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To Be Argued By:
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IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

MARTHA STEWART and PETER BACANOVIC,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of New York
Judge Miriam Goldman Cedarbaum

REPLY BRIEF OF DEFENDANT-APPELLANT MARTHA STEWART

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REPLY BRIEF OF MARTHA STEWART

During a trial about whether Martha Stewart knowingly made material false statements during two informal interviews about her recollection of a short cell phone conversation, a high-ranking government official lied under oath about important matters, with the full complicity of at least four U.S. Secret Service officials, and a juror made numerous false statements on a questionnaire completed under penalty of perjury. Moreover, despite repeated references to "cheating investors in the stock market" and an "illegal" "secret tip" that cost ordinary investors "millions of dollars," S.Br. 28-32, 35,[1] Stewart was barred from proving—or even *arguing*—that she had not committed the uncharged crime of insider trading, and the jury was never cautioned that whether she had was not before it. Finally, the Government repeatedly used out-of-court testimonial statements by Stewart's co-defendant for their truth value to bolster its case and undermine Stewart's defense, in flagrant violation of the Confrontation Clause.

But all this, says the Government, does not matter. Although it also claims no errors occurred, the Government's central argument for affirmance is simpler:

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[1] "S.Br." refers to Stewart's opening brief; "G.Br." to the Government's brief. "JA," "SA," "SPA," "GA," and "SSA" denote the Joint, Supplemental, Special, Government, and Second Supplemental Appendices, respectively. "Tr." refers to the trial transcript; "Lawrence Tr." to the transcript of Lawrence Stewart's trial (SA includes all cited pages).

No harm, no foul. According to the Government, "overwhelming" evidence supported the convictions. The Government is mistaken.

The Government's basic trial theory was that Stewart and Bacanovic fabricated the $60 agreement to hide the "real" reason Stewart sold the small remnant of her ImClone stock on December 27, 2001—an illegal "secret tip" that Bacanovic directed Faneuil to give her—and then invented other falsehoods to make the $60 agreement appear believable. In closing, the Government cited "at least seven different reasons" why "the $60 story was a lie," Tr. 4507, and spent a full third of its presentation so arguing, Tr. 4507-40. No doubt the Government thought the evidence "overwhelming." The jury disagreed, however, acquitting on every specification relating to the $60 agreement.

Its theory of "what really happened" in tatters, the Government has retreated to a fallback position. The acquittals change nothing, it insists, because the evidence concerning the allegations on which Stewart was convicted *really was* "overwhelming." In fact, says the Government, the acquittals show not that this was a close case, but that the constitutional violations surrounding the critical testimony of Lawrence and DeLuca could not have mattered, because their testimony (supposedly) pertained only to the Government's claim that the $60 agreement was a sham.

The Government's reasoning has two fundamental flaws. *First*, it ignores that the $60 agreement was crucial in two separate respects. The allegation that the agreement was fabricated was central to the Government's case—but the contention that it was real was also the foundation of Stewart's defense. The acquittals on the "@60"-related charges and specifications do not mean that the jury credited Stewart's defense—that there really was a $60 agreement, whose existence made it more likely that the charged false statements resulted from mistake or misrecollection, or faulty note-taking by Government witnesses.[2] Because the acquittals cannot establish that the jurors fully credited DeLuca's testimony or fully discounted Lawrence's, they cannot cure the errors that devastated Stewart's central defense.[3]

Second, although the Government repeatedly calls the evidence of guilt "overwhelming," it actually argues only that there was "overwhelming" evidence

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[2] A jury undecided about the $60 agreement, or inclined to doubt its existence but unable to decide unanimously beyond a reasonable doubt, also would acquit on the "@60" specifications. It might not, however, take the additional step of acquitting on the other counts.

[3] The Government's attempt to quarantine the acquittals, separating them from the supposedly "overwhelming" evidence on the other counts, fails because the trial evidence overlapped on those points. For example, in arguing that the $60 agreement was "a lie," the Government relied heavily on Faneuil's testimony that Bacanovic failed to mention $60 or any other price during their December 27 conversation. Tr. 4507-08. But under the Government's current theory, the acquittals show that the jury believed there was a $60 agreement, and thus must also have *disbelieved* a key portion of Faneuil's testimony—leaving something less than "overwhelming" evidence on other counts to which Faneuil's testimony was also critical.

that Faneuil told Stewart about the Waksals' efforts to sell their ImClone shares.[4] But what Faneuil told Stewart was not ultimate issue. Rather, the jury had to determine whether the Government proved beyond a reasonable doubt that Stewart: (1) knowingly and willfully made specified material false statements; and (2) conspired with Bacanovic to mislead government investigators. As Stewart's opening brief explained, S.Br. 20-23—and the Government does not seriously dispute—the evidence on the actual charges was far from "overwhelming," even *if* the jury believed Faneuil.

The Government's brief also continues its trial effort to suggest that Stewart committed insider trading, asserting that Stewart tried "urgently" to contact Waksal "immediately" after speaking to Faneuil. G.Br. 5. But this account omits the most important fact: Stewart gave the sell order *before* calling Waksal's office. The Government also glosses over the fact that Stewart's December 27 sale was effectively an afterthought, as she had already sold the vast majority of her

[4] The Government cites Mariana Pasternak's testimony as another basis for "overwhelming" evidence of guilt. From her grand jury testimony through direct, cross, redirect, and re-cross examination, however, Pasternak confirmed that she did "not know" if the most damning statement she attributed to Stewart had been "made by Martha or just was a thought in [Pasternak's] mind." Tr. 3462. Nor could she give the alleged statement a time, place, or context. Given Pasternak's inability to confirm that her statement had any factual basis, that highly prejudicial testimony had minimal legitimate probative value at best and was inadmissible at worst.

ImClone shares and placed her *entire* stake irrevocably up for sale the month before in response to Bristol-Myers Squibb's tender offer. S.Br. 7.

The Government's assertion that Stewart "*denied* to investigators that she had any information about selling by Waksal or any member of his family" when she ordered the December 27 sale, G.Br. 4 (emphasis added), lacks any record citation. With good reason: None exists. What Stewart actually said, Glotzer and Farmer agreed, was that, on April 10, 2002—three-and-a-half months after the fact and after numerous published reports about the Waksals' efforts to sell their shares on December 27—she *did not recall* whether she knew that fact when she placed the sale order. Tr. 2276, 2593-94. The District Court was surely right in noting "grave reservations" about how asserting lack of memory could possibly be sufficiently "material" to warrant a felony conviction. Tr. 4252.

The Government cannot salvage these constitutionally infirm proceedings with assertions of "overwhelming" evidence. For the reasons set forth in Stewart's principal brief and amplified herein,[5] the convictions must be vacated.

[5] Stewart's opening brief adopted and incorporated by reference certain arguments contained in Bacanovic's opening brief. S.Br. 4 n.2. Stewart adopts and incorporates by reference the arguments contained in Parts I(B), II, V, and VI of Bacanovic's reply brief. *See* Fed. R. App. P. 28(i).

I. THE ONE-SIDED TRIAL ON INSIDER TRADING REQUIRES REVERSAL

Insider trading hung like a dark cloud over this trial. It was the asserted motive for all the criminal activity actually charged—the alleged conspiracy, false statements, and obstruction. Because no jury would believe that Stewart would lie to the Government—risking her career and liberty—to hide a legal transaction, the Government made insider trading the linchpin of its case-in-chief, doing everything possible to show that her trade was illegal. The Government tainted this trial from its opening statement, which used the words "tip" or "secret" 22 times, to its closing and rebuttal, which used those same words 28 times. S.Br. 29-30, 32. The District Court's refusal to take any remedial step—anything from preventing the Government from tarring Stewart with uncharged criminal conduct, allowing Stewart to defend herself, or at least instructing the jury not to consider insider trading—rendered this proceeding fundamentally unfair.

A. The Government Placed Insider Trading Before The Jury

The Government responds to this clear record with gross revisionism. According to the Government, it did not argue or present evidence that Stewart committed insider trading, nor that "fear of being prosecuted for insider trading" motivated her alleged cover-up. G.Br. 84. That contention cannot withstand even the most cursory scrutiny.

First, the Government itself *said* that its strategy was to make illegal insider trading the motive for a subsequent cover-up. When Stewart moved to strike insider-trading language from the indictment, the Government countered that it would "argue and present proof … that one of the defendant[s'] motives in committing the crimes charged was to cover up their insider trading." Tr. 2362. The District Court blessed this strategy, permitting the Government to "presen[t] arguments or evidence that tend to show that defendants were motivated … by the fear that they would be accused of trading illegally." SPA 48-49.

The Government's current position requires it to disavow not only its strategy before the District Court, but also its arguments to the jury. Moments into its opening, the Government said that this case involved "cheating investors in the stock market," because "[t]he reason that Martha Stewart dumped all of her shares was [that] she was told a secret, a secret tip that no other investors of ImClone had." Tr. 769. When ImClone's stock "plummeted," the Government continued, "investors who didn't benefit from a secret tip like Martha Stewart had … lost millions of dollars in the stock market." Tr. 775-76.[6] While alleging that Stewart

[6] The Government claims it mentioned investors losing "millions of dollars" only in relation to Count Nine. G.Br. 58. But that phrase appears in a sentence describing ImClone's "plumme[t]" in the days immediately following Stewart's sale, Tr. 775, long before the statements underlying Count Nine were made.

Moreover, as explained in the opening brief, S.Br. 30 n.11, the reference to investors losing "millions" was grossly misleading because Stewart's December 27 sale represented approximately *0.05%* of ImClone shares traded that day.

had committed insider trading, the Government was simultaneously presenting its "motive" theory: that Stewart lied to avoid "facing all that would come" from acknowledging that she acted on a "secret tip." Tr. 769-70.

The Government's closing was no better, describing Stewart as "tipped off" that the Waksals were "dumping" ImClone and arguing that, at the time of her sale, Stewart lack an "innocent" state of mind and was aware that her trading "looked as bad *as it in fact was.*" Tr. 4448, 4481-82, 4505 (emphasis added). No juror could have missed the import of this refrain: Stewart committed insider trading, and, fearing the consequences, conspired to hide the truth.[7]

The Government's after-the-fact efforts to disavow the testimony of its own witnesses are similarly unavailing. Although Luciano Moschetta testified that his responsibilities included watching for "insider trading," and that a broker sharing "material" and "non-public" information of trading by an insider like Waksal could subject Merrill Lynch to "criminal investigation," Tr. 919, 985, 1026; S.Br 30, the Government insists that Moschetta did not "apply" those principles "to the facts of this case," G.Br. 60. But even if that were somehow dispositive, many other witnesses made *precisely* that connection. Tr. 879-92 (Waksal's advance

[7] The Government now suggests that its allegations could be understood to mean only that Stewart feared "harm to her reputation" from disclosure of a legal stock sale. G.Br. 62. But that is not what the Government told the District Court, *see supra*, at 7, or—more importantly—the jury. Instead, it argued that Stewart "cheated investors" by trading on a "secret tip."

knowledge of FDA denial), 1070-74 (Waksal's misconduct and friendship with Stewart), 1085-91 (linking Stewart's ImClone sale with those by members of the Waksal family), 1190-91 (referral of Waksal's and Stewart's "suspicious" trading to SEC). In fact, the Government introduced evidence, such as the FDA's rejection of Erbitux and ImClone's falling price after December 27, Tr. 1090-1104, whose only possible relevance was to establish the materiality of the "secret information" Stewart received and hence the illegality of her ImClone sale.

Faneuil's testimony that he "did something illegal" when he "told one client about what another client was doing … and then lied to cover it up," Tr. 1443, further suggested Stewart's December 27 trade was illegal. The Government now asserts that Faneuil's mention of "illegal" conduct referred only to the "li[e]," not to "[telling] one client about what another client was doing." Even if Faneuil's statement could plausibly be parsed that way—a possibility grammatically foreclosed by the conjunctive "and"[8]—nobody ever suggested that reading to the jury. To the contrary, the Government reiterated in closing that Faneuil retained a lawyer because he "knew that he provided secret information to Martha Stewart about the Waksals selling, *and* … that he lied to the SEC to conceal that fact."

[8] The Government's only "support" for its reading comes from testimony *six days* after Faneuil's statement on direct, responding to a question about when he and Bacanovic "agree[d] … to commit a crime," Tr. 1927—presumably the crime of lying to federal officials. In fact, Faneuil *confirmed* during cross-examination that he "suspected" that Stewart could not lawfully trade on December 27. Tr. 1961-62.

Tr. 4474 (emphasis added). Faneuil, like the Government's other witnesses, made this an insider-trading case.[9]

B. The District Court's Refusal To Permit Stewart To Defend Herself And Its Failure To Caution The Jury Mandate Reversal

1. Through a series of evidentiary rulings, each erroneous in its own right but especially cumulatively, the District Court allowed the Government to brand Stewart an insider trader and made it impossible for Stewart to defend herself. Even after the Government went beyond evidence of "motive," to arguing that Stewart's trade was actually illegal, the District Court—contrary to its pretrial promise and over Stewart's repeated objections—refused to let Stewart defend herself by, for instance, fully cross-examining Faneuil, Tr. 1963, 1975, arguing that the "tip" she purportedly received was not illegal, Tr. 4737-38, or presenting expert testimony that the ImClone sale did not violate securities laws, Tr. 2103-04[10]; *see*

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[9] There is no truth to the Government's remarkable suggestion that Stewart, not the Government, opened the door to insider trading in an unexplained "tactical decision." G.Br. 45, 90. Once the District Court decided, pretrial, that the Government could offer its insider-trading-as-motive theory, *see supra*, at 7, and the Government tarred her with insider trading in its opening statement, *see supra*, at 7-8, Stewart could not leave the Government's theory unanswered.

[10] The Government's protracted defense of the District Court's ruling on Stewart's proposed expert testimony, G.Br. 42-64, misses the point. Stewart did not offer that testimony to instruct the jury on the counts before it. Tr. 2222. Rather, Stewart sought to rebut evidence that she had committed *uncharged* criminal conduct, consistent with the District Court's pretrial ruling that she would be permitted to rebut evidence of illegal trading if the Government "open[ed] the door." SPA 48-49. The expert testimony would also have countered the Government's arguments that, as a former broker, Tr. 3261-62, Stewart knew she

S.Br. 38-39. Having abandoned its pretrial promise to permit Stewart to defend herself if the Government "open[ed] the door," SPA 48, the District Court also erred in denying Stewart's motion for a mistrial, Tr. 2184, 2364-72.

2. Perhaps most egregiously, the District Court failed to give the basic limiting instruction to which Stewart clearly was entitled: that she was *not* charged with insider trading, and that insider trading could be considered *only* as an alleged motive for the obstruction charges. On this central point, the Government says very little. It does not (and could not) dispute the well-established principle that evidence of uncharged criminal conduct to show motive requires appropriate limiting instructions, such as those requested by Stewart and rejected by the District Court. S.Br. 33-35. As discussed above, the record forecloses the Government's claim that insider trading was not before the jury.

With no substantive argument, the Government falls back on the erroneous claim that Stewart forfeited her objection to the District Court's instructions.[11] But the law requires objections to ensure that trial courts have notice of deficiencies in jury instructions and opportunity to cure them; it does not require any "particular formality … of the objection." *Fogarty v. Near North Ins. Brokerage, Inc.*, 162 F.3d 74, 79 (2d Cir. 1998) (quotation marks and citation omitted). Stewart's

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should not have had the information that purportedly spurred her ImClone sale, Tr. 4784-85.

[11] The Government makes no forfeiture argument with respect to the evidentiary rulings and the denial of a mistrial identified above.

request for a limiting instruction unquestionably gave the District Court full and specific notice.

Nor was there any doubt about the District Court's position. During the charge conference, in a focused colloquy spanning more than 20 transcript pages, the District Court made plain beyond doubt that it had no intention of giving Stewart's proposed instruction because it continued to believe in the distinction it had drawn throughout trial—between evidence of insider trading, on one hand, and evidence of "secret tips" to show motive, on the other. As the District Court explained:

> [T]here has never been a suggestion from the beginning of this trial that the government couldn't argue motive. The government has stayed clear of arguing insider trading in those terms because of the Court's guidance that we *need not complicate things, add jury instructions as to what constitutes insider trading*.

Tr. 4422 (emphasis added). Because "a further objection to the charge as given, on a ground already thoroughly discussed, would have been futile," *Anderson v. Branen*, 17 F.3d 552, 557 (2d Cir. 1994), Stewart was required to do no more.

Finally, the Government's suggestion that failure to give the limiting instruction was harmless is meritless. The standard charge that the jury could convict only upon finding guilt beyond a reasonable doubt, G.Br. 85, did nothing to address, much less cure, the prejudice. The Government's contrary claim proves far too much, for it would render limiting instructions superfluous in *any* trial

involving uncharged, allegedly criminal conduct. According to the Government, a plain vanilla reasonable-doubt charge is sufficient by itself, despite settled case law mandating limiting instructions in such circumstances. S.Br. 33-35. *Cf. United States v. Dove*, 916 F.2d 41, 45 (2d Cir. 1990) (failure to instruct jury on witness' failure to identify defendant in open court reversible error, despite instruction requiring jury to find beyond reasonable doubt that defendant committed crime). The presumption that jurors follow instructions, G.Br. 85-86, only underscores the need for limiting instructions; without them, there is no reason to believe that a jury appropriately cabined its consideration of the evidence.[12]

More fundamentally, this case is a remarkably poor candidate for harmless error. As detailed in Stewart's opening brief, S.Br. 28-33, and above, allegations of insider trading permeated every aspect of the Government's case. Those allegations transformed a mundane false statements prosecution into one about a

[12] The Government appears to argue that even if the jury had the firm impression that Stewart committed illegal insider trading, there could be no prejudice, because the evidence that showed insider trading—Faneuil's testimony that he told Stewart about the Waksals' sales—also required conviction "on the merits" for lying about receiving that information. G.Br. 89. Again, this argument depends on the erroneous premise that if the jury credited Faneuil's testimony, it must also have believed that Stewart intentionally and materially lied by stating that she "did not recall" whether she knew of the Waksals' trading when she sold her shares. Given the brevity and circumstances of the call, the insignificance of the transaction in light of Stewart's prior ImClone sales, and the likely irrelevance of the information in light of Stewart's $60 agreement, that is simply incorrect. The Government's theory, not Stewart's, manifests a "fatal flaw in logic." G.Br. 89.

high-profile business executive "cheating investors in the stock market." If ever a limiting instruction was required, it was here. "Given the highly inflammatory nature of the evidence … the danger of conviction improperly based on [such] evidence required carefully crafted limiting instructions." *United States v. Matthews*, 53 M.J. 465, 471 (C.A.A.F. 2000).

II. THE CONFRONTATION CLAUSE VIOLATIONS REQUIRE A NEW TRIAL

A. The Government's Use Of Bacanovic's Testimonial Statements Violated The *Crawford* Rule

Crawford v. Washington, 124 S. Ct. 1354 (2004), "change[d] the legal landscape." *United States v. Bruno*, 383 F.3d 65, 78 (2d Cir. 2004). Sweeping away old tests that asked whether a hearsay exception was "firmly rooted" or a given out-of-court statement "reliable," *Crawford* lays down a "bright-line rule drawn from the historical origins of the Confrontation Clause." *United States v. Saget*, 377 F.3d 223, 226-27 (2d Cir. 2004). "Where testimonial statements are at issue," *Crawford* holds, "the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."[13] 124 S. Ct. at 1374.

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[13] The *Crawford* Court found only one deviation from the otherwise universal common law practice against "admit[ting] *testimonial* statements against the accused in a *criminal* case": dying declarations. 124 S. Ct. at 1367 & n.6. Even then, the Court abstained from deciding "whether the Sixth Amendment incorporates an exception for testimonial dying declarations," stressing that "[i]f

Remarkably, the Government makes no effort to apply *Crawford* to the facts of this case. In more than 56,000 words, the Government nowhere disputes that:

- Bacanovic's statements were made in a "testimonial" setting; and
- Were used against Stewart;
- To prove the truth of the matters asserted.

These silences effectively concede numerous violations of Stewart's Sixth Amendment rights.

1. In the rare instance where they are testimonial and offered for their truth, co-conspirator statements implicate *Crawford*

The Government makes no effort to fit its concerns within a Sixth Amendment framework. Instead, the heart of its response is an unfounded plea about practical realities. Unless *Crawford* is *per se* inapplicable to co-conspirator statements, the Government claims, "it would be impossible to prosecute anyone for conspiring … to commit perjury or make false statements, because the perjurious testimony or false statements would be inadmissible against the co-conspirator." G.Br. 98 n.*. This is wrong for two reasons.

First, *Crawford* reaffirmed the holding of *Tennessee v. Street*, 471 U.S. 409 (1985), that the Confrontation Clause does not forbid using out-of-court statements "for purposes other than establishing the truth of the matter asserted." *Crawford*,

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this exception must be accepted on historical grounds, it is *sui generis.*" *Id.* at 1367 n.6.

124 S. Ct. at 1369 n.9; *see United States v. Inadi*, 475 U.S. 387, 398 n.11 (1986) (distinguishing admission of co-conspirator statements for their truth, which "implicat[es]" the Confrontation Clause, from other uses, which do not). Accordingly, the Government may offer "perjurious testimony or false statements," either to prove their falsity or for reasons agnostic to their truth, without creating Confrontation Clause issues. Indeed, the Government presented numerous statements by Bacanovic to show their falsity or without asserting their veracity; Stewart has raised no Confrontation Clause objection to any of them. (Tellingly, the Government never denies that it used *all* the challenged Bacanovic statements against Stewart for their truth.)

Second, co-conspirator statements are rarely made in a *testimonial* setting. *See Crawford*, 124 S. Ct. at 1367 ("statements in furtherance of a conspiracy" are "by their nature … not testimonial"). There is no "testimony" when persons engaged in a common crime speak to one another, even if their words are detected by a Government wiretap or otherwise overheard. Nor do conspirators act as "witnesses," U.S. Const. amend. VI, when speaking to someone who is not a government agent or informant, or whom they do not realize is one. *See Saget*, 377 F.3d at 229. Even when knowingly addressing a government official, a co-conspirator's statements are not testimonial unless made under relatively formal circumstances suggesting they may later be used in court. *See Crawford*, 124

S. Ct. at 1364 (outlining circumstances that make statements testimonial); *Saget*, 377 F.3d at 229 (same).

The decisions cited by the Government support Judge Weinstein's prediction that *Crawford* will have no impact on "the usual" co-conspirator statements admitted at trial. 5 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 801.34[1], at 801-74.9 (Joseph M. McLaughlin ed., 2d ed. 2004). Several decisions admitted out-of-court statements offered for purposes other than proving the truth of the matters asserted.[14] Others admitted statements by conspirators who were unaware that they were being overheard,[15] or that they were addressing an undercover agent or confidential informant.[16] Finally, some of the

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[14] *United States v. Bellomo*, 176 F.3d 580, 586-87 (2d Cir. 1999) (Mafia leaders' orders); *Glenn v. Bartlett*, 98 F.3d 721, 723, 727 (2d Cir. 1996) (co-conspirator's claim to police officer during traffic stop that he had "to talk to [defendant] about getting [suitcase] combination" offered to show defendant knew suitcase contained drugs); *United States v. Williams*, 272 F.3d 845, 858 (7th Cir. 2001) (conspirator's false denial that he had been traveling with another conspirator and his claim that "bundles of money found strapped to his body … were intended as an investment in a grocery store with his son"); *United States v. Lim*, 984 F.2d 331, 336 (9th Cir. 1993) (drug courier's false statement that he was traveling alone and had gone to Hawaii to visit friends).

[15] *Inadi*, 475 U.S. at 390.

[16] *See Bourjaily v. United States*, 483 U.S. 171, 173-74 (1987); *Saget*, 377 F.3d at 225; *United States v. Cianci*, 378 F.3d 71, 100 (1st Cir. 2004); *United States v. Reyes*, 362 F.3d 536, 540 (8th Cir. 2004); *United States v. Silva*, 380 F.3d 1018, 1019 (7th Cir. 2004); *United States v. Downing*, 297 F.3d 52, 55-57 (2d Cir. 2002); *United States v. Reyes*, 798 F.2d 380, 383-84 (10th Cir. 1986); *United States v. Hamilton*, 689 F.2d 1262, 1266, 1268 (6th Cir. 1982).

cases involved statements by co-conspirators to civilian witnesses.[17] But *none* of these decisions admitted an out-of-court statement made in a testimonial setting by a witness who did not appear at trial to prove the truth of the matter asserted in the statement.[18]

To say that most co-conspirator statements are not "testimonial," however, does not mean none are. Whether a given "coconspirator statement is 'testimonial' … depend[s] on the nature of the statement." 5 Weinstein, *supra*, § 801.34[1], at 801-74.9. As already explained, S.Br. 42-43—and undisputed by the Government—Bacanovic's declarations to the SEC were paradigmatic testimonial statements. Accordingly, they cannot be characterized out of the Confrontation Clause merely because they may fall within the scope an evidentiary rule that largely embraces nontestimonial statements. *See Crawford*, 124 S. Ct. at 1370 (Sixth Amendment's protections do not depend on "the vagaries of the rules of evidence").

The Government's reluctance to assert that co-conspirator statements can *never* constitute "testimony" is understandable: The Solicitor General has already acknowledged to the Supreme Court that they can. In *Crawford*, the United States

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[17] *United States v. Robinson*, 367 F.3d 278, 292 (5th Cir. 2004); *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1198-99 (2d Cir. 1989).

[18] The facts recited in *United States v. Alameh*, 341 F.3d 167, 176 (2d Cir. 2003), do not reveal whether the co-conspirator statements were made in a testimonial setting.

urged the Court to adopt a "testimonial" framework for Confrontation Clause analysis. Brief for the United States as *Amicus Curiae* at 8-17, *available at* http://www.usdoj.gov/osg/briefs/2003/3mer/1ami/2002-9410.mer.ami.pdf. During oral argument, Deputy Solicitor General Michael Dreeben drew *precisely* the distinction advanced by Stewart. Dreeben first noted that "statements of co-conspirators made to each other out of court in connection with … the conspiracy are almost inevitably non-testimonial statements." Transcript of Oral Argument at 29 (Nov. 10, 2003) (emphasis added), *available at* http://www.supremecourtus.gov /oral_arguments/argument_transcripts/ 02-9410.pdf. But, he conceded, such statements would be testimonial in "rare instances in which the co-conspirators are continuing the conspiracy and speaking to law enforcement" and "those statements were coming in for the truth of the matter asserted." *Id*. That description coincides *perfectly* with the Government's account of this case.

2. The Government's argument that the Confrontation Clause "does not apply" to co-conspirator statements is meritless

Unwilling to contend that a witness' sworn, recorded statements in a formal interview by known government officials are not testimonial, the Government instead offers various arguments why the Confrontation Clause "does not apply" to Bacanovic's statements. G.Br. 91. None is persuasive.

The assertion that *Crawford* leaves *Bourjaily v. United States*, 483 U.S. 171 (1987), unaffected is simply a stubborn refusal to accept that *Crawford* has

"change[d] the legal landscape." *Bruno*, 383 F.3d at 78. Applying the framework from *Ohio v. Roberts*, 448 U.S. 56 (1980), in an opinion by one of two Justices who dissented in *Crawford*, *Bourjaily* held that the Confrontation Clause allowed admission of any statement satisfying Federal Rule of Evidence 801(d)(2)(E), because that "exception" to the hearsay rule was "firmly … rooted." *Bourjaily*, 483 U.S. at 183-84.

But *Crawford* overruled *Roberts*' approach with respect to testimonial statements, *see Crawford*, 124 S. Ct. at 1374; *Saget*, 377 F.3d at 226-27, and Justice Scalia's opinion for the Court makes plain that this aspect of *Bourjaily* is no longer good law, *see Crawford*, 124 S. Ct. at 1369 ("Although the results of our decisions have generally been faithful to the original meaning of the Confrontation Clause, the same cannot be said of our rationales."). While *Crawford* took pains to explain why *Bourjaily*'s result would be the same under the new analysis, the reason was because *Bourjaily* involved *nontestimonial* statements. *Id.* at 1368 (*Bourjaily* "admitted statements made unwittingly to an FBI informant after applying a more general test that did not make prior cross-examination an indispensable requirement"); *see Saget*, 377 F.3d at 229 (*Crawford* reaffirmed *Bourjaily*'s *outcome* because the "co-defendant's unwitting statements to an FBI information [were] nontestimonial").

The Government fares no better claiming that the Confrontation Clause "does not apply" to Bacanovic's statements because Rule 801(d)(2)(E) defines co-conspirator statements as "nonhearsay." G.Br. 91. This argument disregards the constitutional text, which guarantees that

> [i]n all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him.

U.S. Const. amend. VI.

As the Sixth Amendment makes clear—and *Crawford* reaffirms, *see* 124 S. Ct. at 1364—the dispositive question is whether the Government's use of Bacanovic's out-of-court statements for their truth against Stewart made him a "witnes[s] against" her. That inquiry, *Crawford* confirms, depends on whether Bacanovic's statements were "testimonial" and offered for their truth, not whether they happened to constitute "hearsay" under state or federal evidentiary rules. *See id.* at 1374 ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where *testimonial evidence* is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." (emphasis added)).[19]

[19] *Crawford* consistently describes the relevant category as "testimonial statements" or "testimonial evidence." *E.g.*, 124 S. Ct. at 1365, 1367, 1369, 1370,

Not only does the Confrontation Clause address "witnesses against" the accused rather than "hearsay," its protections do not depend on labeling choices by evidentiary drafters. The Sixth Amendment's Framers did not "leave [its] protection[s] to the vagaries of the rules of evidence," *Crawford*, 124 S. Ct. at 1370, and its scope is not determined by "the law of Evidence for the time being," *id.* at 1364 (quotation marks and citation omitted). Rather, the Confrontation Clause preserves "the right of confrontation at common law, admitting *only* those exceptions established at the time of the founding." *Id.* at 1365 (emphasis added). Indeed, the Supreme Court long ago rejected the notion that the 1972 decision by the drafters of the Federal Rules of Evidence to label co-conspirator statements "admission[s]" that are "not hearsay," Fed. R. Evid. 801(d)(2), has any constitutional significance. *See Inadi*, 475 U.S. at 399 n.12 ("Federal Rule of

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1374. The opinion's few references to testimonial or nontestimonial "hearsay" are made in the context of suggesting that nontestimonial statements—even if "hearsay"—do not implicate the Confrontation Clause at all. *See id.* at 1364-65, 1370.

The Government also errs in arguing that the Clause "does not apply" because Bacanovic was not an "accuser." G.Br. 97-98, 109. The Clause does not mention "accusers," and adopting an "accuser" test would suggest that *Crawford* was wrongly decided, because there is no indication that Sylvia Crawford intended to "accuse" her husband when she gave a statement "generally corroborat[ing] [his] story about the events leading up to the fight" but "arguably different" in its "account of the fight itself." 124 S. Ct. at 1357. Indeed, when co-defendants stop being "witnesses" and become "accusers," the Constitution imposes even more stringent restrictions on the use of their statements. *See Bruton v. United States*, 391 U.S. 123 (1968) (in joint trial, Confrontation Clause imposes *per se* bar against admitting unredacted confession by a co-defendant that also implicates the accused).

Evidence 801 characterizes out-of-court statements by co-conspirators as exemptions from, rather than exceptions to, the hearsay rule. Whether such statements are termed exemptions or exceptions, *the same Confrontation Clause principles apply*." (emphasis added)); *see also* 3 Stephen A. Saltzburg *et al.*, *Federal Rules of Evidence Manual* 1474 (7th ed. 1998) (labeling choice was a "*departure* from the common law" (emphasis added)).[20]

Nor do the Government's post-*Crawford* cases support its contention that the Confrontation Clause "does not apply," G.Br. 91, to co-conspirator statements. *Saget* held that "the introduction of Beckham's co-conspirator statements against Saget did not violate the Confrontation Clause"—not because the Clause "does not apply" to such statements—but because the statements "*were not testimonial.*" 377 F.3d at 224-25 (emphasis added).[21]

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[20] *See United States v. Burr*, 25 F. Cas. 187, 193 (C.C. D. Va. 1807) (No. 14,696) (Marshall, C.J.) (doctrine admitting conspirator statements is "exception" to "[t]he rule of evidence which rejects mere hearsay testimony"); *Glasser v. United States*, 315 U.S. 60, 75 (1942) (out-of-court conspirator statements are "hearsay"); *Dutton v. Evans*, 400 U.S. 74, 81-82 (1970) (plurality) (rule admitting co-conspirator statements is "exception to the hearsay rule"); *Bourjaily*, 483 U.S. at 182-83 (same).

The Government's claim that the Confrontation Clause's scope depends on evolving definitions of "hearsay" under various evidentiary codes is particularly curious given that many state codes continue to classify co-conspirator statements as a hearsay "exception." *See, e.g.*, Cal. Evid. Code § 1223; Conn. Code Evid. § 8-3; Fla. Stat. ch. 90.803(18)(e); Haw. R. Evid. 803(a)(2)(C); N.J. R. Evid. 803(b)(5); N.C. Gen. Stat. § 8C-1, R. 801(d)(E).

[21] *United States v. Morgan*, 385 F.3d 196 (2d Cir. 2004), summarized *Crawford* as holding "testimonial hearsay" inadmissible "if the declarant is

As already explained, *see supra*, at 17-18 & nn. 16-17, the other post-*Crawford* cases cited by the Government all involved nontestimonial statements. Nor does their reasoning support the Government. *United States v. Cianci*, 378 F.3d 71 (1st Cir. 2004), does not "hold" that "*Crawford* does not apply to co-conspirator statements made in furtherance of the conspiracy." G.Br. 96. To the contrary, the opinion *never mentions Crawford*.[22] *Cf. Cianci*, 378 F.3d at 101-02 (rejecting argument that co-conspirator's statements had been "inherently unreliable"). *United States v. Reyes*, 362 F.3d 536 (8th Cir. 2004), ruled only that the defendants had no right to cross-examine an out-of-court declarant whose "statements were *nontestimonial*, co-conspirator statements, which fall within a firmly rooted *hearsay exception*." *Id.* at 540 (emphases added).[23] Given that *United States v. Silva*, 380 F.3d 1018 (7th Cir. 2004), reversed a conviction based

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unavailable for cross-examination." *Id.* at 208. But *Morgan* simply used "hearsay" as a stand-in for the more wordy "out-of-court statement offered to prove the truth of the matter asserted." As the letter introduced in that case concededly *was* hearsay, *see id.*, *Morgan* cannot reasonably be said to establish that the Confrontation Clause "does not apply" to any out-of-court statement the drafters of the Federal Rules of Evidence choose to label "not hearsay." *See* Fed. R. Evid. 801(d)(2)(D) (same designation for "a statement by the party's agent or servant").

[22] *Cianci* was argued on October 9, 2003, five months before *Crawford* was handed down, but not decided until August 10, 2004, nearly five months later.

[23] To the extent *Reyes* suggests a *per se* rule that "co-conspirator statements are nontestimonial," *id.* at 540-41 & n.4, that conclusion is erroneous for the reasons explained above. *Cf. United States v. Manfre*, 368 F.3d 832, 838 n.1 (8th Cir. 2004) (co-conspirator statements did not implicate *Crawford* because the "comments were made to loved ones or acquaintances and are not the kind of memorialized, judicial-process-created evidence of which *Crawford* speaks").

on improperly admitted evidence, it is hard to see how Judge Easterbrook's musing that "[p]erhaps [the statement's] admission could [be] justified under the co-conspirator exception to the hearsay rule," *id.* at 1019, can possibly be viewed as a "holding" that such admission would have been proper under the Federal Rules, much less the Confrontation Clause.

Finally, the Fifth Circuit's decision in *United States v. Robinson*, 367 F.3d 278 (2004), supports Stewart, not the Government. In explaining why *Crawford* permitted admission of a co-conspirator's threat to kill a witness who had "snitched," the court stressed that the threat "was made during the course of the conspiracy *and is non-testimonial in nature*." *Id.* at 292 n.20 (emphasis added). If the Government's reading of *Crawford* were correct, the italicized language would have been entirely unnecessary. Under Stewart's, however, it makes perfect sense. Because *Crawford* leaves *Roberts* intact as to nontestimonial statements, *see Crawford*, 124 S. Ct. at 1370; *Saget*, 377 F.3d at 230, a conclusion that the threat fell within *some* valid hearsay exception (or was otherwise "reliable") was necessary, but not sufficient. Given *Crawford*'s "*per se* bar," *United States v. McClain*, 377 F.3d 219, 221 (2d Cir. 2004), against admitting testimonial statements, it was *also* necessary to find that the threat was nontestimonial—a finding that, as already explained, cannot be made with respect to Bacanovic's statements.

3. Bacanovic's statement that he never discussed the $60 agreement with DeLuca was not admissible to "impeach" Bacanovic or DeLuca

As Stewart's opening brief explained, S.Br. 43-47, the most vivid of the many *Crawford* violations arose from the Government's use of Bacanovic's out-of-court statements to attack Heidi DeLuca, the central defense witness who independently corroborated the $60 agreement, and Stewart herself, who told investigators that she and DeLuca had "the same recollection" about it. Tr. 2257. DeLuca testified that she had a conversation with Bacanovic in November 2001 in which Bacanovic told her that: (1) "he felt like ImClone was a dog"; (2) "when the shares came over from Morgan Stanley," he wanted to "set a floor price of 60 or 61"; and (3) "he would speak to Martha personally about" this plan. Tr. 3806. In response, the Government played an excerpt of Bacanovic's SEC testimony in which he claimed that "the issue of the stock at $60" had never "come up with Heidi." JA 520. During closing arguments, the Government argued that the excerpt proved the conversation related by DeLuca "didn't happen." Tr. 4814.

Perhaps recognizing the striking nature of this particular *Crawford* violation, the Government has offered an argument applicable only to it. Because the substance of Bacanovic's statements (as relayed by DeLuca) was admitted under a hearsay exception, the Government argues, Federal Rule of Evidence 806 entitled it to introduce the excerpt to "impeach" both Bacanovic, G.Br 113-16, and

DeLuca, G.Br. 114 n.*. What this argument misses, however, is that the only people the excerpt could possibly "impeach" were DeLuca and Stewart, and Bacanovic's statements could do so only if the jury considered them for their truth.

The excerpt was not admissible against Stewart to "impeach" Bacanovic. When DeLuca testified that she had a conversation with Bacanovic in which she heard Bacanovic say certain things, that testimony was not hearsay because the person whose veracity, perception, and memory were placed at issue was *DeLuca*. *See* Fed. R. Evid. 801(c) (hearsay is a statement "other than one made … while testifying at the trial"). Bacanovic himself became a hearsay "declarant" only when the jury was asked to conclude not only that he uttered certain words, but also to credit them as an accurate statement of Bacanovic's beliefs or intentions. *See* Fed. R. Evid. 801(c) (statement is hearsay only if "offered in evidence to prove the truth of the matter asserted"); 5 Weinstein, *supra*, § 801.11[1], at 801-14 (until out-of-court statement is "offered for its truth, the [out-of-court] declarant's credibility is not material and the statement is not hearsay").

Accordingly, to impeach Bacanovic, the Government would have needed a statement in which Bacanovic said something inconsistent with: (1) a belief that "ImClone was a dog"; (2) a desire in November 2001 to "set a floor price of 60 or 61"; or (3) an intent to "speak to Martha personally about" doing so. Tr. 3806. Such statements, if they existed, would have had relevance independent of their

truth, because a statement inconsistent with what Bacanovic told DeLuca would call into question the truthfulness of all his statements. *See* 2 John W. Strong, *McCormick on Evidence* § 249, at 103 (5th ed. 1999).

But the excerpt was not that sort of declaration. Instead, the jury heard Bacanovic deny *telling DeLuca* about a plan to sell at $60. Because the jury had never heard Bacanovic claim that such a conversation occurred—or make any statement necessarily indicating that it had—the excerpt could not impeach or call into question *Bacanovic*'s veracity, perception, or memory.[24] *See, e.g.*, 3 Saltzburg, *supra*, at 1918 (statements are "inconsistent" for purposes of Rule 806 "when they appear to proceed from beliefs that are necessarily contradictory"). Thus, the excerpt attacked only the credibility of DeLuca, who testified that she *did* have such a conversation with Bacanovic, and of Stewart, who told investigators that she and DeLuca had "the same recollection" about the $60 agreement, Tr. 2257.

[24] The statements could be seen as "impeaching" Bacanovic in the sense that they suggested he may not have believed his own witness. As to Bacanovic, of course, neither the Confrontation Clause nor the Rules of Evidence barred use of the statements for that purpose, even though that use clearly depends on the truth of the statements. But DeLuca's statements, the Government acknowledges, were also part of *Stewart's* defense, G.Br. 114, and the jury was never cautioned that Bacanovic's statements were admissible only against Bacanovic or only for a limited purpose. Nor did the Government ever suggest that it was offering the excerpt only against Bacanovic.

Not only were Bacanovic's statements impermissibly used to attack DeLuca and Stewart, rather than Bacanovic, they could serve that purpose only *if they were true.* If Bacanovic was mistaken or lying when he told government investigators that he never discussed selling at $60 with DeLuca, then the mere fact that he made those statements—though perhaps raising questions about Bacanovic's reliability—would do nothing to undermine DeLuca's account. In other words, if the excerpt impeached DeLuca (and, through DeLuca, Stewart), it could do so only if the jury credited the truth of an out-of-court testimonial statement by an unavailable witness to prove the truth of the matter asserted. That is *precisely* what *Crawford* forbids.

Rule 806 does not alter this analysis.[25] Under Rule 806,

> [w]hen a hearsay statement … has been admitted in evidence, the credibility *of the declarant* may be attacked … by any evidence which would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or conduct *by the declarant* … inconsistent with *the declarant's hearsay statement*, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain.

Fed. R. Evid. 806. Because DeLuca, not Bacanovic, is the "declarant" whose credibility was being attacked, Rule 806 says nothing about permitting use of a

[25] Although *United States v. Benedetto*, 571 F.2d 1246 (2d Cir. 1978), affirms that trial judges have broad discretion in deciding whether to admit "extrinsic evidence" to impeach a witness about a "collateral matter," *id.* at 1250; *see* G.Br. 114 n.*, it does not suggest that this "discretion" encompasses the power to admit evidence that the Constitution renders affirmatively inadmissible.

"statement or conduct by [Bacanovic]" that is inconsistent with "[DeLuca's non-] hearsay statement." *See* 5 Weinstein, *supra*, § 806.03[3] at 806-8 ("Rule 806 applies only to impeachment of the declarant. It does not permit use of statements to impeach the witness who reports the hearsay declaration."). If there were any doubt on this score, the Supreme Court has made clear that the Confrontation Clause's protections are not subject to the Federal Rules. *See supra*, at 21-23.

B. Stewart's *Crawford* Claim Is Not "Waived"

Without actually so arguing, the Government intimates that Stewart waived any *Crawford* claim through a "tactical decision" to use some of Bacanovic's statements in her defense. G.Br. 110-12. That suggestion is meritless.

"Waiver," the Supreme Court has explained, "is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the *intentional* relinquishment or abandonment of a *known* right." *United States v. Olano*, 507 U.S. 725, 733 (1993) (quotation marks and citation omitted) (emphases added). To have "waived" a *Crawford* claim, Stewart would have to have foreseen the most significant Confrontation Clause ruling in the last half-century, but nevertheless deliberately (and irrationally) decided to ignore core constitutional violations that substantially prejudiced her. Not only is there no evidence to support such a supposition, this Court has emphasized how unrealistic it is. *See Bruno*, 383 F.3d at 78 ("[O]nly a soothsayer could have known with any certainty

that [*Crawford*] would change the legal landscape"); *United States v. Viola*, 35 F.3d 37, 42 (2d Cir. 1994) ("[P]enaliz[ing] defendants for failing to challenge entrenched precedent … would … insis[t] upon an omniscience … about the course of the law we do not have as judges.").[26] Once the Government-proffered statements were admitted, the realities of a joint trial dictated that Stewart not object when Bacanovic sought to add parts of his testimony that did not harm her, and required Stewart to attempt to incorporate that evidence as part of her defense.[27]

Adopting the Government's "waiver" suggestion would mean that a defendant's use of Government-presented evidence could be seen as withdrawing

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[26] In *United States v. Coonan*, 938 F.2d 1553 (2d Cir. 1991), a defendant argued for the first time on appeal that he had been "unfairly prejudiced" by evidence about a gang's criminal activities before he joined it. *See* G.Br. 110. Because that claim would have been available and obvious at trial, the panel could sensibly infer that counsel's failure to object represented a conscious tactical choice. *Coonan*, 938 F.2d at 1561. No such inference is possible here, where the basis of the claim (*Crawford*) did not yet exist.

[27] The Government overstates both the overlap of Stewart's and Bacanovic's statements and the extent of defense counsel's affirmative reliance on the latter. For example, although Glotzer and Farmer relayed statements by Stewart about her relationship with Waksal, G.Br. 111 (citing Tr. 2248, 2500-01), only Bacanovic described Stewart's ImClone holdings as "loyalty" stock, JA 488-89. Nor were Stewart's and Bacanovic's seemingly conflicting recollections about whether DeLuca knew of the $60 agreement "the centerpiece" of Stewart's defense to the conspiracy charge. G.Br. 112. That inconsistency was one among other, far more compelling, conflicts, including that the putative "conspirators" could not agree *when* they reached the $60 agreement, with *whom* Stewart spoke on December 27, and *whether* they had discussed the SEC investigation. Tr. 4695-4700.

objections already made, and forever foregoing claims based on legal theories unavailable at trial. That is not, and could not sensibly be, the law.

C. The Government Cannot Show That The Sixth Amendment Violations Did Not Affect Stewart's Substantial Rights

1. The Government bears the burden of persuasion

Where—as here—"a supervening decision alters settled law," *United States v. Viola*, 35 F.3d 37, 42 (2d Cir. 1994), holds that the Government bears the burden of showing that the defendant was not prejudiced by any error. The Government does not deny *Crawford* is such a decision; instead, it asserts, without explanation, that *Johnson v. United States*, 520 U.S. 465 (1997), "effectively rejected" *Viola*'s reasoning. G.Br. 117 n.*. *Johnson* did no such thing.

As *Viola* explained, Federal Rule of Criminal Procedure 52(b) "places three limits on appellate authority to review errors not preserved at trial": There must be "error"; the error must be "plain"; and it must "affect substantial rights." *Viola*, 35 F.3d at 41 (quotation marks and citation omitted). Although the defendant "[g]enerally … bears the burden of persuasion as to prejudice," *United States v. Olano*, 507 U.S. 725 (1993), "specifically left open … whether … special considerations apply 'where the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified.'" *Viola*, 35 F.3d at 41 (quoting *Olano*, 507 U.S. at 734). In such circumstances, *Viola* holds, "special considerations" warrant shifting the burden of persuasion as to prejudice. *Id.* at 42.

Nothing in *Johnson* affects this analysis. Like this case, *Johnson* featured an intervening change in law—the Supreme Court's holding in *United States v. Gaudin*, 515 U.S. 506 (1995), that, in perjury prosecutions, "materiality" is an offense element that must be submitted to the jury. *See Johnson*, 520 U.S. 463-64. Johnson's argument, however, rested on *Gaudin*'s substantive holding, not its timing. Failure to submit materiality to her jury, Johnson asserted, constituted a "structural" defect that was "outside Rule 52(b) altogether." *Id.* at 466. Even when discussing Rule 52(b)'s requirement that an error warrants reversal only if it affects "substantial rights," *Johnson* merely flagged (and declined to decide) whether failure to submit an offense element to the jury is the sort of error that "def[ies] harmless-error analysis," *id.* at 468, an issue that, once again, has nothing to do with the timing of the controlling decision. Because *Johnson* never considered, much less rejected, the view that "special considerations" warrant switching the burden of persuasion on prejudice where an intervening decision alters existing law, it has no impact on *Viola*.

2. The numerous *Crawford* violations were not harmless

As Stewart's opening brief explained, S.Br. 43-50—and the Government has not meaningfully disputed—Bacanovic was a key "witness" against Stewart. During its initial evidentiary presentation, the Government played lengthy excerpts of Bacanovic's SEC testimony to, *inter alia*, establish the background of Stewart

and Bacanovic's relationship, explain Stewart's attitude towards her ImClone holdings, and corroborate the testimony of its star witness on key points. The Government's final piece of evidence—and one of only two pieces of evidence it offered in rebuttal—was out-of-court testimony in which Bacanovic flatly contradicted the in-court testimony of the defense's star witness and, in doing so, also attacked Stewart's credibility. The Government replayed excerpts of Bacanovic's SEC testimony *14 times* in its two closing arguments, repeatedly using Bacanovic's statements to suggest that Faneuil was right and DeLuca wrong about key points. Having "emphasized" Bacanovic's testimony so heavily, on issues "plainly critical to the jury's decision," *Bruno*, 383 F.3d at 80 (quotation marks and citation omitted), the Government cannot demonstrate that the numerous and serious *Crawford* violations did not "substantially influence the jury," *United States v. Jean-Baptiste*, 166 F.3d 102, 108 (2d Cir. 1999), especially given the closeness of the evidence on the specifications for which Stewart was convicted. *See* S.Br. 20-23; *supra*, at 3-5.

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The Confrontation Clause does not apply to a defendant's own statements. *United States v. Rios Ruiz*, 579 F.2d 670, 676-77 (1st Cir. 1978). It does not apply to out-of-court statements by a witness who testifies at trial, or to statements offered and properly received for purposes that do not go to their truth. *Crawford*,

124 S. Ct. at 1369 n.9. And it will rarely bar admission of co-conspirator statements. *See supra*, at 15-18.

But none of that applies here. Rather, this case implicates the core of the Sixth Amendment. Like the declarations in *Crawford*, Bacanovic's formal, recorded, and sworn statements to prosecutorial personnel were "testimonial under any definition," *Crawford*, 124 S. Ct. at 1370, and the Government never disputes that it used those statements against Stewart for their truth. Nor could it: Statements such as, "You heard Peter Bacanovic testify that he never talked to Heidi DeLuca about any agreement to sell it at 60," Tr. 4536, made by a prosecutor during closing, are textbook examples of what the Sixth Amendment forbids. The *Crawford* violations were clear and obvious, requiring reversal by this Court.

III. SEVERE GOVERNMENTAL MISCONDUCT REQUIRED A NEW TRIAL, OR, AT VERY LEAST, A HEARING

No reported decision affirms a conviction in a situation involving anything approaching the level of governmental misconduct present here. Stewart challenges: (1) concededly false testimony; (2) about key matters; (3) by a high-ranking government official (the head of a "law enforcement agency" crime lab); (4) who worked closely with prosecutors before and during trial; (5) where the false testimony was known to *at least* four other government officials, including two Secret Service *Bureau Chiefs*; and (6) at very least, should have triggered suspicions by the prosecutors. S.Br. 54-74.

As explained in Stewart's opening brief, "reversal is 'virtually automatic'" if the Government "knew or should have known" of perjury by its own witnesses. S.Br. 54. Two separate factors satisfy that standard here: (1) Lawrence and the Secret Service colleagues who knew of his lies *were* "the Government" for purposes of the "virtually automatic" rule; and (2) even if the trial prosecutors lacked actual knowledge that Lawrence testified falsely, their failure to detect the falsity was negligent at best and willfully blind at worst. Given these facts, and the "reasonable likelihood" that revelation of Lawrence's lies at trial could have changed the outcome, this Court should reverse.[28]

A. Lawrence And The Secret Service Colleagues Who Knew Of His Lies Were "The Government" For Purposes Of The "Virtually Automatic" Reversal Rule

The Government begins with a startling assertion. It "is not clear in this Circuit," it contends, that "*any* law enforcement agent's knowledge of perjury can be imputed to prosecutors for purposes of determining whether a new trial is required." G.Br. 197 (emphasis added). But it is "clear"—in this Circuit and nationwide.

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[28] The Government asserts that this Court should defer to the District Court's "findings of fact." G.Br. 192. As "mixed question[s]," however, the issues concerning Lawrence's false testimony are subject to this Court's "independent examination." *United States v. Zagari*, 111 F.3d 307, 320 (2d Cir. 1997); *United States v. Payne*, 63 F.3d 1200, 1209 (2d Cir. 1995); *United States v. Rivalta*, 925 F.2d 596, 597 (2d Cir. 1991).

More than two decades ago, this Court declared that a police officer's knowledge of false testimony "may be attributable to the prosecutor" if the officer functioned as an "arm of the prosecution." *Wedra v. Thomas*, 671 F.2d 713, 717 n.1 (2d Cir. 1982)). Although the Government dismissively characterizes this clear statement as "*dicta*," G.Br. 197, one of the very authorities upon which the Government relies concludes that was a *holding*. *See Vail v. Walker*, No. 96-CV-578, 1997 WL 695583, at *5 (N.D.N.Y. Nov. 4, 1997) (quoted at G.Br. 197).

In any event, the Supreme Court has held that knowledge of individuals "acting on the government's behalf in the case" may be imputed to prosecutors for *Brady* purposes. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). Like governmental knowledge of exculpatory materials, governmental knowledge of perjury is, *Kyles* confirms, a *Brady* "situatio[n]." *Id.* at 433. The Government offers no response to Stewart's argument, S.Br. 63, that *Kyles* establishes the governing standard. *See Freeman v. United States*, 284 F. Supp. 2d 217, 227 (D. Mass. 2003) (applying *Kyles* in perjury context).

Finally, if this point were somehow in doubt, the Government's "no imputation" rule could not be squared with the Supreme Court's recognition that prosecutors play a "special role" in our justice system. *Strickler v. Greene*, 527 U.S. 263, 281 (1999). Holding prosecutors responsible *only* for things that they actually know would create a perverse incentive for prosecutors to avoid hearing

things that might cause them to learn, or acquire reasons to suspect, that one of their witnesses intended to lie or already had lied. In contrast, charging prosecutors with knowledge of all persons "acting on the government's behalf in the case," *Kyles*, 514 U.S. at 437, encourages them to prevent perjury in the first place.

The Government also offers a fallback position. Even if knowledge of perjury may *sometimes* be imputed, the Government insists, it cannot be here, because Secret Service officials did not play "the traditional role of a criminal investigator, doing things like executing search warrants … or serving as the case agent." G.Br. 199. This argument fails, both legally and factually.

As to the law: *Kyles* squarely holds that *all* persons "acting on the government's behalf in the case" are part of the prosecution team. 514 U.S. at 437. The proper inquiry is not what *particular tasks* the official performed, it is whether the official *worked with* the prosecutors; if so, the prosecutors are "responsib[le]" for that official's knowledge. *Id.* at 438; *see United States v. Boyd*, 833 F. Supp. 1277, 1353 (N.D. Ill. 1993) (prosecution "encompasses not only Assistant United States Attorneys …, but also other [USAO] personnel, such as paralegals [as well as] … police officers, *federal agents and other investigatory personnel* who participated in the investigation and prosecution of the case." (emphasis added)). Appellate courts applying *Kyles* have treated government officials *far* less involved

with investigation and prosecution than the Secret Service was in this case as members of the "prosecution team." *See Mastracchio v. Vose*, 274 F.3d 590, 599-600 (1st Cir. 2001) ("members of the witness protection team"); *United States v. Wilson*, 237 F.3d 827, 832 (7th Cir. 2001) (U.S. Marshall's Service, though its only role was "keep[ing] the defendants in custody").

Besides being established law, the *Kyles* rule is far more sensible than one focusing solely on the particular tasks performed. This case illustrates why. Lawrence was not the only official aware of his lies: Susan Fortunato (the agent who actually conducted the tests for which Lawrence falsely claimed joint responsibility), and Brittany King (the Secret Service analyst to whom Lawrence sent various text messages) both knew as well. In addition, two Secret Service *Bureau Chiefs*—Benjamin Moore and Richard Dusak—also knew of Lawrence's lies before the trial's conclusion but did *nothing* to inform defense counsel or the District Court.

The Government's total failure to discuss Moore and Dusak is understandable. No principle would justify holding prosecutors responsible for knowledge of perjury by a police officer who executes a search warrant, or by a paralegal who proofreads the prosecutor's briefs, but not for knowledge of perjury by high-ranking officials in a federal law enforcement agency in a case they are *supervising*.

Nor does the *Kyles* standard unduly hamper law enforcement. As this Court has explained, *Kyles* properly balances the pertinent individual and governmental interests:

> An individual prosecutor is presumed … to have knowledge of *all information gathered in connection with his office's investigation of the case* …. Nonetheless, knowledge on the part of persons employed by a different office of the government does not in all instances warrant the imputation of knowledge to the prosecutor, for the imposition of an unlimited duty on a prosecutor to inquire of *other offices not working with the prosecutor's office on the case in question* would inappropriately require a monolithic view of government that would condemn the prosecution of criminal cases to a state of paralysis.

United States v. Avellino, 136 F.3d 249, 255 (2d Cir. 1998) (internal quotation marks and citation omitted) (emphases added).

Ultimately, however, the rule's precise formulation does not affect this case. Whether prosecutors are charged with the knowledge of persons acting "on the government's behalf," "working in conjunction" with the police and prosecutors, or working as "an arm of the prosecution," the result is the same. This case does not involve perjury by a "percipient" eyewitness who happened to be a government employee,[29] or perjury known to state officials in a federal prosecution,[30] or

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[29] Lawrence "was not merely an occurrence witness whose presence at the trial was determined by his relationship to the facts of the case. The [Government] selected him to offer the jury his expert opinion on [a key aspect of the case] and relied upon the credibility imparted by his expertise." *People v. Cornille*, 448 N.E.2d 857, 865 (Ill. 1983).

officials of an agency unconnected to the investigation.[31] Rather, the Secret Service conducted the investigative tests leading to the decision to indict, S.Br. 65, 75 n.30, conducted follow-up investigatory testing, and assisted with Stewart's prosecution before and during trial, S.Br. 63-64.

Because the Secret Service officials were so closely connected to key aspects of the investigation and prosecution, it is irrelevant that they were not involved in *all other* aspects as well. *See* G.Br. 199-201 (Secret Service did not "serve a single subpoena" or "participat[e] in any charging decisions").[32] One need not mastermind an entire investigation and prosecution to work "on the government's behalf." Here, in particular, the shocking complicity of so many high-ranking government enforcement officials fully warrants application of the strictest rule.

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[30] *Carey v. Duckworth*, 738 F.2d 875, 877-79 (7th Cir. 1984); *Wilson*, 237 F.3d at 832; *In re Sealed Case No. 99-3096*, 185 F.3d 887, 896 (D.C. Cir. 1999); *United States v. Ramos-Catagena*, 9 F. Supp. 2d 88, 91 (D.P.R. 1998).

[31] *Pina v. Henderson*, 752 F.2d 47, 49 (2d Cir. 1985) (knowledge of *parole officer* who "did not work in conjunction with either the police or the prosecutor" could not be attributed to prosecutors).

[32] The Government's assertion that Lawrence, although head of the Secret Service crime lab, is not an "agent" of that law enforcement agency and lacks authority "to … conduct investigations," G.Br. 200, contradicts Lawrence's testimony that "[i]n my function as head of the laboratory, whenever someone … counterfeits a bill or a credit card, something like that, our job is to try to figure out who that person is and spot that kind of a crime," Tr. 3272-73. In any event, the Secret Service assisted the FBI and USAO in investigating and prosecuting the case.

The Government's efforts to downplay the significance of the Secret Service's role also ignore the singular importance of the legitimacy of the "@60" worksheet. The only document discussed in all three openings, the worksheet was central to the Government's efforts to prove the "@60" counts and specifications, S.Br. 25, yet also provided sweeping exculpatory evidence undercutting the Government's *entire* theory of the case, S.Br. 70-71. The Secret Service officials' knowledge of false testimony concerning, *inter alia*, Lawrence's work on the worksheet triggers the "virtually automatic" reversal rule.

B. The Prosecutors' Unexplained Failure To Detect And Remedy The False Testimony Warrants A New Trial, And, At Very Least, Requires An Evidentiary Hearing

The "virtually automatic" reversal rule applies for a second reason: the prosecutors' still unexplained failure to detect and/or remedy false testimony that should have been obvious. For three reasons—never addressed by the Government or the District Court—the record conclusively establishes that the prosecutors were at least negligent.

First, one day before Lawrence's testimony, the Government told the District Court that "someone else"—not Lawrence—conducted the 2002 testing, and that Lawrence "reviewed those [tests] in January [2004] and issued a new report." S.Br. 67.

Second, on February 19, 2004, early in Lawrence's direct examination, the prosecutors again made clear their understanding that Fortunato, not Lawrence, conducted the 2002 testing:

> Q. Did Ms. Fortunato perform an analysis on [the worksheet] at some point?
>
> A. Yes, she did.
>
> Q. And approximately when did *she* perform that analysis?
>
> A. In July of 2002, ending in August of 2002.
>
> Q. Did there come a time that *you* performed a separate analysis on [the worksheet]?
>
> A. Yes. I performed an analysis in January of 2004.

Tr. 3277 (emphases added). Later that same day, by contrast, Lawrence offered that he had personally "[o]bserved, participated [in] and reviewed" the lab's testing in 2002 and 2004. Tr. 3322.[33]

Third, Bureau Chief Moore, whose entire knowledge of the matter derived from attending the *very same pretrial meetings as the prosecutors*, immediately detected Lawrence's lies. When Lawrence asserted, contrary to what Moore heard at those meetings, that he had "[o]bserved, participated [in] and reviewed" the 2002 tests, Tr. 3322, Moore wrote "oh-oh" and thought "we might have a problem

[33] Because Lawrence's claims of personal involvement obviously bolstered his testimony, it is reasonable to infer that the prosecutors failed (both then and throughout his testimony) to ask about Lawrence's role in 2002 because they understood, or at least suspected, that he *had* no role in 2002.

here," JA 1237. Moore confirmed his suspicions by conducting one interview. The prosecutors were duty bound to do the same. S.Br. 68.

Nor was the District Court entitled to make "findings of fact," G.Br. 192, on disputed issues "extraneous" to the record without a hearing. *See United States v. Chagra*, 735 F.2d 870, 874 (5th Cir. 1984) ("[T]he alleged governmental misconduct could not be shown except by an evidentiary hearing, because it was (as alleged) extraneous to and outside of the trial record."); *Lindhorst v. United States*, 585 F.2d 361, 365 (8th Cir. 1978) (requiring evidentiary hearing because "[t]his is not the kind of case which the district judge 'could completely resolve by drawing upon his own personal knowledge or recollection.'" (quoting *Machibroda v. United States*, 368 U.S. 487, 494 (1962))). To list just two examples, the District Court: (1) discounted *all* Lawrence's text messages, despite the Government's failure to contest most of them; and (2) failed to acknowledge that AUSA Burck's detailed affidavit concerning his pretrial understanding of Lawrence's role in 2002 conflicts with the Government's clear statements on February 18 and 19, *see* S.Br. 75 n.30; *see also* SSA 4.

The present record demonstrates that the prosecutors should have known that Lawrence lied. That fact is a fully sufficient basis for triggering the "virtually automatic" reversal rule. Moreover, absent a hearing, it is impossible to dispel a further inference: that the prosecutors "consciously avoided recognizing the

obvious—that is, that [Lawrence] was not telling the truth." *United States v. Wallach*, 935 F.2d 445, 457 (2d Cir. 1991).

C. The "Virtually Automatic" Reversal Rule Is Not One of Almost-Invariable Affirmance

Where, as here, the Government knew or should have known of false testimony by one of its witnesses, a conviction *must* be set aside unless "there is no reasonable likelihood that the false testimony could have affected … the jury." *Shih Wei Su v. Filion*, 335 F.3d 119, 127 (2d Cir. 2003) (internal quotation marks and citation omitted). As Stewart explained in her opening brief, S.Br. 68-69, this rule, once triggered, makes reversal "virtually automatic." *See Wallach*, 935 F.2d at 456.

Seeking to avoid this conclusion, the Government contends that various cases, epitomized by *United States v. Wong*, 78 F.3d 73 (2d Cir. 1996), have "explained the import of this language," G.Br. 194, supposedly demonstrating that reversal is *not* required if "there is sufficient evidence of the defendant's guilt independent of the perjured testimony," G.Br. 195; *see* G.Br. 194 (insisting reversal is warranted *only* if the "conviction depends on the testimony of a single government witness, or on a witness whose credibility was not attacked on cross-examination").

But a sufficiency-of-the-evidence standard is far different from one focused on whether there is a "reasonable likelihood" that something "could have" affected

the jury. *Shih Wei Su*, 335 F.3d at 127. Numerous appellate courts, including this one, have rejected the Government's assertion that reversal is the exception—rather than the rule—when the Government knows or should have known of perjury by one of its witnesses.[34] Although "motions for a new trial based on the identification of perjured testimony should be granted only with great caution and in the most extraordinary circumstances," *United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992), relatively few new trials are ordered not because the "virtually automatic" rule is toothless, but because allegations of witness perjury are far easier to make than prove, and because the relevant government actors are often unaware of perjury when it does occur.

Nor does *Wong* support the Government's efforts to transform a rule of "virtually automatic" reversal into one of nearly invariable affirmance. Applying the *Wallach* standard, *Wong* denied a new trial because: (1) the perjury in that case involved a wholly "collateral issue" (whether the witness had paid income taxes in

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[34] *See United States v. Vozzella*, 124 F.3d 389, 392-93 (2d Cir. 1997) (standard "easily met" when the government presented testimony about loan records "known to be partially false"); *Wallach*, 935 F.2d at 455 (reversing where perjury was collateral but was committed by an important witness); *United States v. Mason*, 293 F.3d 826, 828-29 (5th Cir. 2002) (witness falsely denied existence of plea agreement); *United States v. Boyd*, 55 F.3d 239, 246 (7th Cir. 1995) (witness falsely implied he no longer used drugs); *DeMarco v. United States*, 928 F.2d 1074, 1075-77 (11th Cir. 1991) (witness falsely testified about leniency received because of agreement to testify); *United States v. Stoddard*, 875 F.2d 1233, 1237-39 (6th Cir. 1989) (reversing denial of new trial motion); *Schneider v. Estelle*, 552 F.2d 593, 595 (5th Cir. 1977) (same); *United States v. Sutton*, 542 F.2d 1239, 1242 (4th Cir. 1976) (same).

1987); and (2) the false testimony had been "impeached" and later "recanted" during cross-examination. *Wong*, 78 F.3d at 82. In that situation, this Court observed, "further impeachment evidence would have been cumulative" and thus was "insufficient to warrant a new trial." *Id.* (quotation marks and citation omitted).[35]

This case is far different from *Wong*. First, Lawrence's lies did not involve "collateral" issues, which are those having nothing to do with the facts relevant to the merits of the case. *See United States v. White*, 972 F.2d 16, 20-21 (2d Cir. 1992) (distinguishing "perjury involv[ing] some collateral matter concerning the witness" from "testimony about facts relevant to the merits of the case"). Unlike the civilian witness's false testimony in *Wong* about his tax payment practices—a matter unconnected with his substantive testimony about drug charges against the defendants—Lawrence's lies went to the heart of a key issue: the authenticity of

[35] To the extent *Wong* contains language appearing to equate the standard for granting a new trial based on Government knowledge of perjury with Federal Rule of Criminal Procedure 33's ordinary standard for granting a new trial based on newly discovered evidence, that suggestion cannot be squared with controlling Supreme Court authority. *See Strickler*, 527 U.S. at 290 (conviction resting on known perjured testimony may not be affirmed simply because it is supported by "ample, independent evidence of guilt"); *Kyles*, 514 U.S. at 433 n.7 & 435 n.8 (distinguishing "reasonable likelihood" and "sufficiency-of-the-evidence" tests); *United States v. Agurs*, 427 U.S. 97, 111 (1976) (rule governing known perjury is *not* the same as the one governing "the usual motion for a new trial based on newly discovered evidence"); *see also United States v. Antone*, 603 F.2d 566, 569 (5th Cir. 1979) (noting existence of an "exception … [to Rule 33's ordinary requirements] where it is shown that the Government's case included false testimony and the prosecution knew or should have known of the falsehood").

the "@60" worksheet. Lawrence's false statements that he—"the national expert for ink," Tr. 3273—had *personally* "[o]bserved, participated [in] and reviewed" both tests, Tr. 3322, were no more "collateral" than a police officer's false statement in a murder trial that he, rather than another officer from whom the jury never heard, witnessed the murder. *See People v. Cornille*, 448 N.E.2d 857, 865 (Ill. 1983) (prosecution had "selected [a particular witness] to offer the jury *his* expert opinion … and relied upon the credibility imparted by *his expertise*" (emphases added)). Indeed, in prosecuting Lawrence for perjury, the Government described Lawrence's lies as "critically important." Lawrence Tr. 34; *see id.* (Lawrence's "lies were important ones").[36]

Second, the Government errs in asserting that Lawrence's testimony was "almost entirely undisputed." G.Br. 213. Lawrence challenged defense expert Albert Lyter's conclusion that the "dash" was written in the same ink as the "@60",[37] Tr. 3710, claiming that it was impossible to tell because of contamination and insufficient ink for testing. Tr. 3296-97. Lawrence also disputed Lyter's view that "densitometry" could demonstrate whether the remaining marks—other than the dash and the "@60" notation—were made by at least two different pens.

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[36] Although defense counsel *clarified* the precise nature of Lawrence's claims to direct personal involvement during cross-examination, Lawrence never recanted and there was no way to impeach his claims until his Secret Service colleagues belatedly came forward. *See* SSA 2. *Cf. Wong*, 78 F.3d at 82.

[37] Critically, Lyter's analysis corroborated the defense claim that the "@60" notation was written on or before December 24, 2001. *See* S.Br. 20 n.9, 57.

Tr. 3738-43, 4190, 4195. These areas of disagreement were critical to the entire defense theory of the case. S.Br. 57, 69-71. The Government was thus quite right when it told Lawrence's jury that Stewart's "had to resolve a battle of the experts." Lawrence Tr. 34.

Finally, the importance of Lawrence's lies cannot be narrowly confined to the disagreement between the experts. The Government's prompt revelation of Lawrence's false testimony would have been dramatic indeed. The jury would have learned that, in a case involving false statements, a *senior government official* had lied to them about his personal involvement with *a critical piece of evidence*. *Cf. Wong*, 78 F.3d at 76 (lying witness was "a paid confidential informant" and lies were about his tax payment practices). The jury would also have learned that the prosecutors, "nervous about the ink [Fortunato] didn't test," JA 1561, called Lawrence, rather than Fortunato, in the hope that "all the big cases in [Lawrence's] [background]," JA 1521, would create a "CSI effect," JA 1521, that would overcome Fortunato's "fuckedup report," JA 1562.

Revelations such as these could easily have led the jury to conclude that the Government was overreaching. The Government's case against Stewart was, at bottom, about false statements, and the trial record about those specifications depended almost *entirely* on the testimony of government employees. Under those circumstances, revelations that a Government witness—who was also a high-

ranking governmental official—had had testified falsely could plainly have shaken the jury's faith in other government employees who testified, increasing the likelihood of an acquittal. As AUSA Burck acknowledged at Lawrence's trial, the revelation of his lies "would have been a *big problem for the case, for the prosecutors*, and [for Lawrence]." Lawrence Tr. 473 (emphasis added). Burck explained:

> If he lies about something he testifies about, … then it affects his credibility as a witness. It affects the prosecutors. We are not allowed to put on perjured testimony at any time, and we would have to tell the jury, the judge, the defense counsel, that a witness had lied. So it would have made a big difference in that respect.

Lawrence Tr. 473

IV. EVIDENCE OF JUROR DISHONESTY REQUIRED FURTHER INQUIRY

The Government spends so much time "answering" an argument Stewart does not make that it says virtually nothing about the one she does. A new trial is not warranted, the Government contends, because Stewart has not proved that Hartridge's repeated lies flowed from bias and/or desire to sit on the jury. G.Br. 173-81. But Stewart is not contending that the District Court erred in denying her new trial motion. Rather, she argues that, given "clear, strong, substantial and incontrovertible evidence," *United States v. Ianniello*, 866 F.2d 540, 543 (2d Cir. 1989) (quotation marks and citation omitted), that many statements on Hartridge's juror form were factually false, a hearing was essential

to investigate *why* Hartridge lied so many times. To that, the Government has no answer.[38]

The Government does not dispute that inquiry is *required* whenever "reasonable grounds for investigation exist." *United States v. Moon*, 718 F.2d 1210, 1234 (2d. Cir. 1983); *see id.* (once "impropriety" is shown, question is whether it "*could have* prejudiced the trial"(emphasis added)). Stewart's evidence—including court records and affidavits by witnesses with personal knowledge—amply satisfies that standard, as demonstrated by the fact that *every* post-*McDonough* Second Circuit juror bias case cited by the Government included a post-verdict evidentiary inquiry. *United States v. Greer*, 285 F.3d 158, 166 (2000); *United States v. Shaoul*, 41 F.3d 811, 814 (1994); *United States v. Langford*, 990 F.2d 65, 67 (1993); *United States v. Colombo*, 869 F.2d 149, 150 (1989); *see* S.Br. 81-82.[39] The same is true of all but one of the precedents from

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[38] The Government also asserts that Stewart's conduct during *voir dire* shows she was not concerned about jurors' criminal histories. G.Br. 176. Stewart thoroughly refuted this allegation below, *see* Reply Mem. of Law in Further Supp. of Martha Stewart's Mot. for New Trial Pursuant to Fed. R. Crim. P. 33, at 4-5, and the District Court did not rely upon it.

[39] *See also United States v. Moten*, 582 F.2d 654, 657-58 (2d Cir. 1978) (remanding for questioning about credible allegations of juror misconduct). *Moon* and *King v. United States*, 576 F.2d 432 (2d Cir. 1978), involved juror exposure to outside influences, rather than lies during *voir dire*. In *Moon*, the district court "conduct[ed] a hearing where" five jurors were questioned, 718 F.2d at 1233-34; in *King*, this Court upheld a refusal to order a hearing because the evidence of exposure was "weakly authenticated, vague, and speculative," 576 F.2d at 438. *United States v. Torres*, 128 F.3d 38 (2d Cir. 1997), involved government witness

other courts. *Green v. White*, 232 F.3d 671, 673 (9th Cir. 2000); *Dyer v. Calderon*, 151 F.3d 970, 972-74, 979 (9th Cir. 1998) (en banc); *United States v. North*, 910 F.2d 843, 903 (D.C. Cir. 1990) (*per curiam*); *Chase Manhattan Bank, N.A. v. T&N plc*, No. 87 Civ. 4436, 1997 WL 221203, at *8 (S.D.N.Y. Apr. 28, 1997).[40]

The reason for this consistent pattern is plain. Outside the relatively rare circumstance where a particular lie "simultaneously demonstrates both dishonesty and partiality," *Greer*, 285 F.3d at 172, the only way to determine what motivated a juror's false responses is to *ask the juror*. *See Ianniello*, 866 F.2d at 543 ("[I]f the allegations were conclusive, there would be no need for a hearing."). *Cf. United States v. Perez*, 387 F.3d 201, 203, 205-07 (2d Cir. 2004) (because "[f]ew prospective jurors will admit to bias," such assessments require "individualized questioning" and careful attention to juror's "demeanor and tone"). Moreover, because courts strongly disfavor having lawyers conduct the intrusive factual investigations needed to determine the subjective motivations underlying a juror's decision to be untruthful, *see Ianniello*, 866 F.2d at 544-45; *Moten*, 582 F.2d at

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perjury, not juror dishonesty. In addition, *Torres*' basis for affirming the district court's refusal to convene a hearing—*i.e.*, there was no "reasonable likelihood" that the witness's false testimony "affected the jury's decision," *id.* at 49—could not justify the District Court's actions here because violations of the right to an impartial jury "cannot be harmless." *Dyer v. Calderon*, 151 F.3d 970, 973 n.2 (9th Cir. 1998) (en banc).

[40] The sole exception is *United States v. Ross*, 263 F.3d 844 (8th Cir. 2001). There is no indication, however, that Ross ever requested a hearing, and his appellate brief never suggested that the trial court erred in not convening one. *See* Brief for Appellant, *available at* 2000 WL 33977710.

664-65; *Miller v. United States*, 403 F.2d 77 (2d Cir. 1968), a court-convened hearing is the only realistic arena for such questions.

On occasion, a hearing may reveal that apparently false answers were actually truthful. *See United States v. Colombo*, 909 F.2d 711, 713 (2d Cir. 1990). Hearings will also sometimes reveal that a juror made a good faith mistake, *Shaoul*, 41 F.3d at 814, 816; *Chase Manhattan*, 1997 WL 221203, at *9, lied only to avoid embarrassment, *Langford*, 990 F.2d at 69-70, or harbored no "actual bias," *Greer*, 285 F.3d at 171; *North*, 910 F.2d at 903-04. In such instances, a new trial will not be warranted because only those "motives for concealing … that affect a juror's impartiality can truly be said to affect the fairness of a trial." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984).[41]

Other times, however, further scrutiny will reveal that a juror lied for more "sinister" reasons, *Green*, 232 F.3d at 678 n.10, such as a "desire to sit on the

[41] The Government repeatedly overlooks that what matters is not the *subject* of a given false statement, but rather the juror's "*motives* for concealing." *McDonough*, 464 U.S. at 556 (emphasis added). *Langford* does not hold that "deliberate concealment of prior arrests does not justify a new trial," G.Br. 173; it establishes that a new trial is not warranted where a juror lies "to avoid embarrassment," rather than "desire to sit on the jury" or because of "bia[s] or prejudic[e] against" the defendant, *Langford*, 990 F.2d at 69-70. *North* does not establish that lies about criminal histories of family members are *per se* irrelevant, G.Br. 174; it simply applied the well-established rule that no new trial is warranted absent juror bias, *see North*, 910 F.2d at 903; *see also Chase Manhattan*, 1997 WL 221203, at *9 (denying new trial because court found, after a hearing, that juror "believed" her answers truthful and had not been "attempting to answer untruthfully or to hold back information that was responsive").

jury," or an attempt to head off further questioning that might reveal "bia[s] or prejudic[e]." *Langford*, 990 F.2d at 70. In such circumstances, a new trial will be required to vindicate the defendant's Sixth Amendment right to an "impartial jury." *See Dyer*, 151 F.3d at 982 ("The individual who lies in order to improve his chances of serving has too much of a stake in the matter to be considered indifferent.").

Neither Stewart, nor the Government, nor the District Court knows why Hartridge made numerous factually false and otherwise questionable statements, about a wide variety of subjects.[42] Although the trial judge and prosecutors have proffered various possible explanations, "a judge investigating juror bias must find facts, not make assumptions." *Id.* at 976. Because the only way to find such facts would be through evidentiary inquiry, the District Court erred in denying Stewart's request for one.

CONCLUSION

For the above-stated reasons, and those set forth in Stewart's opening brief, this Court should grant the relief requested in the opening brief. S.Br. 86.

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[42] Stewart's brief did not "claim that Hartridge deliberately answered these questions falsely … because he was biased against Stewart because she is a woman and because he wished to be seated on the jury." G.Br. 171. Instead, it pointed out some reasons that *could have* motivated Hartridge's repeated decisions to lie, but emphasized that "Hartridge's true motives remain a mystery" because of the "erroneou[s] refus[al] to convene a hearing." S.Br. 84-85.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it does not exceed 14,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and the Court has granted Appellant permission to file an oversized brief; and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word XP in 14-point Times New Roman.

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