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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

PLAINTIFF,

V.

FREDERIC BOURKE, JR.,

DEFENDANT.

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05 Cr. 518 (SAS)

REPLY MEMORANDUM IN SUPPORT OF MOTION OF FREDERIC A. BOURKE, JR. FOR NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE

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INTRODUCTION

Before turning to the errors that pervade the government's opposition,[1] we emphasize three central points. First, contrary to the government's repeated assertion, Bodmer's false testimony about the "walk talk" was not just a harmless mistake about dates. The entire event was fabricated. The Baku walk talk could only have occurred on one of the two occasions when Bodmer and Bourke were both in Baku: February 6, 1998 or April 24-25, 1998. GX1100. The walk talk did not happen on February 6; the flight records and Bobby Evans' testimony and diary prove that. Nor did it happen in April at the Minaret opening. Bodmer's certainty that Evans was present on the day of the walk talk, his claim that Bourke invested two weeks later, and Schmid's testimony that the walk talk occurred in January or February 1998 prove that. If the walk talk did not happen on February 6 or in April, *then it did not happen*. The prosecution's cooperating witness thus invented one of the key events in the case.

Second, the prosecutors' duty, and not Bodmer's falsity, is the main issue here. The prosecutors had access to documentary evidence conclusively showing that the walk talk Bodmer described in his well-scripted testimony could not have taken place in February. They went ahead, violating their duty under *United States v. Wallach*, 935 F.2d 445 (2d Cir. 1991) (ordering new trial where prosecutors knew or consciously avoided knowledge that prosecution witness had lied). They either knew of the falsity or consciously avoided the knowledge. The proper disposition of this motion thus does not

[1] Government's Memorandum of Law in Opposition to Defendant's Motion for New Trial Based on Newly Discovered Evidence (Doc. 286, filed May 27, 2011) ["G. Opp."]. Bourke's initial memorandum is cited as "D. Mem."

depend on whether Bodmer's falsity was intentional on his part, or the product of being coached at a time when he did not want to go back to jail, or even an innocent mistake. The rule that requires a new trial in cases like this looks at the prosecutors' culpability, not the witness'. The case is brought in the name of the prosecutors' employers, the United States. Because the test is "knew or should have known," this motion must be granted even if the Court finds that the prosecutors acted in subjective good faith but ignored the red flags that abounded.

The Supreme Court's focus on this topic began with *Mooney v. Holohan*, 294 U.S. 103 (1935), which involved perjured testimony. The witness in *Alcorta v. Texas*, 355 U.S. 28 (1957), was probably also lying. But the rule against falsehood has now crystallized in federal criminal cases: the prosecution violates a defendant's right to due process when it presents testimony "that it knew or should have known was false." *United States v. Vozzella*, 124 F.3d 389, 392 (2d Cir. 1997); *see United States v. Agurs*, 427 U.S. 97, 103 (1976) ("knew or should have known"); *Wallach*, 935 F.2d at 456 (same). Moreover, the obligation extends to the entire prosecutorial apparatus, not simply to a particular prosecutor. *See Giglio v. United States*, 405 U.S. 150 (1972), discussed below.

In sum, the issue here is what particular prosecutors knew or should have known and when they knew or should have known it. To say that Bodmer was "mistaken" is a gentler way of saying that he did not speak the truth. Whether he also spoke contrary to his belief is not so important as the now-revealed fact that he spoke contrary to the prosecutor's actual or constructive knowledge of the truth.

Third, none of the prosecutors and agents responsible for presenting Bodmer's false testimony has ever testified or submitted a declaration about what happened. Only AUSA Chernoff signed the government's opposition, and he appears to have had the least involvement of all the prosecutors in preparing and presenting Bodmer's testimony. The Chernoff-signed opposition makes general statements about what "the government" knew and did not know, but it says nothing about what the particular prosecutors and agents who make up the government team--particularly prosecutors Park and Mendelsohn--knew and when they knew it.

The absence of a declaration from Park--now Assistant Chief of the DOJ Fraud Section--is particularly striking. As we discuss below, Park *knew* Bodmer initially waffled on the date of the alleged meeting and thus *knew* that the date was an issue; he or prosecutors and agents under his direction *knew* (or certainly should have known) from the flight records in their possession that Bodmer's story about the events of February 5 and 6 was false; and he nonetheless made the February 6 walk talk, and the asserted fact that it immediately preceded Bourke's investment, the centerpiece of his opening statement and Bodmer's direct testimony. The critical question--unknowable from AUSA Chernoff's vague (and unsworn) references to what "the government" knew--is what Park and those under his direction knew and when. Only a full evidentiary hearing, at which Bourke (through counsel) has a right to confront and cross-examine the relevant witnesses, will answer that question.

ARGUMENT

I. THE EVOLUTION OF BODMER'S STORY.

The government's opposition attaches a single page of an FBI 302 interview memorandum for Bodmer, from October 2004. But it omits notes and memoranda from before that date which reflect Bodmer's vacillation about the date and his ultimate decision to associate the walk talk with Evans' presence and the timing of Bourke's initial investment. The chronology, as far as we know it at this point, highlights the need for a hearing:

- At a July 27, 2004 proffer session--Bodmer's first encounter with the government for which Jencks was provided--he said the walk talk happened at the opening in April 1998. He mentioned getting Kozeny's approval, but he apparently did not mention Evans. Prosecutors Park and Mendelsohn, among others, were present for the proffer. AUSA Chernoff was not. Supplemental Declaration of Harold A. Haddon ("Haddon Supp. Dec."), Exhibit A, at 13-14.[2]
- In a continuation of the proffer on August 2, 2004, Bodmer said the Bourke walk talk happened in April 1998, before the office opening parties. Again, he claimed to have obtained Kozeny's approval and did not mention Evans' presence. Prosecutors Park and Mendelsohn were present, among others. AUSA Chernoff was not. Haddon Supp. Dec., Exhibit B, at 5-7.
- Something then caused Bodmer to change his story. On August 4, 2004--the date of his final proffer session-- handwritten notes contain the following under

[2] Although the notes of the interview are undated, they refer to Bodmer's proffer agreement, which he signed July 27, 2004.

the heading "clarifications": "? re timing of Bourke disclosure could be Feb 98, not April office opening '98 2-6/7-98 because discussion preceded investment same sequence of the discussion". Haddon Supp. Dec., Exhibit C, at 1.

- Bodmer's revised story had the desired effect. On October 8, 2004, he signed his plea agreement--the agreement that freed him to return home, resume practicing law, and travel the world for the past seven years. Haddon Supp. Dec., Exhibit D.
- In his first post-plea interview in late October 2004--the one the prosecution featured in its opposition--Bodmer told the version of the walk talk story that fit the prosecution's theory of the case. He claimed the walk talk occurred on February 6, 1998, when Evans was present in Baku, *before Bourke invested*, and he described the Minaret opening without mentioning the walk talk. G. Opp., Exhibit A, at 10, 13-14. Prosecutors Park and Mendelsohn and FBI SA Rosato (among others) were present for this interview. AUSA Chernoff was not.

The Bodmer Jencks materials from July 2004 through October 2004 show that Bodmer was trying to pick a date for the walk talk story and that prosecutor Park was fully aware that the date was in question. Those materials also show that Bodmer did not get his deal until he settled on the date that fit the prosecution's theory.[3]

[3] Although it is impossible to know for sure without access to Bodmer, it seems likely that he took the innocuous meeting he had with Bourke and Evans on February 6--

The August 4, 2004 handwritten note calls out for a hearing in this case. The government has not disclosed the author, but it appears to have been a member of the prosecution team. The words reveal just how important it was that the alleged walk talk be put into February--"because discussion preceded investment." Here is a motive. Here is a signal just how important were the dates. And here, therefore, is powerful evidence of "should have known" when the flight records came into the government's hands. The parallel between this course of events and the prosecutor's growing knowledge of the witness Guariglia's conduct, in *Wallach*, is striking.

No later than January 27, 2006, the prosecution obtained the Kozeny flight records from Universal Weather & Aviation and the Evans daily diary from Evans. Haddon Supp. Dec., Exhibit E, at 7, 13.[4] In other words, more than three years before trial, the prosecution possessed the documents that proved the falsity of the walk talk story with which Bodmer obtained his plea agreement and that he later told at trial. The prosecution did not come into possession of these documents by accident; it either obtained them by grand jury subpoena or otherwise specifically requested them. And having requested and obtained the documents, someone on the prosecution team must have reviewed them. The knowledge of that member (or members) of the prosecution team is attributable to the team as a whole. *See, e.g., Kyles v. Whitley*, 514 U.S. 419, 438 (1995) (knowledge of

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a meeting that Bodmer's time records duly record and that Evans described in his trial testimony and diary--and turned it into the false walk talk story.

[4] The government's cover letter producing these materials to the defense is dated January 27, 2006. How long before that date the government obtained the records is unknown at this point. It bears noting, though, that Pulley advised the government on July 2, 2002 about the existence of "aviation records out of houston." Haddon Supp. Dec., Exhibit F, at 8-9.

police investigator attributable to prosecutor for purposes of *Brady*); *Giglio v. United States*, 405 U.S. 150, 154 (1972) ("[T]he prosecutor's office is an entity and as such it is the spokesman for the Government.").

What happened after the prosecutor's office reviewed the flight records? Did Park decide to let Bodmer tell his false story and hope the defense would not locate or realize the significance of the records and Evans' diary amid the thousands of pages of discovery in the brief, hectic period between the last-minute Jencks disclosure and the Bodmer cross-examination? Did Park, knowing that Bodmer had waffled initially on the date of the alleged walk talk, make a conscious decision to avoid learning contradictory information? Given the intensity with which the prosecutors investigated comparatively trivial aspects of the case--the exhaustive recounting at trial of Barat Nuriyev's purchases during his trip to New York comes to mind, obsessively documented with credit card receipts, hotel invoices, and travel records--the prosecutors' failure to devote comparable resources to investigating Bodmer's story smacks of willful blindness.

The time-tested way of answering factual questions such as these is an evidentiary hearing. That is how, for example, the Supreme Court directed the Subversive Activities Control Board to resolve allegations of witness perjury. *See Communist Party of United States v. SACB*, 351 U.S. 115, 124-25 (1956) (SACB can either hold a hearing on the perjury or expunge the witness' challenged testimony and reconsider record). That is how *Brady* claims are "[n]ormally . . . assessed" in the post-trial context. *United States v. Mitchell*, 365 F.3d 215, 255 (3d Cir. 2004). That is how factual issues involving the circumstances of unlawful surveillance are resolved. *See, e.g., Roberts v. United States*,

389 U.S. 18 (1967) (per curiam). That is how courts determine whether a government affiant knowingly or recklessly included false information in a search warrant affidavit. *See Franks v. Delaware*, 438 U.S. 154, 169 (1978). That is how the government's fraud on the court was laid bare in *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993). That is how the now-notorious prosecutorial misconduct was fully exposed in the prosecution of Senator Stevens in the District of Columbia and in the Broadcom prosecution in the Central District of California. And that is how the serious factual questions here about how Bodmer came to give false testimony to convict a distinguished American citizen--questions that go to the heart of the integrity of the judicial system--should be resolved.

The unsworn pleading of a single prosecutor who had little or no involvement in the underlying events will not suffice. To make reliable factual findings, the Court needs to hear from people with personal knowledge. AUSA Chernoff uses his unsworn hearsay to seek absolution for an entire prosecution team. But the prosecutors have an obvious interest in the outcome. Their memories of long-ago events may have faded. AUSA Chernoff apparently never saw or heard Bodmer's litany of inconsistent versions, nor did he present Bodmer's testimony at trial. And now he courts the final hearsay danger by seeking to explain the meaning of his comments in the Second Circuit in an unsworn filing by which he hopes to prevent this Court from making a public accounting of himself in the context of adversary inquiry.[5]

[5] It is worth noting that in all the government's speculation about what Bodmer meant, or did, or might have done, there is one voice that is oddly missing--Bodmer's. He has not yet been sentenced and is still required to cooperate. It is hard to imagine that conscientious prosecutors would not have questioned him about the false walk talk story, but the government has not produced a record of any such interview. *Compare Wallach*,

II. THE PROSECUTION'S CONDUCT WHEN BODMER'S LIE WAS EXPOSED.

The government leaves the impression that once the defense brought the flight records to its attention, it stipulated to the records and forthrightly corrected the "mistake" in Bodmer's testimony.[6] That account is false in several important respects.

The government implies that the flight records would not have been admissible absent the stipulation and that it thus assisted the defense in correcting the error. G. Opp. 7 & n.1. In fact, in the middle of trial the defense found and brought to New York a Universal Weather and Aviation employee named Tom Jones. Jones was one of the ground personnel who handled the flight of Kozeny's plane on February 5 and 6, 1998. His name appears on some of the flight records that were placed in evidence. Jones was fully prepared to authenticate the records. As required by the agreement between the parties, the defense advised the government that Jones would be a witness. Faced with the certainty that Jones would authenticate the records during the defense case, the government stipulated to their admissibility and introduced them itself, in an

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935 F.2d at 474 (Altimari, J., concurring) ("[I]n the midst of trial, the AUSAs extensively questioned Guariglia about the events in Atlantic City and the truthfulness of his testimony. Moreover, in an attempt to ascertain the truth or falsity of Guariglia's story, the AUSAs located and interviewed Koplitz and another individual who was with Guariglia in Atlantic City. Both verified Guariglia's version of events. Additionally, the prosecutors--albeit with limited success--attempted to contact and interview Tropicana Casino officials. Thus, it seems to me that the AUSAs did all that was reasonable to assure that they were neither relying on false testimony nor permitting false testimony to go uncorrected.").

[6] *E.g.*, G. Opp. 26 n.10 ("Of course, here Bodmer's error was corrected on the Government's case.").

understandable effort to draw their sting.[7] Later, to avert Jones' testimony entirely, the government stipulated to the facts that the records established. T. 2501. The government's stipulations had nothing to do with correcting Bodmer's falsehoods; they were tactics aimed at avoiding the damage that Jones' testimony would have caused.

The government's reluctant acquiescence in the truth about the events of February 5 and 6 is exposed by another episode, which it does not mention. Near the end of the government's case, *after* the flight records had been introduced, the government called its intern, Dana Roizen, to place GX1100 (the summary of the travel records) into evidence. T. 2422. Amazingly, Roizen's summary claims that *Kozeny was in Baku on February 5*, based solely on an ambiguous entry in Pulley's diary (and contrary to the unambiguous flight records). *E.g.*, T. 2425-26, 2443. Had this been true, Bodmer's story about consulting Kozeny on the night of February 5 in Baku would have been possible. Only on cross-examination did the intern's claim that Kozeny was in Baku on February 5 crumble. T. 2443-48. And only after the Roizen gambit failed did the prosecution stipulate to the actual facts. T. 2501.

But even then the prosecutors would not concede that Bodmer's walk talk story was false. Instead, they claimed that Bodmer was merely "confused" about the dates, and they made up the "April option." The prosecutors sponsored that false story in closing even though (1) Bodmer had testified that he pinpointed the date of the walk talk because

[7] At the end of the trial day on June 22, 2009--the day the government introduced the flight records and four days before the government rested--Bourke's counsel noted that the defense intended to call Jones as a witness. T. 1960--61. The government's suggestion that the defense needed a stipulation because it lacked "a competent witness to authenticate the records" is thus false. G. Opp. 7 n.1.

he knew Evans was in Baku at the time, and he had even seen Bourke and Evans having breakfast in the hotel afterward;[8] (2) Bodmer testified that Bourke invested seven million dollars (five million dollars of Bourke's money and two million dollars from friends including Sen. Mitchell and Megan Harvey) "[a]bout two weeks" after the walk talk, T. 1075-76;[9] and (3) Schmid testified that in January or February 1998 Bodmer returned from a trip to Baku--a trip, it was clear from the testimony, on which he did not accompany Bodmer--and recounted the walk talk to him, T. 1366-67, 1397.[10] This testimony, offered by the government to buttress the February 6 walk talk story before it was proven false, contradicts the "April option."

The government offers still another theory in its opposition, as it did on appeal: that the walk talk "could have taken place in February, with Bodmer simply having been mistaken about the exact timing of the walk and the pre-walk discussions." G. Opp. 18 n.4; *see id*. at 28. But for the walk talk to have occurred on February 6, (1) Bodmer's elaborate story about talking with Bourke and Kozeny in Baku on February 5 would have

[8] It is undisputed that Evans was not in Baku in April 1998. T. 2542, 2608.

[9] By contrast, the July investment to which the government refers (G. Opp. 11) occurred almost three months after the April opening, was for only $1 million, did not include Ms. Harvey or Sen. Mitchell, and did not involve any of Bourke's own money. Bodmer's precise testimony leaves no room to argue that he confused the $7 million March investment with the $1 million July investment.

[10] Schmid did not accompany Bodmer to Baku in February 1998. He did go with Bodmer to Baku in April 1998. T. 1126, 1357, 1364-66. The government describes Schmid's memorandum (GX 181) as having been written "well before any criminal investigation or other motive to fabricate." G. Opp. 10. But regardless of concerns about *criminal* liability in 2001, Schmid and Bodmer undoubtedly had concerns about *civil* liability, in light of the suit pending against Kozeny in London. The entire point of the Schmid memorandum was to convince the plaintiffs in the London action not to bring Von Meiss Blum into the litigation--certainly a "motive to fabricate."

to be "mistaken" at least as to date and location; (2) Bodmer's testimony about the time of the February 6 walk, of which he claimed to be "absolutely" sure, T. 1073, would have to be "mistaken"; and (3) Evans' testimony (corroborated by his diary) that he was with Bourke the entire time they were in Baku on February 6, T. 2542, would have to be mistaken.[11] A confluence of so many significant errors--with Bodmer himself triangulating facts to pinpoint the alleged walk talk--is completely implausible.

The government's repeated efforts to obscure Bodmer's false testimony destroy its claim that it acted in good faith once the defense called the flight records to its attention. Rather than admit the obvious truth that Bodmer made up the walk talk story, the prosecutors have concocted one flimsy alternative after another and refused even to acknowledge the possibility that the walk talk did not happen. G. Opp. 28 ("The flight records merely showed that Bodmer was either mistaken about some of the events surrounding the February walk, or the walk occurred in April instead."). The prosecutors have deployed the "'win at any cost'" approach that the Second Circuit condemns. *Drake v. Portuondo*, 553 F.3d 230, 240 (2d Cir. 2009) (quoting *Wei Su v. Filion*, 335 F.3d 119, 126 (2d Cir. 2003)). At a minimum, the record shows that they "consciously avoided recognizing the obvious--that is, that [Bodmer] was not telling the truth." *Wallach*, 935 F.2d at 457.

[11] This theory also ignores Bodmer's own time records for February 6, which reflect a conference with Bourke and Evans together on that day--exactly as Evans described in his testimony and recorded in his diary--but do not show a meeting with Bourke alone. Haddon Dec. (Doc. 280), Exhibit B, at 4.

III. THE PROSECUTION'S "BLAME THE DEFENSE" DEFENSE.

The government's principal themes in its opposition are (1) that Bodmer simply made an innocent mistake about the date of the walk talk, and (2) that "the government" was unaware of Bodmer's "mistake" until the defense brought it up, at which point the prosecutors acted promptly and forthrightly to correct the error. *E.g.*, G. Opp. 30-31. We have debunked those arguments in the preceding parts and in our initial memorandum. But the government has another line of attack: it brazenly argues that the defense was at least equally at fault for failing to detect Bodmer's "mistake." *E.g.*, G. Opp. 5-7.[12] That, too, is false.

The government observes, correctly, that the defense and prosecution had equal access to the flight records for several years before trial. But the parties did *not* have equal access to Bodmer or his story. The government gained unlimited access to Bodmer no later than October 8, 2004, when he signed his plea and cooperation agreement. It had access to Bodmer, in other words, for almost *five years* before trial. The defense, by contrast, had no access to Bodmer himself. And it received the Bodmer Jencks--along with hundreds of pages of Jencks for other prosecution witnesses--on Saturday, May 30, 2009, *two days before trial*. Haddon Supp. Dec. ¶ 8; *cf. United States v. Gil*, 297 F.3d 93, 106 (2d Cir. 2002) ("Although the Bradford memo was produced before trial, the defense was not in a position to read it, identify its usefulness, and use it. It was among five

[12] Of course, by arguing that the defense should have known that the flight records contradicted Bodmer's walk talk story, the government effectively admits that it too should have known of the contradiction. As discussed below, the "should have known" case against the government is far stronger, because it--unlike the defense--had access to Bodmer for years.

reams of paper labeled '3500 material,' delivered sometime on the Friday before a Monday trial, at a time presumably when a conscientious defense lawyer would be preoccupied working on an opening statement and witness cross-examinations, and all else.").[13]

Although the defense knew upon reading the Jencks that Bodmer's walk talk story was false, regardless of date, the Jencks materials did not reveal the key details that the flight records would refute. Those details were the key to disproving the entire story. For example, the October 2004 FBI 302 that the government cites (G. Opp. 5 & Exhibit A)--by far the most detailed walk talk account in the Jencks--does not state that the walk talk occurred at 8 a.m. on February 6. That fact did not emerge until Bodmer's direct testimony. T. 1067. The time, of course, was critical, because the flight records proved that Bourke did not arrive in Baku on Kozeny's plane until about 9:20 a.m. T. 2501.

Similarly, the October 2004 302 is less specific about the events of February 5 than Bodmer was in his direct testimony. The 302 does not say, for example, where and how Bourke allegedly "asked to meet with Bodmer to discuss the investment," or where and how Bodmer allegedly "asked Kozeny for his permission to do so." Only in Bodmer's direct testimony did the telling (and provably false) details emerge--that Bourke approached Bodmer on the afternoon of February 5 "in the hotel lobby of the Hyatt" in Baku, T. 1065, and that Bodmer then met Kozeny "in his hotel room in the

[13] The government asserts that the defense "had the Jencks Act material disclosing Bodmer's conflicting recollection *weeks before trial*." G. Opp. 21 (emphasis added). In fact, the defense had the Bodmer Jencks only two *days* before trial. Haddon Supp. Dec. ¶ 8.

Hyatt" to get permission, T. 1067.

Once these details emerged, the defense managed within a few days to locate the evidence (flight records, accompanied by Jones' testimony, and Evans' diary and testimony) that would prove them false. The prosecution claims not to have done this same investigative work during the *more than three years before trial* that it had access to Bodmer, the flight records, and Evans' diary. The defense showed exemplary diligence in proving the February walk talk story false within a few days of learning its details. The prosecutors showed (at best) willful blindness to the truth in failing to do so in the more than three years that it had access to all the relevant evidence.

IV. THE GOVERNMENT MISSTATES THE PREJUDICE REQUIREMENT.

The government wrongly insists that Bourke has not established that Bodmer's perjured testimony was material. G. Opp. 23-25. But the government misstates the legal standard and exaggerates the strength of its other evidence.

When--as here--the prosecution uses testimony that it knows or should know is false, "the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Wallach*, 935 F.2d at 456 (quotation omitted); *see Agurs*, 427 U.S. at 103 (same); *Vozzella*, 124 F.3d at 392 (same). This "strict standard of materiality" applies "not just because [the knowing presentation of perjured testimony] involve[s] prosecutorial misconduct, but more importantly because [it] involve[s] a corruption of the truth-seeking function of the trial process." *Agurs*, 427 U.S. at 104. The government ignores this standard, and for good reason; as the defense demonstrated in its initial memorandum (D. Mem. 15), Bodmer's false walk talk story

plainly "could have affected the judgment of the jury."

In an effort to show that the false story it featured so prominently in opening and closing did not really matter, the government lists other evidence that it claims supports the verdict. G. Opp. 24-25. But this evidence adds up to far less than the government suggests, and it certainly does not eliminate a "reasonable likelihood" that Bodmer's false testimony "could" have affected the jury's judgment.

The government refers, for example, to Bourke's "close relationship" with Kozeny. G. Opp. 24. But that alleged "closeness" is offset by the fact that Bourke and Kozeny did not speak from July 1997 until late December 1997, T. 2856-58, the period when Kozeny, Farrell, and Bodmer were making their corrupt arrangements with the Azeris, and that Bourke reported Kozeny's options fraud. The government cites Bourke's "conversations with the two cooperators," G. Opp. 24, but Farrell was heavily impeached and Bodmer's false testimony obviously cannot be counted in determining whether that very testimony was prejudicial. The government cites Bourke's "conversations with the neutral witness, Amir Farman-Farma." G. Opp. 24. But Farman-Farma testified unequivocally that Bourke never told him about Kozeny bribing the Azeris. T. 1504 ("Q. Mr. Bourke never talked with you in 1997, 1998 about Mr. Kozeny paying bribes to Azeri officials, correct? A. Correct."). Bourke's "conversations . . . with his lawyers" (G. Opp. 24-25) show that he did *not* know about Kozeny's corruption and wanted to make sure he could not be liable for actions of which he was not aware undertaken by Kozeny half a world away. The government's reliance on Bourke's "supervision of medical visits to New York by Azerbaijani officials, paid for by Kozeny" is particularly

far-fetched. G. Opp. 25. Bourke did not "supervise" anything; he merely recommended doctors to the Azeris, as he has done for many others. T. 574-93, 845-46, 973-74, 1082, 1149, 1565-66, 2879-80.

The remainder of the litany of evidence the government recites is equally innocuous. That evidence might have been *sufficient* to sustain the FCPA conspiracy conviction, but that is not the standard. The evidence is not so overpowering as to eliminate any "reasonable likelihood" that Bodmer's false walk talk story "could" have affected the jurors' judgment. The Court itself declared at sentencing that "[a]fter years of supervising this case, it is still not entirely clear to me whether Mr. Bourke was a victim, or a crook, or a little bit of both." T. 11/10/09 at 34. When the evidence is that close, false testimony by a key witness on a crucial point is plainly material under the *Agurs* standard.

Bodmer's false testimony--whether a mistake or perjury--had the advantages of repetition and primacy, being featured in the government's opening and again early in the trial. The powerful impression that the prosecutors tried to create--and which they had envisioned back in 2004 when somebody made that handwritten note--could not effectively be undone with later explanations. In the tournament of trial, wrong impressions may well be lasting ones, as every trial lawyer knows.

When assessing the prejudice from the government's misconduct, we should look back at the fundamental issue in this trial. Was Bourke a victim, or was he a conspirator? Two roads diverged before the jurors. Bodmer's false testimony beckoned them down one road, and the prosecutors posted the signs in their opening statement.

The other road was signposted with Bourke's investment of time and resources--with lawyers for the other defrauded investors, with the Manhattan district attorney, and then with the FBI--to tell anyone who would listen that Kozeny was a thief.[14] The prosecutors knew that these were the paths open to the jurors, and they crafted their case not only to take the jurors down the road to conviction but--by including the false statement count--to heap scorn on Bourke's protestation that he was not only a victim but a whistleblower. Of course, he does not now and did not then bear the burden to prove his innocence. The question then as now is whether the exposure of the government's conduct raises the prospect of reasonable doubt.

The prosecutors in *Wallach* made the same argument that the government makes here--that the impeaching details were relatively insignificant and that ample other evidence existed. 935 F.2d at 457-59. Here as in *Wallach*, the record belies such an assertion. Here as in *Wallach*, the importance of the false testimony was highlighted by

[14] The government asserted at trial that Kozeny's options fraud was unrelated to the bribes he gave Azeri officials and thus that Bourke's efforts to expose the fraud were not inconsistent with knowledge of the bribes. T. 3032. But this overlooks the obvious link between the bribes and the fraud. According to Bodmer, the Azeris received two-thirds of Oily Rock's vouchers *and options*. *E.g.*, T. 1034, 1069, 1368. The Azeris did not need the alleged bribe options to participate in privatization; only foreigners needed them. To realize the value of their options, therefore, the Azeris had to sell them to foreigners. Given these facts, anyone with knowledge of the alleged two-thirds/one-third split--including Bourke, if Bodmer had actually told him--would conclude that the millions of options Kozeny sold to Omega from the Oily Rock stock in 1998 included some or all of the Azeris' share. And any such person would thus have known that exposure of Kozeny's options fraud would lead directly to exposure of the fact that Kozeny had given two-thirds of Oily Rock's options to the Azeris. It is inconceivable that Bourke knowingly exposed the very corruption in which (according to the government) he was a participant, and it therefore follows that he was ignorant of the two-thirds/one-third split.

the government's having highlighted it before the jury, and having trumpeted the witness' virtues throughout its case.

V. IN LIGHT OF THE GOVERNMENT'S EFFORT TO RETREAT FROM AUSA CHERNOFF'S STATEMENTS AT ORAL ARGUMENT, THE COURT SHOULD HOLD AN EVIDENTIARY HEARING TO DETERMINE WHETHER THE EVIDENCE IS NEWLY DISCOVERED.

The government insists that Bourke's evidence that the government knew of Bodmer's false testimony--AUSA Chernoff's concession to that effect at oral argument in the Second Circuit--is not "newly discovered." G. Opp. 19-23. It first contends that there is no "evidence" at all, new or otherwise, because AUSA Chernoff's answer at oral argument merely "assum[ed] constructive knowledge of [the government's] discovery." G. Opp. 27. But AUSA Chernoff said nothing in his response to Judge Hall about "assumptions" or "constructive knowledge." He gave no indication he was speaking hypothetically. He argued without qualification:

> The dates with respect to Mr. Bodmer, I sort of am puzzled by Mr. Tigar's argument that because the government had the flight records, Mr. Bodmer should have been rehabilitated in his witness prep. It would have been utterly improper for us to show him the flight records to point out to him that his recollection of these meetings was apparently flawed.

OA Tr. at 18-19. The defense may treat AUSA Chernoff's statement as an admission. *See, e.g., United States v. GAF Corp.*, 928 F.2d 1253, 1259-61 (2d Cir. 1991). The government's effort to back away from that admission now is no more credible than its other representations about the record, many of which we have shown to be wrong. For the reasons detailed above, the relevant members of the prosecution team--and particularly prosecutor Park--should be required to state under oath at an evidentiary

hearing what they knew about Bodmer's false testimony and when they knew it.[15]

United States v. McKeon, 738 F.2d 26 (2d Cir. 1984), is relevant here. In that case, defense counsel made a representation in opening statement in a criminal trial. There was a mistrial. At the next trial, the same lawyer made an inconsistent representation in opening statement. The government moved to disqualify the lawyer because it claimed the right to cross-examine witnesses in such a way as to let the jury know that defense counsel had made inconsistent statements. The district judge disqualified defense counsel.

The court of appeals held that the lawyer's statements were admissible against the client, relying on the familiar principle discussed here and in our prior pleading. It also held that disqualification was proper because the lawyer should not be permitted to argue the meaning and credibility of his own prior statements. That is, no lawyer may adopt the dual roles of witness and advocate when his or her own credibility is at issue. *See also*

[15] The government repeats its claim at oral argument that it was prohibited from showing Bodmer the records that proved his testimony false, and instead had to present the testimony and then prove its falsity separately through the flight records. G. Opp. 27-29. This is nonsense. First, the government is never justified in presenting testimony to the jury for its truth that the prosecutor knows to be false. It is not enough to present the false testimony and then present other evidence contradicting it. The prosecutor should not present the false testimony in the first place. With respect to Bodmer, therefore, the government should not have presented the false walk talk testimony under any circumstances. Second, the entire premise of the government's argument--that it would be improper to have shown Bodmer the flight records--rests on a confusion between *witness preparation* and refreshment of recollection *at trial*. Fed. R. Evid. 612 and the cases the government cites at G. Opp. 27-28 apply *at trial*, with a witness on the stand. Rule 612 has no application during witness preparation; the guiding principle there is to assist the witness in providing truthful, admissible testimony. By declining to show Bodmer the flight records, the prosecutors did just the opposite--they assisted him in providing *false* testimony.

New York Rule of Professional Conduct 3.7.

In this proceeding, AUSA Chernoff is assuming the dual role of advocate and witness, both revising and explaining his prior statements and arguing as to which his present version should be believed rather than his former one. This conduct implicates the concerns that Judge Winter addressed in *McKeon*.

The government asserts that the defense could have discovered that the prosecutors knew Bodmer's testimony was false if defense counsel had exercised due diligence. G. Opp. 21-22. This is a strange argument from prosecutors whose principal defense to the charge of knowingly presenting false testimony is that despite more than three years to investigate that testimony they remained in the dark until opposing counsel unearthed the key evidence during trial. In any event, until AUSA Chernoff's moment of candor in the heat of argument in the Second Circuit, the government had denied knowing about the flight records until the defense brought them forward. Defense counsel are "entitled to treat the prosecutors' submissions as truthful." *Banks v. Dretke*, 540 U.S. 668, 698 (2004).[16] Once AUSA Chernoff made his unguarded remark, the defense was bound to act diligently--and it did so, by filing this motion.

CONCLUSION

For the foregoing reasons, and for the reasons in Bourke's initial memorandum, the Court should conduct an evidentiary hearing to determine when the prosecution knew (or

[16] The Court, of course, was similarly within its rights post-verdict in taking the government at its word on this point, based on what it knew at the time. For this reason, the government's repeated invocation of the Court's rulings on Bourke's post-trial motions is unavailing. The government cannot induce a ruling through a failure to disclose key facts and then cite that ruling to foreclose the inquiry that will unearth those facts.

should have known) that Bodmer's testimony about the February 6, 1998 "walk talk" was false. Following the hearing, the Court should grant Bourke a new trial on the two counts of conviction.

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Respectfully submitted,

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