IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

SHOLOM RUBASHKIN, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	)	No. C13-1028-LRR No. CR08-1324-LRR **PETITIONER'S REPLY MERITS BRIEF IN SUPPORT OF § 2255 PETITION (EVIDENTIARY HEARING REQUESTED)**

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This much is now undisputed: on December 5, 2008, government attorneys met with Bankruptcy Trustee Sarachek and his counsel (including Paula Roby) and declared: "No Rubashkins is very important to us—non-negotiable." The government attorneys further insisted there could be "no involvement of Rubashkins from any standpoint (control, benefit)" in the operation of the successor to Agriprocessors. From that point forward, "the government consistently maintained that it would pursue forfeiture if any [Agriprocessors] assets were ultimately controlled by or used for the benefit of the Rubashkins." (Govt. Merits Brief 58.)

At his sentencing hearing, based on the information available to him (which the government admits did not include everything Petitioner now has located), Petitioner argued the government's "No Rubashkins" restriction hindered the bankruptcy auction process and resulted in a lower sales price for Agriprocessors' assets, thus increasing the victim's loss amount. Petitioner argued the government's actions were an unforeseeable cause of loss that should not be attributed to him in calculating his Sentencing Guidelines range. In support of his position, Petitioner presented, among other things, an affidavit from Meyer Eichler describing the very restriction the government now admits it imposed: "[AUSA] Murphy forewarned us in no uncertain terms that if he (or members of his office) were to discover that any member of the Rubashkin family had either an equity interest or a management role in the company after we purchased it, the US Attorney's Office would not allow this." (Eichler Aff. ¶ 4.)

Following Petitioner's presentation of evidence, the government called Roby as a rebuttal witness and permitted her to testify to the following, under oath and without correction:

- "[A] prohibition [on Rubashkins] was never leveled."
- "Q. And is it your testimony that there was never an edict or prohibition that any purchaser could be involved with Aaron Rubashkin? A. Is there an edict

that they couldn't, is that your question? Q. That they could not, yeah. A. There was none to my knowledge."

- Any rumors in the Jewish business community regarding a "No Rubashkins" restriction were "very unreliable."

- Trustee Sarachek and his advisors "worked very, very hard to dispel any rumors that were in the community" regarding a "No Rubashkins" restriction.[1]

Following sentencing, and in reliance on Roby's testimony, the Court reached the following conclusion regarding Petitioner's claim that the government's "No Rubashkins" restriction hurt the value of Agriprocessors' assets and thus was an unforeseeable cause of loss to the victim:

> Defendant argued that, in the Bankruptcy, the government took the position and presented testimony that no purchaser of Agriprocessors could have any involvement with Defendant or Defendant's family, resulting in a depressed sale price of Agriprocessors. However, the attorney for the Trustee in the Bankruptcy Auction, Paula Roby, testified that there was no such condition attached to the sale of Agriprocessors. The court credits Roby's testimony and discredits testimony from Defendant's witnesses. Accordingly, the court declines to consider this theory in arriving at an actual loss calculation.

(Crim. Dkt. No. 957 at pp. 22-23.) In his Merits Brief, Petitioner argued, among other things, that Roby's false and misleading testimony (and the government's improper failure to correct the same) caused the Court to reach this erroneous conclusion, in violation of *Napue v. Illinois*. Petitioner further argued the government violated *Brady v. Maryland* by not disclosing exculpatory evidence on loss amount, including failing to produce a letter from the victim's attorney essentially begging the government not to assert forfeiture and warning that forfeiture allegations would result in a reduced sales price and higher loss to the victim.

In the face of these undisputed facts (among others), the government unleashes 105 furious and hyper-defensive pages claiming, among other things, the Court did *not* reach an erroneous

[1] There are numerous other examples of false and misleading testimony, which will be discussed in detail below.

conclusion regarding the "No Rubashkins" restriction (despite the government's admission there was, in fact, such a restriction); Roby's testimony was not false and misleading; to the extent her testimony was false and misleading, it was Petitioner's counsel's fault for not cross-examining her more effectively; the government made "extensive disclosures" regarding its forfeiture position; and, Petitioner's sentence would have been the same regardless of whether the Court discredited Roby's testimony.

The government's arguments have no merit. The notion that the Court's conclusion and Roby's testimony are somehow literally correct, for example, rests on the government twisting words and splitting hairs in a way that is impossible to take seriously and inconsistent with the record at the time of sentencing. Due process must not be denied on account of such semantic games. The government also misstates the law on several crucial issues, misunderstands Petitioner's arguments regarding the difference between *Napue* and *Brady* (often with the effect of turning Petitioner's arguments into straw persons easier for the government to overcome), and otherwise seems to spend as much time distracting the Court from the relevant issues as addressing them.

The furious tone of the government's Reply Brief should not mask the significant admissions contained within it. Most importantly, the government admits it imposed a "No Rubashkins" restriction during the bankruptcy proceeding despite the witness's sentencing testimony that "[a] prohibition was never leveled" and "[t]here was none, to my knowledge" and the Court's acceptance of that testimony. This admission alone warrants § 2255 relief.

Similarly, although the government applauds itself for disclosing to Petitioner's trial counsel a December 8, 2008, letter from an Assistant United States Attorney to First Bank's counsel, Lloyd Palans, regarding the government's forfeiture allegations, the government

implicitly admits it did *not* disclose to Petitioner's trial counsel the response letter the AUSA received from Palans the very next day explaining that forfeiture allegations were "likely to have a significantly negative impact on the prospects for the sale of Agriprocessors' assets" and that "there may be few, if any, potential purchasers willing to navigate through a pending forfeiture proceeding and pay fair value for Agriprocessors' assets." This admission is not easy to find, as the government buries it in pages of criticism of Petitioner for failing to expressly identify the government as the source of the December 8, 2008, letter. But once the admission of non-disclosure of the December 9 letter is unearthed, the impact is unmistakable. Indeed, despite not disclosing the letter, the government presented the following testimony at sentencing:

> Q. And there's been some discussion about a forfeiture allegation in the indictment and how that may or may not have affected any prospective bidders. Do you have an opinion about how that may have impacted any of the bidders in this case?
>
> A. I do.
>
> Q. And what's that?
>
> A. It did not.

(Sent Tr. 493.) Having elicited this testimony, the government's suppression of the December 9, 2008, letter from the victim regarding the "significantly negative impact" of the forfeiture allegation on the sale process is inexcusable.

To repeat: in a sentencing hearing where the effect of the government's forfeiture position on the victim's loss amount was squarely at issue, an Assistant United States Attorney elicited testimony from a witness that forfeiture allegations "did not" affect loss amount without disclosing a letter from *the victim's counsel to the same AUSA* stating forfeiture was "likely to have a significantly negative impact" and result in "few, if any, potential purchasers willing to navigate

through a pending forfeiture proceeding and pay fair value for Agriprocessors' assets."[2] The government instead disclosed only the AUSA's letter from one day earlier expressing the government's putative desire not to "impede a sale of Agriprocessors, Inc.'s assets." To disclose the first letter but not the second is either an act of deception or a remarkably convenient oversight. Either is sufficient to justify post-conviction relief.

The government further admits, for the first time, nearly seven years after Petitioner's trial, that a cooperating co-defendant shared information with the government during an interview that undermines the government's trial and sentencing theories regarding money laundering charges against Petitioner. Specifically, the witness said – exactly as Petitioner argued, unsuccessfully, at trial – that certain financial transactions were intended to "play the float" and not conceal the source of funds. Non-disclosure prevented Petitioner's counsel from obtaining this key admission at trial and sentencing and subjected Petitioner to a much longer sentence than he otherwise would have faced.

In sum, despite its overheated tone, the government's Merits Brief admits the facts necessary to require the Court to grant Grounds One and Three of Petitioner's § 2255 Petition. This, in turn, requires the Court to vacate Petitioner's money laundering convictions and permit him to be resentenced in a proceeding free from false and misleading testimony. In the alternative, and at an absolute minimum, the government's Merits Brief highlights factual disputes that require the Court to grant Petitioner leave to take discovery and present his case in an evidentiary hearing.

[2] The victim was, of course, a large financial institution, and thus clearly sophisticated on issues of valuation and loss.

I. THE GOVERNMENT MISSTATES THE LAW REGARDING *NAPUE* AND *BRADY*.

Before analyzing the facts, Petitioner seeks to clarify the government's apparent misunderstanding of the difference between his *Napue* and *Brady* claims. The government treats the two as essentially the same, arguing, among other things, that *Brady* disclosures are sufficient to negate a *Napue* claim (Govt. Merits Brief at 75-76) and the same harmless error standard applies to each (id. at 79). The government further argues a *Napue* violation only occurs if the government suborns "perjured testimony." (Id. at 69.) The government has misstated the law in all respects.

A. Napue Claims Do Not Require Proof of "Perjury," But Rather of the Knowing Presentation of "Substantially Misleading" Testimony.

The government's Merits Brief repeatedly, and incorrectly, describes the relevant question under *Napue* as whether the government presented "perjured testimony" during the sentencing hearing. *See, e.g.*, Govt. Merits Brief at 69 ("Specifically, Movant must establish that the government used perjured testimony..."). Petitioner never once referred to Roby's testimony as "perjury" in his Merits Brief (though he believes it was) and does not need to prove perjury in order to establish a due process violation. Instead, Petitioner merely must establish Roby's testimony was "substantially misleading." *United States v. McClintic*, 570 F.2d 685, 692 (8th Cir. 1978). As *McClintic* explains:

> We do not believe, however, that the prosecution's duty to disclose false testimony by one of its witnesses is to be narrowly and technically limited to those situations where the prosecutor knows that the witness is guilty of the crime of perjury. Regardless of the lack of intent to lie on the part of the witness, Giglio and Napue require that the prosecutor apprise the court when he knows that his witness is giving testimony that is substantially misleading. This is not to say that the prosecutor must play the role of defense counsel, and ferret out ambiguities in his witness' responses on cross-examination. However, when it should be obvious to the Government that the witness' answer, although made in good faith, is untrue, the Government's obligation to correct that statement is as compelling as it is in a situation where the Government knows that the witness is intentionally committing perjury.

Id.; *accord Hayes v. Brown*, 399 F.3d 972, 981 (9th Cir. 2005) ("There is nothing in *Napue*, its predecessors, or its progeny, to suggest that the Constitution protects defendants only against the knowing use of perjured testimony."); *United States v. Rivera Pedin*, 861 F.2d 1522, 1530 fn. 14 (11th Cir. 1988) ("[T]he *Napue* rule applies where testimony, even though technically not perjurious, would surely be highly misleading to the jury.") (internal punctuation omitted); *see also Alcorta v. Texas*, 355 U.S. 28, 31 (1957) (granting post-conviction relief where witness's testimony created a "false impression"). Thus, while the Eighth Circuit and other courts sometimes use the words "perjury" or "perjured testimony" in connection with a *Napue* claim, this simply means the knowing use of perjury is *sufficient* to establish a violation, not that it is *necessary* for doing so.

The distinction between "perjury" and "substantially misleading" testimony is potentially significant. The government goes to great lengths to argue literal truth in Roby's testimony, which would, in fact, be a defense to a perjury charge. However, even if one accepts the government's position that her testimony was literally true (**which Petitioner does not**), it does not mean Petitioner's due process rights were not violated. *See McClintic*, 570 F.2d at 692. It would eviscerate *Napue* to conclude that no due process violation occurs if the government leads a factfinder to an incorrect factual conclusion on the basis of substantially misleading, but not literally false, testimony. *See Hayes*, 399 F.3d at 981 ("There is nothing redemptive about the sovereign's conspiring to deceive a judge and jury to obtain a tainted conviction.").

The government's emphasis on the word "agreement" in Roby's testimony illustrates the point. (*See* Govt. Merits Brief at 2, 9, 26-27, 70-71.) During the sentencing hearing, in response to an affidavit and testimony presented by Petitioner on the No Rubashkins restriction, the government attorney said "there's been some talk about this No-Rubashkin agreement" and asked

Roby whether she was "aware of any agreement out there that relates to some agreement not to hire Rubashkins." (Sent. Tr. 495) (Govt. App. 81.) Roby answered "No." The government claims this testimony is literally true because, in the government's view, there was no "agreement" not to use Rubashkins in the new entity.[3] But this is a straw person argument because Petitioner never argued there was an "agreement." His Sentencing Memorandum did not use the word "agreement"; his objections to the PSR did not use the word "agreement"; his counsel's cross-examination of Agent Van Gent did not use the word "agreement"; and the affidavit he submitted from Meyer Eichler did not use the word "agreement." Thus, the government's fixation on the word "agreement" in Roby's testimony is, at best, a response to an argument Petitioner never made and, at worst, a carefully-planned attempt to mislead the Court in a way that would allow the government later to claim (as it is doing here) that the question and answer were literally true.

Either way, the Court was misled, and even after learning the Court had understood Roby's testimony to be that the government did not "take the position . . . that [No Rubashkins] could be involved" in the business, the government did not correct the false impression it created. This is a *Napue* violation regardless of whether Roby's testimony is literally false. The government's position to the contrary is similar to one the Fifth Circuit rejected in *Tassin v. Cain*, 517 F.3d 770 (5th Cir. 2008), where a cooperating witness testified, without correction, she had not been "promise[d]" favorable sentencing treatment in exchange for her testimony. Although it was undisputed there was an "understanding" of some sort between the witness and government for

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[3] Petitioner disagrees with the government's narrow definition of the word "agreement." When the government directs potential bidders not to use Rubashkins "from any standpoint" and potential bidders comply with that directive, there has, in fact, been an "agreement" not to use Rubashkins in consideration of the government's offer not to forfeit the assets. For purposes of this section of his argument, however, Petitioner will assume there is a difference between an "agreement not to hire Rubashkins" and the restriction imposed by the government on potential purchasers.

sentencing leniency, the government argued the witness's testimony was not literally false because the "understanding" did not rise to the level of a "firm promise." *Id.* at 776-77. Upon review of the state court's adoption of the government's position, the Fifth Circuit accepted as a factual matter that the "understanding" did not rise to the level of a "firm promise" but nonetheless concluded the state court's decision was contrary to clearly established federal law under *Napue* and *Giglio v. United States*, 405 U.S. 150 (1972). *Tassin* held the witness's testimony, even if literally true, was sufficiently misleading to violate the petitioner's due process rights. *See id.*, 517 F.3d at 778-79; *see also Dupart v. United States*, 541 F.2d 1148, 1150 (5th Cir. 1976) (witness's claim to be testifying "voluntarily" was sufficiently misleading to violate *Napue* where witness was threatened with prosecution in the absence of his cooperation and testimony; rejecting government's "formalistic" position that a course of conduct is still "voluntary" even when motivated by legally coercive alternatives).

Here, the manner in which the government attorney introduced the question to Roby about the "agreement" demonstrates the intent to create a false impression. The government attorney said, "there's been some talk about this No-Rubashkin agreement…" (Sent. Tr. 502.) The reference to "some talk" could only have been a reference to the testimony and evidence Petitioner offered earlier in the hearing. But, as noted above, Petitioner's earlier testimony and evidence never used the word "agreement." Thus, regardless of what the government may argue today, at the time of sentencing any reasonable observer would have understood the government to be using the words "No-Rubashkin agreement" as a synonym for the No Rubashkins restriction described in Petitioner's evidence—i.e., a prohibition on Rubashkins (with a focus on Aaron) having an ownership or management role in the new entity. *See, e.g.*, Aff. of Meyer Eichler at ¶ 4 (App. 42.) Roby's denial of an "agreement" was therefore a repudiation of Eichler's Affidavit, which the

government now appears to admit was accurate. It follows the government cannot escape the *Napue* violation by arguing literal accuracy in Roby's testimony. *See Jenkins v. Artuz*, 294 F.3d 284, 294 (2d Cir. 2002) ("[The government attorney's] questions, while eliciting technically accurate testimony, were phrased so as to reenforce the false impression that no deal had been made.").

The principle that testimony can violate *Napue* even if it does not constitute "perjury" is reinforced through a review of FBI Special Agent Randy Van Gent's testimony. He testified the government had "concern" about whether a bidder "may be bidding on behalf of the defendant and/or his family" but denied the government's position amounted to a "No Rubashkin" edict. (4/28/10 Sent. Tr. 56) (Govt. App. 46.) Given the government's admission that it "would pursue forfeiture if any assets were ultimately controlled by or used for the benefit of the Rubashkins," the second part of Agent Van Gent's testimony is false. There was not merely a "concern" about Rubashkins buying the business, but an outright prohibition. *See also* App. 87 ("[AUSA Murphy]: "No R[ubashkins] is very important to us – non-negotiable . . . No involvement of R[ubashkins] from <u>any</u> standpoint.").[4] Indeed, a mere concern, by definition, cannot be "non-negotiable." As Agent Van Gent was not present during the December 5, 2008, meeting, however, it is not clear his testimony constitutes "perjury." He simply may not have realized – like Petitioner did not

[4] The government attaches significance to the fact that Petitioner did not mention Agent Van Gent's testimony in his Merits Brief despite having discussed it in his § 2255 Petition. There is no such significance. The Court's Sentencing Memorandum relied solely on Roby's testimony to discredit Petitioner's evidence and witnesses regarding the No Rubashkin restriction, and thus it is not necessary to Petitioner's claim to prove the falsity of Van Gent's testimony. Petitioner does, however, believe Van Gent's testimony was false. He denied, for example, that the government imposed a "no-get-involved-with-Aaron edict" (4/28/10 Sent. Tr. 57) (Govt. App. 46), which is impossible to reconcile with AUSA Murphy's statement there could be "[n]o involvement of Rubashkins from <u>any</u> standpoint." (App. 87.)

realize – what government attorneys were telling interested parties behind closed doors. But this is not a defense to a due process violation. Under *Napue*, the government cannot sit idly while a witness creates what the government knows is a false or misleading impression:

> The fact that the witness is not complicit in the falsehood is what gives the false testimony the ring of truth, and makes it all the more likely to affect the judgment of the jury. That the witness is unaware of the falsehood of his testimony makes it more dangerous, not less so.

Hayes, 399 F.3d at 981. The government's silence violated Petitioner's rights, and a new sentencing hearing is necessary.

B. Brady Disclosures Do Not Vitiate a Napue Violation.

In addition to incorrectly interpreting *Napue* to require "perjury," the government errs in suggesting there can be no *Napue* violation if the government complies with its *Brady* obligations. *See, e.g.*, Govt. Merits Brief at 44 ("Movant's Ground One hinges upon the false contention that the government violated *Brady* by failing to disclose actions it purportedly[5] took to influence prospective buyers in the Agriprocessors bankruptcy proceeding."); *see also* Govt. Merits Brief at 34 (anything misleading about Roby's testimony that rumors of a No Rubashkin rule were very unreliable is "of no consequence [because] the government's actual and undisputed forfeiture position was set out in documentary exhibits introduced into the record by both parties"). This is an incorrect description of Petitioner's position and the law.

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[5] The government's use of the word "purportedly" is curious, as it admits elsewhere in the Merits Brief that it did, in fact, intend to use forfeiture if any Rubashkins "reclaimed the benefit or control of Agriprocessors." (Govt. Merits Brief at 2). The government also says its position on forfeiture was "clear" (id. at 3, 30), "crystal clear" (id. at 14, 28), and "undisputed" (id. at 34, 35). If this is true, it is difficult to understand why the government also feels the need to qualify the restrictions it imposed on prospective bidders with words like "purported" (id. at 44) and "alleged" (id. at 39).

While it is true that *Napue* and *Brady* arise from the same due process concerns, and often overlap, a *Napue* claim is "analytically distinct from [a] *Brady* claim." *Morris v. Ylst*, 447 F.3d 735, 743 fn. 8 (9th Cir. 2006). Under *Napue*, the question is whether the government presented false or misleading testimony on a material issue; under *Brady* it is whether the government failed to disclose material, exculpatory information. *Id.* A *Napue* violation therefore can occur even when *Brady* disclosures have been made. *See, e.g., United States v. Bigeleisen*, 625 F.2d 203, 208 (8th Cir. 1980) (finding *Napue* violation based on witness's false claim not to have a plea agreement with the government even though government disclosed the existence of the agreement); *Jenkins v. Artuz*, 294 F.3d 284, 296 (2d Cir. 2002) (same); *United States v. Barham*, 595 F.2d 231, 243 (5th Cir. 1979). It follows the government cannot defend against Petitioner's *Napue* argument by claiming it made sufficient *Brady* disclosures.

C. The Harmless Error Standard Is Different Under Napue and Brady.

Moreover, "different standards of materiality apply to *Brady* claims and claims that the prosecution has knowingly used perjured testimony or false evidence." *Kirkpatrick v. Whitley*, 992 F.2d 491, 497 (5th Cir. 1993). Under *Napue*, "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony *could* have affected the judgment of the jury." *United States v. Bagley*, 473 U.S. 667, 679 (1985) (quoting *United States v. Agurs*, 427 U.S. 97, 103 (1976)) (emphasis added). By contrast, a petitioner in a *Brady* claim must establish a reasonable probability "the result of the proceeding *would* have been different" had the government disclosed the exculpatory evidence. *Bagley*, 473 U.S. at 682 (emphasis added).[6] Thus, a *Napue* violation is

[6] In his original Merits Brief, Petitioner inadvertently described the materiality standard under *Napue* and *Brady* as being the same. This was incorrect.

reviewed under a different harmless error standard than a *Brady* violation. *See Bagley*, 473 U.S. at 679-80 (*Napue* standard is "a materiality standard under which the fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt").[7]

A lower standard applies under *Napue* because "the knowing use of perjured testimony involves prosecutorial misconduct and, more importantly, involves 'a corruption of the truth-seeking function of the trial process.'" *Id.* at 680 (quoting in part *Agurs*, 427 U.S. at 103). This case illustrates the point. When the government presents false or misleading testimony, there is an inherent risk the factfinder will credit that testimony regardless of any other evidence the government previously disclosed indicating its falsity. Indeed, although judges and juries hopefully try to avoid it, some factfinders may subconsciously find a government witness more credible than a defense witness *simply because it is a government witness.* An exacting harmless error standard is therefore appropriate and necessary under *Napue*.

For reasons explained below, the government cannot establish that its *Napue* violation here is "harmless beyond a reasonable doubt," *Bagley*, 473 U.S. at 679-680. Petitioner is therefore entitled to § 2255 relief.

II. THE COURT SHOULD REJECT THE GOVERNMENT'S HAIR-SPLITTING ATTEMPT TO ARGUE THE COURT'S CONCLUSION IN ITS SENTENCING ORDER ON THE "NO RUBASHKIN" RULE IS SOMEHOW CORRECT.

Having clarified the law on *Brady* and *Napue*, Petitioner must next address the government's argument that the Court's Sentencing Memorandum was literally correct in concluding the government did not impose a "No Rubashkins" rule in the bankruptcy. (Govt.

[7] As noted above, a finding of perjury is not required to establish a *Napue* violation. *See McClintic*, 570 F.2d at 692. *Bagley*'s use of the word "perjured" therefore should not be read as establishing that perjury is necessary to proving a *Napue* violation.

Merits Brief 35-36.) The government's position is so utterly confusing that Petitioner will not attempt to paraphrase it; instead, he will simply quote, verbatim, from the government's Merits Brief:

> In calculating the amount of loss for purposes of USSG § 2B1.1, the Court fully considered Movant's argument and evidentiary presentation and rejected it. The government's reservation of forfeiture rights was specifically presented, in detail, to the Court. In its June 21, 2010 sentencing order, the Court specifically addressed Movant's misguided claim that the *Bankruptcy sale terms* contained a prohibition against persons associated with Movant or his family purchasing Agriprocessors. The Court stated in its order:
>
> > Defendant argued that, in the Bankruptcy, the government took the position and presented testimony that no purchaser of Agriprocessors could have any involvement with Defendant or Defendant's family, resulting in a depressed sale price of Agriprocessors. However, the attorney for the Trustee in the Bankruptcy Auction, Paula Roby, testified that there was no such condition attached to the sale of Agriprocessors. The court credits Roby's testimony and discredits testimony from Defendant's witnesses. Accordingly, the court declines to consider this theory in arriving at an actual loss calculation.

(Govt. Merits Brief 35-36) (emphasis in original, internal citations omitted).

There are so many problems with the government's argument it is difficult to know where to start. Although the government claims Petitioner's argument at sentencing was that the "*Bankruptcy sales terms*" (emphasis in original) contained a No Rubashkins restriction, the government does not cite, and would not be able to find if it tried, a single instance in Petitioner's sentencing briefing or argument in which he used the words "*Bankruptcy sales terms*" or anything similar. Indeed, Petitioner is unclear on what the government even means with the phrase. It appears, from context, that the government is using it to describe a formal restriction filed in some way with the bankruptcy court. But Petitioner never limited his No Rubashkin argument to a claim that the government imposed formal restrictions in the bankruptcy court. Rather, he argued – without limitation as to time, form, or place – that the government's forfeiture position and conduct resulted in a depressed sales price for Agriprocessors' assets. *See, e.g.*, Petitioner's Sentencing

Memorandum (Crim. Dkt. No. 895) at 39 ("[D]uring and prior to the bankruptcy, the U.S. Attorney's Office for the Northern District of Iowa insisted that none of the Rubashkin family retain an ownership interest in the company. Agriprocessors' sole owner was Aaron Rubashkin, whose name had immense value and good will in the Orthodox Jewish community. The government's position had the effect – foreseeable to the government but not the defendant – of reducing the sale or liquidation value of Agriprocessors."); Crim. Dkt. No. 905 at 10 ("The Government's prohibition against future involvement by a purchaser with Aaron Rubashkin and the looming forfeiture proceedings substantially devalued the company and caused FBBC loss of recovery."); *id.* at 9 ("The decisions to file forfeiture charges against Agriprocessors and forbid involvement by Aaron Rubashkin in purchase of the company from Trustee diminished the value of Agriprocessors sale value, trademark value, and good name in the market."). Whether those conditions were formal or informal was of no significance to Petitioner's position.

The Court knew exactly what Petitioner was arguing. Like Petitioner's briefing, the Court's Sentencing Memorandum does not use the words "*Bankruptcy sales terms*" or otherwise suggest that Petitioner's argument was limited to whether the government put a "No Rubashkins" restriction into a formal filing with the bankruptcy court. Instead, the Court's Sentencing Memorandum recognized Petitioner was arguing that there was a "condition attached" by the government to the sale of the assets that "no purchaser of Agriprocessors could have any involvement with [Petitioner] or [Petitioner's] family."

"Conditions" can be "attached" in many ways, both formal and informal. Thus, while it is theoretically true the government could have tried[8] to impose a formal restriction in the bankruptcy court blocking a sale to any purchaser who refused to promise not to associate with Rubashkins, such formality is not the only way for a "condition" to be "attached" to the sale. A condition also may be attached on an informal basis if, for example, the government informs the Bankruptcy Trustee that "No Rubashkins is very important" and "non-negotiable" and there can be "no involvement of Rubashkins from any standpoint" and then either communicates the condition directly to potential bidders or directs the Trustee to do so, under threat of forfeiture if the condition is not accepted. (App. 39, 41, 45, 48, 87, 94-95, 98, 100, 102, 106.) Indeed, the government maintained at the time of the original bankruptcy case – and essentially reiterates in its Merits Brief to this Court – that its forfeiture powers are so broad and absolute that prosecutors may reject the bankruptcy law definition of "good faith purchaser" and replace it with their own definition by simply including a criminal forfeiture allegation in an indictment. While the government's argument is in no way consistent with the law, *see United States v. Riley*, 78 F.3d 367, 371-72 (8th Cir. 1996), the government's broad view of its forfeiture authority belies its position in the Merits Brief that Petitioner was somehow making a narrow argument focused solely on whether there was a No Rubashkin rule in the formal "*Bankruptcy sales terms*" (whatever those are).

It would not even have made sense for Petitioner to limit his argument to whether the government imposed a formal "No Rubashkins" restriction in a filing with the bankruptcy court. The point of Petitioner's argument was that the government injected itself into the bankruptcy

[8] Such an effort would have been unsuccessful in light of limitations on the government's statutory forfeiture authority. This likely explains why the government chose an informal route – scaring bidders during private meetings – to impose the No Rubashkin rule.

auction process, used its forfeiture allegations to impose conditions on the future ownership and operation of the company, and thereby artificially reduced the sales price in a manner unforeseeable to him. Whether the government imposed these conditions through formal restrictions in publicly-filed documents or merely through informal threats behind closed doors was of no significance to Petitioner's argument. The effect of the government's actions was the same either way: bidders were scared off, the auction process was not allowed to operate in a normal way, and the assets therefore did not yield full value. Indeed, for a potential purchaser in a multi-million dollar acquisition, it makes no difference whether the No Rubashkin restriction was imposed only orally by federal prosecutors or included in a formal written document. If anything, the informal nature of the government's threats likely had a greater impact on the victim's loss than if the government tried to impose formal restrictions through the bankruptcy court, as the bankruptcy judge may have refused to enforce such formal restrictions. By issuing informal threats behind closed doors, the government avoided this judicial oversight and had free rein over the bidders and bidding process. Under these circumstances, there is no reason Petitioner would have limited his argument to whether the government imposed formal restrictions in the "*Bankruptcy sales terms*."

Lest any doubt remain, a review of the evidence Petitioner submitted in support of his "No Rubashkins" argument proves he did not limit it to "*Bankruptcy sales terms*." Petitioner submitted an affidavit from Meyer Eichler stating prosecutors told him in a private meeting they would not allow any member of the Rubashkin family to have an equity interest or management role in the company.[9] (Eichler Aff. ¶ 4) (App. 42.) Eichler does not in any way suggest the restriction was –

[9] Eichler's affidavit acknowledged the government would permit Heshy Rubashkin to maintain a position as a non-management employee, and Petitioner acknowledged the same thing in his Sentencing Memorandum. Thus, any suggestion that the fact of Heshy Rubashkin's employment

or needed to be – a formal part of the bankruptcy auction process in order to reduce his interest in purchasing the company, and thus the government's attempt to place the words "*Bankruptcy sales terms*" into his mouth is misleading and improper. The government is flatly wrong in suggesting Petitioner's argument at sentencing was limited to whether the government imposed the "No Rubashkins" restriction through formal means in the bankruptcy court.

Returning, then, to the language of the Court's Sentencing Order, it is clear the government's failure to correct Roby's testimony caused the Court to be misled and reach an erroneous conclusion regarding the No Rubashkin rule. Specifically, the Court relied on Roby's testimony to conclude Eichler and Yechiel Cohen lied or were confused with respect to the government's No Rubashkin restriction. *See* Court's Sentencing Memorandum (Crim. Dkt. No. 927) at 22-23 ("The court credits Roby's testimony and discredits testimony from Defendant's witnesses.").[10] The government now appears to admit, however, that Eichler and Cohen were accurate in their descriptions of the No Rubashkin restriction. *Compare* Eichler Aff. at ¶ 4 (App. 42) ("[AUSA] Murphy forewarned us in no uncertain terms that if he (or members of his office) were to discover than any member of the Rubashkin family had either an equity interest or a

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in a non-management position with SHF Industries somehow refutes Petitioner's "No Rubashkin" argument is unavailing because the Court "discredit[ed]" Eichler's testimony even *with* his acknowledgement of the so-called "Heshy exception." Petitioner's primary focus, both at sentencing and in this § 2255 proceeding, is on restrictions on *Aaron* Rubashkin's involvement, which the Court, relying on Roby's testimony, found not to exist.

[10] Petitioner presumes the Court was referencing only Eichler and Cohen when it discredited "Defendant's witnesses." However, the government's Merits Brief inadvertently raises the possibility that the Court also discredited FBI Special Agent Randy Van Gent's testimony. The government argues Petitioner's counsel used cross-examination of Agent Van Gent as a vehicle for describing the No Rubashkin restriction (Govt. Merits Brief 22) and that Agent Van Gent's testimony was accurate in describing the restriction (id. 23). If both of those premises are true, then Agent Van Gent was discredited along with Eichler and Cohen.

management role in the company after we purchased it, the US Attorney's Office would not allow this.") *with* Govt. Merits Brief at 58 ("[T]he government consistently maintained that it would pursue forfeiture if any assets were ultimately controlled by or used for the benefit of the Rubashkins."). The words "manage" and "control" are synonymous, *see* Merriam Webster Online Thesaurus, www.merriam-webster.com/thesaurus/manage ("**manage** . . . to look after and make decisions about <*managed* a household and a business simultaneously> Synonyms administer, administrate, carry on, **control**, direct, govern…"), and thus Eichler was referring to the restriction the government now admits it imposed when he said he was forbidden from allowing Aaron Rubashkin to have "either an equity interest or a management role in the company." Eichler's affidavit is also, of course, fully consistent with the now-undisputed fact that AUSA Murphy told the Bankruptcy Trustee there could be "no involvement of Rubashkins from <u>any</u> standpoint" during the December 5, 2008 meeting. It follows the Court erroneously discredited Eichler's testimony and mistakenly concluded "there was no such condition attached to the sale of Agriprocessors."

III. THE GOVERNMENT'S ADMISSIONS ARE SUFFICIENT TO WARRANT § 2255 RELIEF.

The government's frivolous attempt to argue the Court did not reach an erroneous conclusion with respect to the No Rubashkin rule is emblematic of the approach it takes throughout its Merits Brief, which relies heavily on excuses, hair-splitting, and distractions to try to avoid the conclusion that *Napue* and *Brady* were violated. But even in its most creative moments, the government had no choice but to make certain admissions (and near-admissions) that alone are sufficient to find a due process violation justifying § 2255 relief.

A. Government Admissions Regarding Napue and Brady.[11]

First, and most importantly, the governments finally admits it did, in fact, impose a No Rubashkin restriction in the Agriprocessors bankruptcy proceeding. *See* Government's Merits Brief at 58 ("[T]he government's position may have been expressed or described in slightly different terms at different times. In the end, however, the government consistently maintained that it would pursue forfeiture if any assets were ultimately controlled by or used for the benefit of the Rubashkins."). This admission should end the case. The Court concluded, without correction by the government, and based on sworn testimony from a government witness, that "there was no such [No Rubashkin] condition attached to the sale of Agriprocessors." (Crim. Dkt. No. 957 at pp. 22-23.) The government had an absolute duty to correct this erroneous conclusion and the false and misleading testimony that gave rise to it. *See, e.g.*, Sent. Tr. 502 (Govt. App. 83) ("[Roby:] There was none, to my knowledge."); *id.* 509 (Govt. App. 85) ("[A] prohibition was never leveled.").

Second, the government all but admits certain portions of Roby's testimony were false and offers only token resistance to Petitioner's argument that certain other portions were also false, or, at a minimum, wildly misleading. The government comes close to admitting, for example, that Roby provided false testimony regarding the timing of a crucial meeting between Eli Soglowek and the U.S. Attorney's Office. *See* Government's Merits Brief at 73.[12] The government merely

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[11] Petitioner's Reply Brief will discuss many, but not all, of the *Napue* and *Brady* issues identified in his Opening Brief. Any failure to discuss an issue is not a waiver, but rather reflects Petitioner's desire to focus on the government's arguments. As a convenience to the Court in the face of lengthy briefing, Petitioner is attaching an Addendum to this Reply Brief containing a table summary of the *Napue* and *Brady* issues, the government's response, and his reply.

[12] The government does offer a distorted reading of Roby's testimony regarding the timing of the meeting that would make it literally true. *See* Government's Merits Brief at 73 ("[Roby] may have misunderstood the question to refer to her initial meeting with the United States Attorney's

tries to minimize the significance of the false testimony by suggesting Roby had an "innocent misrecollection" about timing. But this ignores the context for the testimony. Roby deliberately volunteered that the meeting occurred "prior to" Soglowek making his $40 million bid as part of an attempt to bolster her earlier testimony that the government's forfeiture position "did not" affect potential bidders. The implication was that the meeting did not discourage Soglowek from making a bid. In reality, as the government now admits, the meeting occurred *after* Soglowek submitted his $40 million bid. Soglowek and his colleague Nathan Tzivin explain the meeting had a

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Office."). When the relevant portion of Roby's testimony is viewed in full, it is impossible to take the government's position seriously:

> A. . . . **But at the meeting that I sat in with Mr. Soglowek**, my trustee and Mr. Soglowek made it very clear that they saw him as an indispensable advisor, and they were told by the United States Attorney's Office that that was not a deal breaker. That did not – was not something that was going to trigger any action or make it impossible to buy this company.
>
> Q. What was the date of that?
>
> A. I don't recall offhand.
>
> Q. Was it in January or was it in April?
>
> A. Well, it wouldn't have been in January because that's when my son was in the hospital, so it would have been sometime after that.
>
> Q. It was in April when Soglowek came back for a second run at trying to buy the company, right?
>
> A. No, it was not. It was prior to the initial auction.
>
> Q. Was it before – was it before Niat Israel (phonetic) offered $17 million plus rent of $3 million per year?
>
> A. It was before Soglowek entered its $40 million bid. We met with the US Attorney's prior to that.

Sent. Tr. 502-03 (emphasis added). There was nothing in the sequence of questioning to provide even the slightest suggestion that Roby "may have misunderstood the question to refer to her initial meeting with the United States Attorney's Office." Instead, the questions clearly related back to "the meeting that [Roby] sat in with Mr. Sogolowek." One suspects the government has prosecuted defendants for perjury in situations where the context of a question was less clear than this.

significantly negative impact on Soglowek's interest in purchasing Agriprocessors' assets. (App. 94-95, 118-119; Reply App. 20.)

Moreover, although the government attaches significance to the February 11, 2009, letter from Soglowek's attorney withdrawing the $40 million bid, which identifies accounts receivable and inventory as a factor in the withdrawal, the timing of that letter strongly supports Soglowek's and Tzivin's affidavits identifying the meeting with prosecutors as a more significant factor in the decision to withdraw the bid. The meeting with prosecutors occurred on Friday, February 6, 2009, in Iowa. That Soglowek chose to withdraw the bid a mere five days later (with a weekend in the middle, no less) strongly indicates the meeting with prosecutors played a central role in motivating him to withdraw his bid—a point Tzivin confirms. (Reply App. 20) ("[T]he primary reason for the withdrawal of the offer was our concern with the government's forfeiture position. We used accounts receivable and inventory as a basis for withdrawing the offer as a matter of expediency.") Given the level of intimidation Soglowek felt from the government (*see* App. 119 ("Mr. Soglowek told me that the representatives of the United States Attorney's Office frightened him with their threats of forfeiture and demands concerning with whom Soglowek Nahariya LTD. could and couldn't do business.")), it is not at all surprising his letter would identify the results of due diligence as the basis for withdrawing the bid, rather than calling the government out explicitly for its conduct. For these reasons, Roby's false testimony regarding the timing of the Soglowek meeting was material.[13]

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[13] The government cannot overcome the falsity by claiming it did not realize the correct timing of the meeting. Government attorneys were present in the meeting (indeed, the meeting occurred at their insistence) and thus the government had, at a minimum, constructive knowledge of the falsity of Roby's testimony regarding timing. *See, e.g., Smith v. Secretary of New Mexico Dep't of Corrections*, 50 F.3d 801, 825 (10th Cir. 1995) (constructive knowledge is sufficient to establish *Brady* violation).

The government also does not seriously contest that Roby offered false or misleading testimony regarding "rumors in the grapevine" about a No Rubashkin rule. The government merely argues, weakly, that Petitioner's trial counsel is to blame for the misleading testimony because of the "hopeless imprecision of the questions asked." (Govt. Merits Brief 74.) But testimony characterizing rumors of the No Rubashkin restriction as "very unreliable" is not hopelessly imprecise, but rather sufficient to cause a factfinder, if the testimony is credited, to conclude no such restriction existed. (The questions were, in any event, not "hopelessly imprecise," but rather fully consistent with AUSA Murphy's statement that there could be "no involvement of Rubashkins from <u>any</u> standpoint." (App. 87.) It is disingenuous for the government to criticize the form of questions that match the exact language government attorneys themselves used to describe the No Rubashkins restriction they were imposing.)

The government does not address at all the portion of Roby's testimony where she falsely claimed Trustee Sarachek "worked very, very hard to dispel any rumors that were in the community [regarding a No Rubashkin rule]." Given the government's admission that there *was* a No Rubashkins restriction, Trustee Sarachek clearly was not working to "dispel any rumors" about it. Instead, as he himself states in his sworn affidavit (App. 39), he was working *at the government's direction* to *perpetuate* that "rumor" – which, of course, was not a rumor at all. Thus, although the government does not discuss this portion of Roby's testimony, its other admissions make clear the testimony was false. Finally, although Roby testified she did not know what the government's position would be if Soglowek expressed a desire to "re-install" Aaron Rubashkin as an owner of the company, the government does not claim there is any actual uncertainty on that point—prosecutors told Roby directly on December 5, 2008, that Aaron would not be permitted to have an ownership interest (App. 87), and the government reiterates that

prohibition in its Merits Brief. Thus, again, Roby's claim not to know is false, and the government is left to argue that the hypothetical form of the question should absolve it from any finding of a *Napue* violation. Given the false impression Roby's testimony left with the Court, this argument is unavailing.

Notably, the government's admission that a No Rubashkins rule existed helps expose even more of Roby's testimony as false or misleading. For example, Roby's claim that "a prohibition was never leveled" (Sent. Tr. 509) (Govt. App. 85) is clearly false. Similarly, in the course of Petitioner's counsel using Eichler's affidavit to try to impeach Roby, the following exchange occurred:

> Q. Was there discussion about, in no uncertain terms, that if any other member of the Rubashkin family had equity or a management role, the US Attorneys would not allow this?
>
> A. I think there was some discussion of the concern held by both the trustee and the United States Attorney that someone could come in and make an offer on behalf of the family, so equity, maybe that came up. I do not recall there being a discussion particularly about management roles because I know that at every -- that almost every potential purchaser, if not every potential purchaser, indicated their desire to have Rubashkins in management.

(Sent. Tr. 513-14) (Govt. App. 86.) As the government now admits it used forfeiture to ensure Rubashkins could not "reclaim[] the benefit or control of Agriprocessors," (Govt. Merits Brief 1), Roby's suggestion the government told bidders it was acceptable to use Rubashkins in management positions is false and misleading. *See* Merriam Webster Online Thesaurus, www.merriam-webster.com/thesaurus/manage ("manage" and "control" are synonymous).

Interestingly, Roby's testimony that "almost every potential purchaser, if not every potential purchaser, indicated their desire to have Rubashkins in management" directly contradicts the argument in the government's Merits Brief that there is "[no] indication that the purported prospective bidders ever communicated to the government a clear intention or desire to include

Rubashkins in the future of the company." (Govt. Merits Brief 65.) The government itself appears not to find Roby credible.

Even the equivocal portion of Roby's testimony – "so equity, maybe that came up" – is misleading. The prohibition on Aaron owning any portion of the company did not "maybe" come up. Rather, it "definitely" came up in an unequivocal and forceful way (*see* App. 87) ("No involvement of Rubashkins from any standpoint."), with prosecutors promising to forfeit the assets of anyone who violated it. In fact, Roby was actively involved in the portion of the December 5, 2008, meeting in which prosecutors laid out their No Rubashkin position, even going so far as telling prosecutors she was "setting [] up" a "seat at the table" for them to make it easier to impose their restriction. (App. 86.) Saying "maybe that came up" comes nowhere close to articulating the existence and forcefulness of the government's position on Aaron Rubashkin as a potential owner.

Third, the government admits (or, at least, does not deny) that prosecutors asserted forfeiture because they did not want a bankruptcy judge to apply the bankruptcy law definition of "good faith purchaser" to the Agriprocessors sale process. In the AUSA's own words, "until we take some action [forfeiture] to put our marker down, people are asking us to rely on the Bankruptcy process and a promise that good faith means the same to you as we need it to mean." (December 5 Meeting Notes at 8) (emphasis in original); *see also id.* at 4 ("[AUSA Deegan:] 'Good faith' – what does that mean? Whatever judge says. Very broad." (Id. at 4 (App. 85)). This admission helps demonstrate the impropriety of the government's use of forfeiture and its unforeseeability to Petitioner.

Fourth, the government implicitly admits it did not disclose the December 9, 2008, letter from Lloyd Palans to the Assistant United States Attorney in which Palans stated:

> [W]e believe that the public assertion of forfeiture claims, even if accompanied by a statement that your office will work with potential purchasers, is likely to have a significantly negative impact on the prospects for the sale of Agriprocessors' assets as a "going concern" or a turnkey operation and thereby "chill" the bidding process. In particular, although we are encouraged that your office is willing to communicate with potential purchasers about its expectations for the sale process, there may be few, if any, potential purchasers willing to navigate through a pending forfeiture proceeding and pay fair value for Agriprocessors' assets.

(App. 81-82.). The government further admits it did not disclose the substance of the December 5 meeting with Trustee Sarachek in which he told the government that forfeiture would "enormously hurt" his efforts to maximize the value of the estate (although the government says Roby's testimony is sufficient to establish the gist of it) or the substance of meetings with prospective bidders and First Bank in March 2016 in which forfeiture threats were made in a hostile and intimidating manner.

B. The Government's Admissions Are Sufficient to Establish a Napue Violation on Ground One.

In light of the government's admissions, there does not appear to be any real dispute that certain portions of Paula Roby's testimony are false and misleading. This conclusion follows inescapably from the Court's reliance on Roby's testimony as a basis for *dis*crediting testimony from Petitioner's witnesses that the government now appears to admit was true. The government does, however, argue that certain other portions of Roby's testimony cure any falsity or misimpression, particularly when combined with what the government characterizes as "extensive" disclosures regarding the No Rubashkin rule.

Petitioner disagrees strongly with the government's position that the whole of Roby's testimony is somehow less false or misleading than individual parts, or that the government's disclosures were sufficient to negate those false and misleading parts. But even if one accepts the government's arguments at face value, a purely legal question arises that Petitioner believes requires the entry of § 2255 relief in his favor without further analysis. Namely:

> If a government witness provides certain testimony that, if viewed in isolation, is false and misleading, and a court relies on that false and misleading testimony to reach an erroneous conclusion on a question of fact, has the government violated Napue in failing to correct the court's erroneous conclusion even if certain other portions of the witness's testimony arguably provide additional context to make the offending portions no longer false and misleading?

The answer is surely "yes." "The touchstone of due process analysis is not prosecutorial misconduct, but the fairness of the trial." *United States v. Biberfeld*, 957 F.2d 98, 102 (3d Cir. 1992). A trial (or, in this case, sentencing hearing[14]) is, by definition, unfair if a witness's false or misleading testimony is credited by a court on a material issue, without correction, and leads to the court rejecting a defendant's argument that could have reduced his sentence. *Napue* requires courts to order a new trial when there is a "reasonable likelihood that the false testimony *could* have affected the judgment of the [court]." *Bagley*, 473 U.S. at 678 (quoting *Agurs*, 427 U.S. at 103) (emphasis added). Surely there would not be a duty to correct false testimony that *could* lead to the wrong result unless there is also a duty to correct the wrong result itself. The government's failure to live up to that duty warrants the entry of § 2255 relief even if the government witness provided other testimony that arguably could have clarified the truth.

The government also fails in its attempt to argue that *Petitioner* is responsible for Roby's false and misleading testimony, either because his counsel should have cross-examined her more effectively (Govt. Merits Brief 76) or because counsel failed to move to reconsider the Court's erroneous conclusion (id. 78). The government relies on its so-called "extensive" disclosures to support this position.

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[14] The government correctly does not dispute that *Napue* applies to sentencing hearings. *See*, *e.g.*, *United States v. Weintraub*, 871 F.2d 1257, 1264-65 (5th Cir. 1989).

The government's argument finds no support in the law or facts. "[T]he government's duty to correct perjury by its witnesses is not discharged merely because defense counsel knows, and the jury may figure out, that the testimony is false." *United States v. LaPage*, 231 F.3d 488, 492 (9th Cir. 2000); *see also United States v. Bigeleisen*, 625 F.2d 203, 208 (8th Cir. 1980) (government's accurate discussion during opening statement of terms of cooperating witness's plea agreement not sufficient to negate witness's later false statements regarding those terms; "The duty to correct false testimony is on the prosecutor, and that duty arises when the false evidence appears"); *United States v. Barham*, 595 F.2d 231, 243 (5th Cir. 1979) (finding *Napue* violation even though government disclosed evidence prior to trial demonstrating the falsity). A trial is not, as the government seems to imply, an English fox hunt in which the government may use false testimony as long as it gives the defense a sporting chance. Instead, as noted above, the government must correct the false testimony regardless of the adequacy of prior disclosures. Thus, the government's pre-sentencing disclosures do not negate the *Napue* violation.

There is also no merit to the government's criticism of Petitioner for not using the government's "extensive disclosures" to cross-examine Roby and "clarify" any false or misleading testimony. (Govt. Merits Brief at 76). Indeed, the government's premise is false. Petitioner's counsel *did* use the government's disclosures to cross-examine Roby. *See* Sent. Tr. 508 (Govt. App. 84-85) ("Q. Well, let's see what they told the bank in Exhibit 5524 on December 8, 2008…"); *id.* 508-09, 517-18 (Govt. App. 85, 87) (using Defense Exhibit 11023, which was a government disclosure). It didn't work. Roby refused to relent, and the Court ultimately credited her testimony despite the cross-examination. This proves not only that the government's attempt to blame Petitioner's counsel is misplaced, but also that the government's disclosures were not "extensive."

Any disclosure that fails to demonstrate to the factfinder what the real facts are is surely not "extensive," much less to the point of satisfying *Brady*.

Petitioner's failure to file a motion to reconsider also does not excuse the government's *Napue* violation. At sentencing, as the government sat idly, Petitioner's counsel used every document the government produced to cross-examine Roby in an attempt to undermine her testimony that "a prohibition was never leveled" and "there was none, to my knowledge." (Sent. Tr. 508-09, 517-18) (Govt. App. 85, 87.) Petitioner's counsel then referenced those documents again during argument to try to convince the Court to discredit Roby. (Sent. Tr. 568) (Reply App. 8.) These efforts were futile. The Court, no doubt influenced by the government's active involvement in eliciting Roby's testimony, rejected Petitioner's evidence, discredited Petitioner's witnesses, credited Roby, and found there was not a No Rubashkin rule. Requiring Petitioner to file a motion to reconsider on these facts would be absurd.

Jenkins v. Artuz, 294 F.3d 284, 295-96 (2d Cir. 2002), is instructive. There, the defense attorney knew a cooperating witness had a plea agreement with the government, but the witness denied it, without correction from the government. After unsuccessful efforts to impeach the witness, the defense attorney eventually gave up. *Id.* The government later argued the defense attorney's knowledge of the agreement and surrender during cross-examination negated any *Napue* violation that might have occurred. *Id.* The court disagreed and held that defense counsel's attempt to cross-examine the witness, combined with government counsel's reinforcement of the false testimony, were sufficient to preserve the *Napue* violation. *Id.*

The same conclusion is appropriate here. Not only did the government fail to correct Roby's false and misleading testimony, it reinforced the misleading impression by asking her directly whether she was "aware of any agreement out there that relates to some agreement not to

hire Rubashkins?" (Sent. Tr. 495) (Govt. App. 81.) Notwithstanding the hopelessly formalistic argument the government tries to make regarding the meaning of "agreement," any reasonable listener would have reached the same conclusion the Court did—that Roby was denying the existence of any sort of No Rubashkin restriction. The government's immediate follow up questions then made the problem worse by falsely implying the related party disclosure requirement in the bankruptcy court (which required disclosure of connections to Rubashkins, among others) was a routine part of the bankruptcy process and not connected to the "No Rubashkin" restriction—which Roby had just denied the existence of anyway.[15] The sequence of questions and answers therefore left the listener with the unmistakable impression that (1) no "No Rubashkins" restriction existed; and (2) any disclosure requirement in the bankruptcy court that may have implied such a restriction was really just a "routine" part of helping the bankruptcy judge and bankruptcy trustee ensure bidders were qualified. In reality, as the government well knew, and now appears to admit, there *was* a "No Rubashkins" restriction and the related party disclosure requirement was used to help enforce it. *See generally* December 5, 2008 Meeting Notes (App. 86-87.) The government therefore perpetuated the falsity of Roby's testimony in a manner that makes the *Napue* violation even more severe. *See Jenkins*, 294 F.3d at 295-96; *Tassin*, 517 F.3d at 779 ("The State not only allowed deceptive testimony to go uncorrected; it also capitalized on its key witness's testimony…").

The government's Merits Brief fails to respond to Petitioner's argument – based on now undisputed facts – that prosecutors used forfeiture to unilaterally impose their own definition of

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[15] Specifically, the government attorney asked whether "this whole idea of related parties, is that something that happens in the bankruptcy as part of the procedures on a pretty regular basis" and whether the question of related parties "is [] a concern to the bankruptcy court?" (Sent. Tr. 496) (App. 28.)

"good faith purchaser" in the bankruptcy proceeding, rather than accepting the bankruptcy law definition of that term. The December 5, 2008 meeting notes make clear that prosecutors did so, (App. 85, 87-88), and this fact provides strong support for Petitioner's position that the government acted in an unreasonable and unforeseeable manner. Indeed, no person, regardless of the criminal conduct in which he or she was engaged, could reasonably foresee that prosecutors would literally refuse to accept the law and instead use forfeiture to create their own definition of legal terms. Moreover, the impact of the government's action was severe, as it prevented an uncharged third-party, Aaron Rubashkin – who, in the words of Trustee Sarachek, was "vital to maximizing the value of the company on a going forward basis" (App. 38) – from having a role in the new entity. By asking leading follow up questions of Roby regarding whether bankruptcy disclosure requirements happen "on a pretty regular basis" and are "a concern to the bankruptcy court," the government therefore not only reinforced the false impression that no No Rubashkins restriction existed, but also concealed its own inappropriate conduct. This, again, exacerbates the *Napue* violation. *See Graves v. Dretke*, 442 F.3d 334, 341 (5th Cir. 2006) (government attorney's conduct became "[p]erhaps even more egregious" when he followed up the suppression of a witness's exculpatory statement by eliciting testimony from the witness suggesting there had been no statement at all). Ground One of Petitioner's § 2255 petition should be granted.

C. The Government's Admissions Are Sufficient to Establish a Brady Violation on Ground One.

The government's Merits Brief also contains sufficient admissions to require the entry of relief in Petitioner's favor on Ground One under *Brady*. In particular, while the government repeatedly asserts it made "extensive disclosures," it implicitly admits it did not disclose the December 9, 2008, letter from First Bank's counsel, Lloyd Palans, stating that the government's use of forfeiture would result in Agriprocessors' assets selling for less than fair value; the March

2009 conversations with multiple bidders and First Bank that led to the bidders and First Bank feeling so threatened; and the comments made by Trustee Sarachek and his counsel that the government's use of forfeiture would "enormously hurt" his ability to maximize the value of the bankruptcy estate.

That the government admits the non-disclosure of these items only implicitly is surprising given the ferocity with which the government attacks Petitioner for failing to mention *ex*plicitly that the government produced prior to sentencing some of the documents on which Petitioner relies in his Merits Brief. The government appears to be guilty of the very "shameless" and "misleading" (Govt. Merits Brief 2, 13, 21) conduct of which it accuses Petitioner. In any event, regardless of the manner in which they were made, the government's admissions confirm the *Brady* violation.

The non-disclosure of the December 9 Palans letter is a particularly clear violation of Petitioner's due process rights. As the government knew, loss amount was, by a wide margin, the largest driver of Petitioner's 27-year sentence. The 22-level increase under the Sentencing Guidelines for loss amount in excess of $20 million equated to approximately 24 years of the 27-year sentence. Moreover, the government emphasized loss amount in urging the Court to impose a sentence near the Guidelines range and placed the blame squarely on Petitioner for the financial harm the victim suffered. *See* Sent. Tr. 545 (Reply App. 7) ("How often has the Court seen a fraud which caused a $26 million loss? It's a staggering amount of money, Your Honor. And it's likely the largest fraud loss ever in the Northern District of Iowa."). In recognition of the significant impact loss amount would have on his sentence, Petitioner argued the government was an intervening and unforeseeable cause of loss through its overly-aggressive forfeiture position.

At the time of these arguments, the government possessed, but did not disclose, a letter *from the victim* placing the blame *on the government* for the loss on the basis of the precise overly-

aggressive use of forfeiture that Petitioner was arguing. Specifically, the victim informed the government that its use of forfeiture was "likely to have a significantly negative impact on the prospects for the sale of Agriprocessors' assets" and that "there may be few, if any, potential purchasers willing to navigate through a pending forfeiture proceeding and pay fair value for Agriprocessors' assets." (App. 81-82.) The non-disclosure of the December 9 Palans letter is inexcusable and in and of itself constitutes a *Brady* violation.

It is difficult to imagine a better witness for Petitioner on the issue of loss amount than a First Bank representative. First Bank was *the* victim of the fraudulent scheme and therefore better-positioned than almost anyone else to evaluate the cause of its loss. Moreover, while the Court sometimes found witnesses perceived to have sympathy toward or friendship with Petitioner to be non-credible, *see* Court's Sentencing Memorandum (Crim. Dkt. No. 927) at 17, 26 (disregarding testimony from Abraham Roth, a "friend of Defendant"); *id.* at 22 (discrediting, presumably, Yechiel Cohen, who identified himself as a "dear friend" of Petitioner (Sent Tr. 530)) First Bank did not fall into these categories. Thus, testimony from a First Bank witness identifying the government's forfeiture position as a cause of some or all of the loss almost certainly would have been credited. The failure to disclose the Palans letter prevented Petitioner from knowing to call a First Bank witness for this purpose.

The non-disclosure further prevented Petitioner from using the letter to cross-examine Roby on her testimony that the government's forfeiture position did not affect bidders in the bankruptcy auction. Here again, the government's conduct is inexcusable. The government attorney actively elicited testimony from Roby that the government's position "did not" affect prospective bidders. To the extent the government had evidence showing the opposite was true, it had an absolute and unassailable duty to disclose it. Yet the December 9 Palans letter, with its

statements that forfeiture was "likely to have a significantly negative impact on the prospects for the sale" and "there may be few, if any, potential purchasers willing to navigate through a pending forfeiture proceeding and pay fair value for Agriprocessors' assets," remained hidden in the government's files. This is a blatant due process violation.

The non-disclosure of the Palans letter provides context for one of the most curious government strategies at sentencing—the decision not to call a First Bank representative as a witness. As noted above, the government described the fraud loss as "staggering" and "likely the largest fraud loss ever in the Northern District of Iowa." Yet the government chose not to present testimony from the victim of the fraud. The non-disclosure of the Palans letter and presentation of false and misleading testimony from Roby suggests the omission of a First Bank witness was a deliberate attempt to avoid bad testimony on the issue of loss causation. To the extent the Court does not grant § 2255 relief on the briefs, discovery is necessary and appropriate to investigate this issue further.

2. The Government's Arguments for Why It Did Not Violate *Brady* Rest Largely on a Misunderstanding of Petitioner's *Brady* Argument.

The government offers several arguments for why it did not violate *Brady*, but none is sufficient to justify the suppression of the Palans letter or other information. Petitioner will address the government's arguments in turn. At the outset, however, Petitioner must address the government's apparent misunderstanding of his *Brady* argument.

Petitioner is not merely arguing that the government violated *Brady* by failing to disclose sufficient information to confirm the existence of the No Rubashkins restriction (although that is part of it), but also by suppressing evidence of the *effect* the government's forfeiture position had on loss amount. In this respect, the non-disclosure of the December 9 Palans letter deprived Petitioner of the ability to make a full and complete argument regarding the extent to which the

government's forfeiture position drove up the loss amount. The non-disclosure of the statements made by Trustee Sarachek and his counsel also prevented Petitioner from making the full argument, as did the non-disclosure of the ferocity of the government's threats directly to bidders and First Bank in March 2009. Without this information, Petitioner did not know – and could not argue – that the government likely caused the entirety of the loss First Bank ultimately suffered. His trial counsel now acknowledges he would have argued for zero loss if armed with the December 9 Palans letter and other undisclosed information. *See* Aff. of Guy Cook at ¶ 7 (Reply App. 12).

3. The Government's Other Disclosures Did Not Put Petitioner on Notice of First Bank's Position on Forfeiture or the Full Impact of the Government's Forfeiture Position on Loss Amount.

Setting aside the government's apparent misunderstanding of Petitioner's position, the government's arguments are insufficient to negate the *Brady* violation. The government first argues Petitioner already knew First Bank's position on forfeiture as a result of other government disclosures, including, especially, the government attorney's letter to Palans from December 8, 2008. This contention is baseless. The December 8 letter says nothing expressly about First Bank's position on forfeiture. It merely states, "[y]ou have previously asked for this office's thoughts on the pursuit of such claims in view of their potential impact on a proposed sale under 11 U.S.C. § 363, and the impact on the rights of the creditors." (App. 79.) The notion that this sentence somehow put Petitioner on notice that First Bank believed the government's actions were "likely to have a significantly negative impact" on the sales process and that "few, if any, potential purchasers" would go through the bidding process and pay fair value has no merit.

In fact, the combination of the government's disclosure of the December 8 letter to Palans and *non*-disclosure of the Palans response on December 9 was highly misleading. The December 8 letter states that "this office does not wish to do anything that would impede a sale of

Agriprocessors, Inc.'s assets to an appropriate purchaser" and "does not wish to impede the distribution of the proceeds of such a sale to the innocent creditors of the bankruptcy estate." (App. 79.) Absent disclosure of the December 9 letter, a reader would have concluded that these reassuring words satisfied whatever concerns First Bank had (to the extent the reader was able to glean from the December 8 letter that First Bank had concerns at all). The selective disclosure of one letter but not the other therefore makes the *Brady* violation worse. *See Bagley*, 473 U.S. at 682-83 ("[T]he more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption.").

The misdirection was taken a step further with the government attorney's comments to the bankruptcy court on December 22, 2008, which, ironically, the government now claims were somehow sufficient to put Petitioner on notice of the government's forfeiture position and its impact. The government attorney represented to the bankruptcy judge that prosecutors had "good discussions" with First Bank and Trustee Sarachek and the parties were now "all on the same page" with respect to forfeiture. (Govt. App. 117-118.) The undisclosed December 9 Palans letter tells a completely different story. Not only were the government and First Bank not "on the same page" with respect to forfeiture, they were diametrically opposed, with prosecutors insisting on moving forward and First Bank begging them not to do so. (App. 81-82.) The government's statements to the bankruptcy court about "good discussions" and being "on the same page" therefore further

demonstrate an intentional effort to mislead regarding the nature and impact of the No Rubashkins restriction.[16]

Roby's sentencing hearing testimony that the government's position caused Trustee Sarachek and his counsel to "freak[] out a little bit" and worry about a "chilling effect" on the bankruptcy sale (Sent. Tr. 493) (Govt. App. 81) also did not sufficiently apprise Petitioner of First Bank's or Trustee Sarachek's attitude toward forfeiture or the impact of the government's position. That this "disclosure" was not made until the sentencing hearing itself is reason enough to reject the government's position, as the timing prevented Petitioner from incorporating Roby's statement into his presentation or conducting follow up investigation. *See Leka v. Portuondo*, 257 F.3d 89, 101-103 (2d Cir. 2001) (finding *Brady* violation where "the prosecution failed to make sufficient disclosure in sufficient time to afford the defense an opportunity for use").

More importantly, however, it is clear from reviewing the entirety of Roby's testimony that she was actually claiming Trustee Sarachek and his advisors were *not* ultimately concerned about the government's use of forfeiture; instead, the "freak[] out" was merely an initial reaction that later gave way to comfort with the government's position. *See, e.g.*, Sent. Tr. 493-94 (Govt. App.

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[16] To the extent the government claims it had follow-up conversations with First Bank between December 9 and 22, and that those follow up conversations served as the basis for the representation of "good discussions" and being "on the same page," the *Brady* violation remains. The fact that First Bank's position *at one point* was that the government's use of forfeiture caused some or all of the loss would be exculpatory even if First Bank later changed that position. *See, e.g., United States v. Triumph Cap. Grp., Inc.*, 544 F.3d 149, 162-63 (2d Cir. 2008) (finding *Brady* violation where government failed to disclose notes reflecting version of events provided by witness's attorney that was inconsistent with witness's later trial testimony). At a minimum, discovery would be necessary to determine what First Bank actually said in those conversations. The government has, to date, disclosed nothing. Petitioner highly doubts, in any event, that any follow-up conversations changed First Bank's attitude toward the government's use of forfeiture. First Bank expressed concerns about the effect of the government's forfeiture position clear into March 2009 (if not later) when it used the government's conduct as a basis for calling its post-bankruptcy petition loan into default. (App. 108-110.)

81) ("[W]e all agreed that the best way to handle it would be to have prospective bidders come talk to the US Attorney . . . [Soglowek] seemed very satisfied with the responses they had gotten from the US Attorney's Office."). This was clearly untrue. Trustee Sarachek himself continues to this day to identify the government's forfeiture threats and No Rubashkins restriction as having caused the bankruptcy sales price to be lower than it otherwise would have been. (App. 40.)[17] Numerous bidders feel the same way. (App. 42, 46, 48-49, 99-100, 102, 106-107.) Indeed, bidders like Meyer Eichler and Sid Borenstein went so far as to make arrangements to have Aaron Rubashkin serve as a minority owner, thus demonstrating how strongly they felt about his value and the harmfulness of the government's restrictions. (App. 44.) First Bank clearly agrees, too, as evidenced by newly-discovered evidence that it called its post-petition loan into default "based on discussions with certain government officials on or about March 24, 2009" that left First Bank "insecure with respect to the actual or potential assertion by the United States of a right to forfeiture of assets of [Agriprocessors] and the actions of the United States in pursuit of such a right or claim of right." (App. 108-109.) The initial concern expressed by Trustee Sarachek and other interested parties therefore did not, as Roby's testimony implies, dissipate with the passage of time; rather,

[17] Trustee Sarachek also explains in a supplemental affidavit (Reply App. 16-17) why he made statements to prosecutors on December 5, 2008, indicating a desire not to use Rubashkins in the new entity, thus addressing the government's argument at pages 60-62 of its Merits Brief. Trustee Sarachek knew going into the meeting that prosecutors did not want Rubashkins and he "did not want to alienate [them]." (Id. ¶ 4.) He also was hoping "the government would decide not to assert forfeiture claims at all." (Id. ¶ 5.) Finally, as of December 5, 2008, Trustee Sarachek "did not yet fully appreciate how crucial the Rubashkins – especially Aaron – were to the successful operation of the business." (Id. ¶ 4.) He later "developed a full appreciation for Aaron Rubashkin's value to the business" and "fully understand[s] why other bidders had the same desire to use him in an ownership, management, or advisory role." (Id. ¶ 8.) Trustee Sarachek also explains why his decision to reject the $40 million offer from Soglowek is not inconsistent with his concern about the government's No Rubashkins position. (Id. ¶ 9) ("Even without Aaron's involvement, however, $40 million appeared to be a reasonable price for the business.").

the concerns remained throughout the bankruptcy process. Thus, the portion of Roby's testimony that the government claims establishes its transparency actually accomplished the opposite by further misleading Petitioner and the Court.

Notably, the government's Merits Brief does not explain what discussions, exactly, the government had with First Bank in March 2009 that caused the Bank to feel so insecure. Whatever they were, the failure to disclose them is a *Brady* violation and not cured by Roby's false and misleading testimony that Trustee Sarachek and his counsel had only fleeting concerns about the impact of the government's forfeiture position.

4. The Government's Use of Forfeiture Was Unforeseeable and Unlawful, and Thus the December 9 Palans Letter and Other Undisclosed Information Were Exculpatory.

The government next defends the non-disclosure of the Palans letter and other loss amount information on the basis it was not exculpatory. (Govt. Merits Brief 47-54.) Specifically, the government argues it had the right to pursue forfeiture of Agriprocessors' assets and thus any impact its actions had on the bankruptcy sales price are attributable to Petitioner. (Id.) This argument fails for several reasons.

First, the government incorrectly assumes Petitioner has to prove the government's forfeiture conduct was unlawful in order to prevail on his § 2255 claim. This is untrue. The touchstone for loss amount under the Sentencing Guidelines is *foreseeability*, not *legality*. *See* USSG §2B1.1, comment. (n.3) ("'Actual loss' means the reasonably foreseeable pecuniary harm that resulted from the offense."). Thus, losses caused by legitimate conduct of the government or a third-party in response to fraud cannot be held against a criminal defendant if the conduct was unforeseeable. *See, e.g., United States v. Marlatt*, 24 F.3d 1005, 1007 (7th Cir. 1994) ("That is the difference between 'but for' causation and the causation—for which the presence of but-for causation is ordinarily a necessary condition but rarely a sufficient one—that imposes legal

liability. The distinction runs throughout the law. Criminal law is no exception."). In *United States v. Tyler*, 767 F.2d 1350, 1351-52 (9th Cir. 1985), for example, the Ninth Circuit held a defendant did not proximately cause loss in a case involving stolen timber because the government chose to hold the timber as evidence rather than selling it when prices were favorable. "Any reduction in its value stems from the government's decision to hold the timber during a period of declining prices, not from Tyler's criminal acts." *Id.* at 1352. Similarly, in *United States v. Olis*, 429 F.3d 540, 549 (5th Cir. 2005), the Fifth Circuit reversed the loss amount calculation because the district court "did not take into account the impact of extrinsic factors on [the] stock price decline." *See also United States v. Rothwell*, 387 F.3d 579, 584 (6th Cir. 2004) (reversing loss amount finding where there were "myriad explanations for the [loss]—an unsound business risk, a poor economy, excess warehouse or office space in the local market, or developments in unrelated transactions affecting [the defendant's] ability to repay the SBA loan—all of which are more likely causes of loss than the fraud"). Therefore, even if the government's assertion of forfeiture was lawful, it was not automatically foreseeable.

Despite extensive research, Petitioner is unable to locate a single case in which the government sought forfeiture of trademarks or a corporate name in response to immigration violations or bank or mail fraud charges.[18] The government's Merits Brief does not identify any such case, either—much less a case in which the government alleged forfeiture of trademarks or a corporate name for the purpose of injecting itself into a bankruptcy proceeding and imposing restrictions on who could own or manage those assets. While this alone evidences that prosecutors'

[18] The government did not actually seek forfeiture in connection with the financial fraud charges, so Petitioner's inability to find precedent is relevant only to illustrate the extent of the government's unprecedented use of forfeiture.

actions were unforeseeable, the fact the government was warned by the Bankruptcy Trustee and victim that its actions would "enormously hurt" the Trustee's ability to maximize the value of the estate and "have a significantly negative impact on the prospects for the sale of Agriprocessors' assets as a going concern" makes the already-unprecedented conduct even less foreseeable and is therefore clearly exculpatory. No person in Petitioner's position – or anyone else's – would foresee that the government would use forfeiture over the objections of the crime victim and independent bankruptcy trustee for the purpose of writing its own definition of "good faith purchaser." Indeed, three former Deputy Attorneys General state that the use of forfeiture in these circumstances would not have been foreseeable to *them*, despite their extensive government and prosecutorial experience. (Reply App. 14, 15, 18.) Surely, then, it would not have been reasonably foreseeable to Petitioner. The government's failure to disclose the statements from First Bank and Trustee Sarachek therefore violates *Brady* regardless of whether the government's actions were, by some stretch of the imagination, within the scope of its criminal or civil forfeiture authority.

In any event, the government clearly exceeded its statutory forfeiture authority, thus making its actions even more unforeseeable. The government barely tries, for example, to justify its assertion of forfeiture of Agriprocessors' corporate stock, which was owned entirely by Aaron Rubashkin, an uncharged third-party. (Govt. Merits Brief at 50.) This surrender is understandable, as the assertion of forfeiture over the stock was plainly unlawful. *See, e.g., United States v. Gilbert*, 244 F.3d 888, 919-923 (11th Cir. 2001) *superseded by rule on other grounds as stated in United States v. Marion*, 562 F.3d 1330, 1340-41 (11th Cir. 2009) (reversing order of forfeiture that included property not owned by any defendant; "criminal forfeiture can only reach a *defendant*'s interest in the subject property") (emphasis added). Granted, the government cites cases suggesting property of a non-defendant may be forfeitable if it facilitates an offense. *See De*

Almeida v. United States, 459 F.3d 377, 381 (2d Cir. 2006); *but see United States v. Contorinis*, 692 F.3d 136, 147-48 (2d Cir. 2012) (reversing forfeiture of funds that were never possessed or controlled by the criminal defendant or others acting in concert with him). But the government wisely chooses not to bother trying to formulate an argument for how Aaron Rubashkin's stock certificates somehow "facilitated" the offense of alien harboring. Indeed, in one of the cases the government cites, *United States v. Stewart*, No. 8:14CR288, 2015 WL 6039742, *8 (D. Neb. Oct. 15, 2015), the court *rejected* the government's broad assertion of forfeiture. The same conclusion is appropriate here.

The government argues the unlawful forfeiture of the corporate stock was immaterial because the stock was "worthless" (Govt. Merits Brief 50), but this begs the question of what the value would have been had the government not improperly exercised its authority. Moreover, the government's position makes no sense. If the government truly believed the stock had no value, it should not have asserted forfeiture over it in the first place; if it believed it *did* have value, it should not have argued the $27 million loss was foreseeable to Petitioner.

With respect to the trademarks and corporate name, the government offers generic quotes from a number of cases about the government's forfeiture authority. (Govt. Merits Brief 47-50). It cites no cases, however, for the proposition that forfeiture of trademarks or a corporate name is appropriate in response to immigration violations or mail or bank fraud offenses. This is unsurprising. Allowing forfeiture of a corporate name or trademarks in response to criminal offenses that had nothing to do with either would eviscerate statutory restrictions on forfeiture. No court has gone so far. Indeed, the government's forfeiture position, if accepted, would allow prosecutors to eviscerate the names "Walmart" and "General Motors," to name a few, on account

of recent environmental and fraud charges, respectively, against those two companies. The government's forfeiture powers do not reach so far.

Ironically, many of the quotes the government provides show just how far it overreached. The government quotes *United States v. Blackmon*, 746 F.3d 137, 143 (4th Cir. 2014), for example, for the proposition that "a victim's hope of getting paid may rest on the government's superior ability to collect and liquidate a defendant's assets." This principle provides no support for the government's position in a case where the sophisticated victim, a bank, was begging the government *not* to assert forfeiture on account of the "significantly negative impact" such an assertion would likely have on the value of the company. In March 2009, First Bank called its post-petition loan into default precisely because of concerns about the government's assertion of forfeiture. (App. 108-109.) The suggestion the government was using forfeiture to help the victim is laughable. Similarly, the quote from *Kaley v. United States*, 134 S. Ct. 1090, 1094 (2014) about the use of forfeiture to "recompense victims of crime, improve conditions in crime-damaged communities, and support law enforcement activities like police training" is a poor fit for a case where the government's threats of forfeiture (over the objections of interested and sophisticated parties, including the victim bank) caused the sale of the assets over which forfeiture was sought to be woefully insufficient to satisfy the victim's losses, much less provide anything for the community or law enforcement.

Finally, the argument that the government could have forfeited the assets civilly misses the point. Even in a civil forfeiture proceeding, the government must establish a nexus between the criminal conduct and the assets it seeks to seize. *See United States v. Dodge Caravan Grand SE/Sport Van, VIN No. 1B4GP44G2YB7884560*, 387 F.3d 758, 761 (8th Cir. 2004) (requiring "substantial connection" between property and criminal offense). No nexus exists here. Simply

put, a corporate name and trademarks do not facilitate the harboring of illegal aliens or mail or bank fraud, nor are they proceeds of such conduct.

The government's Merits Brief utterly fails to address this missing nexus. At most, the government merely describes the crimes it believes Agriprocessors committed, followed by bald statements that it "would have produced overwhelming evidence that Agriprocessors' assets were subject to forfeiture." (Govt. Merits Brief 54.) But the government never provides a link between the criminal conduct and the forfeiture. Instead, the government appears to presume that if a corporation engages in criminal conduct, every asset the corporation owns becomes subject to forfeiture. This is not the law. *See United States v. Riley*, 78 F.3d 367, 370-71 (8th Cir. 1996) (describing as "absurd" the government's position that an enterprise's gross receipts would be subject to forfeiture if the enterprise was engaged in racketeering activity).

The overreaching becomes even worse when one considers the now-undisputed reason the government alleged forfeiture—to prevent a bankruptcy judge from applying the bankruptcy law definition of "good faith purchaser" to the sale of Agriprocessors' assets. (App. 85, 87, 108.) Eighth Circuit law establishes that "federal bankruptcy law [] provide[s] the proper forum for distributing the inadequate assets of defendants' failed or neglected businesses." *Id.* at 371. Like the government in *Riley*, "[t]he government here seemingly lost sight of this statutory limit on its authority." *Id.* at 372. Accordingly, the government's failure to disclose exculpatory information regarding the consequences of its unlawful overreaching violates *Brady* and requires the entry of § 2255 relief. *See United States v. Hicks*, 217 F.3d 1038, 1048-49 (9th Cir. 2000) ("New losses inflicted independently by third-part[ies] [who act unlawfully] after the completion and discovery of a defendant's crime do not 'result from' that crime for purposes of the Sentencing Guidelines, even if the defendant's conduct in some coincidental way was a but-for cause of the ultimate

loss."). Indeed, prosecutors' conduct is not merely unforeseeable, it is fundamentally unfair. The government must accept loss as it finds it. It may not interfere in a bankruptcy process, impose conditions on who can own and operate a private company, prevent a bankruptcy judge from applying bankruptcy law, and take other steps over the objection of interested parties (including the crime victim itself!) to suppress the sales price of private assets.

5. The Government Cannot Defend the Non-Disclosure of the Palans Letter By Arguing Petitioner Had to Ask for it Specifically.

Finally, the government makes a baseless argument that it had no obligation to produce the December 9 Palans letter unless Petitioner or his counsel specifically requested it. (Govt. Merits Brief 64.) This argument flips *Brady* on its head. The government has an obligation to disclose *Brady* evidence even when the defense does not specifically request it. *Agurs*, 427 U.S. at 110. The government cannot dispense with this obligation through a stipulated discovery order. *Cf. Leka v. Portuondo*, 257 F.3d 89, 102 (2d Cir. 2001) ("[I]t is the prosecutor's burden to make full disclosure of exculpatory material, not the defendant's."); *Banks v. Reynolds*, 54 F.3d 1508, 1517 (10th Cir. 1995) ("[T]he prosecution's obligation to turn over the evidence in the first instance stands independent of the defendant's knowledge."). Instead, when it possesses evidence that directly supports the defendant's theory of the case, the government must disclose that evidence regardless of any agreement it had the defendant sign.

The government's reliance on the stipulated discovery order is especially troubling here given the disclose of the December 8, 2008, letter *to* First Bank's counsel but not the December 9, 2008, letter *from* counsel. To disclose the first letter but not the second, and then claim Petitioner should have had the omniscience to know there even *was* a second letter and ask for it, is fundamentally at odds with *Brady*. The Court should reject the government's position.

Notably, the government was well aware prior to sentencing that Petitioner intended to argue the government's forfeiture threats were an unforeseeable cause of loss. Petitioner made this argument explicitly in his Sentencing Brief and other pre-sentencing filings and implicitly in his counsel's April 21 email request for evidence relating to the No Rubashkin rule. Moreover, the government was concerned enough about this argument that it presented testimony from Roby that the government's forfeiture position "did not" affect potential bidders in the bankruptcy proceeding. Accordingly, the failure to disclose the December 9 Palans letter and other evidence indicating the concerns held by First Bank and Trustee Sarachek regarding the government's forfeiture position plainly violates *Brady* and justifies § 2255 relief. *See Bagley*, 473 U.S. at 682-83 ("[T]he more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption.")

IV. THE *BRADY* AND *NAPUE* VIOLATIONS IN GROUND ONE CAUSED PREJUDICE TO PETITIONER AND ARE NOT PROCEDURALLY DEFAULTED.

Paula Roby testified at sentencing that "a [No Rubashkins] prohibition was never leveled"; "there was none to my knowledge"; any rumors regarding a No Rubashkins prohibition were "very unreliable"; and Trustee Sarachek "worked very, very hard to dispel any [such] rumors." The government failed to correct this testimony even though prosecutors themselves told Trustee Sarachek and his counsel that "No Rubashkins is very important to us" and "non-negotiable" there could be "no involvement of Rubashkins from any standpoint." The government further elicited testimony from the witness that the government's forfeiture position "did not" affect potential bidders in the bankruptcy but did not disclose a letter *from the victim* warning that forfeiture would "likely have a significantly negative impact" on the bankruptcy sale and result in "few, if any,

potential purchasers willing to navigate through a pending forfeiture proceeding and pay fair value for Agriprocessors' assets" or statements *from the witness's co-counsel* expressing that forfeiture would "enormously hurt" the Bankruptcy Trustee's ability to maximize the value of the estate. The government instead disclosed only a letter from itself *to* the victim from a day earlier in which the government professed that it "does not wish to impede the distribution of proceeds of such a sale to the innocent creditors of the bankruptcy estate."

The Court credited the government's evidence, discredited Petitioner's witnesses and evidence, and declined to consider the effect of the government's forfeiture position on loss amount. Instead, the Court attributed the entire $27 million loss to Petitioner, added 22 levels (roughly 24 years) to his Sentencing Guidelines range, and imposed a within-range sentence of 324 months' imprisonment. The government now argues Petitioner suffered no prejudice as a result of any *Brady* or *Napue* violations.

A. The Due Process Violations Caused Prejudice.

The government first argues that Petitioner did not present sufficient evidence of what a bidder would have paid in the absence of the government's forfeiture position. This is incorrect. Petitioner has accumulated the following evidence of value:

- Marc Ross's report showing $68.6 million in assets as of June 2008 (even after taking into account the inflated inventory and accounts receivable);
- Soglowek's company offered $40 million for the assets in late January 2009, but Trustee Sarachek rejected the offer because he thought he could get more;
- The high bidder at the March 2009 bankruptcy auction, Kosher Standard, offered between $16 and 17 million at the auction and would have paid more but for the government's position;
- Niat Israel offered $17 million up-front plus $3 million per year in rent;
- Trustee Sarachek informed bidders they should expect to earn $25 million *per year* from operating Agriprocessors;

- Another potential bidder connected with Nathan Tzivin valued Agriprocessors' assets at $45 million. (Reply App. 20.)

This evidence, when combined with the undisclosed evidence regarding the grave concerns of First Bank ("significantly negative impact") and Trustee Sarachek ("enormously hurt") toward the government's impact on the bankruptcy auction, shows the government likely caused a loss in excess of the outstanding debt to First Bank. This raises, at a minimum, a "reasonable probability" that the result of the sentencing hearing "could have" (*Napue*) or "would have" (*Brady*) been different. Had Petitioner been responsible for no loss, his Sentencing Guidelines range would have been 30-37 months. Petitioner's trial counsel confirms that had he been aware of the newly-discovered evidence, Petitioner would have argued a loss amount of $0. (Reply App. 12.)

Even at the low end of what the above evidence shows – which is far less than what Petitioner would establish in a new sentencing hearing, if armed with all the evidence he now has – the government's forfeiture position caused a loss of at least $7.5 million (the difference between Kosher Standard's bid of $16 million+ and the $8.5 million ultimately paid by SHF). Reducing $7.5 million from the $27 million loss attributed to Petitioner would have reduced his offense level by 2 points and thus his Sentencing Guidelines range by 62 months as measured from the bottom end. This, too, is substantial prejudice and entitles Petitioner to a new sentencing hearing. *See United States v. Titchell*, 261 F.3d 348, 354-55 (3d Cir. 2001) ("And if the guidelines range were lowered, we certainly cannot assume that Titchell's sentence would be unaffected.").

The government's Merits Brief ignores the most significant problem with its aggressive forfeiture position—the interruption it caused to market forces in the bankruptcy auction process. Auctions are most effective when numerous bidders actively participate. *See Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 184 (Del. 1986) ("Market forces must be

allowed to operate freely to bring shareholders the best price."). Here, however, despite fielding dozens of initial inquiries, Trustee Sarachek received only two or three offers by the time of the bankruptcy auction in March 2009. Those bidders then removed themselves from the process, in no small part because of the government's continuing threats. The government therefore turned what would have been an open and hotly-contested auction process into a quiet and subdued affair with "few, if any" participants. It is disingenuous – and something of a tautology – for the government to have affected the bankruptcy process in such a profound way but then turn around and blame Petitioner or the bidders for not calculating to the dollar what they would have paid in a hypothetical world in which the government did not interfere.

The government also argues, reiterating what it states elsewhere in its Merits Brief, that its use of forfeiture was lawful and Petitioner "is not entitled to second-guess the decisions of others that may have impacted his loss calculation under the guidelines." (Govt. Merits Brief 84.) This is a misstatement of law. The Eighth Circuit recognizes that "courts should consider collateral when determining the intended loss" in cases involving fraudulent receipt of loan proceeds. *United States v. Staples*, 410 F.3d 484, 490 (8th Cir. 2005). "If a reasonable person intends for the collateral to revert to the defrauded party (or understands that it will), then he or she does not intend to obtain the value of that collateral." Thus, where, as here, a person understands that $68.6 million in collateral serves as security for, and will revert to, the victim-bank, the Court must take that collateral into account. If unforeseeable action by a third-party (e.g., government threats, over the objection of the crime victim and bankruptcy trustee, to forfeit assets unless buyers accept government restrictions on who can own and operate those assets) causes that collateral to yield less than full value, only the portion of loss reasonably foreseeable to the defendant can be attributed to him. *See Hicks*, 217 F.3d at 1048-49; *Rothwell*, 387 F.3d at 584. No reasonable person

would foresee the impairment of collateral in the manner the government caused here. Indeed, even former senior officials with the Department of Justice would not have foreseen the government's actions. (Reply App. 14, 15, 18.) Surely Petitioner would not have foreseen it, either.[19]

B. Petitioner's Ground One Is Not Procedurally Defaulted.

The government also fails in its attempt to argue that Ground One is procedurally defaulted. Specifically, the government argues Petitioner was "fully informed" of the government's forfeiture position prior to sentencing and thus should have appealed the portion of the Court's order concluding there was not a No Rubashkins restriction.

The government's argument ignores the following facts: (1) Petitioner's counsel used all of the government's pre-sentencing disclosures in the cross-examination of Roby, to no avail; (2) the government actively participated in the *Napue* violation by eliciting calculated testimony from Roby about whether there was an "agreement" not to use Rubashkins and using leading questions to suggest that disclosure requirements in the bankruptcy proceeding were "routine" and not designed to enforce the No Rubashkins restriction she already denied existed; and (3) the government also participated in the *Napue* violation by failing to correct other aspects of Roby's testimony, even when the Court relied on them to reach an erroneous conclusion. It is clear from these facts that Petitioner did not have sufficient evidence to establish the falsity of Roby's testimony, particularly given the government's resistance and non-disclosure of material information such as the government attorney's statement there could be "no involvement of

[19] Notably, the government identifies the same number of cases in this portion of its Merits Brief – zero – that it did earlier for the proposition that forfeiture of a corporate name and trademarks is permissible in response to immigration violations. This further illustrates the unforeseeability of the government's conduct.

Rubashkins from any standpoint." *See Strickler v. Greene*, 527 U.S. 263, 283 (1999) (no procedural default where "conduct attributable to the [government] impeded trial counsel's access to the factual basis for making a *Brady* claim"). The *Napue* issue is therefore not defaulted, but rather "properly presented in a § 2255 petition." *Id. United States v. Rosario*, 234 F.3d 347, 352 (7th Cir. 2000) (addressing *Napue* claim); *see also Webster v. United States*, 667 F.3d 826, 831 (7th Cir. 2011) (no procedural default where claim required "development of facts outside the record").

It was only after Petitioner discovered the December 5, 2008, notes that the government finally admitted imposing a No Rubashkins restriction in line with Eichler's and Cohen's testimony, which this Court previously discredited without correction from the government. Even now, however, the government insists on splitting hairs and focusing on words Petitioner never used like "agreement" and "*bankruptcy sales terms*" to argue literal truth in Roby's testimony and literal accuracy in the Court's Sentencing Memorandum. Under these circumstances, Petitioner had more than ample cause for failing to appeal the Court's credibility determination, as the government's interference "made compliance [with the procedural rule] impractical." *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

Petitioner also did not procedurally default on the *Brady* portion of Ground One. The government never disclosed the *Brady* material identified above and in his opening Merits Brief and thus he clearly could not have incorporated it into arguments at sentencing and on appeal regarding the government's impact on loss amount.

V. THE GOVERNMENT HAS NOT ESTABLISHED "BEYOND A REASONABLE DOUBT" OR TO A "REASONABLE PROBABILITY" THAT THE COURT WOULD HAVE IMPOSED THE SAME SENTENCE IN THE ABSENCE OF THE *NAPUE* AND *BRADY* VIOLATIONS.

The government's final argument on Ground One is that the Court would have imposed the same sentence even if it erred in calculating the Sentencing Guidelines range. (Govt. Merits Brief 87.) This argument fails, first, because the *Napue* and *Brady* violations did not merely result in an error in the calculation of the Sentencing Guidelines, but rather a denial of Petitioner's due process rights. The Court surely did not mean it would have imposed the same sentence even if, for example, the government was proven to be the cause of First Bank's loss as a result of a forfeiture position the government's own witness falsely denied, under oath, the government took. Indeed, the Court's Sentencing Memorandum said it would have imposed the same sentence only if it "inadvertently erred" in calculating the Sentencing Guidelines range. (Crim. Dkt. No. 927 at 50.) An error based on a *Napue* and *Brady* violation is not "inadvertent."

Moreover, under Eighth Circuit law, a court's statement that it would impose the same sentence even if it miscalculated the Sentencing Guidelines range is given no effect unless the court explains the alternative sentence on the basis of an "alternative Guidelines range without the disputed enhancement." *United States v. Viezcas-Soto*, 562 F.3d 903, 908 (8th Cir. 2009); *see also United States v. Icaza*, 492 F.3d 967, 971 (8th Cir. 2007). This requirement exists because "the absence of an identifiable advisory guidelines range for the alternative sentence thwarts [the appellate court's] review of the sentence for reasonableness." *United States v. Bah*, 439 F.3d 423, 431-32 (8th Cir. 2006). Here, the Court did not provide an identifiable Guidelines range for the alternative sentence; instead, the Court relied on the accuracy of the government witness's testimony that a No Rubashkins restriction did not exist and declined altogether to consider the impact of that restriction on loss amount. Given the falsity of the testimony on which the Court

relied, and the suppressed information regarding the impact of the government's forfeiture position, there is no basis to conclude "beyond a reasonable doubt" or to a "reasonable probability" that the Court's sentence would have been the same but for the *Napue* and *Brady* violations. *See Bagley*, 473 U.S. at 679-82 (articulating the materiality standards for *Napue* and *Brady*, respectively). The evidence shows Agriprocessors' assets had a value of at least $68.6 million and the Bankruptcy Trustee expected to receive $40 million or more in bids but for the government's interference. A transaction in this neighborhood would have wiped out First Bank's loss altogether. The government cannot possibly believe the Court would have imposed a 324-month sentence if the Sentencing Guidelines range could have been as low as 30-37 months but for the due process violation.

The government's attempt to use the Court's hypothetical statement that it might have varied upward on account of the harboring of illegal aliens does not change this conclusion. The fact is, the Court did *not* vary upward, and thus a statement that it considered doing so does not establish "beyond a reasonable doubt" or to a "reasonable probability" that it would have done so absent *Napue* and *Brady* violations.

Finally, although the government limits this argument to the section of its Merits Brief relating to Ground One, well-established law requires the government to consider the cumulative effect of *Brady* and *Napue* violations when determining materiality. *See Kyles v. Whitley*, 514 U.S. 419, 436 (1995) ("[S]uppressed evidence [must be] considered collectively, not item by item."). Thus, the Court must evaluate Grounds One and Three together when considering materiality.

VI. THE GOVERNMENT'S ADMISSIONS ALSO ESTABLISH A BRADY VIOLATION ON GROUND THREE.

Turning to Ground Three, the government admits, for the first time, nearly seven years after Petitioner's trial, that a key cooperating witness, Mitchel Meltzer, disclosed to the government during an interview that financial transactions involving the Kosher Community Grocery ("KCG") and Torah Education ("TE") accounts were designed to recreate the "float" Petitioner previously lost when banking laws changed. (Govt. Merits Brief 95.) The government further admits – or, at least, does not deny – that Meltzer informed the government he did not believe Petitioner intended to defraud the bank with the movement of funds. The only question is therefore whether this withheld information is material for purposes of *Brady*. The government offers several arguments it is not, including that Meltzer's information was cumulative and/or inadmissible, Petitioner already knew of it, and the information does not fully refute the government's money laundering theories at trial. *See, e.g.*, Govt. Merits Brief 101 (Meltzer information not material because it "fail[s] to account for the best evidence that [Petitioner] engaged in concealment money laundering; that is, the fact that [Petitioner] manipulated the amounts of the transfers between accounts…"). None of these arguments is persuasive.

As an initial matter, the government's Merits Brief completely misses one of the most significant ways in which the non-disclosure of Meltzer's information caused prejudice to Petitioner; namely, the effect it had on the calculation of his Sentencing Guidelines range. The government argued to the jury, in post-trial motions, in its Sentencing Memorandum, and to the Eighth Circuit that the purpose of using the TE and KCG accounts was to make it appear as if the funds came from customers. *See* Govt. Sentencing Memorandum (Crim. Dkt. No. 876-1) at 60 ("Defendant could have committed money laundering by simply writing checks from Agriprocessors' accounts in random amounts and depositing them into the depository account. He

did more than that. In his offenses of conviction, defendant ran the money through the accounts of straw customers—KCG and TE."); Government's Resistance to Defendant's Motion for Judgment of Acquittal at 20 (Crim. Dkt. No. 738) ("Defendant's only purpose for routing the funds through the [TE] and [KCG] accounts was to make the funds appear to be payments by customers…"); Brief of Appellee at 80 ("[W]ith regard to his money laundering convictions, [Petitioner] took the extra step of running the money through Kosher Community Grocery and Torah Education accounts to conceal its source."). In other words, the government characterized the use of the KCG and TE accounts as being part of what the Eighth Circuit later described as "classic money laundering transaction[s]" in which the third-party accounts were used for the specific purpose of allowing repayments to be made to First Bank from some source other than Agriprocessors itself. *See United States v. Rubashkin*, 655 F.3d 849, 866 (8th Cir. 2011).

The government had to portray the KCG and TE transactions in this way to obtain two extra points under the Sentencing Guidelines for "sophisticated laundering," as the government could not have proven two or more levels of laundering transactions if the only laundering was the writing of checks in odd amounts, which it now emphasizes in its Merits Brief. *See* USSG §2S1.1, comment. (n.5) ("Sophisticated laundering typically involves the use of . . . two or more levels (i.e., layering) of transactions . . . that were intended to appear legitimate."). The Court ultimately accepted the government's characterization of a multi-layered scheme and applied the two-level enhancement for sophisticated laundering, *see* Court's Sentencing Memorandum (Crim. Dkt. No. 927) at 33, thus adding 62 months to Petitioner's sentence as measured from the bottom of the Guidelines range.

Meltzer's undisclosed statements undermine the basis for the two-level enhancement. His statements establish that the use of the KCG and TE accounts had nothing to do with concealment,

but rather was designed to "play the float." The statements therefore directly contradict the government's argument that Petitioner "took the extra step of running the money through Kosher Community Grocery and Torah Education accounts to conceal its source." Brief of Appellee at 80; *see also* Govt. Sentencing Memorandum (Crim. Dkt. No. 876-1) at 60 (making virtually identical argument). Had Meltzer's statements been disclosed, there is, at a minimum, a "reasonable probability" of a different result at sentencing. It follows that § 2255 relief is appropriate.

The impact of Meltzer's undisclosed statements goes further, however, and calls into doubt the money laundering convictions themselves. As Petitioner noted in his opening Merits Brief, there were literally hundreds of transactions in 2008 alone in which checks were sent directly from the Agriprocessors operating account to the sweep account at Decorah State Bank. These transactions are utterly inconsistent with the government's trial theory that Petitioner used the KCG and TE accounts to conceal that Agriprocessors was the source of funds. Moreover, undisputed evidence showed that KCG and TE checks were written to the sweep account *before* the Agriprocessors checks were written to backfill those accounts. The government's money laundering case was therefore flimsy even with the checks being written in odd amounts. There is at least a "reasonable probability" that testimony from a longtime Agriprocessors employee with intimate knowledge of the company's finances that Petitioner did not intend to defraud the bank would have caused the jury to render a "not guilty" verdict on those charges. *See Agurs*, 427 U.S. at 112 ("[I]f the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create reasonable doubt.")

The fact that Toby Bensasson provided a statement to the FBI and trial testimony on "playing the float" does not render Meltzer's statements immaterial or cumulative under *Brady*.

Bensasson's statements and testimony indicated that "playing the float" was merely one reason Petitioner caused the use of the KCG and TE accounts; he said Petitioner also did so for purposes of concealment. *See* Govt. App. 182 ("This was done for several reasons, including that AI could get another days worth of use from this money because of the float. Also . . . it would not appear to the DBT that AI was depositing its own money."); Govt. App. 152 ("[H]e needed a third-party situation where he could turn around and pay down those . . . inflated sales . . . you've got *also* the float of one day by doing that.") (emphasis added). Meltzer, by contrast, said the "movement of funds to the KCG and TE accounts therefore could *only* have been designed to extend the time of the 'float' and help with short-term cash flow management." (App. 61) (emphasis added). Meltzer further stated "the movement of funds was simply a means of managing cash flow." (Id.) Meltzer's undisclosed statements therefore exculpated Petitioner on the money laundering charges, whereas Bensasson's statement and testimony did not. It follows that Meltzer's statements were not cumulative. *See, e.g., Boss v. Pierce*, 263 F.3d 734, 745-46 (7th Cir. 2001) (state court unreasonably concluded undisclosed evidence was cumulative of trial testimony without considering "the differences between the new evidence and the testimony").

With respect to Meltzer's statement regarding Petitioner's lack of intent to defraud, the government argues his statement would not be admissible and thus is not material. However, the Eighth Circuit and numerous other courts have permitted testimony regarding a person's intent. *See, e.g., United States v. Duncan*, 29 F.3d 448, 450 (8th Cir. 1994) ("[S]everal investors testified that they continued to believe [Defendant] was an honest businessman and did not intend to defraud them."); *United States v. Rhone*, 864 F.2d 832 (D.C. Cir. 1989) (reversing mail fraud and theft convictions where defendant "testified that she did not intend to defraud the District of Columbia"); *United States v. Laurence*, No. 94-1002, 94-1003, 1994 WL 702341, *2 (10th Cir.

Dec. 16, 1994) (reversing for resentencing where witness testified she believed the defendant "did not intend to defraud anyone"). Moreover, the government's narrow focus on admissibility ignores the larger relevance of Meltzer's exculpatory statement to helping Petitioner's trial counsel understand what to expect when cross-examining him. The cross-examination of a witness known to be sympathetic to the defendant is very different than of a witness believed to be hostile. *See Leka*, 257 F.3d at 103 ("The opportunity for use under *Brady* is the opportunity for a responsible lawyer to use the information with some degree of calculation and forethought.").

For similar reasons, the government's argument that if Petitioner thought Meltzer possessed exculpatory information, "he could have pursued that testimony or evidence on his own" (Govt. Merits Brief 100-101) is unavailing and utterly at odds with *Brady*. To the extent the government is suggesting Petitioner's counsel should have blindly asked Meltzer questions regarding Petitioner's intent, without any knowledge of what Meltzer had been telling the government, the suggestion is absurd. *See United States v. Mahaffy*, 693 F.3d 113, 131 (2d Cir. 2012) (finding *Brady* violation despite government's claim the defendant already knew the exculpatory information; "whatever [the defendant] knew, he did not know what [the witness] told the SEC under oath"). Indeed, Meltzer was an admitted liar with a huge incentive to testify favorably to the government and therefore not someone any reasonable trial attorney would take a chance with. *See Leka*, 257 F.3d at 103 (rejecting argument that defense attorney could have "call[ed] a witness cold, which would be suicidal").

Finally, the government cannot excuse the non-disclosure by arguing Meltzer's statement was *in*culpatory in that it indicated Petitioner was engaged in check-kiting. (Govt. Merits Brief

95-96.)[20] There is a substantial difference in punishment between a conviction solely on fraud charges and a conviction for both fraud and money laundering. In the context of this case, for example, the government's decision to charge both resulted in nearly ten additional years of imprisonment for Petitioner as measured from the bottom of the Sentencing Guidelines range. This additional punishment was clearly important to the government, as it went to great lengths on appeal to defend the money laundering charges against Petitioner's "merger" argument, which asserted that the money laundering charges impermissibly relied on the same financial transactions as the underlying bank fraud charges. The government overcame this argument on appeal by contradicting the position it took at sentencing regarding whether repayments to First Bank were part of the scheme to defraud. *Compare* Sent. Tr. 546 ("[Government Counsel]: But it was the defendant's payment of interest that was necessary to keep the fraud going. If the defendant's didn't pay interest, the loan would have been called. So that's part of the fraud too, Your Honor.") *with* Brief of Appellee at pp. 79-80 (Reply App. 10-11) ("[T]here was nothing about either [fraud] scheme that required defendant to pay down the revolving loan. Rather, he could have just pocketed the proceeds.") Having gone so far to preserve the money laundering conviction (and the additional ten years' imprisonment that came with it), the government cannot spin around again and try to claim the money laundering and bank fraud are suddenly equivalent offenses after all. *Brady* requires the government to disclose evidence material "either to guilt or to punishment," 373 U.S. at 87, and this obligated the government to produce Meltzer's statement, which was, at a minimum, material to the latter. *See id.* 373 U.S. at 88-90 (affirming entry of post-conviction relief

[20] This portion of the government's argument ignores the portion of Meltzer's statement that Petitioner lacked the intent to defraud the bank, which is clearly exculpatory to *all* charges.

based on government's suppression of co-defendant's statement even though the statement in part implicated the defendant).

VII. TO THE EXTENT THE COURT DECLINES TO GRANT § 2255 RELIEF ON THE BRIEFS, THE GOVERNMENT'S MERITS BRIEF ILLUSTRATES WHY DISCOVERY AND AN EVIDENTIARY HEARING ARE NECESSARY.

For reasons set forth above, the government's admissions are sufficient to warrant the entry of § 2255 relief on both Grounds One and Three. To the extent the Court disagrees, however, Petitioner renews his request for discovery and an evidentiary hearing on all matters identified in his Merits Brief.

The government's Merits Brief highlights certain additional factual disputes on relevant issues. First, although the government repeatedly admits the existence of a No Rubashkins restriction perfectly in line with the testimony of Meyer Eichler and Yechiel Cohen (both of whom were discredited by the Court in favor of Roby), the government's Merits Brief is occasionally vague regarding the parameters of that restriction. The government argues, for example, that AUSA Murphy's statement in early December that there could be "no involvement of any Rubashkins from any standpoint" is not necessarily inconsistent with Roby's testimony that two months later the AUSA said the involvement of Aaron Rubashkin as an advisor was "not a deal breaker." (Govt. Merits Brief 72.) The suggestion seems to be that prosecutors may have changed their position. Petitioner should be given leave to take depositions of the government attorneys to determine whether they did or didn't. After all, Eli Soglowek's affidavit denies that a statement was made identifying Aaron Rubashkin as "not a deal breaker." (App. 94) ("[R]epresentatives of the United States Attorney's Office told me that if [my company] purchased the assets of Agriprocessors, no member of the Rubashkin family or any related entity could have any management, consulting, or ownership role in the business going forward."). This creates a clear factual dispute.

Another factual dispute involves Roby's bias. The government does not deny being aware of Roby's bias at the time it called her to testify, instead merely arguing that Petitioner "offers no evidence" of its knowledge. Petitioner *did* offer sufficient evidence, however, including apparently-undisputed evidence that government attorneys were in frequent contact with Roby in her capacity as counsel for Trustee Sarachek and Roby was willing to share her bias with an out-of-state client who had no connection to the criminal case. It is highly unlikely Roby would disclose her bias to an uninvolved client but not make similar comments to the government attorneys prosecuting Petitioner's case. Discovery is appropriate to examine whether the government knew of her bias, as the failure to disclose evidence of a key witness's bias is a particularly severe *Brady* violation. *See United States v. Banks*, 546 F.3d 507, 513 (7th Cir. 2008) (reversing for new trial based on *Brady* violation involving undisclosed evidence of bias even though "acquittal may have been less likely than conviction even if the impeachment evidence had come to light"); *United States v. Sipe*, 388 F.3d 471, 477 (5th Cir. 2004) (affirming entry of new trial where government withheld evidence that a witness disliked the defendant); *Schledwitz v. United States*, 169 F.3d 1003, 1015 (6th Cir. 1999) (granting post-conviction relief where government failed to disclose that witness who was held out as neutral and disinterested was actually heavily involved in the criminal investigation);.

Discovery also is necessary to determine whether Roby testified truthfully when she said "almost every potential purchaser, if not every potential purchaser, indicated their desire to have Rubashkins in management." (Sent. Tr. 513-14) (Govt. App. 86.) The government denies the accuracy of this testimony. *See* Govt. Merits Brief 65 (Petitioner's position is deficient because there is no "indication that the purported perspective bidders ever communicated to the government a clear intention or desire to include Rubashkins in the future of the company."). Thus,

to the extent the Court is unwilling to grant § 2255 relief in Petitioner's favor on the Briefs, the conflict between the government's position and Roby's testimony creates another factual dispute requiring an evidentiary hearing.

Finally, discovery is necessary with respect to the impact of Marc Ross's report identifying Agriprocessors' assets as having $68.6 million in value shortly before the bankruptcy filing. The government's attack on Petitioner's use of the Ross Report (Govt. Merits Brief 80-83) is full of factual assertions that are either wrong or must be analyzed in an evidentiary hearing. The government's suggestion that Ross did not take into account inflated accounts receivable and inventory (Id. 81-83), for example, is simply wrong. Ross made downward adjustments to account for inflated accounts receivable and inventory (*see* App. 62-63) ("(a) To adjust accounts receivable for the fraud perpetrated by management. . ."). The government's other arguments are matters of pure fact and often beg the very question at issue in this post-conviction review proceeding—the impact of the government's forfeiture position and conduct. *See, e.g.*, Govt. Merits Brief 83 ("[I]f Agriprocessors' assets were as valuable as Movant now claims, they would have fetched a far greater price in the bankruptcy sale."); Govt. Merits Brief 81 ("[Values in Ross's report] bore little or no relation to the actual value of the assets."). These issues should be addressed in an evidentiary hearing after permitting Petitioner to take discovery.

CONCLUSION

As the government's responsive Merits Brief contains sufficient admissions to establish both the *Brady* and *Napue* violations in Ground One and the *Brady* violation in Ground Three, the Court should grant Petitioner § 2255 motion without a hearing, order the government to produce any remaining undisclosed exculpatory information, and set this matter for a new trial on money laundering charges and new sentencing hearing on the remaining counts of conviction.

Alternatively, and at a minimum, the Court should grant Petitioner's request for discovery and set this matter for an evidentiary hearing.

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon the parties to this action by serving a copy upon each party listed below on June 20, 2016 by

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ADDENDUM

Summary of the Parties' Positions on Specific Due Process Issues.

The lengthy briefing from the parties may make it difficult to evaluate the merits of Petitioner's *Napue* and *Brady* claims. In the interest of providing some level of clarity, the following table is an attempt to summarize Petitioner's position, the government's response, and Petitioner's reply regarding the facts surrounding specific *Napue* and *Brady* allegations:[21]

Alleged Napue Violations

Petitioner's Position	Government's Response	Petitioner's Reply
The following testimony from Roby was false: Q. And is it your testimony that there was never an edict or prohibition that any purchaser could be involved with Aaron Rubashkin? A. Is there an edict that they couldn't, is that your question? Q. That they could not, yeah. A. There was none to my knowledge.	The government admits imposing restrictions on the ability of purchasers to be involved with Aaron Rubashkin but claims this portion of Roby's testimony is taken out of context because she goes on to explain that "there was some discussion of the concern held by both the trustee and the United States Attorney that someone could come in and make an offer on behalf of the family." Furthermore, the government alleges it made sufficient disclosures to allow Petitioner's counsel to correct any misleading or false statements on the subject	The Court understood Roby's testimony in exactly the way Petitioner did, concluding, in the Court's own words: Defendant argued that, in the Bankruptcy, the government took the position and presented testimony **that no purchaser of Agriprocessors could have any involvement with Defendant or Defendant's family**, resulting in a depressed sale price of Agriprocessors. However, the attorney for the Trustee in the Bankruptcy Auction, Paula Roby, testified that **there was no such condition attached to the sale of Agriprocessors**. The court credits Roby's testimony and discredits testimony from Defendant's witnesses. It is the government, and not Petitioner, that appears to be taking things out of context. Moreover, the

[21] The government raises certain overarching arguments in response to Petitioner's position, such as the argument the sentence would have been the same regardless of any *Brady* or *Napue* violations. These tables are not intended to, and will not, recite those overarching arguments but rather will focus on specific allegations.

		government cannot defend a *Napue* violation by claiming it provided sufficient information to allow the defendant to know the testimony was false.
The following testimony from Roby was false and misleading: Q. So you believe the state of the record is that if Soglowek wanted to come in and re-install Aaron Rubashkin, to purchase that company, they—they would say that's okay. That's your understanding? A. I – I can't have an understanding about that, because that question was never posed. I can't – I don't know what's in the minds of the US Attorneys. All I can tell you is I heard questions posed and assurances given.	Although it admits an AUSA told Trustee Sarachek and Roby there could be "no involvement of Rubashkins from <u>any</u> standpoint" and that Aaron Rubashkin was not permitted to have an ownership interest in the new company, the government argues Roby's testimony is not false or misleading because the question was posed as a hypothetical.	Roby was in the room with prosecutors when they said there could be "no involvement of Rubashkins from <u>any</u> standpoint" and thus it was false for her to claim, without correction, that she "do[es]n't know what's in the minds of the US Attorneys." She knew *exactly* what was in their minds because *they told her*. The form of the question may have been a hypothetical, but her answer was stated as fact, and it was false. Furthermore, if the government had a problem with the form of the question, it should have interposed an objection at the time.
The following testimony from Roby was false and misleading: Q. Okay. Well, if there was no rumor in the wind that – that there was a prohibition against Aaron Rubashkin in particular, then why is there any discussion about it? A. It's hard for me to testify about rumors in the wind. Q. Well, you were present for meetings when the question was asked. Why is the question asked unless somehow people are hearing through the grapevine that there's a no-Aaron-Rubashkin edict?	The government argues that anything misleading or false about Roby's testimony was caused by the "hopeless imprecision" of the questions. Even if false or misleading, the government alleges "there is no evidence the government was aware any testimony was materially false such that it had a duty to provide some manner of correction" because Petitioner "was in as good a position as government counsel to ask follow up questions and attempt to clarify any ambiguity."	There was no "ambiguity" in Roby's testimony. She said any rumors of a prohibition on Aaron Rubashkin's involvement in the new entity were "very unreliable." Given the government's unequivocal position at the time of the bankruptcy on "No Rubashkins" (which the government now concedes), there is no possible reading of Roby's testimony as anything other than as false and misleading. Moreover, the government knew it was false because the government attorneys' own statements to Roby and Trustee Sarachek were at issue. Furthermore, Petitioner's counsel *was* asking follow up questions, but those questions were causing Roby to dig her heels in further in insisting

A. The grapevine can be a very unreliable thing.		there was not a "No Rubashkin" rule. In that situation, *Napue* makes it incumbent upon the government attorney to step in and notify the Court of the truth. Finally, the argument the government was not aware of material falsity in the testimony is frivolous. A government attorney imposed the very restriction Roby denied existed.
The following testimony from Roby was false and misleading: Q. Well, wouldn't you agree, since this was a company run by Jewish Americans who had gained some level of renown, that if – if the rumor went into the Jewish business community that there was a no-Rubashkin edict, that that might cost value on the property? A. Mr. Sarachek, Mr. Ross, Mr. Schwab, all the partners of Triax Capital Advisors, are also, in my opinion, Jewish people of some renown, and they worked very, very hard to dispel any rumors that were in the community and to market this as vigorously as possible.	The government does not address this testimony.	Given the government's concession that a "No Rubashkin" restriction existed, Roby's testimony that Trustee Sarachek and others "worked very, very hard to dispel any rumors that were in the community" regarding such a restriction is clearly false and misleading. Moreover, Trustee Sarachek himself states, under oath, that he was *not* trying to "dispel" rumors regarding the No Rubashkin restriction, but rather was communication that restriction to bidders *at the government's direction*.
The following testimony from Roby regarding the timing of a meeting between AUSAs and Soglowek was false: A. But at the meeting that I sat in with Mr. Soglowek, my trustee and Mr. Soglowek made it very clear that they saw him as an indispensable advisor, and they were told by the United States Attorney's	The bolded testimony is not necessarily false because Roby might have been referring to a meeting she had with prosecutors in which Soglowek was not present. If it is false, it is an innocent misrecollection and prosecutors did not know it was false.	The government's suggestion that Roby might have been referring to some other meeting is frivolous. There is nothing in the exchange to provide even the slightest indication the meeting at issue was any other than the one with Soglowek. Prosecutors were present in the meeting with Soglowek and thus, at a minimum, had constructive knowledge of the falsity of the

Office that that was not a deal breaker. That did not – was not something that was going to trigger any action or make it impossible to buy this company. Q. What was the date of that? A. I don't recall offhand. Q. Was it in January or was it in April? A. Well, it wouldn't have been in January because that's when my son was in the hospital, so it would have been sometime after that. Q. It was in April when Soglowek came back for a second run at trying to buy the company, right? A. No, it was not. It was prior to the initial auction. Q. Was it before – was it before Niat Israel (phonetic) offered $17 million plus rent of $3 million per year? A. **It was before Soglowek entered its $40 million bid. We met with the US Attorney's prior to that.** (emphasis added)		testimony. This is enough to create a duty to correct even if the prosecutors genuinely did not realize it was false when she said it.
The following testimony from Roby was false and misleading: Q. And there's been some discussion about a forfeiture allegation in the indictment and how that may or may not have affected any prospective bidders. Do you have an opinion about how that may	Roby's testimony is taken out of context because she later said, "when the forfeiture allegations came down, we freaked out a little bit. We were a little worried about it ourselves. We immediately contacted the US Attorney's Office and started a dialogue. When we indicated that we were concerned that there may be some chilling effect on	Roby's so-called "clarifying" testimony implies prosecutors somehow softened their position on forfeiture after learning of the trustee's concerns. This implication is false. Prosecutors aggressively threatened bidders from start to finish and did so even after learning from counsel for the victim, First Bank, that their forfeiture position would result in "few, if any,

have impacted any of the bidders in this case? A. I do. Q. And what's that? A. It did not.	prospective bidders, we spoke about that, and we all agreed that the best way to handle it would be to have prospective bidders come talk to us."	potential purchasers [being] willing to navigate through a pending forfeiture proceeding and pay fair value." Prosecutors never disclosed the letter from First Bank's counsel, and instead disclosed only the letter that *preceded* it, in which prosecutors purported to care about First Bank's concerns. In any event, prosecutors knew, from direct conversations with bidders, that many of those bidders were interested in Rubashkin family involvement, yet prosecutors would not relent in their "No Rubashkin" position except to permit Heshy Rubashkin to serve as a line employee. As the bidders were interested in *Aaron* Rubashkin, the "Heshy exception" was of no significance.
The following testimony from Roby was false and misleading: Q. There's been some talk about this no Rubashkin agreement. First of all, are you aware of any agreement out there that relates to some agreement not to hire Rubashkins. A. No. There was—if I could just expound on that for just a second. Q. Yes, please. A. There was in – in the bidding procedures a provision that required anyone who wished to be a qualified bidder to identify their connections with several parties, including the related parties in the bankruptcy, A.A. Rubashkin and sons, the Rubashkin family, but also with creditors, with – you know,	The first portion of Roby's testimony is not false because even though the government admits (or, at least, does not dispute) that an AUSA told Trustee Sarachek there could be "no involvement of Rubashkins from <u>any</u> standpoint," this is not the same as an "agreement not to hire Rubashkins." The government does not directly respond to Petitioner's argument that there was inconsistency between, on the one hand, the questions and answers implying that the related party disclosures were driven by the trustee as a "routine" part of ensuring a "good faith purchaser," and, on the other hand, the statements from prosecutors during the	Petitioner finds absurd the distinction the government apparently sees between an "agreement not to hire Rubashkins" (which the government says did not exist) and a directive to potential purchasers as a condition of the government waiving forfeiture that there could be "no involvement of Rubashkins from <u>any</u> standpoint" (which the government admits *did* exist). The Court apparently shares this confusion. *See* Sentencing Memorandum at 22-23 (rejecting Petitioner's argument that no members of his family could be involved in the business and concluding, based on Roby's testimony, that "there was no such <u>condition</u> attached to the sale of Agriprocessors") (emphasis added).

with anyone involved in Agriprocessors. That's—that's a fairly routine thing for us to do. We need to *make disclosures to the bankruptcy court. Ultimately, my trustee is responsible to the creditors and to Judge Kilburg, and he needs to go in and be able to say in good faith that he has qualified bidders ready to bid.* Q. All right. And so this whole idea of related parties, is that something that happens in bankruptcy as part of the procedures on a pretty regular basis? A. It has happened in bankruptcies I *have seen in the past, yes.*	December 5, 2008, meeting that they did not trust bankruptcy law or the bankruptcy judge and planned to use forfeiture to ensure "'good faith' means the same to you as we <u>need</u> it to mean."	When the government gives a directive to potential bidders not to use Rubashkins "from <u>any</u> standpoint," and the potential bidders comply with that directive, there has, in fact, been an "agreement" not to use Rubashkins in consideration of the government's offer not to forfeit the assets. The government's position is an inappropriate exercise in hair-splitting and semantics. Furthermore, prior to the quoted question and answer, Petitioner's counsel and witnesses had never once during the sentencing hearing referred to the fmoreNo Rubashkin rule as an "agreement," and thus government counsel's use of the word "agreement" in his question appears to have been a calculated effort to mislead the Court while still leaving counsel with some ability to make the hair-splitting argument the government is now making.
Various other aspects of Roby's testimony were false and misleading, insofar as they reinforced the false suggestion that government attorneys had not imposed a "No Rubashkins" restriction or had a negative impact on prospective bidders with their aggressive forfeiture conduct.	When viewed as a whole, Roby's testimony and other "extensive disclosures" accurately communicated the government's forfeiture position to Petitioner and the Court.	The government's Merits Brief exposes even more areas of false and misleading testimony, including Roby's statement that "a prohibition was never leveled"; that the government's forfeiture allegations "did not" affect potential bidders; and

Alleged Brady Violations

Petitioner's Position	Government's Response	Petitioner's Reply
The government failed to disclose the existence or substance of the December 5, 2008, meeting in which prosecutors imposed the "No Rubashkin" rule and were warned that pursuing forfeiture would "kill off bidders" and "enormously hurt [Sarachek's] ability to do his job" of maximizing the value of the estate.	The government appears to claim it disclosed the substance of the December 5, 2008, meeting, when it produced AUSA Deegan's letter to Lloyd Palans dated December 8, 2008. The government further argues Petitioner knew or had the ability to know of the government's No Rubashkin restriction and impact on the bankruptcy sale. Finally, the government alleges Roby's testimony about how they "freaked out a little bit" and were worried the forfeiture allegations would have a "chilling effect" was sufficient to disclose to the Court that concerns existed regarding the effect of forfeiture on the sale price.	Roby's testimony left the listener with the impression the government took a reasonable and accommodating position on forfeiture that left bidders, the Trustee, and the victim satisfied. This is untrue. The government continued making aggressive threats against bidders clear into July, and succeeded in scaring off a number of them, leading the victim to call a post-petition loan into default. In addition, although the government produced the December 8 Deegan letter, it did *not* produce the return letter from Lloyd Palans dated December 9 in which Palans said the government's approach likely would have a "significantly negative impact" on the sales price and result in "few, if any" bidders willing to pay fair value for the assets. Finally, the information the government did disclose was not enough to prevent the Court from erroneously finding there was not a No Rubashkin rule, and thus it is self-evident the failure to disclose the substance of the December 5 meeting was material and prejudicial.
The government failed to disclose the substance of prosecutors' meetings with prospective bidders in which they made threats and prohibited Aaron Rubashkin's involvement in the successor entity to Agriprocessors.	The government does not contest that it did not disclose the substance of meetings with prospective bidders but argues Petitioner knew or had the ability to know the substance of those meetings.	Petitioner did not know, and could not reasonably have known, the identity of all the bidders and prospective bidders with whom the government met. Moreover, given the government's disclosed correspondence professing a desire "not to impede the sale of Agriprocessors' assets" and not to interfere with the ability of creditors

		to recover in the bankruptcy, Petitioner would not have suspected without further disclosure that the government was as aggressive as it was during the meetings with prospective bidders.
The government failed to disclose the substance of prosecutors' "discussions" regarding forfeiture with First Bank in March 2009 that unsettled the Bank to such a degree it declared a default on its post-petition financing;	The government does not address this issue.	The government produced the December 8 Deegan letter in which the government feigned concern for First Bank's attitude toward forfeiture. By not disclosing the December 9 Palans letter, and further not disclosing the hostile discussions in March 2009 that resulted in First Bank calling the post-petition loan into default, the government left Petitioner with the false impression that First Bank was satisfied with the government's approach to forfeiture and comfortable that fair value would be obtained for Agriprocessors' assets. The government's failure to produce evidence in its possession establishing otherwise is a *Brady* violation.
The government failed to disclose the December 9, 2008, letter from First Bank's counsel stating forfeiture would "have a significantly negative impact on the prospects for a sale" and that "few, if any, potential purchasers [would be] willing to navigate through a pending forfeiture proceeding and pay fair value."	The government does not contest that it did not disclose this letter but argues other disclosures were sufficient to communicate the impact, if any, of the government's forfeiture position on the bankruptcy sale.	The government's primary "disclosure" was the December 8 Deegan letter in which the government feigned concern for First Bank's attitude toward forfeiture and professed a desire not to impede the sale of the assets or recovery for creditors. The undisclosed December 9 Palans letter completely undermines the impression left by the December 8 letter and makes it clear the Bank thought the government's forfeiture position was going to hinder the bankruptcy sale process (which it did). In addition, one of the other "disclosures" the government says it made was in the form of statements

		by an AUSA to the Bankruptcy Court on December 22, 2008. The AUSA told the Court he had "good discussions" with First Bank regarding forfeiture. In reality, the undisclosed Palans letter shows those conversations left First Bank unsettled and more convinced than ever that the bankruptcy sale would not generate fair value for the assets. In March 2009, First Bank even declared a default on its post-petition loan to Agriprocessors as a result of the government's continuing threats of forfeiture.
The government failed to disclose the directive prosecutors provided to Trustee Sarachek to communicate to potential bidders the "No Rubashkin" rule	The government does not dispute imposing restrictions on Rubashkins but does not otherwise specifically address this allegation except insofar as it alleges making disclosures that left Petitioner generally aware of the government's position on forfeiture and No Rubashkins.	Given Paula Roby's testimony that Trustee Sarachek tried to "dispel" any rumors about a No Rubashkin rule, the government's failure to disclose this directive to Sarachek became, at a minimum, a *Napue* violation. Furthermore, given prosecutors' understanding that the defense intended to use the "No Rubashkin" rule as a basis for arguing lower loss amount, prosecutors also had a *Brady* obligation to admit issuing such a directive. The materiality of the non-disclosure is self-evident from the judge's erroneous conclusion, based on Roby's testimony, that a "No Rubashkin" rule did not exist.
The government failed to disclose that the use of the "related party" disclosure requirement resulted from prosecutors' dissatisfaction of the bankruptcy law definition of "good faith purchaser" and distrust of bankruptcy judges.	The government does not address this argument other than to say that Paula Roby's testimony regarding the related party disclosure requirement and "good faith purchaser" concept is accurate.	Given the government's awareness that Petitioner intended to argue the government improperly interfered in the bankruptcy process, the government had an obligation under *Brady* to disclose its refusal to accept the Bankruptcy Code definition of "good faith purchaser." It is difficult to imagine clearer evidence of interference than the government's express refusal to abide by bankruptcy law and insistence on

		imposing its own definitions of legal terms.