

Docket No. 24-1983

*IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT*

UNITED STATES OF AMERICA

Appellee

v.

JOSEPH CAMMARATA

Defendant-Appellant

On Appeal from Judgment and Sentence
In the United States District Court for the District of New Jersey
No. 3:22-cr-00639-PGS

BRIEF FOR APPELLANT CAMMARATA
(Including Volume 1: Appx 1 through 78)

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¹ Counsel has used the words “Appellant” and “Mr. Cammarata” interchangeably in this brief.

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SUBJECT MATTER AND APPELLATE JURISDICTIONS

This appeal seeks review of a judgment of conviction and sentence in the United States District Court for the District of New Jersey entered after a jury trial. This Court has appellate and subject matter jurisdiction over this appeal pursuant to 28 U.S.C. Section 1291 and 18 U.S.C. Section 3742, to review a final order of the District Court and its sentence. The conviction was originally entered on the docket on May 13, 2024. Appellant filed a Notice of Appeal was timely filed on May 25, 2024. See ECF #22-CR-00639-RK Doc.# 154.

STATEMENT OF THE ISSUES **WITH STATEMENT WHERE RAISED**

1. Did the district court err in denying Appellant's Motion for Judgment of Acquittal and, in so doing, also violate Appellant's Fifth Amendment Due Process Right to a fair trial based on the Government's failure to prove that Appellant willfully attempted to evade the assessment of taxes, which for tax years 2015-2019?²

Where Raised and Ruled Upon: During trial and in post-trial motions. See ECF #134 (08/15/2024) in 22-cr-00639-RK (*Judge Kirsch's Order*) and Also see ECF #152 (05/16/24) (*Judge Sheridan's Order*).

² Counsel has used the words "Appellant" and "Mr. Cammarata" interchangeably in this brief.

2. Did the District Court err in denying Appellant's motion for a new trial based upon the government's failure to comply with its discovery obligations under Fed. R. Crim. P. 16(a)(1)(E) and (G) for tax years 2015-2019 by failing to provide defense counsel with: (a) copies of the Plan of Allocation ("POA") for all class action distribution settlement payments made by distribution administrators who issued distribution checks to Appellant's hedge funds during the years 2015-2019; (b) all IRS Form 1042-S; and (c) all letters sent by the class action distribution claims administrators which accompanied IRS Form 1042-S sent to the IRS?³

Where Raised and Ruled Upon: Appellant's motion for a new trial was raised in post-trial legal memoranda.
See ECF # 22-CR-00639, Doc. # 134.

3. Did the government constructively amend its indictment against Mr. Cammarata by changing its theory of prosecution from its claim that he willfully attempted to evade the assessment of taxes, in violation of 26 U.S.C. Section 7201, to filing materially false tax returns, in violation of 26 U.S.C. Section 7206(1)?

Where Raised and Ruled Upon: Issue was raised by
See ECF# 22-cr-00639, Doc.#152; Doc. #163 (Opinion by Judge Kirsch which denied Appellant's motions) (See ECF #163)); (See ECF# 164 (Order by Judge Sheridan modifying prior order).⁴

³ Appellant owned three hedge funds. He assigned to the bulk of his stock holdings to two of his hedge funds. The third fund became operative in 2020.

⁴ Judge Kirsch was assigned Appellant's docket in this case after Judge Sheridan retired.

4. Are class action distribution settlement payments excludable from a class action plaintiff's taxable income, as a matter of law, under 26 U.S.C. Section 104(a), based on the similarity of such distribution payments from a lawsuit settlement or awards, given to an injured victim in personal injury lawsuit which is similar to class action settlement distribution payments since both types of payments or awards to the victim to compensate, in part, the loss suffered by the class action plaintiff?

Where Raised and Ruled Upon: Not raised or ruled upon below. De novo review is requested.

5. Did the district court abused its discretion in denying Appellant's Motion in *limine* which sought to prohibit the same fraud scheme evidence from being admitted into the record in this case before requiring the Government to make an offer of proof regarding the: (*a*) relevance of the evidence; (*b*) its probative value, and; (*c*) the harmful effects of the fraud scheme evidence which prevented Appellant from receiving a fair trial based on the District Court's admission of Rule 404(b) evidence, without balancing the probative value of that evidence against its harmful effects, under Fed. Evid. Rules 401 and 403 resulting in Appellant not receiving a fair trial?

Where Raised and Ruled Upon: Raised in pretrial motion. ECF#3:22-CR-00639-PGS #61 (9/20/2023).

STATEMENT OF RELATED CASES & PROCEEDINGS

The cases listed below are related to the present appeal:

(1) *Securities & Exchange Comm'n v. Cammarata, et al.*, 2:21-cv-4845-CFK (E.D. Pa.) (a parallel civil action) (judgment entered 1.27.24) (“*Cammarata #1*”);

(2) *United States v. Cammarata*, 21-cr-00427 (E.D. Pa.) This was a criminal case that arose from related facts and circumstances in (“*Cammarata #1*”). Referred to in this brief as (“*Cammarata #2*”);

(3) *United States v. Cammarata*, 23-2110 (this case is on appeal currently under review by the court which arose from Appellant trial conviction in *Cammarata #2*. This case is referred to in this brief as *Cammarata #3*.

(4) *United States v. Cammarata*, 24-1485 (3rd. Cir). Pretrial bail order. Appeal denied. This case is referred to as “*Cammarata #4*”

(5) *United States v. Cammarata*, 22-2779 (3d Cir. Bail requested. Second bail modification Motion. Motion denied. This case is referred to as “*Cammarata #5*.”

(6) *United States v. Cammarata*, 22-cr-00639-PGS. This case is the tax evasion conviction which is currently before this court on appeal. The case is referred to in the brief as “*Cammarata #7*”).

Appellant Cammarata was sentenced to 60 months imprisonment on Counts 1 through 4 of his indictment in this case which would be served concurrently. On Count 5, Appellant was sentenced of 12 months which would be served consecutively to Counts 1 through 4 for a total sentence of 72 months imposed by Judge Sheridan from which this appeal arose. Appellant will have to serve, in

summary, an additional year of imprisonment after his sentence in the Cammarata #2 ends.

STATEMENT OF THE CASE

The Statement of the Case is divided into several sections with sub-headings in an attempt to summarize the case.

A. The Indictment

On September 22, 2022, Appellant Cammarata was indicted on five counts of willfully attempting to evade the assessment of federal income taxes. The Indictment alleged that Appellant had received more gross income than he reported on his federal income tax returns for tax years 2015-2019 in violation of 26 U.S.C. Section 7201.⁵

The income that the Government’s Indictment accused Appellant of failing to report on the tax returns is listed as follows: Count One (\$1,721,646.11); Count Two (\$2,550, 491.29); Count Three (\$4,821,782.19); Count Four (\$3,556,426.36; and Count Five (\$3,350,113.23).

Each of the five counts contained similar allegations. Appellant allegedly attempted to evade the assessment of taxes by: (a) diverting income into accounts in corporate names; (b) paying personal expenses from corporate accounts; and (c)

⁵ See ECF # 22-CR-00639-PGS. Doc. #1. (The Indictment).

providing to his tax return preparer false financial information and that Appellant filed that did not include the income described in each of the five counts.

B. The Jury Trial

Appellant was indicted in the District of New Jersey approximately 3-weeks before the fraud trial began in *Cammarata #2*. The tax fraud indictment charged Appellant with willfully attempted to evade were class action settlement proceeds for the stockholders in corporations who had been sued in multiple jurisdictions within the United States.

Appellant owned two hedge funds, artificial non-taxable entities, to which he assigned his beneficial interest in shares of stock that he had accumulated through private purchases, and purchases that he made on behalf of his large institutional investors, such as Goldman Sachs, the New York Stock Exchange, and the Chicago Stock exchange prior to 2015.

Upon learning that many of the stocks held by his hedge fund had been sold to the public by corporations who had been sued in class action lawsuits, Appellant, using Alpha Plus as a claim aggregator, filed claims with multiple class action claims administrators. The claims requested review and approval from the claims administrators as to whether the hedge funds were qualified claimants. The claims administrator approved the hedge fund applications.

Disbursement checks were sent to the hedge funds in care of Alpha Plus. As owner of the hedge funds, the distribution of the loss recovery pro rata return of capital of inured to the benefit of the Appellant since he owned both the hedge funds and the stock that had been assigned to the hedge funds.

Appellant's distribution checks that were sent to his hedge funds, as a non-taxable return of capital, flowed through the hedge funds to Appellant for tax purposes. The distribution checks only represented Appellant's *recognized loss*, not the *actual realized loss* which was greater than the recognized loss.

Appellant's assignment of his beneficial ownership interest in his stocks to his hedge funds provided the funds with the legal standing needed to pursue any claims that Appellant otherwise had a right to pursue. The amount of each distribution check was determined by an algorithm used by the class administrators. Before forming Alpha Plus, Appellant traded billions of shares of stock when he owned Speed Route. Appellant could purchase stocks on margin enabling him to purchase large quantities of stock.

Appellant, as pro se defendant, with the assistance of standby counsel, cross-examined his former business partner, Erik Cohen, regarding the volume of stock trades that Appellant company, Speed Route, engaged in as a brokerage firm:

Q. [By Appellant]: Mr. Cohen is it a fact that there were billions of trades from 2005 through 2015 from Speed Route?

A. Off the top of my head, I don't know exactly how many, but I would assume that there were yes, probably billions

Q. I'm sorry?

A. I would say probably billions

See ECF 22-cr-00639-639 (testimony of Erik Cohen)⁶

On November 15, 2023, following a jury trial, Appellant was convicted on all five counts in the indictment. Through counsel, Appellant moved the trial court for an Order which requested an acquittal of the charges lodged against him despite the jury's verdict. In the alternative, Appellant asked the district court to grant him a new trial for reasons that are discussed in greater detail in the argument section of this brief. The district court denied the motions made during trial. See ECF 22-cr-00639-RK (Doc. #159).

The district court permitted Appellant to file written motions to supplement arguments Appellant had made, through counsel during and at the end of the trial, regarding his request for a Rule 29 Judgment of Acquittal, or a new trial under Rule 33 of the Federal Rules of Criminal Procedure. Both motions were denied.

See ECF.# See ECF 22-cr-00639-RK (Doc.#101, #104, #111).

⁶ Erik Cohen was Appellant's partner. Appellant cross-examined Mr. Cohen during the trial to force the witness to admit the extent to which Appellant's company, Speed Route, traded in massive quantities of stock for large financial institutions prior to 2015.

C. Appellant's Entry Into The Securities Market

Starting in his late teens, following his enrollment at St. John's University, Appellant obtained employment with the Datek Securities Company, an online stock brokerage firm.⁷ Appellant's was initially hired by Datek to repair the companies' computers based on his interest and knowledge about artificial intelligence (AI), paired with the use of algorithms, in finding stocks for sales on the Internet.

After leaving his employment at Datek, Appellant formed his own broker firm operating it as the chief executive officer. One of the companies he formed was Speed Route a stockbrokerage firm. Appellant developed a computer application ("App") which, at the time, was novel regarding new AI means of searching the Internet, when coupled with an algorithm.⁸ Appellant eventually sold his App to the Bank of New York. The proceeds from the sale of the App sale proved profitable to Appellant. His new wealth enabled him to retire and purchase a Bahamian Resort which he intended to convert into a tourist attraction.

⁷ The information presented in this subsection was included to help place the case on appeal in its proper context. In the pending appeal before the Court, the information in this section was explained in greater detail by Appellant's counsel.

⁸ The information described here was presented during Appellant's trial in Cammarata #2. That information has only been summarized in this brief for background and context purpose to help shed more light on the question of whether Appellant owned the stocks that he assigned his beneficial ownership interest in which was held by his hedge funds at the time that the funds joined the class action plaintiff in each case where the funds held title to the funds that had been assigned to the funds by Appellant.

D. The Formation of Alpha Plus Recovery Services.

On August 14, 2014, Appellant, Erik Cohen, and David Punturieri incorporated Alpha Plus Recovery, LLC (“Alpha Plus”).⁹ The company operated as a class action claims aggregation company. Alpha solicited and collected claims held by stockholders who had opted into class action lawsuits as members of the plaintiff class.

Appellant, by contrast, contends that the class action distribution payments made to his hedge funds were legal because the hedge funds owned the beneficial interest in the stock which gave the hedge fund legal standing to sue. At the same time, the Appellant also owned Alpha Plus.

Given his ownership of his hedge funds and his ownership of Alpha Plus, the distribution payments paid to Appellant’s funds were sent to Alpha Plus. Appellant divided the proceeds into three tranches. Appellant’s partners received 2/3 of the proceeds as compensation from Alpha Plus while Appellant kept the remaining 1/3 as a nontaxable return of capital.

Supreme Court precedent permits the owner of property interest to “split” the interest held by the property’s owner into a beneficial interest and a legal

⁹ Mr. Cammarata used his personal funds to launch Alpha Plus.

interest which was approved of in *Sprint Communications Co. v. APCC Services, Inc.* 554 U.S. 269 (2008).

In this case, Appellant assigned his beneficial interest in stocks that he had acquired over many years, but mostly, the stock while he owned Speed Route. Appellant used his App to build a client base. After selling the App and retiring, Appellant formed the hedge funds at issue here. Appellant assigned his beneficial interest in the stock to his hedge funds.

STATEMENT OF FACTS

This appeal is related to *U.S. v. Cammarata*, 21-cr-00427-011 (“*Cammarata #2*”) which is currently on appeal before this court. Appellant was accused of being a participant in a conspiracy to commit wire fraud and other offenses. The appellant proceeded to trial and was convicted. His co-defendants, Erik Cohen and David Punturieri entered into plea agreements with the Government which included guilty pleas to tax fraud charged against the two men through an Information.

Mr. Cammarata proceeded to trial in *Cammarata #2* where he testified in his own defense. He did not testify in his tax trial in New Jersey. If he had done so, Appellant would have been required to waive his Fifth Amendment Privilege against self-incrimination.

Appellant now challenges the sufficiency of the evidence presented to the jury to prove that he willfully attempted to evade the assessment of taxes that were due and owing on the class action distribution settlement payments.

Appellant also viewed the class action distribution payments as settlements or awards that were excludable from his taxable income under 26 US.C. 104(a).

SUMMARY OF ARGUMENT

The Internal Revenue Service (“IRS”) has a number of weapons in its arsenal to enforce compliance with federal tax law. Some of the weapons are civil, while others are criminal enforcement tools.

This case, though it arose from a criminal prosecution, should have been investigated by the IRS using its civil enforcement tools for the following reasons before indicting Appellant three weeks prior to the start of his trial in *Cammarata* #2.

The Appellant contends that the Government’s claim that he willfully understated gross income that he received, via his hedge funds, from class action settlement funds, is meritless. The Government did not challenge the Appellant’s stock ownership claim. The fraud case in the EDPA was based, instead, on the theory that the hedge funds, though approved by the class distributors as “qualified claimant,” were not the proper party to file claims seeking distribution payments from the hedge fund “pool of fund” because the funds, themselves, had not

“traded” in the stocks thus ignoring Appellant’s assignment claim. With the use of the Internet, email communications, and artificial intelligence, Appellant contends that the buying and selling of stocks is accomplished through electronic transmissions and not with paper documents unless retrieved from a server.

ARGUMENT

- I. The district court erred in denying Appellant’s Motion for Judgment of Acquittal and, in so doing, also violated Appellant’s Fifth Amendment Due Process Right to a fair trial based on the Government’s failure to prove that Appellant willfully attempted to evade the assessment of taxes for tax years 2015-2019 in the absence of proving that the class action settlement distribution payments, that Appellant received from his hedge funds, were subject to taxation.**

Standard of Review

The standard of review is plenary or *de novo* because the first argument presents question of law. The Court is empowered to apply its own judgment, without deference to the determination of the district on the issue in question. *Holland v. New Jersey Department of Corrections*, 246 F.3d 267, 278 (3d Cir 2001).

Discussion

To convict a taxpayer of willfully attempting to evade the assessment

of federal income taxes, the government must present competent evidence to the jury which proves beyond a reasonable doubt that the taxpayer: (1) engaged in affirmative attempts; (2) to evade the assessment or payment of federal taxes; and (3) the taxpayer's affirmative attempts to evade a tax due and owing was willful, that is, the conduct that the taxpayer engaged in was not based on his good faith subjective belief regarding his understanding of his duties, under the tax code, regarding expense deductions and investment losses under IRC Section 162 and 212.

The Supreme Court has defined the term willfulness in *Cheek v. United States*, 498 U.S. 192, 200-01 (1991); *United States v. Pomponio*, 429 U.S. 10, 12 (1976) and *United States v. Ashfield*, 735 F.2d 101,105 (3d Cir. 1984).¹⁰ Other courts, though not controlling here, have held that when the underlying tax law at issue in a case is vague or highly debatable, it is difficult, if not impossible for government prosecutors to prove, that a taxpayer willfully attempted to either file a false tax returns, or that the taxpayer willfully attempted to evade the assessment of taxes. See e.g., *United States v. Critzer*, 498 F.2d 1160 (4th Cir. 1974) (when the underlying tax law is vague or highly debatable, it difficult, if not impossible, to

¹⁰ The IRS, in this case, had the option of subjecting Appellant to a civil tax audit where he would have been required to prove his ownership of the stocks that he claimed to have assigned to his hedge funds and that expenses that Appellant incurred from his business operations, such as the Bahamian Island, were the type of expenses that could be deducted by Appellant from his world wide income under IRC Section 162 and that his investment losses were deductible under IRC 212. These questions are civil tax inquiries, not inquiries that can be fairly pursued in a criminal trial where the Government indicted the Appellant's three week before his trial in *Cammarata #2*.

prove that a defendant acted willfully); *United States v. Garber*, 607 F.2d 92, 93-94, 97-100 (5th Cir. 1979) (defendant may have lacked requisite willfulness since proper tax treatment of money received from sale of her exceedingly rare blood was novel and unsettled question); and *United States v. Harris*, 942 F.2d 1125, 1127-1131-35 & n.6 (7th Cir. 1991) (law on tax treatment received by mistresses from wealthy widower provided no fair warning that failing to report the income, to would be criminal activity; as such, case law favored proposition that payments should be treated as gifts because criminal prosecutions are place for the government to try out pioneering interpretations of tax law).

If Mr. Cammarata is correct in his understanding regarding the exclusion from taxable income of the class action distribution payments that resulted from lawsuits and settlement, then his conduct could not have been willful in the absence of the government's having proven that Mr. Cammarata violated a known legal duty when considered against the following background facts:

- (1) Appellant's years of experience as a stock broker;
- (2) the knowledge and experience that he gained from learning the class action claims aggregation business;
- (3) Appellant's understanding of the purpose of the POAs;
- (4) the fact that the POAs, in reality, were district court orders regarding the payment of a portion of the amount of money; and
- (5) Appellant's good faith belief, even if subjectively

held, that 26 U.S.C. Section 104(a) excluded class action distribution payments from as gross income which had to be reported to the Internal Revenue Service on his personal income tax returns.

While the Government disclosed some discovery information to the defense, Mr. Cammarata argues that information that was “material” to his defense was not disclosed by the government in violation of its disclosure obligation under Rule 16(a)(1)(E).

The undisclosed discovery material included a copy of each POAs approved by the district court overseeing the class action litigation and copies all IRS Forms 1042-S which the claims administrators sent to the IRS regarding each distribution payments made to Appellant’s hedge funds.

The Government also failed to disclose all documents and other materials that related to Appellant’s business expenses and investment losses. This information was located in the same computer files as the income information that the government extracted and transformed into Government Exh. #1001. This exhibit was introduced into evidence through a USAO-EDPA auditor who analyzed bank accounts, brokerage statements, and other financial data, that she classified as income that was paid to appellant’s hedge funds, but not any tax due and owing on the proceeds.¹¹The exhibit only contained payments made to Appellant hedge

¹¹ The USAO Auditor who testified in the tax fraud trial is the same witness who testified in the fraud trial in Philadelphia. Her testimony in the tax fraud trial is the same as it was in Cammarata #2. In summary, the witness testified about the steps and procedures she used to determine the total payments made to the hedge funds by

funds. Government #1001 did not list any business expenses that were deductible under 26 U.S.C. Section 162 and 212.

The Government also possessed the Appellant's business expense payments, most notably, the expenses incurred with operating his Bahamian Island Resort, Sandy Cay, which provided justification for Appellant to claim the payment for business expenses as deductible under 26 U.S.C. Section 162 and investment losses under 26 U.S.C. Section 212.

Both before and after trial, Mr. Cammarata made a number of requests for the return of his computers, or a printout of the data on the computer, while he was incarcerated at the FDC in Philadelphia. The government claims to have given Mr. Cammarata a computer disc which contained his income and expense information and other materials that the government deemed discoverable.

Mr. Cammarata was not able to view this information while incarcerated for a number of reasons, including the amount of time needed to meet and review the material with counsel, prior to trial. As of the filing of this brief, the government had yet to return Appellant's computers to his parents.

A. The Class Action Settlement Payments Made to Appellant's Hedge Funds Represented a Pro Rata Share of the Return of Capital From the class action Settlement distribution pool of funds.

reviewing number financial statements and other documents in deriving what she considered to be the income paid to Alpha Plus by the distribution fund administration, and the amount of money that she attributed to Appellant and his two partners.

Title 26, U.S.C. Section 61, and *Commissioner v. Glenshaw Glass Co.* *supra* defines income. Section 61 gives examples of gross income while *Glenshaw Glass* provided a more expansive definition of the phrase by holding, in summary, that gross income is all income over which a person has complete dominion and control regardless of the source of that income.

Not all income that a recipient receives is subject to taxation. For example, settlements and awards from lawsuits are exempt from taxation in personal injury cases. It is unclear whether this same exemption applies to distribution payments made to class action plaintiff who have been deemed qualified applicants entitled to receive a distribution from the class action pool of funds in recognition of the recognized loss.

Appellant viewed his business expenses as deductible under Title 26 U.S.C. Section 162. This tax code section allows a taxpayer to deduct all the *ordinary and necessary expenses*¹² paid or incurred during a tax year in carrying *on any* trade or business. The U.S. Tax Court approved a business expense deduction in *Jonathan Chang, et al. v. Commissioner*, T.C. Summ. Op. 2024-18 (Sept. 16, 2024) where

¹² The phrase “trade or business” is not defined in the tax code. Technically speaking, every business expense must meet the test of Section 162. Additionally, the phrase “ordinary and necessary” are terms of art. For these reasons, when the Government challenges a taxpayer’s attempt to claim Section 162 expense deductions, a taxpayer is afforded a civil audit by the IRS. Alternatively, the IRS can assess a tax against a taxpayer and issue the taxpayer a Notice of Deficiency which is the taxpayer’s “ticket to the tax court.”

the taxpayer sought to deduct legal fees paid to defense counsel for representing the taxpayer in a wire fraud and money laundering prosecution.

The IRS's position was that the criminal activity at issue in Mr. Chang's case was not connected to any business that he was engaged in but was merely personal enrichment. The Tax Court disagreed with the IRS. The taxpayer was able to deduct over \$360,000 in legal fee under Section 162. See also *John K. Pak v. Commissioner*, Dkt # 6395-18, 6397 (T.C. Memo 2024-86). Mr. Cammarata's business expenses, unlike the expenses in *Chang*, arose primarily from his ownership and operation Sandy Cay and his other investments.

B. The Government Violated its Brady Obligation

The Government collected information from various class action claims Administrators, such as the POA from each Class Action Settlement Claims Administrator, during its pretrial investigation in Cammarata #1. The POAs, however, were not disclosed to Mr. Cammarata for his use during the tax fraud trial.

The POAs were "material" to Mr. Cammarata's defense. The POAs would have established that class action distribution payments were made to Mr. Cammarata's three hedge funds after review and approval and that the distribution payment represented a partial return of capital and not taxable.

The Government's failure to disclose the POAs that it had obtained from each class action claims distribution manager violated the legal rule established in *Brady v. Maryland*, 373 U.S. 83 (1963)¹³ which was more explicitly defined by the Court in *Youngblood v. West Virginia* 547 U.S. 867, 869-70 (2006) (*per curiam*).

The Supreme Court defined a *Brady* violation as follows:

A *Brady* violation occurs when the Government fails to disclose evidence materially favorable to the accused. This Court has held that the *Brady* duty extends to impeachment evidence as well as exculpatory evidence, and *Brady* suppression occurs when the government fails to turn over even evidence that is known only to police investigators and not the prosecutor. Such evidence is material if there is a reasonable possibility that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," although a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant acquittal." The reversal of a conviction is required upon a showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

¹³ *Brady* is a constitutional requirement of due process. No statute or rule defines its contours. Also see *Giglio v. United States*, 405 U.S. 450 (1972) (evidence affecting credibility falls within the *Brady* Rule); *United States v. Agurs*, 427 U.S. 107 (1976) (the government to disclose immaterial information will not lead to reverse; *United States v. Bagley*, 473 U.S. 667 (1985) (material undisclosed that undermines confidence in the outcome of the trial); *Kyles v. Whitley*, 514 U.S. 419 (1995) (the court defined the materiality standard stated that the standard must be subject to a fact-intensive analysis).

Mr. Cammarata further argues that the POA developed for each class action settlement award was information that “material” to his defense. He further argues that if the jury had been aware of the tax classification placed upon class action settlement distribution payments, this information could have had a significant upon the jury during their deliberations in determining his innocent or guilt of the offenses charged in the indictment for the following reasons.

II. The District Court erred in denying Appellant’s Cammarata’s Motion for a New Trial, pursuant to Fed. R. Crim. Pro. 33, based upon the government’s failure to comply with its discovery obligations under Fed. R. Crim. P. 16 (a)(1)(G) and 16(a) (1) (E) and its discovery obligations under *Brady v. Maryland*, 373 U.S. 38 (1963) and *United States v. Bagley*, 43 U.S. 667 (1985).

Standard of Review

To show an abuse of discretion, an appellant must show the district court was arbitrary, fanciful, or clearly unreasonable. *Stich v. United States*, 730 F.2d 115, 118 (3d Cir 1984); *Oddi v. Ford Motor Co.*, 234 F.3d Cir 1984).

Discussion

In this case, one of the most critical pieces of discovery that the Government failed to provide to Appellant was a written summary of IRS Revenue Thomas Mazur’s expert witness’s anticipated trial testimony. The failure to prepare and produce a written summary as described in Rule 16 denied Appellant the right to confront the Government’s expert witness.

Agent Mazur, did not express an opinion regarding the accuracy of the tax due and owing that had been computed by another agent not called as a witness by the government. His testimony was therefore inadmissible hearsay similar to the evidence criticized in Greenberg v. United States 280 F.2d 472 (1st Cir (1960))
Also see Greenberg v. United States 295 F.2d 909 (1st Cir 1961).

Appellant's Sixth Amendment Confrontation Clause Privilege was hampered by the failure of the Government to prepare a written summary of the anticipated trial testimony of Agent Mazur which would have consisted of his opinion, and the basis for his opinion, if that opinion was going to be that Appellant for criminal tax purposes owed appropriately \$6 million although tax that the IRS may try to collect from Appellant would be higher in a civil tax audit.

Without an expert witness, defense counsel framed his cross-examination questions as hypotheticals. Agent Mazur conceded that if certain information had been made available by the prosecution team, his trial testimony might differ. The IRS agent who prepared the work product upon which Agent Mazur was Agent Leo Hughes, a member of the prosecution team who was present in the courtroom throughout the trial.

Agent Hughes's excel spreadsheet was originally captioned as "Criminal Tax Computation" and marked for identification as Govt. #1004. Defense counsel

objected to the admission into evidence on two grounds. First, the defense challenged the admission of the document on the grounds that the title of the document included the word “criminal” before the Appellant had been convicted of a crime. Second, the Government objected to Agent Mazur being used by the Government, as the foundation witness to get Govt. #1004 admitted into evidence, when Agent Hughes was the proper foundation witness. Agent Mazur could only present hearsay testimony regarding the existence of any tax due and owing arising from the five counts charged in the indictment.

In *U.S. v. Isa Noel*, 905 F.3d 258 (3d Cir 2018), this Court noted that the confrontation clause guarantees a criminal defendant the right to be confronted with the witnesses against him. In this case, Mr. Cammarata contends that he was effectively prohibited from cross examining the Government’s tax computation expert, Thomas Mazur, in the absence of written summary of Mr. Mazur anticipated trial testimony that would inform the jury of his opinion regarding the tax due and owing element of 26 U.S.C. Section 7201. Agent Mazur was not able to offer an opinion regarding the tax due and owing.

Appellant is entitled to a new trial, if this court does not vacate and set aside the district court’s denial of his Motion for a Judgment of Acquittal, based on the Government’s violation of the procedural requirements of Rule 16 of the Federal Rules of Criminal Procedure.

III. The Government constructively Amended its Indictment Against Appellant by Changing Its Theory of Prosecution From The Appellant's Willful Attempt to Evade the Assessment of Taxes, in violation of 26 U.S.C. Section 7201, to Willfully Filing a Materially False Tax Return in violation of 26 U.S.C. Section 7206(1).

Standard of Review

The standard of review is plenary. The Court can consider this appeal was arbitrary, fanciful, or clearly unreasonable. *Stecyk v. Bell Helicopter Textron, Inc.*, 295 F.3d 408, 412 (3d Cir. 2002).

Discussion

The government's constructive amendment of its indictment of Appellant started Government's opening statement where Government Counsel which described Appellant's conduct as follows was a *per se* reversible error

“\$16 million. That’s how much the defendant Cammarata hid from the IRS over the course of five years.”¹⁴

Based on the statute under which Appellant was charging, a taxpayer's attempt to try hide money from the IRS is different from proving a tax due and owing. The government must, first of all, prove that a person has received taxable income before assessing a tax due and owing.

¹⁴ See trial transcript, November 1, 2023 (Jury Trial Volume 2, page 61, lines 16-19)

Appellant argues here that he suffered harm by being portrayed as a “tax evader” before the jury had convicted him of a tax crime. The prosecutor’s opening statement would have been less objectionable if he had stated what he “anticipated the evidence in the case would show” instead of forthrightly stating that this was a case about a man who attempted to hide \$16 million from the IRS.

Because of the consequences that can flow from word usage, Appellant submits that he is, at a minimum, entitled to a new trial if his sentence and conviction is not vacated and set aside in order to vindicate his Fifth Amendment to a Fair Trial and his right to confront his accusers through effective cross examination.

With regards to indictments that are constructively amended, in 2003 the court defined a constructive amendment in *U.S. v. Fallon*, 61 F.4th 95 (3d Cir. 2023):

A constructive amendment occurs where “. . . there is a substantial likelihood that the jury may have convicted the defendant for an offense differing from the offense the indictment returned by the grand jury actually charged.” Trial evidence, arguments or the district courts own instructions can all form the basis of constructive amendments. A constructive amendment is *per se* reversible error because it deprives a defendant of his Fifth Amendment right to be tried on charges presented to the grand jury. The key inquiry in a constructive claim “is whether the defendant was convicted of the same conduct for which he

was indicted.”¹⁵

Fallon, 61 F.4th at 111 (footnotes and internal citations omitted).

See also *United States v. Deu*, 23 F.4th 224, (3d Cir. 2022) (quoting *United States v. Vosburgh*, 602 F.3d 512, 521 (3d Cir. 2010)).

In this case, the Government’s evidence focused on the falsity of tax returns. Appellant, through defense counsel Margaret Grasso, filed a motion in *limine* with the trial court which sought an Order which limited the Government from “representing in its entirety,” the same evidence that the Government had admitted into evidence during its case in chief in *Cammarata #2*. The basis of the motion was the fear that the jury may focus its attention on the fraud evidence from *Cammarata #2* in lieu of the evidence needed to convict Appellant of willfully attempting to evade the assessment of axes.

¹⁵ In this case, it is not possible to determine whether the jury convicted Appellant of filing false tax returns in violation of 26 U.S.C. Section 7206(1), or tax evasion which is a violation of 26 U.S.C. Section 7201.

IV. The District Court abused its discretion in denying Appellant's *Motion in Limine* which sought to preclude the Government from presenting the same fraud scheme evidence, offered by the Government in his EDPA fraud trial, in the absence of requiring the Government to make an offer of proof regarding the relevancy of this evidence to any of the elements of Section 7201 given the highly prejudicial impact this evidence could have on the jury in this case.

Standard of Review

Abuse of discretion showing required of Appellant that the district court's was arbitrary, fanciful, or clearly unreasonably in a ruling. *Stich v. United States*, 730 F.2d 115, 118 (3d Cir. 1984).

Discussion

In *Cammarata #2*, the Government offered into evidence information regarding Mr. Cammarata's ownership of Sandy Cay, an island resort in one of Bahamian Island. Appellant argued in his appeal in *Cammarata's #2*, which is still pending before this Court, that the evidence that the government offered was for no reason other than to cast him in a negative light before the jury.

In this case, Mr. Cammarata is entitled to a new trial because the district court erred in denying his *motion in limine*. The motion sought to prevent the admission of non-relevant and highly prejudicial evidence that was elicited by the Government from various witnesses who testified in *Cammarata #1* instead of

focusing its evidentiary inquiry into the issues of whether Mr. Cammarata owned the stock that he claimed to have assigned to his hedge funds.

The district court abused its discretion under Rules 403 and 404(b) in admitting into evidence in his tax fraud trial the same evidence, in major parts, that the Government used during its fraud trial in EDPA thus making the jury aware of the EPDA fraud trial without Mr. Cammarata testifying at the tax trial. This decision, in the absence of requiring the government to make an initial offering of proof was clearly unreasonable.

To protect Mr. Cammarata's Fifth Amendment Right to a fair trial, and to prevent the "prejudicial spillover" from the EDPA trial, other measure could have been used by the court to protect the fairness of Appellant's trial through less arbitrary options were available to the court to limit the unduly prejudicial effects of the EDPA fraud trial evidence if the Court concluded that some of the same evidence was essential to the Government's tax fraud case at issue here.

For example, a stipulation would have used to convey Appellant receipt of class action distribution payments that were made payable to hedge funds that he owned. The stipulation could have further stated that Appellant did not report the distribution payments as income on his tax returns. The parties could have then presented evidence regarding the issue of whether the distribution payments represented gross income.

For all of the foregoing reasons, if this Court does not vacate the district judgment of conviction and sentence, Appellant urges the Court to remand the case, in any event, for a new trial based upon the procedural errors of the government prosecutor's which advanced the constructive amendment of the indictment, and the constitutional violation that the district court committed in violation of the Fifth Amendment Due Process Clause and the Sixth Amendment Confrontation Clause Rights.

In the absence of requiring the Government to make an offer of proof before admitting the evidence, the district court abused its discretion. The district court abused its discretion in failing to weigh the probative value of the fraud evidence against the harmful effects of the testimony that was not part of the tax prosecution case.

CONCLUSION

For all of the foregoing reason, Mr. Cammarata, the Appellant respectfully urge this Court to vacate the district court's order that denied his Motion for a Judgment of Acquittal pursuant to Rule 29c) of the Federal Rule of Criminal Procedure or, in the alternative, grant the Appellant a new trial pursuant to his Rule 33 of the Federal Rules of Criminal Procedure.

Respectfully submitted,

/Floyd J. Miller

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REQUIRED CERTIFICATION

A. Bar Membership. I certify that the attorney whose name and appears in this brief is a member of the Bar of this Court. I was appointed under Local Rule 109.1 to represent Appellant as CJA counsel as a result of having represented him in the district court.

B. Type-Volume. This brief was prepared in a 14-point Times New Roman, proportional typeface. Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify based on the word-counting function of my word processing (word 2016) that this brief complies with the type-volume limitations of Rule 32(a)(7)(B), in that the brief contains fewer than 13,000 words, which is 7,684, including footnotes.

C. Electronic Filing. I certify pursuant to LAR 31.1(c) that the text of the electronically filed version of this brief is identical to the text in the paper copies of the brief as filed with the Clerk. The anti-virus program Avast! Ver, 18,8 with current updates, was ran against the PDF version of this brief before the brief was submitted to this Court's CM/ECF system and no virus was detected.

/ Floyd J. Miller
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CERTIFICATE OF SERVICE

I hereby certify that this brief was filed on the Filing User identified below through the Electronic Case Filing (ECF) system:

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