UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE No.: 11-80205-CR-MARRA

UNITED STATES OF AMERICA,

vs.

MITCHELL J. STEIN,
Defendant.
_____/

DEFENDANT'S MOTION
FOR EXPLANATORY RECORD ON POST-CONVICTION MOTIONS

COMES NOW, Defendant Mitchell J. Stein ("Defense"), and respectfully requests an explanatory record in connection with his post-conviction motions, pursuant to the "reasoned decision" rule of the Eleventh Circuit Court of Appeals, and states:

I. INTRODUCTION; FACTUAL BACKGROUND

1. The Defense has just filed two new motions, one its Third Motion for a New Trial (DE 355) and the other its Motion for an Evidentiary Hearing (DE 356) (hereinafter collectively "new motions");

2. The Court already ruled on the Defense's first two motions for a new trial (DE 279; 312) on its Motion for Conditional Release (DE 278); on its Motion to Compel Turnover of the SEC's database (DE 277); on its Motion to Compel Turnover of Grand Jury Material (DE 332); on its Motion to Supplement the Record (DE 337); and on its Motion for an Evidentiary Hearing (DE 261). *See* Court orders at DE 339, and DE 340;

3. Among other things, the new motions allege that files and evidence recently produced

by the prosecution team establish evidentiary suppression, establish that the prosecution made statements to the jury and failed to correct others that it knew were false, and establish that these suppressions and misstatements were material under *Napue*, *Brady* and *Giglio*;

4. The law in the Eleventh Circuit requires a district court to issue orders that include explanation so as to allow for meaningful appellate review, and the Defense respectfully requests such treatment be applied to its post-conviction motions. Although in practice this may merely require a statement in the Court's orders explaining which party's arguments the order is based on, the Defense would submit that the explanatory procedure should now be followed.

II. MEMORANDUM OF LAW

The Eleventh Circuit Court of Appeals stated:

> "Many times, and in many contexts, this Court has admonished district courts that their orders should contain sufficient explanations for meaningful appellate review."

Danley v. Allen, 480 F.3d 1090, 1091 (11th Cir. 2007); *see also*, *United States v. Valencia-Trujillo*, 462 Fed. Appx. 894 (11th Cir. 2012) (applying rule to motion seeking grand jury materials); *Bailey v. United States*, 307 Fed.Appx. 401 (11th Cir. 2009) (applying rule to motions for new trial under Fed.R.Crim.P. 33). In connection with its review of a district court order denying a Rule 33 motion, the Eleventh Circuit instructed:

> "District courts are responsible for rendering reasoned decisions, and this Court has remanded where a one sentence summary denial denied the opportunity to conduct meaningful appellate review."

Id., at 402.[1]

In *Bailey*, the Eleventh Circuit found the district court's order sufficiently descriptive, because the Rule 33 motion was improperly brought five years after the verdict instead of within the

[1] The Eleventh Circuit principle requiring a reasoned decision, "[however] does not prohibit a district court from incorporating a party's arguments as to the basis and explanation or its ruling." *Valencia-Trujillo*, at 986.

three years as required by statute. Obviously, in such circumstances, where five years is obviously beyond the three year window of Fed.R.Crim.P. 33, the Court said no explanation by the district court was necessary. *See also, e.g., United States v. Mills*, 334 Fed.Appx. 946, 948 (11th Cir. 2009) (relaxing requirement of a reasoned decision where alleged newly discovered evidence "did not exist … at the time… of trial").

Application of the rule appears particularly important in the instant case if for no other reason than because the prosecution team[2] has just produced over two million pages of files to the Defense. Such a huge production one year after trial is unprecedented. It will take the Defense months to review this new evidence and even longer to review additional large portions of the government files that have yet to be produced. Upon the revelation of each piece of new evidence, an analysis must be made cumulatively under *Brady* and *Giglio* evaluating the new evidence in conjunction with that previously submitted to the Court. The Defense respectfully submits that this set of circumstances lends itself – perhaps like no other – to careful application of the reasoned decision rule.

Indeed, the Defense has presented credible evidence that prosecution and witness statements to the jury were, at the very least, factually untrue or misleading.[3] In its Third Motion for a New

[2] The Defense continues to contend the SEC was obviously a part of the prosecution team in this case, because, *inter alia*, it "substantially assisted" the prosecution (DE 305-1). *See e.g., Moon v. Head*, 285 F.3d 1301, 1309 (11th Cir. 2002) (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 prosecution); *United States v. Antone*, 603 F.2d 566, 570 (5th Cir. 1979) (information possessed by state investigators imputed to federal prosecutors because they worked together on the case). Since their admission that the SEC "substantially assisted" the prosecution, the government has never denied the SEC was a part of the prosecution team.

[3] E.g., "There is no Yossi Keret." Trial Tr. Vol. 10 at 34. "Tribou's name doesn't appear on the purchase order (Govt. Exhs. 64, 300)." Trial Tr. Vol. 10 at 114. "10 Smilansky was a made up address." Trial Tr. Vol. 6 at 59 "Cardiac Hospital Management, exhibit 300, $1.98 million… that was all made up." "Mr. Tribou doesn't know what Tribou & Associates [name on the check] is." Trial Tr. Vol. 9 at 57. "[Tribou] was never a reseller []." Trial Tr. Vol. 9 at 57. "Is Mr. Mijares (Carter's uncle) in any way associated with a company called Cardiac Hospital Management?" Carter: "No, he was not." Trial Tr. Vol. 6 at 42. "Were you going to sell products to [your wife's uncle]?" Carter: "No." Trial Tr. Vol. 6 at 55. "Cutter did not know of Carter's distribution plans." Trial Tr. Vol. 3 at 198. Woodbury "got all of [his] information [for the 2007 10Q] from Mr. Stein." Trial Tr. Vol. 2 at 96. Tracy Jones

Trial, the Defense now demonstrates – using newly discovered evidence hidden in the suppressed SEC database – that the government prosecutors *knew* at trial that at least two of their representations to the jury were, at the very least, untrue. In order to establish a due process violation, the Defense must merely show the statements created a false impression of a material fact:

> "[D]ue process is violated not only where the prosecution uses perjured testimony to support its case, but also where it uses evidence which it knows creates a false suppression of a material fact….Hence, '[e]vidence may be false either because it is perjured or, though not itself factually inaccurate, because it creates a false impression of facts which are known not to be true.'"

United States v. Bartko, 728 F.3d 327, 336-7 (4th Cir. 2013), *quoting Hamric v. Bailey*, 386 F.2d 390, 394 (4th Cir. 1967).

Under any reasonable analysis, the production of millions of suppressed documents by the prosecution team one year after trial changes the calculus of this case. Because there can now be no dispute that a huge database was withheld from the Defense and that many prosecution statements at trial were factually incorrect, orders containing more than a "one sentence summary denial" (*Bailey v. United States*, at 402) would – it is submitted – appear salutary and in furtherance of judicial economy.

In its first opposition briefs, the prosecution frustrated any chance for meaningful appellate review when they refused to evaluate their statements at trial under the *Napue/Giglio* materiality standard.[4] Not only did the government speciously seek application of the "would have" standard to

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called the purchase orders "phantom purchase orders" because she "never received anything on them." Trial Tr. Vol. 3 at 117. The alleged "phantom" nature of the purchase order is why Woodbury and Pickard sent confirmation letters. Trial Tr. Vol. 10 at 40.

[4] E.g., "Stein incorrectly suggests this Court should apply a different or truncated version of the analyses set forth above…" DE 318, at 5. "Stein's demand for a new trial is completely without merit, given that at no point does Stein come close to satisfying the requisite standards for obtaining such relief." DE 298-1, at 1.

their factually inaccurate trial statements (DE 298-1, page 4), but they refused to even mention – let alone discuss – the "harmless beyond a reasonable doubt" or "could have" standard.[5] Instead, the prosecutors incorrectly argued that the law requires proof of evidentiary suppression in order to establish a due process violation under *Napue/Giglio*.[6] Although the government's suppression requirement is entirely artificial, the hurdle has nonetheless now been met in this case. In light of Exhibit "X," this Court is now confronted with evidence of a suppressed document showing the government *knew* it was misstating the truth when it told the jury "there is no Yossi Keret" and "Yossi Keret doesn't exist." This, of course, is Yossi Keret, the "name on the purchase order that was the basis of Count 6 in the Indictment." DE 298-1, at 7.

Because of this, the Third Motion for a New Trial presents very simple factual and legal issues that lend themselves to candid responses by the government, which would result in a reasoned decision: A few of them are:

a. Was Exhibit "X" suppressed?

b. If Exhibit "X" was suppressed, why?

c. Does Exhibit "X" establish the government knew it was lying when it told the jury "Yossi Keret does not exist" and "there is no Yossi Keret?"

d. Does Exhibit "X" establish the prosecutors should have corrected the record after Carter said "Mitch Stein … is the one who made up all these names?"

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[5] *United States v. Alzate*, 47 F.3d 1103, 1110 (1995); *Brown v. Wainwright*, 785 F.2d 1457 (11th Cir. 1986).

[6] DE 318, at 7.

CONCLUSION

WHEREFORE, the Defense respectfully requests that the Court apply the reasoned decision rule of the Eleventh Circuit Court of Appeals to all its post-conviction orders and rulings in this case.

Dated: August 27, 2014

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 27, 2014, I electronically filed the foregoing documents with the Clerk of the Court and all counsel of record using CM/ECF.