UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE No.: 11-80205-CR-MARRA

UNITED STATES OF AMERICA,

vs.

MITCHELL J. STEIN,
Defendant.
_____/

AMENDED REPLY TO THE RESPONSE OF THE UNITED STATES IN OPPOSITION TO DEFENDANT MITCHELL J. STEIN'S MOTION FOR NEW TRIAL

Defendant Mitchell J. Stein, by and through his undersigned counsel, hereby submits his Reply to the Response of the United States in Opposition to Defendant's Motion for New Trial.

I. PRELIMINARY STATEMENT

The United States' opposition (hereinafter "GO") not only establishes Mr. Stein's right to a new trial, but it also justifies dismissal of this case with prejudice.

The Department of Justice (hereinafter "DOJ") has had months to think about its numerous misstatements and that of its witnesses. It could have filed a notice with the Court and owned up to its misstatements.[1] Instead, the DOJ has expanded its misstatements, and argued facts and authorities that are often irrelevant.[2]

[1] *See, e.g. United States v. Alzate*, 47 F.3d 1103 (11th Cir. 1995*); United States v. Friedlander*, 395 Fed.Appx. 577, 580 (11th Cir. 2010).

[2] For example, the DOJ wishes to remind us for some reason that Mr. Stein participated in the drafting of the Motion for New Trial; and that counsel Mr. Kasen has done something wrong in also participating and then filing the motion. It is no revelation that Mr. Stein and Ms. Reichardt researched and drafted the initial motions telephonically, after counsel John Wylie failed to do any work on any motions over the first 100-days after the Court remanded Mr. Stein. *See* Motion for Conditional Release, DE 278, page 11, first new paragraph, and DE 278-4, Ex. D thereto (Decl. of Reichardt). *See* also, Declaration of Judith L. Stein, filed herewith. It is telling that the DOJ's attacks against Mr. Stein, Ms. Reichardt and Mr. Kasen represent a very loud protest from the Government lawyers

The fact is that the DOJ did not tell the truth when it told the jury that "Yossi Keret does not exist; Mr. Stein made him up."[3] It is a fact that the DOJ was not truthful when it said "10 Smilansky Street, Netanya, Israel" does not exist. This address was not made up by anyone and possibly houses an affiliate of Martin Carter's Electrical Connections.[4] It is a fact that the SEC investigation was not "entirely separate" (DE 46, at 6) from the DOJ's investigation. Actually, the SEC "substantially assisted" this prosecution. (Ex. A to the Decl. of Reichardt.) It is a fact, that the hard drive produced by the DOJ was not properly searchable and concealed the existence of numerous documents. *See* DE 264-14 at 2, Decl. of Reichardt. It is a fact that the DOJ produced nothing to the Defense after this Court's September 26, 2012 order. It is a fact that the Antonio Mijares change of address letter was never identified by the DOJ and bears the name of a real person – Carter's relative. The DOJ failed to correct the record regarding Carter's testimony about Mijares and Cardiac Hospital Management.

This case is unprecedented. Since the landmark *Brady/Giglio* rulings,[5] there has never been a case of misconduct rivaling this one. Most *Brady/Giglio* cases involve one or two examples of misconduct.[6] In this case, the Defense has uncovered more than a dozen instances of prosecutorial wrongdoing and perjury. And the Defense continues to unearth even more misconduct[7] even as it files this reply.

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who made the misstatement to the jury that "Yossi Keret does not exist; Mr. Stein made him up" and who also made the misstatement to the Court that the SEC investigation was "separate ... [but] sometimes parallel" to the DOJ's. It is submitted the DOJ should have filed a notice of misstatements with this Court instead of protesting that an incarcerated defendant and his lawyer filed the motion bringing these misstatements to light.

[3] E.g. Transcr. Vol. 10 at 28.

[4] "Electrical Product Imports & Marketing LTD"

[5] *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972)

[6] *See, e.g. United States v. Alzate*, 47 F.3d 1103 (11th Cir. 1995) (one misstatement); *Napue v. Illinois*, 360 U.S. 264, 271 (1959) (one misstatement).

[7] *See* Second Motion for New Trial (expected to be filed within days of this Reply).

II. INTRODUCTION

In support of its motion for new trial, the Defense submitted significant evidence in the form of affidavits. *See,* Declaration of Fiedler (DE 260-2) and Declarations of Reichardt (DE 264-14, DE 280).The DOJ had at least 40 days (and at most 78 days[8]) to rebut the affidavits, and to oppose the Defense's motion for new trial. While the DOJ filed its opposition to the motion for new trial on December 9, 2013, it submitted no affidavits or other admissible evidence whatsoever contradicting (or attempting to rebut) the Defense's affidavits. It has long been established that the submission of affidavits is the proper procedure when litigating a motion for new trial. *United States v. KcKinney*, 312 Fed. Appx. 247, 248 (11th Cir. 2009) ("courts ordinarily decide a motion for new trial upon affidavits without an evidentiary hearing").

Upon considering the Defense's affidavits, the following are the facts constituting sufficient evidence to grant a motion for new trial:

1. The SEC has been investigating Defendant Mitchell J. Stein since at least 2008;
2. In the course of the SEC investigation, the SEC compiled documents produced to it by numerous witnesses (e.g., Tracy Jones, Budimir Drakulic, Dr. Lowell Harmison, Stan Gelfer, David Kendricks, Michael Boliek, and Ryan Rauch, Martin Carter, Ajay Anand, Demetrio Sodi, Jennifer Black, Jamie Jaffa, Evie Muscillo, Norma Provencio and Thomas Tribou);
3. The DOJ represented to this Court in opposition to Michael Pasano's *Brady* motion that the SEC and the DOJ worked on "entirely separate investigations" that were only "at times parallel" (DE 46 at 6);
4. In truth, the SEC "substantially assisted" in the investigation of Mitchell J. Stein (Ex. A attached to the Decl. of Reichardt filed concurrently herewith), and the DOJ obtained its files from the SEC (Transcr. of April 3, 2013 *Faretta* hearing at 41);
5. Accordingly, as a matter of law, the DOJ was at all times in possession of all material held by the SEC (*United States v. Bolen*, 285 Fed. Appx. 655 (11th Cir. 2008); *United States v. Auten*, 632 F.2d 478 (5th Cir. 1980); *United States v. Wood*, 57 F.3d 733 (9th Cir. 1995); *Martinez v. Wainwright*, 621 F.2d 184 (5th Cir. 1980); *Calley v. Callaway*, 519 F.2d 184, 223 (5th Cir. 1975);

[8] The Government was on notice of the Defense's claims on September 22, 2013. *See* DE 260.

6. This issue was never before litigated in this case, because the Court never knew that the SEC was "substantially assisting" the prosecution of Mr. Stein and the Court never knew of the SEC "far larger" database of relevant documents – whether 200 million documents or otherwise;
7. At all times prior to September 26, 2012 (the date of this Court's *Brady* and Rule 16 discovery order), the DOJ never disclosed to the Court that it had "accessed" the SEC database and compiled a "small subset" of documents therefrom;
8. This Court ordered the DOJ to produce to the Defense all documents identified by Mr. Pasano in connection with his *Brady* motion, including everything produced by witnesses to the SEC;
9. The DOJ produced nothing to the Defense after this Court's September 26, 2012 order;
10. Notwithstanding the DOJ's statement to the jury to the contrary, Yossi Keret exists in Israel. He was a reporting person to the SEC in connection with a company named Pluristem Life Systems Inc. nka Pluristem Therapeutics Inc., a large Israeli biotech company;
11. Nobody could have possibly "made up" the name Yossi Keret, because the name has existed at least since 2005 (the date of the public filing provided to the Court by the Defense (DE 264-10);
12. The DOJ stated in its closing argument that "Yossi Keret does not exist; Mr. Stein made him up" (Trial Transcr. Vol. 10 at 28.);
13. Mr. Stein did not make up the name Yossi Keret;
14. The DOJ has not corrected the record regarding the falsity of its statements;
15. The DOJ has admitted that Yossi Keret is a real person and exists (GO at 7);
16. Martin Carter testified that he knows of a street in Netanya, Israel called Smilansky, "the street name is correct, but it was just a made up address" (Transcr. Vol. 6 at 59);
17. Carter's company, as established by the DOJ at trial. is known as "Electrical Connections;"
18. At 10 Smilansky Street, Netanya, Israel, there is a company called "Electrical Products Import & Marketing LTD" (DE 264-11);
19. Martin Carter's testimony that "10 Smilansky Street" is "made up" is false. The Government never denies that Electrical Connections may be affiliated with Electrical Products Import & Marketing LTD;
20. The DOJ has never corrected the record;
21. Government Exhibit 300 is a file taken from the Government hard drive marked DOJ-Carter-000001 from which a page was detached containing a change of address letter with an individual named Antonio Mijares representing Cardiac Hospital Management (DE 260-4 and Decl. of Reichardt, DE 264-14);
22. The Government is aware of this change of address letter as it detached it from the DOJ-Carter-000001 file and chose not to make it an Exhibit notwithstanding the obvious relevancy;

23. Carter's testimony that Antonio Mijares – the uncle of his wife Christina Carter – had nothing to do with Cardiac Hospital Management (Trial Transcr. Vol. 6 at 42) is either false or misleading;
24. The DOJ has not corrected the record regarding Antonio Mijares being listed as the contact person for Cardiac Hospital Management;
25. Government witness Tracy Jones made false or misleading statements. Jones testified she called the purchase orders "phantom purchase orders" because she "never received anything on them" (Transcr. Vol. 3 at 17).
26. Although never produced by the DOJ, embedded in the email chain from Norma Provencio to John Woodbury (Defense Ex.410 – stipulation)[9] is an email from Tracy Jones to Norma Provencio transmitting a $50,000 check on the Cardiac Hospital Management purchase order;
27. Jones was not truthful as she testified that she "never received anything" on the Cardiac Hospital Management purchase order;
28. The DOJ never corrected the record regarding the false testimony of Tracy Jones;
29. Certain files were either destroyed or rendered unusable by the Government, were harvested incorrectly by the SEC or the DOJ and/or its native files have not been retained, e.g., "Emails.DCB," and certain "Personal Storage Table Files;"
30. The Government has not explained why it failed to retain certain native files (*see* DE 41-2 at 7: "[…] did not retain the native files […]" and has not provided the information regarding these files requested by Pasano. The DOJ states that his requests exceed the Government's obligations (DE 41-2 at 6). Further, the Government states in its *Brady* Opposition that "The United States is not aware of other such documents" (DE 46 at 11) yet it previously only provided examples of documents of which it did not retain the native files. ("For example, […]" DE 41-2 at 7 ¶ 2)[10];
31. The DOJ's assertion that the contents of its database were provided "in a format that allows Stein to search across them by letter (or other character), word, or combination of words" (DE 46 at 3), are misleading. The database is <u>not fully</u> searchable (*see* Decl. of Reichardt, 264-14), thus, if the Defense relied on the DOJ's assertions, it would not have known that a search by keyword within the database would not yield a complete and fair search result;

[9] Although the Government infers that Defendant and Ms. Reichardt may be trying to "actively mislead the Court", the fact is that Ms. Reichardt states in her declaration submitted on September 23, 2013 that she found these exhibits during trial (Decl. of Reichardt, DE 264-14, ¶ 4; *see also* Motion for New Trial, DE 279 at 15) (compare with Government's allegation that Ms. Reichardt said she found the Exhibits after trial (GO at 13). The importance of this Exhibit is that it contains reference to the Tracy Jones email which has – to this day – never been produced and (b) it shows a classic Giglio violation given that Woodbury and Jones testified they received all the data regarding the purchase orders from Mitchell Stein.

[10] One of these emails to which the Government apparently did not retain the native file is an email exchange between Lee Ehrlichman – Signalife's President during 2008 – showing that an individual named Eraz Nachtomy identified Yossi Keret stating that "Yossi Keret rings a bell" (DE 280-2).

32. The Antonio Mijares change of address letter could not have been found by reasonable due diligence, as the searchable text version of the file does not contain the name "Antonio Mijares."[11] A search for "Mijares" in the database yields zero search results. Furthermore, the file was attached below one of the purchase orders and placed in a random folder within many random folders not labeled "Carter." (*See* Decl. of Reichardt filed concurrently herewith.) Even though the DOJ had knowledge of this critical change of address letter, it was never identified by the DOJ;[12]
33. The database problems described above also led to the late discovery of the Harmison emails disclosed in Defendant's First Motion for New Trial;[13]
34. The DOJ does not deny it was involved in the California State Bar investigation and may have controlled it – which led to the pre-trial freeze of all of Mr. Stein's bank accounts. DE 279 at 35.

Given the above 34 facts, it is respectfully submitted that the Defense has set forth an overwhelming case against the United States of *Giglio* violations, an overwhelming case against the United States of *Brady* violations, and an overwhelming case against the United States of Rule 16 violations. For, comparison purposes, the Eleventh Circuit case of *United States v. Alzate*, 47 F.3d 1103 (11th Cir. 1995), had but one instance of prosecutorial misstatements to the court and jury, yet the Circuit Court ordered a new trial. *See Napue v. Illinois*, 360 U.S. 264, 271 (1959) (one violation).

Based on the history of *Brady*, *Giglio* and Rule 16 cases since 1963, it is submitted that the

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[11] While it is arguable that newly discovered Antonio Mijares change of address letter produced by Carter (Ex. B to the motion, DE 279-2, at 9) which curiously was never presented to the jury or to the court by the Prosecution, may have been tampered with, given the fact that the pertinent signature by "Antonio M. Mijares" appears to have been partially covered, causing the name not to translate into the corresponding searchable text file (*see* Decl. of Reichardt, DE 279-2 at 9), the document could not have been discovered by reasonable due diligence. *See* comparison of DOJ-Carter-000001 to its corresponding text file attached as Ex. B to the Decl. of Reichardt filed concurrently herewith. A search within the over 2 million documents for "Mijares" or "Antonio Mijares" or "Antionio M. Mijares" yields zero search results. (*See* screen shot of search result attached as Ex. C to the Declaration of Reichardt.) Further, the DOJ-Carter-000001 file was placed into a folder named "001", containing various unrelated documents, which was placed into a folder named "Natives" which can be found in a folder named "120131," a sub-folder of a folder named "Export" within the "Content" folder, however, it is nowhere to be found in a folder labeled "Carter." Whether the document was tampered with or not, and whether the document was placed into a random folder carelessly or by design, is irrelevant to the due diligence argument. What is relevant is that this document could not have been found by the Defense by exercising reasonable due diligence.

[12] "[D]isclosure," in order to be meaningful, requires "identification" as well. *United States v. Salyer*, No. S-10-0061, 2010 WL 3036444 at 6 (E.D. Cal. Aug. 2, 2010) (Emphasis added).

[13] The DOJ claims that the emails from Dr. Harmison – referenced as Exhibit G to the motion for new trial – were produced prior to trial. This claim misses the mark. The emails were copied to an entire host of people, including Stan Gelfer, Budimir Drakulic and Norma Provencio. The Court granted Mr. Pasano's motion to compel as to the categories of documents referenced in DE 41 at 3. However, none of the emails or other documents from certain witnesses listed on the Exhibit "G" emails – Stan Gelfer, Budimir Drakulic and Norma Provencio – have been produced.

Government misconduct here is – at the very least – unprecedented.

III. THE DOJ'S *GIGLIO* VIOLATIONS WARRANT A NEW TRIAL

A. The DOJ Misstates the Standard of Proof

The DOJ also misstates the standard of granting a new trial due to prosecutorial misstatements to the court or the jury. The DOJ believes that reversal is warranted only when "there is a reasonable probability that, but for the remarks, the outcome would be different." GO at 27. (Emphasis added.) The DOJ is wrong. The DOJ does not dispute that this case involves prosecutor and witness misstatements. Indeed, the DOJ does not dispute that each of the statements and all of the testimony is false. GO at 5, 8, 12, 13. It quibbles only because (a) it believes the case is one of overwhelming evidence, (b) it believes the defense failed to exercise reasonable diligence, and (c) it believes the misstatements involve testimony (or utterances) that were merely cumulative. GO at 9, 13, 29. However, when the Government is committing a *Giglio* violation by making false statements to the jury or using perjurious testimony, the standard is whether the misstatement could have affected the judgment of the jury. [14] *See United States v. Agurs*, 427 U.S. 97, 103 (1976); *accord Giglio v. United States*, 405 U.S. 150, 154 (1972); *Napue v. Illinois*, 360 U.S. 264, 271 (1959); *United States v. Alzate*, 47 F.3d 1103, 1110 (11th Cir. 1995); *United States v. Bagley*, 473 U.S. 667, 682 (1985); *Hayes v. Brown*, 399 F.3d 972, 990 (9th Cir. 2005) (correct standard of proof to be used in a *Giglio* false testimony case is the "could have," not the "would have" test).

B. The "Stein Made it Up" Mantra are Classic *Giglio* Violations

Here, the jury's verdict could have been different if only Carter had not lied on the stand, if only the Government had corrected his lies, and if only the Government had not made repeated

[14] The DOJ seems to suggest that *Giglio* violations are limited to false testimony. GO at 4-5. Again, the DOJ is mistaken. A *Giglio* violation arises in cases involving both false testimony and prosecutorial misstatements to the court and jury. *United States v. Alzate*, 47 F.3d at 1110-1111 ("There is no distinction between false testimony, on the one hand, and false prosecutorial statements to the trial court or the jury, on the other hand").

misstatements to the Court and the jury. It is important to remember Carter's exact testimony that 10 Smilansky Street, Netanya was "made up."

> "CARTER: It's a made up address.
> Q Can you just explain what -- explain that to the jury, please?
> CARTER: The street name is correct, but it was just a made up address. I put 10 Smllansky (sic) Street."

Transcr. Vol. 6 at 59.

It was proven at trial that Carter traveled to Netanya, Israel.

> "Q Now, since we've talked about the things that you got before you left for Israel, let's take that down and just talk about your trip to Israel.
> Who did you stay with when you went to Israel?
> CARTER: I stayed at my brother's place, a cousin's place, and then I came back.
> Q And where city-wise?
> CARTER: Oh, I'm sorry. Netanya, Israel, and I don't remember, it's called a moshav. It's like a kibbutz, but it's not. I don't remember where it was, though."

Trial Transcr. Vol. 6 at 55. (Emphasis added.)

Completely ignoring *Giglio*, *Agurs* and *Alzate*, the DOJ argues that its lies were discoverable by the Defense. The DOJ's argument is patent bad faith; the Government's burden to tell the truth is never shifted to the Defense. *United States v. Alzate*, 47 F.3d, at n. 6 (11th Cir. 1995). One Florida district court has ordered a new trial even in the face of "overwhelming" evidence of guilt[15]:

> "Having presided over this trial and having observed the jury's reaction [to the testimony] and notwithstanding the compelling and overwhelming evidence of defendant's guilt, it is impossible for this court to say with any confidence, that beyond a reasonable doubt, the prosecutor's innocent [misconduct] did not contribute to defendant's conviction. *Chapman v. California*, 386 U.S. 18, 26 (1967); *United States v. Suggs*, 755 F.2d 1538,

[15] Compare the DOJ's repeated statements that its and its witness' misstatements are harmless because the case against Mr. Stein was allegedly "overwhelming."

> 1540 (11th Cir. 1985). Simply put, the prosecutor's mistake, albeit unknowing, deprived the defendant of a fair trial."

United States v. Friedlander, 2009 U.S. Dist. LEXIS 14264. Emphasis added.

Here, the DOJ never argues that the "Mr. Stein made it up" mantra was anything other than intentional. Even if we presume innocence on the part of the DOJ it is submitted that a new trial is warranted under the reasoning of *Chapman, Suggs* and *Friedlander*.[16]

The DOJ further claims that it matters – in the *Giglio* context – that the Defense knew or should have known at trial that prosecutorial statements were untrue.[17] It does not. The DOJ has confused a *Giglio* violation (misstatements) with a *Brady* violation (suppression of exculpatory evidence). It is the Government's burden to disclose and correct misstatements made during trial.

> "A *Giglio* error – prosecutorial misconduct and corruption of the truth-seeking function of a jury trial – is a species of *Brady* error that includes perjured testimony and that the prosecution knew, or should have known, of the perjury."

United States v. Agurs, 427 U.S. 97 (1976). If such a misstatement surfaces during trial "the government has a duty to step forward and disclose." *Brown v. Wainwright*, 785 F.2d 1457, 1464 (11th Cir. 1986); *Cf. United States v. Friedlander*, 2009 U.S. Dist. Lexis 14264 (M.D. Fla. 2009). The DOJ did not do that in this case, warranting immediate dismissal for prosecutorial misconduct. *See, United States v. Friedlander*, 395 Fed. Appx 577, 580 (11th Cir. 2010) (Eleventh Circuit not dismissing case of a lone *Giglio* violation because prosecution corrected the record after trial by filing "Notice of Mutual Mistake of Fact at Trial"). The presentation of testimony or evidence that is false is "inconsistent with rudimentary demands of justice." *Mooney v. Holohan*, 294 U.S.

[16] The DOJ argues that none of its misstatements to the Court and the jury matter, because this case allegedly involves "overwhelming" evidence. The Defense submits this case is more about "conflicting evidence." Transcr. Vol. 9, at 102.

[17] E.g., GO at 28.

103, 112 (1935). A due process violation occurs the instant the prosecutor fails to correct the misstatement, *Alcorta v. Texas*, 355 U.S. 28 (1957), even when the false testimony goes only to the witness' credibility. *Napue v. Illinois*, 360 U.S. 264 (1959); *United States v. Alzate*, 47 F.3d 1103, 1110 (11th Cir. 1995). If it is established that the government knowingly permitted the introduction of false testimony, reversal is virtually automatic." *United States v. Wallach,* 935 F.2d 445 (2d Cir. 1991) (quoting *United States v. Stofsky*, 527 F.2d 237 (2d Cir. 1975).

In *Alzate*, the only issue was the prosecution's misstatements to the court and the jury. In reversing the district court's denial of a motion for new trial, the Eleventh Circuit held that the prosecutor had a duty to correct his false statements although the defense knew of the misstatements and could have corrected them.[18] "The defense did not make the misstatements; the government did." *Id.* at 1111. *Accord., Friedlander*, at 580. In distinguishing the fact scenarios outlined in *United States v. Agurs*[19], and *Napue v. Illinois*[20], the Eleventh Circuit stated:

> "The cited decisions deal with false testimony. We do not have that in this case. Instead, we have explicit factual representations to the jury. […] [The] reason the lower materiality burden applies where there is knowing use of perjured testimony is that such a situation involves prosecutorial misconduct and corruption of the truth-seeking function of the trial. [Supreme Court citations omitted.] This case involves prosecutorial misconduct and corruption of the truth-seeking function as well, albeit through somewhat different means."

Id. at 1110. (Emphasis added.)

In *Alzate*, the Government informed the Defense of the new information before the trial ended, but never informed the judge or the jury. The jury convicted Mr. Alzate.

After Mr. Alzate's motion for a new trial was rejected by the district court, the Eleventh

[18] Thus, the Government's claims that learning information after the trial on Google defeats a *Giglio* claim is spurious.

[19] 427, U.S. 97 (1976)

[20] 360 U.S. 264 (1959)

Circuit reversed and remanded the case.

In both cases – *Alzate* as well as the underlying case – the "chief obstacle" to the defense the testimony of one witness who was the only fact witness to the alleged damaging statements by the defendant. In *Alzate*, the only fact witness to the "other box" of cocaine was agent Ostis. Here, the only fact witness to Mr. Stein's alleged statements about the purchase orders was Carter. If Carter's testimony was a lie, then a cloud hovers over the DOJ's theory that purchase orders were fictitious or that the change of address notices contained names and addresses "made up" by Mr. Stein or were directed by Stein. Thus, in *Alzate* and in this case, it was the testimony of one Government witness that impeded the defense's case. And in both instances, the Government made false statements to the court and the jury that they knew were false. In *Alzate*, the prosecutor learned before the end of trial that the "other drug box" was indeed from another investigation. Here, the prosecution is charged with the knowledge, among other things, that Carter's and its statements that 10 Smilansky Street is a "made up address" and that Yossi Keret is a name "made up" by Mr. Stein, were false and misleading.[21] Further, the DOJ has not denied that the Company at 10 Smilansky Street – Electrical Products and Imports – is related to Carter's company, Electrical Connections.

C. The Misstatements to the Court About the SEC Investigation and Database are Additional *Giglio* Violations

The DOJ concealed both the existence of the database, and its SEC "access request," in connection with its 2012 opposition to the *Brady* motion. Rather, in its opposition to Mr. Pasano's *Brady* motion, the DOJ represented to the Court that "Department of Justice prosecutors do not as a general matter have any authority over SEC investigative staff or access to SEC materials." (*See*, DE 46 at 5.) It concealed the existence of the 200 million database, and it concealed the fact that it could

[21] The Government claims Mr. Stein should have discovered the truth about Yossi Keret and 10 Smilansky Street. If it was so easy for Mr. Stein to learn the truth, why did the Prosecution fail to find the truth itself, and why did it make these misstatements at closing?

readily access any part of that database. The DOJ also misrepresented the SEC's role in connection with the prosecution of Mitchell J. Stein. (Compare in 2012: "Here, there were truly separate investigations [by the SEC and the DOJ]." DE 46 at 8, para. 1 – with "the DOJ thanks the SEC for its substantial assistance in the prosecution of Mr. Stein" – press release of DOJ. (Ex. A to the Decl. of Reichardt.)

The DOJ's unilateral "access request" to the SEC that excluded – for example – the lion's share of document production to the SEC by Government witness Tracy Jones, was fundamentally unfair under *Brady*, under the Court order and Rule 16. The law, and justice, require an order granting Defendant's motion for a new trial. The Fifth Circuit aptly described the mandate of *Brady*, and, it instructed, "access" is the key:

> "The basic import of *Brady* is not that there is an abstract right on the part of the defendant to obtain all evidence possibly helpful to his case, but, rather, there is an obligation on the part of the prosecution to produce certain evidence actually or constructively in its possession or accessible to it in the interests of inherent fairness."

United States v. Ramirez, 513 F.2d 72, 88 (5th Cir. 1975) (Emphasis added.)

Because the SEC "substantially assisted" in the prosecution of Mr. Stein, and because its 200 million database (or, in any event, according to the DOJ, a far larger database) was always fully accessible to the Prosecution, the Prosecution had constructive possession of it as a matter of law. *United States v. Bolen*, 285 Fed. Appx. 655 (11th Cir. 2008); *United States v. Auten*, 632 F.2d 478 (5th Cir. 1980); *United States v. Wood*, 57 F.3d 733 (9th Cir. 1995); *Martinez v. Wainwright*, 621 F.2d 184 (5th Cir. 1980); *Calley v. Callaway*, 519 F.2d 184, 223 (5th Cir. 1975).

In *United States v. White*, 492 F.3d 380 (6th Cir. 2007), the court found that the failure to produce the 57,436 page-database had foreclosed the defense from being able to show what was exculpatory or relevant within that database. Because of a wholesale refusal to turn over the database

before or during trial, the court ordered the government to turn it over after trial and further ordered an evidentiary hearing although there was no showing that it contained exculpatory evidence:

> "Because defendants succeeded in obtaining only relatively few of the documents notwithstanding their persistent and diligent attempts, the government effectively foreclosed them from making the requisite showing that the documents were material and favorable (whether exculpatory or impeaching) and that the suppression prejudiced them."
> …
> "Very clearly, the prosecutor here made misrepresentations to the district court. Having failed to disclose the material it sent to Potter -- whether intentionally or inadvertently -- the [government] now asks this court to take his word that the evidence was not favorable to defendants, was not material to their respective cases, and that its suppression did not prejudice them in any way. As the Supreme Court has stated time and again, 'the United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.' [Citations omitted.] The United States Attorney's word is worth considerably less when, as here, it is manifest that he made conflicting representations to the court below."

Id. at 380, 413. *See also, United States v. Alexander*, 748 F.2d 185, 187, 191 (4th Cir. 1984) (remanding case to district court directing it to reconsider the motion for new trial of a doctor as to whom a Blue Cross survey had been suppressed, although the survey may not necessarily be *Brady* material).

Rule 16 requires the Government to disclose all items in its "possession, custody and control," and includes items in the hands of other federal agencies when the Prosecution has access to them. *United States v. Bryan*, 868 F.2d 1032, 1036 (9th Cir. 1989). "A prosecutor may not employ a mechanical definition of 'government' that would deny to the defendant documents accessible to the prosecution." *Id.* at 1036. In this case, the DOJ's discovery and Rule 16 violations are grounds for a

new trial. *See United States v. Rivera*, 944 F.2d 1563, 1566 (11th Cir. 1991); *United States v. Barragan*, 793 F.2d 1255, 1259 (11th Cir. 1986). Substantial prejudice exits when a defendant is unduly surprised and lacks an adequate opportunity to prepare a defense. *Rivera*, 944 F.2d at 1566. Inadvertence on the Government's part does not render a discovery violation harmless; rather, the purpose of Rule 16 is to protect a defendant's right to a fair trial rather than to punish the Government's non-compliance. *United States v. Noe*, 821 F.2d 604, 607 (11th Cir. 1987); *see also United States v. Camargo-Vergara*, 57 F.3d 993 (11th Cir. 1995) (awarding new trial based on government's discovery violation); *United States v. Rodriguez*, 799 F.2d 649, 654 (11th Cir. 1986) (non-disclosure of documents was reversible error because the defendant did not have the opportunity to prepare and meet the evidence).

Furthermore, when "the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." *United States v. Agurs*, 427 U.S. 97, 106 (1976).

Under these facts, there is sufficient reason to take the Prosecution at its word as a matter of law, to wit: The SEC participated in and, in fact, "substantially assisted" the prosecution of Mr. Stein. *United States v. Causey*, 356 F.Supp.2d 681, 691 (S.D. Texas 2005) (DOJ access to SEC files, and DOJ press release, sufficient to show that SEC participated in DOJ criminal prosecution and that DOJ is thus required to turn over SEC files to the Defense); *United States v. Cerna*, 633 F.Supp.2d 1053 (N.D. Cal. 2009) (DOJ access of files of ICE, DEA, FBI and ATF and press releases sufficient to require DOJ to turn over these agencies' files to the Defense and to search them for *Brady* material). *See also Moon v. Head*, 285 F.3d 1301, 1309 (11th Cir. 2002) (the duty to search investigative files is a duty to search the files of the "prosecution team," both investigative and prosecutorial personnel); *United States v. Meros*, 866 F.2d 1304, 1309 (11th Cir. 1989) (investigative team associated with prosecutor); *United States v. Antone*, 603 F.2d 566, 570 (5th Cir. 1979)

(information possessed by state investigators imputed to federal prosecutors because the two governments pooled their investigative energies to prosecute the defendants).

D. The Law Never Shifts the Burden to Correct the Prosecutor's False Statements

The DOJ's argument that the information regarding Yossi Keret and 10 Smilansky Street was public record (on Google; on the SEC website) (GO at 6), and that the Defense should have exercised due diligence and corrected the record, is without merit. The DOJ asserts that the Defense's discovery of the truth after trial using Google or the SEC public company archives excuses Carter's perjury[22] and excuses the DOJ's misstatements to the jury. In support of this novel proposition that repeated misstatements are excusable, the DOJ cites cases it only says are analogous, *United States v. Nosworthy*, 475 Fed. Appx. 347 (2d Cir. 2012) and *United States v. Lester*, 2013 U.S. Dist. LEXIS 156830 (D. Kan. Nov. 1, 2013). These cases do not apply the *Giglio* standard that are applicable here. Neither *Lester* nor *Nosworthy* involves prosecutorial misstatements or witness perjury. Neither case involves a suppressed database containing millions or hundreds of millions of documents. Indeed, in *Nosworthy*, the Second Circuit ruled that the missing testimony was neither exculpatory nor impeaching.

Here, we have multiple misstatements by the DOJ about matters it admits are of "obvious significance." GO at 6. It is indeed curious that the DOJ never once refers to the cases of *Agurs*[23], *Giglio*[24], *Napue*[25] or *Alzate*[26] in its opposition.

The fact that the Defense – ignorant of these allegations until he was surprised by them at

[22] But not the perjury of Tracy Jones or John Woodbury.
[23] 427 U.S. 97 (1976)
[24] 405 U.S. 150 (1972)
[25] 360 U.S. 264 (1959)
[26] 47 F.3d 1103 (11th Cir. 1995)

trial[27] -- did not know in the hustle and bustle of a jury trial to look in the public records in the midst of trial to find the Government's perjury and misconduct, is understandable. Indeed, the Government's failure to disclose to the Defense that it would adduce the perjurious testimony (10 Smilansky is an address that does not exist; it was "made up") and make the false statement to the jury (that Yossi Keret was "made up" by Mr. Stein) represents the classic "trial by ambush" warranting a new trial under Rule 33. *See United States v. Camargo-Vergara*, 57 F.3d 993, 998 (11th Cir. 1995); *United States v. Noe*, 821 F.2d 604, 607 (11th Cir. 1987); *United States v. Rodriguez*, 799 F.2d 649 (11th Cir. 1986) (substantial prejudice warranting a new trial results when defendant is "unduly surprised"). The Government argues that because of the existence of Mr. Keret is proven in the SEC's online filing system, the DOJ gets a pass for lying to the jury about his existence. This allegation is spurious. Neither Defendant, nor Mr. Pasano nor any of Mr. Stein's prior lawyers are presumed to be mind-readers; they were not on notice of the Prosecution's "made up" theory. Because Mr. Carter – curiously – did not testify at all before the grand jury, and because the "made up" allegation is not in the indictment, the Defense could not have known of this.[28] In any event, the Government's misstatements to the jury that "Yossi Keret does not exist; Mr. Stein made him up" was certainly among the most scandalous allegations in the trial.

A false allegation that a criminal defendant made up a surname – and an address – out of whole cloth is extremely prejudicial. Under any standard, these allegations being untrue – and the untruth being concealed from the jury – "could have" foreseeably affected the jury verdict. Under

[27] Curiously, the grand jury in this case indicted Mr. Stein without hearing any testimony of Martin Carter whatsoever. "Mr. Carter did not make any statements before the grand jury." *See* Transc. Vol. 6, at 136-7.

[28] The indictment in this matter is devoid of any allegation that Yossi Keret "does not exist" or that Mr. Stein "made him up." It is similarly devoid of any contention that 10 Smilansky Street is a "fake address" or that it "does not exist." The DOJ claims the Defense knew about the "made up" allegation because the Netanya address "figured prominently in the indictment," referring us to ¶3 and ¶16 thereof. The problem is that ¶¶3 and 16 of the indictment do not even mention the Netanya address, let alone displaying the "made up" allegation "prominently."

Giglio, *supra* at 405 U. S. 154 and *Alzate*, 47 F.3d 1103, 1110 (11th Cir. 1995), such material misstatements – in and of themselves – are grounds for new trial.

In any event, the law never shifts the burden to reveal a prosecutor's false statements to the defense.[29] *Alzate*, 473 F.3d 1103, at n. 6 ("[t]o the extent that the Government would put the burden on the defense to have reopened the case to correct the falsehoods, we reject the arguments on the law and the facts. The defense did not make the misstatements; the government did.) Irrespective of whether Mr. Stein could have or should have found the public record evidence that the DOJ and its witnesses lied about at trial, the Government nonetheless had and still has an affirmative obligation to cure these misstatements. *United States v. Cole*, 755 F.2d 748 (11th Cir. 1985). The Government breached and continues in its opposition to breach this obligation.

IV. THE GOVERNMENT'S NON-PRODUCTION OF SEC FILES VIOLATES RULE 16 AND *BRADY*

A. Mischaracterization of Databases

The DOJ repeatedly infers that the Defense is trying to "actively mislead the Court" (GO at 13) and trying to "muddy the facts" (GO at 16), yet it is the DOJ which appears to be trying to mislead the Court about the "master" database held by the SEC in an effort to avoid the discommodious confrontation with that universe of documents. The opposition speculates on page 16 that "[t]he database to which Stein is likely referring is one established by Signalife and its attorneys during the SEC's investigation of this matter using a vendor called Renew Data." However, Defendant's Motion describes in detail that the RenewData database (also described as the "Signalife subset database" throughout Defendant's motion) Defendant was given access to by

[29] In *Alzate*, 473 F.3d 1103, the prosecution team learned the truth through checking the arrest records on the day of Alzate's arrest. *Id*. at 1107. *Friedlander*, 395 Fed. Appx. 577 at 580 ("mutual mistake"). Here, the Prosecution team is charged with knowledge of the truth – SEC filings and public records – that 10 Smilansky Street and Yossi Keret were not "made up" by anyone. To this date, the Prosecution has not corrected the record, and its misstatements remain a reality even after filing its opposition to the instant motion for new trial.

Signalife could not possibly be the universe of documents from which the DOJ has obtained its small subset database, and could, thus, not possibly be the database the Defense is referring to, e.g. 279 at 5 and DE 264-14 , ¶ 3 – Decl. of Reichardt and, most importantly, DE 264-2, which is a screen shot of the RenewData database, clearly shows that the database contains only 92,871 documents: Even significantly less documents than the DOJ hard drive, which the DOJ calls the "small subset database." The Declaration of Reichardt describes the contents of that database and shows it contains four master sources – emails by and to John Woodbury, Rowland Perkins, Kevin Pickard and Willie Gault. DE 264-14, ¶ 3.[30] However, the DOJ hard drive (containing over 2 million files) is compiled by documents provided by significantly more individuals than Woodbury, Perkins, Nevdahl and Gault, e.g. by Tom Tribou and Evie Muscillo (bates stamped by the SEC). Thus, we know that the RenewData database could not be the universe of documents from which the DOJ obtained its files pursuant to an access request. If anything, this RenewData database (as well as the small subset Government hard drive) may provide an inkling of the magnitude of the universe of documents. It could be argued that the DOJ is actively trying to divert the Court's attention by pointing to the small RenewData[31] database, instead of describing the universe of documents from which it obtained its small subset database. In any event, it is clear that the DOJ obtained its small subset database from a considerably larger database which it accessed, and the DOJ continues to refuse to address that

[30] The database also contains two sub-folders, one of which is called "non-electronic CA" and the other "non-electronic SC" which contains images and scans, however, significant emails between employees (e.g. the Tracy Jones email folder in its entirety), other officers and audit committee members, for instance, are not included in this database.

[31] Ex. 4 to GO is a letter to an SEC attorney "recounting the database history" of RenewData, yet it is inconclusive with regard to the universe of documents held by the SEC. At no point does the Defense maintain that the DOJ had access to RenewData (repeatedly described as the "Signalife subset database" throughout the motion), DE 279 at 5. While the DOJ provided no affidavits pertaining to the database from which it obtained its documents, the Defense has provided affidavits and screen shots about the databases in support of its motion. However, the fact that the DOJ attached this letter as Ex. 4 to its opposition is misleading at best.

universe of documents.[32] The DOJ claims that the Defense "repeatedly mischaracterize[s] the DOJ's remarks at the *Faretta* hearing on April 3, 2013. GO at 14. Specifically, the DOJ maintains that "at no point during the hearing did the United States … state that it ever had access to such a database." GO at 15. (Emphasis added.) The DOJ is not being truthful. At the *Faretta* hearing, the Government expressly represented to the Court that it accessed the SEC's huge database:

> "That's this sort of 200-plus million pages or documents, I've lost track of which one it is. That's that universe of documents. .. A very small subset of those documents were provided by the SEC to the Department of Justice pursuant to an access request. Those documents, for document management purposes, were then, admittedly, put into a database by my office. So there are sort of two databases…"

Faretta Transcript at 41, lines 6-24. (Emphasis added.)

It is a rare case when the DOJ is caught in such a blatant misstatement. The key word is "access." In its opposition, the DOJ claims it never had "access." At the *Faretta* hearing, the DOJ admitted it "access[ed]" the SEC's database.[33]

The DOJ mischaracterizes the Defense's argument about the problem with the *Faretta* hearing. Judge Marra made it clear that the Court would appoint counsel for Mr. Stein, but also that the Court would not continue the case so that new counsel could prepare. *Faretta* at 27. At the time, the Court was unaware -- as Mr. Stein was unaware -- that the Government was suppressing millions (and perhaps hundreds of millions) of documents held by an agency that was "substantially" involved in the DOJ prosecution of Mr. Stein, to wit: the SEC. Had the Court, or Mr. Stein, known these facts, the consideration of how to remedy the situation (with a continuance or otherwise) would certainly have been carefully addressed.

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[32] Here, not only has the Defense properly requested access to the "universe" of documents in this motion to compel, but Mr. Pasano requested such long ago. *See*, DE 41-1, at 11, March 6, 2012 letter, first paragraph.

[33] This is yet another *Giglio* violation; a misstatement made to the Court that has never been corrected.

B. "Cherry Picking" not Allowed Under *Brady* and Rule 16

The Prosecution cannot hide behind its own conduct in selectively accessing the SEC's files, and then say it has complied with Rule 16 and *Brady*. This "cherry picking" of the SEC's files is tantamount to bad faith:

> "It is insufficient for *Brady* purposes for the prosecution to produce only that information from other agencies that has found its way into the physical possession of the prosecutor. The prosecution may not simply ask for information it wants while leaving behind other, potentially exculpatory information within agency files. The Government in the form of the prosecutor cannot tell the court there is nothing more to disclose while the agency interested in the prosecution holds in its files information that is favorable to the defendant. [Citation omitted.] Rather, the prosecutor has a duty to learn of any exculpatory evidence known to others acting on the Government's behalf."

Carriger v. Steward, 132 F.3d 463, 479-80 (9th Cir. 1997); *citing Kyles v. Whitley*, 514 U.S. 419, 437 (1995), *supra*. *See also*, *United States v. Trevino*, 556 F.2d 1265, 1272 (5th Cir. 1977) (the prosecutor is not allowed to avoid disclosure of the evidence by the simple expedient of leaving relevant evidence to repose in the hands of another agency while utilizing his access to it in preparing his case for trial); *United States v. W.R. Grace*, 401 F.Supp.2d 1069 (D. Mont. 2005) (the prosecutor may not rely upon the "prosecution team" construct to limit its discovery obligations; rather, the prosecution is required under Rule 16 to produce requested information that is within its possession or control under the "knowledge and access" standard); *United States v. Bryan*, 868 F.2d 1032, 1036 (9th Cir. 1989) ("the prosecutor will be deemed to have knowledge of and access to anything in the possession, custody or control of any federal agency participating in the same investigation of the defendant"). Indeed, "the prosecution's constitutional duty under *Brady* is self-executing, and cannot be enlarged or curtailed by court order." *United States v. W.R. Grace*, 401 F.Supp.2d 1069 (D. Mont. 2005).

A mistaken belief by the Defendant that he holds a file of *Brady* material[34] is not enough for the Government not to comply with either Rule 16 or *Brady*. The issue is solely whether or not the Defendant, in fact, had the documents. The Government never once in its Opposition even tries to provide evidence that it ever turned over access to the universe of documents.

C. "Safest Practice is to Provide Access to Everything"

A search of reported cases since 2002 reveals no case where the Government has refused to turn over the "universe" of documents. Indeed, the courts are unanimous that the issue is not whether the Government may lawfully withhold the universe of documents – it may not, as the Supreme Court instructed years ago[35] -- but, rather, the extent of the indexing and/or cost the Government must incur after turning over the universe of documents.[36]

The District Court for the Southern District of Florida follows the nationwide trend. For example, it has resolved disputes in favor of allowing the Defense to have the identical access as the Government to the database housing the universe of documents. *See United States v. Perraud*, 2009 U.S. Dist. Lexis 123150 (S.D. Fla 2009), Hon. Robin D. Rosenbaum, Case No. 0:09-cr-60129-RWG, DE 118, entered on FLSD Docket 12/24/2009; a copy of the opinion is appended as Ex. D to the Decl. of Reichardt for the Court's convenience. This Court has ordered CJA to pay $83,185.00 for an indigent's defendant's document services management provider to allow the defense to adequately search the Government's database for *Brady* and other discoverable material. *United States v. Marks*,

[34] Defendant admits that he mistakenly believed he had access to the universe of documents at the *Faretta* hearing, however, the DOJ now denies the existence of that database from which it obtained its subset database.

[35] *United States v. Dennis,* 384 U.S. 855, 873 (1966) ("In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant facts."); *United States v. Auten*, 632 F.2d 478 (5th Cir. 1980).

[36] In most reported cases, the Government even made substantial and good faith efforts to categorize, label and index the database. In some cases, the Government even told the defense what it believes to be most relevant to its case in chief. *United States v. Stanford*, 832 F.Supp. 2d 767, 769-770 (S.D. Texas 2011); *United States v. Skilling*, 554 F.3d 529, 575-577 (5th Cir. 2009).

2013 U.S. Dist. Lexis 51205 (S.D. Fla. March 26, 2013).[37] In no reported case has any federal court sanctioned a governmental refusal to allow a criminal defendant equal access to the investigative databases. Indeed, in *Perraud*, then Judge Magistrate Rosenbaum (now Hon. Robin S. Rosenbaum) noted the Government's stated practice regarding access to the universe of documents:

> "**[The] safest practice in the government's view is to provide access to everything, while separately providing documents on which it intends to rely**."

Perraud at 5. Emphasis added.[38]

In *Perraud*, a mere 5,000 documents were at issue, yet in prudence the United States provided "everything" (from the SEC) to the defense as the "safest practice." There, the documents were housed in an online database called IConnect. In Judge Rosenbaum's written opinion, she noted that the prosecution gave defense counsel

> "access to IConnect because the [G]overnment is not in the position to know what the defense deems relevant to its various and potential defenses."

Id.

Here, the DOJ concealed the fact that it was able to access that database at will, until the *Faretta* hearing when it finally admitted to lodging an "access request."[39] Comparing this case to *Perraud*, the Government's "safest practice" – providing the Defense equal access to the target database – becomes a constitutional imperative when faced with a dataset significantly larger than in

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[37] The Defense does not know whether *Marks* involved the entire universe of documents, but notes the high CJA reimbursement for document management.

[38] Given the "large document production" in *Perraud*, Judge Rosenbaum's Report and Recommendation recommended that the prosecution identify all documents material to the defense, citing *United States v. McDade*, 1992 WL 382351 (E.D. Pa. 1992); *United States v. Poindexter*, 727 F. Supp. 1470 (D.D.C. 1989); and *United States v. Turkish*, 458 F. Supp. 874 (S.D.N.Y. 1978) as examples of cases where "courts have entered orders requiring the government to identify the documents that are actually called for under Rule 16(a)(1)(e)." The Report and Recommendation was approved, adopted and ratified by the Hon. William J. Zloch.

39 An access request, that somehow omitted, for example, the majority of documents and key emails by Lowell Harmison's executive assistant Tracy Jones (one of the Government's key witnesses) and Ajay Anand ("DOJ exhibits" only).

Perraud (8,000 v. some 200,000,000 documents).[40]

V. IMPEACHMENT EVIDENCE WARRANTS A NEW TRIAL UNDER *GIGLIO*

A. Cumulative Impeachment Evidence is Nonetheless Material

Further, the Government argues that the evidence is merely cumulative impeaching evidence. The courts in this circuit treat *Giglio* violations differently than the DOJ does. Indeed, suppression of "mere impeachment" evidence -- as the DOJ says was the case here [GO at 9] – is often grounds in and of itself for a new trial. *See, e.g., United States v. Friedlander*, 2009 U.S. Dist. LEXIS 14264, citing *Giglio v. United States*, 405 U.S. 150, 154 (1972) ("even false testimony which merely impeaches a witness' credibility may require a new trial").

The DOJ refers us to *United States v. Starrett*, 55 F.3d 1525, 1554 (11th Cir. 1995) for the proposition that newly discovered evidence must not be "merely impeaching." However, the DOJ does not tell us about an Eleventh Circuit case decided at the same time *as Starrett, United States v. Alzate*, 47 F.3d 1103, 1110 (11th Cir. 1995). In *Alzate*, the Eleventh Circuit Court of Appeals reversed a district court's denial of a motion for a new trial because of a single prosecutorial misstatement to the court and the jury. The Eleventh Circuit instructs that the standard in a *Giglio* case is not (as the DOJ suggests) whether the misstatements probably, or did, affect the judgment of the jury (the "would have" standard; GO at 5), but whether the misstatements could have affected the jury's decision. *Id*. at 1110.

The DOJ admits (at GO at 6, first new paragraph) that the 10 Smilansky Street address is "significant" to the jury's verdict against Mr. Stein. Yet Carter committed perjury about it, the DOJ

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40 *See also,* U*nited States v. Wecht*, 2006 U.S. Dist. Lexis 39266, (W.D. Pa. June 14, 2006) (database of 200 million documents turned over to defense; government only objected to reproduction and scanning costs); *United States v. Warshak*, 631 F.3d 266, 295-299 (6th Cir. 2010) (database of 17 million pages, 500,000 hard copy pages, turned over to defense), *United States v. Ohle*, 2011 U.S. Dist. Lexis 12581 (database of several gigabytes of data, several million pages in length turned over to defense).

relied on that perjurious testimony to obtain its conviction, and the DOJ has still not corrected the record about its misstatements as it is required to do.[41]

Also, there is no distinction between exonerating evidence and impeachment evidence for purposes of *Brady – see United States v. Bagley*, 473 U.S. 667 (1985) (no legal distinction between exculpatory evidence and impeachment evidence for purposes of *Brady* rule) – and when impeachment evidence shows an actual misstatement on the part of the Government or its witness it is almost always material because the materiality standard is lowered to anything that reasonably "could have" affected the jury.

Here, the fact that, for example, Carter's testimony, e.g. that the Netanya address was "made up,"[42] was false testimony, casts a dark shadow over Carter's entire story. Among the most dramatic allegations by the Government was that Mr. Stein "made up" the name Yossi Keret. The falsity of these allegations, if known by the jury, "could have" changed the result of the trial. There was no greater issue in this case than the veracity of Martin Carter's story. It can hardly be said that had the jury known Carter's story was either perjurious or inaccurate, such a fact "could not" have reasonably be expected to change the result of the trial. *See, Alzate*, 47 F.3d 1103, 1110 (11th Cir. 1995). *See also United States v. Agurs*, 427 U.S. at 104-06 (1976). The fact that Yossi Keret exists is admitted by the Government in both the title, heading and content of Section III.B on page 7 of its opposition brief. This is the diametric opposite of the Government's statements to the jury that "Yossi Keret does not exist; Mr. Stein made him up." (E.g., Trial Transcr. Vol. 10 at 28.)

Further, the credibility of Jones and Woodbury undermine critical elements of the Government's case against Defendant. Far more telling, the Government's only response to

[41] The inconsistencies of the DOJ's positions in this case are perhaps best exemplified by an examination of page 6 of its opposition. Incredibly, the DOJ admits that 10 Smilansky has obvious significance.

[42] The Government cites to no other witness besides Carter who said that the Netanya address was "made up." The Government does not refute its obligation to correct the record, nor does it do so.

Woodbury's and Jones' misstatements is that the exhibit showing the falsity of their testimony was produced. This establishes perjury by both Woodbury and Jones, because receiving information from persons other than Mr. Stein appears to have been "business as usual" throughout this entire period.[43] Woodbury is an SEC attorney. His false testimony that he received purchase order information for the 10-Q only from Mr. Stein is perjurious and is grounds for a new trial.[44] The Prosecution should not have proffered the false testimony and should have corrected it by now. *Alzate*, 47 F.3d 1103, n.6; *Friedlander*, 395 Fed.Appx. 577, 580.

Impeachment evidence is rarely cumulative and always merits a new trial if it involves core issues in the case. *Giglio v. United States*, 405 U.S. 150, 154 (1972).

No witness besides Carter testified that they heard Mr. Stein say "make up" the name Yossi Keret or that they heard Mr. Stein "make up" the address 10 Smilansky Street or that "Carter's wife's uncle Mr. Mijares had nothing to do with Cardiac Hospital Management."

B. Violation of Court Order is Grounds for a New Trial

The DOJ does not deny that it was obligated to produce all the categories of documents ordered on September 26, 2012[45]; that it produced nothing; and that it violated the order. Its failure to produce documents ordered by this Court is inexcusable. A simple review of the DOJ's list of documents produced, DE 46-1, filed June 21, 2012, shows conclusively that the witnesses' document productions to the SEC were concealed and suppressed in this case.[46]

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[43] The suppressed email from Tracy Jones to Norma Provencio transmitting the check by Thomas Tribou toward the Cardiac Hospital Management purchase order is in no way cumulative; it is key to impeachment of the DOJ's story that "Mitch Stein did everything."

[44] Under *Giglio, Agurs* and *Alzate*, it would not even matter if the Defense had known of these exhibits.

[45] *See*, e.g. information regarding the involvement of others with the alleged false documents at issue (DE 41 at 6), all false and misleading change of address notices (DE 41-1 at 12)[45], all contents of Harmison's USB memory drive (DE 41-1 at 19), some of the critical categories of documents covered under the September 26, 2012 Court Order.

[46] Furthermore, the DOJ document list shows other misconduct that is extraordinary. As to each witness who produced documents to the SEC, the DOJ included them for production in the same bates stamp identifier used

For example, Tracy Jones was a key Government witness who was the only person who was the assistant to both Pamela Bunes and Lowell Harmison, former CEOs of Signalife. Jones set up board meetings and controlled Dr. Hamison's schedule. Transc. Vol. 3 at 91.

For the DOJ to intentionally "cherry pick" the SEC's files to such an extent that it completely eliminated the lion's share of documents produced by a key Government witness like Jones is unprecedented and violative of the Court Order, Rule 16 and *Brady*.

VI. THE DOJ'S APPARENT INVOLVEMENT WITH THE ASSET FREEZE

Having never denied its involvement with the freeze of Mr. Stein's assets, the DOJ's conduct is unconstitutional. In its opposition, the DOJ does not deny, or even explain, its curious conduct at Mr. Stein's Los Angeles bail hearing. DE 264-13, at 14, Ex. M to the Decl. of Reichardt (DE 264-14). The DOJ also does not deny that the freezing of Mr. Stein's assets was pursuant to a joint investigation between the State of California and the Federal Department of Justice. Instead, the DOJ spends a total of two short paragraphs answering the issue of the asset freeze. GO at 22. In one paragraph, it explains its conduct by saying that the freeze did not prejudice Mr. Stein because he directed the withdrawal of Mr. Pasano. GO at 22-3. However, the DOJ knows that Mr. Pasano's withdrawal was mandatory. The withdrawal was also prefaced by Mr. Stein's inability to pay Mr. Pasano's law firm Carlton Fields the money it was demanding before trial.[47]

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by the SEC (e.g. Tom Tribou, documents "SEC-TT0001 through SEC-TT0025", Document 46-1, at 7). However, strangely, Ajay Anand's production to the SEC was apparently "culled" by the DOJ, and thus, its production in this case was market "DOJ-ANAND_000001-DOJ-ANAND0000036." FRCP Rule 26. (Discovery of all evidence relevant or reasonably calculated to lead to the discovery of admissible evidence must be produced).

[47] The Defense submits that an evidentiary hearing may not be required for this Motion for New Trial to be granted in light of the evidence, affidavits and case law presented to the Court, but in the event the Court orders an evidentiary hearing, the Defense will establish this fact with one question and answer session with Mr. Pasano, who is still on good terms with Mr. Stein and has communicated with him since the end of trial on issues as serious as the *Brady* violations of the DOJ. Mr. Pasano will testify that his withdrawal was precipitated in part because of Mr. Stein's inability to pay some $200,000.00 (two hundred thousand dollars) on the eve of the first trial (September, 2012), and that it was ultimately Mr. Stein who directed him to withdraw. The Defense has set forth a prima facie case for an unlawful freeze. It cites to the transcript of the bail hearing where the DOJ states that it was the DOJ who

Further, the Defense has candidly said the byzantine relationship of the State of California and the Federal Department of Justice as against Mr. Stein presents a case of first impression under *Monsanto* and its progeny. However, that should not result in allowing a violation of Mr. Stein's Sixth Amendment right to counsel to go unchecked. *See, Dalcour v. City of Lakewood*, 492 Fed. Appx. 924 (10th Cir. 2012) ("illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure").

The DOJ defends its conduct by saying: "California did it." That is not enough to explain away a Sixth Amendment violation of right to counsel. *See, Bartkus v. Illinois*, 359 U.S. 121, 123-124 (1959) (there is not dual sovereignty when one sovereign acts "as a tool" for the other).

Under these circumstances, the Defense submits that Mr. Stein's Sixth Amendment right to counsel has been violated. *See United States v. DeJesus Flores Martinez*, 972 F.2d 1100, 1105 (9th Cir. 1992) ("collusion of state and federal prosecutors may constitute Sixth Amendment violation"). *See also, Mitsubishi Int'l Corp. v. Cardinal Textile Sales, Inc*., 14 F.3d 1507, 1521 (11th Cir. 1994)); *United States v. Petters*, No. 08-5348, 2009 WL 803482, at *4 (D. Minn. March 25, 2009).

The Defense has conceded that this is an issue of first impression. Although the *DeJesus Flores Martinez* case is somewhat analogous -- involving state and federal prosecutors -- it is only that. The relationship here, and the DOJ's admission at the bail hearing in this case that the DOJ was having "a problem" locating Mr. Stein's assets in the California state case, is unique and unprecedented. Given that the DOJ does not deny its involvement in the freezing of Mr. Stein's assets before trial in this case, this Court may be concerned enough to examine the issue more closely than has the DOJ.

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was having trouble locating Mr. Stein's assets. DE 264-13, pages 6-24. The DOJ has not rebutted this evidence, and has not just stepped forward and explained its conduct.

VII. CONCLUSION

There is no reported criminal case where the Government falsely tells the jury that a company does not exist, that a person does not exist, and that an address does not exist; and that the defendant "made them up." A case in which at least three Government witnesses committed perjury, and in which the Prosecution separated itself from the SEC only to reverse itself in a press release. A case in which the universe of documents was suppressed. This is that case.

The Defense respectfully requests that this Court grant Defendant's motion for a new trial for the reasons set forth in detail above.

Dated: January 7, 2014

Respectfully Submitted,

JONATHAN KASEN, P.A.
Attorney for Defendant Stein
633 SE 3rd Avenue, Suite #: 203
Fort Lauderdale, Florida 33301
Phone: (954) 761-3404
Facsimile: (954) 767-6406
E-mail: attykasen@jonathankasenpa.com

By: /s/
JONATHAN KASEN, Esq.
Fla. Bar No.: 0164951

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 7, 2014, I electronically filed the foregoing documents with the Clerk of the Court and all counsel of record using CM/ECF.