEC') was an independent agency of the United States which was charged by law with protecting investors by regulating and monitoring, among other things, the purchase and sale of publicly traded securities, including securities traded on the Pink Sheets and the OTCBB. Federal securities laws prohibited fraud in connection with the purchase and sale of securities . . ." (Indictment ¶ 8.)

an American stock exchange." *Morrison*, 561 U.S. at 273, 130 S.Ct. 2869. Securities listed on the OTCBB and the Pink Sheets are not within these parameters. According to the SEC, there are eighteen registered national security exchanges; the Pink Sheets and the OTCBB are not among them.[11] *See* SEC Website, http://www.sec.gov/divisions/marketreg/mrexchanges.shtml (*hereinafter* "SEC Webpage on National Securities Exchanges") (last visited Jan. 5, 2015); *see also* 15 U.S.C. § 78f(b) (requiring that exchanges register with the SEC and comply with various requirements to constitute a "national securities exchange").

Further, the stated purpose of the Act refers to "securities exchanges" and "over-the-counter markets" separately, which suggests that one is not inclusive of the other. *See* Securities Exchange Act of 1934, 48 Stat. 881, as amended, 15 U.S.C. § 78a *et seq.*, (described as "[a]n Act [t]o provide for the regulation of securities exchanges *and* of over-the-counter markets . . . [and] to prevent inequitable and unfair

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[11] Indeed, the OTCBB is, by definition, a quotation service for "securities which are *not* listed or traded on NASDAQ or any other national securities exchange." *OTCBB Frequently Asked Questions, FINRA*, http://www.finra.org/Industry/ Compliance/MarketTransparency/OTCBB/FAQ/index.htm ("OTCBB FAQ") (emphasis added) (last visited Jan. 5, 2015). Likewise, the Pink Sheets may include securities that "[have] been delisted from an exchange." *Frequently Asked Questions*, http://www.otcmarkets.com/learn/otc101-faq (last visited Jan. 5, 2015). Unlike companies listed on a national securities exchange, those quoted on the OTCBB and the Pink Sheets are not subject to "listing and maintenance standards, which are stringently monitored and enforced . . . . [and do not] have reporting obligations to the market." OTCBB FAQ.

practices on such exchanges *and* markets") (emphasis added).

Given that a "national securities exchange" is explicitly listed in Section 10(b)—to the exclusion of the OTC markets—and coupled with the absence of the Pink Sheets and the OTCBB on the list of registered national security exchanges on the SEC Webpage on Exchanges, we are persuaded that those exchanges are not national securities exchanges within the scope of *Morrison*.[12]

### b. Domestic Transactions in Securities not Listed on Domestic Exchanges

In this case, foreign entities purchased and sold securities quoted on the OTCBB and the Pink Sheets. Several of these purchases were executed by market makers operating within the United States. In contrast, the Court in *Morrison* considered a "foreign cubed action . . . in which (1) *foreign* plaintiffs [were] suing (2) a *foreign* issuer in an American court for violations of American securities laws based on securities transactions in (3) *foreign* countries." *Morrison*, 561 U.S. at 283 n. 11, 130 S.Ct. 2869 (Stevens, J., concurring in the judgment) (internal quotation marks omitted).[13] In that case, all aspects of

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[12] *But see SEC v. Ficeto*, 839 F. Supp. 2d 1101, 1108 (C.D. Cal. 2011) ("hold[ing] that *Morrison* does not bar the *territorial* application of § 10(b) to manipulative trading on the domestic over-the-counter market"); *see also United States v. Isaacson*, 752 F.3d 1291, 1299 (11th Cir. 2014) (securities traded on the OTCBB or Pink Sheets "meet [] Morrison's requirement for a U.S. nexus").

[13] In *Morrison*, Australian investors purchased shares of an Australian bank whose stock shares were listed on the Aus-

the trades at issue occurred abroad, and thus, it was determined that Section 10(b) did not apply. There are two key distinctions between *Morrison* and the instant case: (1) the transactions in this case involve stocks of U.S. companies, (2) that were executed through American market makers.

To determine whether the transactions at issue were "domestic transactions," under *Morrison*, *id.* at 267, 130 S.Ct. 2869, we consider "not . . . the place where the deception originated, but [the place where] purchases and sales of securities" occurred. *Id.* at 266, 130 S.Ct. 2869. It is the "location of the *transaction* that establishes (or reflects the presumption of) the [Security Exchange] Act's inapplicability." *Id.* at 268, 130 S.Ct. 2869.

Several of our sister circuits interpret this to mean that "a securities transaction is domestic when the parties incur irrevocable liability to carry out the transaction within the United States or when title is passed within the United States." *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 69 (2d Cir. 2012); *see also Quail Cruises Ship Mgmt. Ltd. v. Agencia de Viagens*, 645 F.3d 1307, 1310-11 (11th

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tralian Stock Exchange Limited. 561 U.S. at 251-52, 130 S.Ct. 2869. In 1998, the Australian bank purchased an American mortgage servicing company and for three years touted the success of the American company's business in its annual reports and public documents and statements. *Id.* at 251–52, 130 S.Ct. 2869. But in 2001, the Australian bank wrote down the value of the American company's assets by more than $2 billion, which resulted in a drop in the value of the Australian bank's stock. *Id.* at 252, 130 S.Ct. 2869. The Australian investors sued the bank in the Southern District of New York alleging violations of the Securities Exchange Act, 15 U.S.C. §§ 78j(b) and 78t(a). *Id.* at 253-54, 130 S.Ct. 2869.

Cir. 2011) (allegation that closing in Florida precipitated transfer of title sufficient to satisfy *Morrison* at motion to dismiss); *SEC v. Levine*, 462 Fed. App'x 717, 719 (9th Cir. 2011) ("[T]he Securities Act governs the [] sales because the actual sales closed in Nevada when [a defendant] received completed stock purchase agreements and payments."); *United States v. Isaacson*, 752 F.3d 1291, 1300 (11th Cir. 2014) (fund at issue "was 'run out of New York City' and [] [defendant's] office was located in Florida, which support[] the inference that the [] [f]und purchased the securities in the United States.")

We agree that "'[c]ommitment' is a simple and direct way of designating the point at which . . . the parties obligated themselves to perform what they had agreed to perform even if the formal performance of their agreement is to be after a lapse of time.'" *Absolute Activist*, 677 F.3d at 68 (quoting *Radiation Dynamics, Inc. v. Goldmuntz*, 464 F.2d 876, 891 (2d Cir. 1972)) (internal quotation marks omitted). Thus, "the point of irrevocable liability can be used to determine the locus of a securities purchase or sale." *Id.* Accordingly, territoriality under *Morrison* turns on "where, physically, the purchaser or seller committed him or herself" to pay for or deliver a security. *Vilar*, 729 F.3d at 77 n.11.

Facts that demonstrate "irrevocable liability" include the "formation of the contracts, the placement of purchase orders, the passing of title, or the exchange of money." *Absolute Activist*, 677 F.3d at 69, 70; *see also Vilar*, 729 F.3d at 78.[14] In *Vilar*, the

[14] On the other hand, heavy marketing in the United States, a party's residency or citizenship, and the fact that the deception may have originated in the United States were insufficient

Second Circuit concluded that Section 10(b) applied where: (1) some victims entered into investment agreements in the United States; (2) another victim "executed the documents necessary to invest . . . in her own New York apartment and handed those documents to a New York messenger"; and (3) one victim sent the money required for opening her account from New York. 729 F.3d at 76-78 (internal quotation marks and citation omitted).

Here, at least one of the fraudulent transactions in each of the Target Stocks was bought and sold through U.S.-based market makers. Government witness and SEC employee Daniel Koster testified that all of the manipulative trades were "facilitate[d]" by U.S.-based market makers, i.e., an American market maker bought the stock from the seller and sold it to the buyer. (App. 1890-96, 1904-05, 1968); *see also* 15 U.S.C. § 78c(38). Therefore, some of the relevant transactions required the involvement of a purchaser or seller working with a market maker and committing to a transaction in the United States, incurring irrevocable liability in the United States, or passing title in the United States. The record also contains evidence of specific instances in which the Target Stocks were bought or sold at Georgiou's direction from entities located in the United States.[15]

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to support a Section 10(b) claim. *Absolute Activist*, 677 F.3d at 70.

[15] For instance: (1) on November 3, 2005, Waltzer, who was located in Pennsylvania, sold 69,150 shares of Neutron stock from one of his accounts to another of his accounts; (2) on May 9, 2006, from within the United States, Waltzer sold 100,000 shares of Avicena stock from one of his accounts to an-

We now hold that irrevocable liability establishes the location of a securities transaction. Here, the evidence is sufficient to demonstrate that Georgiou engaged in "domestic transactions" under the second prong of *Morrison*, i.e., transactions involving "the purchase or sale of any [] security in the United States." *See Morrison*, 561 U.S. at 273, 130 S.Ct. 2869. Thus, the District Court's application of Section 10(b) to Georgiou's transactions was proper.

**c. Jury Instructions**

Georgiou argues that under the District Court's instructions, all four of the securities fraud counts may have been based exclusively on foreign margin loan transactions. However, Georgiou fails to demonstrate that the jury relied on a legally insufficient theory. The District Court's jury instructions track the statutory language of Rule 10b-5. *See United States v. Syme*, 276 F.3d 131, 146-47 (3d Cir. 2002). "[T]he longstanding rule [is] that general verdicts will stand even if one of the possible grounds for conviction was unsupported by the evidence." *Id.* at 145. The "'invalid legal theory' exception" to this rule applies "if the indictment or the district court's jury instructions are based on an erroneous interpretation of law or contain a mistaken description of the law." *Id.* Here, there was no such deficiency in the instruction.

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other of his; (3) Georgiou deposited 2.5 million HYHY shares into an account in California; (4) on September 3, 2008, an undercover FBI agent purchased 16,000 shares of Northern Ethanol stock from within the United States; and (5) Georgiou wired $5,000 to a bank account in Philadelphia for the undercover FBI agent, in furtherance of the manipulative trading scheme.

Further, the District Court properly instructed the jury on the elements of securities fraud pursuant to Section 10(b) and Rule 10b-5, including the jurisdictional elements relating to conduct in the United States. (App. 2972-73) (requiring the jury to find beyond a reasonable doubt that "the defendant used or caused to be used the facilities of a national securities exchange or any means or instrumentality of interstate commerce in furtherance of the fraudulent conduct"). The District Court was not required to preclude the jury from considering foreign activity in evaluating the evidence. Furthermore, Georgiou's fraudulent activity in the United States is not rendered lawful because some transactions occurred outside of the United States or because some victims are located in foreign countries.

### B. Extraterritoriality of United States Wire Fraud Statute

Appellant also argues that his wire fraud convictions are improperly based on the extraterritorial application of United States law, and that these convictions are legally insufficient because the Government failed to demonstrate that his conduct violated foreign law. As Georgiou raises this argument for the first time on appeal, we apply plain error review. *Henderson*, 133 S.Ct. at 1124.

Unlike securities fraud, the statute governing wire fraud "prohibits 'any scheme or artifice to defraud,'—fraud *simpliciter*, without any requirement that it be 'in connection with' any particular transaction or event." *Morrison*, 561 U.S. at 271-72, 130 S.Ct. 2869 (quoting 18 U.S.C. § 1343). Thus, a wire fraud offense is "complete the moment [a party] executed the scheme inside the United States. . . ."

*Pasquantino v. United States*, 544 U.S. 349, 371, 125 S.Ct. 1766, 161 L.Ed.2d 619 (2005). Moreover, unlike the Securities Exchange Act, Section 1343 applies extraterritorially. *Id.* at 371-72, 125 S.Ct. 1766. Indeed, the explicit statutory language indicates that "it punishes frauds executed in 'interstate or foreign commerce,'" and "is surely not a statute in which Congress had only domestic concerns in mind." *Id.* (quoting 18 U.S.C. § 1343).

Here, the record contains ample evidence that Georgiou used interstate wires to effect a "scheme or artifice to defraud." 18 U.S.C. § 1343. Georgiou regularly used email to direct Waltzer's participation in the fraud and wired money from a Canadian bank to an undercover FBI agent's account in Pennsylvania. (*See, e.g.*, App. 3800-04, 3778-82, 3930-34, 4019.)

In addition, Appellant's argument that *Pasquantino* requires the Government to prove that Georgiou's conduct was illegal in the Bahamas fails. The footnote that Georgiou relies on in *Pasquantino* references foreign tax law for the sole purpose of determining whether the victim had "valuable property interests as defined by foreign law." 544 U.S. at 371 n.13, 125 S.Ct. 1766. Here, it is undisputed that the foreign victims had a property interest in the money and property that Georgiou fraudulently obtained from them. Hence, the wire fraud statute is properly applied.

Finally, Georgiou's arguments that the District Court erred because it did not require the jury to limit its consideration to domestic transactions only and permitted the jury to consider invalid legal theories, also fail with respect to wire fraud. As discussed, the text of the relevant statute, 18 U.S.C.

§ 1343, does not expressly require that a verdict be based on entirely domestic transactions. *Pasquantino*, 544 U.S. at 372-73, 125 S.Ct. 1766 (Ginsburg, J., dissenting). Instead, the statute's only jurisdictional requirement is that a communication be transmitted through interstate or foreign commerce for the purpose of executing a scheme to defraud. 18 U.S.C. § 1343.

The District Court properly instructed the jury on this issue, explaining that interstate or foreign commerce is "to send from one state to another, or to or from the United States . . . ." (App. 2985.) This instruction did not impermissibly allow the jury to convict Georgiou based solely on foreign activity. Thus, the District Court did not err with respect to its jury instruction on wire fraud.

Georgiou's argument that the jury may have relied on a legally invalid theory also fails. Here, the District Court's instructions on the elements of wire fraud were proper, and the evidence was sufficient to convict on the market manipulation theory. Thus, the jury was not presented with a legally invalid theory of guilt, and the District Court did not err.

### C. Violations of *Brady* and Jencks Act Disclosure Requirements

Georgiou contends that the Government suppressed evidence concerning cooperating witness Kevin Waltzer's history of mental illness and substance abuse, as well as statements Waltzer made to the SEC, in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and the Jencks Act, 18 U.S.C. § 3500.

### 1. *Brady* Violations

"Our review of the denial of a motion for new trial on the basis of a *Brady* argument is *de novo* with respect to the district court's conclusions of law and is based on the 'clearly erroneous' standard with respect to its findings of fact." *United States v. Milan*, 304 F.3d 273, 286 (3d Cir. 2002) (citing *United States v. Perdomo*, 929 F.2d 967, 969 (3d Cir. 1991)). Under *Brady*, the Government is required, upon request, to produce "evidence favorable to an accused." 373 U.S. at 87, 83 S.Ct. 1194. The failure to do so will result in a due process violation if the suppressed evidence "is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* To establish a *Brady* violation, a defendant must demonstrate that: "'(1) evidence was suppressed; (2) the suppressed evidence was favorable to the defense; and (3) the suppressed evidence was material either to guilt or to punishment.'" *United States v. Pelullo*, 399 F.3d 197, 209 (3d Cir. 2005) (quoting *United States v. Dixon*, 132 F.3d 192, 199 (5th Cir. 1997)).

Evidence is favorable if it is impeaching or exculpatory. *Banks v. Dretke*, 540 U.S. 668, 691, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004); *Johnson v. Folino*, 705 F.3d 117, 128 (3d Cir. 2013). "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome" of the trial. *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); *see also Kyles*

*v. Whitley*, 514 U.S. 419, 441-54, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Thus,

> "[t]he materiality of *Brady* material depends almost entirely on the value of the evidence relative to the other evidence mustered by the state." Suppressed evidence that would be cumulative of other evidence or would be used to impeach testimony of a witness whose account is strongly corroborated is generally not considered material for *Brady* purposes. Conversely, however, undisclosed evidence that would seriously undermine the testimony of a key witness may be considered material when it relates to an essential issue or the testimony lacks strong corroboration.

*Johnson*, 705 F.3d at 129 (quoting *Rocha v. Thaler*, 619 F.3d 387, 396-97 (5th Cir. 2010)).

Georgiou argues that the Government suppressed Waltzer's bail report ("Bail Report") and the minutes from Waltzer's arraignment and guilty plea ("Minutes"). Both the Bail Report and the Minutes contain evidence of Waltzer's cocaine use and mental health history. Specifically, the Bail Report references Waltzer's history of treatment for psychiatric disorders and substance abuse. The Minutes include Waltzer's statements about his treatment for depression and anxiety and his use of Paxil, a prescription medication, to treat those conditions.

**a. Waltzer's Substance Abuse**

Georgiou argues that the Government failed to disclose evidence of Waltzer's substance abuse in the Minutes and the Bail Report in violation of its *Brady* obligations. However, Appellant received statements concerning Waltzer's drug use in the Government's

pretrial production, including notes showing a statement from Waltzer that he "did drugs and drank alcohol . . . and developed an addiction to cocaine . . . [and] last used cocaine six months ago." (Supp. App. 1338.) Indeed, Waltzer testified on direct and cross-examination about his cocaine use. (App. 502-04, 848-49.) Thus, additional evidence of his substance abuse would have been cumulative. *Johnson*, 705 F.3d at 129; *see also United States v. Barraza Cazares*, 465 F.3d 327, 335 (8th Cir. 2006) (no *Brady* violation where "all that was unknown to the defendant and his attorney was the *fact* of Lopez's statement, not the *content* of that statement"). Because evidence of Waltzer's substance abuse was provided to Appellant prior to trial, this material was not suppressed, and the first prong of *Brady* is not satisfied.

Moreover, assuming *arguendo* that evidence of Waltzer's former drug use had been suppressed, such evidence is not favorable to the Appellant for purposes of our *Brady* analysis. At trial, Waltzer testified that his cocaine use did not impact his ability to understand, remember or testify about his interactions with Appellant. (App. 503.) Appellant chose not to probe this issue more fully on cross-examination. (App. 848-49.) There is no evidence—in the pretrial discovery, trial testimony, Minutes, or Bail Report—to suggest that Waltzer's former substance abuse impacted the reliability of his testimony. Thus, because this evidence neither constitutes impeachment nor exculpatory material, it is not favorable to the Appellant.

Finally, evidence of Waltzer's substance abuse cannot be deemed material because there is not a "reasonable probability" that this evidence would

have changed the outcome of the trial. *Bagley*, 473 U.S. at 682, 105 S.Ct. 3375; *see also Kyles*, 514 U.S. at 454, 115 S.Ct. 1555. Indeed, evidence of Waltzer's substance abuse was considered at trial on both direct and cross-examination. To the extent Appellant argues that additional information about the intensity or duration of Waltzer's substance abuse may have impacted the trial's outcome, he explains neither why he did not probe these issues more fully on cross examination, nor why such new information would have changed the trial's outcome when the substance abuse evidence that was set out at trial did not. Thus, it cannot be deemed material.

Because evidence of Waltzer's substance abuse in the Minutes and the Bail Report was neither suppressed, favorable nor material, Appellant's *Brady* arguments concerning this evidence must fail.

**b. Waltzer's Mental Health History and Treatment**

Georgiou also argues that information regarding Waltzer's mental health was suppressed in both the Bail Report and the Minutes. In the Minutes, Waltzer stated that he had seen a mental health provider for depression and anxiety, and was taking Paxil for depression. However, in response to questioning from the court, he agreed that his "head [has] always been clear," and that his medication did not affect "how [he] think[s]." (App. 4249-50, 4245, 4355.) The Bail Report also includes information that Waltzer had "been diagnosed in the past with Anxiety Disorder, Panic Disorder and Substance Abuse Disorder." (App. 4187.)

The Minutes and Bail Report were not suppressed under the first prong of *Brady* because they were ac-

cessible to Appellant. "*Brady* does not oblige the [G]overnment to provide defendants with evidence that they could obtain from other sources by exercising reasonable diligence." *Perdomo*, 929 F.2d at 973. Indeed, Appellant "was in a position of parity with the government as far as access to this material," *United States v. Jones*, 34 F.3d 596, 600 (8th Cir. 1994), and thus, "the transcript [] was as available to [the defendant] as it was to the Government." *United States v. Ladoucer*, 573 F.3d 628, 636 (8th Cir. 2009) (finding no *Brady* violation from the government's failure to produce the transcript of its witness's state court testimony in an unrelated matter because the defendant "could have obtained a copy of the transcript himself").

Here, as the District Court observed, "it is apparent that with just minimal due diligence on the part of Georgiou, he could have obtained a copy of [Waltzer's] guilty plea transcript because he certainly was aware that the main witness against him had pled guilty before Judge Dalzell." (App. 58.) Likewise, the existence of the Bail Report was not hidden from Appellant, and it could have been accessed through his exercise of reasonable diligence. Accordingly, the Minutes and the Bail Report cannot be deemed to have been suppressed.

Further, evidence concerning Waltzer's mental health is neither favorable to the Appellant nor material. In this case, this evidence neither undermines Waltzer's reliability nor calls into question his "'ability to perceive, remember and narrate perceptions accurately,'" and thus is not "clearly relevant to his credibility." *Wilson v. Beard*, 589 F.3d 651, 666 (3d Cir. 2009) (quoting *Cohen v. Albert Einstein Med. Ctr.*, 405 Pa.Super. 392, 592 A.2d 720, 726 (1991));

*see also* 4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 607.05[1] (Joseph M. McLaughlin ed., 2d ed. 2014) ("A witness's credibility may always be attacked by showing that his or her capacity to observe, remember, or narrate is impaired. Consequently, the witness's capacity at the time of the event, as well as at the time of trial, is significant.").

The evidence at issue here shows that Waltzer had been seeking medical attention for anxiety and depression for several years, and had been taking medication to treat those conditions. (App. 4187.) In the Minutes, Waltzer stated that his medication did not affect his mental capacity, and the District Judge, the Government, and Waltzer's attorney all agreed he was competent to plead guilty. (App. 4250.) *Cf. Wilson*, 589 F.3d at 666 (suppressing mental health evidence found material under *Brady* where it showed that witness had "an inability to form adequate perceptions, that he is easily confused, has dissociative tendencies, blackouts, motor visual problems, weak long and short term memory, poor judgment, and distorted perceptions of reality.") (internal quotation marks omitted). Furthermore, evidence of Waltzer's mental illness was not material because, relative to the strength of the evidence against Appellant, there is not a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682, 105 S.Ct. 3375.

**c. Documents from SEC Meetings with Waltzer**

Georgiou also argues that the Government violated *Brady* in failing to produce documents from meetings

between the SEC and Waltzer. The Government produced pretrial discovery from the SEC, including trading and financial records of the Target Stocks. Subsequent to this production, Georgiou withdrew his discovery motion as moot. (Supp. App. 1228.) However, the Government had not produced notes taken during two SEC interviews of Waltzer, at which members of the prosecution team were present. Subsequent to Appellant's posttrial challenge, the Government reviewed these notes and determined that they did not contain any *Brady* material.

We agree with the District Court's assessment that there is no basis in the record to suggest that these notes contained *Brady* material. Pure speculation that exculpatory information might exist is insufficient to sustain a *Brady* claim. *See United States v. Andrus*, 775 F.2d 825, 843 (7th Cir. 1985) ("'Mere speculation that a government file may contain *Brady* material is not sufficient to require a remand for *in camera* inspection, much less reversal for a new trial.'") (quoting *United States v. Navarro*, 737 F.2d 625 (7th Cir. 1984), cert. denied, 469 U.S. 1020, 105 S.Ct. 438, 83 L.Ed.2d 364 (1984)). Thus, Appellant has not set out a viable *Brady* claim based on these documents.

* * *

In light of the extensive evidence in the trial record, including recordings of Appellant discussing fraudulent activities, emails between Appellant and co-conspirators regarding manipulative trades, voluminous records of the trades themselves, bank accounts and wire transfers, Appellant's argument that the evidence of Walter's substance abuse and mental illness, or his meetings with the SEC, is material for

our *Brady* analysis cannot stand. Waltzer's testimony is "strongly corroborated" by recordings of phone calls and meetings, and records of actual trades. *See Johnson*, 705 F.3d at 129 (citing *Rocha*, 619 F.3d at 396097). Thus, this evidence would "generally not [be] considered material for *Brady* purposes" because when considered "'relative to the other evidence mustered by the state,'" the allegedly suppressed evidence is insignificant. *Id.* (quoting *Rocha*, 619 F.3d at 396). Moreover, for the foregoing reasons, the evidence at issue had not been suppressed, nor is it favorable to the Appellant. As such, Appellant's *Brady* arguments must fail.

**2. Jencks Act Disclosures**

The Jencks Act obliges the Government to disclose any witness statement "in the possession of the United States which relates to the subject matter as to which the witness has testified." 18 U.S.C. § 3500(b). This requirement is limited to production of statements "possessed by the prosecutorial arm of the federal government." *United States v. Reyeros*, 537 F.3d 270, 285 (3d Cir. 2008) (quoting *United States v. Merlino*, 349 F.3d 144, 154 (3d Cir. 2003)). However, unlike *Brady*, "[t]he Jencks Act requires that any statement in the possession of the government—exculpatory or not—that is made by a government witness must be produced by the government during trial." *United States v. Starusko*, 729 F.2d 256, 263 (3d Cir. 1984).

Here, Appellant has failed to identify any statements that were withheld in violation of the Jencks Act. Indeed, Appellant does not dispute that the Government produced boxes of impeachment evidence concerning Waltzer, including records of

Waltzer's numerous prior frauds, evidence of his plea and cooperation, trading and financial records, and prior statements to law enforcement. The additional statements Appellant seeks either were not within the possession of the prosecutorial arm of the government, i.e., those held by the SEC, or do not exist. Likewise, the Government did not have possession of the Bail Report, and thus was not obligated to provide it. (*See* App. 108-09.) (the Government explained that it neither examined nor took possession of the Bail Report, and the Report included language indicating that it should not be removed from the courtroom.)

## D. Evidentiary Rulings

### 1. Koster's Testimony and Summary Charts

After the jury returned its verdict, Georgiou moved for a new trial, arguing, inter alia, that Government witness Daniel Koster, an SEC employee, should not have been permitted to testify as a lay witness under Federal Rule of Evidence 701. The District Court denied this motion on the grounds that Koster's testimony was permissible under Rule 701.

On appeal, Georgiou again argues that the District Court erred by allowing Koster to testify as an undeclared expert and to offer opinions and legal conclusions that usurped the role of the jury. He also argues that the District Court admitted prejudicial charts into evidence without providing cautionary instructions to the jury. The Government responds

that these arguments have been waived,[16] and lack merit.

We review the denial of a motion for a new trial for abuse of discretion. *United States v. Brennan*, 326 F.3d 176, 189 (3d Cir. 2003). "'An abuse of discretion arises when the District Court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law[,] or an improper application of law to fact.'" *Pineda v. Ford Motor Co.*, 520 F.3d 237,

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[16] The Government submitted a trial memorandum, including the following stipulations reached by the parties: (1) "[v]arious trading records and financial evidence relating to the scheme will be introduced in the form of summary charts and testimony pursuant to Rule 1006"; (2) Koster would "present testimony and accompanying charts concerning the manipulative trading activity charged in the indictment"; and (3) Koster may further testify as a "summary fact witness to explain the relevance of his trading analysis to the other evidence presented in the case." (App. 5593-94.) Georgiou objected generally to the use of a summary witness, and to the use of witnesses and charts to summarize anything other than voluminous writings, recordings, or photographs, specifically objecting to summary of oral testimony.

However, Georgiou did not dispute that the "charts and the underlying records have been produced to defendant" and that "defendant has stipulated that [they] are authentic and qualify as business records under Rule 803(6)." (*Id.* at 5594.) Before trial, Georgiou's counsel indicated that he had concerns about the proposed testimony of the Government's SEC witnesses and would be objecting if they "stray[ed] from within [] legal limits," specifically identifying "the issue of opinion testimony or improper summary of things not admissible in evidence." *Id.* at 1520. However, counsel also stated his concerns with the charts had been "resolved." *Id.* Furthermore, at trial, no objections were lodged by Appellant with respect to Koster's testimony, or the admission of charts.

243 (3d Cir. 2008) (quoting *In re TMI Litig.*, 193 F.3d 613, 666 (3d Cir. 1999)).

"A new trial should be ordered only when substantial prejudice has occurred," *United States v. Armocida*, 515 F.2d 29, 49 (3d Cir. 1975), and "if the interest of justice so requires." Fed. R. Crim. P. 33. To grant a new trial, a court must determine that "the allegedly improper statements or conduct make it 'reasonably probable' that the verdict was influenced by the resulting prejudice." *Forrest v. Beloit Corp.*, 424 F.3d 344, 351 (3d Cir. 2005) (quoting *Greenleaf v. Garlock, Inc.*, 174 F.3d 352, 363-64 (3d Cir. 1999)).

"We review the District Court's decisions as to the admissibility of evidence for abuse of discretion. To the extent that these rulings were based on an interpretation of the Federal Rules of Evidence, however, our review is plenary." *United States v. Serafini*, 233 F.3d 758, 768 n.14 (3d Cir. 2000) (citing *United States v. Pelullo*, 964 F.2d 193, 199 (3d Cir. 1992)).

Under Federal Rule of Evidence 701, if a witness does not testify as an expert, opinion testimony must be: "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701.

Under Federal Rule of Evidence 1006, a party may "use a summary, chart, or calculation to prove the content of voluminous writings [or] recordings . . . that cannot be conveniently examined in court," as long as the originals or duplicates are made available

for examination or copying by other parties. Fed. R. Evid. 1006.

Georgiou argues that Koster's testimony was based on specialized knowledge and thus inadmissible from a lay witness. We agree with the District Court's assessment that Koster's testimony, including comparisons of stock quantities and prices did not require prohibited "scientific, technical, or other specialized knowledge," and thus was squarely within the scope of Rule 701. (App. 40.) Koster's testimony provided factual information and summaries of voluminous trading records that he had personally reviewed in his capacity as an SEC employee and as part of the SEC's investigation of Georgiou. *See SEC v. Treadway*, 430 F. Supp. 2d 293, 321-22 (S.D.N.Y. 2006) (rejecting challenge to admissibility of testimony of SEC witness under Rule 701 because witness was "simply an SEC employee providing his view of the facts as a summary of certain evidence and as an aid to the Court," and that witness's declaration "was more akin to a summary document than an expert analysis"). Because Koster "present[ed] testimony and accompanying charts concerning the manipulative trading activity charged in the indictment . . . [and] explain[ed] the relevance of his trading analysis to the other evidence presented in the case," within the scope of Rule 701 and the parties' pretrial stipulation, the District Court did not abuse its discretion in admitting his testimony as a lay witness. (Gov't Trial Mem., App. 5594.)

The District Court also did not abuse its discretion in allowing Koster's remaining testimony on re-direct because Georgiou's counsel first elicited Koster's opinion on cross-examination. Under the doctrine of curative admissibility, i.e., "opening the door," "when

one party introduces inadmissible evidence, the opposing party thereafter may introduce otherwise inadmissible evidence to rebut or explain the prior evidence." *Gov't of the Virgin Islands v. Archibald*, 987 F.2d 180, 187 (3d Cir. 1993) (citing C. McCormick, *On Evidence* § 57 (4th ed. 1992)).

**2. Exclusion of evidence pursuant to FRE 608(b)**

Georgiou also argues that the District Court erred in prohibiting testimony and extrinsic evidence regarding allegations of a post-cooperation fraud perpetrated by Waltzer.[17] The District Court excluded this evidence as collateral and cumulative under Federal Rules of Evidence 608(b) and 403. The District Court's decisions regarding the admissibility of evidence are reviewed for abuse of discretion. *Serafini*, 233 F.3d at 768 n.14 (citing *Pelullo*, 964 F.2d at 199).

Under Rule 608(b) of the Federal Rules of Evidence, "extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness." Fed. R. Evid. 608(b). Further, Federal Rule of Evidence 403 authorizes a district court to "exclude collateral matters that are likely to confuse the issues." *United States v. Casoni*, 950 F.2d 893, 919 (3d Cir. 1991); *see also* Fed. R. Evid. 403 ("The court may exclude relevant evidence if its probative value

[17] Appellant sought to call a law enforcement agent to testify about his investigation of Waltzer on unrelated crimes, and seven lay witnesses to testify that they were victims of an unrelated fraud perpetrated by Waltzer. He argued that this testimony would show Waltzer's bias and pattern of fraud.

is substantially outweighed by a danger of . . . confusing the issues . . . or needlessly presenting cumulative evidence."). A matter is collateral if it is "factually unrelated to [the] case" such as an "unrelated criminal investigation." *Casoni*, 950 F.2d at 919. Moreover, given the District Court's "wide discretion in limiting cross-examination[,] [a] restriction will not constitute reversible error unless it is so severe as to constitute a denial of the defendant's right to confront witnesses against him and it is prejudicial to substantial rights of the defendant." *Id.* (quoting *United States v. Adams*, 759 F.2d 1099, 1100 (3d Cir. 1985)).

Georgiou's rights under the Confrontation Clause were not implicated here, as the record reflects that the District Court allowed Appellant to cross-examine Waltzer about his alleged criminal acts, and limited further questioning only after Waltzer denied engaging in misconduct. (App. 803-819; 835-846; 867-872.) *See Casoni*, 950 F.2d at 919 ("The Supreme Court has said the Constitution's Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way and to whatever extent, the defense might wish.") (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)).

The District Court's imposition of a reasonable limit on the scope of cross-examination was permissible in order to "strike a balance between the constitutionally required opportunity to cross-examine and the need to prevent repetitive or abusive cross-examination." *Casoni*, 950 F.2d at 919. By the time Appellant sought to cross-examine Waltzer on his involvement in post-cooperation fraudulent ac-

tivities, the record already contained evidence of Waltzer's past illegal conduct and his cooperation with the Government, all of which is directly relevant to Appellant's theory that Waltzer was biased in favor of the government. (App. 835-846; 867-872.) Indeed, Appellant directly questioned Waltzer on whether he was untrustworthy and biased for the Government. *Id.* Because "[t]he jury was in possession of sufficient information to make a discriminating appraisal of [the witness's] possible motives for testifying falsely in favor of the [G]overnment," the District Court did not abuse its discretion in excluding certain extrinsic evidence and limiting the cross-examination of Waltzer. *See U.S. v. McNeill*, 887 F.2d 448, 454 (3d Cir. 1989).

**3. Motion to unseal**

We reject Georgiou's argument that the District Court erred in denying his motion to unseal. Georgiou filed the motion after filing a notice of appeal with this Court, appealing the District Court's denial of his Motion for Reconsideration and New Trial. "The filing of a notice of appeal . . . confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982). Because the District Court lacked jurisdiction at the time Appellant filed his motion to unseal, there was no error in denying this motion.

**E. Sentencing**

The District Court sentenced Georgiou to 300 months' imprisonment, followed by a three-year term of supervised release, and ordered restitution of

$55,832,398, a special assessment of $900, and forfeiture of $26,000,000. Georgiou challenges this sentence as procedurally and substantively unreasonable, arguing that the District Court erred procedurally in failing to apply *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005), to the Guidelines loss calculation, resulting in substantive error.

Georgiou also challenges the sentence enhancements on the grounds that the District Court did not require the Government to properly establish the number of victims for a six-point enhancement under U.S.S.G. § 2B1.1(b)(2)(C). Georgiou further argues that the District Court erred in adding six levels to the Guidelines range due to the dissolution of Caledonia and the sophisticated nature of the fraud. Finally, Georgiou asserts that the District Court erred in basing restitution on the Guidelines loss calculation, and in its imposition of the forfeiture order.

The District Court determined that the total actual losses amounted to $55,832,398. This calculation accounted for the losses suffered by: (1) the three institutions Georgiou defrauded through his use of manipulated stocks, namely, Accuvest ($3,613,856), Alliance ($5,890,748), and Caledonia ($22,000,000) (*see* App. 5489); (2) Alex Barrotti ($16,000,000), to whom Georgiou made a false promise to cover trading losses for trades made at Georgiou's direction (*see* App. 5488); and (3) numerous victim shareholders who bought HYHY stock during Georgiou's "pump and dump" scheme ($8,327,794). (*See* App. 5491, Supp. App. 996.)

Based on these figures, Georgiou received a 24-level increase to the base offense level of seven pursuant

to U.S.S.G. § 2B1.1(b)(1)(M) (providing for a 24 point enhancement where the loss exceeds $50,000,000). (App. 5516-24; App. 5308.)

Our "review of a district court's decision regarding the interpretation of the Sentencing Guidelines, including what constitutes 'loss,' is plenary." *United States v. Napier*, 273 F.3d 276, 278 (3d Cir. 2001) (quoting *United States v. Sharma*, 190 F.3d 220, 226 (3d Cir. 1999)). We review factual findings for clear error. *Id.* (citing *Sharma*, 190 F.3d at 229).

**1. Loss Calculation**

Georgiou argues that the District Court incorrectly calculated the total loss attributable to his offense, resulting in a higher total offense level. He contends that the loss calculation contained in the Presentence Investigation Report ("PSR") was grossly overstated because it ignored the impact of market forces on the values of the Target Stocks. Georgiou asserts that such an assessment is required under *Dura Pharmaceuticals*, 544 U.S. 336, 125 S.Ct. 1627.

Although it is undisputed that the District Court did not consider the impact of market forces in its loss calculation, it was not required to do so. *Dura Pharmaceuticals* was decided in the context of a civil securities fraud class action. *Id.* at 341, 125 S.Ct. 1627. While some of our sister circuits have applied the *Dura Pharmaceuticals* loss calculation in the criminal sentencing context, we have not. Thus, there is no basis on which to find the District Court's loss calculation clearly erroneous. Indeed, the record here indicates that the accounts responsible for the losses in the Target Stocks were controlled by the Appellant and his co-conspirators. Appellant con-

ceded as much in recorded conversations. (*See, e.g.*, App. 702-05, 725-32, Supp. App. 1101-11.)

Moreover, assuming *arguendo* that an error had occurred in failing to assess the impact of market forces on the Target Stocks, any such error would be harmless. In applying Section 2B1.1(b), courts must use "the greater of the actual or intended loss." U.S.G.G. § 2B1.1 cmt. n.3(A). During sentencing, the District Court found that Georgiou was responsible for intended losses that "far exceeded a hundred million [dollars]" based on his scheme involving Northern Ethanol. (App. 5485-86, 5490.) However, the District Court did not consider intended losses in its calculation because Georgiou's total offense level, 45, already exceeded the guideline maximum of 43. (App. 5308.) Therefore, under either calculation, Georgiou's total offense level would have been in excess of 43. Thus, his sentence was not impacted by the District Court's alleged error.

**2. Victim Enhancements**

Georgiou's challenge to the six-level upward adjustment for 250 or more victims under U.S.S.G § 2B1.1(b)(2)(C) also fails. The jury found that Appellant participated in a "pump and dump" scheme with HYHY, and had paid for a mailer on the stock to be sent to seven million people. (Supp. App. 987.) Koster, the SEC witness, identified 1,918 investor accounts that purchased the stock during the period of the scheme, each of which lost over $1,000. (App. 5427-29.) Thus, there were well over 250 victims, and the District Court's upward adjustment based on number of victims was not clearly erroneous.

### 3. Forfeiture

Georgiou did not object—though he had several opportunities to do so—to the Court's imposition of the forfeiture order, which had been submitted to the Court prior to sentencing. Thus, any claims on the basis of this forfeiture have been waived. Furthermore, even absent the waiver, the forfeiture is proper under 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c) because the $26,000,000 subject to forfeiture "constitutes, or is derived from proceeds traceable to the offenses of which the defendant was convicted." (*See* App. 1355, 1378-79, 1392-1402, 1415, 1482-96, 1836-38, 5488-89, Supp. App. 995-96.) Because Appellant waived his objections and because the order was, in fact, proper, there is no basis for a finding of clear error with respect to the forfeiture.

## V.

For the reasons stated above, we will affirm Georgiou's Judgment of Conviction.

**APPENDIX B**

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

CRIMINAL ACTION No. 09-88

UNITED STATES OF AMERICA

v.

GEORGE GEORGIOU

**MEMORANDUM**

ROBERT F. KELLY, Sr. J. NOVEMBER 9, 2010

Presently before this Court are Defendant George Georgiou's ("Georgiou") "Motion for a New Trial Pursuant to Rule 33 of the F.R.C.P. and Brady v. Maryland" ("Second Motion for New Trial") and Motion for Reconsideration of this Court's September 20, 2010 Order denying Georgiou's "Supplemental Motion to Compel Disclosure of Sealed and Related Sentencing Documents as to Kevin Waltzer, Brady Material, and Discovery of Additional Evidence Relevant to the Government's Failure to Disclose Brady Material" ("Motion to Compel"). For the reasons set forth below, these Motions will be denied.

## I. FACTS

On February 12, 2010, following a three-week trial, a jury found Georgiou guilty of one count of conspiracy, four counts of securities fraud and four counts of

wire fraud.[1] At trial, the Government offered the testimony of its cooperating witness, Kevin Waltzer ("Waltzer"), who, at the Government's direction, had recorded numerous conversations between Georgiou and him in 2007 and 2008. The Government also offered the testimony of a rebuttal witness, Alex Barrotti ("Barrotti"), who had been a business associate of Georgiou for approximately thirteen years. (Trial Tr. vol. 11, 274, Feb. 8, 2010.)

On May 7, 2010, Georgiou filed his "Supplemented and Amended Motion for New Trial Pursuant to Rule 33." On August 20, 2010, Georgiou filed his Motion to Compel, seeking:

> an Order disclosing and unsealing, subject to the continuing confidentiality provisions of any applicable protective orders, certain documents filed in connection with the sentencing of government witness Kevin Waltzer which have yet to be produced, for disclosure of Brady material concerning Waltzer's mental health and record of substance abuse, and disclosure of, or authorization to subpoena if not in the government's possession, additional mental health and substance abuse records, as may relate to information contained in the Waltzer sentencing and/or Brady materials.

(Def.'s Mot. to Compel at 1.) On September 20, 2010, Georgiou filed his Second Motion for New Trial; on

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[1] A more detailed account of the underlying facts of this case can be found in this Court's December 7, 2009 Memorandum, United States v. Georgiou, No. 09-88, 2009 WL 4641719 (E.D. Pa. Dec. 7, 2009), and September 29, 2010 Memorandum, United States v. Georgiou, No. 09-88, 2010 WL 3825700 (E.D. Pa. Sept. 29, 2010).

that same clay, this Court entered an Order denying Georgiou's Motion to Compel. On September 29, 2010, Georgiou filed his Motion for Reconsideration of this Court's denial of the Motion to Compel. In addition, on that same date, this Court denied Georgiou's "Supplemented and Amended Motion for New Trial Pursuant to Rule 33." (See Georgiou, No. 09-88, 2010 WL 3825700.) The Government filed its Response on October 22, 2010, and Georgiou filed a Reply on October 28, 2010.

The instant Motions focus on various allegations concerning the mental health and record of substance abuse of Waltzer. On March 12, 2010, Waltzer was sentenced before United States District Court Judge Stewart Dalzell in Criminal Number 08-552. In connection with the sentencing, Waltzer's counsel submitted a report (the "Lizzi Report") by Dr. Luciano Lizzi ("Dr. Lizzi"), a psychiatrist and Clinical Professor at the University of Pennsylvania Medical School, whom Waltzer had been seeing since August 2007, shortly after he began cooperating with the Government. The Lizzi Report indicated that Waltzer suffered from bipolar disorder and that he had abused cocaine and alcohol during his illegal activities between 1999 and 2006. Dr. Lizzi stated that it was his opinion that "these mental disorders, either individually, or in concert, so affected Mr. Waltzer's capacity to reason and control his impulses that they significantly contributed to his" criminal behavior during that time. (Def.'s Mot. to Compel, Ex. B.) The Lizzi Report further indicated that Waltzer had been examined and/or treated by several other psychiatrists and had been prescribed numerous prescription medications in-

cluding Paroxetine (Paxil), Seroquel, Xanax, Elavil, Trilafon, Buspar and Klonopin.[2] (Id.)

Following Waltzer's sentencing, counsel for Georgiou filed a "Motion of Defendant for Disclosure of Sealed Sentencing Documents as to Kevin Waltzer and for Disclosure of Brady Material," seeking the Lizzi Report, Waltzer's letter to the sentencing court and "all information, including information contained within the [Presentence Investigation Report], related to Kevin Waltzer's use of cocaine or other drugs and diagnosis or treatment for any mental disease, disorder or defect, includ[ing] bipolar disorder, including information concerning the knowledge of any member of the prosecution team about these subjects." (Def.'s Mot. for Disclosure at 2.) Georgiou's Motion was subsequently submitted to Judge Dalzell. On July, 20, 2010, Judge Dalzell granted Georgiou's Motion and ordered:

> The following documents shall be UNSEALED, and defense counsel in Criminal No. 09-88 shall treat these documents as confidential and shall not file them on the public record, absent an Order of Court to the contrary: (a) The psychiatrist's report; (b) [Waltzer's] letter to the Court referred to at his sentencing hearing of March 12, 2010; and (c) All information, including that contained in the Presentence Investigation Report, related to defendant's use of controlled substances and

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[2] Waltzer also submitted a letter to the sentencing court in which he stated, inter alia, that from 2001 through 2006, he "was addicted to cocaine and living [his] life with abandon, recklessness, and wanton disregard for the laws." (Id., Ex. C.)

> diagnosis or treatment for any mental disease, disorder or defect.

United States v. Waltzer, No. 08-552 (E.D. Pa. July 20, 2010). On August 9, 2010, Judge Dalzell amended his Order and its confidentiality provisions to allow the defense's psychiatric expert, Dr. Peter Breggin ("Dr. Breggin"), to review the sentencing materials concerning Waltzer's mental health and use of controlled substances. (Def.'s Mot. to Compel, Ex. E.)

Attached to Georgiou's Second Motion for New Trial is a report by Dr. Breggin (the "Breggin Report"). In the Breggin Report, Dr. Breggin analyzes various documents relating to Waltzer's sentencing hearing, including the Lizzi Report, the Presentence Investigation Report and Waltzer's letter to the sentencing court.[3] Dr. Breggin states, inter alia, that "[g]iven Mr. Waltzer's bipolar disorder, cocaine abuse, alcohol abuse, and exposure to Paxil, Xanax and other psychiatric drugs in the period 1995 to 2006-2007, he would be unable to accurately testify about events involving Mr. Georgiou during that period of time. At the least[,] he is a very unreliable individual." (Breggin Report at 18, Sept. 16, 2010.)

Georgiou also asserts in his Second Motion for New Trial that Barrotti "admitted [on cross-examination] that he had been surreptitiously tape-recording Georgiou," that "prior to trial, he told the government that he made the recordings, and even offered

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[3] Dr. Breggin never examined or treated Georgiou, but reached his conclusions relying primarily upon the Lizzi Report. Notably, Dr. Breggin is not board certified in psychiatry. (See Schellinger v. Schellinger, Case No. 93-FA-939-763 (Milwaukee City Cir. Court 1997)).

to go look for them" and that "as of the date of Barrotti's testimony he had 'not yet' produced the recordings." (Def.'s Second Mot. for New Trial at 36 (emphasis deleted).) Further, Georgiou states that "Barrotti confirmed that he was 'taking notes during [the conversation between Georgiou and Barrotti discussed at trial]' and went over those notes afterward"; however, "the notes of that critical meeting were not provided to the defense." (a) Finally, Georgiou claims that "[t]he defense has recently learned that as far back as 2008 up until early 2009, Barrotti submitted in his divorce proceedings in the Turks and Caicos sworn affidavits contradicting material parts of his testimony at Georgiou's trial." (Id. at 40.)

## II. STANDARDS OF REVIEW

### 1. Motion for New Trial

Federal Rule of Criminal Procedure 33 states that "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33. "Whether to grant a Rule 33 motion lies within the district court's sound discretion." United States v. Ortiz, 182 F. Supp. 2d 443, 446 (E.D. Pa. 2000) (citation and quotation marks omitted). In evaluating a Rule 33 motion, the court does not view the evidence favorably to the government, but rather, exercises its own judgment in evaluating the government's case. United States v. Johnson, 302 F.3d 139, 150 (3d Cir. 2002). Nevertheless, "[t]he burden is on the defendant to show that a new trial ought to be granted." United States v. Clovis, No. 94-11, 1996 U.S. Dist. LEXIS 20808, at *5 (D.V.I. Feb. 12, 1996).

A court must grant a motion for new trial if it finds that there were cumulative errors during the trial that, "'when combined, so infected the jury's deliberations that they had a substantial influence on the outcome of the trial.'" United States v. Copple, 24 F.3d 535, 547 n.17 (3d Cir. 1994) (quoting United States v. Thornton, 1 F.3d 149, 156 (3d Cir. 1993)). However, even if the court "believes that the jury verdict is contrary to the weight of the evidence, it can order a new trial 'only if it believes that there is a serious danger that a miscarriage of justice has occurred - that is, that an innocent person has been convicted.'" United States v. Silveus, 542 F.3d 993, 1004-05 (3d Cir. 2008) (quoting Johnson, 302 F.3d at 150).

**2. Motion for Reconsideration**

"The United States Court of Appeals for the Third Circuit has held that the purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." Cohen v. Austin, 869 F. Supp. 320, 321 (E.D. Pa. 1994). Accordingly, a district court will grant a party's motion for reconsideration in any of three situations: (1) the availability of new evidence not previously available; (2) an intervening change in controlling law; or (3) the need to correct a clear error of law or to prevent manifest injustice. Id. Federal courts have a strong interest in the finality of judgments; as such, motions for reconsideration should be granted sparingly. Cont'l Cas. Co. v. Diversified Indus., Inc., 884 F. Supp. 937, 943 (E.D. Pa. 1995). Dissatisfaction with the Court's ruling is not a proper basis for reconsideration. Glendon Energy Co. v. Borough of Glendon, 836 F. Supp. 1109, 1122 (ED. Pa. 1993).

## III. DISCUSSION

### 1. Kevin Waltzer

In Brady v. Maryland, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). In United States v. Bagley, the Supreme Court explained its holding in Brady, stating that evidence favorable to the defense is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.); id. at 685 (White, J., concurring in part and concurring in judgment). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles v. Whitley, 514 U.S. 419, 434 (1995). In other words, a "reasonable probability" of a different result is shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial." Bagley, 473 U.S. at 678. Moreover, once a reviewing court applying Bagley has found constitutional error, there is no need for further harmless-error review. Kyles, 514 U.S. at 435. Finally, "showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a Brady violation, without more." Id. at 437.

Georgiou asserts that the Government violated Brady by not disclosing evidence of Waltzer's mental

health issues. The Government asserts that the only information in its possession concerning Waltzer's mental health was Waltzer's guilty plea colloquy before Judge Dalzell. During the plea, Judge Dalzell asked Waltzer whether, in the approximately 1.5 years before the plea hearing on January 28, 2009, Waltzer had seen a mental health provider. Waltzer answered that he had "in connection with some of the criminal activities that brought me here today and also in connection with depression and anxiety." (Guilty Plea Tr., 6-7, Jan. 28, 2009.) Waltzer also indicated in response to questions from the court that he was taking Paxil for his depression, but he also stated that he was able to understand everything he discussed with his lawyer. (Id. at 8.) Counsel for Waltzer, the government, and Judge Dalzell all agreed that there was no issue about Waltzer's competency given the medication he was taking. (Id.) In fact, when Waltzer's guilty plea concluded, Judge Dalzell specifically found that Waltzer was competent to plead guilty, stating, "I find that defendant Kevin Waltzer is competent to plead; there is not an iota of doubt in that department. . . ." (Guilty Plea Tr., 38, Feb. 17, 2009.)

The Government argues that the transcript of the guilty plea was available to Georgiou, but he never made any effort to obtain it, and that it did not violate Brady by failing to give it to him. We agree. It is well-settled that "Brady does not oblige the government to provide defendants with evidence that they could obtain from other sources by exercising reasonable diligence." United States v. Perdomo, 929 F.2d 967, 973 (3d Cir. 1991); United States v. Mitchell, 199 F. Supp. 2d 262, 267 (E.D. Pa. 2002). Here, it is apparent that with just minimal due dili-

gence on the part of Georgiou, he could have obtained a copy of the guilty plea transcript because he certainly was aware that the main witness against him had pled guilty before Judge Dalzell.

More important, even if the Government was obligated under Brady to disclose this evidence, we find that Georgiou has failed to show that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of his trial would have been different. Regarding Waltzer's alleged mental defects, "[m]ental illness is relevant only when it may reasonably cast doubt on the ability or willingness of a witness to tell the truth." United States v. George, 532 F.3d 933, 936 (D.C. Cir. 2008) (citation and quotation marks omitted). As the court in George stated:

> The days are long past when any mental illness was presumed to undermine a witness's competence to testify. The category of mental illnesses includes a wide variety of conditions, of varying degrees of severity and substantially different effects. Simply labeling a witness as having "mental health problems," or alluding to her "issues with rage, anger, [and] racing thoughts," does not provide a basis for thinking she cannot correctly perceive reality. Mental illness is most highly relevant when "the witness exhibited a pronounced disposition to lie or hallucinate, or suffered from a severe illness . . . that dramatically impaired her ability to perceive and tell the truth."

Id. at 937 (alteration in original) (citations omitted).

Although the Lizzi Report does not specifically indicate that Waltzer suffered from a mental defect

which would have made it difficult for him to perceive reality, recall the relevant events or otherwise testify truthfully,[4] Dr. Breggin asserts that "[g]iven Mr. Waltzer's bipolar disorder, cocaine abuse, alcohol abuse, and exposure to Paxil, Xanax and other psychiatric drugs in the period 1995 to 2006-2007, he would be unable to accurately testify about events involving Mr. Georgiou during that period of time. At the least[,] he is a very unreliable individual.[5]

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[4] As noted earlier, the Lizzi Report never suggests that Waltzer suffered from a mental defect(s) that would have made it difficult for him to perceive reality or otherwise testify truthfully, but rather that Waltzer had "mental disorders, either individually, or in concert, [that] so affected Mr. Waltzer's capacity to reason and control his impulses that they significantly contributed to his decision to engage in repeated illegal, fraudulent and high-risk activities." (Def.'s Mot. to Compel, Ex. B.) This assessment of Waltzer is, in fact, consistent with the Government's portrayal of him as being an impulsive high-risk taker who was fully cognizant of the criminal fraud he was engaging in.

[5] Notably, in a letter report dated October 4, 2010, Dr. Lizzi completely rejects Dr. Breggin's conclusions about Waltzer and Dr. Beggin's extrapolations from Dr. Lizzi's evaluation of Waltzer. (See Resp. Mot. New Trial, Ex. C.) Dr. Lizzi stated:

> My report sought to explain that Mr. Waltzer's fraudulent activities were the result of episodes of hypomania built upon a platform of impulsivity, lack of cognitive reflection about the implications of his behavior. Nonetheless despite all these conditions and circumstances, I did not, nor do I, believe that he experienced impairment in memory, perception, or communication other than at times in which he may have been intoxicated.

(Id.)

In addition, Dr. Lizzi recognized that Waltzer could have had an episode of intoxication on cocaine or another substance that would have affected his memory of any event during that epi-

(Breggin Report at 18.) Assuming, arguendo, that Waltzer could not "accurately testify about events" involving Georgiou from 1995 to 2007, we nevertheless find that additional evidence on the issue of Waltzer's reliability is immaterial in light of the totality of the circumstances and all of the evidence introduced at trial.

First, Georgiou does not argue that Waltzer was unable to accurately testify about events involving him in 2008. The Government's physical evidence regarding Georgiou in 2008 corroborates Waltzer's version of the relevant events and includes the following statements by Georgiou: (1) "I kept telling you . . . it's an artificial market. The moment I walk away, this is a 50 cent stock"; (2) "You would never burn me, right? . . . Those are dangerous notes you're taking"; (3) "Nobody is wearing a wire, right?"; and (4) that he might need to be in a "hot tub" with the Government's undercover agent so that no one could be hiding a recording device and that he needed assurance that no one involved in their scheme was a "cop."

Second, substantial evidence was presented which detailed Waltzer's history of misconduct and his alleged bias for the Government. For example, at trial, Waltzer admitted to a $40 million fraud to which he pled guilty under a cooperation plea agreement.[6]

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sode, but he points out that Waltzer did not testify about some isolated event during which he could have been intoxicated, but rather Waltzer testified about a course of regular dealings with Georgiou that occurred over a period of years. (Id.)

[6] In addition, Waltzer readily testified about his use of cocaine from 2004 through 2007:

(Trial Tr. vol. 11, 187-88, Jan. 26, 2010.) This evidence provided ample opportunity for Georgiou to attack Waltzer on the basis that he was untrustworthy and biased for the Government. Indeed, counsel

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> Q. During that period of time [summer 2004 till spring 2007], did you engage in any cocaine use?
>
> A. Yes I did.
>
> Q. And can you describe for the jury what your level of cocaine use was during that time?
>
> A. I was a social user of cocaine during that time.
>
> Q. What does it mean to be a social user of cocaine?
>
> A. In my definition, I would do it approximately once every six weeks.
>
> Q. And when you say you would do it, were you doing it to a level of complete incoherence or were you doing it, as you say, in some other way?
>
> A. I was doing it, "to party," basically, to, you know, get a high and enjoy myself.
>
> Q. And were you ever using it during your dealings with George Georgiou?
>
> A. Never.
>
> Q. And did your, as you described, your social use of cocaine ever affect your ability to understand the stock fraud activities that you were participating in?
>
> A. No, sir.
>
> Q. Or did it affect your ability to remember those stock fraud activities or testify about them here?
>
> A. Not at all.

(Trial Tr. vol. 11, 208-09, Jan. 26, 2010.) This evidence provided ample opportunity for Georgiou to attack Waltzer on the basis that his testimony was untrustworthy due to his history of drug use. In addition, it also gave Georgiou the opportunity to cross-examine Georgiou regarding if and how such drug use affected his mental health and his ability to testify truthfully and accurately.

for Georgiou thoroughly cross-examined Waltzer on his history of deception and alleged bias for the Government. (See Trial Tr. vols. 4-5, 47-177, Jan. 26, 27, 2010.) The Court also instructed the jury about its role in resolving credibility issues.

Finally, the Government's evidence against Georgiou included voluminous recordings, emails, financial records and other evidence that overwhelmingly demonstrated that Georgiou had committed the crimes charged. All of which was consistent with Waltzer's testimony. Georgiou, on the contrary, produced no evidence to corroborate his claim that he had actually been investigating and recording Waltzer. "The testimony of [a witness] must be considered in the totality of the circumstances and all of the evidence introduced at trial." United States v. Hankins, 872 F. Supp. 170, 174-75 (D.N.J. 1995) (citing Bagley, 473 U.S. at 628). Waltzer's version of the relevant events conforms with the staggering physical evidence in this case. As such, we conclude that even if the jury had found Waltzer to be unreliable, Georgiou's trial nevertheless resulted in a verdict worthy of confidence, considering the totality of the circumstances and all of the evidence introduced at trial. Accordingly, an Order compelling discovery of information concerning Waltzer's mental health and record of substance abuse would be futile at this stage of the proceedings and a new trial on such basis is, likewise, unwarranted.

**2. Alex Barrotti**

As previously stated, Georgiou asserts in his Second Motion for New Trial that Barrotti admitted that he had been secretly recording Georgiou and that he took notes of a relevant meeting between Georgiou

and him. (Def.'s Second Mot. for New Trial at 36.) Georgiou argues that "[t]he government's failure to provide those tapes and notes to the defense violated its discovery obligations under the Jencks Act, the Federal Rules of Criminal Procedure and Brady." (Id.) Georgiou further claims that "[t]he defense has recently learned that as far back as 2008 up until early 2009, Barrotti submitted in his divorce proceedings in the Turks and Caicos sworn affidavits contradicting material parts of his testimony at Georgiou's trial." (Id. at 40.)

The Jencks Act requires that once a witness called by the United States has testified on direct examination, "the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." 18 U.S.C.A. § 3500(b). "In speaking of statements 'in the possession of the United States', we understand the statute to require production only of statements possessed by the prosecutorial arm of the federal government." United States v. Dansker, 537 F.2d 40, 61 (3d Cir. 1976) (finding that presentence investigation report and statements contained therein were not within possession of prosecution pursuant to Jencks Act); see also United States v. Harris, 368 F. Supp. 697 (ED. Pa. 1973) (finding that where local police officers made reports in connection with a federal-state drug enforcement program but submitted reports to the local police department, rather than the federal government, defendants were not entitled to production of such reports under the Jencks Act even though the officers were witnesses in the case), aff'd, 498 F.2d 1164 (3d Cir. 1974). Georgiou has not as-

serted that the Government actually possessed the alleged recordings and notes made by Barrotti or the affidavits regarding Barrotti's divorce proceedings. Therefore, Georgiou's argument regarding the alleged Jencks Act violation fails.

Moreover, even if the Government actually possessed such material prior to trial, we find that Georgiou's trial, nevertheless, resulted in a verdict worthy of confidence, considering the totality of the circumstances and all of the evidence introduced at trial. In United States v. Pelullo, the prosecution failed to disclose an Internal Revenue Service memorandum which set forth facts inconsistent with the witness's testimony at trial. 14 F.3d 881, 886 (3d Cir. 1994). The Third Circuit found that although the memorandum could have been used to impeach the witness, the defendant was not entitled to a new trial because there was not a reasonable probability that the result of the proceeding would have been different had the evidence been introduced at trial. Id. at 887.

As the court found in Pelullo, the evidence here is "merely cumulative or impeaching, and thus, not sufficient to warrant a new trial." Id. (internal citation omitted). Significantly, we note that the documents relating to Barrotti's divorce proceedings pre-date Georgiou's trial by more than a year. Georgiou's counsel was clearly aware that Barrotti was involved in divorce proceedings because the defense cross-examined Barrotti concerning such proceedings at trial. However, for reasons unknown to the Court, the defense did not cross-examine Barrotti on the issues which it now raises. Rather, the defense attempted to disprove Barrotti's claim that "he felt threatened and ripped off and afraid" by showing

that "[a]s recently as July '09 he is conferring with Georgiou about the details of his divorce settlement, and . . . goes on to negotiate with Mr. DeRosa . . . [to] settle his divorce case." (Trial Tr. vol. 12, 74, Feb. 9, 2010.)

Similarly, at the time of trial, the defense was aware that Barrotti had made recordings of his communications with Georgiou and cross-examined Barrotti on his failure to produce such recordings in an attempt to discredit his testimony. (Id. at 56-57.) The defense also vigorously cross-examined Barrotti regarding his alleged bias for the Government as a result of the non-prosecution agreement he signed in connection with his cooperation in the Government's investigation. (Id. at 34-43.) The defense further questioned Barrotti extensively on information which he allegedly failed to disclose in his initial communications with the Government. (Id. at 43-55.) As such, we conclude that because the evidence at issue would "merely have provided the defense with an additional ground on which to impeach [the witness]," such evidence is cumulative. Hankins, 872 F. Supp. at 175.

Finally, as stated in Hankins:

> Even assuming arguendo that this newly discovered [evidence] was the proverbial "straw that broke the camel[']s back" and caused the jury to reject entirely the testimony given by [the witness], there was still plenty of additional evidence in this case to support the guilty verdict against [the defendant]. The testimony of [the witness] must be considered in the totality of the circumstances and all of the evidence introduced at trial.

Id. (citing Bagley, 473 U.S. at 628). As discussed, the Government's evidence against Georgiou included voluminous recordings, emails, financial records and other evidence that overwhelmingly demonstrated that Georgiou had committed the crimes charged. Considering the totality of the circumstances and all of the evidence introduced at trial, we cannot find that there is a reasonable probability that the result of the proceeding would have been different had the additional evidence regarding Barrotti been introduced at trial. Therefore, for the above-stated reasons, we will deny Georgiou's Second Motion for New Trial.

An appropriate Order follows.

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**ORDER**

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**AND NOW**, this 9th day of November, 2010, upon consideration of Defendant George Georgiou's "Motion for a New Trial Pursuant to Rule 33 of the F.R.C.P. and Brady v. Maryland" (Doc. No. 208), and the Response and Reply thereto, and his Motion for Reconsideration (Doc. No. 213), it is hereby **ORDERED** that the Motions are **DENIED**.

BY THE COURT:

/s/ Robert F. Kelly
ROBERT F. KELLY
SENIOR JUDGE

## APPENDIX C

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

CRIMINAL ACTION No. 09-88

UNITED STATES OF AMERICA

v.

GEORGE GEORGIOU

## MEMORANDUM

ROBERT F. KELLY, Sr. J. DECEMBER 12, 2011

Presently before this Court is Defendant George Georgiou's ("Georgiou") Motion for Reconsideration of this Court's denial of his Motion for a New Trial Pursuant to Brady v. Maryland[1] and the The Jencks Act.[2] Also, before this Court is Georgiou's Motion to Reinstate Bail Pending Appeal, Supplemental Motion for Reconsideration ("Def.'s Supp. Mot."),[3] and

[1] See Brady v. Maryland, 373 U.S. 83 (1963).

[2] The Jencks Act requires that once a witness called by the United States has testified on direct examination, "the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." 18 U.S.C.A. § 3500(b).

[3] While Georgiou terms this new filing a "Reconsideration," it is, in reality, his fourth Motion for a New Trial and we will call it such ("Fourth Motion for New Trial") because it raises a

Motion to Compel Disclosure of Evidence ("Mot. to Compel"). For the reasons set forth below, these Motions will be denied.

## I. FACTS AND BACKGROUND

On February 12, 2010, following a three-week trial, a jury found Georgiou guilty of one count of conspiracy, four counts of securities fraud and four counts of wire fraud.[4] At trial, the Government offered the testimony of its cooperating witness, Kevin Waltzer ("Waltzer"), who, at the Government's direction, had recorded numerous conversations between himself and Georgiou in 2007 and 2008. (Trial Tr. vol. 11, 274, Feb. 8, 2010.)

On May 7, 2010, Georgiou filed a Supplemented and Amended Motion for New Trial Pursuant to Rule 33. On August 20, 2010, Georgiou filed a Motion to Compel, seeking:

> [A]n Order disclosing and unsealing, subject to the continuing confidentiality provisions of any applicable protective orders, certain documents filed in connection with the sentencing of government witness Kevin Waltzer which

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number of issues not previously presented in his prior Motions. As will be explained, infra, we have issued Memorandum Opinions in three previous Motions for a New Trial brought by Georgiou. See United States v. Georgiou, 742 F. Supp. 2d 613 (E.D. Pa. 2010); United States v. Georgiou, No. 09-88 (filed under seal, Nov. 9, 2010); United States v. Georgiou, No. 09-88, 2011 WL 1081156, at *1 (E.D. Pa. Mar. 18, 2011).

[4] A more detailed account of the underlying facts of this case can be found in this Court's December 7, 2009 Memorandum, United States v. Georgiou, No. 09-88, 2009 WL 4641719, at *1 (E.D. Pa. Dec. 7, 2009), and September 29, 2010 Memorandum, Georgiou, 742 F. Supp. 2d at 613.

> have yet to be produced, for disclosure of Brady material concerning Waltzer's mental health and record of substance abuse, and disclosure of, or authorization to subpoena if not in the government's possession, additional mental health and substance abuse records, as may relate to information contained in the Waltzer sentencing and/or Brady materials.

(Doc. No. 206.) On September 20, 2010, Georgiou filed his Second Motion for New Trial. On that same day, this Court entered an Order denying Georgiou's Motion to Compel. On September 29, 2010, Georgiou filed a Motion for Reconsideration of this Court's denial of the Motion to Compel. In addition, on that same date, this Court denied Georgiou's "Supplemented and Amended Motion for New Trial Pursuant to Rule 33." See Georgiou, 742 F. Supp. 2d at 613.

Those Motions focused on various allegations concerning the mental health and record of substance abuse of Waltzer.[5] On March 12, 2010, Waltzer was sentenced before United States District Court Judge Stewart Dalzell in Criminal Number 08-552. In connection with the sentencing, Waltzer's counsel submitted a report (the "Lizzi Report") authored by Dr. Luciano Lizzi ("Dr. Lizzi"), a psychiatrist and Clinical Professor at the University of Pennsylvania Medical School, who Waltzer had been seeing since August 2007, shortly after he began cooperating with the Government. The Lizzi Report indicated that

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[5] We include in our procedural history this information regarding Waltzer's mental health because Georgiou has once again raised issues concerning Waltzer's mental health in the instant Motion.

Waltzer suffered from bipolar disorder and that he had abused cocaine and alcohol during his illegal activities between 1999 and 2006. Dr. Lizzi stated that it was his medical opinion that "these mental disorders, either individually, or in concert, so affected Mr. Waltzer's capacity to reason and control his impulses that they significantly contributed to his" criminal behavior during that time. (Def.'s 8/20/10 Mot. to Compel, Ex. B.)

Following Waltzer's sentencing, counsel for Georgiou filed a Motion of Defendant for Disclosure of Sealed Sentencing Documents as to Kevin Waltzer and for Disclosure of Brady Material, seeking the Lizzi Report, Waltzer's letter to the sentencing court and "all information, including information contained within the [Presentence Investigation Report], related to Kevin Waltzer's use of cocaine or other drugs and diagnosis or treatment for any mental disease, disorder or defect, includ[ing] bipolar disorder, including information concerning the knowledge of any member of the prosecution team about these subjects." (Def.'s 8/20/10 Mot. for Disclosure at 2.) Georgiou's Motion was subsequently submitted to Judge Dalzell. On July, 20, 2010, Judge Dalzell granted Georgiou's Motion. On August 9, 2010, Judge Dalzell amended his Order and its confidentiality provisions to allow the defense's psychiatric expert, Dr. Peter Breggin ("Dr. Breggin"), to review the sentencing materials concerning Waltzer's mental health and use of controlled substances. (Def.'s 8/20/10 Mot. to Compel, Ex. E.)

Attached to Georgiou's Second Motion for New Trial was a report by Dr. Breggin (the "Breggin Report"). In the Breggin Report, Dr. Breggin analyzed various documents relating to Waltzer's sentencing

hearing, including the Lizzi Report, the Presentence Investigation Report and Waltzer's letter to the sentencing court. Dr. Breggin stated, inter alia, that "[g]iven Mr. Waltzer's bipolar disorder, cocaine abuse, alcohol abuse, and exposure to Paxil, Xanax and other psychiatric drugs in the period 1995 to 2006-2007, he would be unable to accurately testify about events involving Mr. Georgiou during that period of time. At the least[,] he is a very unreliable individual." (Breggin Report at 18, Sept. 16, 2010.)

This Court filed a sealed Memorandum and Order on November 9, 2010 ("November 9, 2010 Memorandum"), denying Georgiou's Second Motion for a New Trial and Motion for Reconsideration. Georgiou was sentenced by this Court on November 19, 2010, to a total of 240 months imprisonment and ordered to pay restitution in the amount of $55,832,398.00. Georgiou filed a third Motion for a New Trial ("Third Motion for New Trial") on December 23, 2010, and also filed a Notice of Appeal in the United States Court of Appeals for the Third Circuit on December 29, 2020, appealing our denials of his prior Motions for a new trial. Georgiou requested that the Court of Appeals stay his appeal until the Third Motion for New Trial was decided, and the Government joined in this request. We granted such requests and on March 18, 2011 denied the Motion on its merits. See United States v. Georgiou, No. 09-88, 2011 WL 995826, at *1 (E.D. Pa. Mar. 18, 2011). On April 1, 2011, Georgiou filed this instant Motion for Reconsideration of this denial.[6] On April 15, 2011, Georgiou filed under seal

[6] Michael Bachner, Esq., filed this Motion on behalf of Georgiou. Shortly after this filing date, Hope Lefeber, Esq. ("Lefeber"), joined Georgiou's defense team. Most of the filings

a Supplemental Motion for Reconsideration, and then filed a sealed Motion to Compel Evidence on June 1, 2011. On July 15, 2011, the Government filed a sealed Omnibus Response to these Motions, and on September 9, 2011, Georgiou filed a 73-page Reply to this Response.[7] Thereafter, on October 24, 2011, the Government submitted a letter response to this Court to Georgiou's Reply Memorandum, and on October 27, 2011, submitted another letter supplementing its response. Lefeber filed letter replies to these responses on November 3 and November 14, 2011.[8]

In his Motion for Reconsideration, Georgiou first argues that this Court "used an incorrect standard of review" to find that the claims in his Third Motion for a New Trial were "procedurally barred and meritless, because they were deemed not to constitute newly discovered evidence." (Def.'s Mot. Recons. at 1.) Georgiou asserts further that:

> The Government has previously conceded that its prosecution team was actually aware that its star cooperating witness [Waltzer] had made statements about his mental health treatment at his plea hearing because one of the Assistant United States Attorneys and one of the FBI agents who prosecuted Mr. Geor-

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thereafter were authored by Lefeber. We note this because, as will be discussed infra, some serious allegations have been made against the Government attorneys, and there have been several contentious letters exchanged between Lefeber and Assistant United States Attorney Louis Lappen ("Lappen").

[7] This Reply was submitted jointly by Bachner and Lefeber.

[8] These letter responses and replies were thereafter filed under seal and docketed. (Doc. Nos. 255-265.)

> giou attended and participated in that hearing. Significantly, the defense *repeatedly requested* all *Brady* and other discovery materials prior to trial, even bringing a motion to compel shortly before trial, which was denied when the Government represented that all such evidence *in its possession* had been produced.

(Id. at 2.) Georgiou's counsel, Bachner, also states in this Motion that he was recently apprised by Lefeber who Georgiou has retained to assist him with his case and appeal that:

> [T]he Government received a draft PSR[9] detailing Kevin Waltzer's mental health diagnosis and psychiatric history on **February 12, 2010** – the exact date of the verdict in Mr. Georgiou's trial. The Government failed to notify Mr. Georgious's defense about the relevant contents of its key witness's draft PSR.

(Id.) (emphasis added). Bachner states further that Lefeber informed him that: (1) she obtained an Order directing the Department of Probation to release to her the date it provided the Government with Waltzer's draft PSR; (2) that the Probation Department ("Probation") forwarded to her an email memorializing the delivery of the draft PSR to the Government and Waltzer's counsel at his sentencing; and (3) that Probation provided her with those portions of Waltzer's draft PSR pertaining to his mental health and substance abuse, for use in connection with Georgiou's post-trial motions or appeal. (Id. at 2-3.)

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[9] Presentence Investigation Report.

Lefeber maintains in Georgiou's Supplemental Motion that "both pretrial and post-trial, in all written submissions, the Government attorneys, Derek Cohen and Louis Lappen have maintained that they had no knowledge of Waltzer's mental health and substance abuse issues with the exception of Waltzer's statements to this Court at the plea allocution, which was filed under seal and also not disclosed to the Georgiou defense." (Def.'s Supp. Mot. Recons. at 2.) Lefeber asserts that "the evidence obtained in response to Judge Dalzell's recent Orders proves that the Government has blatantly misrepresented its knowledge of Waltzer's mental health and substance abuse issues as the evidence proves that the Government had full knowledge of these issues as early as February 17, 2009, when it received the Bail Report from U.S. Pretrial Services." (Id. at 2-3.) It is further asserted that on the exact date of Georgiou's verdict, February 12, 2010, the Government received a draft Presentence Investigation Report ("PSR") further detailing Waltzer's mental health diagnoses and psychiatric history. In addition, it is asserted that the Government received Waltzer's Objections to the PSR and Motion for Downward Departure which outlined in great detail Waltzer's extensive psychiatric history and substance abuse history, but that the Government never disclosed this information to the defense. (Id. at 3.) It is asserted that "upon learning of Waltzer's mental health and substance abuse issues at this sentencing in March 2010, one month after Georgiou's trial, the Georgiou defense confronted prosecutors who claim to have had no knowledge of Waltzer's mental health and substance abuse issues." (Id. at 4.) As noted earlier, Judge Dalzell later granted Georgiou's Motion or-

dering the release of sentencing documents relating to Waltzer's mental health and abuse issues. In addition, by Orders dated March 2, 2011 and April 5, 2011, Judge Dalzell further directed Probation and Pretrial Services to release to the defense all information in their possession regarding Waltzer's mental health and substance abuse issues.

Georgiou now contends that "[a]s a result of documents received pursuant to Judge Dalzell's Orders, the defense has obtained evidence which proves the falsity of the Government's representations regarding its knowledge of Waltzer's substance abuse and mental health issues." (Id. at 4-5.) Georgiou maintains that his Bail Report ("Bail Report") which was given to the Government as early as January 28, 2009 and/or February 17, 2009, the dates of Waltzer's initial appearance/guilty plea, "expressly states that Waltzer had a history of psychiatric and substance disorders." (Id. at 5.) Georgiou argues that the Government failed to reveal this critical information to the defense and has maintained, in all representations to the Court, that it has no knowledge of Waltzer having mental health and/or substance abuse issues, and that had this information been made available to the Georgiou defense, "a full investigation would have been made into Waltzer's extensive history of substance abuse and psychiatric disorders and the effects of abusing drugs and alcohol while on psychotropic prescription drugs for mental disorders." (Id.) Georgiou further asserts that:

> [t]he records from U.S. Pretrial Services included numerous admissions from Waltzer in 2009 that he is an addict and that his life has become unmanageable due to his addiction to drugs and alcohol. See Monthly Treating Re-

> port Substance Abuse, Exhibit "B," pp.4-8. Furthermore, on January 19, 2010, one week prior to his testimony in the Georgiou trial, Waltzer tested positive for opiates at U.S. Pretrial Services. See Exhibit "C," p.4.

(Id. at 6.) Georgiou maintains that these records prove that Waltzer:

> (1) had a long history of alcohol and cocaine abuse;
>
> (2) that he was self-medicating with alcohol and cocaine while on pretrial supervision during 2009-2010;
>
> (3) that he was in treatment for alcohol and cocaine abuse as recently as 2009-2010, before and after Georgiou's trial;
>
> (4) that he was medicated on serious psychotropic drugs for his bipolar disorder, anxiety disorder and panic attacks during defendant Georgiou's trial; and
>
> (5) that he combined drugs and alcohol with the prescription psychiatric drugs.

(Id.)

Georgiou asserts that documents obtained from Pretrial Services in the Middle District of Florida, where Waltzer was reporting prior to his trial, entitled "Monthly Treatment Reports" ("Treatment Report") demonstrate Waltzer's drug and alcohol problems during this time. Specifically, Georgiou points to: (1) Treatment Report dated August 31, 2009 which notes that "alcohol is currently a challenge." (Id. at Ex. B, p. 3.); (2) Treatment Report dated September 30, 2009, which states that "he has many issues regarding self-medicating with alcohol and co-

caine." (Id. at Ex. B, p.4.), and (3) Treatment Report dated October 30, 2009, which notes Waltzer's "willingness to admit his life has become unmanageable due to alcohol and drugs." (Id. at Ex. B, p. 5.) Georgiou argues that this evidence shows that:

> this Court was misled by both Waltzer and the Government in making evidentiary rulings at trial and in post-trial submissions. Had the entire history of Waltzer's mental health issues and past and present drug and alcohol abuse been made known to this Court and the defense, the defense's strategy would have been impacted in myriad ways, including but not limited to the defendant's decision to testify. Conversely, the Government was able to exploit the fact that the defense was unable to challenge Waltzer's credibility based on his mental health issues, or proffer an expert witness on the effect of his drug and alcohol use in combination with his mental health issues.

(Id. at 9.)

Georgiou also asserts that his trial was "further contaminated, not merely by the concealment of Waltzer's past history of drug and alcohol abuse and psychiatric issues, but by the perjury elicited by the Government who presented Waltzer as a reformed man who no longer uses drugs, concealing Waltzer's present addictions and abuse of cocaine, alcohol and prescription drugs." (Def.'s Mot. to Compel at 6.) In addition, to making the very serious allegation that the Government attorneys knowingly elicited perjured testimony from Waltzer, Georgiou's counsel al-

so accuses the Government of other very serious misconduct. Counsel states that:

> [i]t is now clear that at the exact time Mr. Georgiou was scheduled for trial in the fall of 2009, Waltzer's life had become "unmanageable," as a result of his drug and alcohol abuse, and he was in no position to testify at Mr. Georgiou's trial. This would explain the reason for the Government's efforts to continue the trial, over the defense's objection, after the November 2009 date had been previously set by this Court, with no objection from the Government. Presumably, Waltzer used the extra time to sober up, although still heavily medicated and abusing alcohol at the time of the Georgiou trial.

(Def.'s Mot. to Compel at 7-8.)

Counsel also states that the "defense believes that the Government threatened Waltzer with losing his deal with the Government unless he sobered up in time for trial in January 2010. Clearly, using and abusing illegal drugs and alcohol would be a violation of Waltzer's Plea Agreement with the Government, resulting in the loss of his cooperation deal. Without this deal, Waltzer was facing decades' imprisonment. This explains the statements Waltzer made to Dr. Lizzi (Lizzi Report II, p. 5) that he 'feared retaliation . . . of individuals in the Government seeking his imprisonment.' (Id. at 8.)

## II. STANDARDS OF REVIEW

### 1. Motion for Reconsideration

"The United States Court of Appeals for the Third Circuit has held that the purpose of a motion for re-

consideration is to correct manifest errors of law or fact or to present newly discovered evidence." Cohen v. Austin, 869 F. Supp. 320, 321 (E.D. Pa. 1994). Accordingly, a district court will grant a party's motion for reconsideration in any of these three situations: (1) the availability of new evidence not previously available; (2) an intervening change in controlling law; or (3) the need to correct a clear error of law or to prevent manifest injustice. Id. Federal courts have a strong interest in the finality of judgments; as such, motions for reconsideration should be granted sparingly. Cont'l Cas. Co. v. Diversified Indus., Inc., 884 F. Supp. 937, 943 (E.D. Pa. 1995). Dissatisfaction with the Court's ruling is not a proper basis for reconsideration. Glendon Energy Co. v. Borough of Glendon, 836 F. Supp. 1109, 1122 (E.D. Pa. 1993).

**2. Motion for New Trial[10]**

Federal Rule of Criminal Procedure 33 states that "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33.[11] "Whether

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[10] As noted earlier, we consider this Motion for Reconsideration to also be a Fourth Motion for a New Trial. Accordingly, we have included both standards of law.

[11] Federal Rule of Criminal Procedure 33 provides:

> (a) **Defendant's Motion**. Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so desires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment.
>
> (b) **Time to File**.
>
> (1) **Newly Discovered Evidence**. Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of

to grant a Rule 33 motion lies within the district court's sound discretion." United States v. Ortiz, 182 F. Supp. 2d 443, 446 (E.D. Pa. 2000) (citation and quotation marks omitted). In evaluating a Rule 33 motion, the court does not view the evidence favorably to the government, but rather, exercises its own judgment in evaluating the government's case. United States v. Johnson, 302 F.3d 139, 150 (3d Cir. 2002). Nevertheless, "[t]he burden is on the defendant to show that a new trial ought to be granted." United States v. Clovis, No. 94-11, 1996 U.S. Dist. LEXIS 20808, at *5 (D.V.I. Feb. 12, 1996).

A court must grant a motion for new trial if it finds that there were cumulative errors during the trial that, "when combined, so infected the jury's deliberations that they had a substantial influence on the outcome of the trial." United States v. Copple, 24 F.3d 535, 547 n.17 (3d Cir. 1994) (quoting United States v. Thornton, 1 F.3d 149, 156 (3d Cir. 1993)). However, even if the court "believes that the jury verdict is contrary to the weight of the evidence, it can order a new trial 'only if it believes that there is a serious danger that a miscarriage of justice has occurred – that is, that an innocent person has been convicted.'" United States v. Silveus, 542 F.3d 993,

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guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case.

(2) **Other Grounds**. Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 14 days after the verdict or finding of guilty.

Fed. R. Crim. P. 33.

1004-05 (3d Cir. 2008) (quoting Johnson, 302 F.3d at 150). We will now discuss Georgiou's claims in turn.

## III. DISCUSSION

### 1. Correct Standard of Review

As noted, Georgiou first asserts that this Court applied the incorrect standard of law in considering his newly discovered evidence claims in his Third Motion for a New Trial. Georgiou argues "[w]hile, procedurally, *Brady* and Jencks Act motions brought pursuant to Rule 33 are cognizable under the 'newly discovered evidence' clause of the rule, substantively, they are evaluated differently." (Def.'s Mot. Recons. at 1-2.) Georgiou contends that this Court should not have used the five-pronged "newly discovered evidence" standard of review, [12] but rather the three-pronged Brady[13] test. See United States v.

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[12] In interpreting Rule 33, the Third Circuit has held that a district court may grant a new trial on the basis of "newly discovered evidence" if five requirements are met:

> (a) the evidence must be in fact, newly discovered, i.e., discovered since the trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) the evidence relied on, must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal.

United States v. Cimera, 459 F.3d 452, 458 (3d Cir. 2006).

[13] In Brady v. Maryland, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. To establish a due process violation under Brady, a defendant must make the following three showings: "(1) evidence was

Runyan, 290 F.3d 223, 246-47 (5th Cir. 2002) (stating that "when a motion for a new trial based on newly-discovered evidence raises a *Brady* claim, this court instead applies the three-pronged Brady test to determine whether a new trial is appropriate")

This claim, however, is wholly without merit. We need not discuss which test correctly applies because it is clear even a casual reading of our Memorandum Opinion denying Georgiou's Third Motion for a New Trial that we considered Georgiou's claims under both a "newly discovered evidence" standard and the Brady test. In our Memorandum Opinion we stated:

> Georgiou also attempts to claim that the Government violated its obligation under Brady in not disclosing said electronic evidence. We first point out, however, that this Brady claim was not timely filed under Fed.R.Crim.P. 33 and could be rejected on that basis alone. We, nonetheless, address this issue on its merits below, and find that Brady was not violated.

Georgiou, 2011 WL 995826, at *15. In addition, with regard to Georgiou's claim in his Third Motion for a New Trial that the Government violated its disclosure obligations under Brady by failing to produce Waltzer's statements about his "criminal activities" made in the course of his mental health treatment, we stated: "[w]e again point out that this Brady claim was not timely filed under Rule 33, and could be dismissed on this basis alone. We, nonetheless,

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suppressed; (2) the suppressed evidence was favorable to the defense; and (3) the suppressed evidence was material to either guilt or to punishment." United States v. Pelullo, 399 F.3d 197, 209 (3d Cir. 2005).

address it on its merits." (Id. at 17, n.11.) Thus, this claim is baseless and is denied.

**2. Suppression of Text Messages**

Next, Georgiou asserts that this Court employed the wrong standard of review in denying his claim that the Government failed to disclose electronic evidence to the defense. (Def.'s Mot. Recons. at 4.) Georgiou states:

> In the Court's Memorandum, it states, concerning the defendant's text message claim, that this "*Brady* claim was not timely filed under Fed. R. Crim. P. 33," and that any new evidence contained in text messages could not have satisfied the "probably produce an acquittal standard." (Mem. at 15 & n.10).

(Id.) However, as we stated in the previous section, any reading of this Court's Memorandum Opinion and analysis of this claim clearly indicates that we considered this claim under the five-pronged Rule 33 "newly discovered evidence" standard and the three-part Brady test. See Georgiou, 2011 WL 995826, at *3-9.

In his Third Motion for a New Trial, Georgiou asserted that Waltzer traded PINs and/or text messages and emails with FBI Agent Corey Riley and others during his stint as an undercover, cooperating witness, but that the Government produced only a few of those communications during discovery, claiming that it either did not have certain of those communications in its custody or control, or that the defendant was not entitled to them. Georgiou argued that the Government violated its Jencks Act, and/or Brady obligations in not disclosing those messages. In our Memorandum Opinion, we determined that

this claim had no merit finding that it did not meet the five-prong test in order to grant a new trial based on "newly discovered" evidence. See Cimera, 459 F.3d at 458.

Specifically, we determined that Georgiou's counsel had failed to exercise "diligence" in requesting any alleged missing electronic evidence, and that Georgiou simply speculated "that the Government somehow failed to produce communications from law enforcement agents to Waltzer instructing him how to behave during his undercover contacts with Georgiou, and communications from Waltzer to the agents concerning his observations and assessments of the undercover meetings with Georgiou." Georgiou, 2011 WL 995826, at *7. We stated that Georgiou offered little or no evidence to establish that the Government failed to produce such communications, and noted that he only offered as proof of his assertions, his attorney, Bachner's, Declaration in which Bachner claimed "to have analyzed telephone records that the Government produced in discovery and concluded that some unidentified communications were missing and that they showed a 'pattern of instructions between Waltzer and his government handlers for purposes of guiding Waltzer during the undercover sting operation against Mr. Georgiou.'" Id. We concluded that this was "pure speculation." Id.

In addition, we pointed out that the Government had repeatedly maintained that no such communications exist or ever existed, and that it produced all discoverable communications between Waltzer and the federal agents.[14] Id. We, thus, concluded that

[14] The Government stated in its Response to the Third Motion for a New Trial that it:

because Georgiou had failed to produce any evidence that such electronic communications exist or existed, it could not be found to be "newly discovered" evidence.[15] Id.

Moreover, we also considered this claim under the three-part Brady test and stated:

> [W]ith regard to Brady's first element, we find that the alleged electronic evidence was not suppressed as Georgiou has not offered any evidence establishing that the Government suppressed such evidence. In addition, even if this evidence existed and the Government was obligated under Brady to disclose such, we find that Georgiou has failed to show that there is a reasonable probability that, had such evi-

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> [r]eviewed records of electronic communication and has queried the agents involved in the case. Based on this review, counsel has confirmed, as it has represented throughout this case, that Waltzer was not provided with written instructions via electronic communications concerning the undercover investigation of Georgiou. During the undercover operations, Waltzer received his instructions orally. Likewise, Waltzer did not communicate through written electronic communications his impressions of meetings with Georgiou. The electronic communications that Waltzer had with the agents generally involved forwarding electronic communications with Georgiou. Those communications, as defense concedes, were provided during discovery and were presented at trial.

(Id.)

[15] Moreover, we also determined that even if any evidence relating to communications between Waltzer and the agents constituted "newly discovered" evidence, it would be "merely impeaching," in light of the "substantial evidence" presented against him at trial. Georgiou, 2011 WL 995826, at *8.)

> dence been disclosed to the defense, the result of the trial would have been different. See Bagley, 473 U.S. at 682.

Id. at 9.

Georgiou also asserts that this Court "may have misapprehended the factual basis of his claim." (Def.'s Mot. Recons. at 4.) Regarding the basis of this claim, Georgiou states that the "defense was seeking production of the communications between Waltzer and the Government that were sent via text message to see if they contained statements or instruction about his role and his efforts in the sting operation." (Id. at 7.) However, it is apparent that we did not "misapprehend" the factual basis of Georgiou's claim. We directly addressed this specific issue and stated in our Memorandum Opinion that "Georgiou simply speculates that the Government somehow failed to produce communications from law enforcement agents to Waltzer instructing him how to behave during his undercover contacts with Georgiou, and communications from Waltzer to the agents concerning his observations and assessment of the undercover meetings with Georgiou." Georgiou, 2011 WL 995826, at *7.

As noted, the purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence. See Cohen, 869 F. Supp. at 321. With regard to this claim, Georgiou offered nothing in his Motion to convince us that we have committed a "manifest error of law" or that the alleged text messages were newly discovered evidence in order for us to reconsider our determination. As he did in his Third Motion for New Trial, Georgiou has offered nothing more than speculation

that such text messages exist and that they contain exculpatory information. As the Government represented in its Response to Georgiou's Third Motion for a New Trial, it again represents that "it provided to the defendant all substantive communications between Waltzer and the Government, and that there were no electronic communications in which the agents directed Waltzer in the investigation of the defendant or where Waltzer provided his interpretation of the undercover meetings." (Govt.'s Omnibus Resp. at 10-11.) In the absence of any concrete evidence to the contrary, this claim is without basis and will be denied.

**3. Waltzer's Mental Health and Drug Abuse History**

For the third time, we address issues concerning disclosure of information regarding Waltzer's mental health and drug abuse history. In Georgiou's instant Motion for Reconsideration, his Supplemental Motion, Motion to Compel, and Replies to the Government's Omnibus Response, Georgiou's counsel primarily focuses on the Government's alleged failure to disclose what is characterized as critical Brady information relating to Waltzer's supposed mental health and substance abuse issues. Georgiou alleges that the Government "blatantly misrepresented" its knowledge of Waltzer's mental health and substance abuse issues, "was complicit in eliciting perjured testimony" from Waltzer, and failed to provide to the defense critical information relating to Waltzer's issues. Georgiou essentially contends that the Government hid from the defense, the Court, and the jury the fact that Waltzer was seriously mentally ill and abusing drugs before and during his trial. The

defense also accuses the Government of lying to the Court about a continuance request so that the Government prosecutors had time to secretly "sober up" Waltzer before testifying at his trial. (Def.'s Mot. to Compel at 7.)

Throughout these lengthy post-trial proceedings, the Government has repeatedly represented that the only information that was actually known by it concerning Waltzer's mental health prior to and during Georgiou's trial was that which was elicited from Waltzer during his guilty plea colloquy before Judge Dalzell on January 28, 2009 – namely that he suffered from various anxiety issues, but nothing serious that would bear on his credibility as a witness.[16]

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[16] The Government reiterates what it stated in its Response to Georgiou's Third Motion for a New Trial. It stated:

> Judge Dalzell asked Waltzer whether, in the approximately 1.5 years before the plea hearing of January 28, 2009, Waltzer had seen a mental health care provider. Waltzer said that he had "in connection with depression and anxiety." Tr. 1/28/09, 6-7. In response to further inquiries from the court, Waltzer stated that he was taking Paxil for his depression, and that his "head [has] always been clear," and that he was able to understand everything he had discussed with his lawyer. Id. at 8. In response to an earlier question about medication, Waltzer said that he was not taking any medication that "in any way affects how [he] think[s]." Id. at 3. Counsel for Waltzer (who had worked extensively with Waltzer), along with the Government, and then the Court all agreed that there was no issue about Waltzer's competency given the medication that he was taking. Id. at 8. On February 17, 2009, when Waltzer's guilty plea hearing concluded, Judge Dalzell specifically found that Waltzer was competent to plead guilty, stating, "I find that defendant Kevin Waltzer is competent to

The Government argues that the first flaw in Georgiou's argument that they intentionally withheld Brady material from the defense is that he erroneously maintains that Waltzer was seriously mentally ill. The Government asserts that the material and information which Georgiou claims were withheld clearly do establish that the Government knew Waltzer was seriously mentally ill and should have turned such records over to the defense.

Georgiou claims that the Government has been caught "red-handed" with Brady materials concerning Waltzers' mental health and drug abuse history including Waltzer's Bail Report dated February 17, 2009, a PSI emailed to the Government attorneys on the very date that he was convicted, February 9, 2010, and Pretrial reports. While the Government asserts that our analysis of each of these documents should be whether they indicate that Waltzer had "serious" mental issues, we will apply the Brady three-part test to determine if any or all of these materials were Brady material which should have been disclosed to the defense, and whether any suppression of such affected the integrity of the trial.[17] We are of the opinion, however, that the question of whether the information at issue shows "serious"

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> plead; there is not an iota of doubt in that department . . . ." Tr. 2/17/09, 38.

(Govt.'s Resp. Third Mot. New Trial at 30-31.)

[17] "We note that Georgiou asserts that these documents have all just recently been discovered by his defense team. Thus, it could be argued that they should be considered under the five-part "newly discovered evidence" test. See Cimera, 459 F.3d at 458. However, we will consider each of these documents under the less-stringent three-part Brady test.

mental illness, is certainly a factor in considering whether the information is "favorable to the defense" and "material" under the second and third parts of the Brady test.

As noted earlier, to establish a due process violation under Brady, a defendant must make three showings: "(1) evidence was suppressed; (2) the suppressed evidence was favorable to the defense; and (3) the suppressed evidence was material to either guilt or to punishment." Pelullo, 399 F.3d at 209. In United States v. Bagley, the Supreme Court explained its holding in Brady, stating that evidence favorable to the defense is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." 473 U.S. 667, 682 (1985). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles v. Whitley, 514 U.S. 419, 434 (1995). In other words, a "reasonable probability" of a different result is shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial." Bagley, 473 U.S. at 678. We will now consider each of these materials in turn.

### A. Bail Report

We first consider a Bail Report which Georgiou asserts was provided to the Government by Pretrial Services during Waltzer's allocution on February 17, 2009 before Judge Dalzell. (See Def.'s Supp. Mot. Recons., Ex. A.) Georgiou asserts that the Bail Report dated January 26, 2009, was "given to the gov-

ernment as early as January 28, 2009 and/or February 17, 2009, the dates of Waltzer's initial appearance/guilty plea," and "expressly states that Waltzer had a history of psychiatric and abuse disorders." (Id. at 5.) Georgiou contends that the Government misrepresented their knowledge about this Bail Report and deprived the defense of critical information about Waltzer's drug use and mental health issues.

The Government states that:

> [A]t Waltzer's change of plea hearing, the Bail Report was in the possession of the Pretrial Services Officer and was available for the government's inspection. However, the government attorneys did not inspect the report at the hearing because the government was not seeking pretrial detention. Waltzer was actively cooperating in numerous government investigations at the time of his plea, and thus both parties agreed that Waltzer should remain free on bail to continue his active cooperation. The government attorneys did not need to address the uncontested issue of bail. The Government also did not obtain a copy of the bail report for its files because the rules of Pretrial Services prohibit the parties from removing the bail report from the courtroom. Put simply, the bail report may have been in the same courtroom as the Government attorneys, but they never possessed it - never reviewing the report or removing it from the courtroom for their files. The Government was not aware of the contents of the bail report until the defendant raised the issue in this post-trial litigation.

(Govt.'s Omnibus Resp. at 20-21.) Thus, the Government argues that since it did not possess the Bail Report it could not have violated Brady in failing to produce it. (Id.) The Government further argues that even if the Government "were deemed to have constructively possessed the bail report, there is no Brady violation because the information contained in the report is not material under Brady." (Id. at 21, n.12.)

We first note that we are not aware of any official Pretrial Services rule which prohibits the taking of the Bail Report out of the courtroom by the Government. However, the Bail Report does specifically state at the top in bold capital letters that it "**MUST NOT BE TAKEN OUT OF COURTROOM.**" [18] (Def.'s Supp. Mot. Recons., Ex. A.) We, thus, accept the representation of the Government that it believed that such a rule existed and that it did not leave the courtroom with the Bail Report in its possession. We also accept as reasonable the Government's assertion that it did not review the contents of the Report because it was not contesting bail for Waltzer. We, thus, find that the Government did not "suppress" this material from the defense under the first part of the Brady test. However, even assuming that the Government did review the Bail Report, was aware of its contents, and even had it in its posses-

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[18] The Bail Report actually states in full:

**FOR COURTROOM USE ONLY**
**RETURN TO PRETRIAL SERVICES OFFICER**
**IMMEDIATELY AFTER HEARING**
**MUST NOT BE TAKEN OUT OF COURTROOM**

(Def.'s Supp. Mot. Recons., Ex. A.)

sion, we find that its contents do not meet the second and third parts of the Brady test.

The Bail Report stated that Waltzer has a "history of substance abuse," and that the "defendant reported that he began using cocaine and marijuana at age 16 and last used these substances about 2 and ½ years ago." (Def.'s Supp. Mot. Recons., Ex. A.) It further stated that Waltzer related that he had seen "numerous psychiatrists and psychologists for his substance abuse issues between the years of 1994 and 2004." (Id.) It also stated that Waltzer indicated that he had been diagnosed in the past with Anxiety Disorder and Substance Abuse Disorder and that he was currently under the care of his primary physician for his anxiety, and is prescribed Paxil, which he had been taking for the last ten years. (Id.) Regarding drug abuse and mental health issues, Pretrial Services recommended that Waltzer receive "drug testing/treatment" and "mental health treatment" if they "deemed" such "necessary." (Id.)

Under Brady's second prong, we are of the opinion that it is questionable, at best, that the information in the Bail Report is "favorable" to the defense. The Bail Report stated that Waltzer suffered from "Anxiety Disorder," but did not indicate that such condition was severe and would in any way affect his ability to recall the past and to truthfully and accurately testify on behalf of the Government in its case against Georgiou and/or any other defendants in which he was cooperating with the Government. (Id.) In addition, the Bail Report did not indicate that he suffered from any other mental or emotional conditions other than "Anxiety Disorder." It is also notable that, at the time Pretrial Services interviewed Waltzer for this Bail Report, Waltzer was on-

ly being seen by his primary care physician for his Anxiety Disorder and not a mental health professional, nor was he being treated by substance abuse professionals for a current drug problem. (Id.) In fact, it is apparent that Pretrial Services did not consider Waltzer to have serious mental health or substance abuse issues because it did not recommend that Waltzer receive immediate "drug testing/treatment" and/or "mental health treatment." Pretrial Services' recommendation only stated that Waltzer should obtain such if it was "deemed necessary" by it, and at this time, it did not deem such treatment necessary. (Id.)

Moreover, even if the information in the Bail Report were considered "favorable" to the defense, we do not find the Bail Report to be "material" under Brady's third prong because we believe that there is not a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 682. As we discussed in our previous Memorandum Opinions denying Georgiou's Second and Third Motions for New Trial, evidence was presented at trial which detailed Waltzer's history of misconduct and his alleged bias for the government in that he admitted to a $40 million dollar fraud to which he pled guilty under a plea cooperation agreement. We found that this evidence provided ample opportunity for Georgiou to attack Waltzer on the basis that he was untrustworthy and biased for the Government. See Georgiou, 2011 WL 1081156, at *7. In addition, we also pointed out that counsel for Georgiou thoroughly cross-examined Waltzer on his history of deception and alleged bias for the Government. (See Trial Tr. vols. 4-5, 47-177, Jan. 26, 27, 2010).

### B. "Worksheet for Presentence Report"

We next consider a "Worksheet for Presentence Report"[19] ("Worksheet") that was completed by Probation for Waltzer's plea hearing. It indicates that Waltzer was interviewed on January 28, 2009, and names Lappen as the Assistant United States Attorney in this matter. (10/24/11 Letter Resp., Ex. C.) The Government asserts that this Worksheet shows that "Waltzer himself stated, in connection with the preparation of his PSI, that he did not suffer from any serious mental illness." (10/24/11 Letter Resp., at 5.)

On the Worksheet under the section headed "Physical Health," there is a notation that Waltzer has an "anxiety disorder." (Id., Ex. C.) Under the section titled "Current Medications," as best as can be deciphered from the handwritten notes, it is written that Waltzer had been taking Paxil for the past eleven years and Xanax "if needed." (Id.) Dr. John Glazer was listed as Waltzer's physician and a notation was included which stated "no counseling." (Id.) In addition, under the heading "Mental and Emotional Health," it was written that Waltzer was diagnosed

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[19] This Report was not cited by Georgiou in any of his filings as proof that the Government knew that Waltzer had serious mental health and drug abuse issues prior to Georgiou's trial. It was included as an Exhibit in the Government's October 24, 2011 Letter Response ("10/24/11 Letter Resp.") to Georgiou's Reply Memorandum. (See 10/24/11 Letter Resp., Ex. C.) The Government maintains that it was neither aware of this Worksheet nor was in possession of it at the time it was completed by Probation. Despite the fact that Georgiou has not cited to this Worksheet in his arguments, we, nonetheless, will consider it under the Brady test.

with an anxiety disorder in 1993- 94, but was "not bipolar." (Id.)

In considering this Worksheet under the three-part Brady test, we first find that there is no evidence of record that the Government "suppressed" this document from the defense. In addition, we again find it questionable whether this Worksheet was "favorable to the defense." The Worksheet indicates that Waltzer had an anxiety disorder for which he took medication, but it does not indicate that Waltzer was suffering with a mental impairment that would prevent him from testifying truthfully and accurately. In fact, the Worksheet indicated that Waltzer was receiving "no counseling," and was "not bipolar." (Id.) Accordingly, we find that there is nothing in this Worksheet that would alert the Government that Waltzer had serious mental health issues which would affect his ability to testify. In addition, this Worksheet makes no mention of any drug or alcohol abuse problems. Accordingly, we, and do not find this report to be Brady material that the Government was obligated to produce to Georgiou.

### C. Monthly Treatment Reports

Georgiou next relies on "Monthly Treatment Reports" ("Treatment Reports") in the Pretrial Services records from the Middle District of Florida to contend that the Government knew that Waltzer was abusing illegal drugs and alcohol in the months prior to and at the time of his trial. (Def.'s Supp. Mot. Recons., Ex. B.) These Treatment Reports include "comments" from Barbara Dusckas ("Dusckas"), a counselor, who was seeing Waltzer during his pretrial release period in Florida from June 10, 2009 through February 22, 2010. They also include "comments"

from Bethaney Graf, a counselor who saw Waltzer from April 26, 2010 through June 30, 2010. (Id.)

Georgiou asserts that Dusckas' notations in these Treatment Reports prove that the Government, not only knew of Waltzer's past drug abuse issues, but was fully aware that Waltzer was abusing drugs and alcohol in the fall of 2009, and was abusing them right up to and including the time of his trial when Waltzer testified against him on January 26, 27, and 28, 2010. Georgiou quotes from Dusckas' report on September 30, 2009 for proof that Waltzer was currently "self-medicating with alcohol and cocaine." (Id. Ex. B, Report of 9/30/09.) Georgiou also points to Reports from Dusckas, one dated October 30, 2009, and the other dated November 30, 2009, for further proof that Waltzer admitted that his life had become currently "unmanageable" because of drug and alcohol issues. (Id. Ex. B, Reports of 10/30/09 and 11/30/09.)

The Government asserts that, contrary to Georgiou's conclusions that these comments referred to current drug and alcohol use and abuse, these comments refer to his past conduct and current willingness to address his issues. We agree with the Government. It is apparent from an overall, rather than an isolated, reading of Dusckus' counseling "comments" that they were referring to Waltzer's past drug abuse issues and that he was currently in a state of "sobriety." For example, Georgiou asserts that Dusckus' statement in her November 30, 2009 Report that Waltzer had admitted "how his life has become unmanageable due to his addiction" is proof that Waltzer was not only doing drugs, but abusing them, and that the Government knew about Waltzer's drug abuse. (Id., Ex. B, Report of

11/30/09.) However, this Report clearly indicates that this comment was referring to Waltzer's past drug abuse and that he was currently sober and taking steps to prevent relapse. The comment states in its entirety:

> Clt [Waltzer] is moving from preparation to action stage of change as evidenced by his sobriety and accepting that he is an addict. He is identifying triggers for his use of drugs and alcohol. He is practicing relapse prevention skills as evidenced sharing his fears and stressors in tx [sic] instead of intellectualizing, sharing his understanding of addiction with his spouse, and admitting how his life has become unmanageable due to addiction (step 1). Clt has shown progress in finally being able to verbalize his understanding of the relationship between his addictive and compulsive behaviors and the serrious [sic] consequences that he and his family are experiencing. He is encouraged to attned [sic] AA, but as of yet, he still thinks he is different. That is addict thinking and he is continuing to address such issues in tx [sic]. He is [sic] wife has not attended tx [sic] yet, but she is supposed to attend next time.

(Id.) (emphasis added).

The Government has also submitted to the Court a Declaration from Dusckas dated October 18, 2011, which corroborates the Government's assertions that Dusckas' treatment notes were referring to Waltzer's past drug problems, and that he was in a state of "sobriety" in the fall of 2009, and at the time of Geor-

giou's tria1.[20] (10/24/11 Letter Resp., Ex. B.) In her Declaration, Dusckas explains that she is a certified chemical dependency counselor who worked for the Ruth Cooper Center in Fort Myers, Florida from 1992 through March 2010. She stated that she is "not a psychiatrist or licensed mental health counselor." (Id.) She indicated that while working at Ruth Cooper, she provided chemical dependency counseling to Waltzer who was under the supervision of Pretrial Services, and that she prepared monthly substance abuse treatment reports. (Id.) Dusckas stated:

> While I was working with Kevin Waltzer, I observed him to be completely lucid, and high functioning. He had no difficulty intelligently

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[20] Georgiou asserts in a letter reply dated November 3, 2011 ("11/03/11 Reply") to the Government's 10/24/11 Response that this Court should not rely upon the "unsworn declaration" of Dusckas and cites Small v. Lehman, 98 F.3d 762 n.5 (3d Cir. 1996). (11/03/11 Reply at 2.) Small, however, differs from the instant case. Small was a habeas case involving motions for summary judgment, and stated that "Rule 56 of the Federal Rules of Civil Procedure states that motions for and in opposition to summary judgment may be supported by affidavits; unsworn statements, such as those relied upon in the instant matter, fail to meet this requirement." (Id.)

We first note that, here, we are not relying on the unsworn Declaration in deciding a motion for summary judgment and, therefore, we are not subject to the requirements of Rule 56. In addition, we are not relying on Dusckas' Declaration to support our determination that the Treatment Reports did not show current drug and alcohol abuse during this time period. Rather, we credit this Declaration and find that it supports our conclusions after our own independent reading of the Treatment Reports. Moreover, Georgiou's assertion that the Declaration was "clearly drafted by the government" is entirely without basis in the record. (11/03/11 Reply at 2.)

and coherently engaging in conversations with me about his life history, his prior substance abuse, and his criminal thinking. He demonstrated no difficulty with memory, short term or long term. He was anxious and worried about going to prison and reported having anxiety and panic disorders. To the best of my recollection, without reviewing his assessment, he said that except for his anxiety and panic issues, he had not been diagnosed with any mental illnesses, but wondered if he could be considered bipolar. He denied previous diagnosis or treatment for bipolar disorder. Waltzer did not receive a referral for mental or psychiatric services while in substance abuse counseling with me at Ruth Cooper. These options were available to him if needed. His statements about his mental health were consistent with my observations.

During the time I was counseling Waltzer, he advised me that he was engaged in occasional alcohol use but not using illegal drugs. I was also aware that Waltzer was tested regularly for illegal drug use and that his test results were all negative. Waltzer's statements and the results of his drug testing were consistent with my observations. He showed no indication of being under the influence of mood altering chemicals during his counseling sessions. Waltzer appeared to be addressing his substance abuse problems during the counseling period and appeared to be committed to remaining free of illegal drugs. This is evidenced by Waltzer's consistent negative urine screens, through pretrial services, his

> self-reporting, my clinical observations, and Waltzer's desire to avoid further negative consequences of chemical dependency.
>
> In the monthly treatment report for Waltzer that I signed and dated 10/30/09 (for sessions on 10/14, 10/19, and 10/26), I referred to Waltzer's "willingness to admit that his life has become unmanageable due to alcohol and drugs. . . ." This phrase was not meant to suggest that Waltzer was abusing drugs and alcohol during his counseling. Rather, this phrase is from Step One of the 12-steps of Alcoholics Anonymous and refers to the unmanageability of one's life resulting from chemical dependence. Mr. Waltzer was addressing the life changes he was willing to make in order to be responsible and continue his recovery.

(10/24/11 Resp., Ex. B.)

It is apparent from this Declaration that Dusckas' treatment notes never were intended to mean that Waltzer was currently abusing drugs and alcohol. In fact, it clearly supports the Government's position that Waltzer was "sober" during this time. Moreover, it supports the Government's position that Waltzer was experiencing anxiety and panic over his worry about going to prison, and that, except for anxiety and panic issues, Waltzer had not been diagnosed as having any mental illnesses such as bipolar disorder at this time. It also supports the Government's position that Waltzer was not suffering from drug or alcohol abuse and/or mental health issues that would have affected Waltzer's ability to testify truthfully and accurately at trial. Accordingly, under the Brady test, we first find that there is no evidence

that the Government suppressed these Treatment Reports from the defense. In addition, we do not find them "favorable to the defense," and "material" under Brady's second and third prongs. See Pelullo, 399 F.3d at 209.[21]

### D. Waltzer's Drug Testing

In addition to the Pretrial Treatment Reports, Georgiou asserts that the results of one of Waltzer's drug tests also proves that Waltzer was abusing drugs in the months prior to his trial and during his trial as well. This claim, however, is also without a basis in the record. The "Pretrial Services Chronological Record Report" ("Chronological Record") from the Middle District of Florida reflects that between February 20, 2009 and July 6, 2010, Waltzer "submitted to twenty-three (23) urinalysis [sic] with negative results." (Def.'s Mot. to Compel, Ex. E at 23.) Despite this report, Georgiou relies on an entry dated January 19, 2010, which indicates that Pretrial Services in Philadelphia administered a drug test to Waltzer that initially appeared to be positive for opiates. However, this same entry also states that the "specimen" was "sent to the national lab for confirmation testing." (Def.'s Supp. Mot. Recons., Ex. C, at 4.) It further states that "[t]he National Testing Lab (NTL) received the specimen on 01/25/2010 and test results came back on 01/26/2010." (Id.) The January 26, 2010 entry reflects that the specimen collect-

[21] The Government's position that Waltzer was not abusing drugs and alcohol in the fall of 2009 and at the time he testified at Georgiou's trial, is further supported Waltzer's consistent negative drug testing that was conducted by Pretrial Services during this time. We will discuss this in further detail in the next section.

ed on January 19, 2010 "returned Negative." (Id. at 4.)[22] As mentioned above, every other pretrialdrug test of Waltzer was negative for illegal drugs. (Govt.'s Omnibus Resp., Ex. B.) In addition, Georgiou asserts that an indication that Waltzer was abusing drugs before and during his trial was because he "frequently" missed drug testing appointments. (Def.'s Reply at 28, n.34.) Georgiou contends that "Waltzer's frequent missing of his scheduled drug tests is consistent with the behavior of someone who knows that they may fail a drug test, but wants to hide their behavior. Indeed, he may have been deceiving Pretrial Services, and been continuing to abuse cocaine and alcohol, or other medications, such as prescription drugs or over-the-counter cough syrup." (Id.) However, contrary to these assertions that Waltzer "frequently" missed drug tests, the records indicate that Waltzer missed four drug tests during the period from May 26, 2007 to June 21, 2010. He missed tests on November 16, 2009, December 11, 2009, June 17, 2010, and June 18, 2010. (Govt.'s Omnibus Resp., Ex. B). However, in each of these instances, Waltzer reported shortly thereafter and tested negative. It must be noted that the latter two of the missed appointments occurred several months

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[22] Moreover, the Chronological Record stated in a February 1, 2010 entry that Pretrial Services in the Middle District of Florida was contacted by Pretrial Services in Philadelphia and informed that Waltzer "did report as directed and submitted to drug testing on 1/12/10, 1/19/10 and 1/20/10. His test on 1/19/10 initially came back positive for opiates, but the confirmation test was negative. He was taking OTC cough medicine, and our u/a tech indicated that could have been the reason for the positive result."

(Def.'s Mot. to Compel, Ex. E at 16.)

after Georgiou's trial. We are of the opinion that two missed appointments prior to the time that Waltzer testified at the Georgiou trial certainly isn't proof that he was abusing drugs in the months prior to and at the time of the trial. We, thus find that these drug testing records also support the Government's position that Waltzer was not suffering from drug or alcohol abuse issues in the months prior to trial and at the time of Georgiou's trial that would have affected Waltzer's ability to recall the past and testify accurately at trial. Accordingly, under the Brady test, we find that the drug testing results were not suppressed by the Government, were not "favorable to the defense," and were not "material." See Pelullo, 399 F.3d at 209.

There are two remaining allegations concerning the Government's knowledge of Waltzer's drug abuse from the Georgiou defense that we must address at this point. In addition to making the serious allegations against the Government that it intentionally withheld Brady material from the defense as supposedly evidenced by the Treatment Reports and the Chronological Record of Georgiou's drug testing, Georgiou's counsel goes further and makes the even more serious allegations that the Government, not only knew of Waltzer's current drug and alcohol abuse in the fall of 2009 and at the time of trial, but also took steps to cover such abuse and lied to this Court in seeking a continuance of the trial so it could "sober" Waltzer up. (Def.'s Mot. to Compel at 7-8.) Counsel also accuses the Government attorneys of threatening Waltzer that his plea deal would be taken away if he didn't "sober" up in time for the January trial. (Id.) Counsel contends:

> Moreover, it is now clear that at the exact time Mr. Georgiou was scheduled for trial in the fall of 2009, Waltzer's life had become "unmanageable," as a result of his drug and alcohol abuse, and he was in no position to testify at Mr. Georgiou's trial. See Exhibit "B" to Motion to Compel, pp. 3-8) [sic] This would explain the reason for the government's efforts to continue the trial, over the defense's objection, after the November 2009 date had previously been set by this Court, with no objection from the government. Presumably, Waltzer used the extra time to sober up, although still heavily medicated and abusing alcohol at the time of the Georgiou trial.
>
> Thereafter, the defense believes that the government threatened Waltzer with losing his deal with the government unless he sobered up in time for trial in January 2010. Clearly, using and abusing illegal drugs and alcohol would be a violation of Walter's [sic] Plea Agreement with the government, resulting in the loss of his cooperation deal. Without this deal, Waltzer was facing decades' imprisonment. This explains the statements Waltzer made to Dr. Lizzi (Lizzi Report II, p.5) that he "feared retaliation . . . of individuals in the government seeking his imprisonment."

(Id.)

While this Court certainly recognizes the duty of an attorney to zealously represent his or her client, we believe that Georgiou's counsel here has crossed over the line of zealous representation. As discussed above, there is no basis in the Chronological Reports

or Waltzer's drug testing records for defense counsel to make the leap from asserting that the Government withheld Brady materials to accusing the Government of lying to this Court about continuing the Georgiou trial in November 2009 and threatening Waltzer to withdraw the plea agreement so the Government could "sober" up Waltzer to testify. Moreover, there is absolutely no other evidence in this entire record to support such reckless allegations.[23]

### E. Presentence Investigation Report

Georgiou next asserts that the Government was caught "red-handed" withholding Brady material when his counsel discovered that on the day that the verdict came down in his trial, February 9, 2010, the Government was emailed a draft Presentence Investigation Report ("Draft PSR") concerning Waltzer by Pretrial Services which indicated that Waltzer currently, and in the past suffered from mental health issues and drug abuse problems. (Def.'s Reply at 15.) Georgiou argues that this Draft PSR is further proof that the Government knew of Waltzer's mental health and drug issues, but failed to disclose this Brady information to the defense. On the other hand, the Government continues to assert that "it had no information at the time of Georgiou's trial about Waltzer's mental health." (Govt.'s Omnibus Resp. at 14, n.6.) It further maintains that "the case was over by the time the Government had any additional information about Waltzer's mental health, as

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[23] Moreover, this Court observed Waltzer over the course of three days of testimony and such observations did not indicate in any way that Waltzer appeared to be under the influence of controlled substances and/or alcohol. To the contrary, Waltzer appeared sharp and alert.

the jury convicted the defendant before the Government ever saw the information." (Id.) The Government states that on the day of the verdict, February 9, 2010, Pretrial emailed the Draft PSR to it, but it never looked at such email until after the jury came back with Georgiou's conviction. Thus, the Government argues that it never possessed the Draft PSR before or during Georgiou's trial.

We are of the opinion that even though this Draft PSI was emailed to the Government on this date, this does not establish that the Government was caught "red-handed" with Brady evidence. There is no evidence in this record that the Government read the Draft PSR before the conviction came down, recognized it as Brady material with regard to Waltzer's drug abuse and mental health history, and suppressed it from defense counsel. Moreover, we find that even if the Government did read the Draft PSR and/or possessed the Draft PSR before the verdict was handed down, a reading of the Draft PSR indicates that it did not contain any information that would have alerted the Government that Waltzer had mental health and/or drug abuse issues that constituted Brady material that had to be given to the defense. Concerning Waltzer's mental health, the Draft PSR stated in relevant part:

> The defendant informed that he suffers from Anxiety Disorder. He was diagnosed with this condition in 1993 or 1994. Following the diagnosis, the defendant began to use medication. He has used medication continually for the past fifteen years. The defendant's medication is prescribed to him by Dr. Glazer.

> The defendant's wife confirmed the defendant's diagnosis of Anxiety Disorder. He has not been diagnosis [sic] with any other mental or emotional disorders. She confirmed that he been [sic] treated with medication. Despite his prescription medication, he was hospitalization [sic] for a panic attack in the spring of 2009. In addition to anxiety, the defendant has also experienced difficulty sleeping.

(10/27/11 Reply Letter, Ex. A at 23.)

In considering this information under the three-part Brady test, we first find that there is no evidence that the Government suppressed this Draft PSI. Next, once again, we find it questionable that this information is "favorable to the defense" under Brady's second part. The Draft PSR indicates that Waltzer's historical mental health issues were limited to an anxiety and/or panic disorder, and not a mental health issue that would affect Waltzer's ability to testify truthfully and accurately. The Draft PSR states that Waltzer was diagnosed with an "Anxiety Disorder" in 1993 for which he takes medication that was prescribed by his primary physician. (Id.) It added that Waltzer's wife confirmed that he had not been diagnosed "with any other mental or emotional disorders." (Id.) However, even assuming that this information is somehow "favorable to the defense," for the same reasons that we have discussed above, we do not find under Brady's third part that there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 678.

Regarding substance abuse, the Draft PSR stated:

The defendant reported a past history of cocaine abuse. He began to use cocaine while in college in Boston. The defendant's wife confirmed this fact, acknowledging that she witnessed him do so when they were in college. Although he was a recreational user of cocaine during all four years of college, the defendant said he was able to stop after college. He then abstained from cocaine for six years. However, he started to use cocaine again upon his move back to the Boston area in 1998. Despite moving from Boston to Pennsylvania, the defendant's use of cocaine moved with him. In 1999, he contends that he was using cocaine at least five times per week. Yet, he was able to conceal this fact from his wife.

In 2000 or 2001, the defendant said his wife learned of his drug use, a fact that she confirmed to the probation officer. He sought counseling at this time. However, he admits that he only attended sporadically. The Defendant did not recall where he sought counseling. The defendant's wife was unable to state from whom the defendant sought help. Although he did stop, it did not last long. By 2003, and throughout the time frame that he recognized that he became addicted to cocaine, the defendant's wife said the defendant traveled frequently. She believes he used cocaine while away from the house, not in their home.

The defendant informed that he also consumed alcohol, including beer and hard liquor, while he snorted cocaine. The defendant did not view alcohol as problematic. He still consumes alcohol but limits his intake to three glasses of

> red wine per week. The defendant said his use of cocaine ended more than a year before he entered his guilty plea in the instant offense. He did not seek assistance to curb his drug use, nor is he currently involved in drug treatment. The defendant's wife confirmed the same. She believes that his drug use is behind him.

(10/27/11 Reply Letter, Ex. A at 24.) Like the Draft PSR's information concerning Waltzer's mental health, we likewise find that it is questionable, at best, that this information concerning drug and alcohol abuse is "favorable to the defense" under Brady's second prong. The Draft PSR does not indicate that Waltzer had past or current drug and/or alcohol abuse problems that would have affected his ability to testify both truthfully and accurately. In fact, Waltzer told Pretrial Services that his use of cocaine ended more than a year before he entered his guilty plea in January 2009, and that he was currently not using drugs. (Id. at 24.) In addition, even if such information were deemed "favorable to the defense," we again conclude that under Brady's third prong there is not a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 678.

### F. Revised PSR

Pretrial Services revised the Draft PSR ("Revised PSR") on March 4, 2010. Georgiou contends that the contents of the Revised PSR are further proof that the Government knew that Waltzer suffered from mental health and substance abuse issues that would have affected his credibility at trial, and that the

Government continued to violate its continuing Brady obligations by suppressing this information from his counsel. In the Revised PSR, concerning Waltzer's mental health, Pretrial Services added after the sentence, "[t]he defendant's medication is prescribed to him by Dr. Glazer," that: "[h]owever, he [Waltzer] now sees Nancy Troast, M.D. and Luciano Lizzie, a psychiatrist, for this condition [Anxiety Disorder]." (Id., Ex. B at 24.) After the sentence, "[d]espite his prescription medication, he was hospitalization [sic] for a panic attack in the spring of 2009," in the Revised PSR, the following excerpt was added:

> At this time, as the defendant has advised, he was diagnosed with bipolar disorder by Dr. Richard Machiaroli and prescribed the medications Ativan and Depakote. The defendant informed that he never took the Depakote. The defendant also underwent evaluation by Barbara Dusckas, a psychologist, who also referred to bipolar disorder in her report. Defense counsel informed that further information may be presented to the Court concerning the defendant's mental health, suggesting that he may suffer from a mental impairment that affected his judgment in this case and warrants departure, pursuant to U.S.S.G. § 5K2.13.

(Id.) The Government asserts it was only after Waltzer's Draft PSR was prepared that defense counsel began pursuing a downward departure or variance based on Waltzer's mental health. (Id. at 1-2.) It further asserts that the Revised PSR then reflected information that Waltzer and his counsel provided to the Probation Office in anticipation that

counsel was going to file a sentencing memorandum seeking a reduced sentence because Waltzer's alleged mental health issues, at least partially, explained his decision to engage in a massive fraud scheme. (Id. at 2.) The Government also contends that at Waltzer's sentencing hearing, Waltzer and his counsel withdrew this claim and did not rely on mental health issues to try and achieve leniency. (Id.)

Considering this Revised PSR under the Brady test, we first note the obvious -that the Government did not possess this PSR until after Georgiou was convicted, and therefore, cannot be deemed to have suppressed this information from the defense before or during Georgiou's trial. Under Brady's second prong, as we have concluded with the other alleged "new evidence" regarding Waltzer's mental health and drug abuse history, we do not find that the Revised PSR is necessarily "favorable to the defense." First, regarding Waltzer being seen by Dr. Lizzi for his Anxiety Disorder, in connection with Waltzer's sentencing, his counsel submitted the Lizzi Report which indicated that Dr. Lizzi had been seeing Waltzer since August 2007, shortly after he began cooperating with the Government. The Lizzi Report stated that Waltzer suffered from bipolar disorder and that he had abused cocaine and alcohol during his illegal activities between 1999 and 2006. Dr. Lizzi opined that "these mental disorders, either individually or in concert, so affected Mr. Waltzer's capacity to reason and control his impulses that they significantly contributed to his criminal behavior during that time." (Def.'s Mot. to Compel, Ex. B.) However, as we already discussed in two previous Memorandum Opinions, we found that the Government was not even aware of Dr. Lizzi at the time of

Georgiou's trial and only became aware of him because of the Lizzi Report that was prepared in connection with Waltzer's sentencing on March 12, 2010. See Georgiou, 2011 WL 995826, at *17-18; Georgiou, No. 09-88, at *8-9 (filed under seal, Nov. 9, 2010). In addition, we determined that the Government only used Dr. Lizzi to clarify the analysis he set forth in the Lizzi Report. We noted that Dr. Lizzi clarified his report and stated that he did not "believe that he [Waltzer] experienced impairment in memory, or communication. . . ."[24] (Id.)

We also note that the Revised PSR states that Waltzer "underwent evaluation by Barbara Dusckas, a psychologist, who also referred to bipolar disorder in her report." (10/27/11 Resp., Ex. B at 24.) However, as indicated earlier, Dusckas is not a psychologist or any other type of health care professional, but is a certified chemical dependency counselor who never conducted any type of mental testing on Waltzer. In fact, Dusckas stated in her Declaration that "Waltzer did not receive a referral for mental or psychiatric services while in substance abuse counseling with me at Ruth Cooper." (10/27/11 Resp., Ex. B.)

However, assuming that the Revised PSR is "favorable to the defense," we again conclude under Brady's third prong that Georgiou has failed to show that there is a reasonable probability that, had such

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[24] We also previously determined that "even if the Government possessed such evidence regarding statements Waltzer made to Dr. Lizzi, Georgiou has failed to show that there is a reasonable probability that, had such evidence been disclosed to the defense, the result of the trial would have been different." Georgiou, 2011 WL 995826, at *19. We do so again here.

evidence been disclosed to the defense, the result of his trial would have been different.[25] See Bagley, 473 U.S. at 682. Thus, we make the same finding with regard to the Revised PSR that we have concerning all the alleged new evidence and Brady material that Georgiou has submitted concerning Waltzer's mental health and drug abuse history. We conclude that there is nothing in any of this material that persuades this Court to conclude that such alleged mental health and drug abuse issues had any affect on Waltzer's ability to recall the past, perceive reality, or testify truthfully. We further find that even if the defense had in their possession all of the above-discussed material, in light of the staggering evidence against Georgiou that was presented at trial, the result of his trial would not have been different. As we stated in denying Georgiou's Third Motion for New Trial, we reiterate as follows:

> the Government's evidence against Georgiou included voluminous recordings, emails, financial records and other evidence that overwhelmingly demonstrated that Georgiou had

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[25] The Revised PSR included nothing new regarding Waltzer's substance abuse other than adding after the last sentence of the Draft PSR that "[t]he defendant has since discussed his substance abuse with Dr. Dusckas over the past ten months of his counseling. This is the first time that he has participated in counseling with regard to his use of drugs." (Govt.'s 10/27/11 Resp., Ex. B.) However, as noted above, Dusckas is not a doctor, but a counselor. In addition, she clarified in her Declaration that [w]hile I was working with Kevin Waltzer, I observed him to be completely lucid, and high functioning. He had no difficulty intelligently and coherently engaging in conversations with me about his life history, his prior substance abuse, and his criminal thinking. He demonstrated no difficulty with memory, short term or long term." (10/24/11 Resp., Ex. B.)

> committed the crimes charged. All of which was consistent with Waltzer's testimony. Georgiou, on the contrary, produced no evidence to corroborate his claim that he had actually been investigating and recording Waltzer. "The testimony of [a witness] must be considered in the totality of the circumstances and all of the evidence introduced at trial." United States v. Hankins, 872 F. Supp. 170, 174-75 (D.N.J. 1995) (citing Bagley, 473 U.S. at 628). Waltzer's version of the relevant events conforms with the staggering physical evidence in this case. As such, we conclude that even if the jury had found Waltzer to be unreliable, Georgiou's trial nevertheless resulted in a verdict worthy of confidence, considering the totality of the circumstances and all of the evidence introduced at trial.

See Georgiou, 09-88, at 12 (filed under seal, Nov. 9, 2010).

**4. Alleged Perjured Testimony**

Next, we address another serious accusation leveled by Georgiou's counsel against the Government attorneys. Counsel not only makes the accusations that the Government knew of Waltzer's serious drug and alcohol abuse, withheld Brady material concerning such abuse, concealed this abuse from the defense and from this Court prior to and during Georgiou's trial, but also alleges that the Government knowingly and willfully elicited perjured testimony from Waltzer at trial concerning his use of drugs. Georgiou contends that his trial was not only contaminated by the Government's "concealment of

Waltzer's past history of drug and alcohol abuse and psychiatric issues, but by the perjury elicited by the government who presented him as a reformed man who no longer uses drugs, concealing Waltzer's present addictions and abuse of cocaine, alcohol and prescription drugs." (Def.'s Mot. to Compel at 6.)

Defense counsel asserts further that:

> Instead of correcting Waltzer's false and misleading statements, however, the government actively participated in the deception (and emboldening Waltzer on the stand) by, among other things, attempting to vouch for his credibility, parsing his testimony to leave the jury and the Court with the impression that Waltzer's drug and alcohol problems were relatively minor, that those substance abuse problems were in the past, and that Waltzer was a completely changed man who would not lie because he had strong incentives to tell the truth as part of his cooperation agreement.

(Def.s' Reply at 31-32.)

We first note that these are claims of prosecutorial misconduct rather than claims of "newly discovered evidence" which Georgiou can and presumably will pursue on appeal.[26] However, in light of our findings

[26] To succeed on a claim of prosecutorial misconduct for allowing false testimony, a defendant must show that: (1) the witness committed perjury; (2) the government knew or should have known that its witness committed perjury but failed to correct his testimony: and (3) there is a reasonable likelihood that the false testimony could have affected the verdict. United States v. Hoffecker, 530 F.3d 137, 183 (3d Cir. 2008). For the same reasons that we find that the Government has not violat-

above concerning the Government's knowledge of Waltzer's drug abuse and mental health issues, we find no evidence of prosecutorial misconduct, and are of the opinion that the Georgiou defense has again crossed the fine line between zealously representing their client and making unfounded accusations.

As we stated in our Memorandum Opinion denying Georgiou's Second Motion for New Trial, Waltzer testified on direct examination about his use of cocaine from 2004 through 2007:

> Q. During that period of time [summer 2004 till spring 2007], did you engage in any cocaine use?
>
> A. Yes I did.
>
> Q. And can you describe for the jury what your level of cocaine use was during that time?
>
> A. I was a social user of cocaine during that time.
>
> Q. What does it mean to be a social user of cocaine?
>
> A. In my definition, I would do it approximately once every six weeks.
>
> Q. And when you say you would do it, were you doing it to a level of complete incoherence or were you doing it, as you say, in some other way?
>
> A. I was doing it, "to party," basically, to, you know, get a high and enjoy myself.

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ed its Brady obligations, we find that Georgiou has failed to establish any part of this test.

> Q. And were you ever using it during your dealings with George Georgiou?
>
> A. Never.
>
> Q. And did your, as you described, your social use of cocaine ever affect your ability to understand the stock fraud activities that you were participating in?
>
> A. No, sir.
>
> Q. Or did it affect your ability to remember those stock fraud activities or testify about them here?
>
> A. Not at all.

(Trial Tr. vol. 11, 208-09, Jan. 26, 2010.) As discussed in length above, the defense has argued extensively that the Government knew of Waltzer's serious drug abuse and mental health issues, yet withheld Brady material concerning such, and in fact, concealed it from the defense. However, the fact remains that cocaine use on Waltzer's part was disclosed to the defense and it had knowledge of such as evidenced by Waltzer's testimony. As we determined in our prior Memorandum Opinion denying Georgiou's Second Motion for a New Trial, we again find that this testimony "provided ample opportunity for Georgiou to attack Waltzer on the basis that his testimony was untrustworthy due to his history of drug use. In addition, it also gave Georgiou the opportunity to cross-examine Waltzer regarding if and how such drug use affected his mental health and his ability to testify truthfully and accurately." Georgiou, No. 09-88, at *10-11, n.6 (filed under seal, Nov. 9, 2010).

Moreover, the Government did provide other information to the defense concerning Waltzer's drug use. In fact, Georgiou acknowledges that in an "FBI 302" interview report[27] that was given to the defense, Waltzer stated that he had "an addiction to cocaine," and had used it approximately six months before he began to cooperate.[28] (Def.'s Reply at 31, n.38.) However, trial counsel, for whatever reasons, chose not to cross-examine Waltzer about these state-

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[27] Specifically, an FBI 302 interview report dated July 27, 2007 stated that Waltzer said that he "did drugs and drank alcohol. . . and developed an addiction to cocaine. . . [and] last did cocaine six months ago." (Def.'s Reply at 31, n.38.)

[28] Georgiou's counsel argues that the Government attempts to use Waltzer's statement that he had an "addiction to cocaine" in the FBI 302 interview as both a "sword and a shield" in that the Government "cannot now disavow that it had knowledge that Waltzer had on-going substance abuse problems, and was likely to abuse drugs during his period of cooperation." (Def.'s Reply at 31, n.38.) However, the defense cannot now do the same and claim to have been denied Brady material concerning Waltzer's drug use when it was given this interview report. In addition, we do not find that this statement in which Waltzer indicated that he had last done cocaine approximately six months before he began cooperating with the Government to have alerted the Government that Waltzer had a continuing cocaine problem that would have affected his ability to testify truthfully and accurately at Georgiou's trial.

Georgiou also argues that the Government was aware as early as April 3, 2009 of issues relating to Waltzer's mental health, when FBI Agent Joanson specifically noted in a 302 interview report that an individual, who had accused Waltzer of additional crimes, stated to the FBI Agent that, in his opinion, "WALTZER is a *medicated* piece of s- -t." (Def.'s Reply at 10); (Def.'s Reply, Ex. A.) However, we likewise find that this statement is not information that establishes that the Government knew that Waltzer suffered with serious mental issues.

ments.[29] Accordingly, we find no basis for the allegations that the Government, knowingly or otherwise, elicited perjured testimony from Waltzer.

**5. Witness Daniel Koster**

Koster, an employee of the Security Exchange Commission ("SEC"), testified at Georgiou's trial for the Government as a fact and summary witness. Georgiou asserts that:

> The gravitas and authority of the SEC was presented through Daniel Koster, leading the jury to believe that the SEC had conducted an independent investigation that identified corroborating matched trades, when the truth, his conclusions were based on the information given to the SEC by Waltzer. It is now clear that the SEC did not conclude a manipulation occurred after undertaking objective, unbiased analysis, but rather, started with the premise

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[29] In addition, Georgiou asserts that:

> The defense has also identified a far more sinister motive for Mr. Waltzer's perjury. On August 15, 2008 (one month before Mr. Georgiou's arrest), Mr. Waltzer's nephew and protégé (Mr. Mason), died of a cocaine over-dose while working for Mr. Waltzer at Future Annuities of America in Florida. Mr. Waltzer discovered the body. The defense never pursued this questioning at trial because there was no evidence at the time that Mr. Waltzer was still a cocaine addict. In light of the new evidence, this would have been an important area of cross-examination to determine if, Mr. Waltzer was involved in the events which led to Mr. Mason's death- a terrifying reason for Waltzer to lie about his cocaine use.

(Def.'s Mot. to Compel at 10.) There is no evidence in the record to support these allegations.

> that a manipulation had occurred after being guided by Waltzer.

(Def.'s Mot. to Compel at 13.) Georgiou asserts that the Middle District of Florida Pretrial Services' Chronological Record included a statement from Waltzer that he "provided information to the SEC on a regular basis." (Id., Ex. E at 28.) Georgiou argues further that:

> At all times material hereto, the government has denied the existence of any witness interviews regarding Waltzer's communications with the SEC and none were produced as a result of the government's representation. Moreover, the jury was led to believe that the SEC reached its own independent conclusions as to alleged stock manipulation when in reality, its conclusions were based upon the information provided by Waltzer. The government's failure to disclose witness interviews with the SEC of its star witness in a case alleging securities fraud and mail and wire fraud is yet another factor which eviscerated the defense's ability to effectively cross-examine Waltzer.

(Id. at 9.) Georgiou basically maintains that Koster perjured himself at trial when he testified that he conducted an independent review of trading data and financial records rather than basing his testimony solely on information provided by Waltzer.

The Government maintains that it conferred with Koster and other members of the SEC who were involved in the Georgiou investigation, and that the SEC only spoke directly to Waltzer on approximately two occasions about this case, and always in the

presence of the prosecutors. (Govt.'s Omnibus Resp. at 42.) The Government further asserts that Waltzer, also through the prosecutors, provided information to the SEC about numerous other securities fraud investigations, which explains Waltzer's supposed comments to Pretrial in Florida that he "provided information to the SEC on a regular basis." (Id.) The Government asserts that it has "reviewed SEC notes of meetings with Waltzer about the Georgiou investigation, and they do not contain Brady or Giglio information." (Id.)

As with Georgiou's other claims, we will consider this claim under the three-part Brady test in that Georgiou is arguing that the prosecution withheld Brady materials including the "Chronological Record Report" from the Middle District and SEC notes of meetings with Waltzer about the Georgiou investigation.[30] We, however, find that this claim fails under the Brady test. Under the first part, we find that there is no basis in the record that the Government "suppressed" this information. However, even assuming arguendo that the Government did suppress this alleged Brady material and assuming further that such evidence was favorable to the defense, we do not find that it was "material." See Pelullo, 399 F.3d at 209.

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[30] As we noted earlier, Georgiou has argued that we erred in considering his earlier claims in his Third Motion for New Trial under the five-part "newly discovered evidence" test. See Chimera, 459 F.3d at 458. While we certainly do not agree that considering his prior claims under this test was in error, we have considered Georgiou's present claims under the less-stringent three-part Brady test.

The trial record indicates that Koster testified at length about his extensive review of financial and trading records, and provided summary charts reflecting that review. (Trial Tr. vol. 7, Feb. 2, 2010; Trial Tr. vol. 8, 3-56, Feb. 3, 2010.) We have already discussed the basis of Koster's testimony in our prior Memorandum Opinion denying Georgiou's First Motion for New Trial, and will not do so again here. See Georgiou, 742 F. Supp. 2d at 620-23. In addition, Koster was subjected to extensive cross-examination concerning his analysis and the basis of his knowledge. (See, Trial Tr. vol. 8, 56-179, Feb. 3, 2010.) Accordingly, we find that Georgiou's claim that Koster's testimony was based on information provided by Waltzer to be without a basis in the record, and thus, fails to meet the Brady test.

**6. Other Evidence Allegedly Withheld**

Lastly, in his Reply brief, Georgiou sets forth a list of "additional items" that he claims the Government improperly withheld under its continuing post-trial Brady obligations. They are as follows:

> 1) Waltzer's bail report or the information contained therein;
>
> 2) Barrotti recordings and interview notes;
>
> 3) Waltzer witness statements to the SEC;
>
> 4) Information Waltzer provided to the SEC;
>
> 5) FBI 302 interview reports concerning Waltzer produced in other cases where he cooperated containing impeachment materials or statements about his crimes, but not produced to Georgiou, or produced to the Court for its in camera review such as in the Gotshalk, Johnson and "DH" cases, which would have shown

Waltzer's similar modus operandi in other cases, and were not disclosed pretrial;

6) Recordings in other cases that Waltzer co-operated;

7) Suspected recordings between Brad Jensen and Biagio Simonetta/Vince DeRosa;

8) Recording and notes made by rebuttal witness Alex Barrotti;

9) FBI rough notes of interviews:

10) Waltzer's CI file with the FBI and any supervision reports;

11) Access to recording devise Waltzer used in light of allegations that others, besides Georgiou, have alleged unrecorded calls;

12) Boxes of material related to Waltzer's other crimes that were discussed by the FBI Agent at the Hall sentencing;

13) Access to Waltzer's electronics and/or images of his computer, cell phones or blackberry;

14) Communications between Waltzer's attorneys and the government,

15) Text messages involving Waltzer;

16) Disclosure related to U.S. Attorney's investigation of Waltzer in Grand Jury 2001-768;

17) Dr. Lizzi's notes and Waltzer's statements to him;

18) Florida mental health treatment information and statements involving Barbara Dusckas and Bethany Graff; and

> 19) Waltzer's 15-plus year medical, alcohol and drug history.

(Def.'s Reply at 11.) Georgiou, however, has failed to offer any convincing support for his allegations that the Government violated its Brady obligations by suppressing this material from his defense team. In addition, Georgiou has also failed to offer any argument or support that such material is "favorable" to the defense under the second prong of the Brady test or that under the third part that there is a "reasonable probability" that, had any of this information been disclosed to the defense, "the result of the proceeding would have been different." Bagley, 473 U.S. at 682. Thus, these claims, like Georgiou's preceding claims, are not supported by the record. Accordingly, Georgiou's Motion for Reconsideration, which we also have considered as his Fourth Motion for New Trial, is denied.[31]

In conclusion, we have now thoroughly considered and denied the claims that Georgiou has raised in four Motions for a New Trial, and a Motion for Reconsideration. We find that none of his claims undermine confidence in the outcome of his trial. See Bagley, 473 U.S. at 678. As we have steadfastly held

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[31] Georgiou also attempts to assert new claims in his Reply Brief that are not "newly discovered evidence" claims and/or Brady claims. He spends several pages of his briefing arguing that Koster's testimony was "inaccurate and misleading," and that Koster's "improper use of a summary chart with flawed data" misled the jury. (Def.'s Reply at 51-59.) However, these claims are untimely under Rule 33 (b)(2) because they were presented long after the 14-day deadline. See Fed. R. Civ. P. 33 (b)(2). In addition, as stated, we have adequately discussed Koster's testimony in a prior Memorandum Opinion. See Georgiou, 742 F. Supp. 2d at 620-23.

in three prior Memorandum Opinions denying Motions for New Trials, we again find that the trial record reflects a staggering amount of evidence against Georgiou that overwhelmingly demonstrates that Georgiou committed the crimes charged. We will not entertain any further filings, and Georgiou is now free to appeal to the Court of Appeals.

**7. Motion to Compel Evidence**

As noted, in addition to his Motion for Reconsideration, Georgiou has also filed a Motion to Compel Disclosure of Evidence. In this Motion, Georgiou requests that the Government be ordered to produce the following to the defense:

> (1) Waltzer's confidential informant file and 1A envelope, including but not limited to all FBI rough notes of all interviews with Waltzer and logs of all discussions or meetings;
>
> (2) Waltzer's undisclosed witness statements to date, all written communications and notes of verbal communications, including but not limited to any electronic communications, PIN, email or text messages between Waltzer and any person part of the prosecution team, including the SESC [sic] and IRS;
>
> (3) Waltzer's communications with the SEC, in any form, including but not limited to reports, electronic communications, PIN, email or text messages between Waltzer and any person at the SEC, including a summary of discussions and all work product resulting from Waltzer's transfer of information of the SEC;
>
> (4) a detailed summary from the FBI and prosecution as to what Waltzer told them, and

> when, in any oral discussion related to Waltzer's substance abuse and psychiatric history;
>
> (5) all internal government memorandum, FBI 302's, and IRS Memorandum of Interview [sic] relating to Waltzer;
>
> (6) all correspondence, in any form, between Waltzer's attorneys and the government relating to mental health or substance abuse issues;
>
> (7) disclosure of all cases and defendants against whom Waltzer cooperated and any Brady, Giglio, or Jencks Act material therein.
>
> (8) all evidence related to Grand Jury Proceeding No. 2001-768 relating to Waltzer;
>
> (9) all government work product, in any form, including notes of oral discussions, that contains any Brady, Giglio, or Jencks Act material related to Waltzer; and
>
> (10) a summary of any and all evidence that may have been destroyed or spoliated by any member of the prosecution team.[32]

(Def.'s Mot. to Compel at 10-11.)

It is evident from these requests that Georgiou seeks to obtain more discovery in order to retry his

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[32] In this Motion, Georgiou also requests this Court to enter an Order "compelling the disclosure of all medical records, including interview notes, contact with the government, diagnoses and documentation of medications in the possession of Dr. Ivan Mazzarano, Dr. Luciano Lizzi, Dr. John Glazer, Bethaney Graf, Lee Mental Health Center and St. Mary's Hosptial (Philadelphia), relating to Kevin Waltzer." (Def.'s Mot. to Compel at 11.)

case. We will not allow him to do so. However, for all the reasons discussed above, the Government has not committed Brady violations and Georgiou has not established that any of his claims "undermines confidence in the outcome of the trial." Bagley, 473 U.S. at 678. We, thus, deny this Motion to Compel in its entirety.[33] In addition, we deny Georgiou's request that he be granted bail pending appeal.

An appropriate Order follows.

[33] In addition, Georgiou has not identified any legal basis supporting his request for discovery at this post-trial stage of this action.

## ORDER

**AND NOW**, this 12th day of December, 2011, upon consideration of Defendant George Georgiou's ("Georgiou") Motion for Reconsideration (Doc. No. 242), Georgiou's Motion Filed Under Seal (Doc. No. 245), and the Responses and Replies thereto, it is hereby **ORDERED** that the Motions are **DENIED**.

It is further **ORDERED** that:

1) Georgiou's Motion to Re-instate Bail (Doc. No. 242)[1] is **DENIED**;

2) Georgiou's Motion Filed Under Seal (Doc. No. 246) is **DENIED**; and

3) The Government's Motion Filed Under Seal (Doc. 250) is **GRANTED**.

BY THE COURT:

/s/ Robert F. Kelly
ROBERT F. KELLY
SENIOR JUDGE

[1] Georgiou's Motion for Reconsideration and Motion to Re-instate Bail were filed under the same docket number.

**APPENDIX D**

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 10-4774, 11-4587, 12-2077

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UNITED STATES OF AMERICA

v.

GEORGE GEORGIOU,
*Appellant*

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(E.D. Pa. Crim. No. 2-09-cr-00088-001)

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**SUR PETITION FOR REHEARING**

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Present: McKEE, Chief Judge, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE and SHWARTZ, Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/s/ Joseph A. Greenaway, Jr.
Circuit Judge

Dated: February 25, 2015
Tmm/cc: Michael F. Bachner, Esq.
Scott J. Splittgerber, Esq.
Hope C. Lefeber, Esq.
Louis D. Lappen, Esq.