

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

**FILED**

OCT - 3 2017

Clerk, U.S. District Court  
Texas Eastern

UNITED STATES OF AMERICA,	§	
Plaintiff	§	
v.	§	Civil Cause No. 4:17-cv-00391-RAS-KPJ
GARY LYNN MCDUFF,	§	
Defendant	§	
	§	

**MCDUFF'S REPLY TO GOVERNMENT'S RESPONSE**

**Substantive Issue Before the Court**

This case, in both form and substance, is about whether the government is "Licensed to Lie" in order to win a case. The Crux of McDuff's arguments and post appeal newly discovered evidence is that governmental misconduct permeated the trial. And that newly discovered *Brady*, *Giglio*, and *Jencks* evidence demonstrate such misconduct. McDuff raises other constitutional issues as well.

The government defends with "waiver" and "procedural default." As noted herein, the government's position is untenable and anathema to the entire American concept of justice and fundamental fairness. Further, as noted in a plethora of case law, no one intelligently waives constitutional rights (such as right of confrontation, due process, etc...) when those rights are obstructed by rampant government lying. Here the ends do not justify the means--when the governmental means are lying to the court and jury.

**INTRODUCTION**

At the heart of the American ideal is fundamental fairness<sup>1</sup>. In the United States Constitution, other than specific grants of authority and organization, lies the heart of the American

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<sup>1</sup> The Court reemphasized that "[t]he writ of habeas corpus indisputably holds an honored position in our jurisprudence. Tracing its roots deep into English common law [See, 3 *W. Blackstone, Commentaries* \*129 \*138;

ideal. We find it in the 1st, 4th, 5th, 6th, 8th, 9th, 13th, 14th, 15th, 19th, 22nd, 24th, 26th, and 27th Amendments. We have granted the U.S. government limited enumerated powers in the Constitution. Balancing these limited powers, we have preserved and amended the Great Charter to ensure fundamental fairness throughout the grants of authority to the government. We have preserved free speech; free press; protection from unreasonable search and seizure; due process of law; right to remain silent; right to counsel; right to be tried in the district where the crime is alleged to have been committed; to indictment by a grand jury; no cruel and unusual punishment; restricted power grabs by the government beyond the authority specifically granted, outlawed slavery, granted equal protection of the laws, granted voting rights, granted female rights to vote, restricted the president to two terms; granted voting rights to 18 year old's; and restricted changes in compensation for Congress...all of these are designed to ensure the government's (state and federal) fundamental fairness in dealing with the citizens of these United States...to put restrictions on the government's conduct and interaction with the citizens. The guardian of this American *Ideal*--the branch of government that guarantees these rights--is the judiciary. And it is this branch that has in hundreds of opinions (many noted in McDuff's petition) found that these rights lie in *fundamental fairness*--whether delivered by specific Constitutional Amendments--or generally under the Due Process clause or identified in the restraints on government found in the Ninth Amendment. Nowhere in any opinion, in any law review article, in any statutory authority, in any

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*Secretary of State for Home Affairs v. O'Brien*, [1923] AC 603] it claims a place in ART. I of our Constitution. Today, as in prior centuries, the writ is a bulwark against convictions that violate 'fundamental fairness.' See *Wainwright v. Sykes*, 435 U.S. 72, 97 (1977) (Stevens, J. concurring) "It is this centrality of 'fundamental fairness' that has held the Court to hold that habeas review of a defaulted, successive, or abusive claim is available, even absent a showing of cause, if failure to consider the claim would result in a fundamental miscarriage of justice" *Sanders v. United States*, 373 U.S. 1, 17-18 (1963); *Engle v. Issac*, 456 U.S. 107, 126, 135 (1982). (emphasis added)

Next, in *Murray v. Carrier*, 477 U.S. 478, 495, 496 (1986) the Court further noted that the concept of "fundamental miscarriage of justice" applies to the cases in which the defendant was "probably...actually innocent." (emphasis added)

Next, the Court held that "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas Court may grant the writ even in the absence of a showing of cause for the procedural default. *Id.* at 496.

Next, the Court has additionally equated the "ends of justice" with "actual innocence."

"While the conviction of an innocent person may be the archetypical case of a manifest miscarriage of justice, it is not the only case. There is no reason why 'actual innocence' must be both animating and limiting principle of the work of federal courts in furthering the 'ends of justice. As Judge Friendly emphasized, there are contexts in which, [45 governmental lies in a day and a half trial; 7000 pages of *Brady*, *Giglio*, *Jencks* evidence withheld; faulty jury instruction;...incorporating McDuff's Section 2255 petition in its entirety] irrespective of guilt or innocence, constitutional errors violate fundamental fairness." See Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 151-159 (1970). "Fundamental fairness is more than accuracy at trial; justice is more than guilt or innocence." *Sawyer v. Whitley* 505 U.S. 333, 560-361 (1992).

grant of power to the United States government did we, the citizens, confer the right to the government to lie--to lie in a judicial proceeding. In fact, in *Napue v. Illinois*, the Supreme Court (along with its *sui generis* and its progeny) specifically notes that it is tantamount to an undermining of the American Concept of fundamental fairness (paraphrase). See also *Berger v. United States*, 295 U.S. 78 (1935).

The government, in its response, argues unabashedly that it is entitled to lie and that this Court is impotent to do anything about it. In abandonment of the AUSA(s)'s sworn oaths to uphold the U.S. Constitution, the government attorneys in this case, abandon their role in the practice of law (see that justice is done--not merely win a case).

For example, McDuff raised 9 arguments, with sub-arguments, noting the relevancy in the 7,000 pages of documents produced to McDuff on and after June 15, 2016 (noting each document with particularity, its relevance and materiality and the prejudice suffered by McDuff along with the prosecutorial misconduct and constitutional arguments including Kemp's incompetence--incorporating Kemp's ineffective assistance of counsel through all McDuff's arguments). Simply looking at McDuff's sentencing transcript (trial Dkt. #188), the materiality of McDuff's arguments based on the newly discovered evidence are self-evident. The three conspiracies McDuff raised (*Id.* p.17:4-10); the Court's judicial notice of a document--the desist and refrain order from California--and the Court's instructing the jury about a document--incorrectly--(e.g. the document did not read what the Court said it did) (*Id.* p.25:12-20, 34:1-23, 50:8-17); the Court's enhancing McDuff's sentence based on Jessica Magee's lies (*Id.* p.26:1-22, 30:14-17); enhancement on Shipchandler's lies (*Id.* p.27:1 - 30:13); the Court's own misstatements on "prospectus" vs. "PPM" and enhancing thereon (*Id.* p.34:4, 35:9, 42:11, 45:19) (this was a "PPM" and not a prospectus--a "prospectus" is a term of art not related to a "PPM").

#### HOUSEKEEPING

The government's response is couched in an echo chamber of its own falsehoods propounded at trial. McDuff established that the *SEC Investigative file* produced post-trial, post-appeal--contextually changed how the entire case was to be viewed--because the newly discovered evidence changed the testimony from compelling to falsehoods; documents that had been altered or redacted and offered into evidence became tendered falsehoods, especially when viewed in concert with documents and testimony from Leitner's and Stark's trial, or from the post-appeal

administrative hearing; in essence, the entire context of the trial, the knowingly false indictment, etc...changed with the disclosure of the *Brady*, *Jencks*, and *Giglio* evidence that was withheld by the government.

Next, a criminal judgment becomes final when the applicable period for seeking direct appellate review has expired. See *Clay v. United States*, 537 U.S. 522, 525 (2003); *United States v. Gamble*, 208 F.3d 536, 536-7 (5th Cir. 2000). McDuff's conviction became final on June 8, 2016 or June 17, 2016 (March 8, 2016, is the date of denial of McDuff's request for rehearing, and March 17, 2016, is the date of Fifth Circuit Mandate). The last day McDuff could have filed a petition for certiorari in the United States Supreme Court is 90 days post, either June 6, 2016, or June 15, 2016. See *Sup. Ct. R. 13(1)* (A petition for writ of certiorari to review a judgment in any case is timely when it is filed with the Clerk of the Court within 90 days after entry of judgment). The one-year period began to run on June 6, 2016, or June 15, 2015--the day after the conviction became final; see *Flanagan v. Johnson*, 154 F.3d 196, 202 (5th Cir. 1998)--and expired on June 6, 2017 or June 15, 2017. McDuff's petition is file marked June 5, 2017, and therefore timely as a matter of law (Dkt. 1). Alternatively, the newly discovered evidence was not delivered to McDuff until on or after June 15, 2016. See *infra*.

#### TEXAS TWO-STEP

1). McDuff's claims of newly discovered documents come from the SEC investigative file, not the "SEC-appointed Receiver" file, the "FBI file," or other files that the government opines about through Kemp (Dkt. 7, PageID #: 266, 378-380). McDuff's claims come from and are based upon the SEC Investigative File--which may have duplicates of the files Kemp reviewed--Kemp does not recall--but are in any event not based on these duplicative files unless the newly discovered evidence clarifies the prior produced files such as newly discovered un-redacted insurance policies--which prove the duplicity of the government. This is especially relevant in view of the testimony from Leitner's and Stark's trial regarding insurance policies (See Dkt 1, PageID #: 55-56, 98-99, 104-109, and see Appendix "2", Tab 6 g), h), i) and Tab 11 a) - d)).

The government's attempt at a "Texas Two-Step" to conflate the "SEC investigative files" which were not produced or reviewed by Kemp or McDuff pre-trial or pre-appeal with the "SEC-Appointed Receiver's files" or the "FBI's files" is a false sleight of hand. (This type of duplicity

and deceit is part of a pattern and practice by Shipchandler and Lopez as has been pointed out previously in McDuff's §2255 petition.) (Dkt. 1-5, PageID #: 90-137)

Finally, the fact that Kemp did not know what to look for in the discovery (he had the indictment--and presumably knew what the elements that the government had to prove were) underlies his incompetency in security cases (at that time).

In short, Kemp's affidavit merely reinforces McDuff's claims that in McDuff's trial (as a discovery paralegal/attorney) and on appeal (as counsel) he was incompetent.

#### **GOVERNMENT ABANDONED MANY OF MCDUFF'S ARGUMENTS**

2). McDuff raised nine grounds for relief, with dozens of examples and subarguments (Dkt 1-2 PageID #: 35 through Dkt 1-10 PageID #: 160). (McDuff references the Court's own docket headers in brief. For example, "Case 4:17-cv-00391-RAS-KPS Document 1-4 Filed 06/05/17 Page 2 of 12 PageID #: 78" is cited internally in this reply as "Dkt. 1-4 PageID #: 78" for brevity of reference.) Under each ground McDuff provided numerous, specific, detailed, record citations, case citations, and document supported basis for relief under the §2255 paradigm. The government abandoned/waived by failing to address them in their response. See *Colbert v. Cleco Corp.*, 926 F. Supp. 2d 886, 895 (W.D. La 2013) (when a party fails to address an opponent's summary judgment argument or a claim in response, that claim is abandoned); *Satcher v. Univ. of Ark. at Pine Bluff Bd of Trustees*, 558 F.3d 731, 735 (8th Cir. 2009) ("... failure to oppose a basis for summary judgment constitutes waiver of the argument."); *Williams v. City of Cleveland, Miss*, 736 F.3d 684, 686 (5th Cir. 2013) (*per curiam*). See also in appellate context *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1318 (11th Cir. 2012) (Well stated that a party abandons an issue by failing to address it during an appeal); *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1573 n.6 (11th Cir. 1989) (issues not argued on appeal deemed abandoned).

3). McDuff raised the BOP's obstruction of justice involving his criminal appeal. (e.g. the BOP unlawfully blocked his legal mail and interfered with his appeal--even Kemp acknowledge same in his letter to the BOP--blocked his meetings with Kemp during his appeal, obstructed justice by unlawfully seizing his legal papers, etc.) (See Appendix "1" pp.H00002 p.10-12; H00011 p.228; H00018 p.456; H01147-1194, and H01255-1295, filed with McDuff's §2255 petition on 06/05/2017). The government responds with an affidavit of Janie Frank regarding McDuff's

did not respond at all to McDuff's obstruction claims, and thereby abandoned McDuff's arguments re: obstruction of justice by the BOP raised in his §2255. See Dkt. 1-8, PageID #: 153 and Dkt. 6, Pages 22-23.

4). Kemp does not aver he was competent. Does not deny that he was incompetent. Does not explain or attempt to explain his 9/3/2014 email (wherein he asserts *inter alia* that he is incompetent), rather Kemp tries to explain away his incompetence. Kemp filed a brief (his affidavit) (which he acknowledges was against McDuff's wishes based on what McDuff at the time - prior to the post appeal disclosures - believed) and which was summarily panned by the Fifth Circuit as it raised frivolous issues. It is axiomatic that Kemp is responsible for the brief he files and the client is not at liberty to control "tactically" the attorney. (citations omitted)

Kemp's alleged review of Lancaster's "2015 Deposition" is specious--as McDuff's trial was in March 2013--unless this is yet a fourth Deposition of Lancaster not disclosed to McDuff by the government.

Of course Kemp remembers the July 14, 2005 deposition of Stanley Leitner [in which Leitner asserts his 5th Amendment rights], which was not relied on by McDuff in his Petition but Kemp does not remember any of the material documents that McDuff relies upon to support his §2255--that's because the government hid them from McDuff, and Kemp being incompetent did not review them (if they were even shown to him).

Kemp notes in his affidavit (PageID #: 379) that the Court made him "standby counsel with orders to review the discovery and prepare as though I was going to try the case..." (PageID #: 379). Kemp, however, did not prepare for trial. Did not review the discovery. Did not interview any witnesses. Did not prepare any experts. Did not advise the Court when the government offered false testimony from Biles, Benyo, Quilling, Loecker, Magee...the list goes on (Kemp does not

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<sup>2</sup> McDuff's allegations are that the BOP obstructed justice in interfering with his criminal appeal prior to the date of its submission to the Fifth Circuit Court of Appeals. McDuff's case was submitted on or before it was calendared for an argument at the Fifth Circuit. See Cause No. 14-40780, *United States v. McDuff* (5th Cir.) (Dkt. date 11/16/2015). Ms. Frank's declaration reads (PageID #: 434) in part: "The Court [ALJ] ruled on January 11, 2016, that a hearing would be necessary in this case and asked the parties to investigate how a hearing could be accomplished." McDuff's complaints about BOP conduct arise prior to 11/16/2015, Ms. Frank addresses actions she took after January 11, 2016. The two do not overlap at all. What Ms. Frank did regarding the June 15-16 hearing in 2016, has nothing to do with BOP obstruction on or before November 16, 2015.

allege any specific action he took to prepare for trial). Presumably, *if Kemp were competent and if he reviewed the discovery* (80 groups of which he does not recall), Kemp would have told the Court during trial that the government was offering false testimony. But he was not competent and did not so advise the Court.

***BRADY, JENCKS, GIGLIO***

5). McDuff raised *Brady, Jencks, and Giglio* demonstrated by newly discovered evidence. See Dkt. 1-5, PageID #: 90-137. The newly discovered evidence consists of 8,000 pages of discovery delivered to McDuff (7,000 new to McDuff; 1,000 pages duplicative) from the SEC's investigative files, post-trial, post-appeal. The SEC investigative files contained multiple records and documents. (See list found at Dkt. 1-1, PageID #: 31-34.) The newly discovered evidence also consisted of two days of live testimony, under oath, at an administrative hearing, on the matter (July 15-16, 2016), by four (4) of the criminal trial witnesses of the government. (Benyo, Biles, Quilling, Loecker.) The new testimony at the administrative trial in June 2016 by itself undermines the government's case. See generally Appendix "2", Tabs 15 and 16 filed in this case on 06/05/2017.<sup>3</sup>

6). The government in its response has Kemp opine as to documents he recalls seeing in his perusal of discovery prior to trial, but nevertheless *not* delivered to McDuff pre-trial. In any event, Kemp identifies only 18 groups of documents after review of McDuff's §2255 list of documents. As the Court will recall, McDuff identified 98 groups of documents the government hid from McDuff, the government fails to address 80 groups of documents not produced to McDuff, thereby abandoning and/or admitting to McDuff's arguments thereunder. See Dkt. 1-1, PageID #: 31-34<sup>4</sup>.

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<sup>3</sup> The government in its rote response references the ALJ's initial decision (Exhibit E) (PageID #: 318-377). Specifically, an initial analysis of the decision demonstrates that the Findings of Fact have substantially nothing to do with the ALJ's discussion (conclusions of law). Nor does the government note that the ALJ excluded the preponderance of McDuff's evidence at the hearing (PageID #: 374) ostensibly because the exhibits applied to the criminal case and other un rebutted matters. The governments persistence in avoiding the elephant in the room - the fundamentally unfair trial - is not the ALJ's decision.

<sup>4</sup> In Kemp's affidavit--as argued by the government--Kemp identifies as follows:

- "The majority of the discovery [provided by the government pre-trial that Kemp alleges he reviewed] were bank records from various entities including Sardaukar Holding, Cilak, CIG, Megafund, Lancorp Fund [Which one specifically? McDuff identified three different conspiracies in his petition, see Dkt. 1-7, Page ID #146-151; two Lancorp Funds, see Appendix 1" p.H00009 pp.221-222. Quilling, the government's own witness, at the administrative hearing, testifies under oath that Fund II had nothing to do with McDuff. See *Id.*], Cash Cards International, and MexBank." Note none of McDuff's §2255 petition arguments come from the bank records--other than possible

7). McDuff raised 45 falsehoods told to the jury by the government during the criminal trial. The government made an attempt to respond to one of the lies, thereby abandoning the arguments about the other lies told to the jury. As the Court noted in *Napue v. Illinois*, "A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth." See *Haskell v. Superintendent Greene SCI*, (Cause No. 15-3427; 8-1-2017; 3rd Cir) (citing *Napue v. Illinois*). Here, the government doesn't deny or respond to 44 of the lies it offered at trial.

For example, the unrebutted Benyo lies (No. 1, 2, 3 Dkt 1-2 PageID #: 36-38; No. 5, 6, 7, 8, 9, 10 Dkt 1-2 PageID #: 39-41; and No. 12, 13 Dkt 1-2 PageID #: 41-42) demonstrate the government offered false testimony. The government, in its response, merely regurgitates the false trial testimony which does not address in any way McDuff's allegations. The Government does not deny the Biles lie No. 17 (Dkt 1-2 PageID #: 45) which stands uncontroverted.

The Government does not deny SEC Attorney Jessica Magee's lies. She lied and said Lancaster was not a licensed person, when in fact he has a Series 6, 7, 63, and 65 Securities license. She had previously adopted filings filed in the Northern District of Texas wherein she swore that Lancaster was licensed. See Cause No. 3:08-cv-526-L (N.D.TX) (Dkts. 1, 28, 29, 35, 37, 38, & 39). AUSA Shipchandler suborned perjury through Jessica Magee regarding the licensing status of Lancaster--an allegation in the indictment (trial Docket, Dkt. 1, ¶6(c)(d)). The government

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ancillary inferences. E.g. the disclosure of *bank records* is not the gravamen of the "newly discovered evidence." Nor is it the basis of McDuff's *Brady, Giglio, Jencks* arguments!

- "The discovery also included offering documents and ancillary documents related to the funds themselves..." That is rank speculation (What document? Where is it located?), nothing is identified with any particularity. Whereas, McDuff offers Kemp's email from 9/3/2014 wherein Kemp rebuts his own newly conjured affidavit. See Appendix "1" p.H00020. McDuff identified 98 groups of documents, and arguments from specific documents in support of his petition. Kemp does not identify specific documents.

- "...in addition to dozens possibly more than one hundred, FBI 302s." Which means possibly as little as 24 302s... Kemp just doesn't know. However, in his 9/3/2014 email, his recollection is actually more specific. See Appendix "1" p.H00020. There, Kemp opines "The government would provide me specific additional information they intended pursuing at trial." See Appendix "1" p.H00020. That is exactly what McDuff acknowledged he got from the government--the 1,000 pages of documents that the government intended to use at trial. What McDuff complains about is the *7,000 pages that was Brady, Giglio, and Jencks* material that the government did not provide. These undisclosed documents further led to 1,000's of other pages of *Brady, Giglio, and Jencks* documents. Specifically, Stark's trial documents, Leitner's trial documents, and the other documents in the SEC investigative files. See Appendix "1" p.H00020, and Dkt. 1-1, PageID #: 31-34 for the list of documents.

- "I do not recall seeing any previous testimony by Mia Flannery in the discovery, nor the transcript of Lancaster's sentencing hearing. However, I received a copy of Lancaster's Sentencing Hearing Transcript while preparing for the appeal, and I gave a copy to McDuff at that time." But Kemp did not raise the appearance of judicial bias, as noted in the §2255 petition under the *Antar* case In McDuff's appeal.



reurged it in the jury arguments (see trial Dkt. 16) (e.g. manner and means of the conspiracy....McDuff made a "number of affirmative false representations of material fact..."¶(6) (¶(6)(d)) "The representation that [Gary Lynn Lancaster] GLL was a registered advisor under the *Investment Advisor Act of 1940*") "A lie, is a lie, is a lie..." *Napue v. Illinois*.

In the government's response, Lopez writes, "McDuff further attempts to mislead this Court with another long-held allegation: that the government lied when it alleged and proved that the Lancorp Fund was unregistered." (emphasis added) (Gov. Resp. PageID #: 265, 266). The government then references Attachment G, SEC Filing. That is not what the indictment reads. (trial Dkt. 16 ¶(6)(c)). Ms. Lopez misreads the indictment and intentionally lies to this Court. Specifically, the indictment (trial Dkt. 16) (¶(6)(c)) reads, "The representation that the Lancorp Fund had been registered in a Reg D-506 filing." The SEC document, clearly at the top, notes "Form D;" and "filing under 506;" and "Type of filing;" and "New." This is a Reg D - 506 registered filing. A registration with the SEC of an "unregistered" fund. "The Lancorp Fund" was registered with the SEC in a "Reg D - 506 filing." That is the SEC exhibit. And that is expressly what the SEC filing demonstrates. And that is what Jessica Magee lied about. The indictment was indeed false itself. Prejudice is manifest, in that the government repeatedly lied about elements in the indictment that had to be proved to the jury.<sup>5</sup> See Dkt. 1-3, PageID #: 66-76.

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<sup>5</sup> Jessica Magee at the time of her lies in Court (See Appendix "2" Tab 9 pp.316:5-12) goes at length to try and confuse the jury. Specifically, she opines on the aspects of a "registered fund." The SEC statutes and rules provide for two types of filings. (1) A PPM is a "non-registered Fund," such as Lancorp Fund. See generally, pursuant to Section 3(b), 4(2), or 4(5) of the Security Act of 1933 [15 U.S.C. § 77c(b), 77d(a)(2) or 77d(a)(5)] Offerings of Securities *not* involving a public offering require a "Private Placement Memorandum" "PPM" and are registered with the Securities and Exchange Commission (SEC) by filing as an exempted securities offering. A Form D filing is required with the SEC and in every state in which participating investors reside. (See Lancaster Deposition testimony about registration Appendix "2" Tab 2, pp.16:3-18:21.) (See also Appendix "1" p.H00033-34.)

Also, Offerings of Securities which are Public Offerings require a "prospectus." Even now, the government confuses the terms of art "PPM" and "prospectus"--*They are two different items.* Gov. Resp. (Dkt. 7, page 20 ¶1, PageID #: 273).

Title 15 U.S.C. § 77d. *Exempted Transactions:*

An exemption exists for securities offerings to non-accredited investors (35 or fewer purchasers) 17 C.F.R. § 203.506 ("Rule 506"). This 506 exemption applies to *Private Placement Memorandums* offered under the provisions of Section 4(2) of the Securities Act and Rule 506 of Regulation D. 15 U.S.C. § 77d(a)(2). A PPM is used by potential purchasers for the sole purpose of evaluating a possible investment in the issuer's shares.

"The word '*prospectus*' is a term of art referring to a document that describes a *public offering* of securities by an issuer or controlling shareholder." *Young v. Lee*, 432 F.3d 142, 148 (2nd Cir. 2005) (quoting *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 584 (1995)).

The government did not attempt to explain any other lie it told. It did offer Kemp's affidavit. But Kemp's affidavit is rebutted by Kemp's email of 9/3/2014. *Kemp's affidavit* does not establish that the government provided the evidence pre-trial. Rather, *it confirms the 1000 pages produced to McDuff, not the 7000 pages withheld by the government.* See Appendix "1" p.H00020 and H00894-895 ¶ 8.(a) (where ALJ Elliot wrote on the record--"Although Respondent [McDuff] eventually received portions of the investigative file, he received much of it mid-hearing [June 15, 2016]. Because Respondent was incarcerated...and has represented himself, he was never able to inspect or copy the *investigative file personally or through counsel...the investigative file was not duplicative of discovery he otherwise would have received. I directed the Division to address this issue post-hearing, but so far there is no evidence that Respondent has ever personally*

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Section 5 (of Title 15 U.S.C. § 77e) requires that securities be registered with the SEC before any person may publicly offer or sell such securities. §77j prescribes information required in a prospectus. §77a requires the filing of a "prospectus" with the SEC in connection with the offer or sale of securities registered under this title [15 U.S.C. § 77a et seq.] A prospectus is not a "PPM."

See also *Prospectus* C.F.R. § 230.174(d) (25 days to deliver prospectus with sale of newly issued securities).

The SEC counsel and the AUSA are presumed to know the law, however absurd that presumption is (based on the testimony of Jessica Magee who is either grossly incompetent or knowingly lied to the jury about the law--black letter law--governing securities and filing requirements with the SEC). Incompetency or dishonesty. Either way, the conviction cannot stand.

Next, and most importantly, *Safe Harbor Rule 508* [17 C.F.R. § 230.508] [15 U.S.C. § 78u-5(c)] Deviations from a term or requirement of Regulation D.

(a) A failure to comply with a term or requirement of §203.506 [PPM] will not result in the loss of the exemption from the requirement of section 5 of the Act [i.e. "the public offering requirements"] for any offer or sale, to a particular entity, if

- (1) the failure to comply did not pertain to a requirement intended to protect that entity; and
- (2) the failure was insignificant with respect to the offering as a whole; and
- (3) a good faith reasonable attempt was made to comply with all applicable terms, conditions and requirements of 17 C.F.R. § 230.506, as referenced in 17 C.F.R. § 230.508(a) and 15 U.S.C. § 78u-5(c).

This is all black letter law, and contrary to Jessica's false testimony on the law. See Appendix "2" Tab 9, page 316:5-12.

Lancorp Fund was a "non-registered Fund." And contrary to the language of the indictment at ¶(6)(c), it was filed. The May 27, 2003 filing, *Exhibit G*, also found in McDuff's §2255 petition filing at Appendix "1" pp.H00401-409, is exactly what the indictment alleged McDuff and Lancaster failed to do. Attorney Reynolds (Lancorp Fund's attorney) filed a registration form D-506 with the SEC registering Lancorp Fund as a "non-registered Fund." The government did not charge McDuff in the indictment (trial Dkt. 16 ¶6(c)) with any crime having to do with "registered Funds"--rather it charged him with a specific fact, falsely informing investors that the Lancorp Fund was filed with the SEC in a Form D-506 filing when, in fact, it was actually not filed. See trial Dkt. 16 ¶6(c). That allegation by the government was *false* and the May 27, 2003 filing proves its falseness. The government doesn't get to prosecute people for what it wants to be in the indictment or what it wishes to be in the indictment, or what it thought the indictment reads--it must prove what is in the indictment, not some delusional idea of it. The filed 'FORM D' proves Jessica Magee lied and that Shipchandler suborned perjury.

viewed the entirety of the investigative file, or ever had a meaningful ability to do so.") (which rebuts large swaths of the Kemp affidavit and the "Texas Two-Step").<sup>6</sup>

8). Next, the government does not address, and abandons the *Brady*, *Giglio*, and *Jencks* arguments which show the government withheld exculpatory evidence, withheld impeaching evidence [presumably even the government would concede that Jessica Magee's knowingly lying on the stand], withheld *Jencks* evidence--all the Stark trial, Leitner trial, Lancaster sentencing hearing, second Lancaster deposition [gov. provided one of two depositions], and on and on and on was *Jencks* evidence that the government did not produce. While the government does not attempt to address the post-trial testimony from June 2016 of Biles, Benyo, Quilling, and Loecker at all presumably the government would concede that June 2016 was post trial and post appeal and not available to McDuff at trial or on appeal.

9). Next, the government does not address the prosecution team arguments which impose *Brady*, *Giglio*, and *Jencks* duties on Lopez and Shipchandler to produce the documents from all the forums involving the prosecution team members. (i.e. - Stark's trial, Leitner's trial, all the SEC depositions, list goes on and on and on--which the government did not produce or respond to in its response.) (See Dkt. 1-11; PageID #: 176-178.)

10). Loecker confesses his prosecution team role, thereby acknowledging the *Jencks*, *Brady*, *Giglio* obligations of the prosecution team. (Loecker Affidavit; PageID #: 405) ("I was...case agent...I also participated in the trials of certain of McDuff's associates, namely Stanley Leitner and Bradley Stark, who were separately tried in the Northern District of Texas in 2008 and 2012...") Loecker then bloviates in general terms but does not address any specifics. He does tie, which is uncontroverted, the relevancy of all the trials (Loecker calls Leitner and Stark "McDuff's associates"--which McDuff categorically denies--but in any event establishes the relevancy of all the Leitner trial and Stark trial documents, and the withheld *Jencks*, *Brady*, and *Giglio* under the government's own paradigm). The *Jencks Act*, *Brady* and *Giglio* cases do not allow the government to opine about other evidence--rather the law requires its production. The government did not so produce--and tacitly acknowledges it did not produce *Jencks*. (Dkt. 7, generally)

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<sup>6</sup> But of course Kemp's email (9/3/2014) undermines the government's identification of of 18 classes of documents it says it delivered (without specificity or particularity)...and not only impeaches Kemp's general recollection--at worse it smacks of moral turpitude.

11). In sum, the government's response on the *Brady, Giglio, Jencks* "newly discovered" evidence challenge, myopically opines that *procedural default* or *waiver* trumps--but as all jurists are aware, lying by the government--precludes intelligent waiver--and *incompetent counsel* trumps procedural default or waiver. Furthermore, as McDuff's petition and appendix thereto demonstrate, including Kyle Kemp's 9/3/2014 email (Appendix "1" p.H00020), there are dozens of relevant exculpatory insurance documents that were withheld from McDuff from the Stark trial, Leitner trial, recordings of conversations on insurance, insurance policies, attorney testimony about insurance, and on and on and on. See specifically the testimony of Frank at Leitner's trial, Dkt. 1-5, PageID #: 98-100, 106, where the insurance was paid for. See also Appendix "1" pp. H00516-531.

12). Additionally, the government's urging of "procedural default"--is not substantively applicable because the documents were not delivered and the administrative hearing was not until the summer of 2016. So, factually, they are wrong. (See Footnote 1 herein).

Next, in *Murray v. Carrier*, 477 U.S. 478 (1986), the Court held that attorney error that amounts to ineffective assistance of counsel violates the 6th Amendment and overcomes procedural default. Further, where as here, McDuff is actually innocent, a federal court may grant a writ of habeas corpus even in the absence of a showing of cause for the procedural default.<sup>7</sup>

Next, when newly discovered *Brady, Giglio, and Jencks* is discovered post-trial and post-appeal--the failure to raise or argue the issues on appeal *based on the newly discovered* documents cannot ever be a waiver as they were unknown at the time of appeal.<sup>8</sup>

Next, in *Kimmelman v. Morrison*, 477 U.S. 365, 379-80 (1986), the Court, consistent with *Murray* and *Wainwright*, held that the Sixth Amendment mandates that the State bear the risk of constitutionally deficient assistance of counsel, citing *Murray*. The Court also held -

"[w]e also reject the suggestion [made by the government in this case] that criminal defendants should not be allowed to vindicate through federal habeas review their right to effective assistance of counsel...While we have recognized the 'premise of our adversary system of criminal justice...that partisan advocacy...will best promote the ultimate objective that the guilty be convicted and the innocent go free,

<sup>7</sup> McDuff does not agree or concede with the government's procedural default argument. McDuff expressly denies the procedural default argument, his reply is made to demonstrate the government is wrong on facts and law.

<sup>8</sup> It is one thing to allege prosecutorial misconduct, as McDuff has done previously--quite another to have proof--as McDuff now has post-trial and post-appeal.

underlies and gives meaning to the right to effective assistance, we have never intimated that the right to counsel is concluded upon actual innocence...Consequently, we decline to hold either that the guarantee of effective assistance of counsel belongs solely to the innocent or that it attaches only to matters affecting the determination of actual guilt." *Id*

The Supreme Court has, therefore, full throatically rejected the government's "procedural default" argument. Not to mention the fact that its unconscionable conduct, obstructing justice, lying in trial, and hiding exculpatory evidence could ever be a defense to a governmental thwarting of fundamental fairness.

#### ABANDONMENT OF ISSUES

13). The government responds to the jury charge issue by citing generalities, but does not respond to the gravamen of McDuff's claim. McDuff attacks the Aiding and Abetting provision--the government does not address it--and abandons it.

14). McDuff was charged with "conspiracy to commit wire fraud" and "money laundering"--however, as noted in the §2255 petition--the underlying event was *mailing* a check through the U.S. mail--that is *mail fraud*, not wire fraud. McDuff was not charged with *mail fraud*. Error is manifest. E.g. you can't convict McDuff of *conspiracy to commit wire fraud* for *mail fraud* conduct or to support a money laundering count! (McDuff does not concede any wrongful conduct and expressly denies it). See Dkt 1-3 PageID #: 67-76. The government fails to address the jury arguments urged to convict McDuff of substantive wire fraud--a crime not charged in the indictment.<sup>9</sup> There was not a factual or legal basis to support money laundering.

15). The government failed to address the fact that the Court gave no unanimity instruction--thereby abandoning it. See Dkt 1-3 PageID #: 70-74.

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<sup>9</sup> "The offense charged in the counts of this indictment is a conspiracy. This offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a *locus poenitentiae*, so that before the act done, either one or all parties may abandon their design, and thus avoid the penalty prescribed by the statute. It follows, as a rule of criminal pleading, that, in an indictment for conspiracy under Section 5440 [relevant for our purposes herein], the conspiracy must be sufficiently charged, and that it cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy." *United States v. Britton*, 108 U.S. 199, 204 (1883) (citing *Reg v. King*, 7 Q B., 782; *Commonwealth v. Shedd*, 7 Cush., 514).

The case is instructive. McDuff was charged with wire fraud conspiracy and substantive money laundering--however, the money laundering court inserted a substantive fraud predicate charge (McDuff was not indicted for substantive wire fraud), and used as its predicate act an allegation "mail fraud." The money laundering count--not addressed by the government and abandoned--is spurious as a matter of law.

16). The government fails to address the underlying false (not merely unproven, but patently false allegation element) from the indictment--and the fact that the SEC investigative file delivered in June 2016 rebutted many of these, or how a jury could have lawfully come to a verdict, without a unanimity instruction. (waiver).

17). The government does not explain why it urged the Court to misinterpret and misapply "Judicial notice" regarding the [sic] Cease and Desist Order to the jury thereby abandoning it. See Dkt. 1-3 PageID #: 72-73.

18). The government fails to address the disparity in the jury charge between the indictment "conspiracy" and the substantive "wire fraud" charge in the jury charge, waiving McDuff's arguments. See Dkt 1-3 PageID #: 74-76.

19). As the Court will recall, the government solicited the lie that McDuff was barred from selling securities (Dkt. 1-2, PageID #: 37-38, 53-55). Now the government concedes the lie in its response. (Dkt. 7, PageID #: 260) ("...and therefore dismissed the commission's petition to permanently bar McDuff"). The government did not address other than to acknowledge this material lie it told the jury. The jury could clearly have been swayed by the government lie that McDuff was acting as a broker when he was barred from soliciting investments when he did so. He was never barred from acting as a broker or soliciting investments based on the non-qualifying 1993 felony, yet another lie told by the government, and not addressed in their response.

20). The government didn't address Kemp's failure (ineffective assistance of counsel) to address these items--Kemp did not address them in his affidavit. In fact, he does not deny he is incompetent (in this securities related matter), nor does he rebut his 9/3/2014 email in any way. The government's waiver abandons these arguments. Kemp does not offer any tactical trial strategy for his conduct. Kemp did not explain why he abandoned all these arguments and strategies.

21). McDuff specifically incorporated each and every paragraph into each and every other paragraph--thereby enumerating each issue as part and parcel of the Kemp ineffectiveness claim. On appeal, it is highly unlikely in view of *Napue v. Illinois* (a lie is a lie is a lie) that had Kemp actually known of all the government lies (because he actually reviewed the discovery - he is unable to recall) and raised on appeal 45 lies in a day and a half trial; or raised the appearance of judicial bias; or raised *Jencks, Brady, Giglio*, (if he knew, he is unable to recall) or lack of unanimity instruction, none whatsoever--not merely a bad unanimity instruction--; or the plethora

of issues raised by McDuff and abandoned by the government; or the merger of conspiracies...that the appeal would not have been granted. McDuff has represented himself previously and each time McDuff offered a spirited defense. Here, after Kemp advised that he was not competent, McDuff allowed himself to be duped and to pursue the nonsensical "UCC" arguments propagated by the con-man Gordon Hall. It is further axiomatic that the Court could have denied McDuff's *pro se* requests given his defense based on Gordon Hall's advice (citations omitted)

#### JUDICIAL BIAS

22). The government's response is meritless. While citing generalities, it overlooks the facts in this case. First, McDuff notes the Court's stated general bias to investment fraud defendants. The basis of the bias is what the Court said at Lancaster's sentencing. The Court said he was biased. See Dkt. 1-4, PageID #: 78-81. Second, the Court could not have had any ruling involving McDuff at Lancaster's sentencing--it was three years pre-trial, and two years prior to McDuff's arrest. The Court could not have formed any opinion of McDuff three years prior to McDuff's trial (as the government urged). To nevertheless presuppose McDuff's guilt three years prior to trial, and sentence him to restitution, constitutes the most egregious type of appearance of judicial bias imaginable under 28 U.S.C. § 455. See *Antar*, 71 F.3d 97 (3rd Cir. 1995).

23). The government actually responds, "Here, McDuff was an *alleged* co-conspirator at the time Lancaster was sentenced," to justify the Court's predetermination of guilt and bias. Are you kidding me? We do not sentence people in the United States for *alleged* conduct...or convict them for *alleged* crimes before trial, or before arrest... See U.S. CONST. AMEND. V, VI.

24). The fault here lies with the government. The Court in administering justice often relies upon the prosecution. But here, AUSA Shipchandler did not advise the Court during Lancaster's sentencing of its stated errors so it could correct its statements. Shipchandler did not correct the Court's misstatement regarding the "Cease and Desist" order which it took judicial notice of--allowing the Court to misinform the jury of a document "that is not reasonably disputed." McDuff raised "the appearance of bias" by the Court and the government mis-served the Court thereby ensuring that the record conclusively shows the "appearance of bias."

25). Next, the government actually writes "*the Court properly ordered all possible defendants jointly and severally liable at the hearing.*" Two years prior to McDuff's arrest? Three years prior

to trial? The U.S. Constitution does not permit a Court to order "possible" defendants jointly and severally liable. "Possible Defendants?" Really?

26). Finally, the Court's pronouncement at Lancaster's sentencing, was prior to McDuff's arrest. The Court had not even acquired *in personam* jurisdiction over McDuff's person yet. (citations omitted). Further 18 U.S.C. § 3556 provides: "The Court, in imposing a sentence on a defendant *who has been found guilty* shall order restitution ....". The statute required the Court to determine that McDuff was guilty *prior* to imposing restitution.

#### REPLY TO GOVERNMENT'S VAGUE STATUTORY LANGUAGE RESPONSE

27). Initially, as demonstrated *supra*, McDuff could not have procedurally defaulted a claim where Kemp was incompetent. The *Kirkham* court analysis is meritless in this context. Specifically, there can be no dispute that the government put false allegations in the indictment (not merely allegations that were unproven, but allegations that were knowingly false...i.e. the insurance issues, Lancaster not being licensed--when presumably Jessica Magee, SEC Counsel, had adopted pleadings under oath that he had a Series 6, 7, 63, 65--the Court had previously taken judicial notice of his license, the Lancorp Fund was not filed with the SEC when in fact it was on May 27, 2003, and others), in furtherance of its knowing and malicious conduct, suborned perjury throughout the trial, waived and abandoned arguments in its response to McDuff's §2255 petition, ignored dozens of points of law and factual support thereof in McDuff's §2255 and on and on. In this context, the vagueness challenge goes un rebutted.

28). The government urges -- "McDuff actually listed in his motion various legal citations defining 'scheme to defraud' undercutting his own vagueness claim." The law cuts against the government. See *United States v. L. Cohen Grocery Co.*, where the Supreme Court acknowledged that the failure of "persistent efforts...to establish a standard [scheme to defraud] can provide evidence of vagueness. 255 U.S. 81, 91 (1921). McDuff's citations demonstrate the repeated attempts and repeated failures to structure a workable definition of "scheme to defraud." As J. Scalia noted in *Johnson v. United States*, 135 S.Ct. 2551, 192 L.Ed. 2d 569 (2015), "We have deemed a law prohibiting grocers from charging an 'unjust or unreasonable rate' void for vagueness--even though charging someone a thousand dollars for a pound of sugar would surely be unjust and unreasonable. *L. Cohen Grocery Co.*, 255 U.S. at 89. We have similarly deemed void for vagueness a law prohibiting people on sidewalks from 'conducting themselves in a manner



annoying to persons passing by'--even though spitting in someone's face would surely be annoying. *Coates v. Cincinnati*, 402 U.S. 611 (1971)." Scalia gives other vagueness applications which support a finding that the "scheme to defraud" is vague. See...*Scalia*, "The phrase 'shades of red,' standing alone, does not generate confusion or unpredictability; but the phrase 'fire engine red, light pink, maroon, navy blue, or colors that otherwise involve shades of red' assuredly does so." *James*, 550 U.S. at 230 n.7 (Scalia, J., dissenting). In sum, the Fifth Amendment provides that "[n]o person shall...be deprived of life, liberty, or property without due process of law." The Supreme Court cases establish that the Government violates this guarantee by doing so under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357-358 (1983).

29). As the Court noted in *Connally v. General Constn. Co.*, 269 U.S. 385, 391 (1926), the prohibition of vagueness in criminal statutes "is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law." Further a statute such as "scheme to defraud" flouts it and "violates the first essential of due process" notice. As Scalia opined in *Johnson*, "How does one go about deciding what kind of conduct..." would violate the term "scheme to defraud" -- "A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct? Citing *United States v. Mayer*, 560 F.3d 948, 959 (9th Cir. 2009) (Kozinski, C.J. dissenting from denial of rehearing *en banc*).

In sum and in substance the government's response to McDuff's vagueness challenge is unavailing.

#### **REPLY TO GOVERNMENT'S "THREE CONSPIRACIES RESPONSE"**

McDuff identifies three separate conspiracies.

**A.** Involving Lancorp Fund I -- which allegedly involves McDuff;

**B.** Involving Lancorp Fund II -- which Quilling, the government's trustee and witness, states--under oath, post-trial, and post-appeal, at the June 2016 administrative hearing--does not involve McDuff;

C. Involving Lancaster, Reese, and Tringham, but not McDuff - which is noted with particularity in McDuff's §2255 and Memorandum in Support (Dkt. 1-7, Dkt. 1-11) (See corrected Memorandum) (Dkt. 6).

30). The government at trial introduced evidence of all three conspiracies, two acknowledged by the government witness (Quilling) post-trial to have nothing to do with McDuff--and merged them as one for the jury. The two other conspiracies were not alleged in the indictment and the jury charge allowed the jury (unconstitutionally) to convict McDuff (based on government lies and perjury). See McDuff's Memo in Support filed concurrent herewith. (Dkt. 1-11) (Dkt. 6).

In short, the government's response to the unconstitutional merger of three conspiracies is meritless.

31). **REPLY TO GOVERNMENT'S RESPONSE TO NINTH AMENDMENT ARGUMENT**

The government postulates that "McDuff fails to explain how any of his constitutional rights, enumerated or otherwise, were violated by the competing rights of others, including the government." (See Dkt. 7, PageID #: 281) McDuff, by means of incorporation, specifically incorporated each and every section into each and every other section, noting with particularity the government's denial of fundamental fairness--under the Fifth Amendment's due process clause, the Sixth Amendment's right to counsel, the Eighth Amendment right against cruel and unusual punishment (incarcerating an innocent man), the Ninth Amendment's fundamental fairness; and by demonstrating the 45 lies, the perjury by the government attorneys, the *Brady*, *Giglio*, *Jencks* violations, the appearance of judicial bias, the violation of the unanimous jury requirement, the right to competent counsel, and thereby demonstrates constitutional due process infirmity.

**IN SUMMARY**

In addition to the government's violations of multiple constitutional provisions noted in McDuff's petition, McDuff has demonstrated prejudice in that the government's conduct was fundamentally unfair; McDuff adopted a nonsensical trial strategy in response (he had previously represented himself with spirited defenses in prior cases); ineffective counsel prejudiced him both at trial and on appeal; and materially denied him the most basic due process. Finally, McDuff has demonstrated that the government's lies; *Brady*, *Giglio*, *Jencks* violations; appearance of judicial bias; jury instruction errors of constitutional magnitude; and other issues undermine all confidence

in the jury verdict and a new trial is mandated along with an evidentiary hearing and/or a dismissal of the indictment for prosecutorial misconduct, or in the interest of justice.

Date: September 30, 2017

Respectfully submitted,



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#### CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing REPLY was served on September 30, 2017 to the AUSA noted below:

Camelia Lopez, AUSA  
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Gary Lynn McDuff