UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| UNITED STATES OF AMERICA | |
| v. | No. 10 Cr. 56 (RJS) |
| ZVI GOFFER, et al., | |
| Defendants. | |

**MEMORANDUM OF LAW OF DEFENDANT MICHAEL KIMELMAN IN SUPPORT OF HIS MOTION PURSUANT TO 28 U.S.C. § 2255 TO VACATE HIS CONVICTION AND SENTENCE**

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## PRELIMINARY STATEMENT

Michael Kimelman was convicted of insider trading on the thinnest of evidence, after a jury trial that this Court said was "certainly a close case" that could have easily "gone the other way."[1] There was no direct evidence that he even received inside information. The government relied entirely on circumstantial evidence about his interactions with one co-defendant to argue that he was a remote tippee, three levels removed from the source of the information. And critically, even assuming he received any tips, there was not a shred of evidence that he knew that any of them came from an insider who disclosed the information in exchange for a personal benefit. The Court never instructed the jury that it had to find such knowledge in order to convict. Kimelman's attorneys failed to challenge that instructional error in his direct appeal, even though they had preserved their objection and every other court to consider the issue had held that a tippee is not guilty of insider trading unless he knew of the insider's personal benefit. Kimelman's counsel also failed to challenge the sufficiency of the evidence of Kimelman's knowledge of personal benefit either at trial or on appeal.

Over a year after Kimelman's conviction became final, the Second Circuit decided *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014). Under *Newman*, it is clear that Kimelman did not commit any crime and that the jury instructions at his trial were legally erroneous. *Newman* squarely holds that it is not a crime to buy or sell securities on the basis of material nonpublic information unless one knows that the information was wrongfully disclosed for a personal benefit, and that the jury must be instructed that such knowledge is an essential element of the offense. Accordingly, Kimelman's conviction was procured "in violation of the Constitution or laws of the United States," 28 U.S.C. § 2255(a), because the jury instructions

[1] (10/7/11 Tr. 21). Relevant excerpts from the trial transcript and transcript of the October 7, 2011 argument are attached as Exhibits 1 and 2, respectively, to the accompanying declaration of Alexandra A.E. Shapiro ("Shapiro Decl.").

omitted an essential element of the offense and deprived him of his constitutional right to have the government prove every element to the jury beyond a reasonable doubt. In addition, his counsel was constitutionally ineffective in failing to challenge the faulty jury instruction and argue that the evidence of knowledge of personal benefit was insufficient.

There was a clear and fundamental miscarriage of justice here. Kimelman did not commit a crime, and he is actually innocent of the insider trading and conspiracy charges on which he was convicted. These extraordinary circumstances entitle Kimelman to have his conviction and sentence vacated on collateral review.

## BACKGROUND

### A. The Indictment

The operative indictment filed on April 7, 2011 charged Zvi Goffer, Jason Goldfarb, Craig Drimal, Emanuel Goffer, and Kimelman with insider trading.[2] The indictment alleged that Zvi devised an insider trading scheme whereby he acquired inside information from two attorneys in exchange for "cash payments of thousands of dollars"; traded on the basis of that information or caused others to trade; and distributed the information to a network of other traders.[3] (Dkt. No. 167 ¶¶ 29, 31-32). The government alleged that all of the charged defendants *except for Kimelman* had some involvement in the cash payments. (*Id.* ¶ 32). The government did not allege that Kimelman, who was alleged to be a remote tippee, even knew that those payments were being made.

[2] To avoid confusion, the Goffers are referred to herein by their first names.

[3] Although the indictment also alleged that Gautham Shankar provided inside information to the defendants, the government presented no evidence that Kimelman received any information that Shankar had provided.

The indictment charged Kimelman with conspiracy to commit insider trading, and with two substantive counts of insider trading based on purchases of 3Com Corporation ("3Com") stock on August 8, 2007, and September 25, 2007.

**B. The Trial Evidence**

Kimelman was tried jointly with Zvi and Emanuel Goffer. The trial, which commenced on May 16, 2011, lasted for 15 days, including five days of deliberations.

The government introduced evidence that the sources disclosed their information because Zvi was paying them in cash. But the government never argued that Kimelman knew (or even consciously avoided knowing) of these payments, and nothing in the trial record—which included a mountain of intercepted telephone calls, secretly recorded conversations, emails and instant messages—could even remotely support such a contention. Kimelman had no role in Zvi's payments and no reason to suspect that they were occurring.

Viewed in the light most favorable to the government, the evidence showed that Zvi was the "ringleader" of a scheme to pay "cash bribes" to Brien Santarlas and Arthur Cutillo, associates at the law firm of Ropes & Gray LLP, in exchange for material nonpublic information about Ropes & Gray clients. (Tr. 47-48, 1674); *see United States v. Goffer*, 721 F.3d 113, 119 (2d Cir. 2013). The scheme began in the summer of 2007, after the two associates met up with a friend, defendant Jason Goldfarb, to devise a plan to make extra money. Goldfarb told them that he had a friend who was a trader and "would pay money for tips for any information, specifically information related to corporate buyouts or corporate acquisitions." (Tr. 421-23). Although Santarlas and Cutillo never met or even learned the trader's name (Tr. 496-97, 534-35), Zvi was the trader. (*See* Tr. 449); *Goffer*, 721 F.3d at 119.

Soon thereafter, Santarlas and Cutillo started gathering information about Ropes & Gray clients who were negotiating pending mergers and acquisitions and relaying it to Goldfarb. (Tr.

427-28). This information included the parties to the transactions, the types of deal documents being created in Ropes & Gray's computer network, and the level of activity surrounding the deals. (*E.g.*, Tr. 428-29). Goldfarb, in turn, relayed the information to Zvi, who often traded in the stock of the target companies. Zvi also distributed the information to others. According to the government's case, in 2007 and 2008, Zvi tipped at least 11 other people directly or indirectly with information that he acquired from the associates.

The lawyers' first tips involved Bain Capital's acquisition of 3Com, which was publicly announced in September 2007. Santarlas and Cutillo later provided Goldfarb and Zvi with inside information concerning Ropes & Gray's work related to Axcan Pharma, Inc.; P.F. Chang's China Bistro; and Clear Channel Communications. After the 3Com announcement, Zvi paid Goldfarb, Santarlas and Cutillo $25,000 each. (Tr. 435, 448). After Axcan closed, Zvi paid them each $7,500. (Tr. 448).

Kimelman was a remote tippee who was three steps removed from the Ropes & Gray attorneys. He did not know Santarlas or Cutillo, and they did not know him, and there was no evidence that he knew Goldfarb. (Tr. at 556-57). *See Goffer*, 721 F.3d at 118 (describing Zvi's network as "double-blind"). There was no direct evidence that Kimelman ever received inside information. Indeed, numerous government witnesses confirmed that they had never witnessed Kimelman discussing, alluding to, or even suspecting an inside source. (Tr. 295-312, 749, 1339, 1351-53, 1365-68).[4] Moreover, unlike the other alleged conspirators, Kimelman rarely socialized at the Opal bar where Zvi supposedly discussed the 3Com inside information he

[4] For example, the FBI's lead case agent testified that she could not point to a *single* instance in any wiretapped call, consensual recording, email message, or instant message in which Kimelman received or discussed receiving inside information from Goffer, nor to any witness who had told the FBI that Kimelman had received inside information from Goffer. (Tr. 295-312).

received, and did not use prepaid cell phones to avoid detection. (Tr. 822-23, 1500; *see* Tr. 429-32, 837-38, 1087). Accordingly, the government relied entirely on circumstantial evidence to prove that Kimelman had received inside information from Zvi, and that Kimelman knew the information originated from an insider. (*See* Tr. 1652).

Critically, the government did not even suggest, much less try to prove, that Kimelman knew that the sources of the information were providing it in exchange for money. Thus, there was no evidence at trial that Kimelman made, contributed to, or even knew about Zvi's payments to the attorneys, and the government never suggested that he did.

**C. The Jury Instructions**

On April 28, 2011, the parties submitted their joint proposed requests to charge. With respect to the substantive insider trading counts, the government and the defense agreed that the government was required to prove that Santarlas and Cutillo "personally benefitted in some way, directly or indirectly," from disclosing the alleged inside information to Goldfarb and Zvi. (*See* Shapiro Decl. Ex. 3 at 49, 51). The Court accepted that proposal, and included the personal benefit requirement in its charge. (Tr. 2010-11; *see* Tr. 2016-17).

But Kimelman and the other defendants also requested that the Court charge the jury that the government was required to prove that the defendants knew of the personal benefits that Santarlas and Cutillo received. (Shapiro Decl. Ex. 3 at 51). Specifically, the defendants proposed that the Court instruct the jury that the government must prove:

> That Brien Santarlas and Arthur Cutillo personally benefitted in some way, directly or indirectly, from the disclosure of the allegedly inside information to Jason Goldfarb and Zvi Goffer *and that defendant you are considering was aware of those benefits received by Santarlas and Cutillo*.

(*Id.* at 51 (emphasis added); *see also id.* at 63-64).

The Court rejected the defendants' request. Instead, it instructed the jury only that it had to find that Santarlas and Cutillo personally benefitted from disclosing material non-public information—not that the defendants knew that to be the case. (Tr. 2010-11).

At the charge conference, the Court advised the defendants that they need not make specific objections on the record to proposed instructions that the Court had rejected and that their objections in that regard would be preserved. (Tr. 1577). Before the jury retired to deliberate, Kimelman's attorneys renewed their objections to the jury instructions to the extent that the Court had rejected their proposed instructions, including the instructions about knowledge of personal benefit. (Tr. 2059).

**D. The Verdict, Kimelman's Motions, and the Sentence**

After deliberating for five days, the jury convicted Kimelman and his co-defendants on all counts.

Kimelman's counsel had moved for a dismissal of all counts pursuant to Rule 29 but, after the jury's verdict, limited that motion to the substantive insider trading counts. (Tr. 1474, 1559, 1572, 2066; 10/7/11 Tr. 15-16).[5] In their sufficiency arguments both before and after the jury's verdict, Kimelman's counsel argued only that the evidence was not sufficient to support a conviction on the substantive counts, because there was no evidence that Kimelman received inside information or knew that it came from an inside source. Kimelman's counsel did not challenge the sufficiency of the evidence concerning Kimelman's knowledge of the attorneys' supposed personal benefit, nor did they challenge the sufficiency of the evidence for the conspiracy count. (*See* Tr. 1632-61; 10/7/11 Tr. 15-16; Dkt. No. 225). The Court acknowledged that the jury's verdict with respect to Kimelman could easily have "gone the other way" and that

[5] Kimelman's counsel also made a Rule 33 motion based on the conscious avoidance instruction. The motion did not challenge the failure to charge the jury about knowledge of personal benefit.

"it was certainly a close case." But the Court denied Kimelman's motions based on its view that the evidence could "support[] an inference that Mr. Kimelman understood . . . about the illegal relationship." (10/7/11 Tr. 20-21). The Court made no finding about whether the evidence could support an inference that Kimelman knew of the cash payments to the inside sources.

The Court sentenced Kimelman to 30 months' imprisonment, followed by three years of supervised release. The Court also ordered Kimelman to forfeit $289,079. Kimelman completed his prison sentence and began serving his term of supervised release on August 13, 2013.[6]

**E. The Direct Appeal**

Through his trial counsel, Kimelman appealed his conviction. In the appeal, Kimelman's attorneys did not challenge the Court's refusal to instruct the jury about knowledge-of-personal-benefit or attack the sufficiency of the evidence for any of the three counts on the ground that the government failed to prove Kimelman's knowledge of the tippers' personal benefit. Instead, they made other sufficiency arguments as to the substantive counts only and challenged the conscious avoidance instruction, the propriety of using wiretaps in an insider trading case, and the District Court's decision to exclude evidence that Kimelman had rejected a plea bargain.

On July 1, 2013, the Second Circuit affirmed the conviction. The Court held, *inter alia*, that the evidence was sufficient to allow a reasonable juror to infer that "Kimelman was tipped by [Zvi] Goffer and knew or consciously avoided knowing that Goffer's tip about 3Com was based on nonpublic information illegally disclosed in breach of a fiduciary duty." 721 F.3d at 125. To that end, the Court's discussion of the evidence enumerated facts that, in the Court's view, permitted an inference that Kimelman had received inside information from Zvi and knew that he was trading on inside information. *See id.* at 125-26 (*e.g.*, describing evidence that

[6] Because Kimelman is currently on supervised release, he is still "in custody" within the meaning of Section 2255. *Scanio v. United States*, 37 F.3d 858, 860 (2d Cir. 1994).

"would support an inference that Kimelman had some degree of prior awareness of Goffer's illegal source of information"). The Court did not address whether there was any evidence that Kimelman knew of Zvi's cash payments to the Ropes & Gray attorneys.

**F. The *Newman* Decision**

On December 10, 2014—three and a half years after the verdict and nearly 15 months after Kimelman's conviction became final, the Second Circuit decided *Newman*. The defendants in *Newman* were two remote tippees who were several steps removed from, and did not know, the individuals that initially disclosed confidential corporate information to others. At trial, the defendants requested that the jury be instructed that it must find that the defendants knew that the insiders had disclosed the inside information for a personal benefit in order to convict them of insider trading. The Court rejected that request, and both defendants were ultimately convicted. On appeal, the defendants challenged both the jury instructions and the sufficiency of the evidence concerning the defendants' supposed knowledge of personal benefit. 773 F.3d at 442.

In one of the most significant insider trading decisions in over a decade, the Second Circuit reversed the convictions and dismissed the indictment with prejudice. The Court became the first appellate court to hold that a tippee cannot be criminally liable for trading on inside information unless he knew of the insider's personal benefit when he traded. *Id.* at 448-50. The Court held that the government must prove that knowledge as an element of the crime, and juries must be instructed that they are required to find that element beyond a reasonable doubt in order to convict. *Id.* at 450.

The Court also reaffirmed the long-standing principle that there is no "'general duty between all participants in market transactions to forgo actions based on material, nonpublic information,'" and it is not a crime for a tippee to trade simply because he has "'receive[d] inside information from an insider.'" *Id.* at 445, 446 (quoting *Chiarella v. United States*, 445 U.S. 222,

233 (1980); *Dirks v. SEC*, 463 U.S. 646, 655 (1983)). Rather, the Court explained, the insider trading laws are violated only when a corporate insider breaches his fiduciary duty to shareholders (under the "classical" theory of insider trading), or an "outsider" entrusted with material non-public information breaches a duty to the owner of that information (under the "misappropriation" theory). *Id.* at 445-46. And there is no breach of duty unless the disclosing party "'personally will benefit, directly or indirectly, from his disclosure. Absent some personal gain, *there has been no breach of duty*'" and thus no criminal liability under the securities laws. *Id.* at 446 (quoting *Dirks*, 463 U.S. at 662).

Tippee liability is entirely dependent on that initial breach of a duty, and the tippee must know "that there has been a breach." *Id.* at 446 (quoting *Dirks*, 463 U.S. at 660). Accordingly, the Court held, a tippee can only be criminally liable if he knew that the information had been disclosed for a personal benefit. *Id.* at 448. The Court thus held that "to sustain an insider trading conviction against a tippee, the Government must prove each of the following elements beyond a reasonable doubt":

> that (1) the corporate insider was entrusted with a fiduciary duty; (2) the corporate insider breached his fiduciary duty by (a) disclosing confidential information to a tippee (b) in exchange for a personal benefit; (3*) the tippee knew of the tipper's breach, that is, he knew the information was confidential and divulged for personal benefit*; and (4) the tippee still used that information to trade in a security or tip another individual for personal benefit.

*Id.* at 450 (emphasis added). Because the district court's jury charge omitted the critical component of the third element, the charge "failed to accurately advise the jury of the law." *Id.*

After considering and finding wanting the insiders' supposed personal benefits in that case, *id.* at 451-53, the Court also held that the evidence was insufficient as a matter of law to support an inference that the defendants knew, or consciously avoided knowing, of the alleged personal benefit. *Id.* at 455. In so doing, the Court reconfirmed that it is not sufficient for the

government merely to prove that the defendant knew that the information originated with an insider, because in *Dirks* "the Supreme Court affirmatively rejected the premise that a tipper who discloses confidential information necessarily does so to receive a personal benefit." *Id.* at 454. The government had contended that "the specificity, timing, and frequency" of the information that the defendants received—updates with exact gross margin and earnings-per-share figures just prior to public announcements—was so "overwhelmingly suspicious" that the defendants "must have known, or deliberately avoided knowing, that the information originated with corporate insiders, *and* that those insiders disclosed the information in exchange for a personal benefit." *Id.* at 454. The Court rejected that argument out of hand. It held that even if the information showed that the defendants must have known that it originated with a corporate insider, the nature of the information "cannot, without more, permit an inference as to that source's improper *motive* for disclosure." *Id.* at 455 (emphasis in original).

Finally, because a conspiracy conviction cannot be sustained unless the government established the defendant's specific intent to commit the substantive offense, the Court reversed the convictions on the conspiracy counts as well as the substantive insider trading counts and remanded with instructions to dismiss the indictment against both defendants. *Id.*

**LEGAL STANDARD**

Relief under Section 2255 is warranted when a defendant's conviction was infected by "a constitutional error, a lack of jurisdiction in the sentencing court, or an error of law or fact that constitutes a fundamental defect which inherently results in complete miscarriage of justice." *Graziano v. United States*, 83 F.3d 587, 589-90 (2d Cir. 1996) (quotation marks omitted). "The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged." *United States v. Gaudin*, 515 U.S. 506, 511 (1995). Accordingly, a court's failure to charge the jury on an essential element of the crime is a

constitutional error that mandates vacating the conviction, provided the error was not harmless. *Bilzerian v. United States*, 127 F.3d 237, 242 (2d Cir. 1997). And when a later decision demonstrates that the defendant was convicted for conduct that is not criminal, "such a circumstance inherently results in a complete miscarriage of justice and presents exceptional circumstances that justify collateral relief under § 2255." *Davis v. United States*, 417 U.S. 333, 346-47 (1974) (quotation marks and alteration omitted). Ineffective assistance of counsel is also grounds for Section 2255 relief. *See Rivas v. Fischer*, No. 13-2974-pr, ---F.3d---, slip op. at 53 (2d Cir. Mar. 11, 2015); *Johnson v. United States*, 313 F.3d 815, 817 (2d Cir. 2002).

## ARGUMENT

Kimelman is entitled to have his conviction and sentence vacated under the unique circumstances presented here. He was convicted for conduct that is not a crime under *Newman*, by a jury that was never asked to determine a critical element of the offense. Moreover, had the jury been properly instructed, it could not have found Kimelman guilty because there was no evidence that he knew that the insiders who provided the information were being paid to do so. Kimelman is also entitled to relief because his counsel was constitutionally ineffective for failing to make these arguments in his direct appeal. Finally, because Kimelman is actually innocent of insider trading under *Newman*, and because of his attorneys' ineffectiveness, his motion is not time-barred and there is no other procedural obstacle to granting relief.

### I. KIMELMAN IS ENTITLED TO RELIEF UNDER SECTION 2255 IN LIGHT OF *NEWMAN*

#### A. Under *Newman*, The Jury Instructions Violated The Constitution And Laws Of The United States

The Fifth and Sixth Amendment guarantees of due process and the right to trial by jury together invalidate any criminal conviction that does not "rest upon a jury determination that the defendant is guilty of *every element* of the crime with which he is charged, beyond a reasonable

doubt." *Gaudin*, 515 U.S. at 510 (emphasis added); *see In re Winship*, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). Kimelman's trial was unconstitutional under *Newman* because the jury was not required to find an essential element of the offenses beyond a reasonable doubt.

Decisions announcing new substantive rules—*i.e.*, in which a court holds "that a substantive federal criminal statute does not reach certain conduct" or otherwise "decides the meaning of a criminal statute enacted by Congress"—apply retroactively on collateral review. *Bousley v. United States*, 523 U.S. 614, 620 (1998). As discussed above, *Newman* squarely held that it is not a crime for a tippee to trade on the basis of material nonpublic information unless the tippee knows that the information was disclosed for a personal benefit. *Newman* clarified the substantive insider trading law, and "necessarily carr[ies] a significant risk that [Kimelman] stands convicted of 'an act that the law does not make criminal.'" *Bousley*, 523 U.S. at 620 (quoting *Davis*, 417 U.S. at 346). Accordingly, the Court must apply it on collateral review. *See Bilzerian*, 127 F.3d at 242 (assessing jury instructions and the trial evidence under an intervening Second Circuit decision that "legalize[d] certain conduct previously thought to be criminal").

The jury charge in Kimelman's trial was materially indistinguishable from the charge that the Second Circuit invalidated in *Newman*, which also involved both substantive and conspiracy counts. Just as in *Newman*, the jurors here were improperly instructed that it would be sufficient for them to find that Kimelman knew that he had received information that was disclosed in breach of a "fiduciary or other relationship of trust and confidence." (Tr. 2010); *see Newman*, 773 F.3d at 444 (district court charged that the tippee defendants must have known "that the material, nonpublic information had been disclosed by the insider in breach of a duty of trust and

confidence"). Here, as in *Newman*, the charge allowed the jury to conclude "that a defendant could be criminally liable for insider trading merely if such defendant knew that an insider had divulged information that was required to be kept confidential." *Id*. at 450. The Court erroneously rejected the defense request for an instruction that the jury also must specifically find that Kimelman knew that the information had been disclosed for a personal benefit. (*See* Tr. 2010-11); *see Newman*, 773 F.3d at 444 (district court rejected requested charge that jury must find that defendants "knew that the corporate insiders had disclosed confidential information for personal benefit in order to find them guilty"). Yet under *Newman*, "the district court was required to instruct the jury that the Government had to prove beyond a reasonable doubt that [the tippees] knew that the tippers received a personal benefit for their disclosure." *Id.* at 450-51.

The Court's instructions also wrongly suggested that benefit and breach were distinct concepts: the Court instructed the jury that "*[i]n addition*" to proving that Santarlas and Cutillo breached their duties, the government must prove that they received a personal benefit from their disclosure. (Tr. 2010-11). Under *Newman*, however, "the exchange of confidential information for personal benefit is not separate from an insider's fiduciary breach; it *is* the fiduciary breach that triggers liability for securities fraud under Rule 10b-5." 773 F.3d at 447-48. A tippee's "knowledge of a breach of the duty of confidentiality without knowledge of the personal benefit is [not] sufficient to impose criminal liability." *Id.* at 448. Rather, the government must prove beyond a reasonable doubt that "the tippee knew of the tipper's breach, that is, he knew the information was confidential and divulged *for personal benefit*." *Id.* at 450 (emphasis added).

Although *Newman* was prosecuted under the classical theory of insider trading, and this case was based on a misappropriation theory, the Second Circuit has repeatedly held that the elements of the crime are identical under either theory, such that knowledge of personal benefit

is an element of tippee liability in both types of cases. *Id.* at 446; *see SEC v. Obus*, 693 F.3d 276, 285-86 (2d Cir. 2012) ("The Supreme Court's tipping liability doctrine was developed in a classical case, [*Dirks*], but the same analysis governs in a misappropriation case."). *See also United States v. Conradt*, No. 12 Cr. 887 (ALC), 2015 WL 480419, at *1 (S.D.N.Y. Jan. 22, 2015) (vacating guilty pleas in a misappropriation case in light of *Newman*).

Accordingly, Kimelman's conviction on the substantive insider trading counts is constitutionally invalid under *Newman*. *See Fernandez v. Smith*, 558 F. Supp. 2d 480, 504-05 (S.D.N.Y. 2008) (granting habeas because, under intervening law, jury was not instructed on a critical element of the offense). Kimelman's conviction also violates the "laws of the United States" and entitles him to relief on that basis because, as demonstrated below, he is actually innocent of the statutory crimes as defined in *Newman*, such that upholding his conviction would represent "a complete miscarriage of justice." *Davis*, 417 U.S. at 346-47.

The government has petitioned for rehearing en banc of the *Newman* decision, but expressly declined to challenge the Circuit's core holding that knowledge of personal benefit is an essential element of the crime. (*See* Shapiro Decl. Ex. 4 at 2). *Newman* thus requires vacatur of Kimelman's insider trading conviction regardless of whether the Circuit grants rehearing to reconsider other aspects of the opinion. And because conspiracy liability requires proof that "the defendant had the specific intent to violate the substantive statute[s]," *United States v. Lorenzo*, 534 F.3d 153, 159 (2d Cir. 2008) (quotation marks omitted), the conspiracy conviction is invalid too. *Newman*, 773 F.3d at 455.

**B. The Error Was Not Harmless Because There Was No Evidence That Kimelman Knew Of Any Personal Benefit To The Ropes & Gray Attorneys**

The Second Circuit has not consistently applied the same harmless error standard on habeas review. *Compare United States v. Becker*, 502 F.3d 122, 130 (2d Cir. 2007) ("To

establish harmlessness, it is the government's burden to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (quotation marks omitted)), *with Peck v. United States*, 106 F.3d 450, 454 (2d Cir. 1997) ("[T]he appropriate standard applied on collateral review of federal constitutional error is . . . whether the error had substantial and injurious effect or influence in determining the jury's verdict." (quotation marks omitted)). Under either standard, however, the instructional error here plainly was not harmless, and Kimelman's conviction and sentence should be vacated.

Not once during the eleven-day trial did the government argue that Kimelman knew of Zvi's cash payments to Santarlas and Cutillo. Instead, it focused on trying to prove that Kimelman had received inside information from Zvi knowing it came from an inside source, and arguing that the jury should draw that conclusion from the circumstantial evidence. (*See*, *e.g.*, Tr. 1717-18). Indisputably, there was no evidence that Kimelman knew of the payments.[7]

Here, none of the evidence the government cited in its arguments to the jury, its opposition to Kimelman's Rule 29 and Rule 33 motions, and on appeal even remotely suggests that Kimelman knew that attorneys were disclosing confidential information *because* they were being paid by Zvi:

[7] On direct review, the Court of Appeals found sufficient circumstantial evidence to permit an inference that Kimelman received inside 3Com information and knew that that information originated with an insider. *See Goffer*, 721 F.3d at 126. Kimelman does not agree with that ruling, but even assuming *arguendo* for purposes of this motion that it was correct, it is irrelevant. That circumstantial evidence has no bearing whatsoever on the issue under *Newman* which is whether Kimelman knew the insiders were being paid for the information. As the Court of Appeals instructed in *Newman*, evidence that "could support an inference as to the *nature* of the source . . . cannot, without more, permit an inference as to that source's improper *motive* for disclosure." 773 F.3d at 455 (emphasis in original). Indeed, in *Newman* it was undisputed that both defendants knew that some of the information at issue came from an insider, yet that was not sufficient to save the convictions because it did not permit an inference of knowledge that the insider's motive was personal benefit. *Id.*

- The government relied heavily on the fact that Kimelman bought a large quantity of 3Com stock on August 8, 2007, one day after he had a long conversation with Zvi. (Tr. 1725; Dkt. No. 231 at 6; Govt. App. Br., 2012 WL 3061068, at 26-27). That fact, however, at most suggests that Kimelman and Zvi discussed 3Com in that call and that Zvi gave Kimelman information which led him to purchase the stock. The timing and size of Kimelman's stock purchase provides no basis to infer that Zvi told Kimelman he was paying the attorneys for the information.

- The government also pointed to an email that Kimelman sent Zvi on August 14, 2007, forwarding an instant-message conversation he had had with his risk manager about buying 3Com stock. (Tr. 1729; Dkt. No. 231 at 7-8; Govt. App. Br., 2012 WL 3061068, at 27). At most the email suggests that Kimelman and Zvi had talked about 3Com stock. Neither the email nor the underlying instant message exchange has anything to do with cash payments.[8]

- The government argued that Kimelman must have received inside information about 3Com because he occasionally went to a bar where Zvi discussed his 3Com information with others. (Tr. 1728; Dkt. No. 231 at 8; Govt. App. Br., 2012 WL 3061068, at 28). David Plate testified, however, that there was only one time at Opal that Zvi mentioned that the source of the information "was going to need to be paid," and that was on September 28, 2007—the same day that the deal was publicly announced. (Tr. 834-35). There was no evidence that Kimelman was present on that occasion, and Plate testified that the only other person he remembered Zvi mentioning in connection with the payments was Craig Drimal. (*Id.*).

- The government argued that because Zvi and Kimelman discussed the significance of deal documents that Zvi had learned about, Kimelman must have known that Zvi was receiving information from an attorney. (*See* Tr. 1717-18, 1963-64. *See also* Tr. 1704, 1752; Dkt. No. 231 at 9, 11-12; Govt. App. Br., 2012 WL 3061068, at 28). But Zvi never mentioned payments in any of these conversations, and the government never argued that the jury should or could infer that these conversations caused Kimelman to know that the attorney was being paid. Any such inference would have been purely speculative. Instead, as the government argued, these conversations were simply an "indication[] Michael Kimelman had that . . . Zvi Goffer had access to insiders." (Tr. 1688).

- The government also made much of the fact that on two or three occasions, Kimelman and Zvi met in person, rather than talking on the phone. (*E.g.*, Tr. 1675; Dkt. No. 231 at 11, 12; Govt. App. Br., 2012 WL 3061068, at 31). And the government relied on evidence that Zvi was protective of his sources, described using put options as a "smokescreen," asked Kimelman to put together research files, and

[8] Only the first two bullet points concern conversations or events that occurred prior to Kimelman's purchases of 3Com stock. As result, even if the later evidence could be probative of whether Kimelman knew of Zvi's payments after the 3Com trades (which it is not), as a matter of law that evidence is "not in itself sufficient to establish his knowledge *before* the trades"—the relevant timeframe. *Goffer*, 721 F.3d at 124 (emphasis added).

> referred to "our guy . . . uh, my friend" when discussing one deal document, and that on one occasion Kimelman joked in response to Zvi's comments. (*E.g.*, Tr. 1676-77, 1706-08, 1752-53; Dkt. No. 231 at 12, 14; Govt. App. Br., 2012 WL 3061068, at 4, 32, 35). None of this evidence remotely supports a finding that Kimelman knew that Zvi was paying for the information.

In *Newman*, the government attempted to rely—unsuccessfully—on very similar evidence in arguing that the instructional error was harmless. The Court of Appeals rejected those arguments and held that none of the evidence suggested that the defendants knew of the insiders' supposed personal benefit. For example, the government contended that the defendants must have known of the insiders' personal benefit because they received "highly material information concerning [the issuers'] financial performance, shortly before the companies made quarterly earnings announcements," and one defendant knew that the inside source would not have been authorized to disclose that information. Govt. *Newman* App. Br., 2013 WL 6163307, at 61, 63. The government also pointed to knowledge that the information was being gathered discretely "outside of business hours, at night and on the weekend," and to discussions that referred to the ultimate source knowingly as the "main contact." *Id.* at 18, 62-63. And the government relied on a conversation in which a friend asked one defendant how he had such detailed information, and he responded by snapping, "Not your concern. I just do," and that same defendant instructed his alleged co-conspirator "to create sham reports reflecting false reasons for the trades." *Id.* at 63-64. One of the defendants even paid for the tips he received with checks to the source's spouse. *Id.* at 62. But the Second Circuit held that *none* of this evidence could support a reasonable inference that the defendants knew the information was disclosed for a personal benefit. 773 F.3d at 455. As the Court explained, the lack of such knowledge is not unusual for individuals like Kimelman who are "remote tippees many levels removed from corporate insiders" yet "increasingly targeted" by the government's insider trading prosecutions. *Id.* at 448.

In short, the government's strongest evidence at trial—both individually and in aggregate—simply has no bearing one way or the other on whether Kimelman knew that attorneys were receiving cash payments in exchange for providing information to Zvi. Even assuming *arguendo* that the evidence could reasonably be interpreted to show that Kimelman knew Zvi was obtaining information from an insider or an attorney, the source could just have easily have been a fellow subway passenger who was unguardedly reviewing deal documents on his morning commute, or a neighbor who carelessly discarded confidential documents in their building's trash. Nothing in the record indicates that Kimelman had any reason to believe that the source was purposefully sharing information with Zvi and doing so in exchange for money (or any other personal benefit).

Likewise, it would be pure speculation and surmise to conclude that Zvi told Kimelman about the payments simply because Zvi described Kimelman as being in his "inner circle" or because three of the other alleged conspirators knew about the payments. *See United States v. D'Amato*, 39 F.3d 1249, 1256 (2d Cir. 1994) ("[A] conviction based on speculation and surmise alone cannot stand."). First, according to Plate's testimony, Zvi told him that "his inner circle were the people closest to him that he shared all of his information with and that shared with him." (Tr. 824-25). There was no evidence that Zvi shared *how* he obtained his information with those individuals—which supposedly included Emanuel, Kimelman, Jay Roth and Eric Rogers. (*See id.*). Second, there was no evidence that anyone in this group made any contribution to Zvi' payments.

On the contrary, the evidence suggested that Zvi concealed the payments from most of the others, and those who knew about them were the other individuals who provided some of the money—Plate, Drimal, and Michael Cardillo, as well as another person whom Drimal told about

the payments, David Slaine. (Tr. 647-48, 834-35, 1122-24). Other than these isolated instances, there was no evidence that any of the other alleged co-conspirators knew of Zvi's payments.

Finally, there was no evidence from which the jury could infer that Kimelman consciously avoided learning that the sources were paid for the information. To establish conscious avoidance, there must be evidence that the defendant "was aware of a high probability" that the insiders were being paid and "consciously avoided confirming that fact." *United States v. Kaplan*, 490 F.3d 110, 127 (2d Cir. 2007) (quotation marks omitted). As discussed above, at most, the evidence could establish that Kimelman believed Zvi had an inside or attorney source. But under *Newman*, that is not sufficient to infer knowledge of a personal benefit or conscious avoidance of that knowledge. *See* 773 F.3d at 455. And there was no evidence that Kimelman took any conscious or deliberate act to avoid learning of Zvi's payments. *See United States v. Rodriguez*, 983 F.2d 455, 458 (2d Cir. 1993) ("[T]he defendant must be shown to have decided not to learn the key fact, not merely to have failed to learn it through negligence."); *accord United States v. Ferrarini*, 219 F.3d 145, 157 (2d Cir. 2000) (deliberate decision required; not sufficient that "the factual context *should have apprised* [the defendant] of the unlawful nature of [his] conduct" (quotation marks omitted)).

## II. KIMELMAN'S COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE

Kimelman is also entitled to relief because his counsel failed to present these arguments in his Rule 29 and Rule 33 motions or on appeal. Had they done so, Kimelman's conviction likely would have been reversed and the counts against him dismissed, just as in *Newman*.

To establish ineffective assistance of counsel, a defendant must show (1) that his counsel's representation "fell short of being objectively reasonable, and (2) "that a reasonable probability exists that, but for counsel's deficient performance, the result of his proceeding would have been different." *Bloomer v. United States*, 162 F.3d 187, 192-94 (2d Cir. 1998)

(citing *Strickland v. Washington*, 466 U.S. 668 (1984)). At the trial level, counsel's performance is objectively unreasonable if they fail to press an argument "when precedent supported a 'reasonable probability' that a higher court would rule in defendant's favor" based on "the state of the law as it existed at the time." *Id.* at 193. Similarly, appellate counsel's performance is deficient if they "omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker." *Mayo v. Henderson*, 13 F.3d 528, 533 (2d Cir. 1994); *accord Ramchair v. Conway*, 601 F.3d 66, 76-77 (2d Cir. 2010). To demonstrate prejudice, "'[a] defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case.'" *Gonzalez v. United States*, 722 F.3d 118, 135 (2d Cir. 2013) (quoting *Strickland*, 466 U.S. at 693). Prejudice is established if "there was a reasonable probability that the [court] would have recognized a sound claim had it been timely made." *Ramchair*, 601 F.3d at 77. "The fact that precisely the same claim was successful on an appeal pursued by a similarly situated litigant is a strong indication that the failure of the petitioner's counsel to press that claim was prejudicial." *McKee v. United States*, 167 F.3d 103, 107 (2d Cir. 1999).

Both at the time Kimelman's trial and when his counsel filed his appeal, every other district court to have considered the issue had concluded that a tippee's knowledge of the insider's personal benefit is an essential element of insider trading liability. *See United States v. Rajaratnam*, 802 F. Supp. 2d 491, 498-99 (S.D.N.Y. 2011) (holding that a tippee cannot be a knowing participant in the tipper's fiduciary breach unless the tippee knows that the tipper was divulging information for a personal benefit); *Hernandez v. United States*, 450 F. Supp. 2d 1112, 1118 (C.D. Cal. 2006) ("[U]nder the standard set forth in *Dirks,* an outsider who receives material nonpublic information (i.e., 'tippee') can be liable under § 10(b) / Rule 10(b)-5 if the tippee had knowledge of the insider-tipper's personal gain."); *United States v. Santoro*, 647 F.

Supp. 153, 170 (E.D.N.Y. 1986) (holding that a tippee must know of the tipper's personal benefit and that the jury must have this explained "as an element of knowledge of the breach"), *rev'd on other grounds*, *United States v. Davidoff*, 845 F.2d 1151 (2d Cir. 1988); *State Teachers Ret. Bd. v. Fluor Corp.*, 592 F. Supp. 592, 594 (S.D.N.Y. 1984) (reading *Dirks* to require that a tippee know of the tipper's fiduciary breach and holding that this "necessitates tippee knowledge of *each element,* including the personal benefit, of the tipper's breach"). *See also United States v. Whitman*, 904 F. Supp. 2d 363, 371 (S.D.N.Y. 2012) ("[I]f the only way to know whether the tipper is violating the law is to know whether the tipper is anticipating something in return for the unauthorized disclosure, then the tippee must have knowledge that such self-dealing occurred, for, without such a knowledge requirement, the tippee does not know if there has been an 'improper' disclosure of inside information."). Kimelman's counsel requested that the Court instruct the jury in accord with these precedents and preserved Kimelman's objections to the Court's denial of that request. (Tr. 1577, 2059). Inexplicably, however, counsel failed to press this point in their post-verdict motions or on appeal. Nor did Kimelman's counsel challenge the sufficiency of the evidence of Kimelman's knowledge of personal benefit, which was necessary to support both the substantive and conspiracy convictions.

There is no conceivable strategic reason why counsel would have declined to make these arguments. At the time of Kimelman's trial and appeal, the arguments were supported by *Dirks* and every other decision addressing the issue, and there was no Second Circuit case that even arguably spoke to the issue. Indeed, when this Court expressly addressed the question following extensive argument a year and a half later in the *Newman* trial, the Court acknowledged that the knowledge argument was "supportable certainly by the language of *Dirks*." (Shapiro Decl. Ex. 5 at 3595). The Court rejected it only because it felt bound by the Second Circuit's then-recent

decision in *Obus*, which did not list knowledge of personal benefit as an element of tippee liability. (*Id.* at 3595-96, 3604-05). At the time of Kimelman's trial and when his counsel filed their appellate briefs, however, the Second Circuit had not yet decided *Obus*, and so every relevant authority—the district court decisions discussed above and *Dirks* itself—supported Kimelman's position and made these arguments "significant and obvious" both for Kimelman's Rule 29 and Rule 30 motions and on appeal.[9]

Counsel's failure to argue the personal-benefit point on appeal was particularly egregious because they had obtained permission to file a substantially oversized brief, yet used that space to pursue "clearly and significantly weaker" arguments. *Mayo*, 13 F.3d at 533. For example, the Circuit swiftly rejected Kimelman's counsel's arguments challenging the introduction of wiretap evidence; the conscious avoidance instruction; and the exclusion of evidence that Kimelman had rejected an offer of a non-jail sentence. *Goffer*, 721 F.3d at 122-23, 126-29. None of these arguments—in stark contrast to the argument that knowledge of personal benefit is an essential element of insider trading—was uniformly supported by a body of case law that was directly on point.

And Kimelman's counsel's failure significantly prejudiced him because he was deprived of the opportunity to have these issues resolved in his favor years ago. In *Newman*, by contrast, the defendants challenged the very same decision by this Court in their trial, and the Court of Appeals readily held that the Court's jury instructions omitted a critical element of insider

[9] In fact, both the *Rajaratnam* and *Whitman* trials occurred at approximately the same time—*i.e.*, when every other district court had held that a tippee is required to know of the insider's personal benefit under *Dirks*, but before the Second Circuit issued its *Obus* decision suggesting otherwise. In both cases the defendants' counsel argued strenuously for a jury instruction that included the knowledge-of-personal-benefit requirement, and both Judge Holwell and Judge Rakoff agreed with the defendants and instructed the juries accordingly. (Judge Rakoff issued his written decision explaining his reasoning after *Obus* was decided. *See Whitman*, 904 F. Supp. 2d at 371 n.6).

trading liability. *See McKee*, 167 F.3d at 108 (petitioner prejudiced by appellate counsel's failure to raise argument that, when raised on direct appeal in another defendant's case involving "identically defective language" in jury instructions, "resulted in a reversal and an order for a new trial"). Had Kimelman's appellate counsel presented that argument in his appeal, there can be little doubt that the Second Circuit would have at least granted a new trial due to the erroneous jury instructions. The Court also likely would have dismissed the indictment—just as it did in *Newman*—because there was zero evidence that Kimelman knew of the insiders' personal benefit. *See Ramchair*, 601 F.3d at 77 (appellate counsel's ineffectiveness prejudiced defendant where "there was a reasonable probability that the [appellate court] would have recognized a sound claim had it been timely made").

There was no legitimate reason for Kimelman's prior counsel not to raise the personal-benefit argument. Accordingly, Kimelman's received constitutionally ineffective representation, which is an independent ground for vacatur.

## III. THERE IS NO PROCEDURAL BAR TO THIS MOTION

Ordinarily defendants cannot pursue a claim on collateral review that they did not raise on appeal, and motions for post-conviction relief must be brought within one-year of the date the conviction becomes final. *See* 28 U.S.C. § 2255(f)(1). However, a defendant's procedural default will be excused if (1) there was sufficient cause for the default, and the defendant was prejudiced thereby, *or* (2) failing to allow the defendant to proceed with his claim on collateral review would result in a miscarriage of justice—that is, the defendant is actually innocent of the crime of which he was convicted. *See Schlup v. Delo*, 513 U.S. 298, 314-15 (1995). Likewise, a defendant's actual innocence provides an equitable exception to Section 2255's one-year statute of limitations. *See Rivas v. Fischer*, 687 F.3d 514, 548 (2d Cir. 2012). This case satisfies both of these tests.

### A. Any Procedural Default And Untimeliness Should Be Excused Because Kimelman Is Actually Innocent Under *Newman*

Under *Newman*, Kimelman is actually innocent of the crimes on which he was convicted because, more likely than not, no reasonable juror would have found him guilty of substantive insider trading or conspiracy beyond a reasonable doubt. *Schlup*, 513 U.S. at 327. The facts demonstrating Kimelman's actual innocence are "credible" and "compelling." *Id.* at 324.

First, Kimelman has established that he is actually innocent under *Newman*. *See Bousley*, 523 U.S. at 623 (no procedural bar to collateral review if subsequent change in law "has probably resulted in the conviction of one who is actually innocent"); *Ingber v. Enzor*, 841 F.2d 450 (2d Cir. 1988) (excusing procedural default where "retroactive application [of a new substantive rule] is necessary to avoid an unfair result"); *Bing Yi Chen v. United States*, No. 12 CV 3904 DAB, 2013 WL 399226, at *2 (S.D.N.Y. Feb. 1, 2013) (actual innocence under intervening change in law excuses a procedural default); *Petronio v. Walsh*, 736 F. Supp. 2d 640, 658 (E.D.N.Y. 2010) (same); *Johnson v. Bellnier*, No. 09–CV–00381 (KAM) (RER), 2011 WL 3235708, at *14 (E.D.N.Y. July 27, 2011), *rev'd in part*, 508 F. App'x 23 (2d Cir. 2013) (same).

Second, as set forth above, the government presented zero evidence at trial that Kimelman had any awareness that Zvi was paying his sources for inside information. Surely if the government had such evidence it would have presented it at trial—both because it would have been probative of Kimelman's knowledge of the ultimate source of the information and because the Court did not finalize the jury charge (and thereby relieve the government of having to prove Kimelman's knowledge of the insiders' personal benefit) until after the government had presented its case. Thus, if the jury had been properly instructed that it could not convict Kimelman without finding beyond a reasonable doubt that he knew of the attorneys' personal

benefit, "in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *Bousley*, 523 U.S. at 623 (quotation marks omitted).

**B. Any Procedural Default Resulted from Kimelman's Counsel's Ineffectiveness**

It is well-established that the prior counsel's ineffective representation constitutes sufficient cause to excuse a procedural default. *See Restrepo v. Kelly*, 178 F.3d 634, 640-41 (2d Cir. 1999). As set forth above, Kimelman's counsel was ineffective by failing to argue the knowledge of personal benefit issue. At the very least, their ineffectiveness provides adequate ground to excuse the fact that Kimelman did not present the argument on direct review.[10]

**CONCLUSION**

For the foregoing reasons, Kimelman requests that the Court issue an order pursuant to 28 U.S.C. § 2255 vacating his conviction and sentence.

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Respectfully submitted,

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[10] There can be no procedural default as to Kimelman's ineffective assistance claim. *Bloomer*, 162 F.3d at 191-92.