NOT SIMPLY "RETRYING THE CASE"

It is well-settled that a jury is the arbiter of disputed facts. In general, coming back later and arguing that the jury was "wrong" it its analysis is disfavored. However, the presumption of correctness afforded to the jury's analysis is dependent upon two assumptions: 1) that the "facts" presented by the prosecutor are considered by the prosecutor, in good faith, to be "true"; and 2) that the jury has all of the relevant information with respect to the interest and bias of the witnesses to conduct a fully-informed analysis of the credibility of the witnesses. When either of those presumptions is breached, the verdict of the jury is suspect. In Segal's prosecution, both presumtions are void.

The basic accounting "evidence" presented by the government was devoid of backup documentation or "working papers" that are required under the most basic accounting standards to accept the conclusions presented. The government had all of Near North's accounting records during the two-year+ period prior to trial. The government additionally subpoened records from third parties. Although the government was in possession of all of the underlying accounting records, there was no team of government accountants assigned to analyze those records. Instead, the government simply adopted the unsupported accounting conclusions of their witnesses, a.k.a. the "Takeover Group," who had a significant personal financial interest in the success of the proseuction of Segal and Near North. There was no governmental due diligence with respect to the accounting conclusions. Instead, the government took the "ostrich" approach of deliberate avoidance of analysis of the accounting records by government or independent third-party accountants.

The falsity of the Government's exhibits is aptly demonstrated through comparison of the exhibits with:

o the testimony of government witnesses -- whose testimony was often

in conflict with the exhibits;

- o the testimony and affidavits of forensic account, CPA Andrew Lotts of FANCO/Coleman, Joseph, Bilstein & Stuart, LLC -- which demonstrated, through the reconstruction of Near North's accounting systems pursuant to Generally Recognized Accounting Principles, including the production and retention of backup "working papers," that the accounting conclusions presented by the government's exhibits were spurrious and false;
- o the plain language text of the Illinois insurance statutes and regulations governing the alleged transgressions of Segal and Near North -- which differed materially from the requirements imposed upon Segal and Near North by government witnesses who opined as to their beliefs as to what the requirements should be.

In all cases, the prosecutors either actually knew that their accounting evidence was false, or should have known as a result of due diligence (as opposed to sticking their heads in the sand), that their evidence was false.

There are four core sets of compilations analyzing the accounting deficiencies in Segal's prosecution: 1) 1989-1996 Accounting; 2) Time of Offense 1999-2001 Accounting; 3) Lack of proper methodology and working papers; and 4) false Credit Writeoffs.

Key documents in the first compilation, 1989-1996 Accounting include: 1) "FIVE" IS NOT EQUAL TO "THREE" - which debunks the government's premise that Pater's "ratio charts," which are based upon three accounting components are equivalent to Cauffield's PFTA use reconciliations, which are based on five accounting components; 2) CAUFIELD'S PERJURY, which amplifies the differences between Caufield's audited statements and Pater's reliance on unaudited financial statements; and 3) PATER'S NUMBERS ARE BASED ON CAUFIELD'S STATEMENTS, which sets forth not only the fact that from 1989

on Caufield produced only unaudited financial statements, as opposed to the audited financial statements that he produced prior to 1988, as well as demonstrating that although Deloitte & Touche "touched" the 1994 and 1995 financials, D&T did not complete audits of those financial statements.

The second component, TIME OF OFFENSE 1999-2001 PFTA CALCULATIONS, references a series of compilations that systematically debunk the government exhibits that purport to support various PFTA calculations advanced by the government during the period of 1999-2001. Also material to the PFTA calculations during the time of offense are misrepresentations of subsidiary losses and the presentation of false accounting theories to conclude that deposits of loan proceeds into the PFTA somehow established that the PFTA was in deficit prior to the deposit.

The third component includes a presentation of flaws the pervade all of the government's accounting exhibits -- which are generally described as the lack of accounting "working papers," which are the minimally required backup documentation and supporting schedules to establish the veracity of accounting conclusions pursuant to Generally Recognized Accounting Practices (GAAP) and Generally Accepted Audit Principles (GAAP). Without those critical backup documents, the conclusory accounting exhibits presented by the government were not worth the paper upon which they were printed.

Following the collapse of the Enron Corporation in 2001, Arthur Andersen, LLP., was prosecuted for obstruction of justice with respect to the shredding of documents relative to Arthur Andersen's engagement by Enron. One of Andersen's defenses at trial was that it had shredded only surplus and irrelevant documents -- not the critical "work papers" backing up its accounting work:

> Andersen's explanation for the undeniable surge in shredding and the persistent and uncustomary reminders to employees to abide Andersen's retention policy was that it wanted to leave only the work papers

> of auditing efforts, and that Duncan did not want his superiors in Chicago to face his unkempt files.

Arthur Andersen, LLP v. U.S., 374 F.3d 281, 288 (5th Cir. 2004) (emphasis added). Andersen understood the critical role of "work papers" as a backup to accounting work. Andersen's document retention policy, which was used to justify the shredding of tons of documents related to Andersen's relationship with Enron required the retention of the critical work papers. Ultimately, Andersen prevailed in its defense. Arthur Andersen v. United States, 544 U.S. 696 (2005). Had Andersen also shredded its accounting work papers, it is likely that the missing "corruptly persuades" element of mens rea forming the basis for Andersen's victory in the Supreme Court would have been inferred by the destruction of those key documents. Without backup work papers, the accounting conclusions based on them are worthless.

The fourth component is EXHIBIT 119 CREDIT WRITEOFFS, which analyzes "Group Exhibit" 119 -- which never should have been admitted as a "group" exhibit in that the three subcompontens of the exhibit are not related to each other. Because this exhibit was the critical foundation to the government's allegation of the Credit Writeoff subscheme of PFTA fraud, it has the potential to be the Achille's heel of the Government's case.

"Accounting" was the centerpiece of Segal's trial. "Accounting" is an area of specialized, technical knowledge and skill, conducted according to generally accepted principles in the field and subject to peer review. Testimony about "accounting" is therefore potentially subject to the requirements of Fed.R.Evid. 702. See Kumbo Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999) ("We conclude that Daubert's general holding -- setting forth the trial judge's general 'gatekeeping' obligation -- applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge.").

At Segal's trial, different lay witnesses testified to different dollar balances in the same account on the same day -- sometimes different by millions of dollars. The Government's accounting data was presented by lay witnesses, pursuant to Fed.R.Evid. 701. Courts have recognized that "reliability" is an important factor in assessing technical testimony offered by lay witnesses:

> [T]he admissibility of opinion evidence under the structure of Rule 701 is not without limit. Rule 701's requirement that the opinion be "rationally based on the perception of the witness' demands more than that the witness have perceived something firsthand; rather, it requires that the witness's perception provide a truly rational basis for his or her opinion. Similarly, the second requirement, that the opinion be "helpful to a clear understanding of the witness's testimony or the determination of a fact in issue" -- demands more than that the opinion have a bearing on the issues in the case; in order to be "helpful," an opinion must be reasonably reliable.

Asplundh Mfg. Div. v. Benton Harbor Engineering, 57 F.3d 1190, 1201 (3rd Cir. 1995). Mindful of this concern, Fed.R.Evid. 701 was amended in 2000:

> Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing.

Fed.R.Evid. 701. Advisory Committee Notes, 2000 Amendments.

Not all "accounting" testimony must be offered by "experts" pursuant to Fed.R.Evid. 702. As the Advisory Committee noted:

> [M]ost courts have permitted the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert. See e.g., Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153 (3rd Cir. 1993) (no abuse of discretion in permitting the plaintiff's owner to give lay opinion testimony as to damages, as it was based on his knowledge and participation in the day-to-day affairs of the business).

Ibid.

Segal's trial embodied everything that the 2000 amendment to Fed.R.Evid. 701 was designed to prevent -- the presentation of "expert" testimony through the subterfuge of lay opinion masquerading as a fully-qualified expert opinion.

In the federal courts, it is not enough to simply allege that a witness might have offered favorable testimony had they testified at trial. Instead, the courts demand a clear showing of the substance of the witness's testimony:

> [W]e cannoe see how, especially in the context of a habeas proceeding that collaterally attacks the state court conviction, the petitioner's obligation can be met without a comprehensive showing as to what the investigation would have produced. The focus of the inquiry must be on what information would have been obtained from such an investigation and whether such information, assuming its admissibility in court, would have produced a different result. Under usual circumstances, we would expect that such information would be presented to the habeas court through the testimony of the potential witness. . . . [I'f the potential witnesses are not called [before the district court], it is incumbent on the petitioner to explain their absence and to demonstrate, with some precision, the content of the testimony they would have given at trial.

U.S. ex rel. McCall v. O'Grady, 908 F.2d 170, 173 (7th Cir. 1990) (quoting United States ex rel. Cross v. DeRobertis, 811 F.2d 1008, 1016 (7th Cir. 1987). In Segal's case, although an accountancy expert was not called at trial, a defense accountancy expert did testify at Segal's subsequent forfeiture hearing. Additionally, following the forfeiture hearing, the accountancy expert has submitted sworn affidavits expanding his testimony at the forfeiture hearing. As a result, the accountancy expert testimony that could have been offered at Segal's trial is not a matter of speculation. The testimony is especially significant because the "accountancy" testimony from Government witnesses was not offered pursuant to Fed.R.Evid. 702 as "expert" testimony. Because defense accountancy expert Andrew Lotts testified at the forfeiture hearing pursuant to Fed.R.Evid. 702 as an "expert" witness, his testimony is worthy of considerable weight.

Lott's testimony establishes that his team did a complete forensic reconstruction of Near North's accounting records, recomputing the accounting components proffered by the government. The difference is that Lott's work is supported by accounting "work papers" and can be subjected to independent peer-review, while the accounting exhibits proffered by the

Government are unsupported by "work papers" and therefore not subject to independent verification.

Forensic Accountant Lotts both identified fatal flaws in the accounting exhibits proffered by the government's witnesses and offered forensic recomputations of those exhibits. For example: 1) forensic recompuation of consolidated Government Exhibit 72 as of October 31, 1998, reflects a positive $1.5 million PFTA use -- in contrast to the negative value urged by the government at trial; 2) use of the proper "consolidated" PFTA use reconciliation with respect to Exhibit 108B, a 9-30-2000 PFTA analysis, demonstrates a positive $633,350 PFTA reconciliation as opposed to the deficiency of $6,918,000 urged by the government at trial; 3) forensic recomputation of the PFTA use reconciliation as of 6-30-2001 using the methodology prescribed by Illinois statutes and regulations shows a PFTA surplus of $5,852,861.00, as opposed to the $24 million deficit urged by the Government on that date; and 4) identification of fatal deficiencies in various government exhibits which precluded reliance on those exhibits for any purpose.

It is significant that Andrew Lotts was subjected to extensive cross-examination by the Government's cross-examination tended to highlight the strength of the accounting positions put forward by Mr. Lotts. The only true "expert" testimony in the entire proceeding exculpated Segal and Near North with respect to the government's core allegation of a scheme to defraud based on a deficiency in the balance of the PFTA.

The forensic accounting prepared by Andrew Lotts/FANCO was not the only "independent" accounting analysis that wasn't presented at trial. At the end of 2000, Segal and Near North had a strategic plan to borrow, or enter into a convertible debenture relationship, with its two lead insurance carrier vendors, AIG and Firemen's Fund. There was a strong

interest by the carriers in Near North's technology for niche marketing and expansion by acquisition of wholesale brokers. Although Near North engaged Hales Group to prepare financials for presentation to AIG and Firemen's Fund, it is clear that AIG and Firemen's Fund did not take Hales' financial representations about Near North at face value. They used PriceWaterhouse Coopers to do an independent audit and due diligence report. The PWC report necessarily presented a favorable picture of Near North, because, based upon that report, both AIG and Firemen's Fund each loaned Near North approximately $10 million. Although the government obtained this report pretrial through its broad subpoenas to AIG and Firemen's Fund, the report was never disclosed to the defense. The government, however, alluded to the report on numerous occasions during trial, demonstrating a familiarity with its contents. Unfortunately, the PWC report remains successfully concealed by the Government.

The PWC Due Diligence Report is unique among the contemporaneous accounting documents. PWC was engaged by AIG -- their loyalty was to AIG. As a result, the PWC Due Diligence Report is devoid of influence by Near North -- PWC had no reason to curry favor with Near North. PWC's interests were primarily in providing AIG and Firemen's Fund with accurate financial information. Although PWC reported to AIG (Near North didn't even get a copy of the Due Diligence Report), Near North paid for the audit -- $175,000 worth of work. The PWC Due Diligence Report represented a significant accounting effort. Finally, unlike the "aborted" D&T audit attempts, which D&T never "signed," the PWC Due Diligence Report was signed by PWC as having been conducted in accordance with Generally Accepted Audit Standards.

Two plus two is equal to four, It doesn't matter how many witnesses testify under oath in a court of law to a different result. The core of accountancy is arithmetic. The "rules" of arithmetic specify that arithmetic calculations have "right" and "wrong" answers.

There are areas of accountancy where, in addition to strict arithmetic, ther are valuations about which competent professionals can have different opinions -- depreciable assets, intellectual property, the value of business "goodwill." But none of these concepts are relevant to the field of accountancy with respect to the analysis of an insurance broker's PFTA account. Every number associated with the PFTA represents dollars -- as in United States currency. There is no reasonable dispute about the valuation of cash in an accounting analysis. As a result, the results of a true "audit" of a PFTA is either correct, or it is in error. There is no possibility that two accountants, following the same methodology, will arrive at two different results, unless one or both of them are wrong.

The accounting at Near North was problematic during the "time of offense." At the end of 1998, staring the "year-2000" problem square in the face, Near North was forced to convert to a new computer accounting system. Unfortunately, the accounting numbers from October 1998-forward were deeply flawed as a result of failures in the conversion of the accounting software.

When the foundation of a numerical analysis is faulty, every result based upon that foundation is spurious. There were problems with Near North's accounting that went beyond just the base numbers. The effect rippled throughout the organization -- most notably, the insurance payables and receivables were not reconciled and "aging" of the payables accounted for over $4 million in overstated payables. Bank reconciliations fell behind and subsidiary ledgers were not reconciled to the general ledger.

Not only are the base numbers used by the government witnesses for their "accounting" conclusions flawed, the results are only as good as the methodology employed. None of the government's witnesses analyzed the PFTA deposit requirements using the methodology prescribed by Illinois statute and regulations. Instead, each government witness used his own "estimate" methodology -- methodologies which accounted for tens of millions of dollars in differences attributable solely to the changes in methodology from one witness to the next.

The prosecutor knew, or shoul have known through the exercise of due diligence, that accounting conclusions (i.e. the PFTA use reconciliation) was inaccurate and unreliable due to the lack of reconciliation of the underlying numbers. Segal's prosecution is decidely different from other financial crims prosecutions. Normally, the government assembles a team of accountants and auditors to pour over the records of an enterprise to determine what happened. In Segal's case, the Government simply accepted documents from a Takeover Group, employed by business competitor AON, as the foundation for a criminal prosecution. The Government knew better. The Takeover Group was not a group of "whistleblowers." They were agents of a business competitor who was determined to destroy Near North for competitive advantage through the reduction of competition in the insurance brokerage business. The accounting "records" produced by this group whould have been received with extreme skepticism. Instead, the Government vouched for their veracity at every opportunity.

In closing, the Government argued that Segal's case was "a fiduciary fraud case." In other words, an accounting case. Because there was no direct evidence of misuse of the PFTA -- no checks to the Lambourghini dealer, no PFTA checks to a yacht broker, no PFTA checks to Segal personally -- the government had to imply misuse of the PFTA through accounting analysis.

Yet the governemtn didn't use independent accounting auditors, or even Government auditors to establish their case. Instead, the Government relied upon the testimony of a group of ex-employees of Near North who had been rebuffed by Segal in their attempt to take ownership and control from Segal and had gone to work with Near North's business competitor AON, who stood to profit handsomely from the demise of Segal and Near North Insurance Brokerage.

There was "true" accounting testimony presented, but not at trial. The real picture was testified to by Lotts/FANCO at Segal's forfeiture hearing after the trial. Lotts/FANCO had performed a substantial amount of independent work -- $1,227,535.34 worth to be exact. Testimony at the forfeiture hearing established that Lotts/FANCO had not previously performed accounting work for Segal and Near North -- their engagement to forensically reconstruct Near North's accounting records was devoid of any taint that would be associated with a firm that had a pre-existing or ongoing relationship with Near North.

As set forth previously, Lotts/FANCO recomputed the PFTA use reconciliations on key dates corresponding to the dates of the government's exhibits -- establishing, for example, that on 6/30/2001 that Near North's PFTA had a surplus of $5.8 million as opposed to the $24 million shortfall urged by government witnesses. In most cases, that would amount to a "disagreement" between witnesses, which is a proper matter for the jury to resolve. But this case is about accountancy. It's arithmetic. If a jury decides that two plus two is something other than four, then the jury is mistaken.

The government's accounting was not based on reconciled numbers. The government accounting was not supported by "working papers." Accounting results that are not supported by work papers are bunk. They have no value. None. Nada. The Government argued that the jury should believe the accounting

numbers because, for example, witness Angela Amaro "was one of the most competent-looking accounting people I have ever seen take the stand in any trial ever." The veracity of accounting testimony is not based on the personal appearance of the accountant. It's based upon adherence to Generally Accepted Accounting Principles and Generally Accepted Audit Standards. It requires the presence of "work papers" to back up the numbers that are presented. The testimony of accountant Lotts was fully backed up by work papers. Lotts used the methodology for analyzing the PFTA specified by the Illinois statutes and regulations to perform his analysis. Lotts got the right answer. Regardless of the fact that the government presented "more" witnesses, their accounting was simply wrong. In the end, Segal's conviction is based on false accounting, knowingly presented by government prosecutors, to an unsophisticated jury that trusted the prosecutor to not knowingly present false evidence in a criminal trial.

The prosecutors were not simply content to "present" false accounting evidence through the testimony of their witnesses. In closing arguments, the government not only capitalized on the false testimony -- they went so far as to embelish it. The government's reliance on false accounting continued post-trial into the forfeiture proceedings, and continues to this day in the government's representations to the court on forfeiture remand by the United States Court of Appeals for the Seventh Circuit.

PWC PERFORMED A "MINI AUDIT"

It is clear from the record that AIG and Firemen's Fund did not take Hale's financial representations about Near North at face value. They used Pricewaterhouse Coopers to do an independent audit and due diligence report. In government recordings made prior to Segal's arrest, McNichols says, "Yes, it's almost an audit. They're coming in basically to almost audit the numbers given them by Hales." Tape ID6 - 10/25/2001 4:02 p.m. to 5:15 p.m. Tom McNichols (wired) going into Dan Watkins office to ask about petty cash. As Cappel testified:

> Q. Then AIG brought in Pricewaterhouse to do their own due diligence analysis?
> A. Correct.

Tr. 2958:16-18 (Cappel - direct by Hogan).

AUSA Hogan tried to get Poggenburg to testify that PWC's numbers would have been the same as Hales' numbers because they worked from the same sources:

> Q. And, by the way, the books and records, sir, that you were questioned about, those are the same books and records that you utilized to prepare Government Exhibit 101, right?
> A. That's correct.
> Q. The same books and records, the same accounts receivable, the same accounts payable, the same cash figures that Mr. Segal had been using to run the company all these years, right?
> A. Presumably.
> Q. The same internal accounting procedures that he then used in the fall -- same accounting records, same balance sheets that he then used in the fall of 2001 to raise $20 million from outside investors, right?
> A. That's correct.

Tr. 2937:1-13 (Poggenburg - redirect by Hogan). Notice that when asked if the books and records were the ones used to actually run Near North, Poggenburg did not testify affirmatively -- he only "presumed" they were the same.

More importantly, Poggenburg stressed that the numbers prepared by Hales could not be relied upon because of the "extreme" disclaimers associated with their presentation:

> Well, not to put too fine a point on it, when AIG and Firemen's Fund came in to perform their due diligence, we made it very clear that, you

know, we could not -- we have, as an investment [bank], we have standard disclaimers that we are not responsible for the quality of the numbers or management's representation.

There were extreme disclaimers that these numbers were suspect, that the quality of the staff was poor, and that we could vouch for nothing in terms of the financial statements.

Tr. 2937:16-24 (Poggenburg - redirect by Hogan) (emphasis added). AIG and Firemen's Fund did not hire PWC to "rubber stamp" the work done by Hales. Contrary to the attempts by the government to imply otherwise, Pricewaterhouse Coopers did an independent due diligence audit of Near North's books, working directly from the underlying books and records -- not from Hales' presentation and certainly not from McNichols' spreadsheets.

As Poggenburg testified:

Q. And they dug into the figures just like you had.
A. That's correct.
Q. You gave them figures that you had been able to accumulate while were you there. [sic]
A. Yes.
Q. And you worked with a person by the name of Jim Spath, do you remember his name --
A. That sounds familiar.
Q. -- from Pricewaterhouse?
A. Yes.
Q. They did their own due diligence based on these same books and records and same figures, right?
A. Yes.

Tr. 2938:2-14 (Poggenburg - redirect by Hogan). The testimony is that PWC "dug into" the figures and "did their own due diligence." Although PWC was undoubtably examining the representations presented by Hales, they were verifying Near North's financial position by digging into Near North's primary accounting records.

AUSA Hogan attempted to bolster the accuracy of the "books and records" by arguing that Near North's tax returns were prepared from the same "books and records":

Q. And these are the same books and records that Mr. Segal had been relying on to pay his income tax for years, aren't they?

. . .

They are the same books and records Mr. Segal had been utilizing to run the company, right?

A. Yes.

Tr. 2938:17-25 (Poggenburg - redirect by Hogan). The logic of AUSA Hogan's argument is disingenuous. It is true that Deloitte & Touche had used the underlying books and records to prepare Near North's federal tax returns for seven years, signing the returns as the tax preparer. However, portions of Near North's books relevant to the accurate preparation of its federal income tax returns are not part of a PFTA use reconciliation. The problems with Near North's books and records were primarily in the area of billing problems and insurance payables. The cash-method, off-balance-sheet calculations that are necessary to perform a proper PFTA use reconciliation have nothing to do with the preparation of a federal tax return. Specifically, there is no "PFTA" item on a corporate tax return.

PWC REPORT AND REPLACEMENT OF MCNICHOLS AS CFO

Tom McNichols joined Near North in 1999 and became its Chief Financial Officer in October of that year. McNichols was a key member of the management "Takeover Group" that tried unsuccessfully to take ownership and control of Near North away from Segal, eventually becoming a private agent for the FBI. McNichols left Near North five days before Segal's arrest.

McNichols was a critical witness for the government's case. Not only did McNichols provide important testimony, but McNichols was responsible for numerous documents and financial data about which others testified. The government pointed out the significance of McNichols as a witness in its closing argument:

> I want to talk to you about McNichols. I think McNichols was a very important witness in this case. He had a lot to say, put in a lot of documents that were critical.

Tr. 5307:14-16 (closing - government). McNichols provided the primary testimonial support for Government Exhibits #72, #81, and #108. McNichols was the sole witness to testify as to Government Exhibits #119 and #120 with respect to alleged return premium credit write-offs. Not only did McNichols directly testify about Near North's financials, McNichols provided the financial data which formed the foundation for the testimony of other witnesses. Poggenburg, for example, testified that he got the numbers for his PFTA use reconciliation from Excel spreadsheets prepared by McNichols as opposed to getting them directly from Near North's accounting records.

Following the receipt of the Due Diligence report prepared by Pricewaterhouse Coopers, AIG and Firemen's Fund insisted that Tom McNichols be replaced as Near North's CFO. The fact that AIG and Firemen's Fund insisted on the replacement of McNichols is documented in both FBI 302 statements and in trial testimony:

> On 11/13/01, at approximately 8:30 p.m., [Tom McNichols] received a telephone call from Ernie Wish who indicated he had spoken to Michael Segal about the provision in AGI's [sic] loan documents that required the hiring of a new Chief Financial Officer (CFO). Wish informed [McNichols] that segal did not intend to replace the CFO. Wish also told [McNichols] not to let Segal know that [McNichols] has seen the loan paperwork from AGI and Firemen's Fund in that Segal did not want [McNichols] to see it.

FBI 302 by Murphy on 11/14/2001;

> Q. Did [the loan documents] require that there be a new CFO?
> A. Yes. . . . I don't know if the documents themselves required the new CFO, I can't remember that. But I know the lenders in the discussions with them required there to be a new CFO.

Tr. 2962:10-19 (Cappel - direct by Hogan);

> Q. Did you learn that when IGA -- AIG, excuse me -- AIG and Firemen's Fund loaned Near North 10 million -- $20 million that they wanted to put in a new CFO?
> A. Yes, I did.

Tr. 2706:7-11 (McNichols - cross by Cognetti).

AIG and Firemen's Fund did not simply pull a requirement that Near North replace its CFO as a condition for loaning money to Near North out of thin air -- they based it on hard information. Their source of information was a Due Diligence Report prepared by Pricewaterhouse Coopers. Pricewaterhouse would not make such a recommendation without documenting failures of accounting process, management competence, or fiscal integrity on the part of McNichols. Such specific negative <u>independent</u> information concerning McNichol's competence and/or integrity would have been valuable impeachment material which the defense could have used at trial to discredit McNichols' testimony.

PROSECUTOR'S KNOWING USE OF FALSE TESTIMONY - THE LAW

It has long been established that the prosecution's "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice. Banks v. Dretke, 540 U.S. 668 (2004) (citing Giglio v. United States, 405 U.S. 150 (1972) (quoting Mooney v. Holohan, 294 U.S. 103 (1935) (per curiam)).

> Few things are more repugnant to the Constitutional expectations of our criminal justice system than covert perjury. . . . The ultimate mission of the system upon which we rely to protect the liberty of the accused as well as the welfare of society is to ascertain the factual truth. . . . This important mission is utterly derailed by unchecked lying witnesses, and by any law enforcement officer or prosecutor who finds it tactically advantageous to turn a blind eye to the manifest potential for malevolent disinformation. See U.S. v. Wallach, 935 F.2d 445, [446] (2nd Cir. 1991) [quoting U.S. v. Stofsky, 527 F.2d 237, 243 (2nd Cir. 1975) (citing Napue v. Illinois, 360 U.S. 264, 169 (1959)) cert. denied 429 U.S. 819 (1976)] ("indeed, if it is established that the government knowingly permitted the introduction of false testimony reversal is virtually automatic.")

Northern Mariana Islands v. Bowie, 243 F.3d 1109, 1114 (9th Cir. 2001).

A much older and more fundamental due process rule than the disclosure requirement announced in Brady v. Maryland, 373 U.S. 83 (1963), is the rule against obtaining a conviction based upon false testimony. Brief Amicus Curaie of the American Bar Association in Support of the Petitioner, Banks v. Cockrell, 2003 WL 21706254 (July 11, 2003), at *17. That fundamental rule is as follows:

> [Due process is violated if][the government] has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of the court and jury by the presentation of testimony known to be perjured. Such

> a contrivance by [the government] to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is obtaining of a like result by intimidation.

Mooney v. Holohan, 294 U.S. 103, 112 (1935).

An allegation of the use of false testimony to obtain a conviction, if proven, entitles a petitioner to release from custody. Pyles v. Kansas, 317 U.S. 213, 216 (1942). In Alcorta v. Texas, 317 U.S. 213 (1942), the Court broadened this principle to include as a due process violation not only a prosecutor's active solicitation of false testimony but also the prosecutior's failure to correct false testimony. In 1959, the Court made it clear, in no uncertain terms, that Due Process is violated when the prosecutor obtains a conviction with the aid of alse evidence which it knows to be false and allows it to go uncorrected, even it the false testimony affects only the credibility of the witness:

> The principle that a state may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocnece, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.

both in facts

Napue v. Illinois, 360 U.S. 264, 269 (1959).

Consistent with this series of decisions, the American Bar Association has held that, as an ethical duty, the government attorney "should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to seek withdrawal thereof upon discovery of its

falsity." ABA Prosecution Standard 3-5(a). Citing Napue, supra, the Commentary to this standard adds that the standard applies to evidence going to the credibility of a witness, as well as directly to the guilt of the defendant. ABA Prosecution Standard 3-5.6 cmt. at 101-02 & n.2.

Setting aside a conviction based upon a Napue/Giglio violation does not require that the witness offering the false testimony could be successfully prosecuted for perjury. "Successful prosecution would require proof beyond a reasonable doubt not only that the witness's testimony has been false but also that it had been knowingly false (and hence perjury." United States v. Boyd, 55 F.3d 239, 243 (7th Cir. 1995). As the Seventh Circuit has noted, "[t]he wrong of knowing use by prosecutors of perjured testimony is different, and misnamed -- it is knowing use of false testimony. It is enough that the jury was likely to understand the witness to have said something that was, as the prosecution knew, false." U.S. v. Boyd, 55 F.3d at 243 (citing Hamric v. Bailey, 386 F.2d 390, 394 (4th Cir. 1967) ("Evidence may be false either because it is perjured, or, though not itself factually inaccurate, because it creates a false impression of facts which are known not to be true.") and U.S. v. Anderson, 574 F.2d 1347, 1355 (5th Cir. 1978)).

Whether or not a witness is even aware of the falsity of their statement is not a factor in determining whether a violation of Due Process has taken place with respect to the accused:

> Napue by its terms addresses the presentation of false evidence, not just subordination of perjury. . . . The fact

> that the witness is not complicit in the falsehood is what gives the testimony the ring of truth, and makes it all the more likely to affect the judgment of the jury.

Hayes v. Brown, 399 F.3d 972 (9th Cir. 2005) (en banc).

The government's knowing use of false testimony or perjury violates due process and justifies a new trial if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. United States v. Bagley, 472 U.S. 667, 578-79 (1985); United States v. Agurs, 437 U.S. 97 103 (1976); Giglio v. United States, 405 U.S. 150, 154 (1972); Napue v. Illinois, 360 U.S. 264, 271 (1969); United States v. Sutherland, 656 F.2d 1181, 1203 (5th Cir. 1991). "Stated another way, only if the perjurous testimony [is] harmless beyond a reasonable doubt can [the petitioner's] conviction stand." Bragan v. Morgan, 791 F.Supp. 704, 716 (M.D.Tenn 1992); United States v. Alzate, 47 F.3d 1103, 1110 (11th Cir. 1995) ("As the Supreme Court has held, this standard is equivalent [to Chapman."); Brown v. Borg, 951 F.2d 1011, 1015 (9th Cir. 1991) (finding knowing introduction and argument of false evidence by the government "intolerable" -- a "perversion of the adversary system" requiring reversal of conviction "unless the misconduct can be proven to be harmless beyond a reasonable doubt."); Ouimette v. Moran, 942 F.2d 1, 12 (1st Cir. 1991) (noting the essential identity of the rules on Chapman and Napue and, thus, "mak[ing] short shrift of the state's insistence that, despite constitutional error, the outcome of Ouimette's trial was never in doubt"); United States v. Rivera Pedin, 861 F.2d 1522, 1529 n. 13 (11th Cir. 1988) (noting equivalence of Napue and Chapman); United States v. Valentine, 820 F.2d 565,

false security — knows before trial — gov witness cross exam proven false, govt. ignores both, at closing, sentencing, and at trial on redirect attempts to deflect

571 (2d Cir. 1987) ("Because the error was of constitutional dimension, the case was close, and the misrepresentation was emphasized in the prosecutor's summation, th[e] error, even standing alone, was not harmless.") (citing Chapman v. California, 386 U.S. 18, 24 (1967)).

Justices Blackmun and O'Connor explained in Bagley that the Giglio/Napue and Chapman standards are identical:

> The Court in Chapman noted that there was little, if any, difference between a rule formulated, as in Napue, in terms of "'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction,'" and a rule "'requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" 386 U.S. at 24 . . . (quoting Fahy v. Connecticut, 375 U.S. 85, 86-87 . . . (1963)). It is therefore clear, as indeed the Government concedes, . . . that this Court's precedents indicate that the standard of review applicable to the knowing use of perjured testimony is equivalent to the Chapman harmless-error standard.

Bagley, 473 U.S. at 679 n. 9 (Blackjun, J., opinion as to Part III, joined by O'Connor, J.).

Although the same Napue/Chapman materiality standard applies for knowing or intentional presentation of false testimony by the government, when the government "prosecutor intentionally fails to perform his duty[, this] may be regarded as an admission that performance would injure the government's case; and admission, so to speak, of prejudice which might, particularly in close cases, tip the scales." United States v. Gerard, 481 F.2d 1300, 1302 (9th Cir. 1974) (citing Napue, 360 U.S. at 270).

The government's capitalization on its deceptive presentation of false testimony through misleading questions

or closing argument may constitute, in itself, a due process violation. U.S. v. Sanfilippo, 564 F.2d 176 (5th Cir. 1977) (arguing false testimony to the jury heightened the materiality of the false testimony, requiring reversal); DeMarco v. United States, 928 F.2d 1074, 1075-77 (11th Cir. 1991) (noting that, when a prosecutor takes advantage of perjury by arguing in closing that the witness had no motivation to lie, the government has a duty to disclose perjury even known to the defense) (quoting Mills v. Scully, 826 F.2d 1192, 1195 (2d Cir. 1987)); Brown v. Borg, 951 F.2d at 1017 ("Such argument certainly enhances the materiality of false testimony under the Napue/Chapman standard."); United States v. Bigeleisen, 625 F.2d 203 (8th Cir. 1980) (citing the government's adoption of false testimony in closing as an exacerbating factor in the analysis of "materiality" of false testimony.); United States v. Young, 17 F.3d 1201, 1203 (9th Cir. 1994) ("The appearance of misconduct in this case is serious. . . . Prosecutors not only presented Officer Sheldon's false testimony but referred specifically to it during closing arguments."); Brown, 951 F.2d at 1017 (asserting that the "force of a prosecutor's argument can enhance immeasurably the impact of false or inadmissible evidence"); Reutter v. Solem, 888 F.2d 578, 582 (8th Cir. 1989) ("The materiality of the non-disclosed information becomes even more apparent inlight of the presecutor's closing remarks, which capitalized on defense counsel's ignorance by arguing that [the witness] had no possible reason to be untruthful in his testimony because he already had been sentence and therefore had 'nothing that he could gain' from cooperating with the

state."); United States v. Valentine, 820 F.2d 565, 571 (2d Cir. 1987) (finding that "becuase of the prosecutor's 'consistent pattern' argument, at best questionable and perhaps outrageously disingenuous, our confidence in the jury verdict is serverely shaken; holding that "[b]ecause the error was of constitutional dimension, the case was close, and the misrepresentation was emphasized in the prosecutor's summation, this error, even standing alone, was not harmless") (emphasis added); Miller v. Pate, 386 U.S. 1, 6-7 (1967) (holding that, by "deliberately misrepresent[ing] the truth," the prosecutor violated the "Fourteenth Amendment [which] cannot tolerate a state criminal conviction obtained by the knowing use of false evidence"); see also Speigelman, Prosecutorial Misconduct in Closing Argument: The Role of Intent in Appellat Review, 1 J. App. Prac. & Process 115, 141 (noting that "in forty-one of the forty-five recent reversals the impropriety of the argument was well established and consequently the prosecutor knew or should have known the arguments made were improper.").

In order to determine the materiality under Giglio and Napue of the government's knowing use of false testimony, courts look to: 1) whether a witness's testimony was false; 2) whether the government knew or should have known that the testimony was false; 3) whether the credibility of the witness's testimony was important to the government's case; and 4) whether the evidence against the defendant was strong apart from the witness's testimony. Giglio, 405 U.S. at 154-55 (finding that "Government's case depended almost entirely on [the witness's] testimony; without it there could have been no idictment and

[7] only breach is false surety

no evidence to carry the case to the jury" and concluding, thus, that the witness's credibility "was therefore an important issue in the case"); Singh v. Prunty, 142 F.3d 1157, 1161-62 (9th Cir.), cert. denied, 525 U.S. 956 (1998) (noting that it was likely that the jury had to believe the witness's testimony in order to believe the prosecution's theory, where the witness was the key witness lijnking the defenant to the murder-for-hire scheme and only circumstandial evidence otherwise tied the defendant to the murders); Carter v. Rafferty, 826 F.2d 1299, 1308 (3d Cir. 1987) (looking at the "strength or fragility of the state's case . . . as a whole," applying the Aguyrs principle that "if the verdict is already of questionable validity, additional evidence of minor importance might be sufficient" to be material) (quoting Agurs, 427 U.S. 97, 112-13 (1976)); BuBose v. LeFevre, 619 F.2d 973, 979 (2d. Cir. 1980) (noting that the line of questioning went to the credibility of the State's key witness, "without whom it had virtually no case"); Campbell v. Reed, 594 F.2d at 8 (noting extreme importance of witness's testimony, because witness was only one who could link defendant to the offense); Annunziato v. Manson, 566 F.2d 410, 414 (2d Cir. 1977) (finding (1) testimony was false; (2) prosecution knew or should have known it was false; and (3) upholding district court finding that, "in view of the frailty of the State's case, disclosure of [the] bargain . . . could have created a reasonable doubt"); United States ex rel. Washington v. Vincent, 525 F.2d 262, 267-68 (2d Cir. 1975) (comparing additional evidence to testimony by critical witness who "tipped the balance for [an] otherwise deadlocked jury");