No. 08-10047

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES,
Plaintiff-Appellee,
v.
GREGORY L. REYES
Defendant-Appellant.

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF DEFENDANT-APPELLANT GREGORY L. REYES AND SUPPORTING REVERSAL

On Appeal from the United States District Court
for the Northern District of California
(Hon. Charles R. Breyer, Presiding)
No. CV-06-0556-CRB

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Pursuant to Fed. R. App. P. 26.1 and Fed. R. App. P. 29(c), *Amicus Curiae* National Association of Criminal Defense Lawyers states that it is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent corporation, and no publicly-held corporation owns 10 percent or more of its stock.

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INTEREST OF THE *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") respectfully moves for leave to file the accompanying brief of *amicus curiae*. The NACDL is a non-profit organization with more than 12,000 direct members, including private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors, and judges committed to preserving fairness within America's criminal justice system. Founded in 1958 to ensure justice and due process for persons accused of crimes, the NACDL is the only professional association that represents public defenders and private criminal defense lawyers at the national level. NACDL members serve in positions bringing them into daily contact with the criminal justice system in the state and federal courts.

The NACDL therefore has a broad view of our adversarial system of justice. The excessive expansion of criminal securities fraud liability to encompass matters of business misjudgment that are at most distantly related to investment market effects threatens fundamental notions of fairness, especially when compounded by the type of prosecutorial misconduct challenged by the appellant here. Moreover, because so few securities fraud cases are criminally prosecuted, this case will stand as an unusually influential precedent, making it particularly important that the Court give

full consideration to the policy repercussions and broader jurisprudential impact of the issues presented here.

All parties have consented to the filing of this brief. See Fed. R. App. P. 29(a).

INTRODUCTION

This case represents an unwarranted expansion of criminal securities fraud liability, an expansion achieved only by fundamentally distorting the trial process. Gregory Reyes was convicted of securities fraud for signing options grants to other persons—not himself—that were improperly dated. Reyes is the first person to be prosecuted for backdating employee stock options. It is remarkable that the government chose to bring criminal charges against the rare defendant who did not cut himself in on the proceeds of his own alleged crime.

The business conduct here may have been misguided. It may have led to accounting statements that were inaccurate under principles that were comprehensible to some—but clearly not all—public company financial officers. But the defendant here was not a financial officer, but a CEO with a sales background. We have not independently reviewed the record, and assume for present purposes that Reyes' account of the evidence against him is accurate and substantially complete. With that caveat, however, the

evidence that he possessed criminal intent to manipulate securities markets or deceive investors appears to be both slight and tainted. And there appears to be still less support for a finding, beyond a reasonable doubt, that his actions in approving options grants without ensuring expense accounting were material to Brocade investors.

Under the standards required to prove a criminal case, the proven conduct (as we understand the evidence and the district court's orders) cannot support a conviction. That failure is particularly acute in light of the prosecutorial strategy and trial error that resulted in a criminal case being premised on a theory the government apparently knew to be false, yet that was insulated from effective defense. The judgment should be reversed with instructions to enter judgment for Reyes, or, in the alternative, to conduct a new and fair trial.

This criminal prosecution founders—or as a matter of fundamental fairness should founder—for two reasons.

First, the omission of noncash option expenses from financial reports was not proved to be material to Brocade investors. In this Court, even civil liability for securities fraud can attach only upon proof of "a substantial likelihood that a reasonable investor would have acted differently if the misrepresentation had not been made or the truth had been disclosed." *Livid*

Holdings Ltd. v. Salomon Smith Barney, Inc., 416 F.3d 940, 946 (9th Cir. 2005). A criminal conviction requires at least an equal showing and one that supports the required conclusion beyond a reasonable doubt. It is particularly important to police the boundaries of materiality where, for practical purposes, juries infer intent to defraud in large part from the materiality of the misrepresentation.

Second, the evidence of criminal intent was thin to the vanishing point when viewed through the proper lens—intent to manipulate markets or deceive investors, bolstered by knowledge that the conduct was wrong. The slightness of the intent evidence necessarily enhanced the prejudice flowing from the government's pursuit of a theory it apparently knew was false, and its argument that a vigorous and analytical defense against fraud allegations amounted to a continuing "lie" by Reyes and his lawyer. Under the government's theory, the government needed to prove beyond a reasonable doubt that Reyes falsified documents—*i.e.*, signed backdated minutes for options grants—with an intent to mislead his finance department into omitting noncash option expenses from financial reports to investors, and knowing that material misguidance of the investing public would result.

But it appears that the government presented no evidence that Reyes thought about Brocade's stock price or investors at all when he signed the

grant minutes placed in front of him, leaving little beyond speculation to support a finding of specific criminal intent to "influence the investing public." *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 862 (2d Cir. 1968) (en banc); *United States v. Stewart*, 305 F. Supp. 2d 368, 370 (S.D.N.Y. 2004). "[W]hen there is an innocent explanation for a defendant's conduct as well as one that suggests that the defendant was engaged in wrongdoing, the Government must produce evidence that would allow a rational jury to conclude beyond a reasonable doubt that the latter explanation is the correct one." *United States v. Delgado*, 357 F.3d 1061, 1068 (9th Cir. 2004); *see also United States v. Vasquez-Chan*, 978 F.2d 546, 549 (9th Cir. 1992); *United States v. Bishop*, 959 F.2d 820, 831 (9th Cir. 1992).

Because a jury could find materiality or criminally fraudulent intent only with the assistance of strained inferences, the asserted prosecutorial misconduct and other trial error recounted in Reyes' brief was prejudicial. The government rested on the notion that Brocade's finance department was completely unaware of the backdated status of the options grants. But Reyes convincingly demonstrates that the government knew from its own investigation that senior finance department officials did know about backdating, and surely knew much more about its potential accounting significance (and by extension, the potential effect on investors) than Reyes

did. See Reyes Br. 15-18. Indeed, the Securities and Exchange Commission brought charges against two senior financial officers for exactly that reason. See Reyes Br. 19.

Rather than expose the jury to these knowledgeable individuals, the government apparently selected as a witness a low-level finance employee who could more credibly claim to have been unaware that the grants she entered into the computer system were backdated. See Reyes Br. 20-29. Yet when even that administrative employee recanted her testimony, the government foreclosed direct investigation into the matter and convinced the district court to let Reyes' conviction stand. See Reyes Br. 32-34. The government's improper reliance on this evidence it apparently knew to be false was acutely prejudicial.

The government, of course, may dispute the extent to which it knowingly argued a false theory; again, we assume for purposes of our legal arguments that Reyes' presentation of the facts is correct. But the NACDL is particularly concerned with another type of apparent prosecutorial misconduct. To tip the balance with innuendo rather than actual evidence of intent, the government engaged in an *ad hominem* attack on defense trial counsel that exceeded the bounds of propriety, penalizing Reyes for mounting a vigorous and sophisticated defense to the unprecedented

criminal charges against him. In our Republic, the government's duty as litigant is to do justice, not merely to win. The government fell short here.

ARGUMENT

In considering Reyes' appeal, this Court should not lose sight of the many factors that make this case extraordinary. This is a (1) *criminal* securities fraud prosecution against (2) a young CEO with a background in sales rather than finance, for an asserted violation that (3) rests on the effects of an accounting rule that was poorly understood even by accounting specialists, (4) was mirrored in the conduct of dozens of other public and private companies, and (5) that did not benefit the criminal defendant himself.

The Court should bear in mind that the government does not appear to have contended that any fraud on investors could result solely from Reyes' approving backdated, in-the-money options grants. It is only the failure to account for those grants and resulting noncash "expenses" that could even arguably have affected investor conduct. Reyes' indictment provided the first clear signal to company managers that criminal liability might result from options backdating. Yet the government brushed past CEOs that lined their own pockets with backdated options, and prosecuted Reyes instead. The government doubtless could choose whom to prosecute, but it could not

deviate from the responsibilities "of a sovereignty [with an] obligation to govern impartially" and "whose interest * * * in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935).

"While simultaneous pending criminal investigations and lawsuits have always been a theoretical concern in securities litigation, criminal prosecutions have been rare in recent times." Bruce Vanyo, Stuart Kagen & John Claassen, *The Sarbanes-Oxley Act of 2002: A Securities Litigation Perspective*, Practicing Law Institute, 1332 PLI/Corp 89, 95 (2002); ENCYCLOPEDIA OF WHITE-COLLAR AND CORPORATE CRIME 725 (Lawrence M. Salinger ed., vol. 2, 2004). Because criminal securities cases are so rare, each decision carries greater precedential weight and warrants particular attention by this Court on review.

The setting here is problematic because options accounting has a murky history. Until recently, many (if not most) executives believed "that option expensing involves a meaningless, non-cash expense of no materiality to a company's share price, whether the option is 'in the money' or 'at the money' at the nanosecond it is granted." Holman W. Jenkins, Jr., *A Backdating Sentencing*, Wall St. J., December 19, 2007, at A20.

Particularly when criminal liability is at issue, the rule of law requires governance by clear rules (Richard Posner, THE PROBLEMS OF JURISPRUDENCE 57 & n.23 (1990)), laid down in advance so as to provide "fair warning" (*Arthur Andersen LLP v. United States*, 544 U.S. 696, 703 (2005) (quoting *McBoyle v. United States,* 283 U.S. 25, 27 (1931) (Holmes, J.)). Yet accounting rules governing option grants—the ultimate source of the "duty" underlying the criminal charge here—historically have been confusing and contradictory, and thus a poor basis for the imposition of criminal liability, especially against non-accountants. From 1972 to 1995, Accounting Principles Board Opinion No. 25 ("APB 25") governed accounting for employee stock options. *See generally* Nicholas G. Apostolou & D. Larry Crumbley, *Accounting for Stock Options*, CPA J., Aug. 1, 2005, at 30. Under APB 25, accountants calculated compensation expenses using the "intrinsic value method." Under this method, when the stock option is either "at the money" or "out of the money," no expense needs to be recognized.

By contrast, under the Financial Accounting Standards Board (FASB) Standard No. 123 ("FASB 123"), accountants are required to estimate the "fair value" of all outstanding stock options, including "out of the money" options. Under FASB 123, compensation expense related to employee stock

options can be calculated using nonlinear partial differential equations, including the Black-Scholes and binomial option-pricing models. FASB 123 did not supersede APB 25; rather, company managers were left to choose what reporting rule (and hence which valuation method) to follow.

Confusion about the rules and methods of valuation persisted as different company managers adopted different practices for reporting option expenses. When FASB finally gave guidance in its Interpretation No. 44 in 2000, it acknowledged that "questions have been raised about [APB 25's] application[,] and diversity in practice has developed." FASB Interpretation No. 44, at 4. FASB further acknowledged that "questions remain about the application of [APB 25] in a number of different circumstances." *Id.*

The uncertainty about the relevant accounting rules has been reflected in the recognition by dozens of public companies that they had improperly accounted for backdated options grants. *E.g.*, Pamela MacLean, *Backdating Probes Lead to Changes*, Nat'l L.J., June 9, 2008, at S1. Criminal liability should be extended to cover this category of conduct only with the utmost care to avoid criminalizing business conduct undertaken in good faith and without any view towards its effect on securities transactions. Such care accords with the Supreme Court's "traditional[] * * * restraint in assessing the reach of a federal criminal statute," *Arthur Andersen*, 544 U.S. at 703,

and is particularly appropriate when the effect of the challenged conduct on securities markets is unproven and attenuated at best. That is the case here, where the district court at sentencing found no proof that Brocade's options accounting injured Brocade or its investors. *See* ER 416-424.

I. A Substantive And Principled Standard Of Materiality Is Necessary In Criminal Cases And Was Not Satisfied Here.

The government might minimize Reyes' failure to participate in the options grants by arguing that he stood to benefit from any increase in Brocade's stock price. But if that indirect benefit is the only explanation of why Reyes would have criminally intended to do what he did, there should be some sign that failing to expense some options grants affected (or was likely to affect) Brocade's stock price. From all indications, however, the stock price was actually unaffected and even the most sophisticated investors in the company filtered out noncash expenses in their financial analysis of Brocade and instead focused on the company's cash flow. See Reyes Br. 69-70.

Under the governing standards, that type of evidence cannot support a reasoned conclusion that Reyes' conduct was material to investors beyond a reasonable doubt. Materiality is particularly important here, as the asserted *effect* on investors provided a principal, if not the only, connection between Reyes' conduct and any intentional manipulation of securities markets.

Because the *actus reus* of a securities fraud crime is a *material* misrepresentation or omission, each challenged "misrepresentation must be material to form the basis of a conviction for * * * securities fraud." *United States v. Tarallo*, 380 F.3d 1174, 1182 (9th Cir. 2004). "It is not enough that a statement is false or incomplete, if the misrepresented fact is otherwise insignificant." *Basic Inc. v. Levinson*, 485 U.S. 224, 238 (1988); *see also Hockey v. Medhekar*, 30 F. Supp. 2d 1209, 1224 (N.D. Cal. 1998) ("even a deliberate violation of GAAP, without more, does not amount to fraud"). Rather, "[t]he 1934 Act was designed to protect investors against manipulation of stock prices." *Basic Inc.*, 485 U.S. at 230. Immaterial misrepresentations and errors do not affect stock prices.

To be consistent with due process, a criminal conviction must be supported by "proof beyond a reasonable doubt of every fact necessary to constitute the crime." *In Re Winship*, 397 U.S. 358, 364 (1970). "Every fact" of course means every *element* of the crime. Thus, this Court recently observed, a conviction "cannot constitutionally stand if the evidence was insufficient 'to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.'" *Smith v. Patrick*, 508 F.3d 1256, 1259 (9th Cir. 2007) (quoting *Jackson v. Virginia*, 443 U.S. 307, 316 (1979)). To be sufficient, the evidence of materiality must support a

reasonable conclusion that the alleged misrepresentation was material beyond a reasonable doubt. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 253 (1986) (adopting analysis in *United States v. Taylor*, 464 F.2d 240, 242 (2d Cir. 1972) (Friendly, J.)). "[I]f there is no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt" (*id.* (quoting *Curley v. United States,* 160 F.2d 229, 232-233 (D.C. Cir. 1947)), then a conviction cannot stand.

A. Careful Adherence To The Standard Of Materiality Articulated In *Livid Holdings* Is Necessary To Reduce The Risk Of Criminalizing A Broad Range Of Business Activity Under The Securities Laws.

The materiality standard appears to be loosening in practice, becoming "more inclusive" than an appropriate focus on investor conduct would support. Richard C. Sauer, *The Erosion of the Materiality Standard in the Enforcement of the Federal Securities Laws*, 62 Bus. Law. 317, 355 (2006-2007). Rather than adhere to an objective, measurable standard of materiality, many prosecutors (and some courts and juries) appear to "have been influenced by the public view that almost all corporate conduct and motivations of corporate officials are suspect." Practicing Law Institute, *Report on the Current Enforcement Program of the Securities and Exchange Commission*, U.S. Chamber of Commerce, March 2006, at 821. For prosecutors, "the temptation has been great to move to what one

commentator has called a 'zero-tolerance' policy and stricter standards of liability." *Id.* at 821-22.

The judicial standards have not changed, however (Sauer, *supra*, at 355), and should be enforced strictly in a criminal case. The materiality standard must give "fair warning" (*Arthur Andersen*, 544 U.S. at 703) of what conduct may amount to a criminal *securities* violation. Yet, as an SEC Commissioner has recognized, "[o]ne of the most glaring examples of lack of predictability [in securities law] is determining what constitutes materiality." *See* Paul S. Atkins, Speech by SEC Commissioner: Remarks to the 'SEC Speaks in 2008' Program of the Practicing Law Institute, http://www.sec.gov/new/speech/2008/spch020808psa.htm (Feb. 8, 2008).

This Court has held that "a misrepresentation or omission is material" only "if there is a substantial likelihood that a reasonable investor would have acted differently if the misrepresentation had not been made or the truth had been disclosed." *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005) (citing *Basic Inc.*, 485 U.S. at 231-32).[1] That standard focuses on information likely to affect actual investor

[1] This Court has applied the same standard for materiality in criminal as in civil cases. *See, e.g., United States v. Berger*, 473 F.3d 1080, 1100-1102 (9th Cir. 2007); *Tarallo*, 380 F.3d 1174. As noted above, however, a higher quantum of proof—"more facts in evidence"—are needed to sustain a criminal conviction. *Anderson*, 477 U.S. at 253 (quoting *Taylor*, 464 F.2d at

conduct, not merely the limitless category of data that an investor might consider in assessing a company. The Court certainly should not retreat from the *Livid Holdings* standard in the criminal context, where liberty as well as property are at stake. *See United States v. Schlisser*, 168 Fed. Appx. 483, 486 (2d Cir. 2006) (noting that "in the criminal context * * * we typically interpret liability more narrowly"). Rather, if anything the "margin of error" in acceptable proof should be "reduced" from that permitted in the civil context. *Speiser v. Randall*, 357 U.S. 513, 525-526 (1958).

B. Brocade's Accounting Omissions Were Not Proved To Be Material Beyond A Reasonable Doubt.

In this case, however, there appears to be no evidence that would support a conclusion, beyond a reasonable doubt, that there was a "substantial likelihood that a reasonable investor would have acted differently" if he had known of the noncash expenses associated with options backdating. *Livid Holdings*, 416 F.3d at 946. If this Court accepts Reyes' summary of the evidence, the only evidence about what factors would motivate *Brocade* investors to "act[] differently" showed that those

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242 (internal quotation marks omitted)); *see also* Daniel P. Collins, *Summary Judgment and Circumstantial Evidence*, 40 Stanford L. R. 491, 514 (1987-88) ("[T]he critical point of relative plausibility varies as a function of the standard of proof. That is, if the plaintiff's burden of proof is increased, then the inferences she wishes to draw from indirect evidence must be proportionately more plausible.") (discussing *Anderson*).

investors were not concerned with noncash expenses like options grants, but rather focused on cash flow. See Reyes Br. 69-70. The government's own witness testified that analysts and investors routinely factor out noncash accounting expenses such as stock options compensation, focusing on cash flows rather than noncash events to get the "real picture of the company." ER1646-47; *see* ER1650, ER1655-57, ER1666-71. *See also* James S. Granelli, *Chip Maker to Restate Earnings*, L.A. Times (July 25, 2006).

To exclude a reasonable doubt on the issue would have required at least one witness who actually invested in Brocade and likely would have altered her stock acquisition or sales behavior if Brocade had properly expensed the options grants. Indeed, Brocade securities were not lightly traded, so the failure to produce even one such person should conclusively *establish* a reasonable doubt that this item in fact was material to investors.

Moreover, the market confirmed the immateriality of the information about Brocade's option backdating. Although Brocade's stock price briefly declined by about five percent after the company announced its restatement of options expenses, the price recovered in full within two days. See Reyes Br. 72-74. This price stability indicates immateriality as a matter of law

even under a more forgiving civil standard of proof.[2] The real-life experience with the immaterial effects of the disclosures excludes a finding that Brocade's errors in options expensing were material beyond a reasonable doubt—even accepting the doubtful proposition that every dollar of erroneous accounting treatment could be attributed to conduct by Reyes that the jury found was criminal.

II. The Slight Proof Of Criminal Intent Magnifies The Effect Of The Trial Errors And Any Prosecutorial Misconduct.

The asserted prosecutorial misconduct and trial errors in all likelihood influenced the jury's assessment of Reyes' intent. We again assume the accuracy of Reyes' contentions about the state of the record, and examine the relevant legal standards for intent in the securities fraud crimes in order to guide this Court's analysis of the prejudice resulting from the challenged misconduct and errors. In addition, to the extent a retrial may be ordered, the Court should articulate the proper standards to guide the trial court on remand.

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[2] *See Leventhal v. Tow*, 48 F. Supp. 2d 104, 116 (D. Conn. 1999) (finding no materiality despite temporary stock price drop when stock price rebounded five days later); *Oran v. Stafford*, 226 F.3d 275, 282 (3d Cir. 2000) (quoting *In re Burlington Sec. Litig.*, 114 F.3d 1410, 1425 (3d Cir. 1997)) ("[I]f a company's disclosure information has no effect on stock prices, 'it follows that the information disclosed * * * was immaterial as a matter of law."); *United States v. Heron*, 525 F. Supp. 2d 729, 736 (E.D. Pa. 2007) ("information that has no impact on the price of the underlying stock when disclosed is generally immaterial as a matter of law").

A. Criminal Intent In A Securities Fraud Case Means Intent To Deceive Securities Investors.

Intent, like any other element of the crime, must be proved beyond a reasonable doubt. Thus, to prove the *mens rea* for securities fraud, the prosecution must prove beyond a reasonable doubt that the defendant intended to deceive *investors*; a mere false statement is not enough. *See Stewart*, 305 F. Supp. 2d at 378 (granting defendant's motion for judgment of acquittal on securities fraud count because prosecution did not show intent to deceive investors beyond a reasonable doubt); cf. *United States v. Stewart*, 433 F.3d 273 (2d Cir. 2006) (affirming conviction in same trial for various false-statement crimes).

"A defendant may be convicted of committing securities fraud only if the government proves specific intent to defraud, mislead, or deceive." *Tarallo*, 380 F.3d at 1181. That is, there must be sufficient evidence to exclude any reasonable doubt that the defendant specifically intended to influence the actions of investors in the relevant securities. *See Stewart*, *supra*, 305 F. Supp. 2d at 370 ("no reasonable juror can find beyond a reasonable doubt that the defendant lied for the purpose of influencing the market for the securities of her company.").

Furthermore, only "willful[]" violations of the securities laws can result in criminal liability. 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5; *see*

also XueMing Jimmy Cheng, *et al.*, *Securities Fraud*, 41 Am. Crim. L. Rev. 1079 (2004) ("A defendant may vitiate a government securities fraud allegation by arguing that she did not 'willfully' violate the securities laws and, therefore, lacked the requisite fraudulent intent."). Judicial confusion has left it "unclear whether willfulness in criminal cases requires something above the ordinary scienter required in civil cases." Julia K. Cronin, *et al.*, *Securities Fraud*, 38 Am. Crim. L. Rev. 1277, 1288 (2001). But unless the word "willfully" is statutory surplusage—which would be odd, given that the word is the chief statutory distinction between criminal and noncriminal conduct in this field—its addition to the criminal provisions must enhance the scienter element.

As a consequence, federal courts, including this one, "sometimes insist on a higher level of scienter in criminal insider trading cases as compared to civil." Donald C. Langevoort, *Reflections on Scienter (And the Securities Fraud Case Against Martha Stewart That Never Happened)*, 10 Lewis & Clark L. Rev. 1, 14, n. 49 (2006) (citing *United States v. Smith*, 155 F.3d 1052, 1066-70 (9th Cir. 1998)). This is prudent: "the mens rea standard for criminal prosecution should, as a matter of policy, be higher than the standard for civil actions or enforcement, in light of the prospects of imprisonment and the stigma of conviction. * * * This would draw a bright-

line distinction between the behavior that will get one sued or fined, and behavior that will land one in jail." Michael L. Seigel, *Bringing Coherence to Mens Rea Analysis For Securities-Related Offenses*, 2006 Wis. L. Rev. 1563, 1613 (2006). Such a bright-line distinction is particularly desirable where, as here, "the conduct proscribed is difficult to distinguish from normal and acceptable business practices." Norwood P. Beveridge, *Is Mens Rea Required for Criminal Violation of the Federal Securities Laws?* 52 Bus. Law. 35, 64 (1996-97).

Indeed, this Court has held that "'willfully' as it is used in § 78ff(a) means intentionally undertaking an act that one knows to be wrongful." *Tarallo*, *supra*, 380 F.3d at 1188. This definition of "willfully" comports with the Supreme Court's interpretation of willfulness as an act done with a "bad purpose," in bad faith or with evil intent. *See United States v. Murdock*, 290 U.S. 389, 394-398 (1933) (holding that "willfully" as used in the Revenue Acts of 1926 and 1928 means not only voluntarily, but in bad faith or with evil intent). Consistent with the underlying statutory prohibition, which covers only a "manipulative or deceptive device" used in connection with a securities transaction, Securities Exchange Act of 1934, § 10(b), 15 U.S.C. § 78j(b), the wrongful purpose must be to influence securities trades, whether through manipulation or misrepresentation of

something known or expected to affect investor conduct. *See generally United States v. Finnerty*, 533 F.3d 143, 151 (2d Cir. 2008).

Just as some false statement crimes require knowledge of a "nexus" to a particular proceeding, *e.g.*, *Arthur Andersen*, 544 U.S. at 707-708, a false statement cannot prompt criminal liability for securities fraud unless the speaker is aware of the statement's likely effect on securities markets and intends to manipulate them by making it. There is no sign that Reyes was aware that the accounting treatment of Brocade's routine options grants would have any effect on investors. Indeed, he might have received an answer in the negative had he posed the question to a professional investor.

B. The Government's Presentation Of A Theory Apparently Known To Be False Improperly Bolstered The Inference Of Intent To Defraud Investors, While The Trial Court's Erroneous Instructions Deprived Reyes Of A Fair Chance To Rebut That Theory.

The government relied on tenuous inferences, some of which it apparently knew were untrue. First, the government contended that Brocade's finance department did not know about any options backdating, and thus could not properly account for its effect on reported expenses. Second, the government contended that Reyes, an executive with a sales background who lacked training in finance or accounting, had concocted an options backdating scheme and deceived the finance department about it.

From this, the government asked the jury to infer that Reyes could not rely on the finance department either to understand how options were priced or to account for them properly.

At bottom, the government contended that Reyes defrauded Brocade investors by signing incorrectly dated meeting minutes. But the government's burden was to show that he signed with intent to defraud investors, *see Tarallo*, 380 F.3d at 1181, not merely in an attempt to circumvent company rules or practices, *see Finnerty*, 533 F.3d at 150-151, let alone merely in accord with a company practice established by others (as Reyes contended was the case here). As the Supreme Court recently reiterated in *Stoneridge Investment Partners, LLC v. Scientific Atlanta*, 128 S. Ct. 761 (2008), a securities fraud action must hinge on how the "the investing public" learned of and reacted to the alleged "deceptive acts during the relevant times." *Id.* at 769.

There was no evidence that Reyes had any notion that the inaccurate dates on meeting minutes would have significant effects on Brocade's stock price. Reyes did not cut himself in on the deal, and there is no evidence that he took advantage of any stock price effects by making any unusual sales of Brocade securities.

The government had to ask the jury to indulge in speculation to connect widely separated dots. That exacerbates the effect of the central prosecutorial misconduct asserted here. Again assuming that Reyes accurately presents the import of the pretrial interviews of Brocade finance department officials, at trial the government was well aware, from pretrial statements to government investigators, that Brocade's controller and chief financial officer both knew about the backdating. See Reyes Br. 15-18. Indeed, soon after Reyes' trial the SEC brought an enforcement action against one of the very officers that the government here painted as innocently ignorant of any backdating. See Reyes Br. 31. A prosecutor's "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice." *Giglio v. United States*, 405 U.S. 150, 153 (1972). If the Court adopts the view of these facts set forth in Reyes' brief, a retrial is plainly necessary here.

Rather than call as witnesses the high-level officials who knew about backdating, the government instead put on one low-level clerk, Moore, who was willing to testify that she did not know that the options grants were backdated. See Reyes Br. 21-24. Reyes later presented substantial evidence that she had recanted that testimony after trial, but the government actively opposed vacating the conviction and the trial court let it stay in place. See

Reyes Br. 32-34. Again, assuming that the witness indeed recanted, the United States government—and its courts—are supposed to do better than this.

It is the government's solemn "duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78, 88 (1934). "The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial." *Kennedy v. Lockyer*, 379 F.3d 1041, 1058 (9th Cir. 2004) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 648-49 (1974) (Douglas, J., dissenting)).

In light of the slim evidence that Reyes' signature on backdated options grant resolutions had anything to do with a desire to influence the equities markets, the evidence that he supposedly deceived the finance department about backdating was critical in establishing his intent to deceive investors. Take away the evidence that the finance department supposedly knew nothing about backdating—evidence that was intended to support an inference that Reyes had concealed it and, thus, a guilty conscience about backdating itself—and there was very little reason for a jury to infer that

Reyes intended to do anything but follow company procedures designed by others and—to the extent he thought about it at all—enhance other people's compensation.

Other trial errors took away Reyes' ability to defend against the government's misleading theory. Reyes has amply explained how the trial court's deficient instructions—and its *ad hoc*, *sua sponte* foreclosure of a defense missing-witness argument—hampered Reyes' ability even to point out the deficiencies in the intent evidence the government did put on (let alone the outright falsity of the evidence and argument). See Reyes Br. 46-52. The government was fully capable of calling the missing finance witnesses and immunizing their testimony in order to provide Reyes a fair trial. Its failure to do so was more than worthy of comment, particularly because in reality that failure was designed to avoid the collapse of the government's theory—a collapse that would, however, have served justice in a way that the actual prosecution did not. Yet the trial court deprived Reyes of the most fundamental tools of a fair and vigorous defense in this situation, the ability to comment pointedly on the government's unexplained failure to put on obviously pertinent evidence, and the argument that documentary evidence showed the very finance department knowledge that Moore denied. Reyes had to defend himself with one hand tied behind his back.

Another instance of prosecutorial misconduct also directly shored up the scant evidence of criminal intent. The government effectively told the jury that defense counsel would lie because defense counsel's client had lied (ER1011), and that defense counsel's use of an expert before trial was an attempt to "carry out the lie" that Reyes had initiated. ER905. The district court's vague commentary did not repair the effects of these remarks to the jury. Yet remarks of this kind taint the entire trial and require reversal. *See United States v. Rodrigues*, 159 F.3d 439, 449 (9th Cir. 1998); *Bruno v. Rushen*, 721 F.2d 1193, 1195 (9th Cir. 1983).

As the leading voice of criminal defense counsel, the NACDL urges this Court to condemn that conduct in no uncertain terms. An *ad hominem* attack on counsel to a criminal defendant threatens the fundamental fairness of our adversarial system of criminal justice by making a vigorous defense into a sign of guilt. And the improper remarks here again went straight to the question of criminal intent, where thin and counterintuitive evidence very well might not have persuaded the jury without the illicit boost of the government's slander on the defense enterprise.

The prejudice to Reyes is clear: the misconduct bolstered one of the weakest links in the conviction. Accordingly, the convictions should be vacated and the case retried unless acquittal is ordered.

CONCLUSION

The Court should vacate the judgment of conviction and remand the case with instructions to enter a judgment of acquittal or to conduct a new trial.

September 12, 2008

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the undersigned hereby certifies that the attached amicus brief is proportionally spaced, has a typeface of 14 points or more, and contains 5,841 words, exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B).

2. The brief has been prepared in proportionally-spaced typeface using Microsoft Word 2002 in 14-point Times New Roman font. As permitted by Fed. R. App. P. 32(a)(7)(C), the undersigned has relied upon the word-count feature of this word-processing system in preparing this certificate.

September 12, 2008

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CERTIFICATE OF SERVICE

I, Kristine Neale, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is Two Palo Alto Square, Suite 300, Palo Alto, CA 94306. On September 12, 2008, I served the within documents:

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF DEFENDANT-APPELLANT GREGORY L. REYES AND SUPPORTING REVERSAL

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Kristine Neale

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