

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 THIRD MOTION
FOR DISMISSAL OF THE INDICTMENT OR, ALTERNATIVELY, FOR A NEW TRIAL**

COMES NOW, the Defendant, Mitchell J. Stein, by and through the undersigned counsel, and hereby respectfully moves the Court for an order dismissing the indictment or, in the alternative, for a new trial, and as grounds therefore states:

I. INTRODUCTION

A recently produced SEC¹ Investigative file reveals serious constitutional violations by the prosecution in this case.

The file was never before provided to the Defense, and has been produced by the SEC in a companion civil action. Within it is a document bearing bates numbers “SEC-Investigative-E-0037195 – SEC-Investigative-E-0037198,”² establishing that the prosecution team uncovered the existence of Yossi Keret a full three years prior to representing to the jury that Yossi Keret does not exist (Trial Tr. Vol. 10, at 28).

¹ Securities and Exchange Commission.

² Exhibit “X” hereto.

The suppression of the SEC Investigative file in this prosecution, coupled with the fact of newly discovered Exhibit “X” contained therein, changes the calculus of this case and, the Defense respectfully contends, mandates either a new trial or dismissal of this prosecution.

II. STATEMENT OF FACTS

1. In opposition to the Defense’s two motions for a new trial, the government maintained the evidence and arguments were frivolous and the Court agreed in its June 9, 2014 order (DE 430).

2. The Defendant contends the newly discovered Exhibit “X” defeats both of the government’s key defenses that it did not suppress exculpatory evidence and that no suppressed evidence actually proved the falsity of its representations to the jury.

3. Exhibit “X” was produced by the SEC in the ongoing civil action on or about June 19, 2014 after Mr. Stein – representing himself *pro se* – threatened to bring a motion to compel.³ It is contained in a disc consisting of some 15,688 unsearchable investigative files previously suppressed, and is one of several discs and hard drives the SEC recently produced containing over two million files. Decl. of Reichardt; Decl. of Kasen.

4. Exhibit “X” is a public filing with the SEC made by a person named Yossi Keret on November 19, 2004 under an Israeli public company called Pluristem Life Systems, Inc. On the bottom right hand corner of Exhibit “X” is a notation that this public record corporate filing by Mr. Keret was placed into the “SEC-Investigative” file on “2/23/2010” bearing bates number SEC-Investigative-E-0037195 – SEC-Investigative-E-0037198. Thus, before Mr. Stein was indicted in December 2011, the SEC learned of the existence of Yossi Keret. This is the name of a person the prosecution contends “is on a purchase order that was the basis of Count 6 of the indictment” (DE

³ *SEC v. Heart Tronics, Inc., et al.*; Case No. 11-1962-JVS(ANX); C.D.Ca.

298-1 at 7), but despite Exhibit “X” the prosecution told the jury in closing arguments that “there is no Yossi Keret” (Trial Tr. Vol. 10, at 34), and that he “doesn’t exist” (Trial Tr. Vol. 10, at 28).

5. Because many of these newly produced SEC files are unsearchable, and because of the peculiar way the documents have been presented,⁴ it will take the Defense months to complete its review of all the files in the database. As is its obligation under Rule 33, the Defense has made this Motion as soon as practicable after discovering the “SEC-Investigative” file and Exhibit “X.” Decl. of Reichardt.

6. These new discoveries show *intentional governmental suppression of exculpatory evidence*. They also show full knowledge by the government of the falsity of some of its key representations to the jury in closing arguments, including one the prosecution states involved “the basis” for Count 6 of the indictment. DE 298-1 at 7.

III. MEMORANDUM OF LAW

1. Rule 33 Standards – Procedural

A Rule 33 motion for new trial based on violations of *Brady* (evidentiary suppression) or *Napue/Giglio* (witness or prosecutor misstatements)⁵ has one procedural requirement: It must be filed within three years of final judgment. Although such constitutional Rule 33 motions do not

⁴ For example, each page of certain lengthy exhibits have been placed into a separate file that must be opened on the computer in order to be viewed, one page per file. Thus, for example, the transcripts containing a few thousands pages were split into thousands of individual computer files, each containing one image file. The Defense respectfully contends the government is obligated not only to produce all of the SEC database but to produce the unsearchable segments recently produced in a searchable format. *See*, Federal Rule of Civil Procedure 34(b)(2)(E)(ii) – often applicable to criminal post-conviction discovery – which requires the government to produce electronically stored information in a “reasonably usable form or forms”. Rule 34(a) requires that, if necessary, a responding party “translate” information it produces into a “reasonably usable” form. Decl. of Reichardt.

⁵ *Napue v. Illinois*, 360 U.S. 264 (1959); *Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963).

necessarily require the evidence be “newly discovered,”⁶ the evidence in the instant Motion was just produced to the Defense and, thus, is obviously newly discovered.

2. Rule 33 Standard – Substantive

Any suppression of exculpatory evidence requires a new trial if there is a reasonable likelihood it would have changed the outcome of the trial. *Kyles v. Whitley*, 514 U.S. 419, 422 (1995).

Any misstatements by a government witness is a *Napue* or *Giglio* violation if the misstatement, or the government’s failure to correct it, certainly “could have affected the judgment of the jury.” *United States v. Agurs*, 427 U.S. 97, 103 (1976); *Napue v. Illinois*, 360 U.S. at 271. A statement is false under *Napue/Giglio* if it “creates a false impression of a material fact.” *United States v. Bartko*, 728 F.3d 327, 336-7 (4th Cir. 2013). The rule is no different in cases of prosecutorial misstatements to the court or the jury. *Alzate*, 47 F.3d at 1110-1111 (false prosecutorial statements to the court and jury). All three kinds of misstatements represent a “corruption of the truth-seeking function of a jury trial” and merit reversal. *Agurs*, at 103; *Alzate*, at 1110. If such a misstatement surfaces during the trial, “the government has a duty to step forward” and correct the record. *Brown v. Wainwright*, 785 F.2d 1457, 1464 (11th Cir. 1986).

3. The New Evidence Exposes that the Government’s Prior Position on Suppression and Misstatements was Incorrect

The Defense’s prior motions for a new trial centered around two primary issues: Whether the prosecution and witness misstatements,⁷ and the suppression of the SEC database, were unlawful.

The government conceded the SEC database existed when Mr. Stieglitz said so at the April 3, 2013

⁶ See *United States v. Rivera-Pedin*, 861 F.2d 1522 (11th Cir. 1988) (“newly discovered” showing “is not applicable” in *Giglio* false evidence cases); *United States v. Caro*, 2010 U.S. Dist. LEXIS 143830 (S.D.Fla. 2010), *affm’d United States v. Caro*, 2012 U.S. App. LEXIS 502 (11th Cir. 2012) (“[a] court evaluating a motion for new trial involving *Brady* and *Giglio* violations does not use the Rule 33 standard based on newly discovered evidence”).

Faretta hearing (at page 41). The government can hardly dispute that at least the statements it made at trial as set forth in footnote 7 herein, are factually incorrect and misleading.

Instead, the government maintains that nothing of substance was suppressed by it, and that Mr. Stein knew or should have known the truthful facts:

‘No document [Stein] identifies can qualify as “newly discovered,” “suppressed,” or any of the other descriptions that might entitle Stein to a new trial. [] The fact that Stein’s “newly discovered” information about Yossi Keret was by his own admission readily findable on a publicly available website deprives his argument that the United States “suppressed” it of any force.’

DE 298-1, at 1, 7.

“[Stein] apparently failed prior to trial to exercise any diligence to identify an individual *purportedly* named Yossi Keret living in Israel, despite the fact that Stein himself was questioned repeatedly about an individual by that name in his SEC testimony. *See, e.g.*, GX 219 (Stein’s April 15, 2010, SEC testimony) at 574–76. Yossi Keret is also a name on the purchase order that was the basis of Count 6 in the Indictment. (Dkt. No. 3 at 11.)”

DE 298-1, at 7. (Emphasis added.)

Based on these arguments, the prosecution stated the first two Rule 33 motions were “outlandish” (DE 318, at 18), and the Court agreed they were “baseless.” (DE 340, at 1.) However, Exhibit “X” – newly produced and, thus, newly discovered, out of a suppressed file known as “SEC

⁷ 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 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.

Investigative” containing tens of thousands of pages of evidence – impeaches the government’s defense and calls into question the government’s conduct before trial, at trial and after trial.

4. The Government’s Suppression of the SEC Database was Unlawful

The suppression of the SEC database in this case is not a pretrial discovery issue; rather, it is a constitutional issue meriting reversal. *Brady* is not a discovery rule, but a rule of fairness and minimum prosecutorial obligation. *United States v. Beasley*, 576 F.2d 626, 630 (5th Cir. 1978), cert. denied, 440 U.S. 947 (1979). Implicit in this requirement is a concern that the suppressed evidence could have affected the jury’s determination of guilt. *United States v. Agurs*, 427 U.S. 97 (1976).

The new revelation of exculpatory evidence contained in the SEC database, contradicting key representations made by the government to the jury in rebuttal closing is the most severe of violations. The law compelling the government to produce its files and to search for exculpatory evidence within them, was extensively briefed in the Defense’s prior motions, which are incorporated herein.

Rule 16 violations are themselves grounds for a new trial. *See United States v. Rivera*, 933 F.2d 1563, 1566 (11th Cir. 1986); *United States v. Baragan*, 793 F.2d 1255, 1259 (11th Cir. 1986); *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).

Under *Brady*, the government must search its files for exculpatory evidence (*e.g.*, *Moon v. Head*, 285 F.3d 1301, 1309 (11th Cir. 2002)), and although the search need not be exhaustive, an “access request” like the one in this case (from DOJ to SEC) is improper and violates *Brady* for the exact reason that exculpatory evidence will certainly be missed. Indeed, with regard to the prosecutor’s *Brady* obligation to search its files, the government cannot “avoid [its *Brady*] obligation by refusing to search for the truth and remaining willfully ignorant of the facts.” *Commonwealth v.*

Bowie, 243 F.3d 1118 (9th Cir. 2001). If – as in this case – the government fails to search the files of the prosecution team for *Brady* and even inadvertently fails to produce to the Defense material evidence, it has violated *Brady*, and the conviction must be vacated. *See, e.g., Banks v. Dretke*, 540 U.S. 668, 691 (2004) (inadvertent failure to produce still unlawful). Any decision failing to grant a new trial under these circumstances would be contrary to controlling Supreme Court and Eleventh Circuit precedent. The prosecutors’ procedure in this case of a mere “access request” – which left behind the SEC Investigative file and Exhibit “X” contained therein – was violative of *Brady*. It assured “inadvertence” as an excuse for the prosecution team not producing the exculpatory and impeaching Exhibit “X” to the Defense. However, even inadvertence is no excuse. Rather, as the Supreme Court instructed in 2004, for a *Brady* claim of prosecutorial misconduct to be established

“[t]he evidence at issue must be favorable to the accused, 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.”

Banks v. Dretke, 540 U.S. 668, 691 (2004) (quoting *Strickler v. Greene*, 527 U.S. 263, at 281-282, 119 S.Ct. 1936 (1999)). Emphasis added.

As this Court noted at the *Faretta* hearing, the prosecution team “never bothered to look into” the universe of documents housed by the SEC. Tr. of April 3, 2013 *Faretta* hearing, at 44. The Court’s criticism was arguably correct, given what we now know to be the existence of the large SEC database, the existence of the SEC Investigative file and the existence of the exculpatory and impeaching Exhibit “X” contained therein.

In this case the SEC is considered to have been part of the prosecution team and its files are deemed part of the prosecution team as a matter of law. The law across the circuits requires such a conclusion given that (a) the SEC “substantially assisted” this prosecution (DE 305-1 at 4), and (b)

the SEC database contains an “Investigative” file showing the prosecution team learned of Yossi Keret’s existence three years before representing to the jury that he “doesn’t exist.” *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).

Further, the prosecution team is deemed under the law to have prosecuted this case while in possession of all information in the SEC database even though they “did not bother to look into” it. Tr. of April 3, 2013 *Faretta* hearing, at 44. *See, e.g., United States v. Auten*, 632 F.2d 478 (5th Cir. 1980) (“we decline to draw a distinction between different agencies under the same government, focusing instead upon the “prosecution team” which includes both investigative and prosecutorial personnel”).

For two years the Defense has persistently and consistently maintained that the government was prosecuting this case while suppressing material evidence in the SEC’s files. (DE 41; DE 47; DE 277; DE 279; DE 304; DE 308; DE 312; DE 322.) The government has always said these claims were “without merit” (DE 298-1, at 1; DE 318, at 2) and “outlandish” (DE 318, at 18), however, we now know the Defense has been quite accurate throughout this prosecution. The government’s suppression of the SEC Investigative file and Exhibit “X” is a clear violation of Rule 16 and *Brady*. Indeed, because the “evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial. For that reason, the defense should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal.” *Agurs*, 427 U.S. 97, at 111-12.

5. The Government's Suppression of Exhibit "X" Mandates an Order Granting a New Trial

As set forth above, the government prosecutors in this case have conceded they "avoided disclosure of the evidence⁸ by the simple expedient of leaving [them] to repose in the hands of another agency [the SEC] while utilizing [their] access to [them] in preparing [their] case for trial." *United States v. Trevino*, 556 F.2d 1265, 1272 (5th Cir. 1977). Had the SEC not been forced to turn over Exhibit "X," *the Defense would have never learned* that the prosecution team actively knew of the existence of Yossi Keret at the moment they told the jury Yossi Keret doesn't exist (Trial Tr. Vol. 10, at 28). This deprived the Defense of the critical ability to attack the propriety and good faith of the government's case on these important issues. In addition to disproving the accuracy of the government's charging allegations in a criminal trial, one of the most effective defenses is exploiting shoddiness of the government's investigation. *See Kyles v. Whitley*, 514 U.S. 419, 475 (1995) ("conscientious investigative work will enhance [the probative force of evidence] and slovenly work will diminish it"); *Lindsey v. King*, 769 F.2d 1034, 1042 (5th Cir. 1985) (evidence implicating thoroughness of the investigation is a relevant line of inquiry under *Brady*); *United States v. Friedlander*, 2009 U.S. Dist. LEXIS 14264 (even innocent prosecutorial mistakes at trial that may have affected the jury verdict, grounds for a new trial). Had the Defense known of Exhibit "X" at trial as was its constitutional right, it would have easily proven the government prosecutors were disingenuous in stating "Yossi Keret does not exist" when evidence in their own file proves they learned of his existence three years earlier.

The Defense was foreclosed from challenging the propriety of the government's five-year investigation with this direct evidence of the government's knowledge – from its own files – about

⁸ The "SEC-Investigative" file and Exhibit "X."

Mr. Keret. The Defense never had the ability to say to the jury that “the government claims these witnesses do not exist, but here is proof the government knew this witness existed, proof of which is sitting in the government’s own files.” The Defense was foreclosed for one reason: Suppression of evidence by the prosecution.

The prosecution’s excuse that the Defense should have investigated Keret is frivolous. The issue here is not about whether – under Rule 16 and *Brady* – the Defense should have investigated Keret (DE 298-1, at 7), but whether the prosecution team disclosed every single document they compiled about Keret over their five year investigation. The government’s burden of proof and burden of production never shifts (Trial Tr. Vol. 2 at 5; Judge Marra discussing burden of proof); *Kyles v. Whitley*, 514 U.S. 419 at 437, 438 (1995) (“the prosecution’s responsibility [to disclose known favorable evidence] is inescapable”). Rather, the issue is what the prosecution team knew, when they knew it and whether their inaccurate statements to either the grand jury or the jury were knowing and malicious. Unbeknownst to the Defense until now was the fact that the government suppressed an investigative file containing at least one document⁹ showing the government has engaged in classic prosecutorial misconduct to convict Mr. Stein – intentionally misrepresenting the facts to the jury in rebuttal closing. Considering the misconduct occurring throughout the trial and then in rebuttal closing, “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); *United States v. DeMarco*, 982 F.2d 1074 (11th Cir. 1991) (defendant’s knowledge of falsity not enough to save a prosecutor who “argued” and “capitalized” on false testimony in closing); *United States v. Sanfilippo*, 564, F.2d, 564 F.2d 176, 178 (5th Cir. 1977) (defense knowledge irrelevant when prosecutor “argued” and

⁹ It will take months to review the recent SEC production, and the government is still suppressing large parts of its database.

“capitalized” on falsity in closing argument to the jury).

6. Violations of *Napue v. Illinois*; *Giglio v. United States*

The law in this circuit is that a knowingly inaccurate statement by a witness or by the prosecution (or its failure to correct the inaccuracy) is actionable if it reasonably “could have affected the outcome of the trial.” *Napue v. Illinois*, 360 U.S. 264, 271 (1959).¹⁰ This is briefed extensively in the Defense’s prior motions, which are incorporated herein for brevity. It can hardly be said that the jury may not have reached a different result if it was told the prosecutors inaccurately represented that “Yossi Keret does not exist” when (a) the prosecution team knew of his existence three years earlier and (b) Keret was the signatory on a document the government concedes “was the basis for Count 6 of the indictment.” DE 298-1, at 7.

The government’s now proven knowledge of Keret going back to 2010 begs the line of inquiry the Defense was precluded from pursuing, to wit: Why did the prosecution not correct Carter’s statement at trial that Mr. Stein “made up all these names?” (Trial Tr. Vol. 6 at 112.) Why did the prosecution not question Carter about his statement at a July 31, 2012 interview with the prosecutors that he, Carter, made up the name Yossi Keret? (DE 337-1, at 1.) Why did the prosecution then knowingly capitalize on these misstatements during closing arguments to the jury in stating that “there is no Yossi Keret,” (Trial Tr. Vol. 10, at 34) he was “made up” by Mr. Stein (*Id.*, at 28, 119) and that “[t]here’s no evidence that [Keret exists]” (*Id.*, at 28) when that very evidence was sitting in the government’s files and was never produced to the Defense until one year after trial?

Napue and *Giglio* do not permit the government to explain away intentional misrepresentations by its prosecutors or their witnesses that may have affected the outcome of the trial. *Banks v. Dretke*, 540 U.S. 668, 691 (2004). Nonetheless, if this Court is somehow still

¹⁰ In *Napue v. Illinois*, the Supreme Court said a new trial results if the untruth “may” have affected the outcome of the trial. *Id.* at 272.

unpersuaded, it is respectfully submitted that this Court should ask the prosecutors why they told the jury “there is no Yossi Keret” when they knew he existed from their own files. It is also submitted the correct inquiry would be to ask the prosecutors why they didn’t contact Keret after knowing of his existence prior to the indictment. Or, if the prosecution team did contact Keret, why has that evidence been suppressed and why did they tell the jury he doesn’t exist in closing argument? It is respectfully submitted that the prosecution cannot satisfactorily answer these questions.

In any event, accepting the government’s claim that evidentiary suppression is required to prove a *Napue/Giglio* violation, that hurdle has now been satisfied.

7. Newly Discovered Evidence Should be Considered Cumulatively

Although the Court denied the first two motions for new trial, the evidence submitted therein should be considered anew and cumulatively now that we know material evidence contradicting a “basis for Count 6 of the Indictment” (DE 298-1 at 7) was suppressed by the government. Indeed, “[w]hat may have been a reasonable decision on the [first *Brady* record] may no longer be reasonable in light of the new evidence.” *Cullen v. Pinholster*, 563 U.S. ___, 131 S.Ct. 1388, 179 L.Ed 2d 557, 2011 U.S. LEXIS 2616 (2011). *See also, Kyles v. Whitley*, 514 U.S. 419, 436 (1995) (the materiality of *Brady* evidence is viewed “collectively, not item by item”).

IV. CONCLUSION

Based upon the foregoing, it is respectfully requested that the Court dismiss this case or, alternatively, grant a new trial.¹¹

¹¹ The Defense respectfully requests the Court fashion additional relief – depending on its rulings on the instant Motion – based on its additional Motions filed concurrently herewith (e.g., Emergency Motion for Evidentiary Hearing).

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.