No. 18-13762

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

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UNITED STATES,

Plaintiff-Appellee,

v.

MITCHELL J. STEIN,

Defendant-Appellant.

---

On Appeal from the United States District Court for the Southern District of Florida, West Palm Beach Division

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# BRIEF OF DEFENDANT-APPELLANT

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**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT**

In accordance with Eleventh Circuit Rules 26.1-1 through 26.1-3, Mitchell J. Stein, through his undersigned counsel, certifies that the following persons and entities may have an interest in the outcome of this case:

***Corporations and Entities***

A Clemens Trust

A Doris Trust

ARC Finance Group, LLC

ARC Blind Trust

A.R. Pacific Group

Athletes for Life Foundation

Battelle Memorial Institute

Beckring Investments S.A.

Briarwest International Inc.

Cardiac Hospital Management

Catch 83 General Partnership

Center on the Administration of Criminal Law

Clemmens Trust

C Roberto Trust

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT(Cont'd.)**
***United States v. Mitchell J. Stein***
**Case No. 18-13762**

D Clemens Trust

Electrical Connections

Electrical Product Imports & Marketing LTD

Elliott Davis, LLC

Five Investments Partnership

Five Knights Partnership

Five Knights Revocable Trust

Houston Casualty Company

Innet Co., LTD

IT Healthcare

Jaymi Blind Trust

National Association for Public Defense

National Financial Services, LLC

National Securities Corporation

NPC Financial

Manufacturers Bank

M&C Electrical Services MBC LLC

Miko Foods, Inc.

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT(Cont'd.)**
***United States v. Mitchell J. Stein***
**Case No. 18-13762**

Miko Foods Enterprises, Inc.

Oak Tree Investments Blind Trust

Pacific West Securities, Inc.

Park Avenue Securities, LLC

Penson Financial Services, Inc.

Porter Advisory Group

Regal Securities, Inc.

Scottrade, Inc.

Signalife Inc. ("SGN;" "SGNX;" "SGNXXZ;" "SGAL"), nka Heart Tronics, Inc. ("HRTT")

Silve Group

THS Blind Trust

U.S. Securities and Exchange Commission

WBT Investments Blind Trust

World Equity Group, Inc.

***Individuals and Law Offices***

Allenbaugh, Mark H. - Attorney

Anand, Ajay K. - Principal, Silve Group

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT(Cont'd.)**
***United States v. Mitchell J. Stein***
**Case No. 18-13762**

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Clement, Paul D. - Attorney

Cottingham, Caitlin - Counsel for the United States

Crimmins, Brendan - Attorney

Cutter, Timothy - Government Witness

DelNido, Alexander - Attorney

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT(Cont'd.)**
***United States v. Mitchell J. Stein***
**Case No. 18-13762**

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Feldman, James H. - Attorney

Ferrer, Wifredo A. - U.S. Attorney's Office

Fiedler, James N. - CEO and President of Heart Tronics, Inc. (current)

Fisher, Jeffrey L. - Attorney

Gault, Willie J. - President, Signalife

Gelfer, Stanley - Director of IT, Signalife

Goldsmith, Andrew - Attorney

Grosnoff, Nicole - Counsel for the United States

Greene, Jane - VP of Marketing, Signalife

Gruenstein, Benjamin - Attorney

Harmison, Dr. Lowell T. - CEO, Signalife (deceased)

Harris, Bryan - Investor

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT(Cont'd.)**
***United States v. Mitchell J. Stein***
**Case No. 18-13762**

Harris, David - Attorney

Harrison, Charles - Audit Committee Member, Board Member, Signalife

Hayter, Dr. Anthony - Expert for Defendant-Appellant

Hendrix, Keith - Auditor

Hopkins, Hon. James M. - United States Magistrate Judge

Johnson, Dr. Charles - Board Member, Signalife

Johnson, Hon. Michael - United States District Judge, California

Jones, Tracy J. - Executive Assistant and Bookkeeper, Signalife

Kasen, Jonathan B. - CJA Appellate Counsel for Mr. Stein

Kierl, Philip - Investor and Consultant, Signalife

Klugh, Richard C. - Attorney

Koblin, Dr. Robert - Board Member, Signalife

Kolinek, Robert - Investor

Lackner, Lucas - Investor

LaCour, Edmund G. - Attorney

Lieberman, Alan M. - SEC Counsel

Mangiero, Dr. Susan - Expert for Defendant-Appellant

Marra, Hon. Kenneth A. - United States District Judge

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT(Cont'd.)**
***United States v. Mitchell J. Stein***
**Case No. 18-13762**

Mausner, Ian - Investor

McCullough, Darrin L. - Counsel for the United States

McEwin, Jennifer - Executive Director, Casino Collections for MGM Resorts

Melley, Peter J. - Non-Expert Sentencing Witness for the United States

Meltzer, Ellen - Counsel for the United States

Moore, Janet - Co-Chair, *Amicus* Committee, National Association for Public Defense

Muhlendorf, Kevin B. - Counsel for the United States

Muscillo, Evie - Consultant, Signalife

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Paolillo, Jacqueline - Expert for Defendant-Appellant

Pasano, Michael S. - Attorney

Pascucci, Michelle - Counsel for the United States

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT(Cont'd.)**
***United States v. Mitchell J. Stein***
**Case No. 18-13762**

Perkins, Rowland - President, Signalife

Phillips, Dr. Steven J. - Board Member, Signalife

Pickard, Kevin - CFO, Signalife

Provencio, Norma - Auditor, CPA, Board Member, Signalife

Rauch, Ryan - Stock Promoter

Salyer, Kathleen Mary - U.S. Attorney's Office

Scharf, Jared J. - Attorney

Selna, Hon. James V. - United States District Judge, Related Civil Case

Shaprio, Dr. Robert - Expert for Defendant-Appellant

Smachetti, Emily M. - U.S. Attorney's Office

Stein, Mitchell J. - Defendant-Appellant

Stein, Tracey Hampton - former wife of Mr. Stein and former Majority Shareholder, Signalife

Stieglitz, Albert B. - Counsel for the United States

Suh, Sung-Hee - Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice

Taylor, Mark - Investor

Tribou, Delores J. - President, Tribou Investment Co. Inc., Wife of Mr. Tribou

Tribou, Thomas R. - Founder, President at TZ Medical, Inc.

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT(Cont'd.)**
***United States v. Mitchell J. Stein***
**Case No. 18-13762**

Udolf, Bruce L. - Attorney

Van Dyck, Henry - Counsel for the United States

Warren, Andrew H. - Counsel for the United States

White, Charles G. - Attorney

Wilk, Richard - Trustee, THS Blind Trust

Windom, Dr. Robert E. - Board Member, Signalife

Wittenberg, Eric J. - Attorney

Woodbury, John - Securities Counsel, Signalife

Wylie, John - Attorney

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## STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellant Mitchell J. Stein respectfully requests oral argument. This is his first direct appeal of a final, criminal judgment against him and the district court's order of sentencing, restitution, and forfeiture. Moreover, this appeal presents important issues concerning whether the Due Process Clause excuses the knowing use of false testimony where the government does not also suppress evidence indicating that the testimony was false. Courts of appeals across the nation have diverged in answering this question. When this case was previously before this Court in an interlocutory posture, this Court suggested that the government had acted consistent with due process when it knowingly used false, material testimony to convict Stein. But the record was not complete at that time, as the government itself acknowledged in subsequent certiorari proceedings. The issue is now ripe for this Court's review on a full record and, given the complexity of that record and the importance of the issue, oral argument is warranted.

Additionally, this case presents important questions concerning what, for purposes of computing a defendant's sentencing guidelines range and restitution amount, the government must prove to show the amount lost in a financial fraud. The district court allowed the government to prevail on a loss amount that was not adequately supported by the record: The alleged victims of the supposed fraud were not shown to have relied on the fraud in making their investment decisions, nor were

the alleged losses shown to stem from the fraud (rather than other exogenous causes). Because the loss calculation often drives the sentence in financial fraud cases, *see, e.g.*, *United States v. Olis*, 429 F.3d 540, 545 (5th Cir. 2005) ("The most significant determinant of [the defendant's] sentence is the guidelines loss calculation."), this question is of wide-ranging importance. Oral argument is essential to its proper resolution.

Finally, this case presents the question whether the district court erred in finding Stein jointly and severally liable for forfeiture of $2,156,000 that he did not himself obtain. The Supreme Court held in *Honeycutt v. United States*, 137 S. Ct. 1626 (2017), that defendants cannot be jointly and severally liable under statute governing drug crimes, 21 U.S.C. § 853(a), for amounts they themselves did not receive. Following that decision, courts of appeals have split on whether joint and several liability is permissible in the context of the forfeiture statute governing the crimes charged here, 18 U.S.C. § 981. This Court has indicated that *Honeycutt* does not allow such joint and several liability in this context, and oral argument would allow this Court to continue its consideration of this issue in the context of a sizable forfeiture award.

# TABLE OF CONTENTS

**Page**

**TABLE OF CONTENTS**
(continued)

**Page**

# TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**TABLE OF AUTHORITIES**
(continued)

**Page(s)**

**TABLE OF AUTHORITIES**
(continued)

**Page(s)**

**TABLE OF AUTHORITIES**
(continued)

**Page(s)**

**TABLE OF AUTHORITIES**
(continued)

**Page(s)**

**TABLE OF AUTHORITIES**
(continued)

**Page(s)**



**Statutes**

**TABLE OF AUTHORITIES**
(continued)

**Page(s)**



**Other Authorities**

## INTRODUCTION

The record in this case is clear that government knowingly relied on false testimony to convict Mitchell J. Stein of mail, wire, and securities fraud. It also persuaded the district court to inflate the losses and forfeiture amounts stemming from this fraud by incorporating amounts and victims not causally connected to the fraud. Finally, the district court held Stein jointly and severally liable with his co-conspirator for forfeiture amounts the government acknowledges Stein did not himself receive. These errors require reversal of Stein's conviction and sentence.

## JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 18 U.S.C. § 3231, as Stein was charged with an offense against the laws of the United States. The district court issued its final judgment on August 29, 2018, and Stein timely filed a notice of appeal on September 5, 2018.

## STATEMENT OF THE ISSUES

1. Whether the Government violated the Due Process Clause through the knowing use of false evidence.

2. Whether the district court erred in sentencing Stein and ordering $1,029,570 in restitution, based on a loss calculation that improperly incorporated amounts lost before the alleged fraud and that failed to show the 616 alleged victims relied on the alleged fraud.

3. Whether the district court erred in finding Stein jointly and severally liable with his co-conspirator for forfeiture amounts Stein did not himself receive and in including in the forfeiture order amounts without a causal connection to the alleged fraud.

## STATEMENT OF THE CASE

Signalife, Inc.—formerly known as Recom Managed Systems, Inc., and now called Heart Tronics, Inc.—is a medical device company that specializes in developing and marketing electronic heart monitors. Between 2002 and 2005, it raised more than $16 million in capital; it also obtained FDA clearance for its flagship device, the Fidelity 100, a compact, wireless electrocardiography monitor. Signalife's stock was listed on various exchanges, including the American Stock Exchange (AMEX). DE452-10.

In 2007, Signalife named Dr. Lowell T. Harmison as its CEO. Harmison had developed and patented the first fully implantable artificial heart, led another biomedical company, and served as Principal Deputy Assistant Secretary for Health of the U.S. Public Health Service. DE464-19:93. Shortly after his appointment, Harmison secured a $100 million line of credit for Signalife and began entering agreements for the marketing, production, sale, and distribution of Signalife's products.

Defendant-Appellant Stein served as in-house legal counsel to Signalife.

DE240:54. In close consultation with other Signalife employees, he helped draft three press releases for the company in the fall of 2007 that are central to the criminal charges brought against him. DE240:56-58.

**A. The Press Releases**

On September 20, 2007, Stein sent a draft press release to John Woodbury, Signalife's securities attorney. DE240:59. Woodbury was responsible for reviewing the company's press materials to ensure their compliance with the rules of AMEX, the stock exchange on which Signalife's shares were then traded. DE240:56-58. The press release stated that Signalife had sold nearly $2 million worth of Fidelity 100 units "in its initial sales push, being led by new management." DE240:61. Stein told Woodbury that the press release was supported by a purchase order. DE240:59-60.

On September 24, 2007, Stein emailed Woodbury another draft press release announcing a $3.3 million sales order as a "result of new management's initial sales campaign." DE240:64-66.

On October 9, 2007, Stein sent Woodbury a third draft press release; it announced that Signalife had received a sales order of $551,500. DE240:68-70. Stein copied Harmison on the email sending the draft press release to Woodbury. DE240:70. Woodbury approved each press release without asking for supporting documentation. DE240:61-72.

Stein later emailed Woodbury purchase orders supporting each of the press releases. DE240:78-80. These included (1) a September 14, 2007 purchase order for $1.98 million placed by Cardiac Hospital Management (CHM), DE240:73-74, DE453-9; (2) a September 24, 2007 purchase order for $3.3 million placed by IT Healthcare, DE240:74-76, DE453-10; and (3) an October 4, 2007 purchase order for $564,000 also placed by IT Healthcare, DE240:76-77, DE453-12.

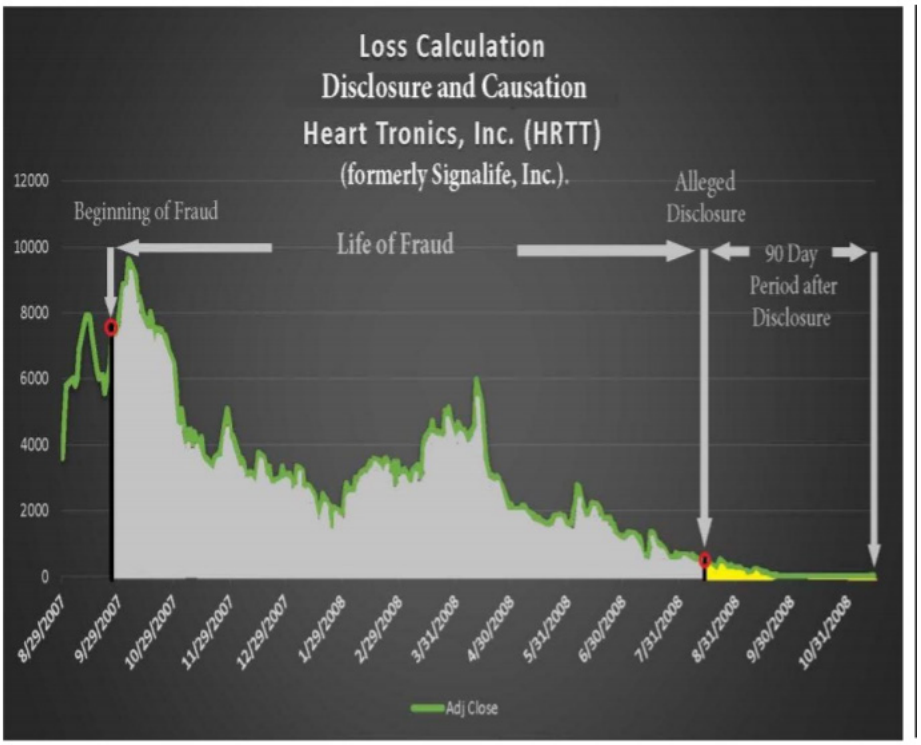
Harmison's assistant, Tracy Jones, also received a copy of the check supporting the $1.98 million purchase order from CHM. The $50,000 check was dated September 27, 2007 and the memo line identified the number on the CHM purchase order, the terms of which called for a $50,000 down payment. DE241:100-01; DE247:34, 38, 58; DE453-9:1; DE529-1. The check was signed by Dolores Tribou—the wife of Thomas Tribou, who had contracts with Signalife—and it was deposited into Signalife's account on September 28, 2007. DE208, DE322-1:9; DE453:14; DE534:4 n.2. Jones received a copy of the deposit slip: On October 24, she emailed copies of the check and deposit slip to Norma Provencio, chairman of the Signalife board's audit committee. DE264-3, DE264-4, DE298-1:37-38. Provencio forwarded these documents to Woodbury, telling Woodbury that the documents represented "the $50k deposit on the 9-14 purchase order." DE264-3.

Harmison incorporated information about these purchase orders into a March 2008 memorandum to Signalife's auditors. These orders were similarly detailed in

reports that Signalife filed with the Securities and Exchange Commission (SEC). DE240:91-94.

On April 14, 2008, Signalife hosted a webcast in which Harmison delivered an overview of Signalife's current and planned product lines. DE551:134:18-22; DE549-4. He did not discuss the sales mentioned in the press releases, nor did he discuss specific new sales. DE549-4. On the last trading day before the webcast, Signalife's stock had closed at $1.34 per share. DE533:4. On the first trading day after the webcast, Signalife's stock closed at $1.00 per share. *Id.*

Soon thereafter, Signalife began to experience manufacturing problems, after which it received cancellations for two purchase orders. DE240:100, 122; DE241:164-167. On August 15, 2008, Signalife filed an SEC report describing the cancellation of the IT Healthcare purchase order. DE453-26. That same day, Signalife's stock closed at $0.10 per share. DE533:5. The movement of Signalife's share price is reflected in the graph below, DE387-6.




**B. Trial Proceedings**

In 2011, the United States indicted Stein for crimes related to his work with Signalife. DE3. The government alleged (among other things) that Stein had conspired with two other men, including Martin Carter, in a scheme to disseminate false information about Signalife and sell Signalife shares at inflated prices. DE3:6. Separate from the conspiracy charges, the government alleged that Stein engaged in the underlying substantive crimes of mail fraud, wire fraud, securities fraud, and money laundering. DE3:9-12.

At trial, the government sought to prove that Stein had Signalife "put out fake good news about sales," DE240:15, to bolster the company's share price. Specifically, it contended that Stein made up the purchases and purchase orders that

he claimed supported the three press releases. DE240:18, 21-22. The government began its case with Woodbury (Signalife's securities attorney), who had reviewed and approved the press releases. The government asked whether Woodbury had, as of late 2007, "any additional independent information about these purchase orders other than" the information Stein provided him. DE240:96. Despite having received copies of the check constituting CHM's down payment and the deposit slip placing that check into a Signalife account, DE264-3, Woodbury replied: "No, I did not. . . . *I got all my information from Mr. Stein*." DE240:96 (emphasis added). Indeed, Woodbury repeatedly indicated that he relied solely on Stein for the information in the press releases. *See, e.g.*, DE240:102-106 (CHM order); DE240:106-110 (IT Health order); DE241:18 (identifying Stein as his "source of this information that Signalife was telling the auditors about these purchase orders"). Even though the government had produced the email showing Woodbury received copies of the check and deposit slip for the CHM order, the prosecution never corrected any of Woodbury's false testimony.

The government's second witness was Jones. DE241:29-31. Jones testified that she had not "seen any invoices for the IT and Cardiac Healthcare purchase orders"; she termed them "phantom purchase orders because [she] never received any backup or anything on them." DE241:116-117. In fact, Jones *had* received documentation for CHM order: the $50,000 check from Tribou and the related

deposit slip, both of which she herself later sent to Provencio. *See* DE298-1:37-38. Although the government produced those documents in discovery, it never corrected Jones's testimony.

The government also introduced the testimony of Bryan Harris, an individual investor in Signalife. DE243:4-10. Harris testified that he relied on Signalife's press releases and SEC filings in deciding to invest. *Id.* Aside from Harris, no trial witness testified that he or she relied on the alleged fraud in making investment decisions. *See United States v. Stein*, 846 F.3d 1135, 1154 (11th Cir. 2017). One victim impact statement did so, and there was support in the victim impact statements and other testimony that investors relied on publicly available information in deciding to invest in Signalife. *Id.* This evidence did not, however, show that the alleged victims specifically relied on the allegedly fraudulent information distributed by Signalife. *Id.*

Before the close of trial, Stein—who represented himself—discovered deep in the government's voluminous disclosures the critical email showing (1) that Signalife had received the down payment for the CHM order, and (2) that Woodbury and Jones, contrary to their testimony, were aware of this fact. Stein sought to introduce the email, check, and deposit slip into evidence, but the government objected on the ground that the email's contents were hearsay. DE246:234-35; *see* DE246:236-267; DE247:13-15, 57-59.

The trial court sustained the government's objection. But the parties agreed to the following stipulation, which was read to the jury: "On or about September 27th, 2007, an individual named Thomas Tribou paid Signalife $50,000 for goods he expected to receive." DE247:71.

During closing arguments, the government emphasized its position that Stein had created "fake purchase orders," DE248:23, to "get the stock price up, manipulate the market." DE248:31. The prosecutor asserted that Stein had lied to Woodbury and others, DE248:22, and specifically reminded the jury of Jones's reference to "phantom purchase orders." DE248:40. Stein was convicted on all counts. DE248:162-63; DE211.

Before sentencing, the probation officer issued a presentence investigation report. That report recommended a 24-level sentencing enhancement under U.S.S.G. § 2B1.1(b)(1)(M) based on a loss calculation of more than $50 million but less than $100 million. Stein objected to the loss amount—which was relevant to both his sentence and the restitution amount—arguing that the government had erroneously presumed that all purchasers of Signalife stock during the period of the alleged fraud relied on false information promulgated by Stein. *Stein*, 846 F.3d at 1144. Stein also argued that the government failed to disentangle the effect of other market forces, including naked short-selling of Signalife stock and the financial crisis in the fall of 2008, that likely contributed to investors' losses. *Id.* at 1140. *See*

*Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Manning*, 136 S. Ct. 1562, 1566 (2016) (explaining short selling).

### C. Post-Trial Proceedings

Stein moved for a new trial, arguing that the government had violated his due process rights by knowingly using false testimony to convict him. DE279. Stein contended that the email from Provencio to Woodbury disproved Woodbury's assertion that the only information he received to substantiate the purchase orders came from Stein. DE279:15-16. Stein likewise argued that Jones's statement that she "never received any backup or anything" for the purchase orders was directly contradicted by the email she had sent to Provencio. DE279:16-17.

In response, the government argued that Stein could not press a due process claim because the documents showing the falsity of its witnesses' testimony were "not 'suppressed' or 'withheld' from" Stein. DE292:10. The district court denied Stein's motion for new trial and his other post-trial motions as "baseless." DE340.

The district court also ruled that Stein's alleged market manipulation caused $13,186,025.85 of loss to 2,415 Signalife investors. The court ordered Stein to pay $13,186,025.85 in restitution and sentenced him to 17 years in prison. DE461. It further ordered Stein to forfeit $5,378,581.61 to the United States, pursuant to 18 U.S.C. § 981(a)(1)(C), 28 U.S.C. § 2461(c), and 18 U.S.C. § 982(a)(1). DE400; DE407. It held Stein jointly and severally liable for the $2,156,000 forfeiture order

against his co-conspirator, Carter. DE400; DE564:6.

### D. First Appeal

This Court affirmed Stein's conviction. *Stein*, 846 F.3d at 1156. In addressing his due process claim, it began from the premise that the government's knowing use of false testimony is merely "a species of *Brady* error"—which it called a "*Giglio* error," *see Giglio v. United States*, 405 U.S. 150 (1972)—that "occurs when the undisclosed evidence demonstrates that the prosecution's case included perjured testimony and that the prosecution knew, or should have known, of the perjury." 846 F.3d at 1147 (quotation omitted). Under that rubric, it is not enough for the defendant to establish that the government knowingly used false testimony that was reasonably likely to affect the verdict. *Id.* Rather, a defendant "generally must [also] identify evidence the government withheld that would have revealed the falsity of the testimony." *Id*. Absent a showing of suppressed evidence, the Court continued, "there is no violation of due process" from knowing prosecutorial use of false testimony unless the government further "capitalizes on it" later in trial. *Id.* (quotation omitted).

Turning to the facts, this Court did not dispute that Woodbury's and Jones's testimony was false and could have affected the verdict. 846 F.3d at 1150. Even so, the Court held that the government's knowing use of this testimony did not violate due process because the government had not suppressed the evidence of its falsity,

but rather had included the critical email in the database it produced to Stein before trial. *Id*. And this Court concluded that "the prosecutor did not emphasize or capitalize on [the false testimony] by repeating it or making it the centerpiece of an argument." *Id.* at n.13.

At the same time, this Court reversed Stein's sentence. 846 F.3d at 1151-56. The district court had assumed that all investors who purchased Signalife stock between September 20, 2007 (when the first press releases issued) and August 15, 2008 (when an SEC filing noted the cancellation of one purchase order) relied on Stein's statements, and that the entire drop in the stock's value could be attributed to Stein. *See id.* at 1154-56. This Court, however, held that the government failed to present sufficient evidence to support a finding that these investors relied on information disseminated by Stein. *Id*. It also held that the district court failed to consider intervening factors that may have caused Signalife's stock to lose value between September 2007 and August 2008, including short-selling of Signalife stock and the overall decline in the stock market in 2008. *Id.* at 1155. This Court accordingly vacated Stein's sentence and remanded for resentencing.

Stein sought the U.S. Supreme Court's review of this Court's due process ruling. Opposing Stein's petition for certiorari, the Solicitor General asked the Court to defer its consideration of Stein's case until after the district court was able to consider Stein's post-trial motion "alleging violations of *Brady* and seeking

additional discovery, including on the [false evidence] issues raised in the [certiorari] petition." Br. for the United States in Opposition, *Stein v. United States*, No. 17-250, 2017 WL 5158038, at *24 (U.S. Nov. 6, 2017) [hereinafter Opp.]. The Supreme Court denied certiorari without comment. DE518.

### E. Further District Court Proceedings

After this Court remanded the case, the district court considered Stein's follow-up motion for a new trial or to dismiss the indictment, *see* DE479; DE529, as well as his motion to vacate the prior forfeiture order, *see* DE524.

#### *1. Motion for a new trial or to dismiss the indictment*

Stein's motion for a new trial or to dismiss the indictment pointed to new evidence showing that the government had relied on evidence it knew to be false to secure a conviction. DE479:7-8. This evidence included a declaration from Tribou (who had not testified at trial), stating that he signed the CHM purchase order and that the September 20, 2007 press release truthfully reflected that purchase order. DE529-1. Tribou also confirmed, contrary to the government's arguments, that the $50,000 down-payment check on the CHM purchase order was authentic and that he and his wife wrote the CHM purchase order number in the memo line of the check. *Compare id.*; *with* DE247:42, 54 (prosecution suggesting Tribou check was not authentic).

Stein also highlighted (among other points) two government reversals of

position on appeal suggesting that it had knowingly relied on false evidence at trial. First, the government switched from arguing that Stein committed fraud because the purchase orders were "made up" to arguing that he committed fraud because "Signalife could not ship any product," DE479:7—an argument it had specifically contradicted at trial. DE248:56 ("Whether that device worked or not doesn't matter."). Second, the government argued that "the jury was aware that some back-up had been received for one of the purchase orders." Resp. Br. 53, *United States v. Stein*, No. 14-15621 (11th Cir. Sept. 28, 2015). For this proposition, the government cited a page in a lengthy public filing that mentioned a down-payment on the CHM purchase order. *Id.* (citing GX 73 at 22 [DE453-11]). Although this exhibit was introduced during Woodbury's testimony, the government expressly told him *not* to "read all that language." DE240:96. And the government did not otherwise note that this exhibit said that Signalife had received $50,000 towards the $1,980,000 order. *See* DE240:95-96.

The district court denied Stein's motion without explanation. DE562.

*2. Motion to vacate forfeiture order*

Stein also moved to vacate the district court's forfeiture order. As relevant here, he argued that *Honeycutt*, which held that a defendant may not be jointly and severally liable for property that a co-conspirator (but not the defendant himself) derived from certain drug crimes, should prohibit Stein from being jointly and

severally liable with his co-conspirators. Stein also argued that the gains he was ordered to forfeit were not traceable to his alleged offense.

The government did not dispute that *Honeycutt* applies to the forfeiture statutes at issue here. But it contended that Stein's motion was foreclosed because the issue was not raised in Stein's first appeal and fell outside the scope of the remand. The government also argued that *Honeycutt* does not apply here because Stein was "the leader of this operation, and, as such, every cent that flowed through the scheme was subject to his control." DE525:8.

The district court denied Stein's motion without explanation. DE562.

**F. Resentencing**

After remand, the government filed a sentencing memorandum requesting that the district court re-impose a sentence of 204 months and order restitution of $8,773,369 based on a loss to investors of $2,027,890 and a loss to Signalife of $6,745,479. DE533.

The district court held a two-day resentencing hearing. DE551; DE552. The government began by calling Mark Taylor, an investment advisor. In examining Taylor, the government again relied on its theory that "the information in the[] press releases was completely made up." DE551:11:22-23. Taylor testified that he read Signalife's SEC filings and its press releases, invested in Signalife himself, and advised his clients to invest in Signalife. DE551:6:15-16, 8:1-23, 9:10-15, 11:4-25.

In the victim impact statements submitted in the prior proceeding, Taylor had been the only alleged victim to claim that he relied on Stein's false press releases. *Stein*, 846 F.3d at 1154. But the government *did not* identify Taylor as a victim in its loss calculations submitted during resentencing. DE569.

The government next called Dr. Chyhe Becker, an economist with the Division of Economic and Risk Analysis at the SEC. DE551:36. She testified as an expert witness about the effect of Signalife's three press releases and webcast on the price of its stock. DE551:36-38. Becker said that, based on her analysis of the movement of Signalife's stock price, the September 25 press release caused Signalife's stock to "experience[] an abnormal" positive return. DE551:37:12-15, 39:24-25, 44:6-7, 24-25, 46:6-9. Becker also testified that Signalife's webcast caused an abnormal negative return. DE551:45:17-20; *see id.* 46:8-9. Finally, Becker testified that short-selling "in Signalife's stock was not excessive during the relevant period." DE551:57:4-16, 66:2-91:15. Although the government argued during its closing argument that Dr. Becker's analysis supported a finding of market-wide reliance on the alleged fraud, DE552:58, Dr. Becker never opined on reliance.

The government also called Peter Melley of the Financial Industry Regulatory Authority. Testifying as a fact witness, Melley explained the methodologies the government used to calculate loss amounts for sentencing and restitution purposes. DE551:146:1-13, 147:8-21. The government presented two different loss

calculations, both of which were "substantially similar to the methodologies [] performed in" the first sentencing. DE551:148:1-4. Only the first methodology is relevant here, as it is the one the district court used. DE561. Under that methodology, the government identified the investors who bought stock during the relevant period of time and figured out who made or lost money. DE551:147:23-148:10; *see also* DE533:7, 9-18; DE547:1. Although both parties' experts agreed that any decline in Signalife's share price before the fraud was revealed to the market (i.e., before August 15, 2008) could not have been the result of the fraud, DE555:2-3, this loss calculation included loss amounts predating August 15, 2008, *see* DE547-1.

The government submitted some new victim impact statements as part of the resentencing. The majority of statements, however, were submitted for the initial sentencing, DE552:85-87, and were "insufficient to support the inference that *all*" of the alleged victims "relied on Mr. Stein's fraudulent information when deciding to purchase Signalife stock." *Stein*, 846 F.3d at 1154.

After the resentencing hearing, the district court ordered the government to submit new loss calculations that "remove[d] any losses that investors allegedly incurred on the sale of Signalife stock which was purchased after September 20, 2007, but which was sold before August 15, 2008." DE557. The government did so, identifying $1,029,570 of losses across 616 investor victim accounts. DE558.

Stein contested the government's newest loss calculations, explaining that they "remain[] unreliable as an estimate of the losses investors suffered 'that resulted from the offense' for" at least two reasons. DE559:2 (quoting U.S.S.G. § 2B1.1 cmt. n.3(A)(i)). First, the calculations assumed that all 616 alleged victims relied on the specific misrepresentations at issue in purchasing Signalife stock, but the government had not introduced evidence supporting that conclusion. *Id*. Second, the government's calculations incorporated losses before August 15, 2008 (when the market first learned of the fraud). *Id.* at 5.

The district court disagreed. Despite both parties' experts' position that pre-disclosure declines in Signalife's share price should be excluded from loss, the court found "the amount of loss attributable to [Stein's] conduct" to be $1,029,570. DE561:1. It further found "credible and reliable" Dr. Becker's "testimony regarding the method of calculating the loss." *Id.* Finally, even though Dr. Becker never discussed reliance, DE578:4-5, the district court reasoned that Dr. Becker's testimony supported a finding of market-wide reliance and therefore "that there were 616 investor victims," DE561:2. The district court entered an amended judgment as to Stein, ordering him to pay $1,029,570 in restitution, and reducing his sentence from 204 months in prison plus two years supervised release to 150 months in prison plus three years supervised release. DE564.

Stein filed his notice of appeal on September 4, 2018. DE567. This Court

initially set the deadline for Stein's opening brief for November 21, 2018, but then extended it to December 21, 2018 upon Stein's unopposed motion for an extension.

## STANDARDS OF REVIEW

This Court reviews de novo alleged constitutional due process violations. *See, e.g.*, *Harrison v. United States*, 577 F. App'x 911, 912 (11th Cir. 2014).

This Court reviews "a district court's interpretation of the Sentencing Guidelines *de novo*, and the determination of the amount of loss involved in the offense for clear error." *United States v. Maxwell*, 579 F.3d 1282, 1305 (11th Cir. 2009). A district court's determination that a person or entity was a victim for purposes of loss calculation is an interpretation of the guidelines, so it is reviewed de novo. *United States v. Martin*, 803 F.3d 581, 593 (11th Cir. 2015). A district court's determination of proximate causation is part of the determination of the loss amount, and thus is reviewed only for clear error. *Id.*

The Court's review of an order of restitution under the Mandatory Victims Restitution Act (MVRA) involves three standards of review: It reviews *de novo* the legality of an order of restitution. By contrast, it reviews for abuse of discretion the determination of the restitution value of lost or destroyed property. Related findings of fact are reviewed for clear error. *United States v. Robertson*, 493 F.3d 1322, 1330 (11th Cir. 2007).

This Court reviews a district court's interpretation of federal forfeiture laws

de novo. *United States v. Kennedy*, 201 F.3d 1324, 1329 (11th Cir. 2000). It reviews its fact-finding supporting the forfeiture amount for clear error. *Id.*

## SUMMARY OF THE ARGUMENT

I. The Supreme Court has repeatedly reaffirmed "that a conviction, secured by the use of perjured testimony known to be such by the prosecuting attorney, is a denial of due process." *White v. Ragen*, 324 U.S. 760, 764 (1945). "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue v. Illinois*, 360 U.S. 264, 269 (1959). "A new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury.'" *Giglio*, 405 U.S. at 154 (quoting *Napue*, 360 U.S. at 271).

Despite these well-established rules, the district court tolerated the government's knowing use of false evidence in both the guilt/innocence phase and the resentencing phase of Stein's trial. It did so even in the face of new evidence showing that the government introduced false evidence. The result is inconsistent with due process.

This result is also inconsistent with the holdings of other federal circuits and state supreme courts. These courts have held, in unequivocal terms, that "[t]he government's duty to correct perjury by its witnesses is not discharged merely because defense counsel knows, and the jury may figure out, that the testimony was

false." *Soto v. Ryan*, 760 F.3d 947, 968 (9th Cir. 2014) (quotation omitted, emphasis added); *see also United States v. Foster*, 874 F.2d 491, 495 (8th Cir. 1988); *New Hampshire v. Yates*, 629 A.2d 807, 809-10 (N.H. 1993); *Michigan v. Smith*, 870 N.W.2d 299, 307 n.8 (Mich. 2015). The reason for this conclusion is simple: the government has an affirmative duty to erase the taint of its own witnesses' false testimony. Shifting that burden to the defendant offends basic principles of due process.

II. The district court also erred in calculating the loss resulting from the fraud for purposes of determining Stein's sentencing guidelines range and the restitution amount he was required to pay.

First, although precedent is clear that all loss amounts must have resulted from the fraud, the district court incorporated amounts into the loss calculation that could not have been caused by his fraud and failed to disaggregate losses caused by market forces unrelated to Stein's crime.

Second, the district court took on faith that all 616 individuals identified by the government were, in fact, victims who relied on Stein's fraud in deciding to invest in Signalife. Evidence in the record does not support that conclusion.

III. Finally, the district court erred twice over in denying Stein's motion to vacate its prior forfeiture order. To begin, the Supreme Court made clear in *Honeycutt v. United States* that a defendant cannot be jointly and severally liable for

forfeiture of property that he did not himself receive unless the forfeiture statute allows it. 137 S. Ct. 1626, 1635 (2017). As this Court has indicated, this logic applies to the forfeiture statutes at issue here, 18 U.S.C. § 981(a)(1)(C) and § 982(a)(1). *See United States v. Carlyle*, 712 F. App'x 862, 864-65 (11th Cir. 2017). Second, the district court erred in including within the forfeiture order amounts that were not traceable to the offenses, even though both of the relevant forfeiture statutes require that causal nexus.

## ARGUMENT

### I. THE GOVERNMENT'S KNOWING USE OF FALSE EVIDENCE AT TRIAL REQUIRES REVERSAL

The foundational elements for Stein's false evidence claim are undisputed. To begin, the government plainly submitted false testimony at trial and during resentencing. Jones testified that the IT and Cardiac Healthcare orders were fake "because [she] never received any backup or anything on them." DE241:116-117. But documents produced during discovery showed that Jones *had* received documentation for CHM order—and, in fact, had forwarded this documentation to a colleague with a note. *See* DE298-1:35-36. Similarly, the government introduced testimony from Woodbury that he "*got all* [his] *information from Mr. Stein*." DE240:96 (emphasis added); *see also* DE240:102-106; DE240:106-110; DE241:18. This testimony was contradicted by the fact that Provencio sent Woodbury copies of the check constituting CHM's down payment and the deposit slip depositing that check into Signalife's account. DE264-3. The government never corrected either witness's false testimony.[1]

It is likewise clear that the government relied on this false evidence at trial.

[1] To be sure, this Court previously suggested that there was no inconsistency between the prosecution's representations that the CHM purchase order was fake and the fact that Tribou signed the purchase order and paid Signalife $50,000. *Stein*, 846 F.3d at 1149-50. But that was before there was additional evidence in the record expressly stating that the $50,000 was for a real order, that the press release was based on that order, and that the government knew that. DE529-1.

The government explained during opening arguments that it would prove that Stein had Signalife "put out fake good news about sales," DE240:15, to bolster the company's share price, *see* DE240:18-22. It made similar representations during closing arguments, contending that the three purchase orders were "fake" and "all made up," DE248:34:17-22, that the sales themselves were also "fake," DE248:34:13, *see* DE248:39:3-5 (similar), and specifically claiming that the purchase order involving Tribou's check by claiming it "never happened," DE248:46-47. *See also* DE248:46:12-14 (similar); DE248:46-47 (discussing each of the three allegedly fake purchase orders in detail). It specifically asked the jury to recall Jones's and Woodbury's testimony relating to the allegedly fake purchase orders. *See* DE248:40:18-19 (Jones); DE248:46:18-20 (Woodbury); DE248:42:17-19 (Woodbury).

Finally, it is clear that the government knew or should have known that the evidence at issue was false. Indeed, the Solicitor General did not dispute the government's knowledge of falsity in prior certiorari proceedings. Nor could it have done so: The $50,000 check, the related deposit slip, and the emails transmitting both those documents to Jones, Provencio, and Woodbury were produced from the government's files. *See* DE529.

The only open question is the purely legal one whether the government's knowing use of false evidence violated due process. When this case was last before

this Court, this Court held that even though Stein identified "allegedly false testimony," there was no due process violation because the government did not (a) suppress other evidence showing that it introduced false testimony or (b) "capitalize" on the false evidence it introduced. *United States v. Stein*, 846 F.3d 1135, 1150 & n.13 (11th Cir. 2017). There is simply no basis in Supreme Court jurisprudence or due process principles for the suppression or capitalization requirements. In any event, even under the principles this Court previously articulated, it is now clear that Stein prevails.[2]

[2] The law-of-the-case doctrine does not apply to Stein's due process arguments for at least two reasons. First, that discretionary doctrine "does not limit the tribunal's power," and should yield where "a prior holding . . . is clearly erroneous and would work a manifest injustice." *Arizona v. California*, 460 U.S. 605, 619 & n.8 (1983); *see also, e.g.*, *Murphy v. FDIC*, 208 F.3d 959, 966 (11th Cir. 2000) (same); *Riley v. Camp*, 130 F.3d 958, 989 (11th Cir. 1997) (Kravitch, J., concurring in part and dissenting in part) (same). That is precisely the situation here: denying relief would be fundamentally unfair, as it would allow the state to secure convictions through use of false testimony, which defendants are little able to correct. It would also flout Supreme Court precedent and conflict with the law of numerous other courts. Second, the law of the case doctrine "applies only where there has been a final judgment"; "a court's previous rulings may be reconsidered as long as the case remains within the jurisdiction of the" court. *Vintilla v. United States*, 931 F.2d 1444, 1447 (11th Cir. 1991). Because Stein's motion for a new trial or to dismiss the indictment was pending when this Court last considered this case, and because this Court has jurisdiction here, the Court can revise its prior decision based on Stein's new evidence. Indeed, the government specifically argued that certiorari should be denied following Stein's last appeal because his motion "alleging violations of *Brady* and seeking additional discovery" (as well as other motions) remained pending. Opp. at *24.

### A. The Government's Knowing Use of False Evidence Violates Due Process Even If the Government Discloses Other Evidence of Its Falsity

There is no basis in due process for the rule that a false-evidence claim can succeed only if the defendant shows that the government suppressed evidence of falsity. Since *Mooney v. Holohan*, 294 U.S. 103 (1935), the Supreme Court has recognized that a conviction cannot stand if it is obtained "through a deliberate deception of court and jury by the presentation of testimony known to be perjured." *Id.* at 112. And in *Napue*, the Court made clear that "[t]he same result obtains when the" government allows false testimony "to go uncorrected when it appears." 360 U.S. at 269. This duty reflects the principle that a prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all." *Berger v. United States*, 295 U.S. 78, 88 (1935). "It is as much [a prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Id.*

Prosecutors are bound by this duty for good reason: If the government deliberately uses false testimony against an accused, the trial is not rendered fair merely because the government discloses evidence showing its witnesses are perjuring themselves. The defendant can try to counter the false testimony, but the stain of that testimony will remain. A defendant's knowledge of false testimony is

thus no antidote to the prosecution's use of it. *See United States v. Bagley*, 473 U.S. 667, 680 (1985) ("[T]he knowing use of perjured testimony involves . . . a corruption of the truthseeking function of the trial process.") (quotations omitted); *Napue*, 360 U.S. at 269-70 ("A lie is a lie . . . and, if it is in any way relevant to the case, the [prosecutor] has the responsibility and duty to correct what he knows to be false and elicit the truth.") (quotations omitted).

In reaching the contrary conclusion in this case's first appeal—that the knowing use of false testimony does not violate due process "[i]n the absence of government suppression of the evidence," *Stein*, 846 F.3d at 1150—this Court mistakenly merged the government's duty under *Brady* to provide exculpatory evidence with its distinct duty under *Napue* not to knowingly introduce false evidence. Nothing in *Brady*, or due process precedent generally, stands for the proposition that the government's observance of its *Brady* obligations relieves it of its separate, wholly independent, and long-recognized duty to refrain from seeking convictions through false evidence. The government can violate *Brady* but comply with *Napue*/*Mooney* or, as in this case, comply with *Brady* yet violate *Napue*/*Mooney*.

Having improperly fused two different due process prohibitions, this Court also failed to recognize a critical distinction between a *Brady* violation and a false testimony violation. If the government has improperly withheld evidence under

*Brady*, but a defendant obtains that evidence through other means before trial, the defendant is fully able to present the evidence in his defense. Thus, even though the government has unquestionably breached its constitutional obligation, the trial itself is ultimately unaffected. That is not true when the government resorts to false testimony. Even if the defendant acquires evidence of the falsity before trial, the government's introduction of, and reliance on, the false testimony necessarily distorts the trial. As explained above, the defendant cannot purge his trial of the stink of the tainted evidence. *See United States v. Barham*, 595 F.2d 231, 242 (5th Cir. 1979) (noting that "prosecutorial failure to correct false evidence," even evidence only affecting the credibility of a government witness "taints a conviction").

### B. There Is No Basis in Due Process for Requiring the Defendant to Prove That the Government Capitalized on the False Evidence

There is similarly no basis in due process for absolving the government of a *Napue* violation if it did not "affirmatively capitalize" at trial on the false evidence it introduced. *Stein*, 846 F.3d at 1147.

The rationale for the capitalization exception seems to stem from concerns about defense gamesmanship. *See, e.g.*, *United States v. Mangual-Garcia*, 505 F.3d 1, 10-11 (1st Cir. 2007); *Ross v. Heyne*, 638 F.2d 979, 986 (7th Cir. 1980). That is, courts seem to worry that enforcing *Napue* as a flat prohibition on the prosecution's introduction of false testimony would permit defendants, armed with knowledge of

the falsity, to sit back and trust that, if they are convicted, they will have a claim for a new trial. *See, e.g.*, *Ross*, 638 F.2d at 986.

This reasoning ignores the judiciary's "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Wheat v. United States*, 486 U.S. 153, 160 (1988). To serve that interest, prosecutors have ethical duties to refrain from introducing false evidence and to correct it when it is discovered. *See* Criminal Justice Standards for the Prosecution Function §3-6.6 (Am. Bar Ass'n 2015); National Prosecution Standards §6-1.3 (Nat'l Dist. Attorneys Ass'n 2009). And the prosecutor's knowing use of false testimony "invites disrespect for the integrity of the court." *Wheat*, 486 U.S. at 162 (quotations omitted). Given the acute threat to the integrity of the system posed by the prosecutor's knowing use of perjured testimony, the only appropriate constitutional response is a policy of zero tolerance. A little knowing use of perjured testimony by prosecutors goes a long way in undermining public confidence in the integrity of criminal proceedings.

In any event, there are several practical reasons why mere disclosure on the government's part of evidence showing falsity does not cure an introduction of false evidence. As this case shows, it is hard to catch the prosecution in an untruth, even with documentary evidence. *See, e.g.*, *United States v. LaPage*, 231 F.3d 488, 492 (9th Cir. 2000) (the "witness evaded defense counsel's ineffectual cross-

examination" intended to show that the government witness had lied). As was the case here, the evidence might not be deemed admissible. *See* DE246:234-35. In other cases, the only effective means for the defense to expose false testimony would be to sacrifice the defendant's constitutional right not to take the stand. At any rate, because Stein *did* try to challenge the falsity at trial, *see* DE246:234-267; DE247:13-15, 57-59, this concern over possible defense gamesmanship is inapplicable to his case.

There are also important institutional reasons to reject the gamesmanship justification for tolerating verdicts obtained through false testimony. First, placing full responsibility on the government "to avoid presenting false or misleading testimony of its own witness . . . is prudent in the unique *Napue* context because *Napue* requires the prosecution's knowledge of the false or misleading testimony of its own witnesses." *Michigan v. Smith*, 870 N.W.2d 299, 306 n.7 (Mich. 2015). Given that there can be no due process violation unless the government knowingly uses false testimony, concerns about dubious defense tactics—overblown to begin with—are focused on the wrong target. After all, any hypothetical "Get Out Of Jail Free Card" is by definition one that the government has knowingly given to the defendant and can take back by correcting the false testimony.

Second, any defendant forced to correct a government-sponsored falsehood begins at a severe disadvantage. "The jury understands defense counsel's duty of

advocacy and frequently listens to defense counsel with skepticism." *LaPage*, 231 F.3d at 492. By contrast, "the average jury" has unique "confidence" in prosecutors precisely because jurors know that prosecutors have a "duty to refrain from improper methods calculated to produce a wrongful conviction" and expect that this duty "will be faithfully observed." *Berger*, 295 U.S. at 88. When the government ignores that duty, therefore, it is properly charged with the task of cleaning up its own mess. Shifting that obligation to the defendant creates an intolerable risk that the government's "improper suggestions" and "insinuations . . . are apt to carry much weight against the accused when they should properly carry none." *Id.*

Finally, this Court's capitalization rule conflicts with the well-established rule that the only prejudice-related inquiry that *Napue* permits is the harmless error test established in *Chapman v. California*, 386 U.S. 18, 24 (1967). Under that rule, the prosecution's "knowing use of perjured testimony" requires reversal unless the government shows that its effect on the verdict was "harmless beyond a reasonable doubt." *Bagley*, 473 U.S. at 679 n.9 (quoting *Chapman*, 386 U.S. at 24). The prosecution need not "capitalize" on false evidence to fall short of that the *Chapman* test any more than the prosecution must "capitalize" on any other evidence introduced in violation of the Constitution to do so. Put another way, so long as there is some chance the false evidence affected the verdict, it should make no constitutional difference whether the prosecutor calls more attention to it in, for

example, his closing argument. Perjured evidence is perjured evidence, whether or not the prosecutor compounds the error by stressing it in argument.[3]

### C. Even Under this Court's Framework, Stein Prevails

Even assuming this Court previously articulated the proper analytical framework for Stein's false-evidence claims, Stein should still prevail. That is because the government *did* capitalize on the false testimony and suppress evidence of its falsity.

#### *1. Capitalization*

Two decisions from this Court elucidate the "capitalization" test. In *DeMarco v. United States*, 928 F.2d 1074 (11th Cir. 1991), a key government witness testified

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[3] That *Chapman* alone governs false evidence claims makes it irrelevant whether the evidence at issue here was "material" as that term is understood in *Brady* jurisprudence. In any event, this Court already noted that "Jones's statement that she received no backup for the purchase orders" was "material." *Stein*, 846 F.3d at 1150 n.13.

Even if the materiality test had some role to play here and this Court had not already suggested the false evidence was material, a moment's reflection would confirm it was material. The materiality requirement necessitates a new trial whenever "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (quoting *Bagley*, 473 U.S. at 682). That is precisely the situation here: There is a reasonable probability that, had the falsity of Jones and Woodbury's testimony been timely disclosed, the jury would have rendered a different verdict. That is especially true given the government's focus at trial on the theory that Stein engaged in fraud because the purchase orders—including the one for which Tribou submitted a check—were "all made up." *Stein*, 846 F.3d at 1149. *See also United States v. Scheer*, 168 F.3d 445 (11th Cir. 1999); *Hammond v. Hall*, 586 F.3d 1289 (11th Cir. 2009).

on cross-examination that he had not been promised nor had he received any consideration from the government in exchange for his testimony against the defendant. *Id.* at 1075. "The government knew that those were prevarications but did nothing to intervene," nor "did defense counsel object although he knew that [the witness] was giving false testimony." *Id.* This Count held that "the failure of the prosecutor to correct the perjured testimony of the government's essential witness, and her capitalizing on it in her closing argument, . . . requires a new trial[,]" even "when defense counsel is also aware of the perjury and does not object to it." *Id.*

Similarly, in *United States v. Sanfilippo*, 564 F.2d 176 (5th Cir. 1977), the government advised defendant's counsel by letter prior to trial that a certain individual would be a government witness in return for which he would not be prosecuted. The government said that it would make the cooperation known to the judge during sentencing. During cross-examination, defense counsel futilely tried to elicit the terms of the prosecutor's promise not to prosecute the individual. The prosecutor knew that the witness's testimony regarding the terms of his plea agreement was false. This Court held that: "Coupled with the failure to correct [the] false testimony at the time was the prosecutor's capitalizing on it in his closing argument. . . . Thus the government not only permitted false testimony of one of its witnesses to go to the jury, but argued it as a relevant matter for the jury to consider." *Id.* at 178-79.

That is *precisely* the situation here: The government allowed Jones and Woodbury to testify falsely, and it capitalized on their testimony that the purchase orders were all made up—including by specifically saying the purchase order connected with Tribou's check "never happened." DE248:46-47. The government also said during its opening argument that it would prove that Stein had Signalife "put out fake good news about sales," DE240:15, to bolster the company's share price. And it contended that Stein made up the purchases and purchase orders that he claimed supported the three press releases about Signalife's sales. DE240:18, 21-22. It continued this approach during closing arguments, contending that the purchase orders were "fake" and "all made up," DE248:34:17-22, that the sales themselves were also "fake," DE248:34:13, and that the evidence was "[a]ll part of the scheme to defraud, all part of the scheme to keep the stock price up, keep the fake sales in the public, keep the fake sales out there so he can make money." DE248:39:3-5; *see* DE248:42 (similar). It specifically asked the jury to "[r]emember Tracy Jones['s]" testimony about "the phantom purchase orders." DE248:40:18-19. Similarly, it referenced John Woodbury's testimony "related to the fake purchase orders." DE248:46:18-20. The government also said that Stein "lied . . . to Mr. Woodbury, the CEO, and the CFO about every facet of the fake purchase orders." DE248:42:17-19; *see also* DE248:46:12-14 ("[I]t's about the false purchase orders and the fake sales that were helping to get the stock price up, helping him sell the

shares that he had stolen from Signalife."); DE248:46-47 (discussing each of the three allegedly fake purchase orders). If this extensive use of the false evidence—which continued even during resentencing, *see* DE551:11:22-24 (suggesting "[t]he information in these press releases was completely made up"); DE551:34:3-4 (similar)—does not constitute government "capitalization" on false evidence, it is hard to see what would.

The government's capitalization on the falsity is compounded by the district court's loss calculations. Those loss calculations assumed a loss period starting September 20, 2007, the date of the press release for the CHM purchase order. DE240:29, 61-64; DE557; DE558; DE564. Measuring loss from the date of a truthful press release was hardly harmless.

*2. Suppression*

Although, under this Court's rule, Stein need not show suppression if he can show capitalization, the government *did* suppress evidence of the falsity by failing to produce it in response to Stein's Federal Rule of Criminal Procedure 16 requests. As the Supreme Court cautioned, "the failure to make [in response to a specific discovery request] is seldom, if ever, excusable." *United States v. Agurs*, 427 U.S. 97, 106 (1976). That is true even if the government produces the exculpatory evidence in a massive production, but does not specifically identify it in response to the Rule 16 requests. *See United States v. Skilling,* 554 F.3d 529, 577 (5th Cir. 2009)

(suggesting that voluminous open-file discovery can violate prosecutors' disclosure obligations), *aff'd in part and vacated in part on other grounds,* 561 U.S. 358 (2010); *Emmett v. Ricketts*, 397 F. Supp. 1025, 1043 (N.D. Ga. 1975) (holding, in the *Brady* context, that "the prosecutorial duty to [disclose evidence] may not be discharged by 'dumping' (even in good faith) a voluminous mass of files, tapes and documentary evidence"); *United States v. Thomas*, 981 F. Supp. 2d 229, 239 (S.D.N.Y. 2013) (similar); *United States v. Hsia,* 24 F. Supp. 2d 14, 29–30 (D.D.C. 1998) (similar).

Defense counsel made such specific requests here, including for *Brady* material comprising "[a]ll documents and communication sent between and among John Woodbury and Signalife's audit committee." DE41-1:3, 15; *see also* DE63:2 (granting motion). The check and email by audit committee member, Norma Provencio, to Woodbury transmitting it constitutes *Brady* material responsive to Stein's requests, yet they were never separately identified and produced.

To be sure, this Court previously indicated that Stein's Rule 16 argument was waived. *See Stein*, 846 F.3d at 1151 n.15. In that same footnote, however, it conceded that Stein raised the Rule 16 violation "in his opening brief." *Id.* Certainly this Court has authority to address the issue. *See, e.g.*, *Hyde v. Bowen*, 823 F.2d 456, 459 n.4 (11th Cir. 1987) (addressing argument made in footnote in brief). It should exercise that authority here, the first appeal in which Stein has direct evidence that the CHM purchase order was indeed valid and that the press release about it was

valid as well. *See* DE529-1.

## II. THE DISTRICT COURT ERRED IN DETERMINING THE AMOUNT OF LOSS ATTRIBUTABLE TO THE ALLEGED FRAUD

The district court erred in determining the loss caused by Stein's crime in two independent ways. First, it assumed without sufficient evidentiary basis that losses in Signalife stock that occurred before Stein's fraud was public knowledge were nevertheless attributable to the fraud. Second, it took on faith that all 616 individuals identified by the government were, in fact, victims who relied on Stein's fraud in deciding to invest in Signalife. Neither decision can withstand scrutiny, and each merits reversal and remand for resentencing.

The government may not remedy these deficiencies by submitting new evidence or arguments in any future remand for resentencing. *See, e.g.*, *United States v. Chi*, 616 F. App'x 950, 957 (11th Cir. 2015) ("[A sentencing] remand for further findings is inappropriate when the issue was before the court and the parties had an opportunity to introduce relevant evidence."); *see also United States v. Archer*, 671 F.3d 149, 168-69 (2d Cir. 2011) ("The consensus among our sister circuits is that generally where the government knew of its obligation to present evidence and failed to do so, it may not enter new evidence on remand." (citing cases)). Stein respectfully asks that this Court include a prohibition on the government's submission of new evidence on remand in its mandate.

### A. The District Court Improperly Calculated the Loss Amount for Stein's Sentencing Enhancement

The government bears the burden of establishing the loss amount by the preponderance of the evidence. *See United States v. Dabbs,* 134 F.3d 1071, 1081 (11th Cir. 1998). Where, as here, the government rests its arguments on the actual (rather intended) amount of loss, it is required to prove the actual loss "*result*[*ing*] *from* the offense." U.S.S.G. § 2B1.1, cmt. n.3(A) (emphasis added). The government is also required to "show that the investors relied on Mr. Stein's fraudulent information to satisfy the 'but for' causation requirement under U.S.S.G. § 2B1.1." *Stein*, 846 F.3d at 1153. Because the record does not contain proof of either part of the loss calculation, the district court abused its discretion in determining the loss amount.

#### *1. Failure to prove causation*

Section 2B1.1(b)(1) of the Sentencing Guidelines provides a table for determining the level of enhancement based on the loss attributable to the offense. In financial fraud cases, the loss calculation often drives the sentence. *See, e.g.*, *United States v. Olis*, 429 F.3d 540, 545 (5th Cir. 2005) ("The most significant determinant of [the defendant's] sentence is the guidelines loss calculation."). So it did here: the court found that Stein had caused $1,029,570 in losses, and thus imposed a 14-point increase in his guidelines range. *See* U.S.S.G. § 2B1.1; DE564. But that loss calculation overstated the loss attributable to Stein's fraud.

There are two ways to measure loss under U.S.S.G. § 2B1.1: actual loss and intended loss. U.S.S.G. § 2B1.1, cmt. n.3(A). At Stein's resentencing, the government offered proof only of actual loss. *See* DE551, 552. "Actual loss" is the "reasonably foreseeable pecuniary harm that resulted from the offense." *Id.* cmt. n.3(A)(i). Although a court may employ a variety of methods to derive a "reasonable estimate of the loss" to the victims, *United States v. Snyder*, 291 F.3d 1291, 1295 (11th Cir. 2002), it cannot "speculate about the existence of facts and must base its estimate on reliable and specific evidence." *United States v. Ford*, 784 F.3d 1386, 1396 (11th Cir. 2015).

The district court's loss calculations engage in just the sort of baseless speculation prohibited by U.S.S.G. § 2B1.1. Specifically, they incorporate losses that are assumed to have resulted from the fraud, without any proof they did so.

As noted above, the vast majority of the decline in the value of Signalife shares occurred prior to August 15, 2008, when the fraud was revealed. For example, on April 11, 2018, Signalife's stock had closed at $1.34 per share. DE533:5. On April 15, 2018, Signalife's stock closed at $1.00 per share. *Id*. This decline (and others) in the stock's value is reflected in Figure 1 below.

**FIGURE 1**

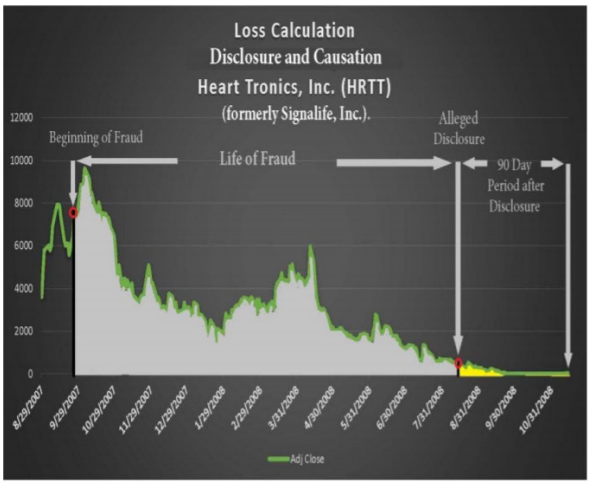
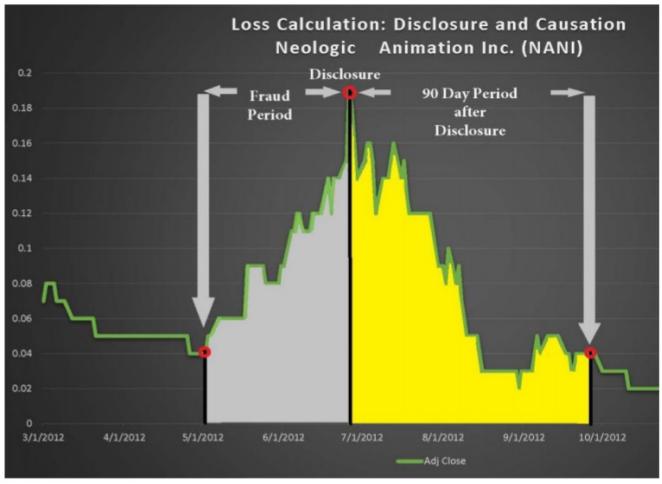



**FIGURE 2**




DE387-6.

As Figure 1 shows, a large portion of the loss the government has alleged for each investor includes a decline in value that predated public disclosure of the fraud on August 15, 2008. *See* DE555:3; DE569. That is true even though both parties' experts agreed that the decline in Signalife's price during the period, before the fraud was revealed on August 15, 2008, could not have been the result of the fraud. DE 555:2-3. Thus, the district court's loss calculation still significantly overstates that amount of loss that is properly attributable to Stein.

*2. Failure to prove victimhood*

The government bears the burden of proving the number of victims by a preponderance of the evidence. *United States v. Washington*, 714 F.3d 1358, 1362 (11th Cir. 2013). Both parties agree that proof an individual *relied* on an alleged fraud is required for that person to qualify as a victim under U.S.S.G. § 2B1.1. *See Stein*, 846 F.3d at 1153; *United States v. Wallace*, 738 F. App'x 676, 680 (11th Cir.

2018) ("To establish but-for causation, the government must show that the victim relied on the fraudulent information."). This Court previously held that such proof can be provided by direct evidence—i.e., evidence that a particular investor read the false information and relied on it when deciding to purchase stock—or "specific circumstantial evidence from which the district court may reasonably conclude that all of the investors relied on the defendant's fraudulent information." *Stein*, 846 F.3d at 1153-54.

Yet the government altogether failed to provide direct or circumstantial evidence of such reliance. It alleged that there were 616 victims. *See* DE569. But the only two witnesses who testified as to their reliance on Stein's fraud in making investment decisions were Mark Taylor, DE551:6:15-16, 8:1-23, 9:10-15, 11:4-25, and Bryan Harris, DE243:4-10. Neither was among the 616 victims identified by the government at resentencing, DE569. Nor is there any basis for the district court to extrapolate from Harris and Taylor's testimony to the conclusion that the 616 individuals who *were* identified during resentencing must have relied on Stein's fraud. The district court thus erred in presuming, without factual basis, that each of the alleged 616 victims relied on the allegedly fraudulent information.[4]

[4] Despite Dr. Becker's failure to discuss the issue of reliance, the government cited her testimony as evidence of reliance. DE552:60-61. Dr. Becker had opined that, based on an event study, there was an abnormally positive return from the second of the three press releases. DE551:44. She also testified that she believed she could presume that the market was informationally efficient. DE551:51. But

Indeed, this Court previously found virtually identical evidence insufficient to support a finding of market-wide reliance. It held that the evidence the government introduced during Stein's first sentencing, including Harris's testimony and Taylor's victim impact statement, was insufficient to infer that all purchasers of Signalife stock relied on Stein's alleged fraud. *Stein*, 846 F.3d at 1154. The other victim impact statements submitted during the first sentencing, many of which were resubmitted for resentencing, were similarly deemed insufficient. Specifically, this Court found that the government produced "a number of victim impact statements suggesting that the investors relied on press releases and other publicly available information generally, but not specifically the fraudulent information Mr. Stein disseminated." *Id.*

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the government offered no support for the novel proposition that an abnormal return on one day is evidence of market-wide reliance on one event, let alone market-wide reliance on three events. Moreover, defense counsel has been unable to locate *any* case holding that informational efficiency can be presumed in a penny stock as opposed to a stock of a large corporation—much less any case holding that informational efficiency can be presumed in a penny stock in the face of credible expert testimony (here, of Dr. Susan Mangiero) opining that the relevant marketplace was not informationally efficient, DE469-1:12, 21; DE469-1, ¶ 87; DE428:106-07. *See also* H. Rep. No. 101-617, 1990 U.S.C.C.A.N. 1408, 1422 (July 23, 1990) ("The penny stock market is not an 'efficient market.'"). And Dr. Becker did not find any statistically significant impact from the other two press releases or the August 15, 2008 disclosure, DE551:43-46, which refutes a finding of market efficiency as well as a finding of reliance, *see Halliburton v. Erica P. John Fund, Inc.*, 573 U.S. 258, 278 (2014) (holding, in the context of the public capital securities markets, that a lack of "price impact . . . [rebuts any] presumption of reliance").

Lest there be any doubt, the newly submitted victim impact statements make clear that many of the alleged victims did *not* rely on Stein's fraud in making their investment decisions. *See* DE565:3, 48, 75, 78, 364 (New Victim Impact Statements); DE552:81-82 (arguing that the new victim impact statements do not show market-wide reliance on the "specific[] . . . fraudulent information" at issue). This evidence not only show an absence of reliance on Stein's fraud; it directly disproves reliance for these victims.

The district court's disregard for this evidence, deeming victims *all* 616 individuals identified by the government, *see* DE561, was reversible error. *See United States v. Lopez*, 549 F. App'x 909, 911-12 (11th Cir. 2013) (reversing and remanding for resentencing where the government presented evidence of more than 50 alleged victims without showing that they were victims within the Guidelines' definition); *United States v. Bradley*, 644 F.3d 1213, 1286-87 (11th Cir. 2011) (holding that the government's "[f]ailure to demonstrate any nexus between the" fraud and the loss means that the alleged victims "cannot be properly counted among the victims" for sentencing purposes). There simply is no basis on which the court could have found that the 616 investors relied on Stein's fraud.

### B. The District Court Erred by Failing To Disentangle Losses from Causes Other Than the Fraud

This Court instructed the district court, on remand, to disentangle losses resulting from Stein's offense from losses resulting from other causes. *Stein*, 846

F.3d at 1155-56. Specifically, it instructed the district court "to consider that Signalife stock value declined in part because of the short selling of over 22 million shares of Signalife stock and the across-the-board stock market decline of 2008." *Id.* at 1155. The district court did not address either factor. DE561.

In doing so, the district court ignored not only this Court's clear instruction but also extensive defense evidence concerning the effect of short-selling and the 2008 stock market decline on the price of Signalife stock. *See, e.g.*, DE532-1:22 (market-wide movement affected Signalife stock prices); DE532-2:51, 47-48; DE532-6:9-10 (losses in Signalife stock was caused by naked short-selling); DE532-4:14-40, 55-57 (statistically significant correlation between naked short-selling and decline of Signalife stock). For example, one of the defenses expert witnesses, Dr. O'Neal, stated: "the stock price reaction to the release of the 10-Q in August 15, 2008 cannot possibly be attributed solely, or even predominantly, to the new information regarding the company's previously reported purchase orders." DE532-1:22. Rather, "at least three pieces of new financial information included in the 10-Q" equally contributed to the stock decline from August 15-18, 2008. *Id*.

The district court's failure to address this evidence and disaggregate the losses caused by these market events from the losses caused by Stein's offense was reversible error. As this Court previously explained, "[o]nce Mr. Stein pointed to intervening events that may have affected the stock price, the district court was

obliged to make findings regarding the effects of these intervening events, if any, and whether these events were reasonably foreseeable to Mr. Stein." *Stein*, 846 F.3d at 1156. "Because the [district] court failed to do so" (again), this Court should "vacate the sentencing order." *Id.*

### C. The Amount of Restitution Was Improper

The district court ordered $1,029,570 of restitution, based on the same alleged loss amount. On one hand, that makes sense: the method for calculating actual loss under the MVRA is "largely the same" as the method for establishing actual loss under the Sentencing Guidelines. *United States v. Cavallo*, 790 F.3d 1202, 1239 (11th Cir. 2015). On the other hand, the MVRA loss calculation makes no sense because the Guidelines loss calculation makes no sense, for two reasons.

First, the district court included losses in the restitution amount that were not caused by the fraud. As with the Guidelines, the government bears the burden of establishing the MVRA restitution amount by a preponderance of the evidence. *United States v. Norman*, 638 F. App'x 934, 940 (11th Cir. 2016); *see* 18 U.S.C. § 3664(e). Loss amounts under the MVRA "must be based on the amount of loss actually caused by the defendant's conduct." *Norman*, 638 F. App'x at 940. This standard reflects the Supreme Court's admonition that restitution awards are limited to "the loss caused by the specific conduct that is the basis of the offense of conviction." *Hughey v. United States*, 495 U.S. 411, 413 (1990) (interpreting the

language "direct and proximate cause" in the Victim and Witness Protection Act of 1982).

Because the government wholly failed to bear its burden, the district court abused its discretion in adopting the government's proposed restitution amount. The loss amount the district court awarded under the MVRA improperly incorporates amounts lost *prior* to August 15, 2008, when the fraud was revealed to the public. In other words, it incorporates losses that were the product of market factors exogenous to the fraud, rather than just those that were "actually caused by [his] conduct." *Norman*, 638 F. App'x at 940.

Second, the MVRA loss calculation is incorrect because it includes individuals not shown to have relied on the fraud in deciding to invest in Signalife. For restitution purposes, a "victim" is any "person directly and proximately harmed as a result of the commission" of the defendant's offense. 18 U.S.C. § 3663A(a)(2). In other words, there must be a direct, causal link between the charged offense and the loss to the victim. *United States v. Ledesma*, 60 F.3d 750, 751 (11th Cir. 1995). Thus, to prove that an individual is a victim for purposes of restitution in this case, the Government must show: (1) that a particular loss would not have occurred "but for" the Defendant's materially false or fraudulent representations and (2) that "the causal connection between [the defendant's] conduct and the loss is not too attenuated (either factually or temporally)." *United States v. Robertson*, 493 F.3d

1322, 1334 (11th Cir. 2007) (citation omitted).

For the same reasons that the government failed to prove that the 616 individuals it named were victims for sentencing purposes, it failed to prove that these individuals were victims for restitution purposes—and thus it failed to prove that their losses should be incorporated into the restitution amount. That is, the government failed to show that these 616 individuals relied on the fraud in deciding to invest in Signalife—and thus that any losses they suffered stemming from their Signalife investments are causally related to the fraud. For this reason, their losses cannot be part of the restitution Stein must pay.

## III. THE DISTRICT COURT'S FORFEITURE ORDER IS ERRONEOUS

The district court's forfeiture order suffers from two errors: First, as the government conceded below, the district court deemed Stein liable for some amounts that his co-conspirator, Carter, received and Stein did not. DE525:8 n.5. Although Stein pointed out that this joint and several liability was directly contrary to *Honeycutt*, the district court disagreed. DE400. Second, the district court included in the forfeiture amount losses that were not traceable to Stein's offense. Both were reversible error. This Court should remand with instructions that the government may not introduce new evidence to support its forfeiture request on remand. *See, e.g.*, *United States v. Isaacson*, 752 F.3d 1291, 1308 (11th Cir. 2014) (government may not introduce new evidence on remand for forfeiture recalculation).

### A. Standard of Review

In his prior appeal, Stein did not object to the forfeiture order. But this Court should consider the *Honeycutt* argument de novo, and review the loss amount for clear error.

As to Stein's *Honeycutt* claim, Stein was not obligated to raise it because to do so would have been futile. At the time of Stein's prior appeal, this Court's precedent under a statute with analogous language to the ones at issue here was "that imposition of joint and several liability in a forfeiture order . . . is not only permissible but necessary." *United States v. Caporale*, 806 F.2d 1487, 1506 (11th Cir. 1986); *United States v. Browne*, 505 F.3d 1229, 1278-81 (11th Cir. 2007) (similar).[5] Any objection on Stein's part would have been futile, and thus was not necessary. *See Wilbur v. Corr. Servs. Corp.*, 393 F.3d 1192, 1200 n.4 (11th Cir. 2004); *United States v. Lindsey*, 200 F. App'x 902, 909-10 (11th Cir. 2006).

In any event, because the district court entered an amended judgment, of which forfeiture is a part, *see* DE564:6, there can be no waiver of Stein's challenge to the forfeiture amount because this is his first appeal from the new sentence. Indeed, the Supreme Court has expressly held that a prior lawsuit regarding one alleged injury does not bar a subsequent lawsuit challenging a new injury that occurred "subsequent to [the earlier] judgment." *Lawlor v. Nat'l Screen Serv. Corp.*,

[5] *Compare* 21 U.S.C. § 853, *with* 18 U.S.C. §§ 1963(a), 3731.

349 U.S. 322, 328 (1955). This is so even if the new injury is of the same nature as the first and was caused by the same challenged conduct, and even if the new claim relies on a legal argument that could have been advanced in the earlier lawsuit. *Id.* at 327-28; *see also* 18 Charles A. Wright et al., Federal Practice and Procedure § 4406 (2d ed. 2007) ("If the second lawsuit involves a new claim or cause of action, the parties may raise assertions or defenses that were omitted from the first lawsuit even though they were equally relevant to the first cause of action."); *Magwood v. Patterson*, 561 U.S. 320 (2010) (allowing later habeas petition challenging a new sentencing order, even though claim could have been raised in prior habeas petition). Accordingly, Stein may challenge the district court's second amended judgment, DE564, just as he could have challenged its prior forfeiture order, DE400. Because this Court applies a de novo standard of review to challenges to the district court's interpretations of forfeiture law, *United States v. Kennedy*, 201 F.3d 1324, 1329 (11th Cir. 2000), this Court should review Stein's *Honeycutt* claims de novo.

Similarly, because Stein challenged the findings underlying the forfeiture order in the proceeding below, DE524, DE527, and because this is Stein's first appeal of the district court's amended judgment, this Court should review his challenge to the calculation of the forfeiture amount for clear error. *Kennedy*, 201 F.3d at 1329.

### B. The District Court Erred in Holding Stein Jointly and Severally Liable for the Forfeiture Amounts

The district court deemed Stein jointly and severally liable for forfeiture amounts imposed under 18 U.S.C. § 981 and § 982. *Honeycutt*'s reasoning applies to both statutes.

In *Honeycutt v. United States*, the Supreme Court examined 21 U.S.C. § 853. That statute provides, "[a]ny person convicted of a violation of this subchapter . . . shall forfeit to the United States . . . (1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation." The Supreme Court concluded, first, that for the forfeiture statute to apply, the property needs to flow from the crime. 137 S. Ct. 1626, 1632 (2017). Second, it held that, because the statute provides for forfeiture only of property "the person obtained," forfeiture is limited to property that the defendant actually acquired. *Id.* at 1632-33, 1635. Finally, the Supreme Court looked to other parts of the statute, which supported limiting forfeiture to the property the defendant actually acquired as a result of the crime. *Id.* at 1633. That is, a defendant may not be "held jointly and severally liable for property that his co-conspirator derived from the crime but that the defendant himself did not acquire." *Id.* at 1630.

This Court and the Third Circuit have indicated that *Honeycutt*'s reasoning also applies to forfeiture under 18 U.S.C. § 981(a)(1)(C), one of the forfeiture statutes at issue in this case. *See United States v. Gjeli*, 867 F.3d 418, 428 n.16 (3d

Cir. 2017), *as amended* (Aug. 23, 2017); *United States v. Carlyle*, 712 F. App'x 862, 864-65 (11th Cir. 2017). *But see United States v. Sexton*, 894 F.3d 787, 799 (6th Cir. 2018) (finding *Honeycutt* inapplicable to § 981(a)(1)(C)). This Court should affirm its ruling in *Carlyle* that a district court errs when it finds defendants jointly and severally liable for forfeiture amounts they themselves did not receive. It should also confirm that *Honeycutt* applies to forfeiture amounts ordered pursuant to 18 U.S.C. § 982(a)(1), the other forfeiture statute at issue here, because it uses virtually identical language to § 981(a)(1)(C).[6]

*1. Section 981*

As to § 981, its text and structure, like the text and structure of § 853, shows that it does not allow defendants to be jointly and severally liable for forfeiture amounts they themselves did not obtain. *See Gjeli*, 867 F.3d at 427-28 ("[T]he text and structure of [§ 981(a)(1)(C)] reveals that [it is] substantially the same as the one under consideration in *Honeycutt.*"); *Carlyle,* 712 F. App'x at 864-65 (similar). To begin, neither statute provides for joint and several liability. Nor do they implicitly permit it. Using language similar to § 853(a)(1), § 981(a)(1)(C) provides: "The following property is subject to forfeiture to the United States . . . Any property, real

[6] 28 U.S.C. § 2461(c), on which the district court also relied in its forfeiture order, simply proscribes the mode of recovery of forfeiture amounts in a criminal case, not the relevant forfeiture amount. It thus cannot support the imposition of joint and several liability.

or personal, which constitutes or is derived from proceeds traceable to a violation . . . or a conspiracy to commit such offense." The plain text of each statute confirms that the amounts subject to forfeiture are limited to the amounts "traceable to" a violation, or "the result of" a violation. *See Honeycutt*, 137 S. Ct. at 1632 (holding that statute's limitation of forfeiture to "property flowing from, or used in, the crime itself" show that "the statute does not countenance joint and several liability" (citations omitted)).

Although § 981(a)(1)(C) does not include the "person obtained" phrase in § 853(a)(1), it does limit forfeiture amounts to that property that "constitutes or *is derived* from proceeds" stemming from a violation. 18 U.S.C. § 981(a)(1)(C). This language shows that a court may order a defendant to forfeit only the property he has derived from the offense, just as § 853 allows a court to order forfeiture only of amounts obtained from an offense.

Additionally, the definition of "proceeds" in § 981 shows that the statute allows forfeiture of only those proceeds the defendant himself actually obtained from the alleged crime. Section 981(a)(2)(A), which defines "proceeds," refers to "property of any kind *obtained* directly or indirectly, *as the result of the commission of the offense giving rise to the forfeiture* . . ." *Id.* § 981(a)(2)(A) (emphasis added). *See United States v. McIntosh*, 11-cr-500 (SHS), 2017 WL 3396429, at *4 (S.D.N.Y. Aug. 8, 2017) (explaining that this provision, among others, shows that § 981 is

aligned with § 853(c)). Thus, § 981, like § 853, is focused on tainted property obtained from the criminal offense, making the application of joint and several liability to forfeiture orders imposed under its authority a departure from the statute's restriction to tainted property that the defendant himself actually received. *See Honeycutt,* 137 S. Ct. at 1632 (reaching this conclusion in the § 853 context).

*2. Section 982*

The same is true of § 982(a)(1). That statute does not expressly or implicitly provide for joint and several liability. It simply obligates a court imposing a sentence for certain crimes to "order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property." 18 U.S.C. § 982(a)(1). This language, like the language considered in *Honeycutt*, "limit[s] forfeiture . . . to tainted property; that is, property flowing from, or used in, the crime itself," and these limitations "provide the first clue that the statute does not countenance joint and several liability, which, by its nature, would require forfeiture of untainted property." 137 S. Ct. at 1632 (citations omitted).

This clue is confirmed by other subsections of § 982, which incorporate many of the provisions on which *Honeycutt* relied in rejecting joint and several liability. *See* 18 U.S.C. § 982(b)(1) (incorporating 21 U.S.C. §§ 853(c), 853(e), and 853(p)); *Honeycutt*, 137 S. Ct. at 1633-35 (discussing these provisions). For example, *Honeycutt* stated that § 853(p) "lays to rest any doubt that the [drug-forfeiture]

statute permits joint and several liability." 137 S. Ct. at 1633. And § 982 provides that "[t]he forfeiture of property under this section . . . shall be governed by the provisions of [section 853]." 18 U.S.C. § 982(b)(1); *see also id.* § 982(b)(2). In light of this incorporation, it is of no moment that § 982(a)(1) itself—like § 981(a)(1)(C)—does not contain the "person obtained" language that the Supreme Court considered in *Honeycutt*. *See United States v. Elbeblawy*, 899 F.3d 925, 941 (11th Cir. 2018) (applying *Honeycutt* to 18 U.S.C. § 982(a)(7)); *United States v. Sanjar,* 876 F.3d 725, 748-50 (5th Cir. 2017) (same); *see also United States v. Brown*, 714 F. App'x 117, 118 (3d Cir. 2018) (applying *Honeycutt* to § 982(a)(2)). Section 982(a)(1) accordingly does not allow Stein to be jointly and severally liable for any amount beyond the proceeds of the fraud that he himself received.

### C. The District Court Erred in Calculating the Forfeiture Amount

As discussed above, both § 981 and § 982 require that forfeiture amounts be "traceable to" the offenses of conviction. This requirement of a causal nexus between the forfeiture amount and the crime comports with the purposes of criminal forfeiture: while "[r]estitution is calculated based on the victim's loss, [] forfeiture is based on the offender's gain." *United States v. McGinty*, 610 F.3d 1242, 1247 (10th Cir. 2010) (quotation omitted); *cf. United States v. Rouhani*, 598 F. App'x 626, 633 (11th Cir. 2015) (reversing forfeiture order because district court did not "mak[e] any findings" supporting order).

The $5,378,581.61 forfeiture order was not supported by the required causal nexus. It included payments from Ajay Anand to Stein ($478,600), all payments from Signalife to Stein from 2005 to 2010 ($160,679.61), Stein's Signalife shares ($1,188,000), and profits from sales of Signalife shares ($1,395,302). DE386:15. The district court did not find that these amounts were traceable to Stein's offenses. DE400; DE564. Nor did the government even try to defend the merits of including these amounts when responding to Stein's objections below. DE525.

As to the payments from Anand to Stein, the evidence showed that Stein purchased some Signalife stock from Stein at below-market prices. DE242:123-125. Stein also provided Anand certain legal services, for which he was entitled to compensation. DE243:44-46. Because the district court never found that these payments were "traceable to" the crime, it erred in including them in the forfeiture amount.

As to Signalife's payments to Stein from 2005 to 2010, it is undisputed that Stein performed at least some legitimate services for Signalife, for which he was entitled to compensation. *See, e.g.*, DE240:201-204. Because the district court did not find that all $160,679.61 was traceable to the offense, it clearly erred in including this amount in the forfeiture order.

As to Stein's Signalife shares and profits from those shares, the government admitted at the sentencing hearing that "we really don't know much about" them.

DE 428:14. It did not establish (nor did the district court find) a nexus between the issuance of shares to Stein and the alleged scheme, such as evidence showing that the shares were acquired illegitimately. And such proof is logically impossible for the profits from Stein's sales of Signalife shares; these sales stopped years before the purchase orders, and thus profits from these sales cannot be traceable to the fraud. DE524:3-4. Because property must have been "traceable to" the offense for the court to order its forfeiture, the district court clearly erred in including these amounts in its forfeiture order.

## CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Under Federal Rule of Appellate Procedure 32(a)(7)(C) and Eleventh Circuit Rule 28-1(m), I hereby certify that the foregoing brief of the defendant-appellant complies with (1) the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5)(A) because it was written in Times New Roman, 14-point font and (2) the type-volume limitations contained in Federal Rule of Appellate Procedure 32(a)(7)(B)(i), because it contains 12,997 words, excluding those parts of the brief excluded from the word count under Eleventh Circuit Rule 32-4.

*/s/ Jeffrey L. Fisher*
Jeffrey L. Fisher

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was filed electronically with the Court's CM-ECF system on December 21, 2018. Service will be effectuated by the Court's electronic notification system upon all parties and counsel of record.

*/s/ Jeffrey L. Fisher*
Jeffrey L. Fisher