17-593

To Be Argued By:
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IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

RICHARD CUNNIFFE, ROBERT STEWART, AKA BOB,

Defendants,

SEAN STEWART,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR DEFENDANT-APPELLANT
[REDACTED]

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INTRODUCTION

The government misses the forest for the trees and fails to acknowledge, let alone address, the fundamental defect in the trial. The jury was presented with a one-sided story on the key issue: did Robert Stewart misappropriate information his son provided in confidence, or did Sean "tip" Robert knowing he would trade? The government's best evidence, which it played to the hilt throughout trial, was the "silver-platter" statement, but the jury never had a chance to weigh the proof Sean never made that statement. Even without that exculpatory evidence, it took the jury five days and an *Allen* charge to reach a verdict—another point the government cannot parry.

The district court's rulings rendered the trial fundamentally unfair and violated due process. Instead of addressing this basic unfairness, the government pursues a "divide and conquer" strategy, attacking each evidentiary claim individually while ignoring the elephant in the room. This failure to join issue with Sean Stewart's principal argument is fatal to the government's effort to defend the conviction. But in any event, as demonstrated below, the government's individual arguments fail as well. All of them are legally incorrect, belied by the record, or both.

This Court should grant a new trial, and provide Sean Stewart with the "meaningful opportunity" due process demands to present his side of the story.

I. THE GOVERNMENT'S STATEMENT OF "FACTS" RELIES ON MERE SPECULATION FOR KEY POINTS

We respectfully urge the Court to scrutinize the government's assertions about "facts" adduced at trial with great care, as many are unsupported, and some directly contradicted, by the evidence.

In typical fashion, the government spins the facts in the light most favorable to itself and draws every inference in its favor. In doing so, it takes a number of speculative leaps unsupported by the record. This would be inappropriate even on sufficiency review. *See*, *e.g.*, *United States v. Coplan*, 703 F.3d 46, 76 (2d Cir. 2012) (reversing for insufficiency where government's arguments were based on "speculation and surmise") (internal quotation marks omitted). Here, however, it is completely out of bounds.

This appeal raises fundamental questions about whether the jury was given enough information to return a valid verdict. If this Court agrees that the district court committed one or more evidentiary errors, it cannot assess the extent of any prejudice by merely assuming that the jury drew all inferences in the government's favor. Rather, the Court must evaluate the effect of the errors under a far more rigorous standard: has the government proven that any error was harmless beyond a reasonable doubt, *see Chapman v. California*, 386 U.S. 18, 23-24 (1967), or at a minimum (for non-constitutional error), that it was "highly probable" the error was not harmless, *United States v. Kaiser*, 609 F.3d 556, 573 (2d Cir. 2010)?

The government also purports to describe conversations between the Stewarts, even though it presented no evidence about what they discussed. There is insufficient space to catalogue every instance where the government's "facts" are rank speculation or unsupported by its record citations, but two examples are illustrative:

1. The government proclaims that when Sean learned of the FINRA inquiry on May 25, 2011, the Stewarts were "spooked" and then agreed that Robert should stop trading in his own account. (G.Br.5). The government says this is why Robert sold his KCI stock on June 1, 2011, and thereafter traded under Cunniffe's name, using only stock options, which FINRA supposedly did not monitor. (*Id*).

But Sean had experience with FINRA. (Br.56). Had he known Robert was trading, he would have anticipated a possible inquiry. Furthermore, there is no evidence about what father and son discussed on their telephone conversations during this period, and abundant evidence refuting the government's nefarious tale. Sean's wedding was on June 4, 2011 (A-307), so he had plenty of innocent reasons to be communicating frequently with his father at that time, as illustrated by the many emails between them in the May-early June time frame discussing wedding-related subjects. (DX161-211; DX215-24; GX566; GX569; GX3011-13).

The record also is clear that the FINRA inquiry is *not* what prompted Robert to buy options in others' accounts; it is indisputable that he had arranged for Boccia and Cunniffe to buy options for him *before* he learned of the inquiry. (*See* Br.9). Nor did he continue using options to avoid regulatory detection. Rather, the government's cooperator, Cunniffe—not Robert—chose to trade options instead of stock. Cunniffe testified that options provided "tremendous leverage" and the opportunity to make more money with less risk (Tr.641-42); that he developed and implemented the investment strategy, including the decision to purchase options (A-201-08, A-215-18, A-224-25, A-238-43, A-271); and that he believed options trading *was*, in fact, monitored (Tr.980-81).

2. It was undisputed that Robert did not trade illegally between July 2012 and October 2014 even though he still had financial problems. (*See* Br.12). The government explains this by claiming that from July 2012 "into early 2013," Sean was "not privy" to confidential information about acquisitions, and that after "early 2013," Robert refrained from insider trading because the SEC had called him and asked about his trading in May 2013. (G.Br.8-9). Supposedly this explains the "silver platter" statement: the government hypothesizes that it was made after May 2013 and before Robert's 2014 trades. (*Id.* at 9).

The record contradicts this theory, however. First, Robert said the conversation was "years ago." (Br.19). Second, Sean *did* have access to inside

information from July 1, 2012 to "early 2013," as he routinely heard deal updates at the health care group's weekly meetings. (*See* Tr.1241-46; DX610-14). Third, even if Sean had only had information about his own deals, there is no evidence he worked on any public deals in "early 2013," as the government suggests. The first public company deal he worked on after Lincare (which closed July 1, 2012) closed *late* in 2013 (September 25th)—months after the SEC call. (A-682; Tr.285-87).

II. THE TRIAL WAS FUNDAMENTALLY UNFAIR

A. The "Silver-Platter" Statement Should Have Been Excluded

The opening brief demonstrates that Robert's hearsay description of the purported "silver-platter" statement was exculpatory, because even under the government's interpretation, Robert described supposedly *declining* to trade on inside information. (Br.18-28).

In response, the government mischaracterizes the standard of review; fails to grapple with the requirement in *Williamson v. United States*, 512 U.S. 594 (1994), that the statement itself, not the overall narrative, be self-inculpatory; advocates a standard so broad it would swallow Rule 804(b)(3)'s limits; and offers an alternative theory (Rule 801(d)(2)(E)) on which the district court made no findings and that fails anyway.

1. The Government Misstates The Standard Of Review

The government claims that "manifest" or "clear" error is necessary to disturb the district court's decision. (G.Br.17, 20). But it is well-settled that evidentiary rulings are reviewed for abuse of discretion. *See Old Chief v. United States*, 519 U.S. 172, 174 n.1 (1997). Under that standard, a "district court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996). Only the district court's *factual* findings are reviewed for clear error on abuse of discretion review. The government cites *United States v. Gupta*, 747 F.3d 111 (2d Cir. 2014) (G.Br.20), but the Court reviewed a factual finding there. *See id*. at 124.

The argument here is that the lower court committed *legal* error under Rule 804(b)(3). And a finding that a statement was made in furtherance of a conspiracy under Rule 801(d)(2)(E) would normally be reviewed for clear error, but here the district court made no Rule 104(a) findings to review. This Court should not make such findings in the first instance. *See United States v. Mickens*, 977 F.2d 69, 72 (2d Cir. 1992) (appellate court cannot "make *de novo* factual findings"); *see also United States v. White*, 173 F.3d 847, No. 98-1424, 1999 WL 147034, at *3 (2d Cir. 1999) (unpublished) (declining "invitation to affirm on the ground that the district court could have found" a particular fact, "even though the district court explicitly did not make that finding") (emphases omitted).

2. The Statement Does Not Satisfy Rule 804(b)(3)

The government contends that the silver-platter statement was admissible under Rule 804(b)(3) because it was part of a conversation that in its entirety inculpated Robert, was itself self-inculpatory, and was made under circumstances that suggested its trustworthiness. (G.Br.21-26). But this argument cannot be reconciled with *Williamson*, or with the clear indicia that the statement was insufficiently trustworthy.

a. The government maintains that "the entirety" of the recorded conversation was inculpatory. (G.Br.22). But as *Williamson* clearly instructs, it is irrelevant if other parts of the conversation inculpated Robert. The Court must focus on whether the statement in question is inculpatory; under Rule 804(b)(3) "statement" means "a single declaration or remark," not a "report or narrative." 512 U.S. at 599. True, the statement must be considered in context. *See id.* at 603. But Robert's exculpatory description of opting not to engage in insider trading is not transformed into a confession just because he made it after describing other times when he did trade illegally.

The government insists that the silver-platter statement is "an integral part" of the conversation as a whole, and that analyzing it separately is "untenable parsing." (G.Br. 22-24). But this ignores that the statements in *Williamson* all involved the same incident and were as or more intertwined than the statements

here. (*See* Br.22). In fact, the *Williamson* Court rejected the approach the government advocates here, which mirrors Justice Kennedy's preferred mode of analysis. Justice Kennedy opined that statements that are collateral to a self-inculpatory narrative should be admissible. 512 U.S. at 611 (Kennedy, J., concurring in the judgment). But the Court disagreed. *Id*. at 600; *see also United States v. Jackson*, 225 F.3d 170, 179 (2d Cir. 2003) ("In *Williamson's* wake…each particular hearsay statement offered under Rule 804(b)(3) must be separately parsed and must, itself, be self-inculpatory.").

b. Quoting the district court, the government next argues that, even viewed in isolation, the silver-platter statement satisfies Rule 804(b)(3) because it "is probative of Robert's alleged collusion with [Sean] and makes it more likely that Robert's other investments…were the product of insider information." (G.Br.22). But as explained, refusing to trade on inside information does not suggest collusion, and whatever tenuous inferences the silver-platter statement might permit about Robert's trading on other occasions are clearly outweighed by the self-exculpatory nature of Robert's denial. (*See* Br.23-24). Indeed, in a remarkable display of verbal gymnastics, the government describes Robert's statement as "admitting that…he had discussed material, nonpublic information, and [his] trading on that information" (G.Br. 21-22), when Robert actually discussed *not* trading. This is double-speak.

The government misreads *Gupta* in arguing that mere probativeness satisfies Rule 804(b)(3). (*See* Br.24-25). This Court has never suggested that probativeness alone would suffice—and for good reason, since a bar that low would eviscerate the hearsay rule. Rule 804(b)(3) is limited to statements a reasonable person would utter only if true; if it included all probative statements, then virtually anything that could have any bearing, however remote, in a potential case against the declarant would qualify. *See* Black's Law Dictionary (10th ed. 2014) (defining "probative" as "[t]ending to prove or disprove"); *see also* Fed. R. Evid. 401 ("relevant evidence" is that with "any tendency to make a fact [of consequence to the action] more or less probable than it would be without the evidence"). One can imagine any number of off-hand comments and inadvertent admissions a declarant might utter whether or not they were true that could be relevant at some later trial against him. A probativeness standard would let in all of them, along with any other statement with any tendency to expose the declarant to any criminal liability. This is flatly inconsistent with the language of Rule 804(b)(3), the Supreme Court's interpretation of it in *Williamson*, and common sense.

Indeed, if probativeness satisfied Rule 804(b)(3), the result would have been different in *Williamson* and any number of this Court's cases. For instance, in *United States v. Kostopolous*, 119 F. App'x 308, 310 (2d Cir. 2004), the government sought to introduce a hearsay statement from the defendant, who

allegedly had been tipped by his brother about a corporate merger and asked his stockbroker, "in effect, 'What do you think, should we buy it, how could I buy it?'" This statement, expressing an interest in trading on inside information (and corroborated by the tippee's subsequent trading) was probative of the tippee's wrongdoing—certainly more than Robert's purported, unverifiable statement about his *refusal* to trade. Yet this Court concluded the defendant's "musings about whether or not trading was permissible…while perhaps tendentious, do not, without more, qualify as statements against his interest." *Id.* at 311.[1]

c. Rule 804(b)(3) also has an additional requirement that "corroborating circumstances…clearly indicate [the statement's] trustworthiness." Even if the government could somehow get over the "against penal interest" hurdle, this second requirement is not met. (Br.26-28). The government counters that the statement must be trustworthy since Robert was speaking to Cunniffe, citing cases finding corroboration when the declarant is speaking to "an ally," and not to "curry favor" with authorities.[2] (G.Br.24-25). But the particular circumstances here

[1] The government also misplaces its reliance on *United States v. Persico*, 645 F.3d 85 (2d Cir. 2011) (G.Br.23). The *Persico* declarant discussed precautions he took to avoid FBI detection of his wrongdoing, demonstrating consciousness of guilt; by contrast, the statement here involves an express denial of wrongdoing.

[2] The government claims that this Court has found a lack of trustworthiness only where the statements were made after "the crime was exposed," when incentives to shift blame and curry favor with the government are heightened. (G.Br.25 (collecting cases)). But these cases do not involve statements shifting blame to

undermine any inference of trustworthiness that otherwise might be drawn from this fact. As the government maintains but downplays, Robert had lied on other occasions, including to Cunniffe. *See United States v. Doyle*, 130 F.3d 523, 544 (2d Cir. 1997) (requiring strong corroboration of both declarant and statement's trustworthiness). He also repeatedly denied that Sean had known about his trading, both to Cunniffe and the FBI. *See Jackson*, 335 F.3d at 179 (declarant's conflicting assertions undermined corroboration requirement); *United States v. Bahadar*, 954 F.2d 821, 829 (2d Cir. 1992) (same). Moreover, the risk the declarant may be lying, which may theoretically be lower when the declarant is speaking to an ally, is but one of the dangers against which the hearsay rule protects. *See Williamson*, 512 U.S. at 598 (describing various risks hearsay poses to truth-seeking). That Robert was speaking to Cunniffe does not make any less likely that he misunderstood, or misremembered, or was paraphrasing what Sean had purportedly said, even if he was not simply lying. (*See* Br.27).

The government also argues that the "statements at issue" were corroborated by other evidence in the record. (G.Br.26). But almost all of the evidence cited (as the plural "statements" suggests) relates to other portions of the recorded

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others or currying favor; they feature statements that tended to exculpate the defendants. In any event, Robert made the statement after being investigated by the SEC, so this *was* a situation where the "crime" had been "exposed."

conversation, not to the silver-platter statement. The only evidence the government identifies as corroborating the silver-platter statement itself—that "there was indeed a long period…during which Robert failed to exploit any information [Sean] gave him" (*id.*)—is equivocal at best. The government claims this fact corroborates Robert's expressed reluctance to trade after the SEC call. But as explained, the government elsewhere declares that Robert's failure to trade prior to the SEC call was due to Sean's not possessing any inside information, and nothing in the record supports the claim that Sean again became privy to such information just about the time of the call. (*See* I, *supra*). If, contrary to the government's unsupported claim, Sean lacked deal information for a period after the SEC call, then at best for the government, Robert's failure to trade during this time has little corroborative value. At worst, Robert's claim he was not trading because of the SEC was another lie, providing yet another reason that his statement lacked the requisite indicia of trustworthiness and should have been excluded.

3. Rule 801(d)(2)(E) Does Not Support The Ruling

Admissibility under Rule 801(d)(2)(E) requires a showing that (1) there was a conspiracy, (2) its members included the declarant and the party against whom the statement is offered, and (3) the statement was made during the course of and in furtherance of the conspiracy. *United States v. Al-Moayad*, 545 F.3d 139, 173 (2d Cir. 2008). The district court never made any findings under this test (*see*

Br.19 n.4), as the government acknowledges (G.Br.27 (court "did not rely on Rule 801(d)(2)(E)), and this Court should not make its own. *See supra* II.A.1.[3]

The government contends that the Rule's requirements were met because (a) "there was an insider-trading conspiracy between [Robert] and [Sean]," and (b) "the 'silver platter' comment plainly furthered the conspiracy." (G.Br.27). This is wrong on both counts.

a. The government asserts that there was a conspiracy that included Sean because the jury ultimately found him guilty of conspiracy. (G.Br.27). But this is irrelevant to admissibility. The jury easily could have, and likely did, reach this verdict based solely on the silver-platter statement. After all, the jury never heard the independent evidence calling into question its truthfulness, and the government placed extraordinary emphasis on it throughout the trial. That is not a sufficient basis for admissibility. In order for hearsay to be admitted under Rule 801(d)(2)(E), "there must be some independent corroborating evidence [apart from

[3] The government points out that the court called its argument "strong." (G.Br.27). But that argument was based on representations proven false at trial. For instance, the government said Robert introduced Sean as his inside source to Cunniffe (*see* Dkt.101 at 5), but Cunniffe testified that he only met Sean once in passing, when Robert was not present (*see* Br.8 n.2). Also, the government asserted that Robert bought Kendle stock when he and Sean were at a hotel (Dkt.101 at 2-3), but the supposedly illicit meeting was actually a visit to Sean's mother's hospital room (*see* Tr.1120-21; A-323-26), and Robert did not trade until well after Sean left (*see* GX537, GX702, GX807).

the hearsay itself] of the defendant's participation." *United States v. Tellier*, 83 F.3d 578, 580 (2d Cir. 1996). Here there is none.

To be sure, there was ample evidence that Cunniffe and Robert were co-conspirators. But nothing other than the hearsay statement itself suggests that Sean "knowing[ly] and willful[y] join[ed] in that conspiracy." *United States v. Svoboda*, 347 F.3d 471, 476 (2d Cir. 2003). All the other evidence is as consistent with Robert's having betrayed Sean's trust by misappropriating the information as it is with Sean's having knowingly and willfully provided the information to Robert to trade on. That is not enough under *Tellier*.

b. To further the conspiracy, a statement must "prompt the listener…to respond in a way that promotes or facilitates the carrying out of a criminal activity." *United States v. Mandell*, 752 F.3d 544, 552 (2d Cir. 2014) (internal quotation marks omitted). The government says the silver-platter statement met this standard because Robert offered assurance to Cunniffe about "his own cautious approach and reliability as a co-conspirator." (G.Br.28). This is creative writing at best.

In reality, the conversation centered on how nervous Robert was because of the various law-enforcement inquiries he had received. Rather than promoting the goals of the conspiracy, this would likely chill conspirators' willingness to trade on inside information. As Cunniffe stated in response: "[The inquiries] [w]ould scare

the shit out of me [indiscernible] that's for sure." (Dkt.101, Ex.C at 10). In fact, the silver-platter portion describes an incident where Robert's fears supposedly *did* deter him from trading, thereby directly frustrating the purpose of the insider-trading conspiracy. *See United States v. Piper*, 298 F.3d 47, 55 (1st Cir. 2002) (statements "antithetic to the central object of the charged conspiracy" inadmissible); *United States v. Nazemian*, 948 F.2d 522, 529 (9th Cir. 1991) (statements inadmissible where "ultimate effect…was to thwart [] part of the conspiracy); *United States v. Saneaux*, 365 F. Supp. 2d 493, 501 (S.D.N.Y. 2005) ("Statements which tend to *frustrate or hinder* the goals of the conspiracy…cannot reasonably be interpreted to further that conspiracy.").

At best for the government, Robert's offhand account of an occasion "years ago" when he resisted Sean's urging to insider trade was a "narrative description by one co-conspirator of the acts of another," *Gupta*, 747 F.3d at 123 (internal quotation marks omitted), that was "entirely retrospective" or mere "idle chatter," *United States v. Thai*, 29 F.3d 785, 813 (2d Cir. 1994) (internal quotation marks omitted). That does not satisfy Rule 801(d)(2)(E).

B. The District Court Erroneously Barred Impeachment Of The Silver-Platter Statement

Once the silver-platter statement was admitted, the defense should have been permitted to impeach it with Robert's post-arrest statements, since they plainly "would be admissible for those purposes if [Robert] had testified as a witness."

Fed. R. Evid. 806. To avoid this, the government relies on an unreasonable interpretation of the statement itself, and the district court's overly cramped and legally flawed definition of "inconsistency."

1. The government argues that the silver-platter and post-arrest statements are not directly inconsistent because Robert purportedly never denied that the conversation happened, but rather "effectively confirmed the exchange," "sought to add color to it," and offered "spin and excuses" for the statements. (G.Br.29, 31, 34). This doesn't fly. When the FBI asked Robert why Sean had made the silver-platter statement, Robert twice stated that Sean actually had said something entirely different. (*See* Br.31-32). Put another way, Robert told Cunniffe that "Sean said X" and the FBI that "Sean said Y." That *is* directly inconsistent. The government's position appears to be that only "Sean did not say X" would satisfy Rule 806, but if this were the law, hardly any statement would ever be viewed as "inconsistent," and impeachment with prior inconsistent statements would rarely occur—either on cross-examination of live witnesses or under Rule 806.

2. In any event, Rule 806 extends well beyond "direct" inconsistency, as this Court's cases reflect. *See United States v. Trzaska*, 111 F.3d 1019, 1024 (2d Cir. 1997) (statements need not be "diametrically opposed") (internal quotation marks omitted). Contrary to the government's argument, the Rule allows

impeachment with statements that offer explanation or spin or excuses or "color," as well as statements that contradict the implication of the statement being impeached, how that statement can be interpreted, or the reasonable inferences to be drawn from it, so long as there is "any variance...that has a *reasonable bearing on credibility*" or the jury could "reasonably find" that a witness who believed one statement would not likely make the other. *See id.* at 1025 (internal quotation marks omitted); *see also United States v. Ebbers*, 458 F.3d 110, 123 (2d Cir. 2006) (quoting *Trzaska*).

In *Trzaska*, this Court quoted with approval two leading treatises, Wright & Gold's Federal Practice & Procedure and McCormick on Evidence, in support of its definition of inconsistency. *See* 111 F.3d at 1025. Both plainly reject the district court's view. The current edition of Federal Practice & Procedure recognizes that "a prior statement of a witness may be considered inconsistent...*even where the witness offers an explanation*, rather than an outright denial, that he made that statement." Victor J. Gold, 28 Fed. Practice & Procedure § 6203 (2d ed. Supp. 2017) (emphasis added). McCormick states that impeachment is allowed "if at least *one inference that may be drawn* from the prior statement[] is that it is inconsistent." 1 McCormick on Evidence § 34 n.18 (7th ed. Supp. 2016) (emphasis added; internal quotation marks omitted). A third leading treatise, Weinstein's Federal Evidence, agrees: A statement is inconsistent "if

under any rational theory it might lead to *any relevant conclusion different from any other relevant conclusion* resulting from anything the witness said," or if "*one reasonable inference* (out of two or more possible inferences) would be that of inconsistency." § 613.04[1] (2d ed. Supp. 2017) (emphases added; internal quotation marks omitted).[4]

Trzaska also rests on this broader view. The issue was whether Trzaska's statement he "didn't want nothing to do with them anymore" could be impeached with his statement that he was like "a drug addict with this." 111 F.3d at 1024. This Court did not merely conclude that these vague statements were not directly inconsistent (let alone that Trzaska never "specifically denied" the former), but instead considered how both reasonably could be interpreted. Noting it was "unclear exactly what each of Trzaska's two statements meant," the Court addressed both of "the two apparent possibilities" before reaching its conclusion. *Id.* at 1025.[5]

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[4] These passages address impeachment of testifying witnesses with prior inconsistent statements. Given that Rule 806 allows impeachment "by any evidence that would be admissible for [impeachment] purposes if the declarant had testified as a witness," the analyses control here too.

[5] The two possibilities were that (i) the first statement referred to certain specific guns, while the second referred to guns in general (as the district court had found); or (ii) the first statement referred to one set of specific guns, while the second referred to another (as the government urged on appeal). *Id.* at 1025. Significantly, neither the Court, the district court, nor the government in that case

Ebbers adopts the same test for inconsistency. *See* 458 F.3d at 123. The government ignores that but stresses the Court's observation that one statement the appellant sought to admit did not "expressly contradict" the statement to be impeached. (G.Br.34-35). But *Ebbers* nowhere suggests that "express contradiction" is *necessary* to satisfy Rule 806. There is no indication that the *Ebbers* Court intended to depart from *Trzaska*'s broad definition of inconsistency, the leading treatises on evidence on which *Trzaska* relied, or the many cases the opening brief cites. (*See* Br.33-35).[6]

The government struggles to distinguish these cases, but its tortured explanations are easily dismissed:

- *Rosario* and *Vegas*: The government notes that neither opinion directly addresses inconsistency. (*See* G.Br.36). True, but both opinions, which uphold admission of statements that are not directly inconsistent, necessarily rest on finding Rule 806 satisfied. *See United States v. Rosario*, 111 F.3d 293, 295 (2d Cir. 1997); *United States v. Vegas*, 27 F.3d 773, 782 (2d Cir. 1994).

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interpreted the first statement as a reference to guns in general, but that is how the government here erroneously argues it must be interpreted (G.Br.35).

[6] The government also cites two out-of-circuit cases. *United States v. Hunt*, 521 F.3d 636 (6th Cir. 2008), is inapposite because it involves statements that are not at all inconsistent. *See id.* at 644 (statement that defendant in health-care fraud "sometimes sends a physician's assistant under his license" was not inconsistent with statement that defendant was unaware that particular individual was held out as physician's assistant). *United States v. Rodriguez*, 259 F. App'x 270, 274-75 (11th Cir. 2007) is unpublished and distinguishable because the statements also violated Rule 403. 259 F. App'x at 275. Regardless, its suggested interpretation of inconsistency conflicts with this Court's Rule 806 standard.

- *Myerson*: The government claims this case supports the district court's analysis. (*See* G.Br.36-37). But it misconstrues an "initial point" of clarification (namely, whether the error in excluding the statement impacted only one count of conviction or the entire trial, *see United States v. Myerson*, 18 F.3d 153, 161 (2d Cir. 1994)), as somehow signaling adoption of the district court's view. Also, the government maintains that Rule 806 was satisfied because the declarant's statement, which it paraphrases as "Myerson had admitted he was working to get the…bills to $300,000," contradicted his "earlier denial that Myerson had been involved in billing at all." (G.Br.37). But that is exactly our point: to get to inconsistency, interpretation is required, as the statements are *not* diametrically opposed.

- *Strother* and *Carr*: The government attempts to limit these cases to the "special circumstance" where an omission is used to impeach (G.Br.37), but nothing in either opinion (much less the Rule itself) supports any such limitation.

- *Perrone* and *Richardson*: The government concedes these cases adopt the broader view of inconsistency (*see* G.Br.37), but claims this theory of "impeachment by implication" is inapplicable here (*id.* at 37-38). The government neglects to explain how this concession can be squared with its position that Rule 806 requires direct inconsistency. And its argument that Robert did not "impliedly deny" that the silver-platter exchange occurred entirely misconstrues the broader view's applicability here. The plain implication of the silver-platter statement is that Sean intended Robert to trade. Accordingly, Rule 806 permits impeachment with Robert's repeated and strenuous denials that Sean had this intent.

- *Rosales-Aguilar, Mack,* and *Wali*. The government argues that these cases involve "direct, explicit contradiction." (G.Br.38). But stating "I don't remember X" is not directly inconsistent with remembering X at an earlier point in time. *Cf. United States v. Rosales-Aguilar*, 818 F.3d 965, 968-69 (9th Cir. 2016). The only way the defendant's "know[ing] exactly what we're doing" and being led to believe he was transporting "money, not drugs" are inconsistent is if one interprets "exactly what we're doing" as involving drugs. *Cf. United States v. Mack*, 572 F. App'x 910, 915, 935

(11th Cir. 2014). And "Hadji" supplying drugs is inconsistent with "Wali" not doing so only under the theory that "Hadji" and "Wali" are the same person. *Cf. United States v. Wali*, 860 F.2d 588, 589-91 (3d Cir. 1988); *United States v. Grant*, 256 F.3d 1146, 1152-55 (11th Cir. 2001) (presenting "remarkably similar Rule 806 issue"). The government's contrary position further undermines its untenable argument that Robert's statements were not directly inconsistent.

This is simply not a close question. The government might wish that Rule 801 or 804 allowed it to present only its theory to the jury, but once it chose to make a hearsay statement of dubious reliability the heart of its case, the defense had a right to challenge that statement's truthfulness with the post-arrest statements—just as if Robert had testified.

C. The District Court Did Not Adequately Probe Robert's Purported Reasons For Invoking And Should Have Compelled His Testimony

As the opening brief explains, the district court's cursory inquiry into Robert's purported basis for invoking his privilege was insufficient under controlling precedent, and there was no valid basis for his refusal to testify. (Br.35-47). None of the government's attempts to prop up the district court's ruling passes muster.

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[redacted]

D. The District Court Erroneously Refused To Compel Immunity

The government does not dispute that a selective immunity grant may be discriminatory. (G.SBr.15-16). However, it claims to have declined to immunize Robert (after immunizing Boccia) based on legitimate law enforcement concerns, namely its view that Robert had engaged in uncharged insider trading and would testify falsely at trial. (*Id.* at 16). But the government had long known about this trading and elected not to charge it. Its decision was "not binding for all time" (*id.*), but plainly if it had ever seriously contemplated pursuing those charges, it would have done so already. The only conceivable reason to revisit the declination was to deter Robert from testifying for the defense. The same is true for the

allegedly false statements to law enforcement. Indeed, the government still has not pursued any such charges, nor charges for Robert's subsequent statements in the post-trial affidavit, made under oath, that Sean had not known about his trading. The government conveniently ignores this point, discussed in the opening brief (Br.53 n.8), because it has no response.

At bottom, there is nothing more here than a desire to shield the jury from exculpatory testimony. As this Court has recognized, however, it violates due process for the government "to elicit testimony from prosecution witnesses who invoke their right not to testify, while declining to use that power to elicit [testimony] from recalcitrant defense witnesses." *United States v. Dolah*, 245 F.3d 98, 106 (2d Cir. 2001).

The government insists there was nothing wrong with its communications with Robert's counsel, citing two identically-worded, terse, pro forma affidavits from the trial prosecutors. (G.SBr.16-17). But multiple Courts of Appeals have held that such supposedly friendly "reminders" about perjury are impermissible, and that such improper thinly-veiled threats may require reversal. (*See* Br.51-52). The government blithely ignores this caselaw.

Finally, the government's contention that Robert's testimony would not have "altered significantly the mix of information before the jury" (G.SBr.17-18), borders on laughable. The government's sole claim is that the testimony would

have been cumulative of a recorded conversation introduced at trial in which Robert once denied to Cunniffe that Sean knew about their trading. (*Id.*) [redacted]

Even regarding what Sean knew, a single recorded statement outside the jury's presence is no substitute for live exculpatory testimony given under oath and subject to cross-examination. Just hearing Robert repeat his statement under oath and being able to evaluate his credibility for themselves would have materially altered the information the jury had to consider.

E. Individually And Cumulatively, These Errors Were Not Harmless

Where "the cumulative effect of the potentially damaging circumstances" at trial "violate[] the due process guarantee of fundamental fairness," vacatur is required. *Taylor v. Kentucky*, 436 U.S. 478, 487 n.15 (1978); *see also Al-Moayad*, 545 F.3d at 178. The jury heard a profoundly skewed story because of the aggregated impact of the trial court's erroneous rulings. This was plainly critical to the outcome. Even though the government made the unrebutted silver-platter statement the centerpiece of its case, it took the jury five days of deliberation and an *Allen* charge to convict. Under these circumstances, the errors could not have been harmless beyond a reasonable doubt.

The government nowhere tries to address this problem. Nor does it even bother to argue that the admission of the silver-platter statement by itself was

harmless, likely because this Court routinely grants new trials when evidence central to the government's case has been erroneously admitted. (*See* Br.53). As to the Rule 806 error, the government makes only a perfunctory effort, relying on Robert's recorded denial to Cunniffe that Sean knew about their trading. (G.Br.39). This single statement is no substitute for the jury hearing Robert's testimony or Robert's repeated and dogged denials, in the face of sustained and probing FBI questioning, that Sean ever uttered the silver platter statement or knew about his trading. There simply can be no assurance that the exclusion of Robert's statements to the FBI and his testimony did not affect the verdict.

III. AT A MINIMUM, RESENTENCING IS REQUIRED

The government makes no serious attempt to argue that the district court made the required *Studley* findings (*see* Br.55-56) that Cunniffe's trading fell within the scope of criminal activity to which Sean supposedly had agreed. Instead, the government tries to bolster the court's finding that Sean could have reasonably foreseen Cunniffe's profits. (G.Br.42-44). Its argument, like the lower court's, is based on the claim that after learning of FINRA's monitoring, the Stewarts decided Robert should not trade in his account, which made it reasonably foreseeable both that Robert would use someone else's account and that this person would trade. (G.Br.43-44). But, as explained *supra*, Sean was intimately familiar with FINRA inquiries; he would have known Robert would be on the FINRA list if

he had been in on the scheme. (*See also* Br.56). Moreover, the FINRA inquiry did not prompt Robert to trade in others' accounts; he was already doing so. And Cunniffe flatly lied to Robert about his own trading activity, so even Robert (let alone Sean) could not have foreseen all of Cunniffe's gains. (*Id.* at 56-57).

United States v. Riley, 638 F. App'x 56 (2d Cir. 2016) (G.Br.43), is inapposite. The tipper there knew that the tippee worked at a hedge fund, so it was plainly foreseeable that the tippee would trade on the information for the fund. *Id.* at 65. Here, there is no evidence that the FINRA inquiry caused Robert to trade in someone else's account, and thus no reason to conclude Sean would have known Robert had shared information with anyone.

The district court's failure to make any finding that Sean ever agreed to Robert tipping a third person, and its erroneous reasonable-foreseeability finding, resulted in a vastly overstated gain calculation. This requires remand for resentencing in the event the conviction is affirmed.

CONCLUSION

The judgment of conviction should be vacated and the case remanded for a new trial. Alternatively, the case should be remanded for resentencing.

Dated: New York, New York
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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

The undersigned counsel of record for Defendant-Appellant Sean Stewart certifies pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) that the foregoing brief contains 6,935 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), according to the Word Count feature of Microsoft Word 2011; and that this brief has been prepared in 14-point Times New Roman.

Dated: September 28, 2017

/s/ Alexandra A.E. Shapiro

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