Nos. 15-2707, 15-2712

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RAJAT GUPTA,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee

MOTION OF APPELLANT RAJAT GUPTA FOR A CERTIFICATE OF APPEALABILITY

Appeal from the United States District Court
for the Southern District of New York, Nos. 15-cv-6630 and 11-cr-907
Before the Honorable Jed S. Rakoff

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Statutes

On June 15, 2012, a jury convicted Rajat Gupta of three counts of securities fraud for tipping Raj Rajaratnam on two occasions, September 23, 2008 and October 24, 2008, and of one count of conspiracy to commit securities fraud. He was acquitted of the two other substantive charges in the case, which alleged tips relating to Goldman Sachs in March 2007 and Procter & Gamble in January 2009. This Court affirmed the judgment of conviction on March 25, 2014. Mr. Gupta began serving his term of imprisonment on June 17, 2014.

Following this Court's decision in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), Mr. Gupta sought to have his conviction set aside pursuant to 28 U.S.C. § 2255. The district court denied the motion on July 2, 2015 (Ex. A) and on August 5, 2015 declined to issue a Certificate of Appealability (Ex. B).[1] Mr. Gupta now respectfully submits this memorandum of law in support of his motion, pursuant to 28 U.S.C. § 2253(c), for a Certificate of Appealability.

Preliminary Statement

In *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), this Court held that merely showing that a tipper and tippee maintained a mutually beneficial personal relationship – the theory on which this case was prosecuted by the government and submitted to the jury pursuant to the district court's instructions –

[1] Exhibits are attached to the Declaration of Gary P. Naftalis submitted in support of this motion.

is insufficient to make out the benefit element of an insider trading offense. Substantially more is required: *Newman* held that the jury can find the benefit element proved beyond a reasonable doubt only when "a meaningfully close personal relationship" between tipper and tippee is shown to have generated a *quid pro quo – i.e.*, "an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature" to the alleged tipper. *Id*. at 452.

Newman effected a significant change in the law of insider trading. In seeking rehearing, the government urged upon this Court that the decision "arguably represents one of the most significant developments in insider trading law in a generation." Petition for Rehearing at 22-23, *United States v. Newman*, No. 13–1837(L) (2d Cir. 2015) (denied) (Ex. C). *Newman*, the government asserted, "redefines a critical element of insider trading liability" by formulating an entirely new personal benefit standard. *Id.* at 1-2, 22. Following denial of its rehearing petition, the government has taken the rare step of seeking Supreme Court review, once again describing *Newman* as an "unprecedented ruling" that "crafted a new, stricter personal-benefit test" that requires the government to meet "a heightened legal standard." Petition for Writ of Certiorari at 14, 18, 20, *United States v. Newman*, No. 15-137 (July 30, 2015) (Ex. D).

At Mr. Gupta's trial, the district court instructed the jury in terms inconsistent with *Newman* by explaining that the benefit allegedly received by him "d[id] not need to be financial or to be tangible in nature. It could include, for example, maintaining a good relationship with a frequent business partner, or obtaining future financial benefits." (Trial Tr. 3371 (Ex. E)). This instruction, allowing the jury to convict Mr. Gupta based upon a now invalid pure relationship theory, was decisive. As discussed below, there is no room to suggest that the jury may have considered and found the more robust *quid pro quo* required by *Newman*. Indeed, in its rebuttal summation, the government, emphasizing the centrality of the pure relationship theory to its case against Mr. Gupta, directed jurors to that portion of the Court's instruction stating that a wholly intangible, modest benefit would suffice. (Ex. E at 3341).

The district court denied Mr. Gupta's application for section 2255 relief, concluding that he had procedurally forfeited his claim by failing to raise it on direct appeal, and that he had met neither the "cause and prejudice" nor the "actual innocence" exception that would permit consideration of his application on the merits. In ruling against Mr. Gupta on procedural grounds, the district court rejected Mr. Gupta's (and the government's) reading of *Newman* as reflecting a significant redefinition of the benefit element, and then, in denying Mr. Gupta's

motion for a Certificate of Appealability, concluded that its own reading of *Newman* is not even open to reasonable debate.

Respectfully, the district court erred in denying Mr. Gupta's request for a Certificate of Appealability. The standard for issuance of a Certificate is not onerous. The Supreme Court has held that the movant need show only "that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further. . . . [O]bviously the petitioner need not show that he should prevail on the merits." *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983) (quotation marks and alterations omitted). "Indeed, a claim can be debatable even though every jurist of reason might agree, after [a Certificate of Appealability] has been granted and the case has received full consideration, that petitioner will not prevail." *Miller-el v. Cockrell*, 537 U.S. 322, 338 (2003). Where, as here, the district court denies the section 2255 petition on procedural grounds, a certificate should issue if the petitioner shows that both the procedural ruling and the underlying constitutional claim are "debatable." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Mr. Gupta has satisfied this standard. As set forth in detail below, with respect to procedural default, it is at the very least debatable (i) whether *Newman* "crafted a new, stricter personal-benefit test" (Ex. D at 18), and whether, under this

Court's decision in *Gutierrez v. Smith*, 702 F.3d 103, 112 (2d Cir. 2012), *Newman*'s new test constitutes an "unlikely development in [firmly ingrained] law," excusing Mr. Gupta's failure to challenge the district court's jury instruction on direct appeal; (ii) whether the jury instruction on benefit was inconsistent with this new test, and whether Mr. Gupta was prejudiced by the erroneous jury instruction; and (iii) whether, even if Mr. Gupta has not shown cause and prejudice excusing his procedural default, he is "actually innocent," allowing his claim to be heard on the merits. And for the same reasons that he has shown he was prejudiced by the district court's benefit instruction, Mr. Gupta has shown that the erroneous instruction resulted in his conviction for conduct that is not criminal, and thus that he is entitled to section 2255 relief on the merits.

Argument

I. Whether Mr. Gupta Established Cause for Not Challenging the Jury Instruction on Benefit on Direct Appeal – Because *Newman* Effected an Unlikely Change in the "Firmly Ingrained" Law of Insider Trading – is Debatable

Although on direct appeal Mr. Gupta did not assert that the district court's jury instruction was erroneous, he is nevertheless entitled to have his section 2255 application evaluated on the merits if he makes a showing of "cause" for failing to raise the challenge and "prejudice" resulting from the underlying error. *See Gutierrez v. Smith*, 702 F.3d 103, 111 (2d Cir. 2012). The district court held that

Mr. Gupta did not establish cause. At the very least, this conclusion is open to reasonable debate.

Gutierrez provides that, if the legal rule at issue was "firmly ingrained" at the time of trial or direct appeal, then challenging the rule will be viewed as having been "futile" at that time. *Gutierrez*, 702 F.3d at 112. As explained by this Court, where counsel's argument at the habeas stage is "based on what was [at the time of direct appeal] an unlikely development in [firmly ingrained] law," the legal basis for the argument was "not reasonably available" at the earlier stage. This is because the settled law of the Circuit is an "objective factor external to the defense" that "impede[s]" counsel from raising the issue, and establishes cause. *Id.* at 111-12 (internal citations omitted).[2]

For Mr. Gupta to have challenged the district court's jury instruction on direct appeal would have been futile. At the very least, the issue is debatable, for prior to *Newman*, the law on benefit to the tipper had long been established in this Circuit, at least since *SEC v. Warde*, 151 F.3d 42 (2d Cir. 1998), and there was no

[2] Similarly, in *Reed v. Ross*, 468 U.S. 1 (1984), the Supreme Court held that "a defendant has cause for his failure to raise [a constitutional] claim in accordance with applicable state procedures" when the Court "disapprove[s] a practice [it] arguably has sanctioned in prior cases," if the practice was "well entrenched . . . in the relevant jurisdiction at the time of defense counsel's failure to challenge it." *Id*. at 2, 16-17 (internal citations omitted). In such a case, there is "no reasonable basis" upon which counsel could have challenged the law prior to the change. *Id*. at 14.

suggestion that it was up for reconsideration. *Compare Warde*, 151 F.3d at 48 ("the SEC need not show that the tipper expected or received a specific or tangible benefit in exchange for the tip"), *SEC v. Obus*, 693 F.3d 276, 291 (2d Cir. 2012) (*Warde* held that "the 'close friendship' between the alleged tipper and tippee was sufficient to allow the jury to find that the tip benefitted the tipper"), *and id.* ("the undisputed fact that [tipper] and [tippee] were friends from college is sufficient to send to the jury the question of whether [tipper] received a benefit from tipping [the tippee]"), *with Newman*, 773 F.3d at 452 (the "inference of [personal benefit] is impermissible in the absence of proof of a meaningfully close personal relationship that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature"), *and id*. ("Government may [not] prove the receipt of a personal benefit by the mere fact of a friendship"). As the government has asserted, *Newman*'s holding and the rule it established are "unprecedented," "novel," and "new" – making for a break with the law as it stood at the time of Mr. Gupta's direct appeal. (Ex. D at 14, 18; Ex. C at 1-2).

Indeed, the district court's reaction to defense counsel's limited objection to the proposed benefit instruction – far from signaling that the benefit element was open to redefinition – illustrates just how "firmly ingrained" in the law the pure relationship theory of benefit was prior to *Newman*. The district court had earlier

observed that, under then governing Second Circuit law, the jury could properly convict based on "unfairly vague benefits . . . like friendship." (Jan. 5, 2012 Pretrial Hearing Tr. at 16 (Ex. F)). And when Mr. Gupta suggested only that the requisite benefit not be described to the jury as "modest," the district court responded that "modest" was "in the case law" and was "the law of the circuit." (Ex. E at 676-78). *Newman* unforeseeably invalidated that very proposition – indeed, not even Mr. Newman himself argued for a redefinition of the benefit element; he made a conventional insufficiency argument under the standard that then prevailed.[3] Thus *Newman* opened the door for Mr. Gupta to challenge the district court's benefit instruction in a way that was previously "not reasonably available" to him.[4]

The district court, however, found that *Newman* did not establish the basis for any new argument premised on a redefinition of the benefit element. *United*

[3] Ex. C at 8-9 (noting that Mr. Newman made only an insufficiency argument under existing law, but "never advanced" the "narrow definition of what may qualify as a benefit" adopted by the panel). The issue was not raised at all by Mr. Newman's co-defendant Chiasson.

[4] Defense counsel's challenge to the use of the word "modest" demonstrates neither that Mr. Gupta was making an argument along the lines of *Newman*'s recasting of the benefit element, nor that such an argument was available to be made. Thus, Mr. Gupta's limited objection does not undermine his futility argument, as the district court concluded. Rather, the district court's *response* to that objection belies the notion that the benefit element was at that time open to redefinition.

States v. Gupta, No. 11-cr-907 at 3 (S.D.N.Y. July 2, 2015) (Ex. A). In the court's view, *Newman* "is concerned on its face with what evidence would warrant a fact-finder in inferring that a remote tippee knew that the tipper intended a benefit to the direct tippee"; on the other hand, according to the district court, reading *Newman* as both Mr. Gupta and the government do – *i.e.*, "to suggest that the potential pecuniary benefit must be to the tipper" – is "not a fair reading" of the decision. (Ex. A at 6).

Notwithstanding that it purports to evaluate *Newman* "on its face," the district court's reading of *Newman* is strained. The interpretation given to the decision by Mr. Gupta and the government is a far more natural reading, as *Newman* avowedly sought to vindicate the "fundamental insight that, in order to form the basis for a fraudulent breach, the personal benefit received in exchange for confidential information must be of some consequence." *Newman*, 773 F.3d at 452. Indeed, the district court itself has recognized that its reading of *Newman* is at least debatable, finding that *Newman* "suggests that the latter type of relationship (i.e. mere friendship) can lead to an inference of personal benefit only where there is evidence that it is generally akin to *quid pro quo*." *SEC v. Payton*, -- F. Supp. 3d --, 2015 WL 1538454, at *4 n.2 (S.D.N.Y. Apr. 6, 2015) (Rakoff, J.); *see also United States v. Salman*, 792 F.3d 1087, 1093 (9th Cir. 2015) (Rakoff, J.) ("To the extent *Newman* can be read [to hold that the government must adduce evidence

showing that the tipper-tippee relationship generated a *quid pro quo* to demonstrate that the tipper received a benefit], we decline to follow it."). Thus even the district court has, in other contexts, acknowledged that *Newman* is open to the interpretation advanced by Mr. Gupta.

II. Whether Mr. Gupta Established that he was Prejudiced by the District Court's Jury Instructions is Debatable

Having denied Mr. Gupta's section 2255 petition for failure to establish cause, the district court did not consider his argument that he was prejudiced by the jury instruction on benefit. A defendant is "prejudiced" when, considering the record as a whole, the instructional error may have had a "substantial and injurious effect or influence in determining the jury's verdict." *Peck v. United States*, 106 F.3d 450, 456 (2d Cir. 1997) (internal citations and quotations marks omitted). Mr. Gupta made a substantial showing of prejudice, easily satisfying this standard.

The district court delivered at trial substantially the benefit instruction requested by the government:

> First, [the government must prove that] on or about the date alleged, Mr. Gupta engaged in an insider trading scheme, in that, in anticipation of receiving at least some modest benefit in return, he provided to Mr. Rajaratnam the material non-public information specified in the count you are considering . . . .
>
> . . . .
>
> [A]s to the benefit that the defendant anticipated receiving, the benefit does not need to be financial or to

> be tangible in nature. It could include, for example, maintaining a good relationship with a frequent business partner, or obtaining future financial benefits.

(Ex. E at 3370-71). This benefit instruction failed to meet the requirements of *Newman* in a number of ways prejudicial to Mr. Gupta.

> *First,* by telling the jury that it could convict on the basis of a finding that Mr. Gupta received "some modest benefit," the instruction communicated the opposite of the requirement, under *Newman*, that the gain to the tipper must be "consequential." *Newman*, 773 F.3d at 452.
>
> *Second*, by instructing that the gain to the tipper "[did] not need to be financial or to be tangible in nature," the district court communicated that maintaining an amicable relationship with Mr. Rajaratnam – having nothing to do with any potential for concrete pecuniary gain – was a sufficient basis upon which to convict Mr. Gupta.
>
> *Third*, the instruction offered that the benefit element could be satisfied *in either of two ways* – by proof that Mr. Gupta anticipated, "for example, maintaining a good relationship with a frequent business partner, *or* obtaining future financial benefits" – the first of which was invalidated by *Newman*. *See United States v. Desnoyers*, 637 F.3d 105, 109-10 (2d Cir. 2011) (reversal of conviction called for where "disjunctive theories are submitted to the jury and the jury renders a general verdict of guilty" and one of those two grounds for conviction is later ruled "legally insufficient") (quoting *United States v. Garcia*, 992 F.2d 409, 416 (2d Cir. 1993)).

Together, these misstatements of post-*Newman* law permitted the jury to convict Mr. Gupta based purely on his allegedly amicable relationship with Mr.

Rajaratnam, and without finding that his tips were part of an agreed upon exchange of tips for consequential benefits – for, in other words, conduct that is not a crime.

The presence of the now invalid pure relationship theory of benefit and other errors in the jury instruction was determinative. The core premise of the defense was that in the twilight of an illustrious life, Mr. Gupta would not have decided to make illicit disclosures of insider information in exchange for no gain of consequence. But this proposition was undermined by the pre-*Newman* benefit standard, which eliminated the element as a meaningful burden for the prosecution. As much as defense counsel stressed Mr. Gupta's long and successful professional career of the utmost probity at McKinsey; his many lucrative, entirely lawful post-McKinsey business opportunities; the absence of any typical indicia of illegal tipping (*e.g.*, an agreement to pay cash for tips or to trade tips for other tips); and the absence of evidence showing that Mr. Gupta even knew what Goldman Sachs trades Mr. Rajaratnam directed, the size or dollar amount of those trades, or how much money Mr. Rajaratnam made – the government had available a ready response under pre-*Newman* law: Mr. Gupta tipped Mr. Rajaratnam to maintain their "relationship."

Recognizing that the evidence did not establish any *quid pro quo*, and not required to prove one under pre-*Newman* law, the government responded to Mr. Gupta's defense by seeking to establish a "benefit [that] was about maintaining a

good relationship with a frequent business partner." (Ex. E at 3340). The government repeatedly invoked this formulation in its opening statement and in summation, contending that the evidence demonstrated a "close relationship" between Messrs. Gupta and Rajaratnam (Ex. E at 109); that they were "business partners and they trusted each other" (*id.*); that they had a "close business relationship" (Ex. E at 124); that the "two men had a close relationship" (Ex. E at 3181); that they "had a close relationship for several years" (Ex. E at 3199); that they were "entangled together in a number of business deals" (*id.*); that they "had a personal relationship that dated back some time" (Ex. E at 3200); that they sought business advice from one another, evidencing their "close relationship" (Ex. E at 3214); and that they "had a close relationship." (Ex. E at 3347).

When it came time to review the trial evidence in summation, the government framed the issue by "talking a little bit about the relationship between Mr. Gupta and Mr. Rajaratnam" – "You know that they had a close relationship for several years." (Ex. E at 3199-200). And having stressed throughout both its opening statement and principal summation that the evidence proved the Gupta-Rajaratnam "relationship," the government punctuated the point in rebuttal summation. Emphasizing that Mr. Gupta's core defenses rested centrally on the absence of benefit and motive ("[t]he defense team spent a lot of time about the benefit" (Ex. E at 3340)), the government declared that its own case rested

centrally on the pure relationship theory of benefit, with the prosecutor specifically affirming that "[f]irst the benefit was about maintaining a good relationship with a frequent business partner" and reassuring the jurors that no more was required for conviction:

> You'll hear Judge Rakoff instruct you on the law about benefit. It is some modest benefit. . . . It doesn't require actual money. It doesn't require a kickback. You will hear the instructions. We ask you to follow those instructions on what the benefit is, and you'll see what the benefit is."

(Ex. E at 3340-41). When defense counsel objected to the prosecutor "charging the jury" in this fashion, the Court stated that the objection was "not well taken." (*Id.*).

The government's overwhelming emphasis on the Gupta-Rajaratnam "relationship" in its statements directed to the jury betrayed its inability to adduce any evidence of a commitment between the two men to exchange tips for consequential benefits. Also telling is what the government did not say: The government never told the jury in opening, summation, or rebuttal summation that Mr. Gupta's tips represented his half of a "*quid pro quo*," "arrangement," "understanding," "commitment," or "exchange."

The prejudice caused by the district court's inclusion of the pure relationship theory and other errors in the benefit instruction is plain and of constitutional dimension. The government's case was entirely circumstantial and credibly

contradicted; the instructional error was repeated throughout the trial; and the government's arguments were targeted toward the invalid theory. It is purely speculative to assert that the jury convicted Mr. Gupta on any theory other than the now invalid pure relationship theory. In sum, the erroneous jury instruction had a "substantial and injurious effect or influence" upon this jury's verdict. *See United States v. Andrews*, 681 F.3d 509, 522 (3d Cir. 2012) ("where the evidence on the valid alternative theory is relatively weak, the government relies heavily on the improper theory, and the district court's instructions on the improper theory are 'interwoven' throughout the jury charge," the instructional error is prejudicial).

III. Whether Mr. Gupta Established Actual Innocence is Debatable

A defendant is "actually innocent" when, after making "a probabilistic determination about what reasonable, properly instructed jurors would [have] do[ne]," the court concludes that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298, 327, 329 (1995). The focus is "on the likely behavior of the trier of fact" in view of the proper instruction. *Schlup*, 513 U.S. at 330. Mr. Gupta satisfies the standard.

The district court concluded that Mr. Gupta failed to establish actual innocence because, "even if one were to read *Newman* the way Gupta erroneously does, as requiring a potential pecuniary benefit to Gupta, such a benefit was also

clearly present, as demonstrated by prior exchanges" – that is, "exchanges" between Mr. Gupta and Mr. Rajaratnam from well before the two September-October 2008 tips of which Mr. Gupta was convicted – which, the court stated, "illustrated the mutually beneficial and *quid pro quo* nature of their relationship." (Ex. A at 8).

But *Newman* requires a more substantial showing by the government, namely evidence of a temporal link between an alleged tip and any alleged gain to the tipper, such that it is reasonable to conclude beyond a reasonable doubt that one was exchanged for the other. *Newman*, 773 F.3d at 453 (where the alleged benefit to the tipper preceded his alleged tips by a year, "it would not [have been] possible under the circumstances for a jury in a criminal trial to find beyond a reasonable doubt that [the tipper] received a personal benefit in exchange for the disclosure of confidential information").

The government never proved any such link with respect to the tips of which Mr. Gupta was convicted, nor could it have. Every aspect of the Gupta-Rajaratnam business relationship introduced by the government at trial was either defunct by the time of the alleged September-October 2008 tips, put in place years before the tips, or proposed and then aborted before the tips. Indeed, the undisputed evidence showed that the significant developments in the Gupta-Rajaratnam business relationship in fall 2008 yielded not any prospective or

continuing business relations, but rather substantial ill will between the two men. (Ex. E at 1923, 3079). The district court identified only one "potential pecuniary benefit" supposedly occurring in this time frame: According to the court, Mr. Gupta could potentially have benefited because both he and the Voyager Fund, in which Mr. Gupta had an equity interest, were investors in the Galleon Buccaneers Fund, and Mr. Rajaratnam made trades in that Galleon fund following the September 2008 tip. (Ex. A at 8). But the government never advanced this argument at trial and it is sheer speculation, particularly given the undisputed fact that Mr. Gupta had entirely lost his equity in the highly leveraged Voyager Fund by that time. Moreover, the record shows that Mr. Gupta had redeemed the entirety of his personal investment in the Galleon Buccaneers Fund several years before, by August 2005. (Ex. E at 2117).

Consistent with the district court's instruction, which was that Mr. Gupta had to have anticipated receiving the benefit *at the time of the tip* alleged in the count under consideration, the only "benefit" that the jury could have found related to the alleged September and October 2008 tips was the longstanding Gupta-Rajaratnam relationship itself. But the mere continuance of a relationship cannot lawfully satisfy the benefit element after *Newman*, and because no reasonable juror, properly instructed on *Newman*, would have found that the government's evidence showed the requisite "objective, consequential" *quid pro quo* with respect

to the alleged September and October 2008 tips, Mr. Gupta satisfies the actual innocence standard.

IV. Whether Mr. Gupta is Entitled to Relief Because the Erroneous Jury Instruction on Benefit Resulted in His Conviction For Conduct That is Not a Crime is Debatable

It is well established that where a defendant is convicted of violating a statute that is subsequently given a narrower interpretation by the Court of Appeals, the prospect then exists that the defendant was convicted "for an act that the law does not make criminal," a circumstance that "inherently results in a complete miscarriage of justice and presents exceptional circumstances that justify collateral relief under [section] 2255." *Davis v. United States*, 417 U.S. 333, 346-47 (1974) (quotations and alternations in original omitted). *Accord United States v. Loschiavo*, 531 F.2d 659, 666-67 (2d Cir. 1976) (defendant convicted of bribing a public official granted relief under 28 U.S.C. § 2255 when, subsequent to his conviction, the Second Circuit narrowed the class of persons who were considered "public officials" and the person whom Loschiavo had bribed no longer came within the definition). As in *Loschiavo*, the decision in *Newman* narrowed the definition of an essential element of an insider trading offense, personal benefit, raising the substantial prospect that the district court's pre-*Newman* benefit instruction resulted in Mr. Gupta's conviction for conduct that is no longer criminal; in other words, caused prejudicial constitutional error. *See Peck v.*

United States, 106 F.3d 450, 457 (2d Cir. 1997) (jury instruction's omission or misdescription of an element of a crime is constitutional error); *United States v. Garrido*, 713 F.3d 985, 994 (9th Cir. 2013) ("Any omission or misstatement of an element of an offense in the jury instructions is constitutional error.") (internal citations omitted); *Miller v. United States*, 735 F.3d 141, 144 n.2 (4th Cir. 2013) ("A conviction for engaging in conduct that the law does not make criminal is a denial of due process for which a COA [Certificate of Appealability] is appropriate.") (quotation marks and alterations omitted). Thus, the same circumstances that establish prejudice excusing Mr. Gupta's procedural default also establish Mr. Gupta's entitlement to section 2255 relief on the merits.

Conclusion

In light of the foregoing, we respectfully submit that the Court should issue a Certificate of Appealability on the following three issues:

> (1) Whether defendant's conviction should be vacated because the jury in his case was erroneously instructed on the benefit element of his alleged insider trading offenses, thereby permitting the jury to convict defendant of conduct that is not a crime.
>
> (2) Whether defendant satisfied the "cause and prejudice" standard so as to excuse his failure to raise this issue on direct appeal.
>
> (3) Whether defendant satisfied the "actual innocence" standard, because it is more likely than not that no reasonable juror, properly instructed on the benefit element of insider trading, would have found petitioner

guilty beyond a reasonable doubt, so as to excuse his failure to raise this issue on direct appeal.

Dated: New York, New York
September 22, 2015

Respectfully submitted,

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