

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v.-

MARTHA STEWART and
PETER BACANOVIC

Defendants.

S1 03 Cr. 717 (MGC)

**MEMORANDUM OF LAW IN
SUPPORT OF MARTHA STEWART'S
MOTION FOR A NEW TRIAL
BASED UPON GOVERNMENT MISCONDUCT**

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There are "few things more threatening to the liberty of our citizens than to have a court system which tolerates perjury by Government agents in a criminal trial."¹

It is sadly ironic that Martha Stewart must petition the Court on the basis of newly discovered evidence, which for the second time conclusively demonstrates that the trial process was marred by dishonesty and perjury. United States Secret Service Laboratory Director Larry F. Stewart, the only witness to testify both in the Government's case-in-chief and in its rebuttal case, has been charged by that same Government with perjuring himself with respect to a matter that was at the core of the charges and the focal point of the proof and arguments at trial. The Government may try to minimize and marginalize the effect of this egregious misconduct, but there can be no denying that Mr. Stewart's perjury was material. Mr. Stewart's testimony was presented as pivotal scientific corroboration to a prosecution based primarily on circumstantial evidence and one that otherwise lacked tapes, transcripts, or other unassailable

¹ United States v. Sanchez, 813 F. Supp. 241 (S.D.N.Y. 1993) (Martin, J.).

evidence of wrongdoing. Thus, his perjury was undeniably material as it fatally undermined Ms. Stewart's right to a fair trial.²

The Government's election to call Larry Stewart as a witness and to present his testimony at trial produced error of constitutional dimension in several respects, requiring that the convictions be vacated and a new trial ordered. First, it constituted the use of, and thereafter the failure to correct, false testimony that the Government knew or should have known was perjurious.³ Second, the failure of Mr. Stewart and his colleagues, who were integral members of the prosecution team, to disclose the perjury during the trial violated basic principles of due process as articulated by Brady v. Maryland and its progeny. Third, the Government's tactical decision to present its case through Mr. Stewart deprived Martha Stewart of her Sixth Amendment right to confront witnesses against her. Each of these constitutional errors warrants vacating Ms. Stewart's conviction and ordering a new trial. There should be little doubt that the aggregation of these egregious violations of Ms. Stewart's right to a fair trial mandates the relief sought here. Simply stated, a verdict that rests upon such a corroded foundation cannot stand. This motion for a new trial should be granted.

² To the extent applicable, we join in the submission of Peter Bacanovic and the arguments set forth therein.

³ We do not allege that the prosecutors knew the testimony to have been perjurious at the time of the trial. We do request a hearing to clarify which members of the prosecution team did have actual knowledge of the perjury.

Introduction

Larry Stewart testified falsely – in one instance, in direct response to a question by the Court⁴ – with regard to the forensic document examination of Government Exhibit 81A, a worksheet listing Martha Stewart’s stock holdings on which Peter Bacanovic made the notation “@60.” Specifically, Mr. Stewart’s false testimony concerned the issue of whether the “@60” notation was created using different ink than appeared elsewhere on the document, buttressing the Government’s theory that Bacanovic altered the document in order to fabricate evidence that would purportedly corroborate the defendants’ claims that Ms. Stewart had decided to sell her Imclone stock if the market price fell to \$60 per share. Mr. Stewart’s testimony regarding the “@60” notation was critical in supporting the Government’s theory. Beginning with the return of the Indictment, the Government embarked on a campaign to disprove the defendants’ alleged “fictitious explanation” regarding the \$60 agreement, which is the recurring theme that is found in virtually every allegation in the Indictment. Mr. Stewart’s testimony was presented as the capstone of this effort.

The Indictment

The “fictitious” \$60 agreement was the centerpiece of the conspiracy allegation in the Indictment. Thus, the original superceding Indictment alleged that on January 7, 2002, Bacanovic made statements to the SEC that were false in two respects: that Ms. Stewart had told him on December 20 “that she had decided to sell her Imclone shares if Imclone’s market price fell to \$60 per share, and that on December 27, 2001, “he told Stewart Imclone’s price had dropped below \$60 per share.” Indictment (“Ind.”) ¶

⁴ The Court: You performed the same analysis?
The Witness: I repeated the same examination, yes, ma’am.
The Court: Why don’t we find out what you did.

(Tr. 3278-79). Mr. Stewart’s answer to counsel’s follow-up question was false. It is alleged as Specification Six of Count One of the Larry Stewart Complaint.

24(a) and (b).⁵ The Indictment likewise charged that on February 4, 2002, Martha Stewart made statements to investigators that were false in several respects, two of which related to the \$60 agreement: that prior to December 27 she and Bacanovic “both decided that Stewart would sell her ImClone shares when ImClone started trading at \$60 per share” and that on December 27, 2001, Bacanovic “told her that Imclone was trading a little below \$60 per share,” as a result of which she sold her Imclone shares. Ind. ¶ 27(a) and (c).

Paragraphs 28 through 33 of the Indictment set forth the Government’s allegations concerning Bacanovic’s alteration of his “worksheet” that contained the “@60” notation reflecting the “fictitious” \$60 agreement. The Indictment’s allegations regarding Bacanovic’s perjured testimony before the SEC similarly have as their focal point the \$60 agreement. Thus, the Indictment charged that Bacanovic falsely testified about three matters, two of which involved that agreement: that on December 20, 2001, he and Ms. Stewart “had a telephone conversation in which they decided that Stewart would sell her Imclone shares if Imclone fell to \$60 per share; and that he had notes of this conversation “that reflected their discussion regarding a decision to sell Imclone at \$60 per share.” It further charged that “he had falsely added the notation ‘@60’ to the worksheet” after he learned of the SEC’s investigation. Ind. ¶ 35(a) and (b).

The Indictment also alleged that on April 10, 2002, Ms. Stewart made statements to investigators that were false in three respects, two of which concerned the \$60 agreement: that the conversation in which she and Bacanovic decided that she “would sell her Imclone shares when Imclone started trading at \$60 per share – occurred some time in November or December 2001”; and that on December 27, 2001,

⁵ The Court submitted a redacted indictment to the jury. Some of the allegations contained in the original superceding indictment were not contained in the redacted version. However, we continue to cite to the original superceding indictment as it accurately represents the Government’s theory of the case.

Bacanovic told her that Imclone was trading below \$60 per share and suggested that Stewart sell her Imclone shares.” Ind. ¶ 36(b) and (c).

The Indictment’s central allegation of conspiracy is thus replete with references to the keystone of the Government’s theory underlying the charges: the allegedly fictitious \$60 agreement. The substantive counts followed in similar fashion, setting forth allegations that tracked the objects of the conspiracy. The structure and language of the Indictment would be a prelude to what would unfold at trial, culminating in expert testimony on the evidentiary significance of the “@60” notation on the worksheet.

Opening Statements

In its opening statement, the Government told the jury that the case was about “fabricating evidence,” Tr. 769, stating that the \$60 agreement was “pure fiction . . . a totally made up lie to cover up what these two had done together.” Tr. 781. The “Bacanovic Worksheet” also figured prominently in the Government’s opening statement. The prosecutor told the jury that the worksheet had been sent “to the nation’s leading laboratory for forensic examination of documents” (emphasis added) and that the tests performed conclusively proved that only the “@60” notation was made in an ink different than the other entries on the page. Tr. 786-87. A significant portion of the Government’s opening statement was devoted to debunking the veracity of the \$60 agreement and emphasizing that it was a central issue in the case.

Counsel for both Ms. Stewart and Mr. Bacanovic focused intently on the \$60 agreement and the worksheet in their opening statements. Ms. Stewart’s counsel stated that the essence of her defense was that the \$60 agreement rendered her alleged receipt of the Waksal information irrelevant, as the prior agreement reflected an intent to sell her Imclone stock before the attempted Waksal sales ultimately occurred. The bulk of Bacanovic’s opening statement was likewise devoted to the validity of the \$60

agreement and the worksheet, with counsel specifically addressing the impending testimony of the Government's expert, Larry Stewart, and the flaws in the tests that were supposedly conducted by Mr. Stewart. Tr. 806.

The Proof at Trial

In its case-in-chief, the Government repeatedly questioned witnesses as to their knowledge of the \$60 agreement and the Bacanovic Worksheet. The Government asked several Merrill Lynch employees what they knew about both issues, including Douglas Faneuil, who testified that he did not believe that the \$60 agreement was true and also doubted the authenticity of the "@60" notation on the Bacanovic Worksheet. Through its witnesses, the Government questioned the timing of the production of the Bacanovic Worksheet, the timing of the disclosure of the \$60 agreement, the inconsistencies in the defendants' recollections and more. One witness, Brian Schimpfhauser, was even questioned by both sides about his habit of using multiple writing implements on a single piece of paper. All of this was designed to provide a backdrop for Mr. Stewart's testimony about the Bacanovic Worksheet.

It is now clear that the forensic testing of GX 81A was performed only by Susan Fortunato, not by Larry Stewart. The Government's decision to call Mr. Stewart as a witness was not the result of idle judgment, but rather tactical analysis. According to the Government, "[b]ecause of his vast experience and expertise and because as Director of the laboratory he set policies that were likely to be the subject of cross-examination, the Government elected to call Mr. Stewart to testify rather than Ms. Fortunato, his subordinate at the laboratory." Government letter dated May 21, 2004 ("Gov't Ltr.").

Mr. Stewart testified not only in the Government's case-in-chief, but in its rebuttal case as well. Following the testimony of a defense expert witness, which Mr. Stewart observed for the purpose of

passing notes to the prosecutor to assist in the cross-examination, the Government recalled Mr. Stewart in its rebuttal case. Like his perjurious direct testimony, his rebuttal testimony, in which he falsely stated that he was aware that his colleagues had prepared a proposal for a forensic science textbook that was to include a chapter on densitometry, [REDACTED]

[REDACTED]. Following Mr. Stewart's rebuttal testimony, Mr. Stewart told a colleague, [REDACTED], that – contrary to his testimony – he had been unaware of the proposed textbook chapter on densitometry.⁶

As the Government would belatedly reveal, Mr. Stewart committed perjury in his extensive trial testimony concerning whether he personally participated in the forensic document examination of GX 81A and whether he was familiar with a book proposal by two laboratory employees that was a subject of cross-examination by defense counsel. In fact, the forensic document examination of GX 81A was performed only by Susan Fortunato, not by Mr. Stewart; nor had the book proposal been shared with Mr. Stewart.

Closing Arguments

The Government continued its quest to convince the jury that the \$60 agreement was fictitious, devoting a substantial portion of its closing argument to debunking the “cover story” that Peter Bacanovic and Martha Stewart concocted, as it argued that the “whole \$60 story is a lie.” Tr. 4491. Among the “seven different reasons” that the \$60 “story” was a lie, the Government zeroed in on GX 81A, claiming that it was “certainly not proof of the \$60 agreement,” as “anybody can add a note to a sheet of paper at any time.” Tr. 4507, 4527-28. But the Government went further, reminding the jury that “the ink used to

⁶ The testimony concerning ink analysis with regard to GX 81A and the issue of the \$60 agreement consumed some three days of the 17 days of trial testimony, exceeded in length only by the testimony of Douglas Faneuil, which spanned four days.

circle ImClone is different than the ink used to make the @60 notation” and concluding that the notation, “the ink,” and the other evidence combined mean only one thing: the “60 dollar agreement is a sham.” Tr. 4528-29.

Recognizing that the charges brought by the Government centered on whether “Peter Bacanovic and Martha Stewart lie[d] and conspire[d] about whether they had a \$60 discussion about selling ImClone,” counsel for Ms. Stewart and Mr. Bacanovic concentrated their closing arguments on the logic behind and plausibility of the \$60 agreement. Tr. 4568; see also Tr. 4714 (“the core of this case . . . is did the 60 dollar conversation take place?”). And counsel for Ms. Stewart presented over 24 fact-based arguments focusing on affirmative evidence in his effort to prove that the \$60 agreement occurred. Tr. 4718-31. One of the critical arguments in this presentation was a discussion of GX 81A, Tr. 4719-22, which was referred to as the “one single persuasive piece of evidence” that deals with the \$60 agreement. Tr. 4722. Among the many arguments presented by counsel for Mr. Bacanovic was a discussion on GX 81A. Tr. 4657-63.

The Legal Standard Governing the Introduction of Perjured Testimony: Knowledge Imputed to the Government

The Court of Appeals recently restated the standard for granting a motion for a new trial based on the introduction of perjured testimony: where the prosecution knew or should have known of the perjury, the conviction must be set aside “if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.” United States v. Monteleone, 257 F.3d 210, 219 (2d Cir. 2001), quoting United States v. Wallach, 935 F.2d 445, 457 (2d Cir. 1991) (emphasis added). The “prosecution” in this context is not limited to the trial lawyers. “The relative entity for knowledge of the falsity of the testimony is the entire prosecution team, which includes individuals involved at all stages of the

investigation.” United States v. Ruiz, 711 F. Supp. 145, 147 (S.D.N.Y. 1989), aff’d, 894 F.2d 501 (2d Cir. 1990).

Thus, intentional perjury by government personnel associated with the prosecution constitutes the knowing use of perjured testimony by the prosecution so that the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. This standard may apply even though the prosecutor lacked actual knowledge of the witness’s perjury; the relevant inquiry is whether another government agent on the team possessed knowledge that will be “imputed” to the prosecution. See United States v. Diaz, 176 F.3d 52, 106-07 (2d Cir. 1999); Shakur v. United States, 32 F. Supp.2d 651, 675 (S.D.N.Y. 1999).

Courts that have considered the question have found that perjury by, or suborned by, a government agent involved in the case constituted knowing use of perjured testimony by the prosecution. Schneider v. Estelle, 552 F.2d 593, 595 (5th Cir.1977) (police officer was “a member of the prosecution team,” notwithstanding prosecutor’s lack of personal knowledge of the perjury); United States v. Turner, 490 F.Supp. 583, 610 (E.D.Mich.1979), aff’d, 633 F.2d 219 (6th Cir.1980) (new trial on the grounds of prosecutorial misconduct based on false testimony by DEA agent even though no knowledge of the perjury by the prosecuting attorney was claimed); Smith v. Florida, 410 F.2d 1349 (5th Cir.1969) (prosecutor’s lack of knowledge of perjury held no bar to establishing a due process violation where the perjury was induced by local law enforcement officials). Underlying these decisions is the courts’ revulsion when any member of the prosecution team commits perjury. See Sanchez, 813 F. Supp. at 247-48. Use of false evidence does not comport with notions of fairness encompassed in the due process clause, thus requiring

that a conviction “must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.” United States v. Agurs, 427 U.S. 97, 103 (1976).

In determining when to impute knowledge of perjury to the prosecution, the courts have generally borrowed the standards for imputing knowledge that have been established in cases interpreting Brady v. Maryland, 373 U.S. 83 (1963). That knowing perjury by a federal employee who is involved in the prosecution can constitute “knowing use by the prosecution” is supported by case law regarding Brady disclosure requirements. Cases in the Brady line have held that knowledge will be imputed to the prosecutor when it is “known to the others acting on the government's behalf in the case.” Kyles v. Whitley, 514 U.S. 419, 437 (1995); see also United States v. Payne, 63 F.3d 1200, 1208 (2d Cir. 1995). In Kyles, the Supreme Court held the prosecution responsible for disclosing exculpatory evidence possessed by police investigators working on the case, even though the prosecution was not informed that such evidence existed until after trial. Id. at 437-38. Similarly, in United States v. Morell, 524 F.2d 550, 553-55 (2d Cir. 1975), the Court of Appeals held that knowledge was imputed to the prosecutor regarding exculpatory material contained in a Drug Enforcement Agency confidential file, the existence of which was unknown to anyone in the U.S. Attorney’s Office prior to trial.

While not every government employee's knowledge is imputable to the prosecution for Brady purposes, where a government agent is involved in the investigation or prosecution of the offense, the Court of Appeals has imputed knowledge to the prosecution. See, e.g., United States v. Jackson, 345 F.3d 59, 73 (2d Cir. 2003); Pina v. Henderson, 752 F.2d 47 (2d Cir. 1985) (affirming finding that a police officer

who testified at trial and was the investigating officer was an “arm of the prosecutor” whose knowledge was to be attributed to the prosecution); Morell, 524 F.2d at 555.⁷

While these cases are well-grounded in logic and policy, the argument to charge the prosecution with knowledge of a government agent's perjury is even stronger than the argument to impute knowledge of Brady material. For, while “the prosecution's failure to disclose relevant information might be due to a negligent lack of communication, perjury by a government agent can only be a knowing, intentional decision to lie by a member of the institution which is charged to uphold the law and seek just convictions.” Sanchez, 813 F. Supp. at 247-48. The standard for setting aside convictions in these circumstances applies “not just because [such cases] involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth - seeking function of the trial process.” Agurs, 427 U.S. at 104.

Larry Stewart and his Secret Service Colleagues Were Members of the Prosecution Team: The Government Knew or Should Have Known of the Perjury

There can be little doubt that Mr. Stewart and his colleagues were members of the prosecution team. By injecting himself into the process of ink examination and reporting, Mr. Stewart participated in pretrial investigative and preparatory meetings with the Government, prepared a second consolidated laboratory report [REDACTED], spent considerable time with prosecutors preparing his own testimony, assisted in preparation for cross-examination of the defense expert and traveled to observe the defense experts as they tested the ink, all leading to his “selection” by the

⁷ Where the Second Circuit has declined to impute knowledge of others to the prosecutors, the cases have involved individuals who played no role in the investigation or prosecution of the case. The Pina Court held that a parole officer who “did not work in conjunction with either the police or the prosecutor” was not sufficiently linked with the prosecution so as to impute the officer's knowledge to it. Id. at 49; accord United States v. Locascio, 6 F.3d 924, 949 (2d Cir. 1993)(FBI agents not in any way involved in the investigation of prosecution of case); United States v. Stofsky, 527 F.2d 237, 244 n.7 (2d Cir.1975) (knowledge of Internal Revenue Service from tax return of witness not imputed to prosecution).

Government as its expert witness. In addition to testifying, he remained in the courtroom as an advisor to the Government concerning the testimony of the defense expert (passing suggestions to the prosecutors during their cross-examination).

Susan Fortunato conducted ink examinations at the request of the FBI [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The discovery received to date indicates that members of the prosecution team knew or should have known that:

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

•

[REDACTED]

•

[REDACTED]

**A Lesser Standard Should Apply to Perjury
Committed by a Member of the Prosecution Team**

If “it is established that the government knowingly permitted the introduction of false testimony, reversal is ‘virtually automatic.’” United States. v. Wallach, 935 F.2d 445, 456 (2d Cir. 1991) (internal citations omitted). Where, as here, a member of the prosecution team actually committed perjury, a lesser standard applies, and vacating the resulting convictions should be “virtually automatic.” And where that perjury was not only committed by a member of the prosecution team but was known by other members at the time of trial, convictions surely cannot stand.

Perjury by someone on the prosecution team can only result from a knowing, intentional decision to lie by a member of the institution that is charged to uphold the law and seek just convictions. Only by imposing a standard that renders convictions based on such perjury subject to “virtually automatic” vacatur can these principles be vindicated.

**There is a Reasonable Likelihood That the False Testimony
Could Have Affected the Judgment of the Jury**

It ill behooves the Government to now claim that the false testimony that is alleged to be material for the purposes of charging Larry Stewart with perjury is not sufficiently material to have affected the judgment for the purposes of Martha Stewart’s motion for a new trial. The false testimony was an important part of the Government’s presentation as it corroborated other government witnesses, refuted the defense theory of the case and bolstered the Government’s central thesis. From the outset, the

Government presented this case to the public and to the jury as an object lesson concerning a simple, basic principle: thou shall not lie. From its pronouncements at the press conference announcing the Indictment in this case to its closing argument to the jury, the Government sounded the same theme: that nobody – not the rich or the famous – is entitled to lie.

If Mr. Stewart's perjury had been exposed at trial – together with the circumstances attending his selection as a witness and the involvement of his colleagues in keeping the truth from the jury – the entire posture of the Government would have been revealed to the jury as a sham and the credibility of its case destroyed. And the jury "could have been affected" by this deeply troubling revelation that involved "a corruption of the truth-seeking function of the trial process." Agurs, 427 U.S. at 104. The jury would have been faced with the questions of why a government official lied and what impact that should have on the remainder of the case.

Although the Government argues to the contrary, there can be little question that Mr. Stewart's perjury was material. In evaluating materiality in the context of perjury committed at trial before a petit jury, "the focus properly is on the impact on the trier of fact." United States v. Guariglia, 962 F.2d 160, 164 (2d Cir. 1992). The test of materiality "is whether the false testimony was capable of influencing the fact finder in deciding the issues before [it]." Id. (citing cases). Here, the Government has itself determined that Mr. Stewart's perjurious statements "were capable of influencing the [Martha Stewart and Bacanovic] tribunal on the issues before it, and therefore are material for purposes of the perjury statute." Id. In its Complaint charging Mr. Stewart with two counts of perjury, the Government alleges that Mr. Stewart made "a false material declaration" in the trial of Martha Stewart and Peter Bacanovic, specifying portions of his testimony that Mr. Stewart "believed to be materially false." Complaint ¶¶ 1 and 2. Thus, the Government

has concluded that there is evidence that Mr. Stewart's "false testimony was capable of influencing the fact finder in deciding the issues before" it. Guariglia, 962 F.2d at 164. Not unexpectedly, in an effort to save the verdict, the Government argues that Mr. Stewart's perjury, like that of Mr. Hartridge's, "in no way compromises the validity of the verdict returned in this case against either defendant." Gov't Ltr. at 4. But in the face of its own allegations regarding the materiality of Mr. Stewart's perjury, the Government's arguments are unconvincing.

The Government would have the Court ignore the ramifications of Mr. Stewart's perjury with regard to the jury's view of the entire case. With knowledge of Mr. Stewart's misconduct, the jury would have focused on the Government's conscious decision to present as its witness the Laboratory Director rather than the employee who had actually done the work. It likewise would have considered the Government's choosing to use a witness who would conceal inadequacies in the employee's work, as well as the Government's knowing use of perjured testimony – all indicative of the lengths to which the government witnesses would go to secure a conviction. The Government would also have the Court ignore the real potential that the jury would view the testimony of all government agents with more caution, since it would know that it could not automatically rule out the possibility of perjury by Government witnesses. The likely consequences of Mr. Stewart's perjury cannot be so lightly tossed aside by the Government, particularly where its case was not accepted in anywhere near its entirety by the jury.

The Government argues that Mr. Stewart's testimony, which lasted some three days, was of little consequence to the jury in rendering its judgment. But in light of the knowledge of the individuals who were privy to the information suggesting that Mr. Stewart was in no position to testify truthfully and in fact perjured himself – knowledge that is imputed to the Government – "the Government should have been

aware of [Mr. Stewart]’s perjury.” Wallach, 935 F.2d at 456. On this record, no fair-minded person could be “satisfied that the government properly utilized the available information.” Id. In Wallach, the Court of Appeals rejected a similar argument by the Government, which sought to save a perjury-tainted conviction by contending the evidence was merely limited to the credibility of one witness. The Court took a broader view of what likely would have affected the jury’s judgment, recognizing that the perjury called into question the entirety of the witness’s testimony as well as the “factual elements of the government’s case.” Id.

In this case, what should not be lost is the fact that Mr. Stewart was one of several witnesses who were in the employ of the United States Government and whose credibility was crucial to a finding of guilt on charges that Martha Stewart lied to the Government. Particularly critical in this regard is the fact that all of the statements on which Ms. Stewart was convicted were unsworn statements to government officials, whose testimony concerning her statements was unsupported by evidence such as tapes, transcripts, or anything of a verbatim nature. Had the jury been aware of the conscious decision by a government employee to inject himself into the process for the purpose of committing perjury, and the Government’s role in selecting that person as the witness, rather than the individual who performed the tests, there is more than a reasonable likelihood that the jury’s assessment of the remainder of the Government’s case could have been affected. The Government’s argument requires us to accept the absurd notion that, having rejected a portion of its case, the jury would have remained unaffected and stood pat in the face of revelations that the Government had presented perjured testimony by one its primary witnesses on an issue that was a focal point in the case.

The Government nonetheless argues that Mr. Stewart's perjury "in no way compromises the validity of the guilty verdicts" because it related "solely" to corroborating the Government's allegation that the "@60" notation had been made in an effort to substantiate Ms. Stewart's and Bacanovic's \$60 agreement. Gov't Ltr. at 4. But as the Indictment made abundantly clear, see supra, pages 3-5, this was the essence of the Government's case. The fact that this substantial portion of the Government's case is now tainted with perjury renders any general verdict invalid, as there is no sure way to know whether the verdict rested on evidence that was contaminated by perjury. Such a verdict cannot pass constitutional muster. See Stromberg v. California, 283 U.S. 359 (1931)(a general verdict may not rest on a constitutionally forbidden ground); Bachellar v. Maryland, 397 U.S. 564, 570-71(1970) (setting aside convictions that may have rested on an unconstitutional ground); United States v. Ruggiero, 726 F.2d 913, 922 (2d Cir.1984); United States v. Irwin, 654 F.2d 671, 680 (10th Cir. 1981); United States v. Head, 641 F.2d 174, 178-79 (4th Cir. 1984). Thus, the conspiracy count that had the alleged document alteration as one of its multiple objects and included it as an overt act cannot survive because that object, the proof of which was infected by the perjury, may have been the basis of conviction. Under the same analysis, the general verdict on the substantive count alleging obstruction of an agency proceeding fares no better.

The Failure to Disclose Brady Material Requires a New Trial

The Government's wholesale Brady violation in connection with the Stewart testimony also requires that a new trial be granted. From the revelations in the Complaint filed against Stewart and other materials, it is now apparent that many individuals on the prosecution team were in possession of material favorable to the defense before and during trial, but failed to disclose it to the defense in a timely fashion. As part of the prosecution team, they had a constitutional obligation to furnish the information in their possession to

the defense. The failure to do so is fatal to the Government's case, as the jury surely would have been affected by the timely revelation of this knowing perjury.

Numerous individuals on the prosecution team came into possession of such information, among them:

- Mr. Stewart, who made pretrial accusations that ██████████ had “fucked up” the lab reports and who now states that ██████ skills are questionable;
- ██████████, who was aware that Mr. Stewart had neither overseen nor participated in the preparation of the reports, as he later testified;
- ██████, who observed Mr. Stewart's testimony, which he knew to be false during the trial;
- Other Secret Service laboratory employees, who were aware of Mr. Stewart's criticism of ██████████ testing and analysis, including ██████████ to whom Mr. Stewart admitted perjury immediately after he testified and before the end of the trial.

It now appears that members of the prosecution team were in possession of information which might have suggested that Mr. Stewart had not performed the tests after all: accordingly, they had a duty to investigate to discover the truth. “[W]here the facts which were known by the prosecution should have prompted further investigation, Brady mandates the inquiry.” United States v. Burnside, 824 F.Supp. 1215, 1254 (N.D. Ill. 1993); see, e.g., Carriger v. Stewart, 132 F.3d 463, 479-80 (9th Cir. 1997) (en banc); see also Shih Wei Su v. Fillion, 335 F.3d 119, 127 (2d Cir. 2003). “Allowing the government to absolve itself on the basis of counsel's asserted ignorance of the facts – ignorance prompted by the government lawyers closing their eyes to facts which should have prompted them to investigate – would be akin to allowing criminal defendants to avoid guilty knowledge by means of the ‘ostrich’ defense.” Burnside, 824 F. Supp. at 1256.

Here, it is not unreasonable to conclude that the Government deliberately disregarded information that it knew, had reason to know, and had a duty to discover. [REDACTED]

[REDACTED] It is unclear to us whether, with the knowledge that Mr. Stewart had not signed the original test reports, the Government questioned Mr. Stewart as to what he did. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED], the Government elected to call Mr. Stewart as its witness without having adequately obtained all of the facts. While the Government now chooses to characterize its decision to put Mr. Stewart on the stand as tactical, it seems to have avoided challenging the discrepancies of which it was aware.⁸

The Denial of Ms. Stewart’s Confrontation Rights Requires a New Trial

The Government argues that the evidence underlying Stewart’s testimony, the “principal scientific conclusion testified to” was largely unaffected by the perjury. See Gov’t Ltr. at 4. In other words, the Government argues that the proffered evidence was reliable notwithstanding the perjury. But where, as

8 [REDACTED]

here, the defendant has been denied the right to confront the actual witness against her – in this case, Fortunato, the person who performed the test and authored the report – the reliability of the evidence does not suffice to overcome a deprivation of the Sixth Amendment right to confront witnesses.

The Supreme Court recently made just this point quite clearly in Crawford v. Washington, 134 S. Ct. 1354 (2004), in which it overruled Ohio v. Roberts, 448 U.S. 56 (1980). In Roberts, the Supreme Court had held that the Sixth Amendment’s Confrontation Clause does not bar the admission of an unavailable witness’ statement against a criminal defendant if the statement bears an “adequate ‘indicia of reliability.’” Id. at 66. In Crawford, the Court reviewed Roberts’ “admissible-if-reliable” standard and concluded that the test was not only fundamentally wrong, it was at odds with the basic purpose of the Confrontation Clause. The Court explained:

Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment’s protection of vagaries of the rules of evidence, much less to amorphous notions of ‘reliability’ . . . Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation . . . It commands, not that evidence be reliable, but that reliability be assessed in a particular manner, i.e., by testing in the crucible of cross-examination.

Crawford, 124 S. Ct. at 1354. Thus, the Court held that where out-of-court “testimonial” evidence is at issue, the Sixth Amendment does not permit such evidence to be admitted against an accused, regardless of its “reliability,” unless the witness is unavailable and the defendant had a prior opportunity for cross-examination.

Here, Ms. Fortunato was neither unavailable nor did the defendant have an opportunity to cross-examine statements that, it turns out, were in fact Ms. Fortunato’s. Indeed, it was solely by virtue of the Government’s tactical decision that the appropriate witness was not presented to the jury or the defendant in order to satisfy the right of confrontation. The Government “elected to call Mr. Stewart to testify rather

than Ms. Fortunato.” Gov’t Ltr. at 3, n1. It did so on the basis of Mr. Stewart’s falsification of a test report and on the basis of his false representation that he had personally overseen and participated in the forensic examinations of Government Exhibit 81A. It did so while at least constructively in possession of information that demonstrated the falsity of Mr. Stewart’s representations and the likelihood that he would commit perjury at trial. Several of Mr. Stewart’s colleagues knew or should have known that Mr. Stewart’s testimony regarding his personally overseeing and participating in the forensic examinations would be perjurious, and that knowledge should be imputed to the Government. These circumstances make the denial of Martha Stewart’s right to confront the witnesses against her all the more egregious. That the Government can now cobble together an argument that the underlying evidence was reliable or not determinative of the jury’s verdict should not suffice to overcome this basic violation of Ms. Stewart’s right to a fair trial under the Sixth Amendment.

The testimonial statements by a witness who was not present at trial, not unavailable, and not subject to cross-examination may not be admitted pursuant to the Confrontation Clause as interpreted by the Supreme Court in Crawford. In Fortunato’s absence, they should not have been admitted in this case. Because the Government deprived Martha Stewart the right to confront Fortunato on her testimonial statements, their admission in evidence for the truth of the matters asserted violates the United States Constitution under the rule of Crawford. Accordingly, Ms. Stewart’s conviction should be vacated, and a new trial ordered.

Ms. Stewart is Entitled to be Provided With Requested Discovery

The troubling facts revealed by the Government in the Larry Stewart Complaint led to a defense request that the Government furnish certain discovery in connection with this application. While the

Government has provided some discovery, those materials raise almost as many questions as they answer.

For example, the materials describe [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] In addition, the materials make reference to (1) [REDACTED], (2)

[REDACTED], (3) [REDACTED]

[REDACTED], (4) [REDACTED]

[REDACTED], (5) [REDACTED]

[REDACTED], (6) [REDACTED]

[REDACTED], and (7) [REDACTED]

By letter dated June 8, 2004 (annexed to the Affidavit of Robert G. Morvillo, Esq., sworn to on June 9, 2004), we have requested additional discovery materials that, in light of the references in the furnished material, are likely to exist.⁹ To the extent that the Government declines to furnish the material that we have sought, we seek the Court's assistance in developing an adequate record on which to fairly assess the impact of the perjury and the attendant Brady violations by members of the prosecution team.

There is ample authority in the Second Circuit supporting a District Court's discretion to order discovery of this nature. Thus, in United States v. Agunbiade, 1995 WL 351058, *5 (E.D.N.Y. 1995) the District Court noted "[i]n deciding a motion filed under Rule 33, the decision of whether to permit

⁹ The Affidavit of Robert G. Morvillo, Esq. and the attachments thereto are filed under seal.

discovery and conduct an evidentiary hearing remains within the sound discretion of the trial court.” See also United States v. White, 972 F.2d 16 (2d Cir. 1992). As stated by the Eleventh Circuit in a similar context, “[d]iscovery might also enlighten the District Court as to when the United States Attorney’s Office first learned of the disturbing allegations . . . [d]epending upon when this information was learned, [the defendant] might succeed in obtaining a new trial based upon the government’s failure to disclose evidence that could have been used to impeach a government witness.” See United States v. Espinosa-Hernandez, 918 F.2d 911 (11th Cir. 1990). Additionally, much of the discovery requested constitutes Brady information. The Supreme Court has acknowledged that the prosecution has obligations to reveal exculpatory evidence after conviction. See Imbler v. Pachtman, 424 U.S. 409, 427 n.5 (1976). We therefore ask the Court to order the materials sought in the June 8, 2004 letter.

A Hearing is Required

Critical to a determination of this motion is an evaluation of what the various members of the prosecution team knew about Mr. Stewart’s participation in the testing process and when they knew it. We submit that the record already demonstrates that the Government knew or should have known about Stewart’s false statements – both to it and to the jury – well before the trial. To the extent that the Court is uncertain, we submit that a hearing is required at which additional facts may be ascertained. The discovery materials furnished in connection with this application reveal facts that are plainly inconsistent with the Government’s position on the merits of this motion. One key example is [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] This

is contrary to Mr. Stewart's trial testimony and the representations the Government now claims that he made before the trial. See Gov't Ltr. at 3, n.1. In this regard, the materials indicate [REDACTED]

[REDACTED]

Significant factual issues also exist with respect to the second report of laboratory findings that Mr. Stewart produced at the Government's request. (GX 3516-B). That report deceptively implied that Mr. Stewart had performed and reviewed both the tests in 2002 and in 2004. According to [REDACTED]

[REDACTED] This too is inconsistent with the Government's position. There are many other examples of factual matters in the discovery materials that contradict the Government's current position. Particularly given the current state of the record, we submit that only a hearing will enable the Court to have an accurate factual basis on which to rule.

Conclusion

This case was brought, announced, and tried by the Government as a showcase trial to vindicate the principle that lying – even about truly minor matters – will not be tolerated in the Federal system. A major Government witness lied about the very matters that were the subject of the charges. As a result, the Court now has the opportunity to dispel the aroma of taint that has enveloped this case. The Government should not be heard to make excuses, as this is a situation entirely of its doing. It failed in its obligations to ascertain facts that it had a Constitutional obligation to disclose to the defense. It presented false testimony that soiled the record when clearly it knew or should have known the facts available to it from many members of the prosecution team. By its tactical maneuvering to present a witness who would

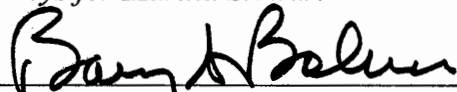
“play better” to the jury, the Government presented a perjurer instead of a witness through whom Ms. Stewart could exercise her Constitutional rights to confront and cross-examine the appropriate witness. In depriving Ms. Stewart of that right and others through the knowing presentation of perjury and the failure to fulfill its Constitutional obligation of disclosure, the Government deprived Ms. Stewart of a fair trial. To afford fairness to Ms. Stewart, and to vindicate the truth-seeking function of the trial process, the Court should grant the motion for a new trial.

The public has followed this controversial case with avid interest. It is clear that significant segments of the public are troubled by the double perjury (Hartridge and Larry Stewart) that has infected the trial and cast doubt on the fairness of the proceeding. This cloud can only be removed by remedying the effect of the perjury through a new trial.

Dated: New York, New York
June 10, 2004

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