IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

UNITED STATES OF AMERICA,	§	Civil (2255) Case No. _____
Plaintiff	§	(4:09-cr-00090-RAS-DDB)
v.	§	
	§	
GARY LYNN MCDUFF,	§	
Defendant	§	
	§	

SOURCE BRIEF TO GARY LYNN MCDUFF'S

TITLE 28 U.S.C. § 2255 HABEAS CORPUS PETITION

APPENDIX "3"

APPENDIX "3" IS THE SOURCE BRIEF, WHICH SEAMLESSLY INCORPORATES MCDUFF'S *§ 2255* MOTION; IS DOCUMENTARY SUPPORT FOR SAME; MCDUFF'S SOURCE BRIEF IS PROVIDED AS A "SOURCE" TO THE COURT AND AS A COURTESY TO ASSIST IN THE EVALUATION, CATALOGING, AND TO DETERMINE THE MERITS OF MCDUFF'S *§ 2255* MOTION.

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PREAMBLE

Pettifoggers AUSA Shipchandler and DOE Counsels Jessica Magee and Janie Frank conspired and confederated to produce a penny dreadful.

Ninth Circuit Federal Judge Alex Kozinski states, "[it] is an open secret long shared by prosecutors, defense lawyers and judges that perjury is widespread among law enforcement officers." *Stuart Taylor, Jr.*, *For the Record, Am. Law*., Oct 1995, at 72. This perjury phenomenon permeated every aspect of McDuff's trial; its testimony, post-trial statements by prosecutors, and McDuff's follow-on proceeding. This problem system-wide is, generally speaking, an open secret. See *Andrew J. McClung, Good Cop, Bad Cop: Using Cognitive Dissonance Theory to Reduce Police Lying,* 32 U. L. Davis L. Rev. 389, 405 (1999).

The following seeks to expose and reverse their unconscionable conduct. The government, in its opening statement, stated, "...in a fraud case that story is about two things: It's about people and it's about lies." H00147 (Dkt. 186, p.77:11-12)[1]

"...We're here to talk about lies." (*Id*. at p.77:13-14)

"...based on their lies." (*Id*. at p.77:17-18)

"...anything to the contrary was actually a lie." (*Id*. at p.79:6-7)

"...but, again, none of that was true." (*Id*. at p.80:11)

"...is about people and it's about lies." (*Id*. at p.82:7-8)

"...people and lies." (*Id*. at p.83:13)

What the government did was hide all its own lies and fabricate McDuff's alleged lies. The government's penny dreadful is a chronicle of slip-shod prosecution, infused with government perjury, deceptive sleight of hand, all typical quills in a pettifogger's quiver.

The government withheld some 8,000 pages of *Brady*, *Giglio* and *Jencks* materials from McDuff that were discovered when the Discovery (SEC investigative file) was delivered in a follow-on proceeding on and after the June 15, 2016 hearing. See H00002 p.10:19 to 11:4, and H00011 p.228:7-16. The Documents delivered all post-trial, post-appeal, demonstrating a gross

[1] Bates # H00001 to H01295 denotes the referenced item(s), which are located in APPENDIX "1", attached to this *Habeas* petition. Note: APPENDIX "2" is a courtesy copy containing the full transcripts of any Deposition, Testimony, or Recording referenced in APPENDIX "1". A compendium source brief is provided as APPENDIX "3".

violation of Due Process with "extreme scienter" violating *Brady*, violating *Giglio*, violating *Jencks*, violating the *Jencks* Act, violating their collective oaths of office, and all sense of fundamental fairness and fair play. Finally, Judge Schell announced his bias (appearance of bias), three years prior to McDuff's arrest, trial, and conviction at Lancaster's sentencing, finding McDuff guilty and sentencing him to "Joint and Several restitution along with Lancaster" - all years prior to McDuff's trial - as his intent all along was to recover for the victims.

When the government overreaches, as in the prosecution of Senator Ted Stevens and McDuff, it exposes its underbelly, as it did in the SEC follow-on civil proceeding [*In the Matter of Gary L. McDuff*, File No. 3-15764]. Judge Elliot in that case ordered the disclosure to McDuff, for the first time (delivered in 2016), the Department of Enforcement (DOE) - SEC's enforcement arm - investigative files (which included the criminal case and the receiver Quilling's file in part) In those files the Medusa-like heads of the AUSA, DOE, and Quilling were exposed in a virtual Pandora's box of government corruption.[2] Marcus Aurelius Antonius advises that all "government Frauds and Secrets are always discovered." Consistent therewith - the government frauds and secrets (perjury) were discovered in the civil follow-on proceeding on June 15-16, 2016.

For more than half a century, the Supreme Court has taught, in its admonitions of prosecutors, the platitudes that adorn the halls of the Department of Justice. The Court teaches that the principal in prosecutions "is not that it shall win a case, but that justice shall be done."[3] Expanding on this principal, Chief Judge Martin[4] voiced his concerns; "What if Uncle Sam sues you, charges you with a criminal violation, even gets an indictment and proceeds, but they are wrong. They are not just wrong, they are willfully wrong, they are frivolously wrong. They keep information from you that the law says they must disclose. They hide information. They do not disclose exculpatory information to which you are entitled. They suborn perjury."[5] Next, the government appoints you incompetent counsel to represent you. D. Kyle Kemp. Mr. Kemp

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[2] Greek Mythology - one of the three Gorgons slain by Perseus. Greek Mythology - the first woman; out of curiosity, opens the box containing all human ills into the world.

[3] *Berger v. United State*s, 295 U.S. 78, 88 (1935); that admonition was reiterated again 64 years later by the Supreme Court in *Strickler v. Greene*, 527 U.S. 263, 281 (1999).

[4] Fifth Circuit U.S. Court of Appeals

[5] *United States v. Hoffman*, *et al* 2012 U.S. App. Lexis 7050, April 2, 2012 (5th Cir. No. 09-12129) (Martin, C.J. Dissent)

tells you, "I've never taken a case to trial and won." (See APPENDIX "1", p. H00020) "I've never won an appeal and I don't know anything about securities law."[6] This cauldron, this witch's brew, conspired to lay the foundation of this case.[7]

Summary

The government charged Gary L. McDuff with, ultimately, two counts in an August 13, 2009, Superseding indictment: Conspiracy to commit wire fraud *18 U.S.C. § 1349* and Money Laundering *18 U.S.C. § 1956(a)(1)(A)(1)*. See H00784-792. A jury returned a verdict of conviction on March 27, 2013 on both counts. The verdict was a general verdict and the jury charge is in error. The government committed perjury (government agent lied) and suborned perjury, violated *Brady*, *Giglio*, *Jencks*, and committed fraud upon the court in order to obtain a conviction. Because of the structure of the jury charge, and the nature of the perjury by the government, the *Brady*, *Giglio*, *Jencks*, and Ninth Amendment issues, the judgment of conviction is *infirm*. McDuff's fundamental rights under the Ninth Amendment were violated. To add insult to injury, the trial court appointed D. Kyle Kemp as stand-by counsel and as appellate counsel. As appellate counsel he authored perhaps the worst written white collar brief ever submitted to the Fifth Circuit, was dishonest with McDuff, and conspired to injure McDuff's appellate rights, and did injure McDuff's appeal. The BOP obstructed Justice by destroying legal materials, and prejudiced him as follows:

First, the government lied to the court and jury. McDuff notes herein a partial collection of the government's lies, *Giglio* evidence, hidden in the SEC investigative file not produced before trial, including:

- **The lie** by a government attorney, Jessica Magee, called to testify that the PPM (Private Placement Memorandum) a security at issue was not registered with the SEC. It was registered on May 27, 2003. [See Exhibits H00401-409, and H00053 p.55:3-21, and Lancaster's trial testimony [Cr. Dkt. 186, p. 202:25 - 203:2, H00160-161].]

- **The lie** by a government attorney, Jessica Magee, called to testify (in March 2014) that Gary Lancaster was not licensed to sell securities. He was. He has securities licenses 6, 7, 63, and 65 at all times material hereto. See Exhibits H00387-400 Resume and NASD registration attached, and Cr. Dkt. 115, PageID 988-89, and Lancaster's 11/17/05 deposition p.10:12-16,

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[6] Kyle Kemp Statement (attached as Exhibit H00020)

[7] "Double, double toil and trouble; Fire burn and cauldron bubble." *Shakespeare, Macbeth*, Act IV, Scene I.

H00027; and *ONESCO v. Broderson*, 2007 U.S. Dist. Lexis 11447 (C.D. Mich. 2/14/2008). And see H00090-91, p.165:25 to 166:3; and H00958 ¶ 6.; H01129, p.8:19; H01133, p 46:28.

• **The lie** that the investors were deceived into believing they had insurance on their investments. They did not and they all signed documents acknowledging same. Cr. Dkt. 115, PageID 1009; Cr. Dkt. 163-5, PageID 1967. H00411-421.

• **The lie** that McDuff was somehow involved in the alleged insurance lie. In a separate prior prosecution (Stark trial was in 2012, McDuff trial was in 2013) the government, including members of the same prosecution team, used evidence (government wires - recordings) that disproves that allegation. See Exhibit 54. (In *U.S. v. Stark* 3:08-cr-00258-M (N.D.Tex. 2008) quote:

> **Stark:** Yes. That is correct. Because your principal is insured through ACE Finance.
> **Rumpf:** Even though it's in your account?
> **Stark:** Correct. Because my account is actually insured by Lloyds of London.

See attached as H00325. (Dkt. 277-3, p.3 of 13, lines 4-8.)

• **The lie** that Reese had a cease and desist order that was not disclosed to investors, the witnesses who testified about Lancorp Fund I were investors who were recruited between September 2003 and August 2004 and Reese's Desist and Refrain order was not issued until August 16, 2004, and was not even final (an initial order that was remanded twice) until 2009. McDuff could not disclose an event that was non-existent. See Exhibit H00434-462 [Gov't Ex. 33]. Further the Order was remanded. [Not admitted as evidence, the court misinformed Jury of its contents. This is structural error, *per se*].

• **The lie** that McDuff was previously involved in fraudulent activity with Reese. See Dkt. 16, p.4 ¶¶ a. and b., H00787 and see H00464 from the SEC investigative file discovered on 6/15/2016.

• **The lie** that Lancaster pled guilty to a conspiracy involving McDuff. A review of Lancaster's sentencing transcript reveals that Lancaster pled guilty to a separate conspiracy involving Lancaster and Reese, but not McDuff. Prosecution team member Quilling testified in the follow-on proceeding on June 15, 2016 (See p.222:2-11, H00009) that McDuff had nothing to do with the second conspiracy.

• **The lie** that there was one conspiracy when, in fact, there were three. The Lancaster sentencing conspiracy and the two Lancorp Funds. Lancorp Fund I (allegations include McDuff). Lancorp Fund II (allegations include Lancaster and Reese, but not McDuff). The government mixed together the three conspiracies and offered documents from all conspiracies - deceiving the jury and constructively amending the Indictment - violating the 5th and 6th Amendments.

The government lies infected the entire trial. They were knowing lies, oft repeated, despicable conduct authored and offered by the government. There were many other lies as well, and the government lies were material.

Second, the government charged as one conspiracy, what was, in fact, three conspiracies. The two of which did not even include the allegation of McDuff's participation.

Third, the Government withheld *Brady*, *Giglio*, and *Jencks* material.

Fourth, the jury charge is fatally in error. The court instructed the jury that the predicate charge to support count 2, money laundering, was wire fraud. McDuff was convicted of conspiracy to commit wire fraud - not wire fraud - as the court knows, conspiracy does not even require a predicate act, making the burden less on the jury a fatal flaw in the money laundering count. The court included wire fraud in the jury instructions - McDuff was not charged with wire fraud. The court failed to include a unanimity instruction. The jury charge - allowed conviction outside the indictment. The court included an aiding and abetting charge against Lancaster, a non-defendant.

Fifth, The Government violated the Ninth Amendment guarantee of fundamental fairness.

Sixth, D. Kyle Kemp was incompetent and his incompetency infected the entire trial and appeal. While Kemp was stand-by counsel at trial, he was incompetent, a feat almost impossible to accomplish - but he succeeded in his gross incompetence. Kemp failed the routine task of delivering discovery. Kemp, alternatively, did not review the discovery, and alternatively, if Kemp did review the discovery, he breached his duty as an officer of the court by not advising the court of the AUSA's subornation of perjury. On appeal, Kemp breached his duty of loyalty and fealty to McDuff and lied to him, failed to comply with the briefing requirements of the Fifth Circuit and abandoned McDuff after lying to him. These efforts and conduct violate *Strickland v. Washington*.[8]

Seventh, Counselor Landry and BOP personnel conspired to obstruct justice by blocking McDuff's access to Court appointed counsel and the courts. OIG (Office of Inspector General) - investigation not withstanding the prejudice had occurred.

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[8] Kemp was incompetent. Whether intentional or not, his conduct simply did not meet the minimal Standards of Attorneys and Officers of the Court. Whether he knew he was incompetent (he did and noted same to McDuff - seen *infra*) is not the issue; he did not comply with the Bar Rules (to make himself competent) nor associated with competent counsel, nor meet the minimum standards of an officer of the court who has an independent duty to inform the court when the government offers perjured testimony and/or commits perjury itself. He did not, and his failure infected the trial and appeal.

Eighth, the term "scheme to defraud" is unconstitutionally vague. [The government alleged an elaborate "scheme to defraud" between McDuff and Lancaster and Reese.]

Ninth, the Court committed structural error by its predisposition to find McDuff guilty and had ulterior motives prior to trial. On October 6, 2010, at Lancaster's sentencing, the Court actually stated on the record:

"Mr. Lancaster, because it's more important to me that you pay the restitution you owe than a fine, I'm not going to impose a fine. I want the victims to get their money back as soon as possible. You will owe interest on this amount along with the other defendants, McDuff and Reese, because the victims are entitled not only to their money back but interest on their money." *United States v. Lancaster*, Case No. 4:09CR231 (p.50:19-25). McDuff was not even arrested yet, not tried until 2013, three years later, but the Court had found him guilty - a structural error - demonstrating ulterior motive and bias by the Court.

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I. PROCEDURAL BACKGROUND

1) On June 11, 2009, McDuff was indicted in the Eastern District of Texas on a charge of conspiracy to commit wire fraud. *18 U.S.C. §1349*, *United States v. Robert Thomas Reese* and *Gary Lynn McDuff*, 4:09-cr-00090 (E.D. Tex. 2009) [Dkt. 1][9]

2) On August 13, 2009, a charge of money laundering was added in a superseding indictment, Case No. 4:09-cr-00090 (E.D. Tex. 2009) [Dkt. 16] *U.S. v. Reese and McDuff*.

3) The criminal charges against Reese and McDuff arose from the same facts and events alleged in Civil Case No. 3:08-cv-526-L, *Securities and Exchange Commission v. Gary L. McDuff*, *Gary L. Lancaster* and *Robert T. Reese* (N.D. Tex. 2008). Default Judgment was granted. That judgment is currently on appeal. (Rule 59, 60) (Cause No. 16-10691).

4) On October 6, 2010, at Lancaster's sentencing in Case No. 4:09-CR-231; *United States v. Lancaster*, the U.S. District Court pronounced McDuff guilty, prior to trial and assessed punishment involving recovery to victims - a structural error - plain error - all prior to trial (p.50:19-25). See H00143. See *In re Antar*, 71 F.3d 97 (3rd Cir. 1995).

5) On March 26-27, 2013, McDuff's criminal case proceeded to trial. McDuff did not participate in the trial based on advice from Gordon Hall, who held himself out to be a law professor but who was actually a con man. (See *U.S. v. Hall*, 6:13-cr-00184 (U.S.D.C. Arizona 2013); *U.S. v. Hall*, 6:13-cr-00170 (U.S.D.C. Eastern Dist. N. Carolina 2013).) The jury convicted McDuff on both counts. *U.S. v. McDuff* [Dkt. 107].

6) On April 16, 2014, this Court sentenced McDuff to 300 months of incarceration, followed by three years of supervised release. *U.S. v. McDuff* [Dkt. 153]. 240 months on count one. 240 months on count two with 180 months to run concurrent and 60 months to run consecutive.

7) On April 16, 2014, Judge Schell arguably, unconstitutionally ordered McDuff not to file anything further with this Court without first obtaining leave to do so. *U.S. v. McDuff* [Dkt. 156].

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[9] "Dkt." references in this motion are to entries on the docket in this case, unless otherwise indicated.

8) On April 17, 2014, Judgment was entered, as to Gary Lynn McDuff, Count(s) 1s, 240 months imprisonment, 3 years supervised release, $6,563,179.49 restitution, $100.00 special assessment fee; Count(s) 2s, 240 months imprisonment with 180 months to run concurrent and 60 months to run consecutive with Count 1; 3 years supervised release concurrent with Count 1, $100.00 special assessment fee. *U.S. v. McDuff* [Dkt. 158].

9) On April 30, 2014, McDuff filed a motion for leave [Dkt. 162] to file: Motion for Reconsideration. This Court granted leave to file the motion(s) on May 2, 2014. *U.S. v. McDuff* [Dkt. 164].

10) On June 16, 2014, this Court, at Dkt. 170, denied McDuff's:

- Motion for Reconsideration [Based on Newly Discovered Evidence] [Dkt. 163]
- Petition for [Oral] Hearing [Dkt. 163]
- Motion for New Trial [Dkt. 163]

11) On June 27, 2014, McDuff filed:

- Motion for Leave to File Notice of Appeal [Dkt. 171]
- Notice of Appeal
- Motion for Appointment of Counsel on Appeal [Dkt. 171]
- Motion to Reserve Right to Colorable Showing of Factual Innocence [Dkt. 171]

12) On July 21, 2014, McDuff filed a Notice of Appeal as to [Dkt. 158] Judgment. [Dkt. 173].

13) On July 21, 2014, this Court granted McDuff's Dkt. 171 motions: Leave to file, Notice of Appeal, Appointment of Counsel, Right for Colorable Showing of Factual Innocence [Dkt. 176].

14) On August 4, 2014, McDuff filed:

- Petition / Motion for Interlocutory Appeal [Dkt. 177].

15) On November 13, 2014, the Court of Appeals sua sponte consolidated the Direct Appeal and Interlocutory Appeal 14-40780 and 14-40905, naming attorney D. Kyle Kemp as appellant attorney for both. See Appellate Docket, H00779.

16) On November 10, 2014, McDuff filed a motion to substitute counsel (D. Kyle Kemp) for lack of communication or appeal brief preparation. Following counsel's assurances to the appellate court of improvement of his advocacy, he was continued as appellant counsel. Appeal

Dkt. 14-40780, 03/09/2015. [7773984-2] [10] [D. Kyle Kemp advised McDuff pretrial that he had never tried and won a case in federal court. Did not know Securities law. And had never won an appeal.] (See attached statement of attorney D. Kyle Kemp) ("During my initial meeting with Mr. McDuff immediately following the appointment by Magistrate Judge Dan D. Bush, I was questioned by Mr. McDuff regarding my experience in defending against securities fraud allegations in the Eastern District. Answering Mr. McDuff's specific questions, I acknowledged that I had never before defended a client against Securities fraud allegations and prevailed.") (See APPENDIX "1" Exhibit H00020.)

Mr. Kemp did not have or take any specialized training in securities law, did not refer the case to, or associate with, a competently trained counsel with particularity in securities law, and did not consult with any competently trained counsel during his time of representation of Mr. McDuff.

17) On May 22, 2014, the appellate court denied attorney D. Kyle Kemp's motion to file an oversized consolidated brief, for failing to comply with the 10-day requisite notice requesting leave to file excess pages. The appeal brief was stricken because attorney Kemp did not comply with the applicable rules. Ten days to correct the page count was given. Appeal Dkt. 14-40780 / 14-40905. [7918214-2].

18) On June 18, 2014, attorney D. Kyle Kemp made the appellant's brief "sufficient" by reducing the word count to 13,526 words. The word count reduction eliminated interlocutory appeal issues and deprived appellant McDuff of their review. Appeal Dkt. 14-40780 / 14-40905, 06/18/2015 [7928732-2]. The Kemp Brief was substandard.

19) On August 11, 2015, McDuff filed a motion with the appellate court to proceed *pro se* on appeal or alternatively to be permitted to withdraw the defective, incomplete brief filed by attorney D. Kyle Kemp on 06/03/2015 for not presenting the interlocutory appeal (14-40905) issues. [7972409-2].

20) On August 11, 2015, attorney D. Kyle Kemp filed an unopposed motion to suspend appellant's reply brief due deadline until the Court ruled on McDuff's *pro se* motion to proceed

[10] 5th Circuit Docket number hyperlink shown in [ ].

pro se or alternatively to strike the incomplete June 3, 2015 brief. Appeal Dkt. 14-40780 [79724093-2]. The Court granted that motion on 08/20/2015. [7983281-2].

21) On October 7, 2015, the Court denied relief (CLERK ORDER: Gary Lynn McDuff has filed a *pro se* motion seeking to strike his opening brief in each of these consolidated cases and substitute a brief that would jointly cover the issues raised in both cases. In the event the court finds McDuff's *pro se* motion to be improper, given that he is represented by counsel, he requests to proceed *pro se*. McDuff's *pro se* request to file a substituted brief is denied, because he is represented by counsel on appeal. And because these cases are fully briefed, it is too late for McDuff to seek to proceed *pro se*. Accordingly, McDuff's *pro se* motion to strike is DENIED. (IN DETAIL) [7972409-2]; [7972409-3]. [14-40780, 14-40905] (DMS).)

Note: The reply brief due deadline suspended by the Court on 08/20/2015 was never restarted to give McDuff an opportunity to file a reply-brief. McDuff did not understand why he was deprived of a reply-brief filing opportunity until September 2016 when 5th Circuit Deputy Clerk Nancy Dolly informed McDuff that 5th Circuit Clerk's notes show that D. Kyle Kemp telephoned deputy clerk Dawn Schulen on or about October 27, 2015, stating that "no Reply-Brief was necessary" [clearly against McDuff's interest]. Kyle Kemp waived McDuff's Appellate rights against McDuff's expressed instructions. Most of McDuff's subsequent filings were done in confusion due to D. Kyle Kemp's subterfuge, by not following instructions and calling the 5th Circuit (unbeknownst to McDuff) to undermine McDuff's substantive rights. A fact discovered by McDuff in September 2016, with the assistance of 5th Circuit Court Clerk Nancy Dolly. Kemp deceptively kept this information from McDuff.

22) On October 27, 2015, deputy clerk Dawn Schulen entered in appeal dockets 14-40780, 14-40905 the notation "BRIEFING COMPLETE." November 2, 2015, D. Kyle Kemp filed a false and misleading letter to the Fifth Circuit. See H00763-766 attached.

23) On November 6, 2015, attorney D. Kyle Kemp filed a motion to withdraw as counsel. Appeal Dkt. 14-40780 [8053797-2].

24) On November 12, 2015, McDuff filed a pro se motion to place under seal attorney D. Kyle Kemp's 11/2/15 letter violating attorney-client privilege. Appeal Dkt. 14-40780 [8049465-2], Declaration by McDuff in Support [8057253-2], Motion to Proceed *Pro Se* [8057253-3], Motion to Disqualify Attorney [8057253-4], Motion to File Corrected Brief [8057253-5].

25) McDuff's Appeal was calendared for oral argument on 01/08/2016 in New Orleans in the East Courtroom AM session. Appeal Dkt. 14-40780, 14-40905. Oral argument was necessary to

elucidate all the fraud and perjury. On 12/22/2015 oral argument was canceled following attorney D. Kyle Kemp's motion to withdraw as counsel.

26) On January 8, 2016, McDuff filed his Corrected *Pro Se* Appellant's Brief and Record Excerpts. No action was taken "because the Court has not yet ruled on appellant's motion to file a *pro se* appellant's brief." See H00776-777.

27) On February 2, 2016, the appellate Court affirmed McDuff's conviction in an unpublished opinion before affording McDuff an opportunity to file a Reply-Brief, with or without assistance of counsel, or an opportunity to withdraw the defective / incomplete brief of 06/03/2015. On that same day, the **Court:**

- Denied McDuff's motion for judicial notice [8097863-2]
- Granted Kemp's motion to withdraw as counsel [8053797-2]
- Granted McDuff's motion to proceed *pro se* on appeal [8057253-3] (meaningless relief, post-decision)
- Denied McDuff's motion to file a corrected brief [8057253-5]
- Granted McDuff's motion to seal letter of attorney D. Kyle Kemp which violated attorney/client privilege [8057253-2]
- Denied as moot McDuff's motion to disqualify attorney D. Kyle Kemp [8057253-4]
- Denied McDuff's motion to withdraw filings of D. Kyle Kemp [8057253-6].

28) On February 3, 2016, the appellate court entered and filed Judgment.

29) On February 18, 2016, McDuff filed a petition for rehearing with the appellate court. On March 8, 2016, the appellate court denied the petition for rehearing. Appeal Dkt. 14-40780, 14-40905 [8130479-2].

30) On March 15, 2016, McDuff filed a motion to stay the mandate. On March 17, 2016, McDuff filed exhibits in support of his motion to stay the mandate. Appeal Dkt. 14-40780, 14-40905 [8154001-2]. That same day, the appellate court denied McDuff's motion to stay the mandate and issued the Mandate.

31) On March 31, 2016, McDuff filed a motion to recall the mandate and memorandum in support. Appeal Dkt. 14-40780, 14-40905 [8167731-2]. On April 5, 2016, the Court denied McDuff's motion to recall the mandate pending the filing of a petition for a writ of certiorari.

32) On March 17, 2016, this Court received the Mandate of the United States Court of Appeals for the Fifth Circuit for the Notice of Direct Appeal [Dkt. 173], and the Notice of Interlocutory Appeal [Dkt. 177] in criminal case no. 4:09-cr-00090-RAS-DDB-2. [See Dkt. 199, dated 03/17/2016.]

33) On June 15 and 16, 2016, the SEC had a follow-on civil proceeding. The government produced its investigative file pursuant to ALJ Elliot's order. McDuff received 8,000 pages of files he had never seen before - containing *Brady*, *Jencks*, and *Giglio* evidence. See Administrative Proceeding Docket, H00878-879, and Order, H00894-895, p.2 ¶ 8(a).

34) This Habeas Corpus *Title 28 U.S.C. § 2255* petition is timely and is now ripe for consideration.

Extra Docket Procedural Background

(a) On February 21, 2014, the SEC initiated a follow-on proceeding seeking a lifetime ban against McDuff for the conduct essentially alleged in the criminal case. See Administrative Proceeding File No. 3-15764, *In the Matter of Gary L. McDuff*, H00880-884.

(b) On March 27, 2014, the ALJ ordered that the SEC investigation file be made available for inspection and copying.

(c) On June 15 & 16, 2016, the ALJ had a hearing on the merits.

(d) Beginning on June 15, 2016, and ending on July 12, 2016 the SEC DOE's investigation file in relevant part was delivered to McDuff (copies of the file). The records constituted some 8,000 pages.

II. FACTS

The government alleged that McDuff and Robert Thomas Reese (deceased at the time of trial) and Gary Lynn Lancaster (GLL) violated *18 U.S.C. § 1349*; conspiracy to commit wire fraud. (Dkt. 16; p.1) (Dkt. 96; p.3).

The government also alleged that McDuff and Robert Reese violated *18 U.S.C. § 1956(a)(1)(A)(i)* and that GLL was guilty of *18 U.S.C. § 2* aiding and abetting; Laundering of money investments. (Dkt. 16; p.7) (Dkt. 96; p.7).

(a) To meet its burden, the government alleged that McDuff and/or Reese and/or Lancaster engaged in false representations and material omissions in the sale of securities in a PPM (prospectus) called Lancorp Financial Fund Business Trust (Lancorp I)[11] (Dkt. 16; p.1) (Dkt. 96; p.3-4). The government alleged multiple false representations and material omissions attributable to McDuff or Reese or Lancaster. These alleged "false allegations" include in part:

1. The representation that the Lancorp Fund I had been registered in a *Reg D-506* filing.
2. The representation that GLL was a registered advisor under the Investment Advisor Act of 1940.
3. The failure to disclose that Reese was under a Cease and Desist order from the State of California barring him from soliciting investments.
4. The failure to disclose that Reese was involved with McDuff in these previous fraudulent securities offerings.
5. The representation that the Lancorp Fund I maintained an insurance policy to protect any investment against a loss.
6. The representation that GLL had been previously involved with a similar and successful program in Europe.
7. The representation that all amounts invested in the Lancorp Fund would remain in the Lancorp Fund's Bank account. (Dkt. 16; p.3-5) (Dkt. 96; p.3-5)

The government alleged that on March 21, 2005, McDuff and Reese conducted a financial transaction affecting interstate and foreign commerce, that McDuff and Reese, aided and abetted by Lancaster, caused Leitner to sign and send check number 1133 in the amount of $500,000.00 from bank account number xxx-xxx6683, in the name of "Megafund Corporation Operating Account," located at Wells Fargo Bank, N. A., 4975 Preston Park Blvd., Suite 100, in Plano, Texas, in the Eastern District of Texas...to Lancorp Financial Group, LLC in Oregon...which involved the proceeds of a specified unlawful activity, that is a violation of *18 U.S.C. § 1343* (wire fraud)... (Dkt. 16; p.7). McDuff was never charged or convicted with wire fraud. Lancaster pled guilty to *§ 371* conspiracy charge. Reese pled guilty to *§ 1349* wire fraud conspiracy. No one in this case was ever charged with or found guilty of wire fraud. The specifics adduced at trial by the government are that:

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[11] There were actually two Lancorp Funds in existence. The government hid that from the jury and the court. Lancorp Fund I and Lancorp Fund II. The government actually offered evidence from both funds at trial. However, in a follow-on civil proceeding, the government confessed that McDuff had nothing to do with Lancorp II. (See pages 220:14 to 222:11 of the June 15, 2016 hearing testimony of Receiver - Michael Quilling, APPENDIX "1" Exhibit H00009)

(b) Between September 19, 2003 and July 5, 2005, McDuff, Lancaster and Reese agreed to solicit investments from individuals for a Private Placement Memorandum (PPM) based on alleged false material representations and omissions. The government alleged that McDuff and Reese agreed to solicit investments by agreeing to misrepresent or omit the following facts:

1. There was insurance to protect the investments;
2. Reese had been barred from soliciting investments in the State of California;
3. McDuff had been previously convicted of a felony and therefore could not solicit investments;
4. Lancaster was not licensed to solicit investments;
5. Lancaster had experience in PPMs when, in fact, he did not.
6. That the alleged false material representations of the conspiracy used or planned to use wire communications in interstate commerce.

Conspiracy to commit wire fraud and money laundering resulting from proceeds of "wire fraud" were the only counts. No one was charged with or convicted of substantive wire fraud.

McDuff, based on the teachings of law professor Gordon Hall (actually a con-man), did not participate in the trial and rejected counsel. The Court sentenced McDuff in retaliation for proceeding to trial to 240 months for conspiracy to commit wire fraud and 240 months for money laundering, with 60 months running consecutively, for a total of 300 months. The Court had, prior to trial in October 2010, pronounced McDuff guilty and assessed penalty - all years prior to McDuff's arrest, conviction, or the trial itself. (See H00143, Lancaster's sentencing on October 6, 2010, p.50, Lines 19-25.)

Relevant Extra Judicial Facts

(c) The prosecution team consisted of AUSA Shipchandler, Case Agent Ron Loecker, SEC Attorney Julia Huseman, SEC Attorney Jessica Magee, Lancorp Receiver and investigator Michael Quilling, AUSA Lopez, and SEC Chief Eric Werner.

Prosecution Team Roles

- AUSA Shipchandler and Lopez - tried the case
- Case Agent Ron Loecker - Case agent in: *U.S. v. McDuff*, *U.S. v. Lancaster*, *U.S. v. Stark*, *U.S. v. Leitner*, *U.S. v. Reese*, *SEC v. Megafund*, *SEC v. McDuff*, *SEC v. Stark*, *SEC v. Lancaster*, *SEC v. Reese.*
- SEC Attorney Julia Huseman - conducted investigations (parallel - civil investigations), depositions of:: Gary Lancaster (2), Stanley Leitner (1), J. Stephen Coffman (1), Larry

Frank (1), Gregg Harris (1), Norman Reynolds (1), Steven Renner (1), John McDuff (1), Roger McDuff (1), Jerry Hobbs (1), Gordon Brown (1), Kenneth Humphries (1), Robert Fridd (1).

- SEC Attorney Jessica Magee - Along with Loecker and Quilling conducted investigations into Lancorp, Megafund, and the Stark enterprises, was lead counsel in the Lancorp civil prosecution; and, was a material witness in McDuff's criminal trial.
- Case Agent Ron Loecker, SEC Attorney Jessica Magee, and Quilling testified at *U.S. v. McDuff* trial. Ron Loecker actually participated at trials of Leitner, Stark, McDuff, and assisted with Lancaster's plea.
- Ron Loecker was present at Counsel table throughout the trial of McDuff, Stark, Leitner and was aware of the false, perjured testimony of Jessica Magee, and others, and remained silent. Ron Loecker testified falsely as noted herein.
- SEC Chief Eric Werner helped prepare Lancaster's 2005 declaration underlying the entire case.

III. NEWLY DISCOVERED POST-TRIAL DOCUMENTS

The Court appointed Kyle Kemp to facilitate the delivery of discovery to McDuff. Documents were kept in four locations. (1) With the SEC. (2) With the AUSA. (3) With the FBI. (4) With the Receiver. All four locations were with members of the prosecution team, See section of McDuff's brief herein, *Ante* V. D), page 24-26. Based on Kemp's representation. There were 15-20 legal boxes at multiple locations. H00020, H00363:4, H00880, and H00894 ¶ (a). Some of the material may be duplicates - that is currently unclear. Fifteen (15) days prior to trial, the government made its delivery of *Jencks* and *Brady*, pursuant to the trial court's pre-trial order. The list of documents disclosed are approximately 1000 pages of documents noted below. Post-trial, in a follow-on proceeding, the ALJ ordered the SEC to produce its entire investigative file to McDuff. H00363. The file was approximately 18-20 legal boxes of materials. H00188. The files were reviewed and 8000 pages were copied and produced to McDuff at FCI-Low Beaumont. H00894 ¶ 8.(a). All of McDuff's arguments herein are not, to the best of McDuff's knowledge, based on the documents produced by the government pre-trial pursuant to the judge's order (and relied upon by McDuff in his decision to not participate in trial). McDuff's arguments on *Jencks*, *Brady*, *Giglio*, Court errors, Ninth Amendment, enumerated lies of the government, multiple conspiracies, and all other arguments (Fifth Amendment and Sixth Amendment) are based on the other seven (7) thousand pages not produced to McDuff, and not properly reviewed by Kemp pre-trial and/or delivered to McDuff.

A) Government Discovery Produced Pursuant to Court's Pre-Trial Order

Brady Material, *Jencks Material* & *Giglio Material* provided to McDuff 15 days prior to trial:

(a) Government's Exhibit List consisting of 57 trial Exhibits, see Dkt. 99, PageID #602-606, a Witness List of witnesses the government represented it would rely on to introduce each exhibit. Also see revised witness from Renner to Roseland to introduce exhibits 36-40 (Dkt. 99, PageID #605) (compare to Dkt. 108 &109 revealed to McDuff on last day of trial 3/27/2013). Attached as H00799-817.

(b) FBI's 302s and IRS Interviews and NCICs on: Scot Arnold Bennett, Marvin Langsam, Derek Joyner, William Hanson, Lonnie Gibson, Henrietta Charters, John Blandi, Charlene Prins, Harold Pals – *ONESCO*, Thomas Nemes – *ONESCO*, Larry Miracle, Peter Weiss, Scott Walls, William Summerton, Thomas Robertson, Bert Baumer, Dan Cui, Kevin Herring, Gary Lancaster, Stanley Leitner, Mia Flannery, Barbara Allen, Don Hendrickson, Thomas Ferrara, Sammy Cattan – *ONESCO*, Richard Holmes, Frances Lynn Benyo, Gary McDuff, Robert Reese

(c) June 30, 2005 Declaration of Lancaster consisting of 6 pages only. Exhibits 1 through 7 were not produced, though referenced in the declaration. See H00604-625.

(d) Copies of Megafund checks paid to Megafund investors and introducers.

(e) March 21, 2005 email from Lancaster to Reynolds regarding Lancorp Group dividing "Group's" earnings with MexBank.

B) Withheld *Brady*, *Jencks*, and *Giglio* (not produced pursuant to Court's Pre-Trial Order) including the SEC Investigative File:

- Norman Reynolds emails
- Norman Reynolds legal services billing
- Peoples Avenger Fund Registration documents
- Avenger Fund Form D filing & PPM
- Lancaster's November 17, 2005 Deposition
- Lancaster's October 6, 2010 sentencing transcript
- March 1, 2013, 6:15 PM email from Lancorp attorney Reynolds to FBI agent Smith regarding Gov. Exhibit #29 - Lancorp Fund II PPM

- Remand portion of Gov. Exhibit 33, Reese's Desist & Refrain Order
- Lancaster's Resume reflecting securities licensing, and prior securities experience
- Lancaster emails to investors & from investors
- James Rumpf (CI) recordings of Bradley Stark, pertaining to insurance for Lancorp
- Robert Reese's statement to SEC with attachments
- Stark Indictment (Lancorp is a victim)
- Stark trial transcripts, witness list and exhibit list
- Stark (Sardaukar Holdings) letter, email and a copy of ACE and Nationwide Insurance policies (covering Lancorp Fund I)
- Megafund Corporation General Ledger showing Commissions to introducers and customer files, letters, faxes (John McDuff and Roger McDuff responsible, not Gary McDuff)
- Frances Lynn Benyo's two separate investments in Megafund (impeachment of Benyo)
- Megafund, Lancorp Group JV (all pages) with NCND
- Emails between Lancorp & Megafund (exculpatory and impeachment evidence)
- Letters between Lancorp & Megafund (exculpatory and impeachment evidence)
- Insurance confirmation letters from attorneys Humphries and Schoenbach
- State of Oregon registration documents for People's Avenger Fund
- Lancorp Fund I Audit by Albert Masters
- Wilhelm Cadle's August 14, 2006 letter to Quilling regarding 1318 Minchen Dr. - property not belonging to McDuff- as well as Secured Clearing and Southern Trust Company - not belonging to McDuff
- Quilling's letter to investor Jewel Bevins copied to AUSA Yanowitch and SEC attorney Huseman
- Quilling's employee Dee Raibourn III's letter to Nigel Gilbert of Max International broker-dealer regarding First National Ban Corp. $2,000,000 (Lancaster and Tringham)
- Lancaster, Quilling, Loecker, Frank, and Harris witnesses testimony at Stark's trial
- Quilling, Loecker, Leitner, Gilbert and Chapman's testimony at Tringham's trial
- Quilling, Loecker, Harris, Frank, Leitner, Flannery testimony at Leitner's trial, obtained post-June 15, 2016, based on Exhibit and Witnesses list in SEC investigative file
- JV between Lancorp Group and First Asset Mgt. Corp. (Lancaster and Tringham)
- Max Intl. - Gilbert's letter to SEC attorney Huseman regarding recordings of Tringham and Lancaster
- Lancorp Group - Bank of America account transactions of $2 million to Max Intl.

- Cash Cards attorney Shiff email to Quilling employee Brodine regarding a Court Order needed to surrender MexBank records to Quilling
- Lancorp Group 1996 formation documents - certified
- Final Judgment of Lancaster and Reese in SEC case #3:08-cv-526-L
- May 30, 2005, 4:53 AM fax from McDuff to Flannery regarding May earnings due to MexBank, Value Asset, and First Global Foundation (not Lancorp) (never paid by Megafund)
- Lancaster's letter to Megafund to pay Lancorp Group 64.833% and MexBank 35.166% of March 2005 earnings
- US Bank business card of Lancaster reflecting him as - Vice President & Financial Consultant
- Megafund Articles of Incorporation
- Megafund/CIG, Ltd. (Leitner/Rumpf) JV
- Wire transfers from Megafund & CIG, Ltd.
- Declaration of Zawistowski, Jr. - Opinion of Megafund Fraud
- Letters/documents/faxes between Megafund and Lancorp Group, and ledgers
- Faxes from Secured Clearing to Mia Flannery
- Bank of America Funds Transfer Request by Lancorp Group to MexBank for $128,437.58
- Demand by Leitner to Rumpf to return all money to Megafund with dividends
- Demand by Lancaster to Leitner to return all money to Lancorp Group with earnings letter and email
- Client List of Megafund & 70 investors' files
- McDuff Brothers Megafund file [not Gary McDuff]
- Email from Flannery to Fridd regarding commissions of 1%
- Registration documents of First Global Foundation, in Panama - [Ramirez - not McDuff]
- Value Asset Management (VAM), Zurich, Switzerland, documents and letters from owner Edgar Rosset to Megafund, related to VAM's Megafund investments. And webpage www.vamag.net [not McDuff]
- MexBank SAT registration certificate to do business in Mexico - number MEX010124K54 issued to MexBank SA de CV [not McDuff]
- 1% Introducers fee agreement offered by Megafund to MexBank Leitner/Trejo [not McDuff]
- Megafund letter dated July 18, 2005, to all Megafund investors informing them of the SEC investigation and lawsuit

- MexBank investment in Megafund reflecting documents signed by Leitner and Trejo [not McDuff]
- First Global Foundation investment in Megafund reflecting documents signed by Wilhelm Cadle [not McDuff]
- Megafund ledgers reflecting commission payments to multiple introducers (all without securities licenses) [none reflecting Gary McDuff]
- Inbound and Outbound flow of money into and out of Megafund related to investors, earnings, commissions, refunds, etc., by date [none to Gary McDuff]
- June 14, 2005 Deposition of Stanley Leitner conducted by SEC DOE attorneys Eric Werner, Julia Huseman, at the Fort Worth, Texas SEC offices
- Megafund communications with SEC by letter and through his attorney Scott Baker
- Megafund info on Clocktower, LLC, the new name for the Megafund to conform to SEC rules. Per Attorney Aichele
- Megafund investor Sondra Martin - Hicks seeking $35 million investment from Megafund to make feature films
- Cilak Intl. Forex Trading Group, Articles of Corporation (Rumpf), list of Overseers and partners/investors, client list A-Z
- Email communications between SEC attorney Korotash and Leitner's attorney Baker
- Default on $16 million of CIG and Cilak investors by HMS in Linden, Canada, June 9, 2004 (when Megafund was formed)
- Plea Agreement and Factual Resume of Bradley Stark admitting to false representations and losses, incorrectly attributed to McDuff.
- Government's Exhibit List (Stark)
- Government's Witness List (Stark)
- Trial Stipulations - Stark's fabrication of fake insurance policies (ACE MBIA & Nationwide), Stark's fabrication of fake securities licenses
- Stark's proffer agreement
- Judgment of Bradley Stark reflecting Lancorp
- Sardaukar Holdings Subscription Agreement and supporting documents related to Stark's securities offering
- Formation Articles of Incorporation for International Consultants (re: Stark & Dudley)
- Sardaukar client files and transaction
- Sardaukar Profit Sharing Agreement
- Sardaukar Bank Records
- Larry Frank, James Rumpf, Aaron Keiter Cilak Intl. Corp. Resolutions

- Law suit between Rumpf, Kotsanis & Keiter and deposition scheduling
- Stark's answer to SEC lawsuit
- SEC attorney Webster's declaration regarding the activities of Megafund, Sardaukar, CIG, Cilak, Leitner, Bradley & Pamela Stark, and Rumpf - declaring safety of principal to investors [no mention of McDuff]
- Factual Statement of co-defendant Reese, dated Jan. 14, 2010, in Case No. 4:09-cr-00090
- Government's Trial Exhibit List and Witness List in Tringham's trial. Case No. 2:09-cr-00490 (C.D. Cal. 2009)
- Sardaukar/Stark disbursement authority wherein Stark signs as "Broker" and investor Schaefer signs agreeing to compensate the broker 20% of gross profits. And letter from Schaefer to Stark reflecting his understanding that his wife's principal funds are guaranteed by an insurance policy Stark had obtained

Post-Appeal testimony of SEC witnesses - Benyo, Biles, Quilling, and Loecker at follow-on proceeding - Follow on proceeding transcripts June 15, 2016, June 16, 2016, See OIP SEC Administrative Hearing Transcripts in Appendix "2", Tab 15 and 16.

IV. INCORPORATION

McDuff, hereby incorporates each and every paragraph and argument into each and every other paragraph as a basis of support. For example, instead of noting separately Kemp's gross incompetence multiple times under each Argument - McDuff, for the sake of clarity and broad application, incorporates it under every allegation herein.

Specific Incorporations

1. McDuff outlines numerous constitutional arguments throughout his brief. They encompass Due Process and 6th Amendment issues. Each of these and related arguments are specifically incorporated into McDuff's arguments regarding the ineffectiveness of Kemp - to demonstrate both his lack of qualifications, skill level, and his failure to perform to a minimum level required under *Strickland v. Washington*.

2. McDuff specifically incorporates his declaration and the exhibits thereto for two independent purposes. (H01281 - H01295)

First, McDuff incorporates his declaration to lay out a factual basis for the obstruction allegation noted herein, producing often times correspondence and relevant evidence denoting therein the BOP obstruction.

Second, McDuff incorporates his declaration in that he was *pro se* at trial. McDuff's declaration (in Appendix "1") (H01281-1295) demonstrates the alternate trial theory, along with impeachment of witnesses, and exculpatory nature of the *Brady*, *Giglio*, and *Jencks* materials withheld as noted herein; for purposes of demonstrating the arguments that would have been proffered to defeat the government's case - in addition to proving the falseness of the government's case - and attacking the credibility of the government witnesses.

Alternatively

McDuff makes each argument collectively and alternatively to provide himself the broadest possible scope of relief.

V. THE LAW

A) The Law Generally - *§ 2255*

28 U.S.C. § 2255 provides that a prisoner in custody under sentence of a court established by an Act of Congress who claims the right to be released upon a ground that the sentence was imposed in violation of the Constitution or laws of the United States [ ] or is otherwise subject to collateral attack may file for relief. A defendant can challenge his conviction after it is presumed final only on issues of Constitutional or jurisdictional magnitude, *Hill v. United States*, 368 U.S. 424, 428 (1962), and may not raise an issue for the first time on collateral review without showing both 'cause' for his procedural default and actual prejudice resulting from the error. *United States v. Frady*, 456 U.S. 152, 168 (1982). If the error is not constitutional or jurisdictional, "the defendant must show that the error could not have been raised on direct appeal and if condoned, would result in a complete miscarriage of justice." *United States v. Shaid*, 937 F.2d 228, 232 n.7 (5th Cir. 1991) (*en banc)*

Section 2255 of *Title 28 U.S.C.* reads in pertinent part:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum allowed by law, or is otherwise subject to collateral attack may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255(a)

In a proceeding to vacate a judgment, the petitioner bears the burden of proving his or her claim by a preponderance of the evidence. *Miller v. United States*, 261 F.2d 546, 547 (4th Cir. 1958).

McDuff meets the *Hill*, the *Frady*, and the *Shaid* standards. First, the documents were produced post appeal and could have not been raised at trial, post trial, or in McDuff's appeal.

Some newly discovered documents, led to other documents, additionally subsequent documents (found in the SEC investigative files) were not produced until post appeal - June 15, 2016. So in addition to the associating multiple errors of constitutional magnitude, McDuff also procedurally complies with the requirements. Further, the errors demonstrate a complete miscarriage of justice.

28 U.S.C. § 2255(f) provides for a 1-year period of limitation with varying limitations periods - McDuff's *§ 2255* is timely.

B) The Law on Government Lying, *Brady*, *Giglio*

In order for McDuff to prove a *Brady* violation, McDuff must show that the evidence withheld meets three elements. **First**, the evidence "must be favorable to the accused, either because it is exculpatory, or because it is impeaching." *Strickler v. Greene*, 527, U.S. 263, 281-82 (1999); see also *United States v. Bagley*, 473 U.S. 667, 676 (1985) ("Impeachment evidence...as well as exculpatory evidence falls within the *Brady* rule."). **Second**, the evidence "must have been suppressed by the government, either willfully or inadvertently." *Strickler*, 527 U.S. at 282. **Third**, the evidence must have been material such that prejudice resulted from its suppression. *Id.*; see also *Banks v. Dretke*, 540 U.S. 668, 691 (2004). The "touchstone of materiality is a 'reasonable probability' of a different result." *Kyles*, 514 U.S. at 434. Materiality "does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in [McDuff's] acquittal...[Rather], [a] 'reasonable probability' of a different result is... shown when the government's evidentiary suppression undermines confidence in the outcome of the trial." (internal quotation marks omitted). Exculpatory evidence need not show defendant's innocence conclusively. Under *Brady*, "exculpatory evidence includes material that goes to the heart of defendant's guilt or innocence as well as that which may well alter the jury's judgment of the credibility of a crucial prosecution witness."

United States v. Starusko, 729 F.2d 256, 260 (2nd Cir. 1984) (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972).

The United States Supreme Court has made plain, impeachment evidence may be considered favorable under *Brady* even if the jury might not afford it significant weight. *Kyles*, 514 U.S. at 450-51 (rejecting the state's argument that the evidence was "neither impeachment nor exculpatory evidence" because the jury might not have substantially credited it; according to the court, "[s]uch [an] argument...confuses the weight of the evidence with its favorable tendency.").

The Supreme Court further instructed in *Kyles* that "[a] defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." 514 U.S. at 434-35. "The rule is clear, and none of the *Brady* cases have ever suggested that sufficiency of the evidence (or insufficiency) is the touchstone." 514 U.S. at 435 (n.8). A court is not at liberty to "emphasize [ ] reasons a juror might disregard new evidence while ignoring reasons she might not." *Wearry v. Cain*, 136 S. Ct. 1002, 1007 (2016). Nor is there a requirement that the *Brady* evidence be deemed by the government to be significant, or that a government determination not to pursue a piece of evidence absolves it of its responsibility to turn it over to McDuff. The concept behind *Brady* itself relies on the principle that prosecutors bear an obligation to structure a fair trial for defendants. [say, for example, by not lying, and by producing *Jencks*, *Brady*, *Giglio* to McDuff] "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly...A prosecution that withholds evidence...which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice even [if]...his action is not the result of guile." *Brady*, 373 U.S. at 87-88. See further at Footnote.[12]

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[12] Between 1989 and 2003, Gross documented 340 exonerations; 144 by DNA evidence, 196 by other means. Gross, Jacoby, Matheson, Montgomery & Datil, *Exonerations In the United States 1989 through 2003*. JCLC, Vol. 95, 1ss. 2, Art. 5.

Between 1999 and 2000, thirty-nine defendants where convicted of drug charges in Tulia, TX, based on the uncorroborated word of a single dishonest undercover narcotics agent. In 2003, thirty-five were pardoned because it was shown that the undercover officer had systematically lied about these cases, and charged the defendants with drug sales that never occurred. See Polly Pess Hughes, "*Jury Pardons 35 in Tolia Sting.*" Hous. Chron., Aug. 23,

The United States Supreme Court has never recognized an affirmative due diligence duty on the part of McDuff, as to *Brady*, let alone an exception to the mandate of *Brady*. The Supreme Court precedent "lend[s] no support to the notion that [McDuff] must scavenge for hints of undisclosed *Brady* when the prosecution represents that all material has been disclosed." *Banks*, 540 U.S. at 695. In McDuff's case see government's delivery letter H00798 (showing delivery of *Jencks*, etc...). To the contrary, McDuff was entitled to presume that prosecutors have "discharged their official duties." *Id*. at 696 (quoting *Brady v. Granley*, 520 U.S. 894, 909 (1997). The duty to disclose under *Brady* is absolute - it does not depend on McDuff's actions. *Agurs v. United States*, 427 U.S. 97, 107 (1997) ("[I]f the evidence is so clearly supportive of a claim of innocence [as is the *Brady* demonstrated throughout McDuff's *§ 2255*] that it gives the prosecution notice of a duty to produce the duty should equally arise even if no request is made.") *Brady*'s mandate and its progeny are entirely focused on prosecutorial disclosure, not defense - not McDuff's actions. Shipchandler argues at sentencing that (i.e.) "he [McDuff] wouldn't use it if we gave it to him". H00188-189, p.14:22 - 15:2. – That is not the *Brady* standard. (emphasis added)

The Supreme Court's emphasis in the *Brady* jurisprudence on fairness in criminal trials reflects [Due Process] *Brady's* concern with the government's unquestionable advantage in criminal proceedings which the Court has explicitly recognized. See e.g. *Strickler*, 527 U.S. at 281 (reasoning that the "specials status" of the prosecutor in the American legal system, whose

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2003, at A1; Adam Lip tak, "*$5 Million Settlement Ends Case of Tainted Texas Sting*," N.Y. Times, Mar. 11, 2004, at A14; Laura Parker, "*Texas Scandal Throws Doubt on Anti-Drug Task Forces*," USA Today, Mar. 31, 2004 at 3A.

In April of 2004, the Dallas Sheetrock Scandal came to light regarding a January 2002 prosecution of 80 defendants in Dallas, Texas, were falsely charged with possession of cocaine, which when properly analyzed turned out to be powdered gypsum. Mark Donald, "Dirty or Duped?: Who's to Blame for the Fake-Drug Scandal Rocking Dallas Police? Virtually Everyone," Dallas OBSERVER, May 2, 2002, available at www.dallasobserver.com/issues/2002-05-02/news/feature.html - *Paul Doggan*, "*Sheetrock Scandal' Hits Dallas Police*," *Wash. Post*, Jan. 18, 2002, at A12.

Many of these incidents have the same thing in common as McDuff. Their prosecution and convictions were produced by systematic police perjury [in McDuff's case Jessica Magee and Ron Loecker] which were uncovered as part of a large scale investigation (as a result of the 8,000 pages of Division of Enforcement files produced to McDuff in the follow-on proceeding in 2016) (*In the Matter of Gary L. McDuff*; File No. 3-15764; Before the Securities and Exchange Commission). Perjury by police officers, forensic scientists or expert witness and civilian witnesses.

This type of systematic corruption and error occurs far too frequently in the American Jurispurdencal system. For example, in "*A Broken System: Error Rates in Capital Cases, 1973-1995*", Professor James Liebman and colleagues examined approximately 5,760 capital cases between 1973 and 1995 and found that the overall rate of prejudicial error in the American capital punishment system was 68%. In other words, in 7 out of 10 cases, there was reversible error. (Liebman, Fagan, & West 2000, p.i)

interest "in a criminal prosecution is not that [he] shall win a case, but that justice shall be done...explains...the basis for the prosecutor's broad duty of disclosure" (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). See also McDuff's Ninth Amendment argument *infra*. Requiring an undefined quantum of diligence by McDuff, however, would enable precisely that result because it dilutes *Brady*'s equalizing impact on prosecutorial advantage by shifting the burden on to McDuff, which is what Shipchandler argued at McDuff's sentencing hearing. See p.222:2-11, H00188:25 - H00189:3.

This focus on Shipchandler's requirement to disclose *Brady* evidence, and not due diligence by McDuff, is reiterated in the Supreme Court's approval of the shift in the traditional adversarial system that the *Brady* paradigm embraces. In *United States v. Bagley*, the Court instructed that "[b]y requiring the prosecutor to assist [McDuff] in making [his] case, the *Brady* rule represents a limited departure from a pure adversary model;" because Shipchandler was not tasked with simply winning the case, but with ensuring justice 473 U.S. 667, 675 (1985). A task at which he aborted and abjectly failed. Next, the Supreme Court placed the burden of obtaining evidence favorable to McDuff squarely on Shipchandler's shoulders. See *Kyles*, 514 U.S. at 437. (“[T]he individual prosecutor has a duty to learn of any favorable evidence known to others [prosecution team] acting on the government's behalf in the case.") That this obligation burdens Shipchandler does not undercut his obligation under *Brady*. The imposition of an affirmative duty of discovery or due diligence on McDuff erodes Shipchandler's obligation under *Brady* itself. The Supreme Court has cautioned against such a rule, rejecting the notion that McDuff's conduct or diligence is relevant in assessing "cause" for failure to raise *Brady* issues in the trial itself. In *Strickler*, the Supreme Court reasoned that because [McDuff] was entitled to rely on the prosecutor fulfilling its *Brady* obligation, and had no reason for believing Shipchandler had failed to comply, the failure to raise the issue earlier - other than a habeas proceeding - was justified. See *Strickler*, 527 U.S. at 286-289.

The Court in *Banks*, explicitly rejected what happened in this case; that "the prosecution can lie [Shipchandler, Magee, Loecker, Quilling, Benyo, Biles] and conceal [fail to produce *Jencks* - such as depositions, trial transcripts - declarations; fail to produce *Brady* such as the documents discussed herein not contained in the government's disclosure on March 11, 2013. See H00798-805.] and the prisoner [McDuff, *pro se*, with ineffective stand-by counsel, confined to jail] still has the burden to...discover the evidence, so long as the potential existence of

prosecutor misconduct [perjury and subordination of perjury, withholding *Jencks*, *Brady*, *Giglio*] claim might have been detected." 540 U.S. at 696.

Further, in *Agurs v. United States*, 427 U.S. 97 (1976) three lines of holdings by the Court are discussed. In the relevant line, *Mooney v. Holohan* 294 U.S. 103 (1935), the Court identified *Brady* evidence "that the prosecution's case includ[ed] perjural testimony and that the prosecution knew, or should have known of the perjury." *Id*. The court noted in *Mooney* "that such allegations, if true, would establish such fundamental unfairness as to justify a collateral attack on petitioner's conviction." *Agurs*, 427 U.S. n.7. The court went on to hold therein that "[i]f a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured[;]" "such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation." *Id*. at 112.

Next, the Court has held in a series of cases, subsequently, that a conviction obtained by the knowing use of a perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. See *Pyle v. Kansas*, 317 U.S. 213 (1942); *Alcorta v. Texas*, 355 U.S. 28 (1957); *Napue v. Illinois*, 360 U.S. 264 (1959); *Giglio v. United States*, 405 U.S. 150 (1972); and *Donnelly v. De Christoforo*, 416 U.S. 637 (1974).

Further still, the relevant line of cases the court discussed in *Agurs* is typified by *Brady v. Maryland* itself. There, the court concluded, "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process when the evidence is material either to the guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). As explained in *Giglio*, "the Government's case depended almost entirely on [the witnesses'] testimony, without it there could have been no indictment and no evidence to carry the case to the jury." *Id*. at 154. As noted *infra*, the government's case against McDuff is substantially and materially based on perjury. Perjury known by, proffered by, and sponsored by the government.

Additionally, the *Agurs* cases include *United States v. Bagley*, 473 U.S. 667 (1985). There, the Court reinforced its holding in *Agurs* ("...where the defendant does not make a *Brady*

request and the prosecutor fails to disclose certain evidence favorable to the accused.") *Id*. at 680. Further in *Bagley*, the court, in discussing the *Brady* & *Agurs* lines of cases, dove tailed into *Strickland v. Washington*, 466 U.S. 668 (1984) (A new trial must be granted when evidence is not introduced because of the incompetence of counsel only if there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. The *Strickland* court defined a "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." *Id*. The Court went on in *Bagley* to determine that" The *Agurs* test for materiality [is] sufficiently flexible to cover the 'no request,' 'general request,' and 'specific request' cases of prosecutorial failure to disclose evidence to the accused."

Following on in the Supreme Court's lineage of cases is *Kyles v. Whitley*, 514 U.S. 419 (1995), the Supreme Court identified "four aspects of materiality for *Brady* purposes..." *Kyles*, 87 L.Ed. 2d at 496.

First, "favorable evidence is material, and constitutional error results from its suppression by the government, if there is a 'reasonable probability' that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." "Thus, a showing of materiality does not require demonstration by a preponderance that [the] disclosure of the suppressed evidence would have resulted in the defendant's acquittal." 473 U.S., at 682. (emphasis added)

Second, "*Bagley* materiality is not a sufficiency of evidence test. One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine the confidence in the verdict." *Id*. (emphasis added)

Third, "contrary to the Fifth Circuit's assumption, once a reviewing court applying *Bagley* has found constitutional error, there is no need for further harmless-error review, since the constitutional standard for materiality under *Bagley* imposes a higher burden than the harmless-error standard of *Brecht v. Abrahamson*", 507 U.S. 619, 623 (1993). (emphasis added)

Fourth, the government's disclosure obligation turns on the cumulative effect of all suppressed evidence to the defense, not on the evidence consideration by item. *Bagley*, 473 U.S. at 625.

The Court went on to note that the prosecutor's responsibility to provide *Brady*, *Giglio*, etc...material "remains regardless of any failure by the police to bring favorable evidence to the prosecutor's attention. To hold otherwise would amount to a serious change of course from the *Brady* line of cases." And, in *Kyles*, as here in McDuff, "[b]ecause the net effect of the state-suppressed evidence favoring *Kyles* [McDuff here] raises a reasonable probability that its disclosure would have produced a different result at trial, the conviction cannot stand, and *Kyles* [McDuff] is entitled to a new trial. *Kyles*, 131 L.Ed. 2d. at 497.

Finally, the government in McDuff's case instigated a follow-on proceeding, post-trial, post-appeal. In that case *In the Matter of Gary L. McDuff*, File No. 3-15764, ALJ Elliot ordered the government to produce its SEC investigative file. (16-18 boxes - which had at least 8,000 pages of *Jencks*, *Brady*, and *Giglio* documents and some duplicates.) As a result, for the first time on June 15, 2016, and afterward, McDuff received these *Jencks*, *Brady*, and *Giglio* documents - post trial, post appeal. The documents delivered to McDuff pre-trial (1000 pages) do not constitute the basis for the arguments herein.

C) The Law on *Jencks*

Next, in *Jencks v. United States*, 315 U.S. 353, 657 (1957) the Court held that "the defendant was entitled to an order directing the government to produce [ ] reports for his inspection...[because] they contained statements of government witnesses relating to the events and activities to which [the] witnesses testified at trial..." Following *Jencks*, Congress enacted the *Jencks Act*. *18 U.S.C. § 3500*, which provides in relevant part:

> **(b)** After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness testified...
>
> **(e)** The term "statement, as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States means:
>
> > **(1)** a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement, or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury. *18 U.S.C. § 3500(b) and (e)*.

A constitutional error occurs from the complete denial of pre-trial discovery of statements covered by *18 U.S.C. § 3500*, which resulted in actual prejudice to McDuff's fair trial. The government withheld several entire transcripts and other documents from McDuff, despite providing some other *Jencks* material. *United States v. Augenblick*, 393 U.S. 348 (1969); *Krilich v. United States*, 502 F.2d 680 (7th Cir. 1974). Cert. den. 420 U.S. 992 (1975) (failure to provide material to which defense is entitled under *Jencks Act* may adversely affect defendant's ability to cross examine government witnesses and thereby infringe upon constitutional right of confrontation); *United States v. Anderson*, 574 F.2d 1347 (5th Cir. 1978) (when *Brady* material is contained in *Jencks Act* material, disclosure is generally timely if government complies with *Jencks Act*); *United States v. McVeigh*, 923 F. Supp. 1310, (D.C. Colo. 1996) (Government must provide to defendant exculpatory and impeachment information pursuant to *Brady* well in advance of trial, because *Brady* obligations are not altered or modified by the fact that information is contained in witness statements...since duty and purpose of *Brady* is to give defendants opportunity to prepare their defenses well in advance of trial.)

As more particularly described *infra*, the trial court issued a "Pre-trial Order and Order Relating to Pre-trial Discovery and Inspection." (Dkt. 62) The court ordered that the government "shall provide each defendant with *Jencks Material* (*18 U.S.C. § 3500*) on the day prior to the testimony of the witness to whom such material relates." The prosecution team included IRS Agent Ron Loecker. Ron Loecker had previously testified on this matter in two other cases. Neither transcript, which were directly related to the testimony of Ron Loecker at McDuff's trial, was provided. A *per se Jencks* violation more fully discussed *infra*. Receiver Michael Quilling testified in previous cases along with Loecker. Those transcripts which were related to the testimony of Quilling in McDuff's trial were not provided. A *per se Jencks* violation more fully discussed *infra*. Gary Lancaster was deposed on three prior occasions by Michael Quilling and Julia Huseman (Receiver and SEC counsel who conducted a parallel - civil investigation in cooperation with the AUSA in this case) who provided documents to the prosecution team and

participated in the investigation and prosecution of Gary McDuff. The government produced one deposition to McDuff but did not produce the other two depositions of Lancaster (which rebut his trial testimony). A *per se* violation of *Jencks* as more particularly discussed *infra*. Lancaster also previously testified at prior trials. His prior related testimony was not provided. Another *per se* violation of *Jencks* more particularly discussed *infra*. Gary Lancaster gave declarations prior to McDuff's trial with Exculpatory exhibits attached that were never produced. Still another *Jencks* violation. (Some of the exhibits attached to Lancaster's declarations were altered to make them unusable, and produced to McDuff prior to McDuff's trial. However, only one Lancaster declaration was produced prior to trial, and the exhibits attached thereto (all of which are *Brady* evidence) were never produced to McDuff. Another *per se Jencks* violation (and *Brady* violation)). Numerous emails between Lancaster and Eric Werner, the SEC Chief who helped Lancaster prepare his declaration, were not produced. A *per se* violation of *Jencks*. Mia Flannery previously testified at the trial of Stanley Leitner. That testimony was not provided. Another *per se Jencks* violation discussed more particularly *infra*. See attached exhibits as more particularly noted *infra* from Cause No. 3:07-CR-00261-G, *United States v. Stanley Leitner*, in the U.S. District Court for the Northern District of Texas, Dallas Division (2007); *In the Matter of Megafund Corporation*, Cause No. FW-02975-A, Before the Security Exchange Commission (2005); *United States v. Bradley Stark*, Cause No. 3:08-CR-258-M, In the U.S. District Court for the Northern District of Texas, Dallas Division (2008); and Cause No. 2:09-CR-09-00490, *United States v. Robert Tringham*, U.S. District Court Central District of California (2009). In all of these causes at least one prosecution team member was involved as more previously noted *supra* and below. Not only are members of the prosecution team the same, but also the same witnesses testified at many of these trials (at least three witnesses - Lancaster, Loecker, and Quilling testified at more than one of the prior trials).

Finally, Lancaster was previously sentenced in 2010 (McDuff was tried in 2013). His sentencing colloquy has statements made by Lancaster that directly refute his McDuff trial testimony. AUSA Shipchandler was the AUSA in both cases. But of course it was not produced as required by the *Jencks Act* and Court Order. Another *per se* violation of the *Jencks Act*. Further still, as a result of a follow-on civil proceeding against McDuff by the SEC (in which McDuff prevailed) (*In the Matter of Gary L. McDuff*, File No. 3-15764), ALJ Elliot ordered that the SEC investigation file be produced to McDuff. Revealing to McDuff for the first time post

trial and post appeal the extent of the AUSA's subornation of perjury, *Jencks* violations, *Brady* violations, *Giglio* violations, and AUSA Shipchandler's wholesale abandonment of his oath of office as noted more particularly *infra*.

D) Prosecution Team

Relevant to the case law pertaining to *Brady*, *Agurs*, *Jencks*, *Jencks Act*, *Giglio*, etc... is the question to whom does that obligation to disclose fall upon. *Brady* prohibits the prosecution from "suppress[ing]" material, favorable evidence, 373 U.S. at 87, but that does not mean that the prosecution's duty to disclose is limited to evidence within the actual knowledge or possession of the prosecutor. It is well-settled that the prosecution has a duty to learn of and disclose information "known to the others acting on the government's behalf in the case..." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). Accordingly, it has been held that a prosecutor [AUSA Shipchandler] has a duty to obtain and turn over to the defense favorable evidence known to an agent [Ron Locker, DOE Attorney Janie Frank, DOE Attorney Julia Huseman, Receiver Quilling, DOE Attorney Jessica Magee and Eric Werner] who investigated the case. *Id*. at 437-38. Therefore, AUSA Shipchandler is charged with knowledge possessed by other agents of the federal government when those agents are a part of a "prosecution team" which includes federal personnel involved in the investigation as well as the prosecutor of the case. *United States v. Pelullo*, 399 F.3d 197, 216-218 (3rd Cir. 2005); See also *United States v. Antone*, 603 F.2d 566, 569 (5th Cir. 1979). ("[T]his Court has declined to draw a distinction between different agencies under the same government, focusing instead upon the 'prosecution team' which includes both investigative and prosecutorial personnel.") *Id*.

The analysis does not end there. The government's obligations under *Brady* extends further in cases such as McDuff's where there is a parallel civil and criminal prosecution. See *United States v. Risha*, 445 F.3d 298, 303-306 (3rd Cir. 2006) and *Antone*, 603 F.2d at 569-70. (Evidence possessed by state agents in joint investigations may be constructively possessed by a federal prosecutor such that the prosecutor has a duty to obtain that evidence and disclose it to the defense.) This is called "cross-jurisdiction constructive knowledge." *Risha*, 445 F.3d at 299.

The Third Circuit has held that it is a case-by-case analysis when considering a federal prosecutor's constructive knowledge, and set forth three questions relevant to the analysis:

(1) "whether the party with knowledge of the information is acting on the government's behalf or is under its control."

(2) "the extent to which state and federal governments are part of a team; are participating in a joint investigation or are sharing resources;" (emphasis added) and

(3) "whether the entity charged with constructive possession [AUSA Shipchandler] - has 'ready access' to the evidence." *Id*. at 304.

The Agents and attorneys noted above meet all three elements noted in the Third Circuit's analysis which was adopted by the Fifth Circuit.

In *United States v. Antone*, *supra*, the Fifth Circuit considered whether knowledge of State investigative agents should be imputed to federal prosecutors where, as here, there was a joint effort (Civil and Criminal - parallel prosecutors) or task force composed of FBI agents and State agents. *Antone*, 603 F.2d at 568-69. There the defense argued that evidence that a witness's attorney fees had been paid by the State was material because it was impeachment evidence which should be imputed to the federal prosecutors for purposes of determining whether the evidence had been suppressed in violation of *Brady*. *Id*. at 569-70. Here the evidence impeaches the government's entire case- as well as demonstrates actual innocence.

The Fifth Circuit agreed that the State agents [in McDuff's case the parallel civil attorneys; the receiver; and joint case agent from all trials - Ron Loecker] knowledge should be imputed to the federal prosecutors for purposes of determining whether the evidence was suppressed. The Court first noted that, if the investigators with knowledge of the evidence had worked for a federal agency, [in this case, Julia Huseman, esq. - SEC Counsel; Jessica Magee, esq. - SEC Counsel; Michael Quilling, esq. - Receiver in all relevant cases - including McDuff's civil case; Ron Loecker-Case Agent in McDuff's case and all relevant cases; SEC investigator Eric Werner] their knowledge would be imputed to the prosecution for *Brady* purposes. *Id*. at 569. Further, instead of considering whether different sovereign's [or in this case federal agencies - a much closer relationship than considered in *Antone*] investigators should be treated differently, the Fifth Circuit concluded that the knowledge of the investigative agencies who had "cooperated intimately from the outset of [the] investigation", should be imputed to the prosecution team. *Id*. The Court, in essence, noted that under circumstances that exist in the McDuff case, that the SEC Attorneys (who were attorneys in the civil case and investigation) and

Receiver in both Civil and Criminal cases and the identical case agents "were in a real sense members of the prosecutorial team." *Id.*[13]

E) There were multiple conspiracies.

One conspiracy allegedly involving Lancorp Fund I with Lancaster, Reese, and allegedly McDuff (the charged conspiracy). A second conspiracy involving Lancaster and Reese in Lancorp Fund II, which had nothing to do with McDuff, as the government witness confesses in the follow-on civil proceeding (Quilling, the government receiver in every case) (on June 15, 2016). See p. 222:2-11, H00009. Lancaster pled to a third independent conspiracy. See arguments *infra,* section *Ante* VI. C) 4. page 103-112; and VI. I) page 137-142.

The government alleged in the indictment ¶ 5 (Dkt. 16) that: "From on or about September 14, 2003, through on or about July 5, 2005, Defendants Reese and McDuff conspired, confederated, and agreed with GLL (Gary L. Lancaster), not named as a defendant herein, to devise a scheme and artifice to defraud investors and to obtain money and property from these investors by materially false and fraudulent pretenses, representations, and promises, ..., and signals when transmitted by means of a wire communication in interstate commerce, a violation of *18 U.S.C. § 1343*".

What the government argued was that there was one PPM (Private Placement Memorandum) called Lancorp Financial Fund Business Trust. In reality there were two PPMs, the second named Lancorp Financial Fund Business Trust II. See Gov. trial exhibits 51 and 29 (H00428, H00429; compare to Fund I, Exhibit 56, H00427 (for clarity hereinafter "Lancorp Fund I" and "Lancorp Fund II"). The government witnesses conceded, in a follow-on proceeding on June 15, 2016 (the Court appointed receiver Mike Quilling), that McDuff had nothing to do with Lancorp Fund II. A side-by-side comparison of the two funds demonstrates that all of the substantive government allegations of wrongful or illegal conduct had to do with Fund II, which McDuff had nothing to do with, and not Lancorp Fund I, which McDuff is alleged to be associated with. Because McDuff was not involved with Lancorp Fund II in any way, there

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[13] Noteworthy is the fact the AUSA Shipchandler presented Jessica Magee as a witness in McDuff's criminal trial. Jessica Magee was the lead prosecutor against McDuff in his Civil Case (her affidavits were not produced - a *per se* violation of *Jencks*). Jessica Magee had an inherent conflict of interest - being both a witness for the U.S. and an attorney advocate for the U.S. Both she and AUSA Shipchandler knew this fact and hid the fact of this conflict from the Court - committing fraud upon the Court, knowingly suppressed this from the Court - another structural error. *Infra*.

could be no foreseeability, no confederation, or no participation in any conspiracy. Comparison is listed below:

Lancorp Fund I	**Lancorp Fund II**
Created by attorney Reynolds[14]	Created by Lancaster[15]
Filed with SEC on May 27, 2003[16]	Not filed with SEC[17]
Before any alleged Cease & Desist Order [18]	After any Cease & Desist Order [19]
Insurance initially, insurance waivers obtained[20]	No insurance [21]
Investors who testified 2003-2004 (primarily)[22]	Investors who testified (if any) 2004-2005[23]
McDuff alleged involvement[24]	No alleged McDuff involvement[25]

The reason we know the government confused the jury with the two Funds and hid the two conspiracies is because they actually offered documents interchangeably from the two Funds throughout trial. Fund I, See Gov. Exhibit 56. Fund II, See Gov. Exhibit 51, 29. But the attributes of Fund II are confused to be the same as Fund I. See (Dkt. 186, p.152:20) (Lancorp Financial Fund Business Trust II). But see Quilling's post-trial testimony where he acknowledges that McDuff had nothing to do with Lancorp Fund II, p.222:2-11, H00009. But for the post-trial, post-appeal, follow-on civil proceeding (*In the Matter of Gary L. McDuff*, File No. 3-15764), McDuff could not demonstrate how the government confused the jury about the

[14] March 17, 2003 PPM of Lancorp Fund I (trial Exhibit 56), see H00427 and Appendix "2" for complete PPM; Lancorp attorney Reynolds billing, see H00366-381; Lancaster's 6/30/2005 declaration, see H00604-624; Lancaster's 11/17/2005 deposition, see H00033, p.16:5-8.

[15] June 1, 2005 PPM of Lancorp Fund II (trial Exhibit 29 & 51), see H00429 and H00428; attorney Reynolds email H00732-733; Quilling's testimony that McDuff had no knowledge of Lancorp Fund II, H00009, p.222:2-11; Lancaster's Lancorp Fund II emails never mention McDuff nor are any CC copies sent to McDuff by anyone, H00654-671, and H00674-682

[16] *Reg D* - Form D for Lancorp Fund I, file stamped by SEC Headquarters on May 27, 2003, see H00401-409; and see Edgar Filing for Lancorp Fund I, H00925.

[17] Edgar search showing no filing of Lancorp Fund II, see H00925

[18] Lancorp Fund I formation and filing on May 27, 2003, see H00401-409; and see the Desist and Refrain Order of August 16, 2004, naming Robert Reese which was "Remanded" twice and not final until 2009, see H00434-462.

[19] Lancorp Fund II formed on June 1, 2005 (see PPM cover, H00429), but no Reg D - Form D SEC filing ever showing on Edgar Filings, see H00924.

[20] Lancaster's Lancorp Fund I letters to subscribers, dated March 12, 2004, and April 5 - June 15, 2004, informing them of insurance industry changes causing there to no longer be policy protection available, request return of their money from escrow or acknowledge their desire to proceed without insurance by signing insurance waivers, see H00410, and H00411-421.

[21] Lancorp Fund II had no insurance mentioned or offered in its PPM (see H00429 and Full Lancorp II PPM in Appendix "2"); also see Lancaster's deposition testimony 11/17/05 regarding no insurance, p.101:11-19, H00069.

[22] Frances Lynn Benyo, Jay Biles, Robert Broderson, Philip Johnson, Randy Dirks, Julie Tolman (Fund I investors).

[23] Scott Bennett (Fund II investor).

[24] Government alleged.

[25] Michael Quilling testified at the SEC administrative hearing that McDuff was not involved in or aware of Lancorp Fund II, see p.222:2-11, H00009.

two funds and multiple conspiracies. The fact that there were two funds was *Brady* material which had to be produced and was not. It was also evidence of separate conspiracies between Lancaster and Reese - but not McDuff.

The Court in *Kotteakos v. United States*, 328 U.S. 750 (1946) began the discussions on multiple conspiracies being charged as one conspiracy, without specific instructions from the trial court. Here, the government knew of the three alleged conspiracies (Lancorp Fund I, Lancorp Fund II, the Lancaster independent conspiracy), and merged them, did not disclose the existence of them, violating both the Fifth and Sixth Amendments of the United States Constitution (notice under the due process clause and the right to grand jury indictment under the Sixth Amendment). "We do not think that either Congress,...or this Court, when deciding the *Berger* case, intended to authorize the Government to string together, for common trial, eight or more separate and distinct crimes, conspiracies related in kind though they might be, when the only nexus among them lies in the fact that one man participated in all." *Id*. at 773.

As noted *infra* in McDuff's attack on the jury charge, the elements of conspiracy to commit wire fraud are all different from the substantive charge of wire fraud and substantially different from money laundering and substantially different from aiding and abetting. As a result, under *United States v. Katz*, 271 U.S. 354 (1926) and *Gebardi v. United States* 287 U.S. 112 (1932) there is not even an argument for merger on the three conspiracies. The common law rule that the substantive offense, if a felony, was merged in the conspiracy, has little vitality in this country. See *May, Crimes*, 4th ed. 1938 §126; 17 *Cornel L. Quart*. (1931) 136; 75 ALR 1405; 37 ALA 778, 75 ALR 1411. The agreement to do an unlawful act is even distinct from doing of the act. Even so, in this case in regards to a separate PPM, it would be a separate conspiracy - which does not include McDuff. As illustrated in *Kotteakos v. United States*, "[t]he dangers of transference of guilt from one to another across the line spreading conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial rights has not taken place.... Guilt with us remains individual and personal, even as respects conspiracy." *Id*. *328 U.S. at 773*.

Finally, the second conspiracy, separate and apart from the first, involving different PPMs, different defendants, different factual elements - disclosed post-trial (June 2016) - constitute *Brady* evidence. The *Brady* evidence issue is addressed separately herein. However,

the failure of the government to disclose the separate conspiracies, and to try the three conspiracies as one, even though the second and third conspiracy were not charged in the indictment and did not include or involve McDuff, violates both the *Fifth Amendment's* Due Process Clause (as to notice), and the *Sixth Amendment* (right to be charged by indictment) and requires reversal.

VI. ANALYSIS

A) Lying

The government repeatedly lied to the jury. Violating the Constitution as interpreted under *Giglio*, the Fifth Amendment, the Sixth Amendment (the right to be charged by a grand jury), the Ninth Amendment as argued *infra*; and the materials demonstrating the lies were not disclosed until post-appeal in June 2016 - but were discovered in the SEC's own investigative files. All qualifying under *§2255*. For ease of examination by the Court, McDuff notes the statement by the government agent, witness, attorney or actor - its location in the transcript. McDuff follows, by demonstrating the falseness of the statement - the location in the SEC's investigative files where it was located, or the *Jencks* material in which it was contained. The *Brady* and *Giglio* violations become obvious. A *Strickland* analysis is contained *infra*, in particular reference to the Appellate Brief authored by Kemp. His incompetence, addressed later, was by both omission and commission.

Lie #1. The government lies begin in opening statements. See (Dkt. 186, p.78:2-4). "He [referring to McDuff] promised that the principal that she was going to invest would be insured, protected from an insurance company..." We now know that Ms. Benyo knew there was no insurance, she testified under oath that she knew there was no insurance, and she signed a document, which was found in the SEC's investigative files stating she wanted to proceed without insurance. See (H00411) attached. In the follow-on proceeding in front of ALJ Elliot on June 15, 2016, Ms. Benyo testified as follows: Beginning at p.88:9 - 92:7 (full transcript attached, see Appendix "2", Tab 15).

> **Q:** Ms. Benyo, you testified earlier that there was going to be insurance being made viable [sic] [available] through the Lancorp Fund that you could purchase. That was an option you had?
> **A:** Correct.

Q: Ms. Benyo, if you look at [exhibit] 71, April 5, 2004 [see attached at Appendix "1", H00411 located in the SEC's investigative files] .... [ ] Start with the first line."

[Beginning on p.90:6]

A: "Recent statutory amendments in the insurance industry have caused many months of delay for us in going effective. [The PPM becoming active.] Many of you have expressed a desire to proceed if the insurance element could be replaced with an obligation of the custodian, qualified bank that provided the same level of protection..." [ ]

[Beginning at p.91:17]

Q: Now, the very last paragraph, please read that.
A: "Please sign in the appropriate space below indicating that you desire to proceed as a subscriber in the fund through the next calendar quarter under the terms of protection described above or your desire to withdraw your subscription... [ ]"
Q: Here, he's [Gary Lancaster] asking you to do what down below?
A: To acknowledge the fact that there's no longer insurance.

So the allegation that McDuff deceived Ms. Benyo about insurance is abjectly false. She acknowledges that a change in the law made it impossible to obtain insurances, and she signed an acknowledgement that she did not have insurance and was proceeding anyway.

Benyo's testimony on June 15, 2016, along with the signed acknowledgement of no insurance - signed by Benyo in April 2004 - before she invested proves that. See H00411, found in the SEC's investigative files produced on June 15, 2016. This is *Brady* evidence, *Giglio* evidence, *Jencks* evidence. Further clarified by Ms. Benyo post-trial on June 15, 2016. As to insurance.

Lie #2. Government lied again. (Dkt. 186, p.78:25 - 79:4). "For example, Mr. McDuff never told Ms. Benyo that he couldn't possess a securities license, he couldn't be selling these securities in the first place because he had a felony conviction and that barred him from possessing a securities license." Bold face lie. Mr. McDuff had a prior felony, *18 U.S.C. § 1957*, see H00918-923, but that is a non-qualifying felony under securities laws[26] then in

[26] The DOJ, in making its allegations and eliciting statements from witnesses regarding McDuff's ability to be associated with the Lancorp Fund I, misstates the law. Chief among the purveyors of falsehoods regarding the law were AUSA Shipchandler and his marionette Lancaster. Specifically the law provides:

15 U.S.C.S. § 780(b)(6)(A) "with respect to any person who is associated who is seeking to become associated, or, at the time of the alleged misconduct, [1993 conviction resulted from 1988 conduct] who was associated or seeking to become associated with a broker or dealer...the Commission, by order, shall censure...[McDuff never even censured - much less barred] if the Commission finds, on the record after notice...[McDuff won! He won! He won! - no bar, no censure, no discipline of any kind!] that such censure, placing of limitations...[He won, even with two felony convictions he has no bar] or bar is in the public interest and that such person..."

existence, and therefore he was not precluded from obtaining a securities license because of his felony, as a matter of law. As an attorney - an AUSA no less - Shipchandler knew this and lied to the jury. Shipchandler is dishonest.

(i) has committed or omitted any act, or is subject to an order or finding enumerated in subparagraph (A), (D), or (E) of paragraph 4 of this subsection,

(ii) has been convicted of any offense specified in subparagraph (B) of such ¶ 4 within 10 years.

6A(ii) is not relevant to McDuff. McDuff's prior criminal conviction in 1993 is for *18 U.S.C. § 1957* (which is not included in the enumerated counts of subparagraph (4)(B).

4(B) has been convicted within ten years preceding the filing of any application for registration [McDuff has never applied for a license] or at any time thereafter of any felony or misdemeanor or of a substantially equivalent crime by a foreign court of competent jurisdiction which the Commission finds --

(i) * involves the purchase or sale of any security [not McDuff]

* the taking of a false oath [not McDuff]

* the making of a false report [not McDuff]

* bribery [not McDuff]

* burglary [not McDuff]

* or conspiracy to commit any such offense; [not McDuff]

(ii) arises out of the conduct of a broker, dealer, municipal advisor, government securities broker, government securities dealer, investment advisor, bank, insurance company fiduciary, transfer agent, national recognized statistical rating organization, or entity or person required to be registered under the Commodity Exchange Act (*7 U.S.C. 1 et. seq*.) [not McDuff].

(iii) involves the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversation, or misappropriation of facts, or securities, or substantially equivalent activity however denominated by the laws of the relevant foreign government or; [all not McDuff]

(iv) involves the violation of Section 152, 1341, 1342 or 1343 or Chapter 25 or 47 of *Title 18, United States Code* [*18 U.S.C.S. §§ 152, 1341, 1342, 1343 or 471 et. seq. or 1001 et. seq*.] [not McDuff].

Making AUSA Shipchandler a suborder of perjury and Lancaster (presumably because he is as "dumb as a box of rocks" - unintentionally) a perjurer! (Quilling calls Lancaster "as dumb as a box of Rocks" - See p.121:7-8, H00006.)

Also note that "bad actor" is a new enactment and is not applicable to conduct prior to 2013.

15 U.S.C. § 78j(d) "Bad Actor" disqualification:

(2) Paragraph (d)(1) of this section shall not apply;

(i) with respect to any conviction, under judgment, decree, suspension, expulsion or bar that occurred or was issued before September 23, 2013.

None of the new laws applied to McDuff. None of the old laws applied to McDuff.

See *The Securities Act of 1933* codified as *15 U.S.C. § 77 et. seq*. provides: *15 U.S.C.S. § 77d*. Excepted transactions: In relevant part: Disqualifying felons and other "bad actors" from *Regulation D offerings Act July 21, 2010, P.L. 111 - 203, Title IX, Subtitle B §926, 124 Stat. 1851* does not apply to McDuff's prior felony in 1993 under old or new law. New law specifically enacted in 2010 - applying in 2013 had nothing to do with McDuff's 1993 felony case. See *Title 18 U.S.C. § 1957*, not an included felony. Judicial notice requested.

Making all the government witness testimonies about McDuff not being able to be associated with the Lancorp Fund, false as a matter of law!

Lie #3. AUSA Shipchandler lied again (Dkt. 186, p.79:16-19). "And so she sent Mr. McDuff $175,000 that represented everything that she had and she told him, she said, 'I cannot lose this money. This is all that I have'."

The government called Ms. Benyo to testify in a follow-on proceeding on June 15, 2016. Mr. McDuff asked her about that statement. See Appendix "2", Tab 15 (full transcript attached) at p.78:4-19.

McDuff questioning Ms. Benyo.

Q: Do you recall saying in the criminal trial that that was all the money you had in the world?
A: Yes.
Q: Was that true?
A: I had some money from a life insurance policy that I had recently received.
Q: Why did you say that was all the money you had in the world?
A: Well, everybody has to have a slush fund. I have to live the same as every body else. I have to have some money, and I was fortunate that I had an insurance policy that paid off. (emphasis added)

Further, as the ALJ found in the follow-on proceeding, no money was ever sent to McDuff. Shipchandler knew about that and lied. See p.186:6-17, H00007, and see p.10 ¶ 3. at 5th paragraph and p.11, ¶ 4. at 1st paragraph, H00906-907. No one ever sent McDuff $175,000.

Lie #4. Shipchandler lied again (we're not even out of the opening statement yet!) (Dkt. 186, p.80:21-24). "And Robert Reese never told them that he couldn't be selling the securities in the first place because the State of California had barred him from selling securities to investors based on his past fraudulent conduct." Another bold face lie by Shipchandler. On or before April 7, 2004, investor Dirks acknowledged that his investment would not be insured. (As all investors did.) See H00412. His investment had to be before April 7, 2004. All relevant investors who testified in this case invested before August 2004. See H00716-723. Robert Reese's initial Desist and Refrain Order from the State of California is dated August 16, 2004, four and a half months after the very latest date possible for Dirk's investment. The SEC's investigative files actually reveal that the initial Desist and Refrain Order issued (which was remanded twice - not final till 2009) occurred months and years after the investors' investments. See Desist and Refrain and Remands discovered in the SEC's investigative files on or after June 15, 2016. See H00434-462.

Lie #5. (Dkt. 186, p.98:2-5). **By Shipchandler, questioning Ms. Benyo**.

Q: Now, according to your conversations with Mr. McDuff at this time, how was it the case that your principal would be protected, according to what he told you?
A: Through an insurance policy.

This was false. In fact, every investor signed a document acknowledging there would not be an insurance policy due to changes in the industry. See H00411-421. Benyo signed the same document. See H00411. And in June 2016, she confessed she knew that there was no insurance coverage. See p.91:3 - 92:7, H00004. Shipchandler knew and suborned perjury over and over and over again. The government's own records prove it (from the SEC's own investigation file produced on or after June 15, 2016). Not only that, Shipchandler knew that the only person deceiving people about insurance was Bradley Stark of Sardaukar Holdings. See the redacted trial exhibit Shipchandler produced to McDuff prior to trial - wherein he redacted the proof that McDuff needed to show it was solely Stark's scam. See H00515. Now see the unredacted document discovered in the SEC's file. See H00516. Further, see the wire recordings where the government informant / CI Rumpf recorded Stark deceiving everyone about insurance; these recordings Gov't Exhibits 54, 56, 57, 58 the government offered as a trial exhibit in Stark's trial See H00325, See Appendix "2", Tab 11, Gov't. Exhibits 54, 56, 57, 58-James Rumpf recordings of Bradley Stark, full transcript. The very same trial that the case agent, Ron Loecker, a case agent for Stark's case (he was a case agent in the Stark and McDuff trial). The very same trial that the same receiver Quilling was involved. See H01091 and H01100.

Specifically, Stark said - recorded on tape - a government exhibit (#53, 54, 55, 56, 57, 58) in Stark's trial:

Stark: Yes. That is correct. Because your principal is insured through ACE Finance.
Rumpf: Even though it's in your account?
Stark: Correct. Because my account is actually insured by Lloyds of London.

See attached as H00325. (Dkt. 277-3, p.3 of 13, lines 4-8.)

Lie #6. Shipchandler suborned perjury again on the direct of Ms. Benyo. (Dkt. 186, p.99:8-12).

Q: And, Ma'am, was this all of the retirement money you had?
A: It was every penny of my money I had left in the world.
Q: Did you ever express that to Mr. McDuff?
A: Definitely.

Post-trial, on June 15, 2016, when asked about her false statement, Ms. Benyo retorted, "Well, everybody has to have a slush fund (emphasis added). I have to live the same as everybody else. I have to have some money, and I was fortunate that I had an insurance policy that paid off. See H00003. p.78:4-19, cited more fully *supra*.

Lie #7. Shipchandler misled the jury again. (Dkt. 186, p.99:13-15).

> **Q:** What did you tell him?
> **A:** He knew my husband had just recently died, that it had been a prolonged illness, and I was broke other than this.

Well, other than her insurance policy and slush fund! See *supra*. See also her other own personal investments into Megafund...she was investing all over the place...the crocodile tears "all the money I had" is complete bull excrement, in keeping with Texas colloquialisms. See H00003. 78:4-19 ($20k in posted investments in Megafund).

Lie #8. AUSA Shipchandler is a veritable provocateur of falsehoods. See (Dkt. 186, p.101:20-23).

> **Q:** The position of Mr. McDuff, the idea that your investment would be insured, did that give you comfort that this would not put your principal at risk?
> **A:** Definitely.

We, of course, know now as a result of receiving Ms. Benyo's live testimony at the June 15, 2016 hearing, and the documents from the SEC's own investigative file, that she misled the jury. She told us as much when she said she knew there was no insurance - and signed a document acknowledging no insurance. See *supra* p.91:3 - 92:7, H00004, and H00411.

Lie #9. Ms. Benyo on direct in the criminal trial. (Dkt. 186, p.102:15 - 103:1).

> **Q:** Let me stop you there, Ma'am. Is that what you were discussing before about the insurance aspect?
> **A:** Yes.
> **Q:** And did you elect insurance as it's based in the beginning of this, "Does Investor request insurance?"
> **A:** Definitely, yes. [ ]
> **Q:** So you told Mr. McDuff you wanted the insurance and you also filled out a form to that effect?
> **A:** Yes. See p.91:3-5, H00004.

Lie #10. (Dkt. 186, p.106:1-18). Again with the insurance misrepresentation and "all the money I had in the world - boo hoo" lie.

Q: Was that important to you, Ma'am?
A: Yes, it was.
Q: Why was that so important to you?
A: As I said, that was literally ever [sic] penny of money I had to my name. [ ]
Q: And what did you expect to happen in the event that the investment opportunity went south and you had this insurance coverage?
A: That the insurance company would reimburse me my $175,000.

See *supra*. Ms. Benyo had ample insurance proceeds and a slush fund, she knew there was no insurance, she signed a waiver acknowledging no insurance, she confessed she knew there was no insurance post trial. See H00004, p.91:3-5. She invested personally in Megafund. See H00555-598.

Lie #11. (Dkt. 186, p.106:19 - 109:15). There was no insurance due to an industry change. Ms. Benyo knew. She said she knew. She swore under oath in a judicial proceeding that she knew there was no insurance before she invested. See p.91:3-5, H00004. Ms. Benyo acknowledged the material change in the PPM. See H00411.

Lie #12. AUSA Shipchandler continues the misrepresentation. (Dkt. 186, p.112:3-7).

Q: Three things, Ma'am [Ms. Benyo]: Insurance, Permitted Investments and a qualified Bank's money-market accounts. Did you believe that was what was going to be determined to be the use of your money?
A: Yes.

Of course, AUSA Shipchandler continues misrepresenting on the insurance issue - See *supra*. But additionally, Shipchandler broadens his misrepresentation, raising the permitted Investments. He did this knowingly. In 2010, Shipchandler was at Gary Lancaster's sentencing. Three years prior to McDuff's trial. He knew that Lancaster was not aware of the placement of the money. See p.7:4 - 8:25, H00100-101. But nevertheless expands his misrepresentations (*Jencks* evidence not produced) (sentencing transcript of Lancaster) (Full transcript in Appendix "1", H00094-146.)

Lie #13. (Dkt. 186, p.113:24 - 114:4) (in part below):

Q: Now, if you had known that there was no insurance on the principal of your own investment, would you have invested with Lancorp?
A: No, I would not have.
Q: Why not, Ma'am?
A: As I said, it was literally the only money that I had.

Benyo had insurance proceeds. See p.78:4-9, H00003. Benyo had a slush fund. See 78:10-12, H00003. Benyo invested in Megafund independently on two separate occasions. See H00555-598. The same fund that Lancorp invested in. Ms. Benyo signed an acknowledgment of no insurance. SeeH00411. She testified on June 15, 2016, that she knew there was NO insurance. See p.91:3-5, H00004. Bold face lies! Suborned by Shipchandler.

Lie #14. Shipchandler continues his litany of falsehoods. (Dkt. 186, p.114:5-8).

> **Q:** If you had known that Mr. Lancaster had no experience in this type of investment, would that have affected your decision whether or not to invest?
> **A:** Yes, it would have.

She invested in Megafund two times prior to Lancorp Fund's investment in Megafund. See H00555-598. Once for $15,000, and once for $5,000. The only question is whether this $20k came from her slush fund or her "non-existent insurance proceeds". See H00003 See Benyo's confession of knowing there was no insurance. *Supra*.

Next, the question also has no basis in fact. No prior testimony at trial of Lancaster's qualifications. However, the SEC's file has Lancaster's Resume. See H00387-388. SEC's file included the Lancaster depositions (*Jencks* material withheld), wherein his experience is discussed. See p.8:12 - 10:14, H00025-27. See also Lancaster's sentencing colloquy where he discusses his 30 years of experience. See p.32:17-24, H00125. Shipchandler was the prosecutor, he knew - he was the prosecutor at Lancaster's sentencing - and he lied about it. Shameful!

Lie #15. (Dkt. 186, p.116:1-7).

> **Q:** That last sentence of this paragraph, "In addition, I wish to purchase the optional Insurance." Was that referring to the Insurance to cover the principal?
> **A:** Yes.
> **Q:** And did you indicate that you were going to be purchasing insurance?
> **A:** Yes, I did.

See *supra*. But see a United States District Court judge's discussion of the E&O insurance series of transactions similar to 21 different *ONESCO* cases...involving Lancorp and Lancaster - all of which took place before McDuff's trial. There, the courts wrote (substantially similar) see *O.N. Equity States Co. v. Samuels*, *et al*., 2007 U.S. Dist. Lexis 90332) p.2, which reads:

> "Prior to his employment with ONESCO, Lancaster, an experienced insurance salesman and investment representative, (emphasis added) organized the Lancorp Financial Fund Business Trust ("Lancorp Fund") [NO mention of McDuff]. In

March 2003, Lancaster generated and began circulating a Private Placement Memorandum ("PPM") to sell investor shares in the Fund [Filed with the SEC on May 27, 2003. See H00401-409.] The PPM described the Lancorp Fund as "an unregistered, closed-end non-diversified management investment company." Prior to investing in the Fund, individuals were rejoined to read the PPM and execute a Subscription Agreement. Both the PPM and agreement informed investors that amounts paid into the Fund would be held in an escrow account until the initial closing date. [No commissions paid on investment.] See ALJ Order H00908, second paragraph. See also H00426.

Although the Subscription Agreement described payments as "irrevocable," it also stated that an investor's money would be promptly returned if "the shares are not subscribed for and accepted by the Trust pursuant to the terms and conditions specified in the Confidential Memorandum." The PPM further provided that "at any time before or after the Initial Closing Date and before the maximum number of the Investor Shares have been sold, the Trust may terminate the offering." Another provision stated that, if any material changes to the Lancorp Offering occurred prior to the closing date and below the maximum number of the investor shares have been sold, the Trust may terminate the offering." Another provision stated that if any material changes to the Lancorp offering occurred prior to the closing date, Lancorp would amend or supplement the PPM. [The Court is discussing the PPM - Gov. Trial Exhibit # 56, H00427.]

According to Lancaster, [more *Jencks* materials not produced at trial either pre- or after Lancaster testified] changes in the insurance industry during late 2003 and early 2004 prevented Lancorp from obtaining outside insurance for investors that was an important feature of the Lancorp Fund offering. Thereafter, Lancaster sought to replace the insurance element with a validated written obligation from a financial institution. A letter was sent to investors on March 12, 2004, apologizing for the delay in moving forward with the Fund and explaining the current status of insurance arrangements (emphasis added). [All these records are in the SEC investigative file.] At the time, Lancaster offered a full and immediate refund to anyone whose "patience [was] at an end." See March 12, 2004 letter. H00410.

A second letter was sent by Lancaster on April 5, 2004, announcing the changes in insurance coverage and requiring previous investors to sign a form that either (1) confirmed subscription participation and acknowledged the memorandum modifications, [no insurance] or (2) requested withdrawal of the subscription. (See *O.N. Equity Sales Co. v. Samuels*, *et al*., 2007 U.S. Dist. Lexis 90332) p.2, See also April 5, 2004 letter. H00411.

Unfortunately, Lancaster apparently invested most of the Lancorp Fund assets in Megafund, which was later discovered to be a Texas-based ponzi scheme. (emphasis added) *Id*. at p.3. Importantly, that closing date did not occur until May 14, 2004...In addition, Lancaster made a [material] change to the offering

> that required [the investors] to confirm or rescind his decision to invest in Lancorp. *Id*. at p.6.

Twenty-one (21) United States District Court cases and opinions regarding Lancaster and Lancorp Fund I, no doubt hidden from Judge Schell by Shipchandler. As an attorney, an AUSA no less, Shipchandler has a duty under the State Bar Rules and the local rules of candor with court and a duty to disclose other court cases on the same issue before the court, to the court. No doubt, an experienced judge such as Judge Schell would have read those cases and opinions - had Shipchandler disclosed those to the court as he is obliged to do. Also, note that U. S. District Courts (21 of them) determined the closing date on investments for Lancorp I was May 14, 2004 - three (3) months prior to Reese's initial Desist and Refrain Order precluding telling any one about an event in the future.

All investors signed (the ones who appeared at trial) the acknowledged form materially changing the PPM - i.e. no insurance. See H00411, H00412, H00413, H00415, and H00417. These investors, invested before August 16, 2004 - before Reese's Desist and Refrain Order from California (which was subsequently remanded, modified, and not final until 2009). The government knew that all the investors had invested prior to Reese's initial Desist and Refrain Order in August 2004. They hid the fact that there was no relevant "Desist and Refrain Order" in place at the time of investments so Shipchandler could lie about it. This is, perhaps, the most corrupt case the DOJ has ever put before a jury.

Lie #16. Among Benyo's many lies:

> **Q:** And you mentioned that this was the entire amount that you had at the time.
> **A:** It was every penny of money I had.
> **Q:** What impact has that had on you?
> **A:** I'm 67 years old and I'm still working.

We now know she had a slush fund (p.78:10-12, H00003). She had insurance proceeds. She invested independently on her own in Megafund. Two times (H00555 and H00598) . Prior to Lancorp investing in Megafund. Compare H00594 and p.25:11-12, H00037. Her poor, poor me statements designed to illicit sympathy, which are improper in the case in any event, are based on lies! Benyo's lies about her financial condition.

Lie #17. Shipchandler presents many of the same misrepresentations with Mr. Biles. All the insurance misrepresentations. Fortunately, Mr. Biles testified on June 16, 2016, at a follow-

on proceeding, making his statements at the criminal trial wrong, at best. For example: (Dkt. 186, p.136:11-25)

(**Shipchandler questioning Biles**)

Q: Can you please read the first sentence.
A: "Each Investor may elect to purchase insurance insuring his investment in the Trust."
Q: Was that important to you?
A: Yes.
Q: Did you buy the insurance or elect to have the insurance?
A: Yes, I elected to have insurance. [ ]
Q: If you had known that there was no insurance to be provided, would that have affected your decision to invest?
A: Absolutely.

We now know, based on the waivers of insurance signed by every investor, that that statement is not true. The government attempted to mislead the jury when it offered Exhibit #16, (H00413), which was the insurance waiver signed by Biles, wherein Biles' wife wrote "insurance." But the Biles waiver from the SEC files (See H00414) has no such word "Insurance" on it. The government offers an altered document, a fraudulent document. (Dkt. 186, p.144:2-4). That is not a document from Lancorp, that is a doctored document conjured up by the AUSA and Biles to mislead the jury.

Next, Biles testified on June 16, 2016, to a nonsensical belief as to what "insurance" is - how it is defined, making all his testimony suspect.

For example, see ALJ hearing June 16, 2016, p.262:1 - 263:14 (H00013-14) (full transcript of excerpts attached in Appendix "2", Tab 16).

(Beginning at 262:14)

Q: [By McDuff] Mr. Biles, in reading this, it says: "To that end, we have successfully negotiated and obtained a validated written obligation from the qualified bank acting as custodian that any security which may be purchased must have a liquidation value greater than the amount paid." That does not say "insurance." That says that there would be a bank obligation assuring that the value of it would be greater than the amount paid using your money to pay for it.
A: Which is basically insurance. Basically if I go buy -- if I go buy a hundred-dollar Rolex and I can sell it for a thousand dollars, then that Rolex is basically insured. That's basically what this says. This says that the fund is going to purchase things that are worth more -

Clearly Biles' definition of insurance is not the same as the definition of insurance in Webster's or in Black's Law Dictionary;

> "A system of protection against loss in which a number of individuals agree to pay certain sums (premiums) periodically for a guarantee that they will be compensated after stipulated conditions for any specified loss..."

Webster's New World College Dictionary, 4th Ed., p.741.

"Insurance" is defined in Black's Law Dictionary as: A contract whereby, for a stipulated consideration, one party undertakes to compensate the other for loss on a specified subject by specified perils. Black's Law Dictionary, 6th Ed. 1990, p.802.

When Biles speaks of insurance, or when Shipchandler speaks in this case, they are misplacing definitions. There is not even the color of insurance being on the modified PPM. Further still, because the proposed "lack of insurance" was a key element of the indictment, the forefront of the government's argument for conviction, the conviction - independent of all the government lies and other issues raised herein cannot stand for the reasons raised *supra*. See Constructive Amendment argument, *Stirone v. United States*, 361 U.S. 212, 215-217 (1960) ("obstructing an interstate shipment of sand" vs. "obstructing an interstate shipment of steel").

Lie #18. Here, Shipchandler pulled a "sleight of hand" - as smooth as most con-artists. (Dkt. 186, p.151:14 - 152:6).

Q: Did you feel comfortable with both Mr. Reese and Mr. Lancaster?
A: Yes, I did.
Q: Did you ever speak with an individual named Gary McDuff?
A: No, I did not. (emphasis added)
Q: Did you know that Mr. McDuff had any role in the investment at all?
A: No.
Q: Did you receive any written materials from Lancorp? [This would be Lancorp Fund II - the second conspiracy that McDuff was not even alleged by the government to be involved in.]
A: I did.
Q: If you could take a look at what's been put in front of you as Government Exhibit 51. It will be behind a tab marked 51. Do you recognize that document, Sir?
A: Looks like the offering.
Q: Is that the offering, meaning the prospectus, that you received?
A: The prospectus, yes.

The deception by Shipchandler was complete.

Exhibit 51 attached was for Lancorp Fund II. See the other Exhibit 56, which was Lancorp Fund I. Further, in the June 15, 2016 hearing, the Receiver Quilling acknowledged that Fund II was all Lancaster and Reese - nothing to do with McDuff - and yet Shipchandler presents the second unrelated conspiracy as though it was the same conspiracy. A rather shabby attempt at deception on Shipchandler's part. **See Quilling's testimony**, p.222:2-11, H00009. Nothing to do with McDuff, Max International - not only that, Lancorp II had no insurance provisions. The basis of the case. (See Fund II PPM - Appendix "2", Tab 14.)

See also (Dkt. 186, p.152:17-20)

> **Q:** Sir, [ ] what is the title of this document?
> **A:** "Lancorp Financial Fund Business Trust II."

To solidify the deception, Shipchandler then proceeds to discuss Lancorp Fund II as though it was the Fund allegedly associated with McDuff. (Dkt. 186, p.153:8 - 157:12)

See also (Dkt. 186, p.157:13-15).

> **A:** "Limited Operating History. The trust was founded in the State of Nevada on June 1st, 2005, Gary L. Lancaster..."

This second fund is not remotely related to McDuff. See *supra*, p.222:23-25 and p.222:2-11, H00009. Quilling testifies it has nothing to do with McDuff. It was Lancaster and Max International, but not McDuff.

See also Day one of June 15-16, 2016 hearing, p.220:21.

> **Q:** In your responsibility to the court investigating this, did you inform the court of your discovery of the Lancorp Fund 2? [ ]
>
> **Judge Elliot:** ....When were you aware there were two different funds?
>
> **A:** [Receiver Quilling]: At or about the same time I learned this way back when, yes I would - SEC probably Ms. Huseman and I were running parallel at this time in that part of the world interviewing people and looking at documents [demonstrating the vastness of the prosecution team]. If I discovered it, she probably discovered it, may have discovered it before me; and I would have talked to Gary Lancaster about it. At the end of the day, I didn't care much about how many entities there were. I cared about the flow of funds and what was left and could I track it...But, yes, I know about the fact that there was more than one of them. (emphasis added)
> **Q:** The date it was created shows on the front bottom as being what...?
> **A:** It says the effective date of this memorandum [Lancorp Fund II] is June 1, 2005.
> **Q:** And the Megafund had already been closed down at this time? Megafund was closed down in June 2005?

A: I don't recall.
Q: And this fund, do you recall tracing the money went to Max International?
A: Yes, Sir. Thank you for reminding me. That was a whole different movie (emphasis added)
Q: And do you recall Mr. Lancaster said that he did not tell myself [Mr. McDuff] anything about this Fund No. 2 or his movements or anything he was doing in that transaction or a gentleman by the name of Robert Trickle? [sic actually Tringham] (emphasis added)
A: That's true.
Q: All of Lancorp Fund 2 was a creation of him all by himself?
A: That's true.
Q: That's what he admitted?
A: Yes, that's true.

So we know that Fund 2 had nothing to do with McDuff, and yet Shipchandler introduced it in evidence at the criminal trial as though it was part of the alleged conspiracy - more of Shipchandler's deceptive sleight of hand.

See Dkt. 16 - the Superseding Indictment. No mention of Fund 2 (Lancorp Fund II), Robert Trickle, Max International. Lancaster and Reese were involved in a completely different conspiracy that had nothing to do with the allegations with McDuff. Shipchandler deceived the jury. It was not merely a mistake on Shipchandler's part, it was intentional!

In addition to the new evidence from Quilling's testimony at the June 15-16, 2016 hearings (follow-on proceeding at the insistence of the government) See attached at p.221:23 - 222:11, H00009, and see also H00069, Lancaster's deposition testimony.

Shipchandler, we have now discovered, withheld multiple volumes of *Jencks* material. He produced one of Lancaster's two depositions - but withheld the second deposition. What does the second deposition of Lancaster reveal? (11/17/05 deposition of Lancaster that was in the SEC's investigative file) See H00069. at p.101:5-19. (Deposition by Huseman - SEC Counsel, and Michael Quilling - Receiver -- prosecution team members)

Q: Tell me about Fund II.
[ ]
Q: Why -- what are the offering documents for Fund II?
[ ]
Q: So Fund II was supposed to be involved in debt securities as well?
A: Correct.
Q: And why didn't -- how much money have you raised for Fund II?
A: Well, I have deposits for Fund II that amount to 550 or 575.

Q: Thousand?
A: Yeah.
Q: How many investors?
A: Four.
Q: Four large investors?
A: Uh-huh.
Q: Did you disclose to those investors -- are those investors also Megafund investors?
A: No. [ ]
Q: .... And I realize that we went through this at our prior meeting [Ms. Huseman - SEC Counsel speaking], but I need to do it for the record. (emphasis added)

So we have a deposition of Lancaster (*Jencks* material) that Shipchandler hid from McDuff. Notes from a prior meeting with Huseman and Lancaster (possible *Jencks*, *Brady*, *Giglio* material) hidden from McDuff. Shipchandler also withheld Lancaster's prior testimony at multiple trial(s)/grand jury(s) and email(s) exchanged between Eric Werner - SEC investigator and Lancaster. All *Jencks* and *Brady*!

Lancaster pled guilty to a completely separate conspiracy - separate from McDuff (Not in the indictment, members of the prosecution team knew of the separate conspiracy, and co-mingled the alleged conspiracy with the unrelated conspiracy. The prosecution used the second conspiracy at trial to create a constructive amendment to the indictment, and yet at the same time misled the jury. None of this conduct would have been discovered without the post-trial, post-appeal, follow-on proceeding on June 15-16, 2016 - and the production of the SEC's investigative file to McDuff on or after June 15, 2016, which included all the hidden depositions, transcripts, documents, all revealing the entire government prosecution scam! (Third conspiracy *infra*.)

Lie #19 All of the repetitive lies and misrepresentations of Shipchandler are repeated to witness Scot Bennet (Dkt. 186, p.147-164), however, without pointing to those *Giglio* violations and *Jencks* violations and *Brady* violations therein - but presenting the constitutional error by noting it here - All of Scot Bennet's testimony pertains to Fund II, which the government conceded in the follow-on proceeding on June 15-16, 2016, had nothing to do with McDuff. [the second conspiracy] Reese was dead at the time of McDuff's trial, and Lancaster was not on trial. So all the testimony goes to show deception by Shipchandler, Constructive Amendment of the Indictment, and violation of the Fifth and Sixth Amendments (as noted *supra*), but not to the captioned lies of the government (not raised herein as they do not pertain to McDuff) in

McDuff's trial - as they are not relevant to McDuff. Bennet's testimony is to Fund II - Lancaster's conspiracy - separate and apart from McDuff.

Lie #20. The government next witness called was **Robert Broderson**. In their direct examination, they did not disclose the date of his investment. He either invested in Fund II, which had nothing to do with McDuff (he did not know of or recognize McDuff) (Dkt. 186, p.172:16-20) or the government proffered its next lie. (Dkt. 186, p.171:3-15).

> **Q:** Do you recall hearing language about the principal being insured?
> **A:** Yes, I do recall that.

We know that whole line of questioning by Shipchandler was false and misleading, as Fund I never had insurance at the time of it's effective date, and all investors signed waivers - waivers contained in the SEC's investigative files. See H00412-421. McDuff incorporates his prior arguments and factual disclosures, and concessions of the government regarding Fund II herein by reference (see *supra*). The Fund II PPM had removed the insurance provision. See Lancaster deposition. See H00069

Lie #21. Here Shipchandler knowingly continues to perpetuate falsehoods regarding Reese's Desist and Refrain Order from California. First, Shipchandler persists in calling it a "Cease and Desist Order." It is not. A Desist and Refrain is different legally from a "Cease and Desist." Black's Law defines "Cease and Desist Order" as: "An order of an administrative agency or court prohibiting a person or business firm from continuing a particular course of conduct." (emphasis added.) *Black's Law Dictionary*, 6th Ed. 1990, p.223. A "Desist and Refrain Order" is not backward looking but forward looking. See *Cincinnati, et al., v. Interstate Commerce Commission*, 162 U.S. 184 (1896). See Refrain = forebear. Webster's New World College Dictionary, 4th Ed., p.1205. From time immemorial "Cease and Desist" is stop what you're doing. "Desist and Refrain" is don't do it moving forward.

But more than that, as we have demonstrated, Reese's Desist and Refrain was initially issued on August 16, 2004, and remanded (voided) and corrected two more times before it became final and effective in 2009. See H00434-462. All of the relevant Lancorp Fund I investors who testified at trial invested prior to August 16, 2004, so Shipchandler's persistent questioning - to the extent it is relevant (what happened in Fund II is irrelevant to McDuff, a separate conspiracy of Reese and Lancaster ONLY!) - was a subornation of perjury by sleight of

hand. There was no "Cease and Desist Order!" It did not exist. See H00429. The Desist and Refrain Order that was remanded twice and corrected, to the extent it was valid, was not issued until August 16, 2004 and not final until November 2, 2009 - AFTER ALL FUND I investors who testified at McDuff's trial had already invested initially in Fund I (i.e. they invested prior to August 16, 2004). So, to ask as Shipchandler did: (Dkt. 186, p.172:5-11, H00156).

> **Q:** Did you know that Robert Reese was prohibited from offering any kind of securities for sale because of a Cease and Desist Order he had in California?
> **A:** No.
> **Q:** Had you known that, would that have affected your decision to invest?
> **A:** Absolutely.

...is a rank subornation of perjury. The investor did not know their testimony was false. But Shipchandler knew - making his offer subornation of perjury. Inferring that a "Cease and Desist Order" was in place (when in fact it was not) prior to all the investors investing.

Further, upon reading the order issued by the California Corporation's Commissioner, it states;

> "Pursuant to section 25532 of the Corporate Securities Law of 1968, Robert T. Reese, I.F.A. Holding, Inc., and Cypress Financial NW., Inc. are hereby ordered to desist and refrain from acting as investment advisors in the State of California…[ ]
> ...are hereby ordered to desist and refrain from offering or selling or buying or offering to buy any security in the State of California...by means of any written or oral communications which includes an untrue statement of material fact or omits to state a material fact ..." See p.5 ¶ 2, H00439. (emphasis added)

Shipchandler's mischaracterization of the "Desist and Refrain Order" as "prohibit[ing] [Reese] from offering any kind of security because of a Cease and Desist Order he had in California" is a complete and incondite falsehood. (Dkt. 186, p.172:5-8, H00156.) The conduct by Shipchandler is unconscionable. Misstating the law, misstating the facts, deceiving the witness and the jury. Violating the Fifth and Sixth Amendments (as noted *supra*) to the United States Constitution.

Further still, Mr. Boderson was from Michigan. The State of California had no jurisdiction in Michigan.

Lie #22. (Dkt. 186, p.187:8-16) **(Shipchandler questioning Mr. Johnson).**

> **Q:** Did you believe that there was any risk to your principal?

A: No, Not -- I had no reason to feel that there was any risk at the time.
Q: Because of the insurance coverage?
A: That's correct.

Of course, we now know that the questions premise was false. As all investors signed waivers waiving insurance. See H00415. He invested, he states "late 2003/early 2004," (Dkt. 186, p.184:7-8). They all (investors) knew prior to investment that insurance was not available.

Lie #23 Shipchandler avoids the truth. (Dkt. 186, p.191:4-11).

Q: When you spoke to Mr. Reese, did Mr. Reese ever tell you that he had been barred by the State of California from selling securities?
A: No, Sir.
Q: Would that have affected your decision as to whether or not to invest?
A: I most assuredly would have questioned him about that and presumably have withdrawn the funds.

Shipchandler knew that Mr. Johnson invested in late 2003/early 2004. Shipchandler knew that the initial "Desist and Refrain Order" of Reese was August 16, 2004, not final until November 2, 2009 (after 2nd Remand). See H00434. After the time frame of Mr. Johnson's investment. Mr. Shipchandler is not an idiot. He presumably had to be able to read a calendar in order to pass law school and the bar exam. His conduct was willing, knowing, fraudulent, and should be referred to the State Bar of Texas. It is unconscionable for an AUSA to conduct himself in this manner. For a discussion of Government Misconduct, see: *United States v. Luis Posada-Carriles*, 486 F.Supp. 2d 599 (W.D. Tex. 2007). Unless Shipchandler's argument is that defendants are clairvoyant and can predict the future. Securities by their very nature contain some type of risk - much like gambling. Reese, McDuff and Lancaster are not clairvoyant, as Shipchandler continues to illicit (Ok, Mr. Investor, did you know, did anyone tell you, that months or even years in the future, Reese would obtain a 'Desist and Refrain Order' that will be defective and remanded twice before being final in 2009?" - "Would you have invested?")

Lie #24. Shipchandler and Gary Lancaster misstate the facts. (Dkt. 186, p.197:13 - 198:3) **(Shipchandler questioning Gary Lancaster.)**

Q: So talk about this UK banking group. What did that entail?
A: That entailed three individuals that wanted me to manage a fund for them. [ ]
Q: Did you ever speak with those individuals directly?
A: I only spoke with one, Ian McWharter, over the telephone... [ ]

Really ..."only spoke with one, Ian McWharter ..." Liar. Lancaster flew by plane to London to meet them. In person. (See Lancaster's deposition taken by Julia Huseman and Receiver Michael Quilling - members of the prosecution team in McDuff's case.)

> **Q:** Who are those individuals? [Referring to the UK people.]
> **A:** I can get their names for you. They are the ones who promised to make payment, make payment, make payment, and never did. Had me fly to London, left me stranded at the airport, promised to pay for all my expense...

See Lancaster depositions p.419:4-10, H00093, and p.12:10-16, H00029. In the SEC's investigative file not provided to McDuff, pre-trial - post trial - post appeal - not until June 15, 2016, did he get the *Brady*, *Giglio*, and *Jencks* documents.

Lie #25. The old lie about McDuff's prior felony. (Dkt. 186, p.199:4-23) The questioning on the conviction is a complete fantasy conjured up by Shipchandler and the liar Lancaster.

> **Q:** Now, at some point in time, did you find out Mr. McDuff had a felony conviction?
> **A:** Yes. I don't remember the circumstance, but he had indicated to me with Mr. Reynolds [a licensed attorney] that he had a previous felony...(emphasis added)

[Next, Shipchandler asks Lancaster for a legal opinion - a non-lawyer, but of course Shipchandler does not ask Reynolds, a licensed lawyer, about McDuff's prior felony. No one was designated as an expert witness in McDuff's trial, yet Shipchandler continues to illicit expert opinions from lay witnesses.]

> **Q:** And what did you draw from this conclusion that he had a felony conviction?
> **A:** Well, I was convinced from the explanation and from the assurance of Mr. Reynolds [the only licensed securities attorney - none of the AUSAs were specialists in securities] that it was a one-time thing that was not material to what we were doing.
> **Q:** And did that have anything to do with why you were chosen and selected to head up Lancorp?
> **A:** In large part, it did, because he, of course, would be ineligible to represent the fund in any capacity with a felony.

Liar. Liar. Liar. First, Lancaster is not an attorney, and Shipchandler knew he was not qualified to so opine. Second, McDuff's felony (prior felony) has nothing to do with Lancorp and did not prohibit him, as a matter of law, from representing the fund. See Footnote 26 herein, page 31-32. The follow-on proceeding at which McDuff prevailed (see ALJ admin case) would have precluded him (after this 2nd felony); (had he lost the proceeding) but he won!! So he is still not prohibited from being involved with any Fund. Shipchandler's conduct is shameful. The

reason he didn't ask Reynolds about the felony (McDuff's prior felony) is Reynolds, the licensed securities attorney, would have told the truth - that McDuff's prior felony imposed no limitation on McDuff, and did not cause him to be barred from being associated with the fund. Judicial notice requested. The only reason for the follow-on proceeding, was to bar McDuff from being associated with Funds. The follow-on proceeding (*In the Matter of Gary L. McDuff*, File No. 3-15764) would have barred McDuff from being associated with Funds similar to Lancorp Fund I in the future - if McDuff had lost the follow-on proceeding. But McDuff won! He was afforded due process, and he prevailed. Unlike the criminal trial where Shipchandler, the "Lying Ranger," corralled a heard of liars to show up and testify falsely.

Lie #26. (Dkt. 186, p.207:20 - 208:3) at line 25. (Shipchandler asking Lancaster questions.)

Q: Did you know that he [Reese] was under a Cease and Desist Order from the State of California, preventing him from selling securities?
A: I did not.

Once again, without the proper context, Shipchandler suborns perjury. We know, *supra*, that Reese's "Desist and Refrain Order," issued initially on August 16, 2004 (remanded twice and not final until 2009), would not have been material to the conspiracy alleged against Mc Duff as all investors had invested, relative to McDuff's trial, prior to the "Desist and Refrain Order" (i.e. before August 2004) and that all subsequent investors, as demonstrated *supra*, that invested in Lancorp Fund II (invested after August 2004), the government conceded did not involve McDuff. See *supra* Quilling testimony. Making Shipchandler's solicitation - subornation of perjury.

Lie #27. (Dkt. 186, p.208:12-23) (Shipchandler and Lancaster)

Q: So whose idea was it, then, to send the Lancorp money to Megafund?
A: Gary McDuff.
Q: Did you do any research into - independent research into Megafund to find out what they were doing with the money?
A: No.
Q: Did you rely exclusively on what Mr. McDuff told you?
A: That and the letters of representation from two different attorneys as to the activity.

We now know from the SEC's investigative files that they actually had the two letters from attorneys in their files - not produced to McDuff. They hid facts, *Brady* facts, that were hidden by Shipchandler. See Attorney letters. H00616, H00620. We also know from

Lancaster's prior deposition, *Jencks* material hidden from McDuff - in the SEC investigative file, that it was John McDuff, not Gary McDuff who made the Megafund recommendation. See Lancaster and John McDuff depositions in Appendix "2". See also deposition of Roger McDuff, more *Brady* material withheld from Gary McDuff. We also know that Lancaster did do an investigation into Megafund and actually contacted the SEC about wrongdoing by Megafund. See Lancaster's sentencing transcript H00094-146. All found in the SEC investigative files delivered to McDuff (8,000 pages) on or after June 15, 2016. All *Brady* material, all *Jencks* materials, all *Giglio* materials - hidden by the government in their conspiracy to convict Gary McDuff. Based on all the SEC investigative file materials McDuff located Leitner's trial testimony. There Leitner testified that Lancaster contacted Leitner, not McDuff. p.817:18-20, H00315.

Lie #28. (Dkt. 186, p.210:24 - 211:13).

> **Q:** Turn to the first page of 22, Government Exhibit 22. Generally speaking, what is this document, Sir?
> **A:** It's simply a document -- 22? Are you talking about the Cash Management Agreement now?
> **Q:** Yes.

Of course we now know about the Lancorp Fund II - Lancorp Fund II, created June 1, 2005, after the conspiracy alleged to include McDuff was alleged to be concluded, and this Cash Management Agreement is dated August 31, 2005 - and did not involve - McDuff, the charged conspiracy, or anything allegedly related to McDuff. See Exhibit 22; (H00430-443); (p.222:2-11, H00009); and Quilling statement/indictment (Dkt. 16), H00784. All the information about the second conspiracy listed *supra* came from the SEC investigative files, putting the exhibit in context, plus Quilling's June 15, 2016 testimony.

Lie #29. (No one paid for insurance.) (Dkt. 186, p.225:2-6)

(Shipchandler questions Quilling).

> **Q:** So, based on your analysis of the accounts associated with Lancorp, did you find any records, any payments to insurance companies to provide any kind of protection of the investor's investments?
> **A:** No.

Really, Mr. Shipchandler? Why did you not give Lancaster the Larry Frank documents that showed he (Larry Frank) paid $50,000 for insurance? They were in your investigative files.

Why not give him the Stark documents (two insurance policies fabricated by Stark and offered as exhibits in Stark's trial in 2008? They were in your investigative files). Your case agent Ron Loecker was also the case agent in the Stark case. See Dkt. 153, p.3, H01098. Or even all the other insurance file evidence in the SEC files. (June 16, 2016, testimony of Ron Loecker.) See p.353:1-5, H01197; and p.147:10 - 148:8, H00078-79; and Insurance files H00537. Or even the transcripts of recorded conversations, made by government CI Rumpf, which were trial exhibits in Bradley Stark's trial. (H00325-346) The same case where your case agent Ron Loecker was the case agent. The same case where your receiver Michael Quilling was the receiver. The same case where Julia Huseman conducted parallel investigations (SEC, DOJ, Receiver). See H00689, H00695, and H00715, H00724, p.221:1-9, H00009.

The governments own SEC file - had *Brady* evidence, *Giglio* evidence, *Jencks* evidence about insurance, all hidden so Quilling and Shipchandler could lie about it.

But as demonstrated herein, Shipchandler suborned a lifetime of perjury in one case - so he could get promoted to the SEC Division of Enforcement Director position in Dallas and proceed to prosecute McDuff in the follow-on proceeding - but, alas, he had to turn over his treasure trove of hidden *Brady*, hidden *Jencks*, hidden *Giglio* materials all in his investigative files - which demonstrated all of his lies.

Lie #30. (Dkt. 187, p.273:22 - 274:1) **(Shipchandler questioning Dirks)**

> **A:** ...yes. The initial investment was $30,000, and then subsequently to supplement the reported earnings of the First Quarter of '05, I invested another $3,260 there in April, and then again in July, to supplement the refunded earnings from the Second Quarter of '05, an amount of $4,126.

See also Investor Summary. Trial exhibit 31, Dkt. 238. Dirks invested in both Fund I and Fund II; however, the government merged the two conspiracies. See Trial Exhibit 31, Claim #238. The initial investment and conversation with Reese was years before the alleged "Cease and Desist Order." See Desist and Refrain Order, H00434.

The final investment was after Fund I was closed down (June of 2005), and Fund II was opened June 2005. Dirks invested on 7/26/2005 - post alleged conspiracy, into the Second Fund, not alleged to be attached to McDuff, where government witnesses concede that it had nothing to

do with McDuff [but with Fund II]. See p.222:2-11, H00009 and H01125-1126, H00695 and H00715.

(Dkt. 187, p.281:19 - 282:1).

Q: ...Did Mr. Reese ever tell you [using his super special never heard of before clairvoyant powers to predict years into the future] that he had been [or would be years in the future] ordered by the State of California [after it was remanded twice prior to 2009] not to sell securities based on his past conduct?
A: Absolutely not.
Q: Would that have made a difference in your decision as to whether or not to invest [if you could use your time machine and go back in time years to invest]?
A: Of course. I wouldn't have gone there at all.

The farcical nature of the repugnant conduct of Shipchandler would be humorous, if it were not for the fact that McDuff has been incarcerated based on Shipchandler's lies for 5 years now.

Lie #31. (Dkt. 187, p.282:17-22).(Shipchandler to Dirks).

Q: Did you at any point in time know that Mr. McDuff did not hold a securities license because he had a previous felony conviction? (emphasis added) (Shipchandler's lie.)
A: No.

As noted previously, *supra*, that statement by Shipchandler is a misstatement of the law, as an AUSA, Shipchandler knew it. See Footnote 26 herein, page 31-32.

Lie #32. (One of Shipchandler's favorite lies). (Dkt. 187, p.282:23 - 283:1).

Q: If you had known that -- even though you opted for insurance -- there was no insurance on your principal, would that have affected your decision to invest?
A: Sure.

Lie. He signed an insurance waiver. Found, of course, in the SEC investigative file.

Lie #33.

Q: If you had known that Mr. Lancaster had no experience with this kind of investment, would that have affected your decision to invest?
A: Absolutely.

Shipchandler lies again. Lancaster did have experience. See Lancaster's Sentencing Transcript in October 2010, (Appendix "1", H00094-146). More *Jencks*, *Brady*, and *Giglio* that

Shipchandler withheld - of course, found in the SEC's investigative files. See *ONESCO* cases H00734-735

Lie #34. (Shipchandler to Dirks).

> **Q:** So, even though you had sent in checks that were not sent in to Megafund [Lancorp Fund II that had nothing to do with McDuff], those funds disappeared into Lancorp?
> **A:** Yes....

Second conspiracy. Shipchandler suborned more misrepresentations regarding the second conspiracy that had nothing to do with McDuff. See (June 15, 2016, Quilling Transcript, p.222:2-11, H00009).

Lie #35. (Shipchandler to Dirks #2)(The felony lie of Shipchandler) (Dkt. 187, p.294:9-16).

> **Q:** And was it discussed to you that he could not possess a securities license because he had a felonious background? [Shipchandler lie.]
> **A:** No.

As previously noted, over and over and over again, that statement of Shipchandler's is not a correct statement of the law. See Footnote 26 herein, page 31-32. McDuff incorporates his prior facts and arguments *supra*, herein.

Lie #36. (Dkt. 187, p.294:22 - 295:1)

> **Q:** Had you known...no insurance...affected your decision...?
> **A:** Yes.

Not to beat the same dead horse, but Shipchandler lies nonstop. See H000411-421, H00515-516, H00517-518, H00519-531, H00532-536, H00573, H00538-539, H00559-603, H00611, H00615-618, H00620, H00653, H00665, H00666-667, H00681, H00697, H00234-256, H00264-268, H00271-274, H00275-290, H00315, H00317-318, H00325-344, and H00485. Insurance documents, waivers, recordings, policies - all from the SEC's own investigative file. See Appendix "2" for Leitner's trial transcripts, Stark's trial transcripts. Tab 6 a)-i), and Tab 11 a)-d).

Lie #37. Again Shipchandler elicits nonstop falsehoods.

> **Q:** And had you known...Mr. Lancaster had no experience...
> **A:** Absolutely.

It's amazing how many lies Shipchandler iterated. It's easy when you hide *Brady*, *Giglio*, *Jencks*. For proof see Lancaster's sentencing transcript for October 2010... (H00094-146)

(**Court questioning Lancaster**)

Q: Did you represent to investors that you had had experience in this sort of work before?
A: I responded that I had experience as a registered representative.
Q: Did you?
A: Yes, as a licensed person, I worked in the banking environment...(See p.38:15-21, H00131) [ ]
The Court: All right. Mr. Shipchandler, do you have any information contrary to what Mr. Lancaster is telling me?
Mr. Shipchandler: Specifically, Your Honor, that the investors were told they would receive a portion of the money?
The Court: Un-huh.
Mr. Shipchandler: No, Your Honor, nothing different than that.

So, not so inexperienced after all. See p.42:13-21, H00135.

Lie #38. (**Julie Tolman and AUSA Lopez**)

Ms. Tolman invested in 6/18/2004. See p.304:18 - 305:10, H00179-180. She spoke to McDuff, Lancaster, Don Winkler before she invested. (Dkt. 187, p.296:16-24, H00171)

Q: (Dkt. 187, p.312:13 - 313:1). If you had known that Gary Lancaster did not actually have the experience in these types of investments that he said he did...
A: I wouldn't have invested with him.

See Lancaster's sentencing transcript (Appendix "1"). Lancaster did have experience. See *ONESCO* cases. H00734-735.

Lie #39. (**Shipchandler and Jessica Magee**) Direct lies by a government attorney Jessica Magee - suborned by Shipchandler. (Dkt. 187, p.315:12-19).

Q: Based on a request from the U.S. Attorney's Office, did you check the registration status of the Lancorp Fund?
A: Yes, I did.
Q: What did you find?
A: The Lancorp Fund was not and never was registered with the [SEC]...

Such a pair of liars. See the registered filing attached H00401-409. Found in Magee's and Shipchandler's files!! (SEC files)

Lie #40. (Shipchandler and perjurer Jessica Magee). Direct lies by a government attorney - Jessica Magee - suborned by Shipchandler (Dkt. 187, p.317:11 -318:11).

> **Q:** Based on a request from the U.S. Attorney's Office, did you check into any registration status for Gary McDuff?
> **A:** Yes, we did.
> [ ] (Dkt. 187, p.317:24).
> **Q:** Did you make the same determination for a gentleman named Gary Lancaster?
> **A:** Yes, Sir. Not registered.

She (Jessica Magee) sat there and lied. In no uncertain terms. Shipchandler suborned perjury in no uncertain terms. In the SEC investigative files of Shipchandler and Magee are the depositions of Lancaster. See H00021-93. He has a securities license registration series 6, 7, 63, 65. See also his sentencing transcript, p.32:21-24. See also 21 United States District Court cases *ONESCO v. Pals*, 2008 U.S. Dist. Lexis 11447 (E.D. Michigan 2/14/08). "Gary Lancaster, previously held series 6 and 7 licenses with the National Associate of Securities Dealers, Inc. ("NASD) and was a registered representative with *ONESCO* from March 23, 2004, to January 3, 2005." See *O.N. Equity Sales Co., v. Steinke*, 504 F. Supp. 2d 913, 915 (2007 C.D. California)

See also public records of the SEC attached H00401-409. See also Jessica Magee's own filings in civil cases with the U.S. District Court for the Northern District of Texas. See *SEC v. Gary McDuff*; Cause No. 3:08-cv-526-L, before the Honorable Judge Lindsey; Dkt #28 "Motion to Reopen Case," 6/19/12 (wherein Jessica Magee alleged in her filings that Lancaster had a Series 6, 7, 63, and 65); "Motion to Reissue Summons," Dkt. #29; 6/19/12; (wherein Jessica Magee alleged in her filings that Lancaster had a Series 6, 7, 63, and 65); Dkt #35 9/24/12 "Application for Entry of Default," (wherein Magee specifically pleads that Lancaster is licensed - adopting pleadings as a basis for default); (See Dkt. #25, 29, 35, 36, 37, and 39) "Motion for Entry of Default," 9/24/12; (adopting and during same facts, Dkt #39 "Motion for Default Judgment Brief;" 2/19/2013; Alleging and urging the same.) Such audacity, such repugnant conduct for a government attorney. McDuff requests referral to the State Bar of Texas

Lie #41. (Dkt. 187, p.324:8-17). Lopez is a suborner of perjury.

> **Q:** In preparation and in anticipation of this trial, did the government [prosecution team] call upon Lloyds to see whether certain policies existed regarding named individuals and entities?
> **A:** Yes.

Q: And specifically, did we [the prosecution team] ask you whether or not Lloyds held insurance for Gary McDuff?

A: I believe that the request was whether or not an insurance policy had been issued to Lancorp Financial Fund Business Trust II. And I know additional names of individuals and entities were shared as well. (emphasis added.) [Not only that, the "Lloyd's Insurance" policy appears in the transcript]. Conversations of Bradley Stark. See Gov. Exhibit H00325-346.

As we now know, Fund II was created by Lancaster and had nothing to do with McDuff. See Hp.222:2-11, H00009. Fund II was created at the end of the alleged conspiracy in June 2005. See PPM II, Gov. Ex. 29, Appendix "2", Tab 14. The new conspiracy involved Lancaster and Reese - but not McDuff. See H00648-715. And yet Lopez and the trial team knowingly seeks to deceive the jury. All the revealing information about the second conspiracy came from Shipchandler's and Lopez's own SEC investigative files.

Lie #42. (Dkt. 187, p.335:7-10). (**Shipchandler questions Loecker**)

Q: In your review of the account records, did you determine that there were any payments to insurers or any expenditures related to bond transactions?

A: I saw no indication of any payments whatsoever.

But if you look in Shipchandler's SEC files you see the evidence of the $50,000 payment by Larry Frank for insurance. If you look in the Stark file (Stark is the fraudster in which Megafund invested) where Ron Loecker was the case agent, the case that he was listed as a witness, the government had stipulations on insurance documents created by Stark, had phone calls and body wire recordings by its CI - Rumpf - demonstrating that the entire insurance fraud was done solely by Stark - no one else. See H00328, and see Appendix "2", Tab 11 - Rumpf recordings of Stark. Both Loecker and Shipchandler knew - but lied about it. See H01086-1090.

Lie #43. Ron Loecker is dishonest! (Dkt. 187, p.335:13 - 336:4). Shipchandler the constant suborner of perjury urged Loecker's answer - in material part. (beginning at Dkt. 187, p.335:21 - 336:4).

A: The remaining portion of that $1 million, a total of $175,835, went to a MexBank account with Cash Cards International, which we determined was controlled by Mr. McDuff.

Q: The entities in blue on the screen, are those all entities controlled by Mr. McDuff?

A: Yes, Sir.

Such liars. Of course we now know, from Shipchandler's and Loecker's own files - their own investigative files - what liars they are. In Shipchandler's SEC investigative and Loecker's investigative files are the deposition of Steven Renner (the CEO of Cash Cards), who testified that none of these were McDuff's accounts. Perhaps that's why the dishonest Shipchandler changed witnesses on the eve of trial and did not call Steven Renner in the criminal trial. See witness list and amended witness list H00800-808. Steven Renner is the founder and owner of Cash Cards International. He testified as follows: **See Renner Deposition** (H00190-216) from the investigative file.

> **Q:** MexBank is not his account?
> **A:** The account in question [MexBank] was not his account. I wasn't going to give him [Gary McDuff information on someone else's account. (emphasis added)

Shipchandler's and Loecker's entire discussion about accounts [MexBank] somehow tracing money to McDuff was false! MexBank was not McDuff's account. (See Dkt. 187, p.334:12 - 340:5).

Lie #44. Unabashedly, Shipchandler urges the Court to take judicial notice - and the Court did take Judicial Notice regarding a document Exhibit 33 (not admitted) and then recited to the jury falsely regarding Reese. Specifically, see (Dkt. 187, p.344:16 - 352:16). The "Desist and Refrain Order," which Shipchandler urges the Court to take judicial notice of states the following: (See trial Exhibit 33) attached H00439.

PURSUANT TO SECTION 25532 OF THE CORPORATE SECURITIES LAW OF 1968, ROBERT T. REESE, IFA HOLDING, INC., AND CYPRESS FINANCIAL N.W., INC., ARE HEREBY ORDERED TO DESIST AND REFRAIN FROM ACTING AS INVESTMENT ADVISORS IN THE STATE OF CALIFORNIA UNLESS AND UNTIL THEY HAVE FIRST APPLIED FOR AND SECURED FROM THE COMMISSIONER A CERTIFICATION, THEN IN EFFECT, AUTHORIZING THEM TO ACT AS INVESTMENT ADVISORS. (emphasis added)

AND

PURSUANT TO SECTION 25532 OF THE CORPORATE SECURITIES LAW OF 1968, ROBERT T. REESE, IFA HOLDING, INC., AND CYPRESS FINANCIAL N.W., INC., ARE HEREBY ORDERED TO DESIST AND REFRAIN FROM OFFERING OR SELLING OR BUYING OR OFFERING TO BUY A SECURITY IN THE STATE OF CALIFORNIA, INCLUDING BUT NOT LIMITED TO INVESTMENT CONTRACTS, BY MEANS OF ANY WRITTEN OR ORAL COMMUNICATION WHICH INCLUDES AN UNTRUE STATEMENT OF A MATERIAL FACT OR OMITS TO STATE A MATERIAL FACT NECESSARY IN ORDER TO MAKE THE STATEMENTS MADE, IN THE LIGHT OF THE

CIRCUMSTANCES UNDER WHICH THEY WERE MADE, NOT MISLEADING . (emphasis added)

Really not much of a Desist and Refrain Order. Under California law, really all states' laws, you have to have a license to be an investment advisor (with certain notable exceptions not relevant here). And, you are never supposed to make materially false or misleading statements regarding investing, even without an injunction or Desist and Refrain Order.

Now compare what the actual "Desist and Refrain Order" reads, to what the Court instructed the jury - they are materially different. Beginning at (Dkt. 187, p.351:23 - 352:15), the Court said to the jury as its instruction:

> NOW THE GOVERNMENT HAS OFFERED GOVERNMENT'S EXHIBIT 33, WHICH DOESN'T SPECIFICALLY INVOLVE MCDUFF. BUT THE ALLEGATION IN COUNT 1 OF THIS CASE IS CONSPIRACY, CONSPIRACY IS THE FORMATION OF AN AGREEMENT TO ACCOMPLISH SOME ILLEGAL PURPOSE. SO WHAT I'M GOING TO DO ON GOVERNMENT'S EXHIBIT 33 IS TELL YOU THAT YOU MAY CONSIDER IT AS A FACT -- AND I'VE TAKEN JUDICIAL NOTICE OF THIS DOCUMENT, GOVERNMENT EXHIBIT 33 -- YOU MAY CONSIDER IT TO BE TRUE THAT ROBERT THOMAS REESE, BEGINNING ON AUGUST 16, 2004, WAS UNDER A CEASE AND DESIST [SIC] ORDER FROM THE STATE OF CALIFORNIA WHICH PROHIBITED HIM FROM OFFERING OR SELLING ANY SECURITIES IN THE STATE OF CALIFORNIA.

That is false!! That is not what the Desist and Refrain Order reads!! Shipchandler urged the judge to make structural error and the judge made structural error. McDuff urges this as a falsehood and as a separate structural error.[27]

Lie #45. (Dkt. 187, p.352:22-25).

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[27] In *United States v. Young*, 470 U.S. 1 (1985), Justice Brennan (along with Marshall, J. and Backman, J.), concurring in part and dissenting in part wrote:

> "This analysis leads me to concur in much of the court's opinion. Specifically, I agree fully with the Court's conclusion that federal prosecutors do not have a "right" of reply to defense improprieties..." *Id*. at 22. [ ]
>
> "The Court goes on to suggest, however, that courts should apply an 'invited error' analysis in determining the consequences of prosecutorial violations of these scandals. Under this analysis courts...should determine the possible effect of the misconduct 'on the jury's ability to judge the evidence fairly.'"

In *United States v. Lopez-Escobar*, 920 F.2d 1241, 1246 (5th Cir. 1991), the Court held that under the "invalid error" doctrine - "[a] party cannot complain on appeal of errors which he himself induced the district court to commit," such as the prosecutor did throughout McDuff's trial.

Q: The Cease and Desist [sic] Order we spoke about a moment ago was that during the pendency of when Lancorp was soliciting investments from the investors?
A: Yes, Sir.

Which Lancorp Fund? Lancorp Fund I or Lancorp Fund II? All the investors who testified at trial who invested in Lancorp Fund I spoke to McDuff, Lancaster, or Reese prior to August 2004. All the investors who testified at trial who invested (initially) after August 2004 - invested in Fund II, which the government concedes does not include McDuff. See p.222:2-11, H00009.

Lying Summary

The government, on 45 separate occasions, in a day and a half trial, misled the jury. Made material misrepresentations and made false statements over and over. The government's lies pervaded the trial. The misrepresentations, lies, and falsehoods infected the trial. The lies, all demonstrated by documents, depositions, declarations and information contained in the SEC's own investigative files, or from Leitner's trial and from Stark's trial [which were in the possession of members of the prosecution team from 2007-2008 forward, years before McDuff's trial]. The documents withheld (8,000 pages) delivered to McDuff on June 15, 2016, in part (6,000 pages), and after June 15, 2016, in part (2,000 pages), demonstrate government attorney corruption on a scale not generally seen, if ever seen before. The court, after considering all the evidence attached - which came from the government's own SEC files - *Brady* evidence, *Giglio* evidence, *Jencks* evidence, *Jencks Act* evidence - withheld from McDuff - and the knowing lying of Jessica Magee, the subornation of perjury by Shipchandler, the false testimony of Ron Loecker, may wish to open an investigation into the conduct of the DOJ in this case along the lines of the investigation performed in Senator Steven's case.[28] Senator Stevens' case only had a

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[28] "There's a Supreme Court Case *Napue v. Illinois*, 360 U.S. 264 (1959) decided years ago. Which requires the Government to correct false testimony. The prosecutor said not a word which, in my view, and as I concluded in our report, constituted another example of a *Brady* violation...And, you know, there are a couple of ways a prosecutor could deal with that. The simplest way is to get up on redirect and say, 'Now [blank] just asked you, "Did you tell us about this only recently?" and you said, "No," well, you did tell only on September the 14th. You remember that?'...or the prosecution could have approached the bench and made some kind of disclosure to the Court and counsel...He did none of that." Oral History of Henry F. Schuelke, 111; 6th Interview, May 24, 2012; Oral History Project of the Historical Society of the District of Columbia Circuit.

See *Napue v. Illinois*, 360 U.S. 264 (1959) the Supreme Court held that:

(1) "...it is established that a conviction obtained through use of false evidence, known to be such by representations of the state..." is a denial of Due Process.

handful of government lies, a handful of hidden evidence - not the avalanche of evidence that the Government hid in this case. See p.10:19 - 12:25, H00002; p.35:3-25, H00364; p.228:7-13, H00011, H01199-1195. McDuff makes such a request for an independent investigation.

B) Jury Charge

The government charged McDuff with two counts which are unrelated conceptually.

Count 1 is conspiracy to commit wire fraud in violation of *18 U.S.C. § 1349*. As the Court noted in the jury instructions "*Title 18 United States Code Section 1349*, makes it a crime for anyone to conspire with someone else to do something that, if actually carried out, would result in the crime of wire fraud. (Dkt. 105, p.8). See H00825 (emphasis added)

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(2) "The same result obtains when [the government], although not soliciting false evidence allows it to go uncorrected when it appears."

(3) "The principle that a State may not knowingly use false evidence including false testimony to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness."

(4) "It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie no matter what its subject, and if it is in any way relevant to the case, the [AUSA] has the responsibility and duty to correct what he knows to be false and elicit the truth..."

(5) "That the [AUSA's] silence was not the result of guilt or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair." *Id*. at 264-270.

As we all remember, *Henry F. Schuelke, III*, esq., Blank Rome LLP, was appointed by U.S. District Judge Emmett Sullivan to investigate the misconduct of the DOJ in the prosecution of Senator Ted Stevens. There, he discovered a mere fraction of government misconduct compared to the McDuff case. And while it is admitted that competent counsel would have been helpful to McDuff - we know of the government corruption in large measure because of 8,000 pages of the DOJ, SEC, and Receiver's investigative files, discovered in June 2016. Those disclosures led to 1000s of pages of *Jencks* material in the investigative files, in the form of depositions (taken by the SEC and Receiver Quilling - members of the prosecution team), declarations, prior trial transcripts of Bradley Stark's trial, Stanley Leitner's trial, and Lancaster's sentencing (all which occurred years before McDuff's trial) (for which Case Agent Ron Loecker was the case agent and testified previously on this exact matter (i.e. Sauduker Holdings - Stark's trial; Megafund - Leitner's trial; Gary Lancaster's sentencing - Lancorp and Gary McDuff).)

Those same SEC files had depositions of witnesses, which, while not all being *Jencks* material, all are *Brady* material or *Giglio* material, and of course, none were disclosed by Shipchandler.

Those same SEC files had government records, filings with the SEC, Insurance policies, unaltered documents (altered documents offered at trial) - dozens and dozens of documents that unravel a web of lies told by Jessica Magee, government attorney and witness and member of the prosecution team. Lies by Ron Loecker, case agent, member of the prosecution team. Material evidence from Quilling's files rebutting the testimony of witnesses. All falsehoods proffered by the prosecution team noted supra. None of which (in substantive part) would have been discovered without a follow-on proceeding initiated by the SEC. See H00879-880. In that administrative proceeding, ALJ Elliot ordered the government to make the SEC investigative file available to McDuff's family and private investigator (H00002, p.10L19 - 12:25, H00363, p.25:2-7, and see H00894-895 ¶ (a).).

The result is some 8,000 pages of *Brady*, *Giglio*, *Jencks*, *Jencks Act* materials being disclosed to McDuff for the first time on June 15, 2016 (6,000 pages), and, two weeks later, in early July 2016 (2,000 pages).

What follows is a chronology of most, but not all, of the government falsehoods, perjury, and misrepresentations suborned by the government at McDuff's trial - the breadth and scope are breath-taking - all hidden in the government's own SEC investigative files.

Count 2 is money laundering in violation of *Title 18 U.S.C. § 1956(a)(1)*, for which the government alleged the underlying crime was wire fraud - a crime McDuff was not charged with. A crime for which McDuff was not indicted. A charge no one was charged with. The government additionally attached an aiding and abetting charge against Gary Lancaster who was not on trial in this case, but nevertheless it was charged. (Dkt. 16, p.7, See H00790)

When the correctness or adequacy of a jury instruction is at issue, an Appellate Court may not review the evidence in the light most favorable to the verdict winner. There can be no deferment to a factual finding tainted by legal error. If the jury was misled as to the law on a material point, "We cannot presume that the jury applied the appropriate standard in deciding [an issue]," *McPhee v. Reichel*, 461 F.2d 947, 951 (3rd Cir. 1972); see also *Hunziker v. Scheidemantle*, 543 F.2d 489, 497-498 (3rd Cir. 1976).

The jury charge is so fundamentally flawed that no conviction can stand. The law addressing jury charges is undergirded by multiple Constitutional Amendments and provisions.

The Fifth Amendment guarantees that a criminal defendant will be tried only on charges alleged in a grand jury indictment. The indictment cannot be "broadened or altered" except by the grand jury. *United States v. Chandler*, 858 F.2d 254, 256 (5th Cir. 1988), citing *Stirone v. United States*, 361 U.S. 212, 215-217 (1960). A constructive amendment occurs when the trial court, "through its instructions and facts it permits in evidence, allows proof of an essential element of a crime on an alternative basis permitted by the Statute, but not charged in the indictment. *United States v. Slovarek*, 867 F.2d 842, 847 (5th Cir. 1989) (cert. denied, 490 U.S. 1094 (1989).) Such amendments need not be explicit. An implied or constructive amendment also constitutes reversible error. *Stirone*, 361 U.S. at 217-18; *United States v. Young*, 730 F.2d 221, 223 (5th Cir. 1984).

Constructive amendments are reversible *per se*, whereas variances between the indictment and proof are evaluated under the harmless error doctrine. *Stirone*, 361 U.S. at 217-18; *Young*, 730 F.2d at 223. "The accepted test is that a constructive amendment of the indictment occurs when the jury is permitted to convict the defendant upon a factual basis that effectively modifies an essential element of the crime charged." *Young*, 730 F.2d at 223 (internal citations omitted). The question is: Was the jury allowed to convict McDuff upon a "set of facts different from that set forth in the indictment." *Id*. at 223; *Stirone*, 361 U.S. at 217-18. *Stirone* is

instructive, there *Stirone* was indicted for a *Hobb Act* violation for obstructing an interstate shipment of sand. The evidence at trial and jury instruction was that *Stirone* had interfered with a shipment of Steel. The Court held:

> There are two essential elements of a *Hobb Act* crime interference with commerce and extortion...The charge that interstate commerce is affected is critical since Federal Government's jurisdiction of this crime rests only on that influence. It follows that when only one particular kind of commerce is charged to have been burdened a conviction must rest on that charge and not another... *Stirone*, 361 U.S. at 218.

In McDuff's case, the indictment reads that "...to wit, McDuff and Reese, aided and abetted by GLL (Gary L. Lancaster), caused Leitner to sign and send check number 1133 in the amount of $500,000 from Bank account number xxx6683, in the name of 'Megafund Corporation Operating Account,'" ... (Dkt. 16, p.7). See H00790.

However, the jury charge reads:

"For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

- **First:** That the defendant knowingly conducted a financial transaction;
- **Second:** That the financial transaction involved the proceeds of a specified unlawful activity, namely wire fraud;
- **Third:** That the defendant knew that the property involved in the financial transaction represented the proceeds of some form of unlawful activity; and
- **Fourth:** That the defendant intended to promote the carrying on of the specified unlawful activity."

(Dkt. 105, p.11) See H00828.

There are so many things wrong with the jury charge *supra*, when compared to the indictment that the conviction is *infirm*.

Initially, it is undisputed that McDuff did not conduct the purported "financial transaction." The indictment alleges it was Gary L. Lancaster, not McDuff. So the first element fails under the constructive amendment principle. However, the government also alleged aiding and abetting in the indictment. (McDuff and Reese, aided and abetted by GLL.) But it is Gary Lancaster who "aided and abetted," not McDuff - as alleged in the indictment. The particular role of the defendant McDuff, alleged by the government, is material. McDuff is not even

charged with Aiding and Abetting; Lancaster is charged with aiding and abetting. The Court goes on to give erroneous aiding and abetting instructions - because McDuff was not charged by indictment with aiding and abetting; Lancaster was charged in McDuff's indictment with aiding and abetting. Lancaster was not on trial. Sending a check through the mail - is mail fraud, not wire fraud. (Fundamental error - charging the wrong crime)

It is the duty of the Court to see that the jury instructions and arguments to the charges presented in the indictment be properly tailored. *Stirone*, 361 U.S. at 217. Merely instructing the jury that the "defendant is not on trial for any act or conduct or offense not alleged in the indictment" (Dkt. 105, p.6) does not fulfill this duty of the Court. *Id.* See H00823.

To find Gary McDuff guilty (in arguendo) of money laundering the jury had to find that Gary Lancaster was guilty of aiding and abetting in mail fraud (not wire fraud), a crime for which McDuff was not indicted (no one was charged with mail fraud). The Court specifically instructed the jury as to the indictment "...I will not read the superseding indictment to you at this time because I will give you a copy to take with you to the jury room." (Dkt. 105, p.7, H00824) Included in the jury charge (Dkt. 105, p.6) was "neither are you called upon to return a verdict as to the guilt of any other person or persons not on trial as a defendant in this case." Lancaster was not on trial, but the jury had to find him guilty (in *argunedo)* to find McDuff guilty of money laundering. As a result, the Fifth Amendment of the U.S. Constitution has been violated by the jury charge and the conviction must be reversed. *Stirone*, 361 U.S. at 217-18.

Here in Dkt. 105, p.13, H00830, the Court instructed:

> "If another person is acting under the direction of the defendant or if the defendant joins another person and performs acts with intent to commit a crime, then the law holds the defendant responsible for threats and conduct of such other persons just as though the defendant had committed the acts or engaged in such conduct."

For example, if Lancaster was a defendant herein, and was found guilty beyond a reasonable doubt for aiding and abetting mail fraud, then McDuff could be held guilty for money laundering (under the charge in the jury instruction). McDuff is the alleged principal, and aiding and abetting applies to the non-principal actor.

However, Lancaster did not appear herein, and was not found guilty of aiding and abetting (no one charged with mail fraud), and, therefore, the first element of the aiding and abetting instructions failed.

The first element reads (Dkt. 105, p.14, H00831) "That the offense of laundering of monetary instruments was committed by some person." That instruction on its face is vague and ambiguous. Initially, the "offense of laundering money" would have to be committed by some person tied in some way to the criminal venture. As it reads, McDuff could be found guilty of aiding and abetting (assuming he was charged with aiding and abetting - he was not) by being guilty of elements 2-4. Further, the unknown person, is unconstitutionally vague. (completely unrelated to McDuff or any alleged criminal venture alleged to be related to McDuff because he could be the "person"). Under the facts at trial, the charge is fatally flawed. Under the indictment, GLL was charged with aiding and abetting - but he is not a defendant herein - not McDuff (and no one charged with mail fraud).

The Sixth Amendment requires unanimity by the jury in its findings of guilt as to the elements of the offense. *Richardson v. United States*, 526 U.S. 813, 817 (1999). "In the routine case, a general unanimity instruction will ensure that the jury is unanimous on the factual basis for a conviction, even where an indictment [as the indictment in McDuff's case] alleges numerous factual bases for criminal liability." *United States v. Holley*, 942 F.2d 916, 925-26 (5th Cir. 1991). Even so, such an instruction is insufficient if "there exists a genuine risk that the jury is confused or that a conviction may occur as the result of different jurors concluding that a defendant committed different acts." *Id*. at 926. As noted *supra*, several of the potential factual elements alleged by the government were the product of fraud and perjury on the part of the government which call into question any single basis relied upon by the jury to come to a conviction. McDuff has previously demonstrated a modicum of evidence - based on governmental misconduct - to demonstrate prejudice and plain error. McDuff was sentenced for both counts and in part the court's sentences to run concurrent and consecutive creating prejudice *per se* as to each count. (citations omitted).

The Court gave no unanimity instruction. The case went to the jury on a general verdict. The unanimity instruction was absent. As the Fifth Circuit noted in *United States v. Mauskar*, 557 F.3d 219, 227 (5th Cir. 2009), a district court's unanimity instruction can be sufficient to

guard against a non-unanimous verdict. Here there was none, and because many of the alleged acts supporting the "conspiracy" were products of governmental fraud and perjury, *supra*, the failure of the court to provide a unanimity instruction like the one below is plain error.

The proper unanimity instruction follows (5th Cir. held in *Mauskar*):

> Your verdict, whether it is guilty or not guilty, must be unanimous. The following instruction applies as to Count One.
>
> As I have explained, Count One of the second superseding indictment accuses the defendant of committing the crime of conspiracy in up to three different ways. [In McDuff's case, by as many as 8 actions - (Dkt. 16, p.3-4) H00786-787.] We went over this. The first is the defendant conspired to commit health care fraud in connection with the delivery of or payment for physical therapy services. The second is the defendant conspired to commit health care fraud in connection with the delivery of or payment for durable medical equipment, namely power wheel chairs. And the third is that the defendant conspired to solicit or receive remuneration in return for referring Medicare and Medicaid patients.
>
> The government does not have to prove all three of these objects of conspiracy for you to return a verdict of guilty on this charge. Proof beyond a reasonable doubt on one object of the conspiracy is enough. But in order to return a guilty verdict, all twelve of you must agree that the same one has been proved. All of you must agree that the government proved beyond a reasonable doubt that the defendant conspired to commit health care fraud in connection with the delivery of or payment for physical therapy services, or all of you must agree that the government proved beyond a reasonable doubt that the defendant...conspired to commit health care fraud in connection with the delivery of or payment for durable medical equipment, or all of you must agree that the government proved beyond a reasonable doubt that the defendant conspired to solicit or receive remuneration in return for referring Medicare and Medicaid patients. In other words, if four of you believe A was proved and four of you believe B was proved and four of you believed C was proved, you're not unanimous. Everybody has to agree on the same one for you to find a guilty verdict.
>
> Now, of course, all of you may also agree that the conspiracy, if you have so found, has had as its object the commission of more than one of the alleged federal offenses. So long as you are unanimous on each of the federal offenses.

Just as the Court in *Stirone,* 361 U.S. at 218, would not permit a substituted fact to that charged in the indictment (the Court refused to allow substitute of "sand" for "steel"); here, the Court should have required the jury to reach a unanimous verdict to at least one charged fact underlying in the indictment.

The Court did not, and it was plain error.

Alternatively, in fact, a good instruction is sufficient to guard against a non-unanimous verdict. See *United States v. Fisher*, 106 F.3d 622, 633 (5th Cir. 1997). But here, as seen herein, there was no unanimity instruction given by the court, and there is no way to conclude the jury was unanimous. In fact, they didn't even read the jury charge as they returned a verdict in six minutes (which necessarily required prior jury deliberation prior to the end of the case). (The charge is 16 pages.) See H00818-843.

In McDuff's case, the government charged that McDuff and Reese (who was deceased at the time of trial) "conspired, confederated, and agreed with GLL (Gary L. Lancaster) [ ], to devise a scheme and artifice to defraud investors and to obtain money and property from these investors by materially false and fraudulent pretenses, representations, and promises and in execution of the scheme and artifice, to cause writings ... to be transmitted by means of a wire communication..." (Dkt. 16, p.2). The government then listed the manner and means of the conspiracy. The government listed 7 "affirmative false and material representations or material factual omissions." (Dkt. 16, p.3). However, nowhere was the jury required to agree upon any of these. Of particular importance is ¶ 6(c), (the government alleged that one McDuff misrepresentation was); "The representation that the Lancorp Fund had been registered in a Reg. D-506 filing." We of course now know that the government, through the perjury of government agent and attorney, Jessica Magee, lied to the jury stating that the filing did not exist. (See Dkt. 187, p.315:12-19, H00181.) When, in fact, it did. And was filed on May 27, 2003. See Exhibit H00401-409. But for the production, post-trial, of the SEC DOE's investigative file we would have not known of this perjury. (Without addressing *Brady*, *Giglio* issues raised *infra*.) And not known without evidence from the SEC's own file, that the lie was intentional, malicious, and without excuse - the government had proof of the filing in their own file - and yet lied about its existence.

Also important was ¶ 6(d) (Dkt. 16, p.3), (the Government alleged that one McDuff misrepresentation was); "The representation that GLL (Gary L. Lancaster) was a registered advisor under the Investment Advisor Act of 1940." We, of course, now know that the government, through the perjury of government attorney Jessica Magee, lied to the jury as Lancaster, in fact, had a Series 6, 7, 63, and 65 at all times material hereto. (Dkt. 187, p.317:24 - 318:1). See H00182-183, and H00391-400. But for the production, post-trial, of the SEC DOE's investigative file, the subsequently disclosed *Jencks* material (Lancaster depositions, sentencing

transcript, declaration, trial testimony, and the SEC's own records) and *Brady* and *Giglio* - we would again have not known of Magee's knowing perjury. And not known, without evidence from the government's own file, that the lie by Jessica Magee was intentional, malicious, and without excuse - the government had proof of the license of Lancaster in their own file - And yet lied about it - urging that Lancaster was not licensed. The question, in addition to Jessica Magee's knowing perjury is why AUSA Shipchandler knowingly suborned perjury. In open court, they lied to the court. They lied to the jury. The answer lies in the *Berger* court's analysis. Winning was more important to Shipchandler than integrity; winning was more important than honesty; winning was more important than his oath to uphold the Constitution.

Also important was ¶ 6(e), (the Government alleged that another one of McDuff 's misrepresentations was) "The representation that no commissions would be paid on the sale of Investor Shares in the Lancorp Fund and that only GLL, as trustee of the Lancorp Fund, would receive compensation..." But for the production, post-trial, of the SEC DOE's investigative file [See ALJ's decision - regarding lack of payment of commissions] (see H00907-908, p.11-12) and *ONESCO* cases (see H00734-735) we could not prove that. More *Brady*, more *Jencks*, more *Giglio*. (e.g. - commission or profits under security law. Each of those have different meaning and definitions. "Commission" is payment on sale regardless of whether the security makes a profit. As the ALJ found in reviewing all the evidence, there was no commission payments). The Court and AUSA merged the definitions of commission with that of compensation producing a conflated definition - error as a matter of law.

Also important was ¶ 6(g), (the Government alleged that another one of McDuff's misrepresentations was) "The failure to disclose that Reese was under a Cease and Desist Order from the State of California barring him from soliciting investments due to this involvement with fraudulent securities offerings." But for the production, post-trial, of the SEC DOE's investigative file (June 15, 2016, and later) we could not prove the falseness of the government's allegation. See Gov. Ex. No. 33, H00434-462. The Desist and Refrain Order [not Cease and Desist] issued in August 16, 2004, after McDuff's alleged involvement, could not have been foreseen (an element in conspiracy) - since it occurred after McDuff's alleged involvement. The Desist and Refrain Order was actually remanded and changed twice, not becoming final until 2009, long after the alleged conspiracy ended in 2005. But for the production, post-trial, of the SEC DOE's investigative file, we would never have known of the order's remand and

amendments. Nor would we know that the Desist and Refrain Order had nothing to do with Lancorp Fund as the government alleged. See H00434-462. The government's allegation that Reese was barred "due to this previous involvement with fraudulent securities offerings" is categorically false! And we would not have known of the government's lies without the DOE's files. Absent a unanimity instruction, we have no way of knowing what basis the jury used to convict in 6 minutes, along with ignoring the 16-page jury instruction. We have no way of even inferring that it reached a unanimous verdict on any one of the remaining untainted elements, if any.

Next, see ¶ 8(a) (Dkt. 16, p.4), where the government repeats its lies which it proffered by perjury regarding the Cease and Desist Order. Additionally, see ¶ 8(b), (the Government alleged that one McDuff misrepresentation was); "The failure to disclose that Reese was involved with McDuff in these previous fraudulent securities offenses" (emphasis added). But for the production, post-trial, of the SEC DOE's Investigative file (June 15, 2016), along with *Brady*, *Giglio*, and *Jencks* materials therein, we would not know of the order's remand. See H00464. The Desist and Remand Order had nothing to do with the alleged charges in this case!

Further, see ¶ 8(c) (Dkt. 16. p4). "The representation that the Lancorp Fund maintained an insurance policy to protect any investment from loss." But for the production, post-trial, of the SEC DOE's file (June 15, 2016), along with *Brady*, *Giglio*, and *Jencks* materials therein, which led to both the Stan Leitner trial transcripts and the Bradley Stark trial exhibits and transcripts, which refute the entire government case, and which are exculpatory and impeaching, and certain *Jencks* evidence. McDuff would have never recovered the tape transcripts from Stark's trial (for which McDuff's case agent Ron Loecker was also case agent), along with insurance policies which demonstrate McDuff did not know of lack of insurance. See Gov. Ex. 54, p.13:4-8, H00325. The tapes demonstrate that only Stark knew of no insurance - and the government actually redacted the copy of the insurance policy it produced to McDuff pre-trial that demonstrated it was Stark alone making the misrepresentations - making it unusable by McDuff. See H00515.

Also, see ¶¶ 8(d), (e), (f), (g), (h) (Dkt. 16, p.4). But for the production, post-trial, of the SEC DOE's investigative file (June 15, 2016), along with *Brady*, *Giglio*, *Jencks*, we would not know of all these government lies involved in these paragraphs.

McDuff makes these arguments and, as previously noted, incorporates all his arguments herein to establish prejudice from the lack of the Court's providing unanimity instruction. The requirement of the jury to be unanimous was never explained to the jury and that, under the facts in this case, is plain error. The result would be different, if the Court had given an instruction and we simply did not know which item or items the jury agreed on. But here, the Court did not instruct, and its failure to instruct is fatal to the conviction. It is plain error under the Sixth Amendment.

Next, to demonstrate further the error, look to the government's closing arguments. (Dkt. 187, p.382:13-16, H00184) ("was the evidence sufficient to prove that Gary McDuff was part of the conspiracy to commit wire fraud and to launder the proceeds?"). Initially, conspiracy does not require an act of wire fraud, but the jury charge includes a wire fraud charge (separate and apart from conspiracy and money laundering) and an instruction for a finding of wire fraud by the court. The conspiracy is found on p.8 of Dkt. 105; the wire fraud is found on p.9 of Dkt. 105; and the money laundering is found on p.11 of Dkt. 105, H00828; and the aiding and abetting charge is found on p.13-14, Dkt. 105. The charge is so substandard that it instructs the jury to find McDuff guilty of "wire fraud." See p.11, Dkt. 105. ("That the financial transaction involved the proceeds of a specified unlawful activity, namely wire fraud.") NO ONE was charged with wire fraud. The charge was "conspiracy to commit wire fraud." They are not the same and the court's instruction is fatally flawed under both the Fifth and Sixth Amendments, *supra*. The prosecutor, either through hook or crook, specifically misled the entire jury. The bulk of her arguments (substantially) do not go to conspiracy. They are wire fraud arguments. "First, that the defendant knowingly devised or intended to devise any scheme to defraud." (Dkt. 187, p.382:21-22, H00184). That is wire fraud. McDuff is not charged with wire fraud!!

The first element for wire fraud conspiracy, what McDuff was charged with, is:

"First, that the defendant and at least one other person made an agreement to commit the crime of wire fraud..."

The prosecutor then urged the jury to convict McDuff of "wire fraud," not what he was charged with: "conspiracy to commit wire fraud." She urged, "Second, that the scheme to defraud employed false material representations." (Dkt. 187, p.383:6-7, H00185) Again, wire fraud. The second element for conspiracy to commit wire fraud is: "That the defendant knew

that the unlawful purpose of the agreement and joined in it willingly, that is, with the intent to further the unlawful purpose." (Dkt. 105, p.8). The elements of "wire fraud" and "conspiracy to commit wire fraud" are substantively different.

Ms. Lopez continues, urging the jury to convict for wire fraud - not conspiracy to commit wire fraud. (Dkt. 187, p.383:19-22). "Third, that the defendant transmitted or caused to be transmitted by way of wire - wire communications." Whereas the third element of conspiracy reads: "That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the overt acts described in the superseding indictment..." (which we have shown was the product of government perjury and misconduct). Mrs. Lopez continues through page 384, Dkt. 187, H00186. "So, there you go. Four elements. Done. Wire Fraud." The fact that she cursorily went over the conspiracy elements in passing does not alleviate the damage done.

As the court noted in *United States v. Landerman*, 109 F.3d 1053, 1066 (5th Cir. 1997) closing arguments show the extent and the length to which the government relies upon a particular theory. Here, the government relied upon wire fraud - which was uncharged - and aiding and abetting - which was charged against Lancaster, not McDuff. The Jury charge is plain error and McDuff is entitled to reversal.

Concluding that wire fraud and conspiracy to commit wire fraud are substantively different events, as the court ruled, "it has been long and consistently recognized by the court that the commission of the substantive offense [wire fraud] and a conspiracy to commit it are separate and distinct offenses." *Clune v. United States* 159 U.S. 590 (1895).

There is no "merging law" allowing the government's failure to charge wire fraud and to, thereafter, seek a conviction for wire fraud in place of conspiracy to commit wire fraud and/or as a predicate for money laundering, it is, therefore, *infirm* and plain error by the court. Both violations of the Fifth and Sixth Amendments to the United States Constitution.

Finally, when allegations in an indictment differ from the evidence offered at trial, a court considers three separate but related theories of constitutional relief: an amendment, a variance, "and a third category lying between the other two - a constructive amendment." *United States v. Hynes*, 467 F.3d 951, 961 (6th Cir. 2006).

The difference between a variance and a constructive amendment is really a matter of degree. Variances occur on the one hand "when the charging terms of an indictment are left unaltered but the evidence offered at trial proves facts materially different from that alleged in the indictment." *United States v. Combs*, 369 F.3d 925, 935-36 (6th Cir. 2004) (internal quotation marks omitted). Constructive amendments, on the other hand, are "variances occurring when an indictment's terms are effectively altered by the presentation of evidence and jury instructions that so modify essential elements [wire fraud] [and] [conspiracy to commit wire fraud] of the offense charged that there is a substantial likelihood the defendant [was] convicted of an offense other than that charged in the indictment." *Id*. at 936 (alteration in original) (internal quotation marks omitted).

Here, McDuff was not even alleged to be involved in Lancorp Fund II, see *supra*, and the wire fraud conspiracy cannot be a predicate for substantive money laundering - rather a substantive wire fraud conviction is required - and the Court's jury instructions and government's argument, to the contrary, violated the Fifth and Sixth Amendments, warranting reversal. See Footnote 26, on page 31-32 and Footnote 27, on page 58 herein.

C) *Brady*, *Giglio*, *Jencks* Evidence Analysis

As the Court will recall in *Kyles v. Witley*, 514 U.S. 419 (1995) the Court established that the prosecutor is charged with the knowledge of all members of the prosecution team. This includes the knowledge of federal personnel involved in the investigation as well as the prosecutor of the case. *United States v. Pelullo*, 399 F.3d 197, 216-218 (3rd Cir. 2005), *United States v. Antone*, 603 F.2d 566, 569 (5th Cir. 1979) (This Court has declined to draw a distinction between different agencies under the same government, focusing instead upon the prosecution team which includes both investigation and prosecutorial personnel.") *Id*.

Here the prosecution team includes AUSAs Shipchandler and Lopez; Case Agent Ron Loecker (Case Agent in *U.S. v. McDuff*; *U.S. v. Stanley Leitner*, Case No. 3:07-CR-00261-G (Northern District of Texas); *U.S. v. Bradley Stark*, Case No. 3:08-cr-00258(N.D. Tex.)); Case Receiver Michael Quilling (Testifying witness and SEC Receiver in *U.S. v. McDuff*; *U.S. v. Leitner*; and *U.S. v. Stark*); SEC Attorney Julia Huseman (who conducted parallel civil investigation and criminal investigation with Quilling - specifically advising all deponents before any deposition that the depositions were for possible use in criminal matters); SEC Attorneys

Jessica Magee and Janie Frank (who prosecuted concurrently the civil and follow-on proceeding).

A cursory review of the *U.S. v. Stanley Leitner* case and the *U.S. v. Bradley Stark* case reveal that the government withheld *Brady*, *Giglio*, and *Jencks* materials from those prosecutions (same Case Agent Loecker) from McDuff. A cursory review of the Investigative file reveals that the government withheld *Brady*, *Giglio* and *Jencks* materials that were contained in the SEC investigative files that were delivered to McDuff on or after June 15, 2016. *Supra*, McDuff has enumerated some of the 8,000 pages of *Brady*, *Giglio*, and *Jencks* materials, and *Jencks Act* materials withheld in the SEC's investigative files, along with other transcripts from *U.S. v. Leitner* and *U.S. v. Stark*, and trial exhibits withheld from McDuff from those two trials as well. (Recall that Ron Loecker was the Case Agent at all of the trials, conducted all the investigations for all three trials, testified at all proceedings as a government agent, and is imputed with all the knowledge of the case files under *Kyles v. Witley*, *United States v. Pelullo*, *United States v. Antone*, and *United States v. Risha*, 445 F.3d 298, 303-306 (3rd Cir. 2006) (involving parallel civil and criminal investigations such as the one here involving McDuff in his criminal prosecution, his civil prosecution by the SEC and a separate civil prosecution by Quilling. See *Quilling v. McDuff*, 3:06-cv-00959 (N.D. Tex.); and the follow-on Administrative Proceeding. See p.3:7, H00001, p.223:9, H00012. McDuff was appointed stand-by counsel, Kyle Kemp, (not counsel) whose only job was to search the 60-80 boxes of files (if there were that many), but he failed. When McDuff was allowed to use non-lawyers to review the 16-18 boxes of the SEC investigative files (not part of Kemp's investigation) for the follow-on proceeding, they (the non-lawyers) found almost 8,000 pages of *Brady*, *Giglio*, *Jencks*, and *Jencks Act* materials. Including depositions, court filings, trial exhibits from Leitner's trial, Stark's trial, etc... The government produced almost 1,000 pages to McDuff pre-trial (not the same documents as the SEC investigative file) - not *Brady* or *Jencks* or *Giglio* - but rather documents or summaries to support the government's theory of the case. The incompetent Kemp did not produce anything. Kemp did not say a word when the government lied and suborned perjury, violating his oath - not saying a word while fraud upon the court occurred in front of him. Either he did not actually review the file (he certainly did not produce them to McDuff) or he violated his oath. Either way, he was ineffective - see *infra*.

What we now know is that witnesses common to the related cases include agent Ron Loecker who testified in all three cases; Receiver Quilling who testified in the cases; witness Miss Flannery who testified in two cases. Further, witnesses Frank, Leitner, Humphries, Aichele offered exculpatory evidence (*Brady*) in the Leitner trial. We know there was *Giglio* evidence in the prior trials (both Leitner and Stark were tried years before McDuff). We know that transcripts were prepared in those cases. We know that depositions were prepared and placed in the SEC investigative files. We know many of the same exhibits from the related trials were found in the SEC investigative files (i.e. Leitner trial exhibits, and Stark trial exhibits were found in the SEC's McDuff investigative files - which were not disclosed to McDuff until June 15, 2016, or later, and those led to the discovery of Leitner and Stark's trial exhibits and transcripts).

What follows is a specific enumeration of some - not all (the Court can imagine how long this brief would be if McDuff were to list and specifically enumerate all 8,000 pages and the 1000s more pages of transcripts - all hidden from McDuff - that are exculpatory, or constitute *Jencks* or *Giglio* materials unconscionably withheld from McDuff by the government, in a government conspiracy 1000s of times longer than the corruption case and cover-up in Senator Stevens prosecution).

For ease of analysis, excerpts of the transcripts cited to are attached as Appendix "1", along with specifically referenced documents. Appendix "2" contains the full depositions or transcripts with the excerpt noted therein, along with full documents (should excerpts be pulled from a larger document, McDuff notes *supra* in the brief documents delivered to McDuff pre-trial - contrasted with those delivered and found post-trial) - should the court wish to peruse the entire transcripts which were withheld.

1. Beginning with *United States v. Stanley Leitner*; case 3:07-CR-00261-G; before the Honorable Judge Fish; Northern District of Texas.

Michael Quilling testified in McDuff's trial. Quilling testified in Leitner's trial. Quilling was appointed the Receiver for Lancorp relevant to McDuff's trial. Quilling was appointed the Receiver in Stanley Leitner's trial. See p.133:20-24, H00218. Quilling testified about the Lancorp funds being transferred to Megafund (Leitner); from Megafund to Rumpf (government CI); and on to Bradley Stark (Stark's company was Sardaukar Holdings). See p.159:16-25, H00222. Quilling gathered records from Lancaster (McDuff's case); from

Megafund (Leitner's case) and from Sardaukar Holdings (Stark's case). See p.136:6-24, H00219. Quilling testifies in McDuff's trial that McDuff was the "brain child" behind the fraud. See p.120:19-20, H00005. But in Leitner's case, Quilling doesn't mention McDuff's name. There, he blames the fraud (that the government charged McDuff with committing) on Stark. See p.151:16-19, H00220 (an alternate theory of the case).

> **Q:** Was Sardukar Holdings a business? What was it?
> **A:** Theft.
> **Q:** What did you find when you took control over all records and assets of these companies? What did you find?
> **A:** Bradley Stark was a convicted felon out on probation, and he was running... a complete financial fraud. [See p.151:11-19, H00220.]

First, the entire transcript of Quilling's testimony is *Jencks* material and it was not produced under the court's pre-trial order. See Dkt. 62, H00793-797.

Second, at McDuff's trial, Quilling said McDuff was behind everything, but in Leitner's trial Quilling testifies it is Stark. See p.151:16-19, H00220. This is impeachment evidence, exculpatory evidence, *Giglio* evidence, *Brady* evidence - it goes to an alternate theory of the case (i.e. it was Stark not McDuff). It was withheld. This alone is grounds for reversal; however, there are many more such examples.

Next, Quilling nicely ties together the evidence of Stark's and Leitner's guilt for Lancorp losses but not McDuff. This is Exculpatory evidence, *Giglio* evidence, *Jencks* evidence, *Brady* evidence. The evidence goes to McDuff's innocence, alternative theory of the case, impeachment evidence, credibility evidence - against Quilling. Quilling testified in McDuff's trial. See p.219-226 in Appendix "2", Tab 9.

But see **Quilling's testimony in Leitner's trial**:

> **Q:** And that would be Brad Stark?
> **A:** And Sardukar, right. And then at the Megafund level which includes Mr. Rumpf, CIG, CILAK and all of those entities....I have recovered an additional three of four million dollars...And in the Lancorp receivership... [See p.158:16-21, H00221. Demonstrating a connection, making it *Jencks*, *Brady*, *Giglio*, etc....]

Next, as to intent of the investors like Lancaster and Lancorp, etc... (there was no fraud intent)

> **Q:** When these church members who had invested and then got other people to invest [in Megafund] - when you consider their involvement in this [which would include

Lancorp who was the largest investor in Megafund] would you say they were acting fraudulently in going out and soliciting investors in this case?

A: Well, I'm not sure that is my call to make...Did these people [Lancaster and McDuff] know this was being run as a fraudulent enterprise? I don't think so. [See p.169:7-18, H00223.]

Exculpatory evidence, impeachment evidence as to Quilling, and Loecker's testimony in McDuff's case. *Jencks* evidence as to Quilling's testimony in McDuff's trial. See H00005, H00218-223, and H00793. Not disclosed. Grounds for reversal by itself.

Next, Ron Loecker. **Loecker testified in all three cases.** Loecker was the case agent in all three cases; was the interviewing agent throughout the entire prosecution of all three; member of the prosecution team in all three cases.

Loecker testified in Leitner's trial, tying the cases together.

A: ...There was a transfer of a deposit into the Megafund accounts for 1.48 million dollars which came from Landcorp [sic]... [See p.358:23-25, H00224.]

This testimony makes it *Jencks*, and what follows demonstrates *Jencks*, *Brady*, *Giglio*.

Q: And based upon your investigation, did you determine what Landcorp [sic] [Lancorp Fund I] is?

A: Landcorp [sic] is what I would call an aggregator of funds. Landcorp [sic] is made up of well over a hundred investors who deposited their money to Landcorp [sic] who transferred it to Megafund.

Q: When you say he, who are you referring to? [Note above there is no pronoun "he." The AUSA and Loecker knew Lancorp was Lancaster. All part of the cover-up.]

A: The individual responsible for Landcorp [sic] is Gary Lancaster. [See p.359:7-15, H00225.]

McDuff's name is never mentioned in the entire trial. Judicial notice requested. This is *Jencks* evidence, not disclosed. This is *Brady* evidence not disclosed, this is *Giglio*, not disclosed. This by itself is sufficient for a reversal.

Next, the government urged as part of the money laundering charge that McDuff aided and abetted Lancaster in getting Leitner to send money to Lancaster by mail. See Dkt. 187, p.386:2-8, H00187. But here, Loecker's posits that Leitner found out he was in trouble at Megafund, at about the same time as the money was transferred from Leitner to Lancaster. Raising another alternate theory that Leitner transferred the money back to Lancaster because he found out he was in trouble at Megafund.

A: ...Mr. Leitner was certainly aware of the predicament he was in and the illegality under which he was operating Megafund. March 4th is a -- I gave him a week to get to acknowledge the fact that he had some legal issues here.... See Loecker Testimony, p.569:17-21, H00269.

This is *Brady* evidence, *Giglio* evidence, *Jencks* evidence - it goes to alternative theories as to why Leitner sent money in checks or wires to Lancaster. These transfers (wire transfers, mailed check transfer - and the reasons for them is the gravamen for the entire case against McDuff). This is exculpatory evidence, and by itself is grounds for a reversal. This is the entire basis of count two - money laundering. (Besides "mail fraud" not "wire fraud" being the entire basis of the government's money laundering charge).

Next, the government in McDuff's trial made a center piece of its case the presence or lack of insurance protection on the investments. The government further argued that it was McDuff's idea. We know that is false. As follows *infra*, that the insurance concept came from Stark, Rumpf, Leitner - but not McDuff, H00325-346. This is *Jencks*, *Brady*, *Giglio* evidence. It is a transcript, that is exculpatory and it shows the government and its witness knowingly lied.

The government also asked the investors in McDuff's trial did they think the money would be kept in an account controlled by Lancaster in a major U.S. bank. See p.80:10, H00149; p.97:19, H00152; p.107:24-25, H00153; p.141:5-6, H00154; p.149:7-9, H00155; p.191:17-19, H00157; p.224:20-21, H00168; p.285:6-10, H00169; p.288:14-15, H00170.

But in Leitner's trial, Loecker never mentions McDuff's name. Judicial notice requested and that conduct was not by McDuff but by Leitner. See H00267-268 (highlighted excerpts)

Loecker testifies in Leitner's trial:

Q: So Mr. Leitner told you that the funds he raised from Megafund [which include Lancorp Fund I] he would send to Mr. Rumpf?
A: Yes.
Q: And Mr. Rumpf represented that they would remain in a sole signatory account under whose control?
A: Under Mr. Rumpf's control.
Q: And did Mr. Leitner say that he also -- where did he tell you that he got the documents that he used in the Megafund program?
A: Mr. Rumpf had Mr. Leitner sign a joint venture documentation similar to what Mr. Leitner's used for his investors [including Lancorp], and that's where he got the wording on those. See p.584:8-19, H00267. [Not from McDuff, as urged in McDuff's trial.]

Q: ...Did Mr. Leitner tell you that at his meeting with Mr. Rumpf there was a discussion about an insurance policy?
A: Yes, Sir.
Q: And what did Mr. Leitner tell you about that discussion?
A: ...Mr. Rumpf advised him there was an insurance policy...[Not from McDuff, as urged in McDuff's trial.] [See p.584:21 - 585:3, H00267-268]. [ ]
Q: Did you ask him whether he [Leitner] had ever disclosed to any investors [Lancorp, Lancaster] that he was not sending all of their money off to Mr. Rumpf? [Investors, included primarily Lancorp.]
A: We asked him, and he stated he never disclosed that at all to anybody. [Never told McDuff, as urged in McDuff's trial.] [See p.593:22 - 594:1, H00270-271.] (highlighted excerpts)
Q: And what did he tell you about the insurance policy?
A: ...he said he was not given a copy of that by Mr. Rumpf because it had the trader's name on it.
Q: Did Mr. Leitner tell you that he actually at some point received a copy of the insurance policy.
A: Yes, yes, at some point he did that. [See p.594:18-25, H00271.] (highlighted excerpts)
Q: ...Mr. Leitner admitted to you that Mr. Rumpf said the funds will be held in my sole signatory account. Is that what Mr. Leitner told investors? [most particularly Gary Lancaster at Lancorp Fund I.]
A: He told them, quote, exactly those same words which was "the funds will be held in my account." [See p.620:7-11, H00272.] (highlighted excerpts)
Q: Anywhere in the documents [given to Mr. Lancaster which made him believe the funds were in a broker's account and covered by brokers "value guarantee"] did he say with regard to the insurance policy the insured is not actually your money with me; [meaning Lancorp's money with Megafund] it's whatever money ends up with the trader. It's the trader that is insured?
A: No. [See p.621:15-19, H00273.] (highlighted excerpts)
Q: And anywhere in the documents [given to Lancaster] did he identify or disclose to the investors I didn't know who the trader is or anything about them?
A: No. [See p.622:5-8, H00274.] (highlighted excerpts)
Q: And in the documents [from Rumpf to Leitner] that Mr. Rumpf provided... I think he disclosed the money would be kept in a major United States Brokerage firm registered with NASD and the SEC... That statement is Mr. Rumpf's contract with Mr. Leitner. Is that correct?
A: Yes.
Q: And that statement is Mr. Leitner's contract with his clients [which included Lancaster and Lancorp Fund I]?
A: Yes. [Not created by McDuff as alleged in McDuff's trial.] [See p.622:9-18, H00274.] (highlighted excerpts)

Ron Loecker, the case agent who testified *supra* in Leitner's trial, years prior to McDuff's trial, offers substantively a different story than he told the jurors at McDuff's trial. His testimony constituted *Brady*, *Giglio*, and *Jencks* and was not produced by Shipchandler. It provides

exculpatory evidence regarding the insurance policy - a center point in McDuff's trial. It provides impeachment evidence to cross Quilling and Loecker in McDuff's trial. It provides exculpatory and impeachment evidence to cross witness Biles and Benyo (regarding their testimony about insurance, funds being in a brokerage account etc...). Benyo had invested in Megafund with Stanley Leitner (with her "slush fund" money) prior to Lancorp Fund I being invested in Megafund. See *supra*. This prior Loecker testimony from Leitner's trial is important exculpatory evidence to cross examine Ms. Benyo further on her testimony about insurance and other matters.

Ron Loecker's testimony in Leitner's trial undercuts his testimony in McDuff's trial, undercuts Quilling's testimony in McDuff's trial, undercuts the government's theory of the case, undercuts Biles' and Benyo's testimony - *supra*. The failure to produce violates *Jencks*, *Brady*, and *Giglio* - and by itself requires reversal.

Next, **Ameilia Flannery "Mia" testified in both Leitner's trial (years prior to McDuff's trial) and in McDuff's trial**. In that Ron Loecker was case agent in both Leitner's trial and McDuff's trial, it is the same prosecution team, under *Kyles*, *Pelullo*, and *Antone*, the knowledge is imputed to the McDuff prosecution team. Her testimony is *Jencks*, and *Brady* evidence. Both exculpatory and impeachment evidence. And of course not produced but hidden by the prosecution. This is the third witness from both trials that Shipchandler didn't produce transcripts (*Jencks*) of their prior testimony on the same matter. Not to worry; many more to come.

As the court will recall, the crux of the government's case against McDuff was that McDuff orchestrated a big fraud, misrepresented that insurance would protect the investors, that funds would remain in a brokerage account, etc... but as demonstrated below, the deception about insurance was not McDuff's but Stark, Rumpf, and Leitner. Flannery testified at Leitner's trial about two letters from attorney Humphries. Trial exhibits 16 and 18 at Leitner's trial. The same trial that Loecker was the case agent in. The same trial that Quilling was the receiver.

In the colloquy between the AUSA and Ms. Flannery, she directly discusses the attorney letter (by Humphries) sent to Lancaster on which he (Lancaster) relied to believe there was insurance coverage / brokerage coverage. See p.438:8 - 439:5, H00257-258. See Exhibits 16-18 found in the SEC investigative files. H00616, H00620.

The letters regarding insurance were sent to all investors (including Lancaster). The original (Exhibit 18) actually signed by Kenneth Humphries was sent to Lancaster. See H00516-618.

Q: What did he tell you to do with it when it came out?
A: I think that was a merge, and I mailed it out to everyone. [See p.440:4-7, H00259.] (highlighted)

Ms. Flannery's testimony goes to support the Humphries' letter, the original of the Humphries' letter (the legal opinion letter) that demonstrates that Lancaster relied upon an attorney in his determination about Megafund and did not rely on McDuff as alleged by the government in McDuff's trial. Ms. Flannery's testimony is exculpatory because it tends to demonstrate that Leitner was behind the Megafund fraud, not McDuff. The testimony is *Jencks*, is *Brady*, and was withheld by the government. This by itself is grounds for reversal.

Next, **Vivian Aichele, esq., testified at Leitner's trial**. While not being *Jencks* testimony since she did not testify at McDuff's trial, it is *Brady* evidence because it's exculpatory. For example, see excerpts from p.447:20 - 466:18, H00261-266. (highlighted)

Q: Please state your name for the record.
A: My name is Vivian Aichele. [ ]
A: I am an attorney. [ ]
A: Well, I first met Stan [Stanley Leitner] face to face on or about March 28, 2005....[ ]
A: ...one of the things of interest to me right off the bat is it was represented there was an insurance policy covering the monies that were invested.... [By Leitner, not McDuff, as urged in McDuff's trial.] [Leitner not alleged to be a part of the McDuff conspiracy.] [ ]
Q: Do you have any recall, sitting here today, in that meeting did you discuss a copy of the insurance policy?
A: I asked for everything relevant to the investment program.

[Nothing - absolutely nothing having to do with the conspiracy - the one McDuff is charged with creating - nothing appears.] The absence of which may be evidence of McDuff's non-involvement.

Q: what was your understanding of who the named insured was on that insurance policy?
A: ...it was my initial understanding that Megafund held the policy.
Q: What led you to understand that?
A: ...documentation I reviewed or discussion with Mr. Leitner. [Not McDuff, as urged in McDuff's trial.]
Q: Do you ever recall receiving or seeing a copy of an insurance policy?
A: I did not. [ ]

Q: Did he [Leitner] ever tell you why he couldn't provide you the insurance policy?
A: .... he said he would get a copy to me... [See p.466:10-13, H00266.] (highlighted)

Attorney Aichele provides testimony that tends to dispute the government's theory of McDuff's case - (that McDuff was behind the insurance; behind the conspiracy). It further provides impeachment of Quilling's testimony, Loecker's testimony and Benyo's testimony regarding insurance. It is clearly *Brady* evidence - in the case in which Loecker was the case agent and Quilling was the receiver. Their knowledge is imputed to Shipchandler - and the testimony supports Humphries' testimony. All had to be disclosed under *Kyles* and was not. This withholding by itself is sufficient to reverse McDuff's conviction.

Next, **Larry Frank**. Larry Frank testified at Leitner's trial; he did not testify at McDuff's trial, so his testimony is not *Jencks*, but it is exculpatory and impeachment evidence, and had to be produced under *Brady*. Loecker was the case agent. Quilling was the receiver. Both were members of the prosecution team in McDuff's case. His testimony, in whole or part, was not produced. The failure is a *Brady* violation.

Larry Frank testified as follows, in relevant part: (see highlighted sections)

Q: At some point in preparation for this trial, did you speak with members of the prosecution team here that you see in the courtroom?
A: Yes, Sir.
Q: Do you remember who it was that you spoke with?
A: The three gentlemen sitting right there at that table.
Q: Mr. Yanowitch, Mr. Loecker and Mr. Stokes.
A: Yes, Sir.

[Loecker was a member of the Leitner prosecution team and the McDuff prosecution team] Judicial notice requested. [ ]

Q: Did they ever ask you whether or not there was an insurance company, whether or not Mr. Rumpf had insurance coverage for his investments? Did any of that ever come up in any of your conversations?
A: No, Sir.
Q: Did you speak at one point with someone from the SEC, the Securities and Exchange Commission?
A: Yes, Sir. [ ]
Q: Did the issue of insurance or whether in fact there was insurance that Mr. Rumpf had -- did that topic come up with them?
A: Yes, Sir.
Q: ...And did you bring an insurance policy with you?

A: I brought a copy of the insurance policy.... [ ]
Q: And the insurance policy that you are referring to, what company was it that issued that insurance policy?
A: I believe it was ACE [ACE Insurance Company]. [ ]
Q: ...Does this appear [Defendant's Exhibit 15] to be a true and correct copy of the insurance policy that you are referring to?
A: ...yes. [ ]
Q: ...under named of insured, who does it list?
A: Sardukar Holdings, IBC.
Q: And who do you know to have been affiliated with Sardukar Holdings?
A: Thomas Bradley Stark. [Not McDuff.] [ ]
Q: And are you aware in some of the financial dealing that Cilak [Mr. Rumpf] had -- for instance in his dealings with Mr. Leitner [Megafund] -- that Mr. Rumpf stated that the account was insured, that the deposits [of Megafund of which Lancorp was the primary investor in Megafund] were fully insured?
A: Yes, Sir. [Not McDuff, as urged in McDuff's trial.]
Q: Was this type insurance policy supposedly the [type of] insurance on those accounts?
A: Yes, Sir.
Q: Did you believe when these insurance policies were made known to you that they were legitimate and really there to insure these accounts?
A: Yes, Sir. [ ]
A: Mr. Rumpf asked me to take a copy of it [insurance policy] to Mr. Leitner, except Mr. Rumpf whited out Sardukar's name. [ ]
Q: And did Mr. Leitner personally take possession of it?
A: Yes, Sir.
Q: And that is the same document as Government's Exhibit 15 [in Stanley Leitner's trial] with the redacted names?
A: Yes, Sir.

[See Exhibit 15 found in the SEC investigative files which included Quilling, Loecker, and Shipchandler's files.] See p.634:6-15, H0277, and see H00519-531. [ ] (highlighted)

Q: This is entitled "United States of America's Policy of Global Property Insurance" and is issued by ACE Insurance Company of North America. Is that right?
A: That's what it [the policy] says. [ ]
Q: And then a few moments ago, you were asked some questions about the insurance policy that you brought in here. Did I hear you say that your understanding is that originally this came from Stark? [Not McDuff, as urged in McDuff's trial.]
A: Yes, Sir.
Q: The trader?
A: Yes, Sir. Bradley Stark. [ ]
Q: And you are aware, are you not, that Rumpf passed a similar type of policy to Mr. Leitner?
A: Yes, Sir. [Not McDuff, as urged in McDuff's trial.] [See p.632:5 - 662:6, H00275-290.]

Again, this is impeachment evidence and exculpatory evidence, tending to show that someone other than McDuff created the idea of insurance. Either Stark, Rumpf, Leitner - but not Lancaster (who was an investor victim in Leitner's trial) and not McDuff. This is impeachment to Benyo, Biles, Quilling and Loecker and all investors who testified in McDuff's trial regarding insurance. This *Brady* evidence was withheld, not produced. This Conduct alone is sufficient for reversal. The insurance argument was one of the main focuses of McDuff's criminal case.

Next, **Stanley Leitner**. Mr. Leitner did not testify in McDuff's trial, so his trial transcripts would not be *Jencks*. But it is impeachment of Loecker, Quilling, Biles, Benyo, and all other investors who testified in McDuff's trial. And, it is *Brady* evidence. His testimony is exculpatory, as it indicates that he, Stanley Leitner, was at fault and not Lancaster or McDuff or Reese. It is exculpatory as it attacks the main theory of the government's case in McDuff's trial - i.e. .... that McDuff was the "brain child" behind all of the losses; that McDuff was behind the insurance policy; that he introduced Lancaster to Leitner; on and on the impeachment goes to the government's case. Loecker was the case agent in Leitner's trial. Quilling was the receiver in Leitner's case. Both are prosecution team members in both Leitner's trial and McDuff's trial. AUSA Shipchandler had constructive possession of the entire Leitner trial testimony and withheld it and failed to disclose it. Many of the Leitner trial exhibits were found in the SEC investigative file delivered to McDuff on June 15, 2016. More *Brady* not disclosed. Leitner testified in part as follows: See p.663-817 (highlighted excerpts), H00291-315.

Initially, Leitner testifies how Megafund came into existence - See highlighted excerpts p.672:6 - 688:25, H00300-314. Nothing to do with McDuff. Leitner discusses James Rumpf's companies Cilak and CiG.

Q: It goes on to say that "The parties agree that no investment is risk free but the CIG holds an insurance policy that insures the safety of the principal investment at all times." Right?
A: Yes. [Not McDuff - not from McDuff, as urged in McDuff's trial.] [ ]
Q: And when you passed along the similar assurance to the investors in Megafund, did you believe it then too?
A: I did. [Lancorp Fund I was the largest investor in Megafund, see H00994, ¶ D.37.] [Insurance story was not McDuff, as urged in McDuff's trial.] [ ]

[The language of agreements with Lancaster and Lancorp Fund I, Megafund's primary investor.]

Q: "The parties agree that no investment [of Lancorp Fund I] is risk free. However, because Megafund's affiliate holds an insurance policy that insures the safety of the investment principal at all times, client [Lancorp Fund I] is assured that your investment capital is never at risk." [ ]
Q: Did you believe in fact that Rumpf or the trader had an insurance policy in effect that insured the safety of the principal investment at all times?
A: I do.
Q: And when you said that to the investors [Gary Lancaster and Lancorp Fund I], you believed that?
A: Yes. [ ]
Q: You believed him [James Rumpf]. These investors believed you; is that correct? [Not McDuff making the insurance representation, as urged in McDuff's trial.]
A: That's correct.
Q: In Mr. Loecker's notes of the conversation with you...
A: I did.

[Case Agent Loecker, who interviewed Leitner, sat through his entire trial; who was also the case agent for McDuff; did not disclose any of the Leitner statements to McDuff - or any testimony - exculpatory testimony, misrepresented testimony.] [ ]

Q: And indeed in this case you did know that many of your investors were concerned because, in fact, many of them questioned you about the details of the program, where the money would be kept and the relationship with the trader and the insurance policy? [Lancaster did all this due diligence - the government in McDuff's trial claimed Lancaster did not.]
A: The ones that I spoke to registered these concerns. I explained [to Lancaster] the fact that there was an insurance policy in place that would provide for any downside. [Not McDuff, as urged in McDuff's trial.]

[So it was Leitner!!! Not McDuff as the government argued in McDuff's trial!] [ ]

A: Let me qualify it to this extent. Roughly ninety percent of people that came into the program, [by investing in Lancorp Fund I] I did not have any personal contact with. So to the extent that I had contact with people, [Gary Lancaster], I explained the program...and likewise told them that the insurance company was the underpinning of it. [Leitner, not McDuff, as urged in McDuff's trial.]
Q: You heard Special Agent Loecker testify on Friday, did you not?
A: I did. [ ]
Q: ...you never told any of your investors, [Lancaster and Lancorp Fund I] did you, that Mr. Rumpf existed?
A: I did not. [ ]
Q: You never told anybody anything about that affiliate, [James Rumpf or Bradley Stark] did you?
A: No, I did not. [ ]

Q: You never told any of your investors [Lancaster and Lancorp Fund I], did you, that the money would be going -- at least some point the money would be traveling offshore to an account that was not a U.S. brokerage firm?
A: I did not tell them that.... [ ]
Q: You never told any of your investors, [Lancorp Fund I and Gary Lancaster] it's true, is it not, that at any point in the process their money would be traveling over seas beyond the United States banking system?
A: I did not. [ ]
Q: ..."Megafund warrants that it has an association and relationship with a trader," now at the time you never knew there was a trader. Is that correct? [ ]
Q: And at the time you made that statement, did you not know the name of the trader, did you?
A: No, I did not.
Q: You didn't know anything about the trader?
A: I didn't know anything about the trader. [ ]
Q: Well, let's talk about the insurance policy. You represented to investors [Lancaster and Lancorp Fund I] that there was an insurance policy, did you not?
A: I did. [Not McDuff, as urged in McDuff's trial.] [ ]
Q: And in the joint venture asset management agreement, [not produced to McDuff until June 15, 2016] it states does it not, pretty explicitly the investors' funds [Lancorp and Lancaster] are never at risk because there is an insurance policy that covers it?
A: ...the answer is yes.
Q: You never saw any evidence of that insurance policy until at least some time in February 2005. Isn't that correct?

[Lancorp Fund I and Lancaster did not invest in Megafund until February 2005.]

Q: In February of 2005, you were approached by an investor, Gary Lancaster. Is that correct?
A: Yes.

[Not McDuff! Not McDuff! Not McDuff! The testimony at McDuff's trial was that McDuff introduced Lancaster to Leitner, which this controverts!]

Q: <u>And Mr. Lancaster told you that he was someone who would invest millions of dollars, a significant sum, but wanted some verification that the insurance policy existed?</u> (emphasis added)
A: Actually, I think Mr. Lancaster made an initial investment of several millions and a second investment of five million dollars and was prepared to invest that. <u>He told me that investment was being made through his corporation, Lancorp.</u> [Not McDuff!] ...And he was a registered broker and held numerous licenses [the opposite of the perjured Jessica Magee's testimony].... He asked to see a copy of the insurance policy ... Larry Frank brought the insurance policy to me.... [ ]
Q: After Mr. Humphries [Megafund's attorney] wrote his letter, [to Lancaster telling him that Megafund had an insurance policy] didn't you receive a copy of a letter written on the stationary of a Lawrence Schoenbach, an attorney in New York? See exhibit H00620.

A: Yes, Sir.
Q: And that letter was represented to you, was it not, to be the letter from the trader's lawyer?
A: That's correct. See exhibit H00615. [ ]
Q: And didn't that email arrive or you received that email sometime after Mr. Humphries had written his letter to Mr. Lancaster?
A: Several Days after.
Q: It's addressed actually to the Lancaster Financial Group, correct?
A: It is.

[More proof that insurance representations had nothing to do with McDuff.]

Q: You never told any investor, [Gary Lancaster or Lancorp Fund I], did you, that you were taking funds, that you were not sending all of their funds to Mr. Rumpf?
A: No, I did not. [ ]
Q: This is a letter from Mr. Humphries [esq.] to Mr. Lancaster...so in February of 2005 [before Lancaster or Lancorp Fund I invested in Megafund], you had Mr. Humphries tell people you couldn't tell them the name of the trader...
A: I didn't know the name...

Mr. Leitner's testimony is exculpatory evidence, impeachment evidence, it is *Brady* evidence. His testimony directly controverts the entire government case against McDuff. *Re: the Insurance; McDuff being some brain child; McDuff introducing Lancaster to Leitner; none of the investor's money being kept in U.S. accounts; all the money being kept in brokerage accounts*. Mr. Leitner's testimony virtually guts the entire government case against McDuff. It impeaches Quilling, Loecker, Biles, Benyo, Lancaster, and other government witnesses, as well as the government's theory of the case. It is *Brady* evidence. And the failure to disclose it, by itself, so undermines the government's case it is sufficient to reverse by itself.

Next, **Ken Humphries, esq.** Attorney for Megafund who wrote the letter to Lancaster telling him that Megafund had an insurance policy. While not *Jencks*, it is *Brady* and *Giglio* evidence. Humphries testifies as follows:

A: Kenneth Wayne Humphries. [ ]
A: I am an attorney.
Q: Let me direct your attention to February of 2005. Did you have occasion to contract as general counsel for Megafund Corporation?
A: Yes.
Q: ...In addition to wanting to retain general counsel for Megafund Corporation, was there any other thing he wanted from you?

A: Two things. Needed a letter to go out as soon as possible that day to a fellow by the name of Gary Lancaster, who was going to invest I believe $6,800,000 in Megafund to be placed with the trader. [ ]
Q: What did the letter need to say?
A: Two things, ... The first thing was that the money was going to be placed in a major brokerage account, that it would be safe there. And secondly, the money or the principal was going to be insured against loss. Couldn't be lost.
Q: Did he [Leitner] indicate who was requiring this letter?
A: Yeah. Mr. Lancaster.

[Exculpatory evidence, impeachment evidence...hidden evidence.] [ ]

Q: After telling you he needed this second assurance concerning insurance, what did he [Leitner] tell you about it?
A: He said he had the policy in hand and the name of the insurance company was ACE. [ ]
Q: And did you agree to draft a letter?
A: I did. [ ]
A: He said the wording needed to be fairly precise or there was a need for precision in the way it was drafted, and he suggested that he would draft a letter and fax it up to me and if I would look at it and agree to sign it...I could download it on my office letterhead and I could return the letter by fax and he could get it on to Mr. Lancaster.
Q: This is the same telephone conversation, February 5th [prior to Lancorp Fund I initial investment]...
A: Yes, Sir... [ ]
Q: This was actually the letter that you eventually signed, is that correct?
A: That's correct.

See exhibit H00616 (disclosed for the first time on June 15, 2016).

Q: It was drafted entirely at Mr. Leitner's request. He sent it, correct?
A: That's correct.[ ]
Q: And what is that?
A: That's the letter that Mr. Leitner asked me to have put on my letterhead that I returned to Mr. Leitner which was addressed to Gary Lancaster. [ ]
A: ...The subject of the letter was Gary Lancaster and the Lancaster Corporation Financial Group, LLC. [ ]
Q: And is the signature yours?
A: That is mine. [ ]
A: The letter wasn't going to be distributed to anyone. It was going to be sent to Mr. Lancaster. [ ]
Q: And you knew this was going to be sent to an investor with Megafund that was nervous about these things, right, or needed some sort of assurance about these things?
A: I knew it was going to be sent to Mr. Gary Lancaster, who needed the assurance that all funds involved in the trading program were secured in a brokerage account a

> major investment institution and that the principal amount of funds are insured against all losses including fraud.

See p.417:2-11, H00256. For Humphries' testimony about his belief there was insurance, see p.387:23 - 417:11, H00226-256.

In sum, the Leitner trial documents and transcripts, they are a combination of *Jencks*, *Brady*, and *Giglio*. They directly controvert the government's theory of the case in McDuff's trial, they are exculpatory, impeaching, and would have changed McDuff's trial strategy. They were not produced or disclosed to McDuff and, as a result, he made a disastrous trial strategy and was grossly prejudiced by the government hiding them from McDuff.

2. Next, with the *United States v. Bradley Stark*; Case No. 3:08-CR-00258-M-1 before the Honorable Judge Lynn; in the Northern District of Texas.

Initially, many of the trial exhibits in the Stark trial were found in the SEC investigative file produced to McDuff in June 2016.and will be included in the discussion following on *Brady*, *Jencks*, and *Giglio* documents in the SEC investigative file. What follows in this section is specific to the Stark trial - that was not produced and was not located in the SEC investigative file.

Next, the AUSA for Leitner's trial and Stark's trial were the same. Next, the case agent, Ron Loecker, was the same for all three cases. Next, Quilling was the receiver for all three cases. See Government witness list in *United States v. Bradley Stark*, Case No. 3:08-cr-00258-M, Dkt. 153, Quilling, Loecker and Leitner are listed as witnesses. See H01098, and H01100. Quilling is listed as an expert witness in Stark's trial. Case No. 3:08-cr-00258-M; Dkt. 133. See H01091.

Next, the following transcripts of phone calls or body wires recordings between Bradley Stark and James Rumpf were exhibits in Stark's trial. They are *Brady* evidence, exculpatory evidence, and were hidden from McDuff. Specifically, the transcripts reveal in part as follows: (Stark Trial Exhibits, Gov. Exhibit 53, 54, 55, 56, 57, 58). See *United States v. Stark*, Case No. 3:08-CR-00258-M; (Dkt. 172) (Full transcripts in Appendix "2"Tab 11).

First, from October 28, 2004:

Jim Rumpf (JR): Question 4: It's my understanding that the risk of trading futures offshore is limited strictly to the profits?

Brad Stark (BS): Yes. That is correct. Because your principal amount is insured through ACE Finance.

(JR): Even though it's in your account?

(BS): Correct. Because my account is actually insured by Lloyds of London. [This line of questioning also appears in McDuff's trial with different witnesses - only there it shows AUSA Shipchandler's awareness of this transcript.]

(Dkt. 277-3, p.3 of 13) Case No. 3:08-cr-00258-M (Gov. Exhibit 54) H00325.

(JR): Okay.

Chris Rodine (CR) ...The insurance payment itself will go directly to the Bank of America.

(Dkt. 277-4, p.3 of 46) Case No. 3:08-cr-00258-M (Gov. Exhibit 56) H00326.

(CR): And the insurance is in his company's name.

(JR): I have a question. Is this $50,000 [cost of insurance] per investor per million, per 50 million. What is -

(CR): Per investor.

(Dkt. 277-4, p.7 of 46) Case No. 3:08-cr-00258-M (Gov. Ex. 56) H00327.

(CR): Brad, you're going to provide a breakdown from the insurance company of what the insurance files are and legal forms...

(BS): Absolutely. Absolutely.

(Dkt. 277-4, p.7-8 of 46) Case No. 3:08-cr-00258-M (Gov. Ex. 56) H00327-328

(BS): We're a registered broker dealer with the SEC and NASD.

(Dkt. 277-4, p.8 of 46) Case No. 3:08-cr-00258-M (Gov. Ex. 56) H00328.

Aaron Kiner [sic] [Keiter, esq] (AK): Yeah, who issues - who writes the insurance?

(BS): Uh, the Indemnity Insurance Company of North America and ACE INA.

(AK): Are they U.S. based or are they offshore?

(BS): No, no, they're U.S. based. [ ]

(BS): Uh, ACE INA is actually providing um, global property protection. It's for (inaudible) excess a control master program for U.S. and Overseas exposure and also doing excess in excess flash liability insurance for joint ventures and special projects.

(Dkt. 277-4, p.24 of 46) Case No. 3:08-cr-00258-M (Gov. Ex. 56) H00329.

(AK): Any inqui - any problems with SEC or regulatory authorities?

(BS): None whatsoever.

(AK): Uh, anybody involved in the transactions, uh, have any type of criminal background? [Stark actually on parole for fraud.]

(BS): No.

(AK): That you know of?
(BS): Not that I am aware of.

(Dkt. 277-4, p.25-26 of 46) Case No. 3:08-cr-00258-M (Gov. Ex. 56) H00330-331.

(AK): And your - (inaudible) - your organization is a NASD broker dealer?
(BS): Correct. We are registered with the SRO.
(AK): With who?
(BS): The NASD, its self regulatory.

(Dkt. 277-4, p.25-29 of 46) Case No. 3:08-cr-00258-M (Gov. Ex. 56) H00330-334.

(AK): I've been Jim's [James Rumpf's] attorney for 20-something years.

(Dkt. 277-4, p.31 of 46) Case No. 3:28-cr-00258-M (Gov. Ex. 56) H00335.

[March 10, 2005 - phone calls] (Gov. Ex. 57) (Below)

(JR): ...Uh, as I mentioned to, Megafund as [sic] informed me they had several clients with more than a hundred million that want to go direct to you... [ ]
(BS): Right now the website is up and everything and everything is updating, uh fine. But, we can't publish it because we have the SEC, the NEFC, the NFA and CFCT regulations because since we're an offshore broker dealer, we cannot do things in a public manner....

(Dkt. 277-5, p.6&7 of 43) Case No. 3:08-cr-00258-M (Gov. Ex. 57) H00336-337.

(BS): Right. Because I have the licenses [Series 6, 7, 63, 65, etc...] and the authority, and I have the systems to do it.

(Dkt. 277-5, p.24 of 43) Case No. 3:08-cr-00258 (Gov. Ex. 57) H00338.

(JR): You mentioned that you have the copy of the proof of insurance.
(BS): Yeah.
(JR): And we just need that for the due diligence file. Um, okay. CiLAK was covered under the insurance.
(BS): Yeah.
(JR): What about CiG?
(BS): Yeah, they're covered under it because you're in my account. [ ]
(BS): ...Secondly, it's easier for me to get insurance. They don't have to pay the premium price of the insurance.

(Dkt. 277-5, p.32 & 33 of 43) Case No. 3:08-cr-00258-M (Gov. Ex. 57) H00339-340.

(JR): Um, what I told them, uh you know, this guy [Lancaster] in Oregon.
(BS): Mm-hmm.
(JR): --the guy that the $5 million investor.
(BS): Mm-hmm.
(JR): Um, since he's [Lancaster] been scammed so many times before.
(BS): Mm-hmm.

(JR): If I don't pay him, pay Megafund next week so that he can pay them.
(BS): Mm-hmm.
(JR): Oh, he thinks the client [Lancaster and Lancorp Fund I] will ask for his money back. [The entire basis of the McDuff trial.]
(BS): Right. I got you.
(JR): Okay. So Stan Leitner is the CEO of Megafund.
(BS): Uh-huh.
(JR): He's got his tit in the ringer. Okay.
(BS): Uh-huh.

[Leitner had just had his first visit with the SEC (Ron Loecker) prior to this phone call.]

(JR): Now, uh, in one sense, um, the way he pays his people, he pays them 10 percent a month. He doesn't guarantee it to them. But, he pays them 10 percent a month.

(Dkt. 277-5, p.38 & 39 of 43) Case No. 3:08-cr-00258-M (Gov. Ex. 57) H00341-342.

Government Exhibit 58, Case No. 3:08-cr-00258-M on 5/5/05 and call on 5/10/05

(JR): The date is May 5th, 2005, uh, in Ontario California. The time is approximately 4:00 PM. Meeting is with Brad Stark and Hans Tschebaum.
(JR): Tell me about your trip. Where is the business at?
(BS): Uh, we have offices in London. We have them in Frankfort, uh. Paris, Vienna. We now have one in Rome, and we have one in Jerusalem. [ ]
(BS): A lot of our clients, I mean, we have UBS Warburg that's coming in, um, what are couple of the other big names that we got going on.

(Dkt. 277-5, p.3 of 55) Case No. 3:08-cr-00258-M (Gov. Ex. 58) H00343.

(BS): Last month we did 5862 pips. [ ]
You know, that's per lot. [ ]
(BS): Two percent of their balance. One percent we're automatically generating, oh, for insurance purposes, and everything like that. [ ] Strictly for insurance premium, you know, cost increase.

(Dkt. 277-5, p.11 of 55) Case No. 3:08-cr-00258-M (Gov. Ex. 58) H00344.

(BS): ...I'm an institutional trader, it's an institutional fund.

(Dkt. 277-5, p.24 of 55) Case No. 3:08-cr-00258-M (Gov. Ex. 58) H00345.

(JR): Alrighty, uh, we've got a little bit of a situation here, alright. My major client Megafund -
(BS): Uh-huh.
(JR): [Handing Stark SEC Notice letter] Got that from the SEC okay. And -
(BS): From the SEC?
(JR): Yeah. They're shutting them down. Alright. And that's where we're going to be taking all of their money out and giving it back to all of their clients. [Gov. CI Rumphf is wearing a wire at the meeting.] [See p.36 of 55, H00346.]

(JR): Previous conversation with Brad Stark took place on May 10, 2005, approximately 6 PM in the evening.

The phone calls and body wires made by James Rumpf, the government CI, which were trial exhibits in Stark's trial - *supra*, demonstrate that Stark - was by himself in this scam - not McDuff (no allegation that McDuff was in a conspiracy with Stark, Rumpf, Leitner). That Rumpf and Stark deceived Leitner who, in turn, deceived Lancaster - and not McDuff. No mention of McDuff at all. These are alternate theories of the case; are impeachment evidence against Loecker and Quilling; and are exculpatory evidence, indicating that McDuff was not involved in any conspiracy. This is further evidence that Leitner wired money to Lancaster for reasons independent of the government arguments in McDuff's trial. This is exculpatory of all the charges (conspiracy to commit wire fraud and money laundering) in McDuff's case. They are *Brady* evidence and were not produced - were not in the SEC investigative file, but both the case agent Loecker and Quilling were part of the Stark's prosecution team and part of the McDuff prosecution team. This by itself is grounds for reversal of McDuff's conviction. This is proof of actual innocence.

3. As previously noted, prior to June 15, 2016, the ALJ in the follow-on proceeding ordered that the SEC investigation files be made available to McDuff. McDuff's family and J. Stephen Coffman a former federal agent, went to the SEC office and in consultation with McDuff (telephonically) reviewed the 16-18 boxes of data (over a three-day period). Eight thousand (8,000) pages were copied and sent to McDuff at FCI-Low-Beaumont. See p.456:1-5, H00018. This 8,000 pages is only a small portion of the documents in the 16-18 boxes that is relevant to this matter. As noted previously herein, Kemp alleges he reviewed 60-80 boxes of documents which, if he had actually done so, would be a Herculean task requiring some 30-60 days of legal work. Needless to say, Kemp did not spend 30-60 full legal days reviewing records to produce to McDuff pre-trial. H00020. The only job Kemp had as stand-by counsel - was to produce documents to McDuff from the investigative files pre-trial, - he did not do so. Nor did he go to the SEC files where all this evidence was hidden. At some time two weeks prior to trial the FBI delivered to McDuff approximately 1,000 pages of documents pertaining to the witnesses (Government witnesses) at trial. See *supra* herein, section; III. A) Government's Discovery Produced Pursuant to Court Order, page 9 herein, denoting the items received by McDuff pre-trial. They, of course, did not include all the *Jencks* materials noted herein, the

Brady materials - subsequently noted herein, the *Giglio* evidence - noted herein. The government production did not include the *Jencks*, *Brady* and/or *Giglio* materials from Stanley Leitner's trial or Stark's trial, noted *supra*.

Gary Lancaster gave two depositions, a declaration, and one statement to the government. He also testified at his sentencing hearing - all years before the McDuff trial. He also testified at Tringham's trial related to Fund II and Max International. Six *Jencks* statements not produced to McDuff. These depositions were transcribed. This sentencing transcript and trial transcript was transcribed. The government only produced one deposition and did not produce the second deposition, the prior statement, the sentencing transcripts - all of which are *Jencks*, *Brady*, and *Giglio*. The government provided the declaration, but stripped the exhibits from the declaration - the statement has never been produced. The exhibits have been located in the SEC investigative file post trial, post appeal, but was never produced to McDuff prior to June 15, 2016.

There are, however, some trial exhibits from those two trials that are contained in the SEC investigative file. There is also numerous depositions in the SEC investigation file taken by Julie Huseman and Michael Quilling - prosecution team members. Most were not provided to McDuff pre-trial. McDuff goes through the Lancaster deposition not produced by the government pre-trial; and then lists, in part, the documents in the SEC investigative file that constitute *Jencks*, *Brady*, and *Giglio* - that were not produced to McDuff prior to June 15, 2016. This actual production was post-trial, post-appeal.

Starting with the Lancaster deposition that was not produced to McDuff pre-trial; **Lancaster testified as follows:**

3(a). *In the Matter of Megafund*; File No. FW-0475-A on November 17, 2005 -

Q: My name is Julia Huseman and I'm an officer of the Commission for purposes of this proceeding...However, the facts developed in this investigation might constitute violations of other Federal, State, criminal, or civil laws. H00022 (*Id*. at p.4) [ ]
Q: Are you represented by counsel?
A: I am. [H00023 (*Id*. at p.5)]
Ms. Huseman: For the record, also present is Michael Quilling, the court appointed receiver in this case. Do either of you object to Mr. Quilling being present?
Mr. Sellers [Lancaster's counsel]: No. No... [H00023-24 (*Id*. at p.5-6)]
Q: Beginning with your graduation from high school, could you briefly [discuss] your educational background?
A: I went to Oregon State University in Corvallis, Oregon for four years. [ ]

Q: Do you have any degrees?
A: I do not.[ ]
Q: Once you graduated from -- or once you left college, what did you do then?
A: I went to work for Connecticut Mutual Life... [ ]
Q: And what did you do after that?
A: I started a property causality agency as a Farmer's Insurance Agent. [ ]
Q: ...just continue to describe your employment history...
A: ...then I started Lan Corp Consultants...I then went to work for John Deer for John Deer Life...I then worked for First Interstate Bank, which is taken over by Wells Fargo. I then became for a short time directly attached to Wells Fargo, worked for Stevens, Inc., as an employee of Stevens, Inc....Then I went to the Bank of America...where it was taken over by National Bank...I then went to work for U.S. Bank. [ ]
A: I think it was '99 to 2002. And then I left U.S. Bank in 2002 and I've been self-employed under Lan Corp Financial Group since then. [H00025-27 (*Id*. at p.8-10)] [ ] Oh I left out Universal Underwriters was my last employer.
Q: What licenses do you hold?
A: Life, health, Series 6, 63, 65, and 7 are the ones that I've qualified for.
Q: Are any of them active?
A: They have been -- all of them are active. [H00027 (*Id*. at p.10)]

[Recall SEC Attorney Jessica Magee testifying in McDuff's trial that Lancaster was not licensed and never had been licensed.] See *supra*.

Q: Prior to opening the record, I gave you a copy of what I'm marking as Exhibit 16, which is your declaration, which was submitted with the case that was filed in July. Have you had an opportunity to review that?
A: I have.
Q: Is there anything on there you wish to change at this time?
A: I don't think so, no. [H00027-28 (*Id*. at p.10-11)]

[Declaration produced to McDuff pre-trial - but all exhibits from the declaration were withheld by the government.]

Q: When did you initiate the People's Avenger Fund?
A: ...It was a work in progress that was transferred over to me.
Q: By whom?
A: By Secured Clearing.
Q: And what is Secured Clearing?
A: Secured Clearing is -- is a company that was owned by a gentleman in England who was -- had had a previous fund as I understood it...
Q: And what was that gentleman's name?
A: Terrance De'Ath. [H00029-30 (*Id*. at p.12-13)]

[The guy whose name he couldn't remember at McDuff's trial - that he flew to England to meet (Dkt. 186, p.197:13 - 198:3) (Trial testimony of Lancaster) H00158-159.] [ ]

Q: And how long have you known Mr. McDuff?
A: Since 2001, I think. [H00030 (*Id*. at p.13)] [ ]
Q: When was the last time you did have direct dealings or a relationship with him?
A: At the time that the joint venture agreement was executed and all of Secured Clearing's interests were transferred... [H00030 (*Id*. at p.13), H00422-425][ ]
Q: And, to your knowledge, how did they [MexBank] compensate McDuff?
A: I don't know. [H00031 (*Id*. at p.14)]
Q: What was the next fund that you attempted to initiate?
A: Lan Corp [sic] Financial Fund Business Trust.
Q: And when did you initiate that?
A: I think we began work on it in 2002 and the registration, I think was complete in 2003. [H00033 (*Id*. at p.16), and see H00401-409]

[Jessica Magee, SEC attorney, lied at McDuff's trial. See p.315:12-19, H00181. She said it was not filed.]

Q: When you say "we began," who began?
A: Norman Reynolds. [esq.] [Not McDuff as alleged at McDuff's trial.] [H00033 (*Id*. at p.16]
Q: And you were still working with Mr. Reynolds. Did he -- is he the one who prepared your offering documents?
A: Norman Reynolds prepared absolutely everything...[Not McDuff as alleged at McDuff's trial.] [H00033 (*Id*. at p.16)] [ ]
Q: And did you register the fund as a Reg. D --
A: Yes.
Q: -- under Reg. D?
A: Correct. [H00034 (*Id*. at p.18)]
Q: And when did you receive your last investment in Lan Corp? [sic]
A: I'd have to look, but it was probably July or August of 2005. [Lancorp Fund II, Lancorp Fund I ended months earlier.]
Q: And in July and August of 2005, what did you do with the money that you received? Because I'm assuming you didn't send it to Megafund.
A: Correct. [So it's not part of the conspiracy involving McDuff, which the government alleges ended in early July 2005.] [H00035 (*Id*. at p.21)] [ ]
Q: When did you first talk to Mr. Leitner about Megafund?
A: Sometime in January.
Q: Of?
A: Of '05.

[This is substantively after the alleged beginning of the conspiracy in June 2003, and after all the witnesses who testified at McDuff's trial had already made their initial investments into Lancorp Fund I (prior to August 2004). Therefore, to the extent that any matter involving Megafund

reaches a conspiracy - as the government alleged in McDuff's case - it went to the second conspiracy of Reese and Lancaster, but not McDuff, making the government's theory of the case (e.g. that McDuff and Reese and Lancaster conspired to deceive the investors - who testified at trial - to invest in Lancorp and to put the money into Megafund ponzi scheme) impossible, as neither Reese, Lancaster, or McDuff knew anything about Megafund in August of 2004. See also deposition of John McDuff following.] [Megafund not created until a year after June 2003, no false statement forward looking.] [H00036 (*Id*. at p.24)]

Q: And is that joint venture agreement an exhibit to your declaration which has been marked as Exhibit 16?
A: Yeah, that's it. That's the signature page. [H00038 *Id*. at p.27.]

[The joint venture agreement was an exhibit to the Lancaster declaration - that was reviewed by the government and not given to McDuff pre-trial.]

Q: What due diligence did you do on Megafund before you invested 9.3 million, I believe? Is that correct?
A: Correct. [ ] The primary due diligence was just looking at the referral, the references from Stan Leitner and getting a letter in writing from legal counsel verifying that the money would be held as agreed [in a Lancorp Fund I account, where the principal would not be touched - see Lancaster's sentencing transcript. p.29:23-25, H00122.] and would be insured.
Q: And who -- what legal counsel gave you that verification?
A: Mr. Humphries.
Q: Did you speak to Mr. Humphries?
A: I did.
Q: Did you do any due diligence to check out Mr. Humphries?
A: Only to check that he was an attorney. [H00039-40 (*Id*. at p.28-29)]

[Humphries letter was not attached to Lancaster's declaration.] [H00040-41 (*Id*. at p.29-30)]

Q: Is this the letter that you relied on?
A: It is.
Q: And is this the sum total of the due diligence you did on Megafund?
A: Yes. [ ]
A: I also requested and was assured I would also receive the same kind of written verification from corporate counsel for the trader. [H00041 (*Id*. at p.30)]

[See also Leitner's trial testimony about Humphries and Lawrence Schoenbach.] See p.824:2 - 825:17, and p.853:5-8, and p.860:9 - 862:7 in Dkt. 62 in Appendix "2" (Tab 6 i)). And see H00599 [ ]

Q: You had a pretty significant background in investments. You were licensed. You had a Series 6, Series 7, is that correct?
A: Correct.

[Prosecution team knew Lancaster was licensed and, nevertheless, Jessica Magee - a prosecution team member - lied to McDuff's jury.] [H00041 (*Id*. at p.30)] See p.315:12-19, H00181 [Jessica Magee's false testimony in McDuff's trial.]

A: At the time my only concern was that I had verification that the funds were secure. If they [Megafund] could deliver, great. If they didn't deliver, then I would get the funds back.

[Demonstrating no intent on Lancaster and thereby no intent on the alleged conspiracy - the First conspiracy as to McDuff.]

Q: Why did you think you would get the funds back?
A: Because of the assurance from Mr. Humphries that they would be held as agreed. [Separate account and would be insured.] See H00616, and [H00042 (*Id*. at p.31)]
Q: What are you referring to specifically in this letter?
A: It's not in this letter. It was the letter that was -- the email that was sent to me by what I thought was from attorney Schoenbach. [H00042 (*Id*. at p.31). See also H00620.]
Q: ...and is that email attached as an exhibit to this?
A: Yes.
Q: And is that Exhibit 5 to your declaration?
A: Correct.

[The government removed the exhibits to Lancaster's declaration before providing the declaration to McDuff pre-trial.] [H00042 (*Id*. at p.31) - unconscionable]

Q: Referring to Exhibit 5 [not produced pre-trial] of your declaration, the letter from Mr. Schoenbach...or email that purports to be from Mr. Schoenbach says, "The principal amount of your investment will be insured by Nationwide Financial Services, Inc., Nationwide Financial Services Bermuda, Inc." ....

[Evidencing insurance on Lancorp's fund.] [H00043 (*Id*. at p.32)]

Q: When did you first get a payment from Megafund?
A: In March.
Q: Of?
A: 2005. [ ]
Q: And how did you distribute that to your investors?
A: 20 percent all allocated for investors.... [H00044 (*Id* at p.35)]

[The government lied at McDuff's trial and said no money went back to investors.] [H00046, H00112, p.19:3-5; H00540-554, H00716-723]

Q: And you said that people came and went in and out of the fund, people died. Did you always have 35 [non-accredited] and 65 [accredited]?
A: Yes.
Q: And you're positive of that?
A: To my knowledge, yes.

[Government argued at McDuff's trial that Lancaster exceeded that limit set for Reg. D. funds, see Dkt. 186, p.82:1-2, Appendix "2", Tab 9.] [H01198, p.316:21-25; p.333:2-4, H01199, H00045 (*Id*. at p.40)]

Q: Did you pay any -- give anyone any money?
A: The investors who requested it had the earnings distributed to them at the end of each quarter, received a check, or if there was a IRA, then their trustee received a check. [Government argued at McDuff's trial that no investor was paid.] Dkt. 186, p.129:19-20; p.312:20-22 (Appendix "2") (Tab 9) [H00046 (*Id*. at p.41), and see H00112, p.19:3-5.]
Q: When did you next get a payment from Megafund?
A: I received no further payments
Q: When did you figure out in May that you were not going to receive a payment that month?
A: I was suspicious very early and -- but -- but then I was told that -- by Mr. Leitner that under [the] advice of counsel, that he no longer could support the joint venture agreement [between Megafund and Lancorp Group] was considered not a securities transaction.
Q: Excuse me. Let me stop you. Mr. Leitner told you the joint venture agreement was not a securities transaction?
A: We had been operating under the presumption that -- it's my understanding, that -- that the private offering he was making was exempt from -- or did not have to have any securities registration. [All this goes to intent to commit a crime - it impeaches the government's case - was withheld.] [H00047 (*Id*. at p.43)]
Q: Okay. And with your financial background, of course, you understood what that was.
A: Correct, it made sense to me.

[Contrary to the government's arguments at McDuff's trial, here the government argues or urges at Lancaster's sentencing that Lancaster has a financial background - See also Lancaster's sentencing transcript.] [H00125, p.32:17-24 and H00048 (*Id*. at p.44)]

Q: And what did you understand -- what trading did you understand was occurring?
A: That he was investing in a variety of repos and investment grade bonds and anything that they could do to get a 1 percent margin on [per month], they would be doing. I made it clear to him that I didn't care if I only made 1 percent a month, so long as the money would remain secure and that he conformed to the committed investment schedule. [H00049 (Id. at p.46) See p.15:19-16:10, H00109.]

[This is contrary to the government's theory of the case, contrary to any criminal intent, was not disclosed, is *Jencks* and *Brady* and *Giglio*.]

Q: What would make you believe that that was still -- that he was telling you the truth at -- by October or September of 2005?
A: -- I mean, the conversation that I guess I had with Jack McDuff saying that he still believed that Stan [Leitner] was a stand-up guy and that he would make good.
Q: And when did you have this conversation with Jack McDuff?
A: I don't remember.
Q: Is this Gary McDuff's father?
A: Correct...

[Contrary to the government's case at trial, Jack McDuff, not Gary McDuff, recommended Megafund.] [So in Gary Lynn McDuff's trial, "Mr. McDuff" means either Gary McDuff or Jack McDuff.] H00050 (*Id*. at p.49) Dkt. 186, p.196:24-25 (Appendix "2", Tab 9) [ ]

Q: And when were you notified that a website had been set up?
A: I don't recall. [Summer/fall of 2005.] Eric Warner [SEC Chief Counsel] notified me by email.
Q: He notified you by email?
A: Yes.

[Lancaster had contacted the SEC to report the incident. The SEC Chief Eric Warner began to investigate. Lancaster was the only person to contact the SEC. This goes to an attack on *mens rea*.] H00051-52 (*Id*. at p.52-53) [ ]

Q: And in making the subsequent filings on your own behalf, were you relying on that work product as a model of what to do?
A: Yes.

[Lancaster and securities attorney Reynolds, in addition to the May 27, 2003, filing of Lancorp Fund I, filed State registrations as well. This is contrary to what the government alleged at McDuff's trial.] [H00054 (*Id*. at p.59), H00160-161 (p.202:25 - 203:2)] [ ]

Q: And were there any states in which your submissions were rejected? [Submissions for filing the Reg. 506 D]
A: I only recall one state that indicated that I had to have a licensed broker/dealer or representative in the state. [A local representative.] And so I subsequently refunded -- terminated the application from the investor in that state and refunded their deposit .... [H00054-55 (*Id*. at 59-60)]

[Directly controverts the governments argument of a "Scheme to defraud" by Lancaster, Reese, and McDuff.] [ ]

Q: Who is your contact at MexBank?
A: Eduardo Trejo.... (See Appendix "2", Tab 2 – Lancaster 11/17/2005 Deposition, p.61)

[Eduardo Trejo is MexBank, not McDuff as the government argued at McDuff's trial.]

Q: What was Gary McDuff's association with Secured Clearing? [A British owned company.]
A: He was a director of Secured Clearing and he was the contact person for Secured Clearing [director as in manager, not as in board of directors.]
Q: How do you justify that? [Being compensated out of profits.]
A: By -- by taking my compensations out of earnings only. There was no fee charged at any time out of the principal. If they didn't make any money -- any earnings, then I didn't make anything.

[Directly controverts government's allegations of commissions. Commissions are earned on buy and sell. Profits are an excess earned over and above principal placed at risk.] [H00056 (*Id*. at p.72)]

Q: What about Gary McDuff? Did you compensate him in any way?
A: No. [Controverts government's theory of the case and testimony at McDuff's trial.] [H00057-58 (*Id*. at p.73-74)]

See Dkt. 186 (Appendix "2", Tab 9), p.209:1 - 210:17 of Lancaster's testimony at McDuff's trial and the related Joint Venture Agreement and notice of assignment, H00422-425.

Q: Did they [MexBank, Gary McDuff, Secured Clearing] know how you were compensated?
A: No.
Q: Who did you send the money to MexBank -- who did you direct the payments to Mr.-
A: Trejo. [Not McDuff.] [H00057-59 (*Id*. at p.73-74, 77)] [ ]
Q: At some point did he [Leitner] provide you with what he claimed was a [insurance] policy or anything?
A: No. It was his lack of providing that information that caused me to call Mr. Schoenbach.
Q: And tell me about that conversation.
A: Well, I just called him up, identified who I was. I told him that given the current circumstances, that I wanted to put the insurance carrier on notice that there is the possibility of a claim because things aren't adding up. The money is not coming back.
Q: And what did he say?
A: He said he didn't represent them.
Q: And when was this conversation?
A: ...June 5th or June 6th [2005]. [Closed Lancorp Fund I the same day] [H00060-61 (*Id*. at p.81-82)]

[This controverts substantively the government's entire case on Insurance, *mens rea*, specifically whether Lancaster and McDuff knew there was no insurance - further, too many independent parts to have a common goal required for conspiracy.] [ ]

Q: Did you ever hear of someone named James Rum[phf]? (phonetic)
A: From the Receiver Website [documents from the website] that was -- who all the --
Q: Defendants are?
A: -- defendants are. That is the first time I'd learned their name, first time I'd heard Stark's name or any of those people's names. [H00062 (*Id*. at p.83)]

[All goes to lack of Lancaster's notice, lack of *mens rea* - lack of conspiracy, lack of intent to commit a crime or illegal act.]

Q: What did he [Leitner] know about Stark?
A: ...that the money was not coming back. That he met with and that he was actually going out to meet with him again to make demands in no uncertain terms in the strongest way possible to have the funds delivered. [H00063 (*Id*. at p.84)]

[Supports the testimony of Leitner in Leitner's trial - goes to *mens rea* - that there was no criminal intent.]

A: -- well, I talked to Humphries [esq.].
Q: Okay. And Schoenbach [esq.].
A: And Schoenbach [esq]. And I talked to Humphries since that time.
Q: Oh, have you? When was this?
A: Two or three weeks ago.
Q: And what was the substance of that conversation?
A: I told him that given the current circumstances, now I wanted him to produce for me all the documents that he read as his means to write the letter. [H00616.]
Q: And what did he say?
A: And he said that he would have to get approval from Leitner first because of confidentiality and client --
Q: Attorney-client privilege?
A: -- attorney-client privilege. [H00064 (*Id*. at p.87)]

[All goes to *mens rea* (lack thereof) for purposes of the conspiracy.]

Q: Have you spoken to anyone from the FBI?
A: Yes.
Q: Who was that? Is it Dale Shelton?
A: No.
Q: Tim Nylan (phonetic)?
A: Tim Nylan.
Q: And when did you speak to Mr. Nylan?
A: Shortly after I first talked to Eric. [With SEC.]

Q: And how long did you talk to Mr. Nylan?
A: Five minutes. [ ]
Q: Okay, what did Mr. Nylan want to talk to you about?
A: He just wanted to know did I know that the money that I sent to Megafund was being wired offshore.
Q: Did you know that?
A: I had no idea.
Q: What did you think when you found out that that was the case?
A: Stunned. [H00065-66 (*Id*. at p.88-89)]

[All the above goes to lack of *mens rea*, impeachment, exculpatory not produced, controverts government's theory of the case.]

Q: Was that the first you'd heard of anything going offshore?
A: That's the first I heard of anything offshore. [H00067 (*Id* at p.90)]
Q: What else can you tell me about Robert Rees [sic, Reese] that you haven't -- that we haven't already discussed? Is there anything? [ ]
A: When I sent the last letter saying that -- the first one saying that the funds were frozen, that there is a problem.
Q: And that was in September of '05?
A: Yeah.
Q: And that's when he stopped sending you investors?
A: I think so, yes. There were people that I don't know when they -- when he talked to them, the ones I referred to that sent applications for Fund II and I don't remember when those came up.
Q: Tell me about Fund II. [ ]
A: It's identical to Fund I [which is allegedly involving McDuff] with the exception that any reference to the insurance that was optional and the like in the first one, all of that was removed.

[Government merged Fund I and Fund II in McDuff's trial. Quilling testified on June 15, 2016, that McDuff had nothing to do with Fund II. Fund II was Reese and Lancaster, not McDuff. Two Funds, two conspiracies - a Constructive Amendment - deceiving the jury violating the 5th and 6th Amendments.] [H00069 (*Id*. at p.100-101)]

Q: Did Gary McDuff make any representations to you about Mr. Rees [sic]?
A: No, not specifically.
Q: So you just kind of went on --
A: I made the presumption that -- you know, that things were being done appropriately. [H00070 (*Id*. at p.110)]

[This is the opposite of the McDuff trial testimony - it is impeachment evidence.]

Q: Did you look it up?

A: No. I -- I relied on Norman Reynolds to handle it, to make sure everything was in order. [ ]
Q: What is your opinion of McDuff now?
A: I would certainly have engaged in no business actively with him going forward. My -- my experience with him has been, I would say, positive. It appears -- has already appeared to me that he's attempted to do the right thing, always directing me to Norman Reynolds [esq.] to make sure things were done in proper order. [H00071-72 (*Id*. at p.111-112)]

[*Brady* evidence does not get any clearer than that. The deposition was withheld - and the government put on knowingly false testimony at the McDuff trial!]

[Quilling questioning Lancaster]

Q: During the time that Mr. Reynolds provided services, was he representing Lan Corp [sic] or was he representing Gary Lancaster individually?
A: Lan Corp [sic]. [H00073 (*Id*. at p.123)]

[As to Insurance - for a time, Gary Lancaster, a licensed holder, Series 6, 7, 63, and 65 - had E&O insurance - but yet in McDuff's trial the government lied about the insurance issue.]

Q: Do you have -- does Lan Corp - or Gary Lancaster have any E&O policy or other insurance that might cover claims that investors want to serve against either you or the fund?
A: Actually, I do not. ... My previous appointment with a broker/dealer [*ONESCO* cases] allowed me to purchase errors and omissions, insurance through that company. They cancelled, nonrenewed my E&O contract when they cancelled my appointment with the broker/dealer and I received no notification whatsoever.
Q: Was there ever a period of time when you did have E&O?
A: Yes.
Q: Coverage?
A: Correct, yes.
Q: What period of time?
A: '04 and '05.

[So, in fact, contrary to the testimony at McDuff's trial, but consistent with the 21 U.S. District Court findings in the *ONESCO* cases - see H00734-735 - Lancaster did have insurance at the time of the alleged conspiracy in '04 and '05. E & O coverage, which demonstrates a lack of intent, and rebuts the government's argument about Gary Lancaster not being licensed.] [ ]

Q: The reason I ask that, Gary, is a number of investors, as you know, have contacted my office [ ] -- and several of them have referenced that they were told by you that you had E & O coverage. Do you remember ever telling any investors that?
A: Yes. At the time I spoke to them, I had E & O coverage…. [H00074-75 (*Id*. at p.124-125)]

[The *ONESCO* U.S. District Judges, all 21 of them, determined that no sale of securities took place until May of 2004 (cumulatively) because of material changes to the prospectus. The material change goes to undermine the government's theory of the case "conspiracy to commit an illegal act, and wire fraud in furtherance of that." The material change (that no insurance was available), and notice of same (to all investors) undermines the government's theory of the case.]

Q: ...what are the parameters in the policy in terms of coverage and that sort of thing?
A: It's basic, you know, but I also elected additional coverage for investment advice, so it would cover securities.... [H00075-76 (*Id*. at p.125-126)] [ ]
Q: Well, it was your belief that Megafund had an insurance policy on the principal, is that correct?
A: Yes, separate coverage. [H00078 (*Id*. at p.147)]
Q: Did you ever charge a Megafund investor or any investor whose funds you put into Megafund for insurance?
A: No.
Q: Never?
A: Never.
Q: So you took this out?
A: This [insurance] was removed and it was replaced with an addendum that everyone signed (all investors) indicating that we couldn't get the insurance piece done, but that we made arrangements so that money could be held so that it would be insured in the sum -- consistent with what we were trying to do here, only there would be no charge to the investor.
Q: Okay.
A: Because broker/dealers don't charge for the insurance coverage. [H00078-79 (*Id*. at p.148)]
Q: Are you aware or do you know if he [Reese] ever spoke to Gary McDuff or Stan Leitner or anyone else about the Megafund investment?
A: I have no idea. [H00080 (*Id*. at p.149)]

The Lancaster deposition reviewed above had *Brady*, *Jencks*, and *Giglio* evidence which rebutted the entirety of the government's case. At the heart of their case - the government posited that McDuff, Lancaster, and Reese entered into a conspiracy that foresaw that someone might have transmitted a wire (since conspiracy does not require a substantive act).

However, the government merges the three alleged conspiracies - Lancorp Fund I and Lancorp Fund II, Lancaster's separate conspiracy. The government has conceded that McDuff had nothing to do with Lancorp Fund II. See p.222:2-11, H00009. Further, the common purpose is unknown, as the second deposition of Lancaster makes clear. Lancaster had E & O coverage, Lancaster and McDuff believed that Megafund had insurance, that the Lancorp money would be

held in the U.S. in a single account. All of this exculpatory evidence, and impeachment evidence, and evidence which attacks the loss amount, and rebuts the testimony at trial of Lancaster, Quilling, Loecker, Magee and others, in and of itself is sufficient to overturn the case. [E & O coverage resulted in a class action settlement reducing McDuff's restitution]

4. On October 6, 2010, Gary Lynn Lancaster was sentenced, pursuant to a plea agreement in this Court. Case No. 4:09CR231. His sentencing transcript has *Brady* evidence in it, is *Jencks* evidence and has *Giglio* evidence in it, and was not produced by the government to McDuff pre-trial, or on or after Lancaster's testimony at trial. Further, the government conceded at the follow-on proceeding that McDuff did not have anything to do with Lancorp Fund II, even though the government offered Lancorp Fund II as exhibits at McDuff's criminal trial purporting to be tied to McDuff. See H00654-671, H00674-682. And Quilling in the follow-on proceeding stated that he believed Lancaster was truthful at his sentencing proceeding. See p.186:916, H00007; p.222:2-11, H00009.

Lancaster testified at his sentencing hearing - that transcript was not produced to McDuff as ordered by the court pre-trial or on or after Lancaster's testimony at trial. It reads as follows:

[But wait. It gets better.]

> **Ms. Benson:** [Lancaster's counsel] ..."I would like to state that Mr. Lancaster -- this case began as a pre-indictment plea negotiation...And during that time, Mr. Lancaster has cooperated with authorities in California. [no production of the notes, 302s, transcripts, or otherwise from that matter to McDuff. (The Tringham trial, involving Tringham and Max International and Lancorp Fund II.)] He [Lancaster] cooperated by testifying in grand jury, [no production of the notes, transcripts, or otherwise from the Grand Jury testimony], He cooperated by testifying at the trial of Mr. Tringham, [no production of the notes, transcripts, or otherwise from the Tringham trial]...
> **The Court:** Mr. Who?
> **Ms. Bensen:** Mr. Tringham. He's not a co-defendant. But it was a related case that they prosecuted in California..." [*United States v. Tringham*, Case No. 2:09-cr-09--00490 (C.D. Cal. 2009)] [H00096-97 (*Id*. at p.3-4)]

So, we have discovered now, post-trial, that there is even more *Jencks* materials involving Lancaster, although ordered to be produced to McDuff, it was not produced to McDuff. Shameful!

The Court: ...Did you make misrepresentations to investors in your investment program?

Lancaster: Yes, I did.

Court: Why did you do that?

Lancaster: Well, at the time, I believed that they weren't -- that they were, in fact, not [sic]true...

[impeachment, exculpatory evidence withheld]

Court: Well, did you tell investors that the funds would stay with Lancorp?

Lancaster: I did.

Court: And you knew they would not, correct?

Lancaster: At the time, I thought they were being held in an account with Lancorp's name. That's what I was told [by Leitner]. But they in fact weren't.

Court: An account where, at Megafund?

Lancaster: Yes.

Court: In Lancorp's name?

Lancaster: Yes.

Court: Did you tell the investors that their money was insured?

Lancaster: I told the investors that while the money was being held in the accounts of the brokerage firm and/or the bank that it was insured by the FDIC or by the SIPC, which is the equivalent of FDIC in the brokerage account.

Court: Did you know that to be untrue?

Lancaster: I did not know that to be untrue. While it's held in the account. That is in fact true. I believed the money was being held in a brokerage account that carried that insurance.

Court: Who told you that?

Lancaster: Megafund told me that the funds were being held and sent me confirmation that it was being held in a brokerage account. So it would have SIPC coverage automatically. [H00099-100 (*Id*. at p.6-7)]

Court: ...Now, was this indeed a ponzi scheme where you were paying old investors with money from new investors?

Lancaster: It became that, yes. I didn't know that that was the case. The funds that -- the earnings that I thought I received from Megafund were earnings, and I credited it accordingly.

Court: You thought they were earnings from what?

Lancaster: From the investment in Megafund.

Court: From investing in what?

Lancaster: From doing bond transactions and doing repos and a variety of other things that they described that they were doing.

Court: So you were sending all this money to Megafund from your investors that you had solicited, and you thought they were doing what they told you they were doing?

Lancaster: Correct. When they sent a distribution to me, I then credited it to the investors.

Court: Okay.

Lancaster: And then I was requesting from Megafund verification of the transactions. And it didn't happen. Over a period of three months, excuses continued to come that

they weren't providing the information I needed. And that's when I had contact with the SEC and I filed a formal complaint against Megafund.

Court: All right.

Lancaster: At the time, I was --

Court: Is that after you were investigated?

Lancaster: No. At the time that I -- I was the only one -- according to Eric Warner, who was the SEC Head Investigator, I was the only one who was willing to file a formal complaint against Megafund. We had numerous exchanges by e-mail to have a complaint worded like he wanted to have it worded so he could move forward, because nobody else would do it.

[Of course, emails between Eric Warner, the SEC Chief, and Lancaster are akin to 302s, they are statements under *Jencks*, they are *Brady* (because they show a member of the alleged conspiracy initiating the complaint to the SEC - undermining in the intent element and on and on - but not produced - not even in the SEC investigative file. The only item produced to McDuff was a single fax with Lancaster's declaration attached to it that was sent to Eric Warner...none of the emails where Eric Warner coached Lancaster or drafted Lancaster's declaration were produced. Unconscionable. The prosecution's conduct is shameful.]

Court: Did you tell your investors that their money would be invested in bonds?

Lancaster: Yes.

Court: Why did you tell them that?

Lancaster: Because that was the premise and that was the plan, for me to have it invested in bonds, to do bond underwriting.

Court: Through Megafund?

Lancaster: Through Megafund. And that's what Stan Leitner told me, that the Lancorp funds would be engaged in bond underwriting. [H00101-103 (*Id*. at p.8-10)]

Now, AUSA Shipchandler confesses he knew about the depositions personally - and yet did not disclose them to McDuff.

The Court: .... Mr. Shipchandler, what can you tell me about that?

Mr. Shipchandler: Your Honor, Mr. Lancaster was deposed by the SEC in connection with the investigation into Megafund versus Lancorp. During the deposition, Mr. Lancaster disclosed the existence of the $2 million and indicated that $2 million was under his control. However, the bank records showed that the amount was not under his control, it had been transferred into another ponzi scheme. The ponzi scheme that it had been transferred into was the one that Mr. Lancaster recently testified about in the California case that Ms. Benson -- [The Lancorp Fund II, Tringham, Max International cases - nothing to do with McDuff. Lancaster pled, in effect, to the second conspiracy involving Lancorp Fund II - the second conspiracy that had nothing to do with McDuff.] See also p.222:2-11, H00009.

The Court: So you are saying Mr. Lancaster did tell the SEC about the $2 million, or whatever amount it was, but he falsely represented that he had control over the money?

Mr. Shipchandler: That is correct, Your Honor, that is correct.

The Court: And could therefore return it to investors, perhaps?

Mr. Shipchandler: The question wasn't asked, Your Honor, in that manner. It was only asked whether the funds remained in his control.

The Court: Mr. Lancaster, did you tell the SEC you did have control of those funds?

Lancaster: Yes. And I believed that I did.

The Court: Where were the funds?

Lancaster: They were at a brokerage account at Max International in New York. I had previously requested that those funds be transferred. I did not know at that time that Mr. Tringham was under investigation and that all of the funds that were held in that -- in those accounts there were frozen. So they couldn't be released until the investigation was complete. And ultimately they were released and sent to the receiver. [H00104-106 (*Id*. at p.11-13)]

Such liars! The government in this case are complete and total provocateurs of lies.

Note the discussion about Lancaster's guilt had to do with the "second conspiracy" between Lancaster and Reese - not McDuff. We know this because the second conspiracy did not involve Megafund (which neither Lancaster or McDuff knew anything about its illegal activities) but rather involved Max International (Lancorp Fund II), which prosecution team member Quilling readily acknowledged had nothing to do with McDuff. See p.222:2-11, H00009.

And yet, the trial team suborned perjury - asked Lancaster to lie and say he pled guilty relating to Lancorp. That was false. He pled guilty regarding Lancorp Fund II which did not involve McDuff!

The Court: So what misstatements did you make to investors?

Lancaster: The only thing I ever told investors was that the provisions in the prospectus would be adhered to. And they weren't because when I gave the money to Megafund, the representations I made in the prospectus became untrue. So, in effect --

The Court: What do you mean became untrue?

Lancaster: I didn't do the due diligence necessary at that point to make absolutely certain that what was happening conformed with the fund. I didn't do that till after I was sending money. [ ]

The Court: What's the dividing line between a criminal case and a civil case, then Mr. Shipchandler? If Mr. Lancaster didn't do the due diligence until after he sent the money, is that criminal?

Mr. Shipchandler: Your Honor, if that is the allegation, the Court has two recourses: First, his criminal intent from purely determining whether Mr. Lancaster had the

intent to commit the crime or also from willful blindness if the Court infers from the conduct that Mr. Lancaster engaged in that he was willfully blind to the circumstances as a substitute for criminal intent. There's a body of case law in the Fifth Circuit --

The Court: Is that what you assumed in bringing this case?

Mr. Shipchandler: No, Your Honor, we're not assuming willful blindness... [H00109-110 (*Id*. at p.16-17)]

The Court: Okay. Can I stop you right there? Mr. Lancaster, what about that? Did you tell investors that there was an initial policy for them?

Lancaster: Initially, when I was first collecting funds, the intent was to have an insurance contract issued by AIG that was going to cover their investment for a fee. I sent that information out to everyone and gave them an option to either elect insurance or to not elect insurance and not pay the fee. That never occurred. I was not able to obtain the insurance separately. I subsequently then sent out letters to all the investors letting them know that there was no longer any separate insurance, and that they could continue in the fund without a separate insurance policy--

The Court: You thought there was an insurance policy somewhere?

Lancaster: No, I was trying to acquire one.

The Court: Before you acquired the policy, did you send forms to investors allowing them to elect insurance on their investment?

Lancaster: Yes, before I had the insurance in place.

The Court: Why did you do that?

Lancaster: To determine whether or not they wanted to have insurance, to take that information to the underwriter to determine whether or not I had enough to provide insurance.

The Court: Did you tell them that there was no insurance in existence, but you were trying to get insurance?

Lancaster: The fund was not effective at that point. I had not done any investing. It was during the accumulation phase. I had to have at least 5 million to be a qualified investor. So I said, "I am working on this insurance, we're trying to make it available. Do you want it? There will be a fee for it. If you want it, make the election; if you don't, make the election that you don't want it." When I was unable to get it, I then sent letters to every single investor letting them know that the insurance was not going to be available, that they needed to sign a statement, sign an acceptance if they wanted to continue in the fund. And there were some people who requested to have their funds returned, which I did.

The Court: Okay. And you had not sent the money to Megafund at that time?

Lancaster: No, this was way before Megafund.

The Court: Well, Okay. So what's the problem there, Mr. Shipchandler?

Mr. Shipchandler: Your Honor, according to at least one of the investors, that representation was made after his investment had already been sent to Megafund.

The Court: How would the investor know? [H00109-112 (*Id*. at p.16-19)]

And, of course, as the 21 U.S. District Courts found in the *ONESCO* cases H00734-735, the material change in the insurance portion of the Lancorp Fund I PPM took place on or before

May 14, 2004, almost 9 months prior to Megafund investment - proving the Court's point in its colloquy with AUSA Shipchandler.

> **The Court:** Okay, so do the investors recall Mr. Lancaster saying that he did not have the insurance yet, he wanted to know what their interest was in insurance, and then, when he didn't get it, he notified them that there was no insurance, did they want their money back?
> **Mr. Shipchandler:** Your Honor, we don't have any information about any notification to investors that insurance is no longer available, you can have your money back. No investors told us that information.

[Shipchandler was untruthful.] At McDuff's trial, Shipchandler actually offered the exact document sent by Lancaster to investors - waiving insurance. The one he offered had been altered and had the word "insurance" written on the side of it. See H00413, unmodified notice from the SEC's file. H00414. Both investors, Benyo and Biles, who testified in the follow-on proceeding on June 15, 2016, and June 16, 2016, acknowledged receiving such a document and executing it. They both previously testified at McDuff's trial. See p.90:1 - 92:2, H00004, and p.262:1-5, H00013. [They acknowledge it was a waiver of insurance.]

> **The Court:** Did you tell Richard Holmes that his money would be used to buy A-Plus or higher rated bonds?
> **Lancaster:** Yes. That's what's in the prospectus.
> **The Court:** And that's what you thought was being done with the money --
> **Lancaster:** Correct.
> **The Court:** --At Megafund.
> **Lancaster:** At Megafund, yes. [H 00116 (*Id*. at p.23)] [ ]
> **The Court:** ...You didn't tell any of the investors that McDuff was a convicted felon. Right?
> **Lancaster:** Correct.
> **The Court:** Would you have a duty to disclose that normally?
> **Lancaster:** I guess so. I didn't know that at the time. Otherwise I probably would have.

[No *mens rea*, no intent, unconstitutional to charge as a crime without intent.]

> **The Court:** You didn't know he was a convicted felon?
> **Lancaster:** No, I didn't know that I needed to disclose it.
> **The Court:** Okay. That's not an ethical obligation under the licenses that you have?
> **Lancaster:** I'm presuming it is, yes. It must be. I mean, I didn't think it was a relevant factor, because he was representing Secured Clearing on behalf of these bankers in the UK and I was in control of the funds. All he was was a director of Secured Clearing. He had no access to the money, he had no control of the money. I was the one responsible for that.
> **The Court:** Okay. [H00117-118 (*Id*. at p.24-25)] [ ]

Mr. Shipchandler: Correct, Your Honor. The way the sequence worked is that he did not raise the funds after the receivership was in place. However, when the SEC asked him about these funds, he told the SEC that they were under his control. That was the representation that was false. They were no longer under his control. They had been sent to another ponzi scheme.
The Court: Okay.
The Court: And do you agree with that or disagree with that, Mr. Lancaster?
Lancaster: The funds were in fact sent to a brokerage account in my name, in the name of Lancorp. It had not been engaged in anything. It was sitting in the account.
The Court: With Megafund?
Lancaster: No. This had nothing to do with Megafund.
Mr. Shipchandler: It was a different ponzi scheme, Your Honor.

[This involved the second conspiracy that the government readily conceded (see p.222:2, H00009) did not involve McDuff, and yet at McDuff's trial, the government offered testimony that Lancaster pled guilty - but his guilty plea was to the second conspiracy, which did not involve McDuff - and then Shipchandler allowed Lancaster to lie about the basis of his plea - if Lancaster truly understood what he pled to...his sentencing transcript is unclear. Specifically, since his statements were true (as Lancaster believed) when he made them there is no "scheme to defraud".] [H00119 (*Id*. at p.26)] [ ]

The Court: But he says it was represented to him that they would be invested in bonds. [The Government's answer is false.]
Mr. Shipchandler: He did no diligence, however, no due diligence whatsoever, didn't ask any questions at all. He simply transferred the funds. After representing to them this is what would be done, he transferred those funds over and lost control of the funds. It was his obligation, after making a representation to investors that this is what your money will be used for, in order to make sure that that was what their money was going to be used for.
The Court: Okay. In other words, to somehow verify that Megafund was indeed buying bonds with this money?
Mr. Shipchandler: Exactly. That was his affirmative obligation, because that is what he disclosed to the investors that he would do.
The Court: And that's what the law requires?
Mr. Shipchandler: Yes, Your Honor. It was a material representation to do otherwise.
The Court: Okay.[H00122-123 (*Id*. at p.29-30)]

[Of course, we know Shipchandler was untruthful.]

First, Shipchandler misrepresented the law to the Court. The law imposes no such duty (criminal law). That is what E & O insurance covers, errors and omissions, omissions and errors like NOT DOING DUE DILIGENCE! It is not criminal. Further, as noted *supra,* the government did not bring a willful blindness case.

Next, see the letter of Humphries. H00616. See the letter of Schoenbach. H00620. Besides the misrepresentation of the law by Shipchandler (no statute requires that, nor did the PPM say that - so no material misrepresentation, not criminal); Shipchandler knew that Lancaster had, in fact, done due diligence, but nevertheless lied to the Court about it. See H00519-531.

[All *Brady*, *Giglio*, and *Jencks* materials, impeaching the entire government case, withheld - not disclosed. Shipchandler actually participated in the sentencing - and yet did not disclose to McDuff.]

Next, the conspiracy, by definition, requires commonality of purpose. Lancaster addresses that he did not know Megafund was a ponzi scheme - not disclosed to McDuff. More *Jencks*, more *Brady*.

> **The Court:** Mr. Lancaster, at what point did you realize that Megafund was nothing more than a fraudulent scheme?
> **Lancaster:** After about 90 days. 'Cause I had received two letters from attorneys, one who did in fact represent Leitner who sent a letter. And as I recall he also sent a letter indicating who the insurance carriers were for Megafund. After 90 days, I was requesting verification of the transactions that were taking place for the money that he was sending as profits to Lancorp. One excuse after another after another became totally unviable, at which time I then demanded return of the funds and then began receiving just totally ridiculous, unbelievable excuses, like the money had to be converted from Euros to Dollars before they could be released and the like. It was clear to me at that point that something very bad was going on. [H00124-125 (*Id*. at 31:13 - 32:1)] [ ]
> **The Court:** Were you still raising money?
> **Lancaster:** Not at that point, no. At that point -- I was doing nothing at that point except trying to get the funds back from Megafund. That's when I called this attorney on one of the two attorney letters that I received to notify him that there was likely going to be a claim against the insurance, because I thought the funds were not gonna all be there. That's when the attorney then notified me that he had nothing to do with them.
> **The Court:** So $10,744,000 was raised by you and McDuff and Reese and sent to Manage Fund [sic]. Correct?
> **Lancaster:** Correct.
> **The Court:** And only after you sent all that money to Megafund did you find out that Megafund was a fraud?
> **Lancaster:** Yeah. That's where my lack of due diligence was bad. [H00124-125(*Id*. at p.31-32)]

[This uncontroverted statement destroys the government's case - no intent - did not know of the fraud - government acknowledges it's true - destroys the conspiracy - no common purpose - McDuff is not guilty as a matter of law.]

The Court: Did you represent to investors that you had had experience in this sort of work before?

Lancaster: I represented that I had experience as a registered representative.

The Court: Did you?

Lancaster: Yes. As a licensed person, I worked in the banking environment. I worked very closely with the portfolio managers. And with the portfolio managers, I sat down at the computer screens while they traded hundreds of millions of dollars for an eighth of a point or a quarter of a point, generating enormous amounts of money. It was my feeling that all I needed was connections and access and anybody could do that. And that's what was represented by Gary McDuff of Secured Clearing, that the UK group had bought a private bank and that they would have access and they would be able to bring all the paper that was necessary to execute deals going forward. [H00131-132 (*Id*. at p.38-39)][ ]

The Court: So you didn't represent to your investors any particular return range?

Lancaster: Correct. See, this all occurred -- when the fund first started, I actually had the funds placed at Tricom Equities in Australia. And we did one deal, a very successful deal, and then it ended. There was not gonna be any more. That was a recommendation that was made by -- from Gary McDuff supposedly from this UK group that he represented. It was all on the up-and-up, it was all squared away, everything was perfect, all the funds came back without a problem.

Lancaster: So I became comfortable with Gary McDuff, because everything -- every exposure that I had had with him up to that point had been all the I's dotted, all the T's crossed, no impropriety, absolutely nothing. Everything was done through attorneys and everything was approved, and so on, so that I became very comfortable that if he made a recommendation that he had done the same due diligence himself that had previously been done. Then I was lax in doing it a second time myself and that was stupid. All the investors actually [that] had requested to drop out of the fund or take a distribution, which I accommodated.

The Court: All right. Mr. Shipchandler, do you have any information contrary to what Mr. Lancaster is telling me? [ ]

Mr. Shipchandler: No, Your Honor, nothing different than that. [H00134-135 (*Id*. at p.41-42)]

[This controverts the entire government case. No fraud at the time of investment, no common illegal purpose - no common purpose in the conspiracy - no *mens rea* - and of course this evidence - not produced by the government.]

Next, the Court commits structural error, no doubt because of all the misrepresentations of the government and the combining of conspiracies of Lancorp Fund I and Lancorp Fund II into Lancaster's case, when the government prepared Lancaster's PSR for sentencing. Specifically:

The Court: Okay. Thank you. Mr. Lancaster, because it's more important to me that you pay the restitution you owe than a fine, I'm not going to impose a fine. I want the

> victims to get their money back as soon as possible. You will owe interest on this amount along with the other defendants, McDuff and Reese, because the victims are entitled not only to their money back but interest on their money. [H00143 (*Id*. at p.50)]

In *Antar* *In re: Sam M. Antar*, 71 F.3d 97 (3rd Cir. 1995), the Court reversed on a situation that is on all fours with what happened above. See detail *infra*. That *Jencks* was not disclosed, preventing McDuff from raising it during trial. The Court announces prior to McDuff's trial - years prior to his trial - that the Court's purpose is to get the money back to the investors from McDuff - McDuff had not even been arrested yet. Shows an improper purpose by the Court - pre-trial. McDuff is not even guilty yet, and the Court already has plans to make him pay.

Lancaster's sentencing transcript is *Jencks* - statutory *Jencks*. Lancaster's sentencing transcript contains *Brady* evidence which could have been used in McDuff's trial to impeach the witnesses, is exculpatory evidence is *Giglio* evidence. The testimony controverts Jessica Magee's false testimony about Lancaster not being licensed along with many other areas which permeate the government's case. In addition to the structural error that the court committed due to the deception of the government, the government withholding *Jencks* after the court order, *Brady* and *Giglio* requires reversal.

5. Steve Renner was listed a as witness for the government at McDuff's trial. However, he was not called. His deposition that he had given to the SEC in: *In the Matter of Megafund Corporation*, File No. C-3932-A, is *Brady* evidence. The prosecuting attorneys who took the deposition were members of the prosecution team, Julia Huseman, esq. and receiver Michael Quilling. The deposition was in the SEC investigative file that was given to McDuff for the first time on June 15, 2016. (See p.228:7-13, H00011.) Contains *Brady* and *Giglio* as follows - the deposition was taken on May 12, 2006.

> **Q:** I'm Julia Huseman and I'm an officer of the Commission for purposes of this proceeding. Also present is Michael Quilling. He is the Court-appointed Receiver in this case. This is an investigation by the United States Securities and Exchange Commission in the Matter of Megafund to determine whether there have been violations of certain provisions of the federal securities laws. Prior to the opening the record you were provided with a copy of the formal order of investigation in this matter, which is marked as Exhibit 1. Have you had an opportunity to review the formal order? [H00190 (*Id*. at p.4)]

[The deposition was part of the criminal investigation, the parallel civil and administrative investigations.]

[Questioning by Huseman of Renner:]

Q: Could you please describe the search that was conducted for the subpoenaed documents and state who conducted the search.
A: I conducted the search myself through the data base of records that I have for the, the people that you -- for the people that are listed here. And specifically the MexBank and Gary McDuff. [ ]
Q: Describe for me what Cash Card International's business is.[ ]
Q: Kind of like Pay Pal?
A: Similar to Pay Pal, right. The people who wish to transact business on line, a lot of times we use an on-line currency, on-line credits in the form of V Cash or E Gold or Pay Pal is a very popular one. And the concept of the e-wallet where a person would create themselves an e-wallet with one of these companies and then they would fund that e-wallet and then do transactions on the internet, then conduct business with people and then use that form of, method of payment. [H00191-192 (*Id*. at p.7-12)]
Q: When did you first come in contact with Gary McDuff?
A: Sometime in 2002. [H00193 (*Id*. at p.16)][ ]
Q: Back to Mr. McDuff, after his first conversation did he open a portal?
A: Yes, he did. [H00194 (*Id*. at p.20)][ ]
Q: How many accounts does Mr. McDuff currently have with you?
A: Well, I believe in his portal there are 40-something accounts, 41 or two accounts. [H00195 (*Id*. at p.21)][ ]

[MexBank has a separate portal from McDuff's portal.]

Q: Did you tell him that? When I say him I mean Mr. McDuff.
A: I don't believe I told him that, no. I didn't tell him exactly -- I didn't divulge exactly what we were doing to him, because it's not his account. [MexBank is not his account.]
Q: MexBank is not his account?
A: The account in question [MexBank] was not his account. I wasn't going to give him information on someone else's account.
Q: What was the account Mr. Rodie [Michael Quilling's associate] was asking about?
A: It was a transfer to MexBank, I believe. [Not McDuff.] [H00196 (*Id*. at p.28)]

[Quilling and Loecker lied at McDuff's trial. They took the stand and said they traced all this money to McDuff using summary documents. But MexBank is not McDuff. The prosecution team deposed Renner and knew MexBank was not McDuff's account. This is *Brady* and *Giglio* evidence.]

[At trial, Shipchandler pulled a sleight of hand to deceive the court and the jury. See the testimony at McDuff's trial. (Dkt. 186, p.177) (Appendix "2", Tab 9). There, Shipchandler had the following exchange (p.177, line 12-16):

> **Shipchandler:** "Do you understand that MexBank Account to be controlled by an individual named Gary McDuff?
> **A:** There's not an actual associated name, but this would be under the FGF (First Global Foundation) Account, so it would be under the main account. It would be an account within that group."

That statement is true. FGF had an account where they could make payments to MexBank, but the wire from Megafund went to a MexBank account, not an FGF account for payables to MexBank. The sleight of hand was designed to deceive the jury and the court - to cover up what Renner had testified with his deposition, which was that MexBank was not McDuff! See also all the prior testimony of Lancaster (deposition) that was hidden, noting that Mr. Trejo was MexBank, not McDuff. As Renner testified at his deposition, "it's not his account." After this sleight of hand by Shipchandler, Loecker was thereafter permitted and encouraged to lie to the jury - urging that McDuff was MexBank. See p.335:24 - 336:1, H01200-1201.[ ]

> **Q:** Showing you what has been marked as Exhibit 119 that appears to be email from your attorney to Mr. Rodine, is that correct?
> **A:** Yes.
> **Q:** And it's CCs a web address titled admin@MexBankSA.com. Whose email address is that?
> **A:** It's MexBank.
> **Q:** Do you contact Gary McDuff through that email address?
> **A:** I don't think so.
> **Q:** Have you ever contacted him through that email address?
> **A:** No. [H00197 (*Id*. at p.30-31)]

[Once the government got a falsehood, it persists in perpetuating it over and over. But McDuff is not MexBank.] [ ]

> **Q:** Who from MexBank called and threatened to sue you?
> **A:** A person named -- someone who said they were MexBank's attorney...
> **Mr. Shiff:** [Renner's attorney]: Austin Cooper [not McDuff]. He called me too. Threatened to sue me too. [H00198 (*Id*. at p.34)] [ ]
> **Q:** Do you know what that stands for [FGF]?
> **A:** Yes. It's for First Global Foundation.
> **Q:** Has he [McDuff] always called his portal that?

A: Yes. [not MexBank.] [H00199 (*Id*. at p.37-38)] [ ]
Q: I'm showing you what has been marked at Exhibit 125. That account is entitled Mex 439070; is that correct?
A: Yes.
Q: Is that a separate portal? Is that a different portal than FGF? [McDuff]
A: Yes, that's different. [Not McDuff.] That's a MexBank portal.
Q: Who owns the MexBank portal?
A: MexBank.
Q: What is MexBank?
A: MexBank is a company of Mexico... [ ] -- I don't have the records in front of me. It's some sort of a Latin American company. [H00203 (*Id*. at p.54-55)]

[MexBank is not McDuff. Like a dog with a bone - a false bone, at that - the prosecution team simply will not acknowledge the truth, but persists in trying to establish MexBank, and the funds in and out of MexBank, as being McDuff. As President John Adams noted, "Facts are stubborn things." McDuff is not MexBank - and no matter how many times the prosecution team asks Renner - MexBank is still not McDuff. Perhaps that's why the prosecution team lied to the Court and jury at McDuff's trial; the facts to support their case just were not there - so they hid *Brady* evidence and lied at trial.] [ ]

Q: On the second page of Exhibit 128 there are a number of transfers from MexBank; is that correct, specifically three?
A: Yes.
Q: For a total of $85,000?
A: Yes.
Q: Is that MexBank account located in the FGF [McDuff] portal?
A: No. I don't think so. I think it's in the MexBank portal. [Not McDuff, Not McDuff, Not McDuff, Not McDuff] [H00205 (*Id*. at p.64)] [ ]
Q: If you assume with me for a moment that Gary McDuff controls these accounts, MexBank and FGF, are those the only two portals that he has, FGF and MexBank? [Unconscionable. Asks the witness to assume a patently false premise and then opine off of it...who does that? The government in this case! Shameful!]
A: I don't know that he controls the MexBank, but he controls the...[FGF].[ ]
Q: Are there any other portals he controls...?
A: No. [McDuff does not control MexBank or other portal(s).][H00206 (*Id*. at p.68)][ ]

(By Quilling questioning Renner)

Q: And it reflects a transfer from Megafund Corporation of $175,835; is that correct?
A: Yes. [H00212 (*Id*. at p.92)][ ]
Q: Okay. And this is the $175,835 transfer to the MexBank account; is that correct? [Not McDuff.]
A: Correct... [H00213 (*Id*. at p.95)]

In summary - McDuff is not MexBank. And the government lied at McDuff's trial in saying that he was. This *Brady* evidence was withheld so the prosecution could lie to the jury. Renner's testimony establishes conclusively that McDuff was not MexBank, a bulwark of the government's case at McDuff's trial, the deposition is *Brady* material, it was withheld and is alone sufficient for a reversal.

6. Roger McDuff, Gary McDuff's uncle, was deposed by the SEC for criminal, civil, and administrative purposes related to Megafund and Lancorp Fund I (the basis of this trial). Of course his deposition was not produced to McDuff pre-trial, post-trial, or pre-appeal. Roger McDuff did not testify at trial, so it is not *Jencks*, but of course it contains *Brady* material. The deposition was taken by prosecution team members, Julia Huseman and Michael Quilling. As the court will recall, the prosecution team did produce one of the two depositions taken of Lancaster, but withheld the other, discussed *supra*. Both Lancaster depositions were taken by Julia Huseman and Michael Quilling - prosecution team members. Roger McDuff was deposed on February 1, 2006, *In the Matter of Megafund Corporation*, File No. FW-02975-A. Roger McDuff testified as follows:

> **Ms. Huseman:** This is an investigation by the United States Securities and Exchange Commission in the matter of Megafund Corp to determine whether there have been violations of certain provisions of the federal securities laws. However, the facts developed in this investigation might constitute violations of other federal or state, civil or criminal laws. Prior to the opening of the record, you were provided with a copy of the formal order and investigation in this matter, which is marked as Exhibit 1. It will be available for your examination during the course of this proceeding. [H00356-57 (*Id*. at p.3-4)][]
> **Q:** ....In that listing you and your brother are given credit for bringing in the Lancorp investment to Megafund. Do you know what Lancorp is?
> **A:** Only by name, and what you're telling me now is all I've ever heard. Okay.
> **Q:** That's the first time you've ever heard of Lancorp?
> **A:** No, no, no. I didn't say that. I've heard of Lancorp.
> **Q:** Who first talked to you about Lancorp?
> **A:** I heard it in the office at Megafund. [H00361 (ID. at p.27)]

This is *Brady* evidence demonstrating that someone else introduced Lancorp to Megafund. Someone named McDuff, but not Gary McDuff. It was not produced and it is impeaching evidence.

7. On February 1, 2006, Julia Huseman of the SEC and Michael Quilling, both prosecution team members, deposed John McDuff *In The Matter of Megafund Corporation*; File No. FW-02975-A. The deposition contains *Brady* material. It was not produced. Both John McDuff and Roger McDuff's depositions were in the SEC's investigative file produced to McDuff for the first time on June 15, 2016. See p.2 ¶ 8(a), H00894, of the ALJ Protective Order.

John McDuff testified as follows:

> **Ms. Huseman:** My name is Julia Huseman, and to my right is Mike Quilling. I'm an officer of the Commission for the purposes of this proceeding, and Mr. Quilling is a court appointed receiver in this matter. This is an investigation by the United States Securities and Exchange Commission in the matter of Megafund to determine whether there have been violations of certain provisions of the Federal securities laws. However, the facts developed in this investigation might constitute violations of other Federal, state, civil or criminal laws. Prior to the opening of the record, you were provided with a copy of the formal order of the investigation in this matter, which was marked as Exhibit 1. Have you had an opportunity to review the formal order? [H00347-48 (*Id*. at p.3-4)] [ ]
> **Q:** Mr. McDuff, my name is Mike Quilling. I'm the receiver appointed by the court with respect to Megafund and a bunch of related entities, including most recently Lancorp. I'm going to be asking you a number of questions. Have you ever given a sworn statement like this before?
> **A:** About Megafund? [Case about Megafund and Lancorp. Related *Brady* evidence, not produced.]

(By Mike Quilling)

> **Q:** When did you first meet Stan Leitner?
> **A:** It would have been December before last.
> **Q:** December '04?
> **A:** Yes, Sir. [H00350 (*Id*. at p.13)]

[Impeaches Lancaster's testimony that Leitner had known John McDuff for years. See p.24:3-5, H00036.][ ]

> **Q:** The first time when Mr. Leitner sat down at your table, was your brother Roger present at that time?
> **A:** Yes, Sir. [H00351 (*Id*. at p.15)]
> **Q:** So you go to Dallas on January 10th of 2005 and meet with Mr. Leitner and he gives you this position in Megafund for you and Roger, and you then tell Gary about it; is that right?
> **A:** I told him about Stan, when he came -- when he gave us that money.
> **Q:** Did he indicate he already knew all about Megafund?
> **A:** No.
> **Q:** Did he tell you anything to the contrary?

A: No.
Q: Did he know Mr. Leitner already?
A: No. [H00352 (*Id*. at p.54)]
Ms. Huseman: I'm showing you what I've marked as Exhibit 34. It's a miscellaneous partner payout for April 2005. This is a document that we took from Megafund. If you look at the bottom of that page, it says McDuff Brothers.
The Witness: Uh-huh.
Ms. Huseman: The investments that it credits you with, in other words, pays you a commission on or gives you money for having procured include GW Health, LLC; Lancorp Financial Group, LLC; Coleman McDuff; Veryl Pembers; and United with Christ Ministries. Do you see that?
The Witness: Uh-huh.
Mr. Quilling: Is that a "yes"?
The Witness: Yes. H00353 (*Id*. at p.72)

[John McDuff credited with bringing Lancorp to Megafund, not Gary McDuff. Impeaches the government's argument at trial. See Dkt. 186, p.208:4-14 (Appendix "2", Tab 4)]. [ ]

Q: I can't encourage you, nor stop you from having a phone conversation with whoever you want. But Mr. Lancaster's very clear in why he got involved with Megafund, and he attributes it to you. He also -- the internal records of Megafund attribute Megafund's involvement with Lancorp to you and they were paying you well for that introduction. That's what it appears like --
The Witness: Yeah. H00354-355 (*Id*. at p.77-78)

[Again John McDuff introduced Lancaster to Megafund, not Gary McDuff.]

John McDuff's deposition clearly contains *Brady* as to who introduced Lancaster to Leitner. It was taken by prosecution team members, it was located in the investigative files on June 15, 2016, it was never produced, prior to that date.

Transcript and Deposition Summary

There were seven trial transcripts and/or depositions containing *Jencks*, *Brady*, or *Giglio* - they involved the same prosecution team members as McDuff's trial. The testimony was about Megafund and Lancorp Fund I and Lancorp Fund II (the second conspiracy, not related to McDuff), they were not produced to McDuff, and are grounds for reversal.

D) Ninth Amendment

The court in *Berger v. United States*, 295 U.S. 78 (1935) held that:

` The United States Attorney is the representative not of an ordinary party to a controversy but 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. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilty shall not escape nor the innocent suffer. He may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be truthfully observed. (emphasis added).

The Ninth Amendment to the United States Constitution reads: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. AMEND. IX.

Thomas Jefferson opined that the absence of a *Bill of Rights* to the United States Constitution was a substantive objection to the Constitution at the Federal Constitutional Convention of 1787. See, e.g. 12 The Papers of Thomas Jefferson 438 (Boyd ed. 1955).

The *Bill of Rights* was therefore drafted and attached to enable passage of the Constitution. This was juxtaposed with Alexander Hamilton's argument that the inclusion of a *Bill of Rights* was not only unnecessary, in that the people had only granted the Federal Government limited powers, but that it "would even be dangerous" on the ground that enumerating certain rights could provide a "plausible pretense" for the Government to claim powers not granted in violation of the people's rights. The Federalist No. 84, pp. 573 (Ford Ed. 1898) (A. Hamilton). As these two positions, these two arguments boiled over during the First Congress deliberations on the *Bill of Rights*, the solution became the Ninth Amendment. See 1 Annals of Congress 439, (1789) (remarks of Rep. Madison).

Madison's comments urged in Congress some sort of a Constitutional "Saving Clause" to, among other aspects, foreclose application to the *Bill of Rights* of the maxim that the affirmation

of particular rights implies a negation of those not expressly defined, resulted in the Ninth Amendment. See 1 Annals of Cong. 438-440 (1789). See also, e.g., 2 J. Story, Commentaries on the Constitution of the United States 651 (5th Ed. 1891). The Ninth Amendment specifically expressed that the granting of certain rights did not constitute the exclusion of others.

Further, the Ninth Amendment is relevant to demonstrate that citizens of these United States have many such other rights and liberties than those enumerated in the first eight Amendments. And, that federal encroachment upon liberty is not merely prohibited or limited by the First, Second, Fourth, Fifth, Sixth, and Eighth Amendments, but rather, federal encroachment is prohibited as against all the fundamental liberties and rights of citizens of the United States; and that those fundamental liberties are further guaranteed under the Constitution. See Comment, Ninth Amendment Vindication of Unenumerated Fundamental Rights, 42 Temple LQ 46, 53-56 (1968); Bertelsman, The Ninth Amendment and Due Process of Law - Towards a Viable Theory of Unenumerated Rights, 37 U Cin L Rev 777, 787 *et seq*. (1968); Forkosch, Does "Secure the Blessings of Liberty" Mandate Governmental Action?; 1 ARIZ ST. LJ 17, 32 (1970).

Included in the Ninth Amendment's Bulwark against the United States' encroachment on citizens' liberty are a litany of Supreme Court cases proscribing such actions. See *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Kent v. Dulles*, 357 U.S. 116 (1958); *Carrington v. Rash*, 380 U.S 89, 96 (1965); *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957); *NAACP v. Alabama*, 360 U.S 240 (1959); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). Some examples, *supra*, *Bolling v. Sharpe* found the equal protection clause subsumed in the Due Process Clause of the Fifth Amendment. *Id*. at 499. Further in *Schware v. Board of Bar Examiners*, *supra*, the Court found that the Fourteenth Amendment protects from arbitrary state action the right to pursue an occupation, such as the practice of law.

The right to privacy has its foundation in the Ninth Amendment. (The phrase "right to privacy" appears first to have gained currency from an article written by Messrs. Warren and (later Mr. Justice) Brandeis in 1890). *The Right to Privacy*, Harv. L. Rev. 193. But this unenumerated right, though controversial finds support along with many such "unenumerated

rights" recognized by judges under other amendments - especially the Fourteenth. Examples include:

- State action which "shocks the conscience," *Rochin v. California*, 342 U.S. 165 (1952);
- Conduct sufficient to "shock itself into the protective arms of the Constitution," *Irvine v. California*, 347 U.S. 128 (1954);
- Conduct that runs counter to the "decencies of civilized conduct," *Rochin*, *supra*, 342 U.S. at 173;
- "Some principle[s] of justice [are] so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934);
- "Those canons of decency and fairness which express the notions of Justice of English-speaking peoples," *Malinski v. New York*, 324 U.S. 401, 417 (1945), (concurring opinion);
- "The communities sense of fair play and decency," *Rochin*, *supra*, 342 U.S. at 173;
- The Constitution has been extended to determine whether a State law is "fair, reasonable and appropriate," or is rather "an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into...contracts," *Lochner v. New York*, 198 U.S. 45, 56 (1905);
- Citizens have constitutional guarantees to "fundamental notions of fairness and justice." *Haley v. Ohio*, 332 U.S. 596, 607 (1948);
- Citizens have "rights...basic to our free society," *Wolf v. Colorado*, 338 U.S. 25, 27 (1949);
- Constitution protects "fundamental principles of liberty and justice," *Hebert v. Louisiana*, 272 U.S. 312, 316 (1926);
- Constitutional protection from "denial of fundamental fairness, shocking to the universal sense of justice," *Betts v. Brady*, 316 U.S. 455, 462 (1942);

And while many of these restrictions have been couched under Due Process or Equal Protection or the other amendments, it is specifically the Ninth Amendment which protects unspecified "natural and inalienable rights." See *Patterson*, *The Forgotten Ninth Amendment (1955)*, Further analysis of the Forgotten Ninth Amendment can be found in *Redlich*, *Are There Certain Rights...Retained by the People?* 37 NYU L. Rev. 787. Professor Redlich, while advocating reliance on the Ninth and Tenth Amendments to strike an anti-contraception law, urged, "The law is unconstitutional - but why? There are two possible paths to travel in finding the answers. One is to revert to a frankly flexible due process concept even on matters that do not involve specific constitutional prohibitions. The other is to attempt to evolve a new

constitutional framework within which to meet this and similar problems which are likely to arise." *Id*. at 798.

In the case at bar, the question thus arises whether McDuff has a fundamental right to a fair trial? All honest jurists would concede he does. Second, whether a sense of well ordered liberty is subsumed in the Due Process Clause, and whether it is one of the "natural and inalienable rights" referred to in the commentary on the Ninth Amendment that attached to his person. And third, whether that right of fundamental fairness, of decent treatment by the government, to corruption free prosecution, free of perjury and denials of other constitutional guarantees by the government is so fundamental a right that the Constitution provides an inalienable guarantee. McDuff would posit that it does!

Analysis on Ninth Amendment

The government, as demonstrated herein generally, used perjury to obtain a conviction, withheld *Brady* evidence, withheld *Giglio*, withheld *Jencks*, was untruthful with the court, and obstructed justice additionally through the conduct of the BOP. There is no serious argument that the government's conduct was not unconscionable. The question then is whether such conduct by the government - designed to corrupt the judicial process - can be waived? The answer lies in *Berger v. United States*, *supra*, in that a sovereign must govern impartially. The sovereign must, itself, insure fundamental fairness regardless of the trial conduct of the individual. There is no higher obligation of the judge than to insure fundamental fairness, an obligation the judge undertook with his oath to support the Constitution.

Whether a defendant participates in the trial, waives certain due process rights, is immaterial to the obligations of the sovereign. In review once it is determined that the sovereign failed to insure that fundamental fairness, no further analysis is required. The prejudice is not to the individual defendant, though McDuff was certainly prejudiced, but to the Constitution itself - which memorializes the grants of authority to the government, and reserves to the individual citizen those certain inalienable rights - of which - fundamental fairness on the part of the government - is central to all others. Such unconstitutional conduct requires, at a minimum, reversal.

E) ***Strickland v. Washington***

Next, in *Strickland v. Washington*, *supra*, the Court noted that for McDuff to successfully show ineffective assistance of counsel, he must show (1) that counsel's representation fell below an objective standard of reasonableness; [lying is such an example] and (2) show that "the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687.

In making this evaluation, McDuff must demonstrate by a preponderance of the evidence that Kemp made errors so serious that he was not functioning as a counsel guaranteed by the Sixth Amendment." *Strickland*, 466 U.S. at 687. McDuff must also prove by a preponderance of the evidence that Kemp's conduct was prejudicial which requires a showing that "there is a measurable probability that, but for counsel's unprofessional errors, [like failing to timely comply with Fifth Circuit rules] the result of the proceeding would have been different." *Strickland*, 466 U.S. at 693-694.

The Sixth Amendment to the Constitution provides that "the accused shall enjoy the right...to have the assistance of counsel for his defense." The Supreme Court has held that that right is "the right to effective assistance of counsel." *Id*. at 686. "As all the Federal Courts of Appeals have now held, the proper standard of attorney performance is that of reasonably effective assistance." *Id*. at 687. (internal citations omitted)

McDuff represented himself at trial. Kemp was appointed as appellate counsel. McDuff thereafter filed post-trial motions which were denied and filed an interlocutory appeal. The two appeals were consolidated and Kemp was appointed counsel of the consolidated cases. Cause No. 14-40780 and 14-40905.

Procedural History on Appeal

- Appellant's brief filed by Kemp on: 6/3/2015
- Government's brief filed on: 7/27/2015
- Corrected brief filed on: 1/7/16

As noted previously herein *ante* at page 3, in August 2015, the briefing schedule for a reply brief was suspended pending ruling on McDuff's outstanding motions. See H00757-761.

In 2016, on 10/27/2015, it was documented that Kemp, against the wishes of McDuff, called the 5th Circuit Clerk and told her briefing was complete, which was false.

Kemp had originally filed a substandard brief, which was rejected by the Fifth Circuit due to its oversize and his failure to timely seek leave to expand the size of the brief. See Appeal Docket 05/22/2015, H00779-780, and H00747-751. Thereafter, Kemp, on 6/3/2015, filed his substandard brief without addressing the proper issues for appeal.

The Appellate Court noted in its opinion filed Feb. 3, 2016, in Consolidated Case 14-40780, the following:

"McDuff, through counsel, raises several arguments on appeal. Because inadequately briefed arguments are considered abandoned on appeal, we address only those adequately briefed." at ¶ II, p.3.

(a). Kemp raised:

Fifth Amendment, Venue, Statute of Limitations, 404(b) prior status as a convicted felon, Uncharged criminal conduct (Securities Fraud), *Brady* evidence, *Santos* argument, and the sentencing was procedurally incorrect. (Wrong 5th Amendment claims.)

(b). In the consolidated brief, which was joined with Kemp's brief for which he was appointed to represent McDuff - but wholesale abandoned that appointment, the following arguments were raised:

(The case was consolidated, whose arguments were to be continued in the Kemp brief.)

1. The Court lacked Jurisdiction because the indictment charged only post-conspiracy wire use, which is not a federal offense;
2. There was no *1956(a)(6)* Subject Matter jurisdiction because the indictment charged a 2005 Gross Proceeds Financial Transaction non-offense.
3. Insufficient evidence of an argument to commit wire fraud and that McDuff joined it.
4. It was plain error to admit Lancaster's hearsay, inadmissible guilty plea
5. It was plain error to instruct the jury that concealment of McDuff's felony conviction was a material fact.
6. Verdict obtained by "known false material evidence"
7. Plain error to deny McDuff's Motion for New Trial.

(c). The Appellate Court addressed:

1. Statute of Limitations
2. Venue

3. 404(b)

4. *Brady*

5. *Santos*

6. Loss calculation

So, initially, Kemp failed to properly brief the remaining issues. Second, Kemp's brief, respectfully, is terrible. Specifically, he knew he was not qualified to represent McDuff and advised of same. See H00020. An appellate brief (especially in this case in which two large briefs were filed and Kemp was ordered to consolidate) with voluminous issues that was, as demonstrated by the following break down, deficient by law school standards - much less attorney standards. McDuff's brief filed by Kemp breaks down as follows:

- Introduction (3 pages)
- Summary[s] of the Argument (15 pages)
- Statement of Facts (7 pages)
- Conclusion(s) (8.5 pages)
- Argument(s) (22 pages)

Kemp writes a separate factual basis for each argument (after an initial introduction); a summary that is twice a long as the consolidated statement or facts; multiple conclusions...and while there might be discretion for an attorney not concerned with the brief's length - whereas here, where length was an issue (5th Circuit had previously rejected the brief) multiple factual statements, multiple conclusions, multiple summaries of arguments was grossly negligent. They all demonstrate a lack of sufficient expertise, as noted in Kemp's letter. Kemp should have gotten assistance from other lawyers.

Next, Kemp filed two frivolous arguments. Statute of Limitations and Venue challenge. Statute of Limitations is an affirmative defense, which is waived if not properly raised; and venue, while constitutionally guaranteed, is also waived if not challenged during trial - specifically requesting a jury instruction. (citations omitted) It was a frivolous argument by Kemp to raise these two and ignore other more important plain error - Lancaster's guilty plea issue and McDuff's legal argument regarding his non-qualifying felony - see Footnote 26 herein, page 31-32.

McDuff incorporates his brief for purposes of establishing Kemp's failure to raise a proper argument in his appellate briefs (This Brief). (raising proper arguments)

Further, Kemp failed to properly brief Santos (see *infra*); failed to properly explain *Brady*. As the Fifth Circuit noted, Kemp did not "demonstrate [ ] that his "non-discovery of the allegedly favorable evidence" was not "the result of his lack of due diligence." Kemp's failure was his briefing. McDuff acknowledges that the documents described herein were not available pre-trial, post-trial, or during appeal; however, the briefing on the *Brady* was particularly weak. Specifically, Kemp did not make any diligence argument or rebuttal.

Additionally, respectfully, the Fifth Circuit's reasoning and reliance on *United States v. Walters*, 351 F.3d 159 (5th Cir. 2003) is wrong. As the Third Circuit noted in *Dennis v. Secretary*, 2015 U.S. App. LEXIS 7488 (May 6, 2015) (en banc) the concept of "due diligence" on the part of the defendant is misplaced as the *Brady* disclosure obligation is the prosecutor's duty, not a "hide and seek" discovery game. In any event, Kemp's briefing was wrong - did not address his own conduct, his own actions - allegedly reviewing 60 boxes, nor does Kemp (because he didn't review the boxes as he asserts) explain his breach of oath - his oath as an attorney - where he failed to advise the court, based on his vast knowledge of the case file, from reviewing the 60-80 boxes to advise McDuff what was in those boxes - that the government was putting on perjured testimony, that Jessica Magee was lying...and on and on...See this brief.

Further still, Kemp did not make the proper argument on the 404(B) evidence. McDuff incorporates his legal argument herein, at Footnote 26, page 31-32, documenting that the Court miss-instructed the jury as to McDuff's prior felony conviction - it's a non-qualifying felony under the then existing law - nor does Kemp point out Shipchandler's misleading the Court as to the law. This is probably because Kemp was unqualified to take this case, as he noted in his letter.

Another error, Kemp mis-argues the Reese Desist and Refrain Order. Specifically, as noted herein *ante* Lie #44, page 57-58, the Court committed plain error on instructing the jury on a document that did not exist The language the Court used to instruct the jury *ante* at Lie #44, page 57-58, did not exist in the Desist and Refrain Order. Perhaps, if Pent had bothered to read it, he would have noted that undisputable fact - and raised that error to the Appellate Court.

Following on, as to *Santos*, 533 U.S. 507 (2008), Kemp's argument and the Court's analysis based thereon are inapposite. The wire fraud conspiracy ran from 2003 until June 2005. While the indictment purports to cite overt acts - those acts are not necessary for a wire fraud conspiracy. The jury could rely on any act to be the overt act. Because the jury charge was a "general verdict" charge, and because McDuff was never charged with or convicted of wire fraud, the record is unclear as to which overt act they (the jury) relied upon for the conspiracy - that is what caused the merger. Kemp made the wrong argument, which calls the judgment into question. (no unamity instruction)

As the 5th Circuit noted in *United States v. Kennedy*, 207 F.3d 558, 565 (5th Cir. 2013), "There, we held that" in the money laundering context, "the relevant inquiry is "whether the money laundering crime is based upon the same or continuing conduct of the underlying predicate crime, or whether the crimes are separate and based upon separate conduct." In McDuff's case, the conspiracy ran through to June 2005, pursuant to the indictment and conviction. The alleged money laundering occurred during the conspiracy time period as a matter of law. The government could have charged that the conspiracy ended in March or April, but it did not. McDuff was not convicted of wire fraud but wire fraud conspiracy. *Santos* and *Kennedy* under the facts in McDuff's case create merger as a matter of law.

Next, the Jury Charge charges Lancaster with aiding and abetting - not McDuff. No one charged with mail fraud. Under the definitions of "aiding and abetting," McDuff is always the principal and not the agent. (McDuff "aided and abetted by GLL") As a result the Jury Charge is in error. See arguments *ante* page 61-63.

Next, as the 5th Circuit noted, Kemp abandoned the following arguments because they were not briefed in the follow-on brief. Of course - Kemp did not address jury arguments and instructions - they contain plain error - and the failure to so raise was ineffective assistance of counsel. (Two briefs filed - consolidated - an oversized brief filed and rejected by the Fifth Circuit - a second substandard brief filed on 6/3/2015) Kemp argued:

- Plain error to admit Lancaster's guilty plea statements
- Plain error on the McDuff felony - misstatement of law
- Plain error to deny McDuff's Motion for a New Trial
- Verdict obtained by "Known false material evidence"

Next, the Constructive Amendment issues addressed herein, not addressed by Kemp, demonstrate both his substandard performance and McDuff's prejudice. Specifically in noting not only conspiracy issues - the indictment calls for an underlying conclusion of "mail fraud" - not "wire fraud" to support the money laundering charge. Kemp did not raise that structural error. It was substandard not to do so, prejudice is manifest. (e.g. a check was sent in the U. S. Mail – no wire made to support wire fraud.)

These valid points were abandoned because of Kemp's incompetence. Prejudice as demonstrated herein, in this brief, is manifest. Kemp's acknowledged incompetence is manifest. McDuff meets (by incorporating the arguments and factual evidence in this brief) both prejudice and deficiency required under *Strickland*.

F) Obstruction of Justice by The BOP

The BOP, through the person of Counselor J. Landry and others, known and unknown, participated in intentional obstruction of justice by interfering with McDuff's legal materials and legal mail involving his appeal, both when he was represented by Kyle Kemp and when he was representing himself *pro se*. As noted in the McDuff declaration attached hereto and incorporated herein by reference, with particularity, Counselor Landry unlawfully and illegally retaliated against McDuff, refused to deliver legal mail; knowingly interfered with McDuff's communications with counsel Kemp; obstructed McDuff's legal calls; and falsely accused McDuff in one disciplinary incident report after another. During the time of the pendency of McDuff's appeal, Counselor Landry obstructed McDuff's ability to communicate effectively with family (who were assisting with legal materials and communications with the court) and counsel. On appeal (throughout the BOP appeal process) all seven incident reports were overturned, H01156, H01161, H01183, and McDuff's incident reports have been expunged. H01146. Throughout, Landry destroyed legal materials, obstructed justice, thwarted due process at every turn. These series of unconscionable conduct resulted in a correctional officer, M. Michael, pouring water on McDuff's legal materials and putting them in the trash - destroying some 12,000 pages of materials. Counselor Landry has retired, the CO involved in the incident was removed from the compound, and the Office of Inspector General opened an investigation - however, after taking multiple witness statements and inquiring from McDuff "who ordered him (the CO) to do this"; the OIG advised that any disciplinary conduct against a C.O. is not

disclosed to the inmate - so McDuff does not know the outcome of the OIG Investigation. (The officer was removed from the compound for at least 8 months).

Because the conduct of the BOP employees was not reasonably related to any legitimate purpose, and was calculated to obstruct justice and did obstruct justice - McDuff was prevented from properly communicating with Kemp and the court and from presenting a properly briefed (lawyer assisted) appellate brief or *pro se* brief, prejudicing his constitutional right to appeal. McDuff's declaration, the follow-on proceeding transcripts noting the obstruction and the ALJ's attempts to remedy the obstruction; and the incident reports noted therein adequately explain McDuff's position and arguments. See Declaration of Gary L. McDuff in Appendix "1", (H01281 - H01295). The BOP's obstruction is grounds for reversal.

G) Scheme to Defraud

The Supreme Court's analysis of the "Due Process" clause when it takes away someone's life, property, or liberty under a law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or is so standardless that it invites arbitrary enforcement is found in *Kolender v. Lawson*, 461 U.S. 352, 375-358 (1983). The prohibition of vagueness in criminal statutes "is a well-recognized requirement, consonant alike with ordinary notions of fair play and settled rules of law, and a statute that flaunts it violates the first essential of due process." *Conally v. General Const. Co.*, 269 U.S. 385, 391 (1926).

The Supreme Court has acknowledged that failure of "persistent efforts...to establish a standard can provide evidence of vagueness". *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 91 (1921).

In *Kotteakos v. United States*, 328 U.S. 750, 773 (1946) the Supreme Court advised "we do not think that either Congress, ..., or this Court, when deciding the *Berger* case, intended to authorize the government to string together for common trial, eight or nine separate and distinct crimes, conspiracies - related in kind though they might be, when the only nexus [Lancaster] among them lies in the fact that one man participated in all." And "as it is broadened to include more actors in varying degrees of attachment to the confederation, the possibilities for miscarriage of justice to particular individuals become greater and greater." See *Gerbardi v. United States*, 287 U.S. 112 (1932).

Next, a prequel to Judge Schell's colloquy at Lancaster's sentencing ("What's wrong with that, Mr. Shipchandler?"); the Conference of Senior Circuit Judges reported in 1925 that conspiracy charges are many times abusive and unjust.

> "We note the prevalent use of conspiracy indictments for converting a joint misdemeanor into a felony; and we express our conviction that both for this purpose and for the purpose - or at least with the effect - of bringing in much improper evidence, the conspiracy statute is being much abused."
>
> Noting further,
>
> "Although in a particular case there may be no preconcert of plan, excepting that necessarily inherent in mere joint action, it is difficult to exclude that situation from the established definitions of conspiracy; yet the theory which permits us to call the aborted plan a greater offense than the completed crime supposes a serious and substantially continued group scheme for cooperative law breaking. We observe so many conspiracy prosecutions, which do not have this substantial base that we fear the creation of a general impression, very harmful to law enforcement, that this method of prosecution is used arbitrary and harshly. Further the rules of evidence in conspiracy cases make them most difficult to try without prejudice to an innocent defendant." Annual Report of the Attorney General for 1925, pp.5,6. (emphasis added)

Against the above backdrop of vague criminal statutes and improper use of multiple conspiracies is the law and history on the term "scheme to defraud."

Judge Brown of the Fifth Circuit wrote, "[t]he law does not define fraud; it needs no definition; it is as old as falsehoods and as versatile as human ingenuity." The language of fraud statutes had been held to encompass any conduct "which fails to match the reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society." *Blachly v. United States*, 380 F.2d 665, 671 (5th Cir. 1967). The government must prove that some actual harm was contemplated by McDuff [not done here], *United States v. Regent Office Supply*, 421 F.2d 1174, 1180 (2nd Cir. 1970) but that furthers the definitions no more.

The fraudulent aspect of the scheme to defraud is a measured nontechnical standard. *Gregory v. United States*, 253 F.2d 104, 109 (5th Cir. 1958). Judge Holmes wrote, "the law does not define fraud" *Weiss v. United States*, 122 F.2d 675, 681 (5th Cir. 1941). All that is necessary is that it be a "scheme reasonably calculated to deceive persons of ordinary providence and comprehension." *Silverman v. United States*, 212 F.2d 405 (5th Cir. 1954).

See also *Kreutor v. United States*, 218 F.2d 532, 535 (5th Cir. 1955). "A scheme may be fraudulent even though no affirmative misrepresentation of fact be made." Or, "The deceitful concealment of material facts may also constitute actual fraud." *Gusow v. United States*, 347 F.2d 755, 756 (10th Cir. 1965).

So a "scheme to defraud" from the Statutes and Case Law is:

1) "not defined - the law needs no definition"

2) "Involves any conduct which fails to match the reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society" [Which members, what society, whose moral uprightness, fundamental honesty and fair play defined by whom? Where is this "society" located?]

3) "Scheme to defraud is a nontechnical measured standard"

4) "scheme [is] reasonably calculated to deceive persons of ordinary providence and comprehension"

5) "includes everything designed to defraud by representations as to the past or present or suggestions and promises as to the future." *Durland v. United States*, 161 U.S. 306, 312 (1896)

6) "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises "Act of Congress," Mar. 4, 1909, Ch. 321 §215, 34 seat 1130.

7) "to wronging one in his property rights by dishonest methods or schemes" [scheme to scheme?]

8) "usually signif[ied by] the deprivation of something of value by trick, deceit, chance or overreaching." *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924) [Overreaching? As the government did in this case. Scheme to Defraud?]

9) "fraud" as "applied to every artifice made use of by one person for the purpose of deceiving another" or as "any cunning deception, or artifice used to circumvent, cheat, or deceive another." I. J. Story, Equity Jurisprudence §186, pp.189-190 (1870)

10) "[t]o defraud is to withhold from another that which is justly due to him, or to deprive him of a right by deception or artifice" I Bruvier's Law Dictionary 530 (1897) [current with the enactment of the statute]

11) "the deliberate concealment of material information in a context of fiduciary obligation." *United States v. Dial*, 757 F.2d 163, 168 (7th Cir. 1986)

12) Crime of fraud includes deceptive seduction, *United States v. Cordolun*, 600 F.2d 7 (4th Cir. 1979) (fraudulent scheme to seduce woman supported wire fraud conviction)

13) "deceptive seduction" *State v. Parker*, 144 Wash. 428, 195, p.229 (1921)

14) "does not require any affirmation misrepresentation of fact"

But see:

15) "There are no constructive offenses; [as in McDuff's case] and before one can be punished, it must be shown that his case is plainly within the statute" *Fasulo v. United States*, 272 U.S. 620, 629 (1926)

This plethora of definition(s) is truly bizarre. The term "scheme to defraud" which includes everything, thereby excludes nothing. So from the above cases the definition of "scheme to defraud" means it has no definition, but includes immaterial conduct, lack of fundamental fairness, impacts the concept of fair play and rights, and general and business life in members of society [same with wire fraud]; it is a non-technical standard; but can deceive persons of ordinary prudence and comprehension [ordinary persons where? New York City? Appalachia? Plano, Texas? Longview, Texas?]; does not require any misrepresentation of fact; wronging one in his property rights; to withhold from another that which is justly due him; to deprive him of a right by deception; and includes deceptive seduction, which seems to be the definition of Holly Golightly from Capote's Breakfast at Tiffany's who, although married and from Appalachia, went to New York City, wore make up, pretended to be someone she was not, used the telephone, used her wiles to get gentlemen callers to give her money and property, was deceptive - but one would hardly conclude she was guilty of wire fraud. (But by definition she is)

Under Lenity, the statute is undefined, vague, and subject to being applied in an arbitrary manner. "Scheme to Defraud" as undefined and used is unconstitutionally vague to put any citizen on notice of what is "unlawful conduct".

H) Judge Schell bias under *28 U.S.C. § 455*

Judge Schell should have been recused (or recused himself) from McDuff's case because three years prior to McDuff's arrest, trial, and conviction, the Court announced him guilty and asserted a penalty, a monetary judgment against McDuff.

1) McDuff was arrested and charged with two counts. First, a wire fraud conspiracy and a subsequent money laundering charge. McDuff's arrest date was May 24, 2012. McDuff went to trial on March 26-27, 2013. McDuff was sentenced on April 16, 2014.

2) On October 6, 2010, two years prior to his arrest, and three years prior to his trial, Gary Lancaster was sentenced pursuant to a plea agreement in Case No. 4:09-CR-00231-RAS-

DDB (Dkt. 30). In that sentencing, the Court, **Judge Schell, made the following pronouncements:**

> **The Court:** Are McDuff and Reese in another case, Mr. Shipchandler?
> **Mr. Shipchandler:** Yes, Your Honor. Mr. Reese has pled guilty and I believe he's going to be sentenced approximately the 20th of October [2010]:
>
> **The Court:** Do I have that case?
> **Mr. Shipchandler:** You do. McDuff is currently a fugitive.
>
> **The Court:** I'm just curious. Why are Lancaster, Reese, and McDuff not all in the same case?
> **Mr. Shipchandler:** Because Mr. Lancaster agreed to plead guilty prior to an indictment and Mr. Reese did not. [(Dkt. 163-10, p.35:2-13) H00128.]
> **The Court:** I have had investment-fraud cases before where it's clear that the defendant just blatantly misrepresented things to investors. Your misrepresenting apparently -- unless I believe what's in paragraph 22 -- And I don't have anybody here for me to hear that from -- your misrepresentations, or the three that we've gone over here [Recall that the case against McDuff is a conspiracy - and there would have had to be a commonality - and of course there was not], that is, misrepresenting that you had control of the money -- apparently you had partial control but not total control; not advising investors that your partner, McDuff, [McDuff was never Lancaster's partner] was a convicted felon [a non-qualifying felony; see also Footnote 26 herein, page 31-32.] [ ] and not engaging in Due Diligence, those are a little more subtle than the type of ponzi scheme investment frauds that I have seen in the past. [Making McDuff's criminal trial a scam, for a conspiracy you have to have commonality of purpose, communality of means, commonality of illegality - and it does not exist - the government put on a different conspiracy trial than that found by the court with regards to Lancaster - this is completely separate from the fact that there were three conspiracies in the McDuff trial.] Had you fit the mold of those that I have seen in the past, I would have told you -- and actually, <u>I still think that the wire-fraud statute that limits the prison time to five years on investment frauds is too low</u>. I think five years is not enough time on some investment frauds. I'm not necessarily making that statement with respect to you, but the ones that I have seen. It limits the court on what the court can do with people who fleece other people out of their savings... [emphasis added] [(Dkt. 163-10, p.45:17 - 46:13) H00138-139.]
>
> **The Court:** .... It's further ordered that you are jointly and severally liable with <u>Gary Lynn McDuff</u> and Robert Thomas Reese [who had not been sentenced yet, but had pled guilty], who are defendants in Docket Number 4:09CR90, to pay restitution totaling $6,372,024.79 to the victims .... (emphasis added) [(Dkt. 163-10, p.46:16-25) H00139.]
>
> **The Court:** ...Mr. Lancaster, because it's more important to me that you pay the restitution you owe than a fine, I'm not going to impose a fine. I want the victims to get their money back as soon as possible. You will owe interest on this amount along with the other defendants McDuff and Reese, because the victims are entitled not

only to their money back but interest on their money.... [(Dkt. 165-10, p.50:19-25) H00143.]

The Court: Mr. Lancaster, unlike most defendants who are convicted of some sort of investment fraud, I am going to allow you to self-surrender because you have cooperated. (emphasis added) [ ] .... Mr. Lancaster, you are still under the same conditions of release. [(Dkt. 163-10, p.52:2-7) (p.53:3-4) H00145-146.]

First, the Court conferred a benefit on Mr. Lancaster for cooperating - he received 45 extra free days and the right to self-surrender, specifically because he cooperated. That was not disclosed to the McDuff jury. [See p.213:21 - 217:11, H00163-167.] (Benefit conferred on a witness not disclosed to the jury - error is manifest).

In (*United States v. Antar*) *In re: Sam M. Antar*, 71 F.3d 97 (3rd Cir. 1995) the Court held that Judge was disqualified where trial comments regarding goal of criminal trial of defendant's sons had disqualified him there, also because he expressed deep-seated favoritism and it appeared that he had predetermined outcome. An overview of the *Antar* cases reveals that Sam Antar's sons had their convictions for conspiracy to commit securities and mail fraud overturned and the district judge was disqualified because the judge had stated that his purpose was to recover for the investing public the funds which they had lost through petitioner's son's schemes. The district judge also commented on the conspiracy of the family as a whole and petitioner in particular.

Here, the Honorable Judge Schell pronounced McDuff guilty two years prior to his arrest, ordered restitution three years prior to his conviction and three years prior commented on his bias against McDuff in general and wire fraud "ponzi" cases in particular. In the *Antar* case, the Court commented post trial, and the 3rd Circuit reversed and disqualified the United States District Judge from the remand - here the Court spoke on the record years prior to arrest and trial, acknowledging a deep-seated bias, which requires recusal under *28 U.S.C. § 455*. The Lancaster transcript (*Jencks* material) was withheld by the government so the issue could not be raised prior to habeas. In the alternative, Kemp (as addressed more fully herein regarding Kemps failure to render effective counsel - violating the 6th Amendment) failed to raise this on appeal, and it is noted herein to demonstrate his failure under *Strickland v. Washington*.

***§ 455*. Disqualification of justice, judge, magistrate or referee in bankruptcy.**

> **(a)** Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> **(b)** He shall also disqualify himself in the following circumstances:
>
> > **(1)** Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding: [ ]
>
> **(e)** No justice, judge...shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualifications. *28 U.S.C. § 455*. See also, Canon 3 (A)(6):(c)(1)

Waiver

In certain circumstances, disqualification can be waived when the basis for disqualification is that the judge's "impartiality might reasonably be questioned," *Section 455(e)* permits waiver after a full disclosure on the record [did not occur in McDuff's case] of the grounds for disqualification. If the judge does this disclosure, and the parties waive, the judge may then continue to participate in the case. For a discussion on same see, *Frank Commentary on Disqualification of Judges Canon 36*, 1972 Utah L. Rev. 377.

In the *Antar* case the judge "in the course of sentencing Eddie Antar: [said] "my object in this case from day one has always been to get back to the public that which was taken from it as a result of the fraudulent activities of this defendant and others" 53 F.3d 568 (3rd Cir. 1995) ("*Antar II*") ("*United States v. Antar*"). In *Antar II* the 3rd Circuit held the above statement dispositive in overturning the convictions of Eddie and Mitchell Antar with a finding that it created the appearance of prejudice. *Id* at 576. Further, because the statement pertained to Eddie directly and "others" the 3rd Circuit reversed the conviction of Mitchell Antar as well writing:

> We cannot distinguish reasonably between Eddie and Mitchell in this respect, as they were charged with offenses arising from the same circumstances. [Same situation as McDuff.] Furthermore, the judge indicated that he intended to retrieve what 'this defendant,' meaning Eddie [here the Court mentions McDuff by name], and 'others' had taken by fraudulent activities. *Id*. at 579.

Because the 3rd Circuit's objective is to protect the public's confidence in the judiciary, their inquiry (and the inquiry here) is not on whether the judge actually harbored subjective bias,

[as it appears in the McDuff case - pronouncing a defendant guilty and passing sentence years prior to trial] but rather on whether the record, viewed objectively, reasonably supports the appearance of prejudice or bias. *Antar II* 53 F.3d at 574; *United States v. Bertoli*, 40 F.3d 1384, 1412 (3rd Cir. 1994); *Alexander v. Primerica Holdings, Inc*., 10 F.3d 155, 162 (3rd Cir. 1993); *Haines v. Leggett Group, Inc*., 975 F.2d 81, 98 (3rd Cir. 1992).

Under *§ 455a*, the Supreme Court addressed the application of this section in *Liteky v. United States*, 510 U.S. 540 (1994), 127 L. Ed. 2d 474, 114 S.Ct. 1147 (1994). There the Court made clear that the standard is the appearance of a wrongful or inappropriate bias or prejudice. 114 S.Ct. at 1157. There the Court stressed the importance of the extrajudicial source doctrine in assessing a judge's unfavorable disposition toward a litigant. (emphasis added). The most critical factor, according to the Supreme Court is not the source of the judge's prejudicial knowledge or bias, but the judge's "inability to render fair judgment" 114 S.Ct. at 1155. As the 3rd Circuit Court found in *Antar II*, and applicable here, in the judge's similar pre-trial statements in Lancaster's sentencing transcript, the Court expressed its bias:

- "I still think that the wire-fraud statutes that limits the prison time to five years on investment frauds is too low. [Which goes to the Court's disposition prior to conviction, to the court's inability to be impartial.] I think five years is not enough time on some investment frauds...It limits the court on what the court can do with people who fleece other people out of their savings." (Dkt. 163-10, p.46:13 - 47:17) H00139-140 (emphasis added)

- "It's further ordered that you are jointly and severally liable with Gary Lynn McDuff [who had not been arrested, not been tried, not been convicted - where there were no trials on the matter so no development of factual basis] and Robert Thomas Reese, who are defendants in Docket Number 4:09CR90, to pay restitution totaling $6,372,024.79 to the victims...[complete lack of Due Process]." (Dkt. 163-10 p.46:16-25) H00139.

- "Because it's more important to me that you pay the restitution you owe than a fine, I'm not going to impose a fine. I want the victims to get their money back as soon as possible. You will owe interest on this amount along with the other defendants McDuff and Reese, because the victims are entitled not only to their money back but interest on their money..." (Dkt. 163-10, p.50:19-25) H00143.

This indicates that the Court's goal "was something other than what it should have been and indeed was improper." 53 F.3d at 576. As the 3rd Circuit noted, these types of statements [finding McDuff guilty and imposing restitution as part of his sentence...pre-trial] "indicates that the judge's purpose was at odds with his judicially mandated responsibility to provide a fair trial

and impartial favor for the litigants before him." See *Haines*, 975 F.2d at 98 ("The right to trial by an impartial judge 'is a basic requirement of due process.'") (quoting *In re Murchison*, 349 U.S. 133, 136 (1955). The judge's three comments, taken together, made pre-trial as to McDuff, pre-guilty verdict as to McDuff "manifest an improper bias" against McDuff.

As the 3rd Circuit noted in *Antar II*:

> It is difficult to imagine a starker example when opinions formed during the course of judicial proceedings display a high degree of antagonism against a criminal defendant. After all, the best way to effectuate the district judge's goal would have been to ensure that the government got as free a road as possible towards a conviction, which then would give the judge the requisite leverage to order a large amount of restitution. 53 F.3d at 576.

Here, on reading Lancaster's sentencing - there was no commonality of purpose in the alleged wire fraud conspiracy, no commonality of elements...the court allowed a merger of three conspiracies (one to allegedly involve McDuff, two not including McDuff); The Court heard testimony at Lancaster's sentencing about his licensing (Series 6, 7, 63, 65) and allowed Jessica Magee to lie and say Lancaster was not licensed; heard testimony about the Lancorp Fund I being filed, and allowed Jessica Magee to lie and say it was not filed; the Court allowed Shipchandler to elicit expert testimony from lay witnesses; instructed the jury on a "Desist and Refrain" order - unbelievably telling the jury something the "Desist and Refrain" order did not state - never mind the dates being materially misrepresented (related to when the investors invested); didn't tell the jury the "Desist and Refrain" order had been rejected and remanded twice and wasn't final until 2009 - 4 years past the alleged conspiracy [as a matter of law, on each remand the order is not in effect but is a notice]...among other errors.

The Court's statements at Lancaster's sentencing, taken together, create an appearance of bias that meets both the required thresholds in both character and degree on the facts before the court. Recusal is required. A new trial must be granted.

I) The Three Conspiracies

McDuff was charged with conspiring with Reese and Lancaster to commit wire fraud *18 U.S.C. § 1349* and laundering of monetary instruments aided and abetted by Lancaster in violation of *18 U.S.C. § 1956(a)(1)(A)(i)*. Lancaster was not charged in either charge. No one charged for mail fraud. Money laundering charged in the indictment requires mail fraud.

An analysis of conspiracy law holds that the government must prove that: (1) two or more persons made an agreement to commit wire fraud; (2) the defendant knew the unlawful purpose of the agreement; and (3) the defendant joined in the agreement willfully with specific intent. *United States v. Grant*, 683 F.3d 639, 543 (5th Cir. 2012).

An analysis of the three conspiracies is in order.

Summary

The government identifies three distinct potential conspiracies, by way of elements and factual underpinnings which are distinct from each other. The government offers materially inconsistent facts to support the elements, charges McDuff although he is not alleged to be a member of two of the alleged conspiracies and thoroughly conflates the three conspiracies as one conspiracy in order to effect, unconstitutionally, a conviction of McDuff which cannot stand. Mail fraud, a necessary underpinning of the money laundering charge - not even alleged.

To work the Court's analysis through the conspiracies, McDuff begins with the first conspiracy. Lancaster, pursuant to a plea agreement, was sentenced on October 6, 2010. There, after an extensive colloquy with the Court (noted *supra* page 103-112) the court found the following:

Conspiracy No. 1

"I have had investment-fraud cases before where it's clear that the defendant just blatantly misrepresented things to investors. Your misrepresentations, apparently -- unless I believe what's in paragraph 22 -- And I don't have any body here for me to hear that from -- your misrepresentations, or the three that we've gone over here, that is misrepresenting that you had control of the money -- apparently you had partial control but not total control; not advising investors that your partner, McDuff, was a convicted felon; and not engaging in Due Diligence..." H00138-139(*Id*. at p.45:17 - 46:1).

So the three factual underpinnings are: (1) not full control over the money; (2) didn't advise that McDuff was a felon; and (3) not engaging in due diligence...

The Court extensively questioned Lancaster about the following and disregarded them as not substantiated. The colloquy in relevant part reads below:

[By the Court and Lancaster]

The Court: Wait a minute. You are saying you are naive? Did you not make this representation to investors in your investment program?
A: Yes, I did.

Q: Why did you do that?
A: Well, at the time, I believed that they weren't [false] -- that they were in fact not [sic] true...

Q: .... Did you tell investors that the funds would stay with Lancorp?
A: .... I did.

Q: And you knew they would not, correct?
A: At the time I thought they were being held in an account in Lancorp's name. That's what I was told.

Q: Account where, at Megafund?
A: Yes.

Q: In Lancorp's name?
A: Yes.

Q: Did you tell the investors that their money was insured?
A: I told the investors that while the money was being held in the accounts of brokerage firms...that it was insured by the FDIC or by the SIPC...

Q: Did you know that to be untrue?
A: I did not know that to be untrue...

Q: Who told you that?
A: Megafund told me that... [H00099-100 (*Id*. at p.6:14 - 7:23).]

Q: ...Was this indeed a Ponzi scheme...?
A: It became that, yes. I didn't know that was the case... H00101(*Id*. at p.8:16-20). [ ]

A: ...And that's when I had contact with the SEC and I filed a formal complaint against Megafund. H00102 (*Id*. at p.9:11-13).

Q: Did you tell your investors that their money would be invested in Bonds?
A: Yes.

Q: Why did you tell them that?
A: Because that...was the plan...to do bond underwriting.

Q: Through Megafund?
A: Through Megafund. And that's what Stan Leitner had told me.... [not McDuff]. H00102-103 (*Id* at p.9:23 -10:5) [ ]

Q: Did you tell your investors that the funds would stay under your control?
A: I did.

Q: Was that untrue?
A: Yes. H00103 (*Id*. at p.10:11-15) [ ]

Q: Mr. Lancaster, did you tell the SEC you did have control of those funds?
A: Yes. And I believed that I did.

Q: Where were the funds?
A: They were at a brokerage account at Max International in New York... H00105-106 (*Id* at p.12:21 - 13:6)

These funds are part of the third "conspiracy" that had nothing to do with McDuff. See p.222:2-11, H00009. The Court there following after impeaching the factual statement in support of Lancaster's plea, thereby creating this separate "solo" conspiracy that did not involve McDuff as follows:

[By the Court: questioning Lancaster]

Q: -- Says that you stated you knew at the time the documents provided to investors contained misstatements, specifically that investors were told that funds would be invested in bonds. But you've told me here today that you thought they were going to be invested in bonds. Correct?
A: Yes.

Q: So what misstatements did you make to investors?
A: The only thing I ever told investors was that the provisions in the prospectus would be adhered to. And they weren't when I gave the money to Megafund. The representation I made in the prospectus [thereafter - not at the time they were made] became untrue...

Q: What do you mean became untrue?
A: I didn't do the due diligence necessary at that point to make absolutely certain that what was happening conformed with the Fund [Fund I]...[not a factual element in his plea agreement or factual statement]. [ ]

The Court: What's the dividing line between a criminal case and a civil case, then, Mr. Shipchandler? If Mr. Lancaster didn't do the due diligence until after he sent the money, is that criminal? H00108-109 (*Id*. at p.15:19 - 16:20) [ ]

The Court: Is that what you assumed in briefing this case?

Mr. Shipchandler: We interviewed almost all investors in Lancorp [Lancorp Fund II], and all of them described their conversations with Mr. Lancaster and Mr. Reese [Fund II] in great detail...[the second conspiracy - not McDuff]

Q: Mr. Lancaster, what about that? Did you tell investors that there was an initial [insurance] policy for them?

A: Initially, when I was first collecting funds, the intent was to have an insurance contract issued by AIG - ... that never happened. I was not able to obtain the insurance separately. I subsequently then sent out letters to all investors letting them know that there was no longer any separate insurance... H00110-111 (*Id*. at p.17:18 - 18:5) [ ]

Q: Did you tell them that there was no insurance in existence...

A: ...When I was unable to get it, I then sent letters to every single investor letting them know that the insurance was not going to be available... [ ]

Q: So what's the problem there, Mr. Shipchandler? H00111-112 (*Id*. at p.18:15-19:10) [ ]

Q: Did you tell Richard Holmes that his money would be used to buy A-Plus or higher ruled bonds?

A: Yes. That's what's in the prospectus.

Q: And that's what you thought was being done with the money -- at Megafund?

A: Correct.

A: At Megafund, Yes. H00116 (*Id*. at p.23:7-14) [ ]

Q: ...You didn't tell any of the investors that McDuff was a convicted felon, right?

A: ...Correct.

Q: Would you have a duty to disclose that normally? [As a matter of law, No! Since McDuff had a non-qualifying felony and did not ever have any control over funds. (See Footnote 26 herein, page 31-32.)

A: I guess so. I didn't know at the time otherwise I probably would have. [Securities attorney Reynolds advised it was not required.]

Q: You didn't know he was a convicted felon?

A: No, I didn't know that I needed to disclose it.

Q: Okay. That's not an ethical obligation under the licenses that you have? [The licenses that Jessica Magee - prosecution team member - lied about at trial and said he didn't have them.]

A: I'm presuming it is, yes. It must be. I mean, I didn't think it was a relevant factor, because he [McDuff] was representing Secured Clearing on behalf of these bankers in the UK [the ones Lancaster flew to London to meet] and I was in control of the funds.

He had no access to the money. He had no control of the money. I was the one responsible for that. H00117-118 (*Id*. at p.24:23 - 25:14) [ ]

Q: Did you have control of the money? Or had it left your control and gone to a ponzi scheme? [Second conspiracy, not McDuff, but Lancaster, Reese and/or Robert Tringham.] H00120 (*Id* at p.27:2-6)
A: No, that money was still in an account in my name [Lancorp Fund II] and I had control. But the other party, Robert Tringham [not McDuff, not Lancorp Fund I, a completely separate conspiracy - see Quilling p.222:2-11, H00009] He [Tringham] also had access to the funds.

Q: The other scheme had access?
A: The guy [Robert Tringham, Max International - not McDuff, not Lancorp Fund I - not the second alleged conspiracy] who perpetuated the other scheme had access to the funds...I had been told by Mr. Tringham...it didn't happen....[totally unrelated to McDuff.] [ ]

Q: So you didn't have sole control over the funds?
A: Correct. [Not related to McDuff, not related to Lancorp Fund I.] H00120 (*Id*. at p.27:2-24) [ ]

Q: Now tell me what your background is.
A: Mostly in insurance and banking --

Q: And you been
A: --Financial services.

Q: Had you been a securities broker?
A: Not a broker, but as a requirement of my employment at the bank, I obtained my Series 7, Series 6, 63, 65, all of the securities licenses... H001258 (*Id*. at p.32:17-24)

In other words, the three underlying factual elements in Conspiracy 1: (1) not full control over the money [was not in McDuff's alleged conspiracy - also not found by the jury]; (2) didn't advise that McDuff was a felon [not relevant, not an "included felony under securities law," McDuff is not an officer of the Lancorp Fund I - no such thing as "de facto employee" as far as McDuff is concerned. See Footnote 26 herein, page 31-32, and therefore not material; Shipchandler mislead the court. See p.222:2-11, H00009; and (3) did not engage in due diligence [not a criminal offense] [was not in McDuff's alleged conspiracy, and was not an argument].

The three elements in Lancaster's conspiracy denoted at his sentencing do not involve any agreement with McDuff and do not provide any such support for the alleged McDuff conspiracy.

Conspiracy No. 2

The second conspiracy is the alleged conspiracy involving McDuff, so as not to duplicate the arguments, McDuff incorporates his arguments in this brief.

Conspiracy No. 3

The third conspiracy involved Lancaster, Reese, and Tringham, but not McDuff. See arguments *ante* at page 26-29. McDuff denies the allegation that he was involved in any conspiracy.

The government merged three conspiracies, which did not have commonality of purpose, commonality of actors, commonality of elements, commonality of facts.

Further, there is no intent by Lancaster. No intent by McDuff. No intent precludes a conspiracy. The government's case fails wholesale.

The error is manifest. It violated the Fifth and Sixth Amendments to the U.S. Constitution. It is plain and requires reversal. See *Ante* at page 26-29.

Conclusion

McDuff, painstakingly and in detail, notes the newly discovered evidence discovered on June 15, 2016, and later; denotes how that evidence impeaches the government's case, exculpates McDuff; denotes the plethora of *Jencks* evidence withheld from McDuff and how that *Jencks* evidence was material to McDuff's case. McDuff demonstrates that the government, through AUSA Shipchandler, and the prosecution team withheld *Brady* evidence, *Giglio* evidence, *Jencks* evidence, knowingly lied to the jury. McDuff demonstrates manifest error in the jury charge allowing a constructive amendment to the indictment. McDuff notes violations of the 5th Amendment, 6th Amendment, and 9th Amendment. McDuff notes the violation of *Strickland v. Washington* by Kemp. McDuff notes the obstruction of Justice by the BOP. McDuff notes the unconstitutional basis - for vagueness - of the term "Scheme to Defraud." McDuff urges and demonstrates bias under *28 U.S.C. § 455*. McDuff demonstrates and documents three separate conspiracies prosecuted as one.

McDuff's *§ 2255* is timely, both under the one year statute and under newly discovered evidence provision. McDuff is demonstrably "actually innocent" of these charges, was the subject of wide spread government corruption, and is entitled to a hearing and, thereafter, a new trial.

Prayer

For these reasons, and in the interest of justice, McDuff prays for an evidentiary hearing and a new trial.

Date: June 2, 2017

Respectfully submitted,

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