21-543(L)

21-559(CON)

To Be Argued By:
ALEXANDRA A.E. SHAPIRO

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

PARKER H. PETIT, WILLIAM TAYLOR,

Defendants-Appellants.

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

REPLY BRIEF FOR DEFENDANT-APPELLANT PARKER H. PETIT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes, Regulations & Rules

INTRODUCTION

Parker H. Petit was convicted of a single count of securities fraud. This count alleged that MiMedx told investors it followed GAAP but reported some revenue which, under GAAP, should not have been included. There were no fictional sales, forged purchase orders, or phantom shipments. The disputed revenue reflected amounts billed for actual transactions involving genuine products that MiMedx really shipped and for which payments were collected. As the opening brief explained, the government failed to prove any deception, because it failed to prove MiMedx's reported revenue figures were incorrect under GAAP. And it failed to prove that Petit, who was neither a lawyer nor an accountant, knew the revenue figures did not accord with GAAP. Moreover, on these key disputed elements—deception and scienter—the district court committed multiple errors in the jury instructions that, individually and collectively, deprived Petit of a fair trial.

The government attempts to reframe the issues and dodges most of Petit's arguments. For example, its opposition brief proceeds as if Petit was convicted of the (far broader) conspiracy charge, even though the jury acquitted him on that count. It ignores the focus of the securities fraud charge, why that charge required proof of a GAAP violation, and the accountants' disagreement and conflicting testimony on the nuances of GAAP, which were central in this case, but absent in the other cases on which the government relies.

As to the erroneous jury instructions, the government cannot dispute that the Supreme Court has twice held that "willfulness" requires proof a criminal defendant knew his conduct was unlawful, or that this Court recently adopted that standard for all securities fraud crimes. And the government does not even try to explain how an executive who invited an audit committee inquiry into revenue recognition issues could have consciously avoided learning the truth about those issues. Nor does it offer any good reason to excuse the district court's failure to include the two essential components of any conscious avoidance instruction.

Petit's conviction should be reversed.

ARGUMENT

I. THE GOVERNMENT FAILED TO PROVE THE CHARGED SCHEME TO DEFRAUD

A. To Prove The Charged Securities Fraud, The Government Had To Prove MiMedx Violated GAAP

Petit was convicted of one count of securities fraud for allegedly "engag[ing] in a scheme to mislead the shareholders of MiMedx and the investing public by fraudulently inflating MiMedx's reported revenue." (A-77). The conspiracy count alleged three distinct objects, one of which involved misleading the auditors, but *Petit was acquitted of that charge*. As to the substantive count, the government was required to prove a GAAP violation because the only deception charged in that count was the alleged inflation of revenues. The number of pages or paragraphs in

the indictment and how often GAAP is mentioned (*see* G.Br.22) are irrelevant. As the opening brief explained, MiMedx's SEC filings stated that revenue was recorded in accordance with GAAP, so those filings could only deceive investors if the reported revenue included amounts disallowed under GAAP. (Br.24-25).

The government disregards most of these points, instead targeting an argument Petit never made—that all "accounting fraud requires proof of GAAP violations." (G.Br.27). But Petit is not arguing that the government must *always* prove a GAAP violation in every securities case involving accounting fraud. The point is simply this: Where the charge is deceiving investors by publishing revenue figures the company asserted were calculated under GAAP when they were not, the only way to establish a false statement is by proving the company included revenue that should not have been recognized under GAAP.

And here the charge turned entirely on GAAP—specifically, when GAAP allows sale proceeds to be recognized as revenue, and when it does not. Although the government derides the defendants for steering transactions at quarter's end solely to meet MiMedx's revenue targets, that was not the basis for the alleged fraud; indeed, it was undisputed that was a legitimate business practice. And, contrary to the suggestion in the government's brief, its trial theory was not that the defendants committed fraud by reporting revenue on payments MiMedx had not yet received. The evidence established that the accounting rules permit companies

to report sale proceeds as revenue well before any payment is received; in fact, such "accrual" accounting is the default. (A-216-18, A-263-64). Thus, the theory of fraud was that MiMedx recognized revenue from certain transactions which involved actual shipments of products to actual customers and were supported by actual purchase orders and invoices, but nonetheless failed to qualify for accrual accounting under GAAP. Accordingly, the government had to demonstrate that MiMedx's reported revenues were "inflated" because GAAP precluded MiMedx from reporting revenue before payment was received, given particular aspects of the transactions—*e.g.*, that SLR subsequently received a loan from Petit's family, that distributors had the right to return certain products.

The three cases on which the government relies—*United States v. Rigas*, 490 F.3d 208 (2d Cir. 2007); *United States v. Ebbers*, 458 F.3d 110 (2d Cir. 2006); and *United States v. Simon*, 425 F.2d 796 (2d Cir. 1969)—do not hold otherwise. They simply did not involve situations in which the charged deception of investors hinged on whether GAAP allowed certain transactions to be classified in one bucket or another.

For instance, in *Rigas*, the government was not required to prove a GAAP violation because GAAP's "requirements [we]re not essential to the securities fraud alleged [t]here." 490 F.3d at 220. The case concerned the $3.2 billion fraud at cable giant Adelphia Communications Corp., in which Adelphia's controlling

family "reclassified" certain debts as belonging to their other entities even though Adelphia remained jointly and severally liable. *Id.* at 221. As a result, "investors were misled into believing that Adelphia had been infused with more cash." *Id.* The defendants challenged their convictions on the ground that the government should have been required to establish the GAAP disclosure requirements pertaining to the underlying loan agreements. This Court rejected that argument because the defendants' guilt "d[id] not turn on whether Adelphia's accounting statements complied with GAAP." *Id.* at 222; *see id.* at 221 ("Whether the reclassification was permitted under GAAP was not the issue."). The opposite is true here. If GAAP permitted MiMedx to recognize revenue on these transactions notwithstanding, for example, a distributor's right of return, then MiMedx's reported revenues complied with GAAP and there was no false statement.

In *Ebbers*, the defendant argued that the indictment "was flawed" because it did not even allege that the accounting violated GAAP. 458 F.3d at 125. However, the financial statements were misleading not because of any particular GAAP rule, but because the defendants concealed that they had changed their internal accounting guidelines. These "unannounced change[s] in bookkeeping" deceived investors who "would not have been alerted to the fact that revenue as previously calculated was actually down." *Id.* at 126. Likewise, in *Simon*, the question was not whether any specific GAAP rule was violated, but whether the

financial statements as a whole were materially misleading in light of defendants' undisclosed diversion of corporate funds for personal use and other chicanery. 425 F.2d at 806-08.

The opening brief explained (at 25-27) why the charged conduct in these three cases was distinguishable. Here, the issue was that investors were presented with revenue figures and told those figures accorded with the GAAP revenue recognition rules. That is why the investors here, unlike the investors in the other three cases, were misled *only* if MiMedx's reported revenue *did not* comply with GAAP. The government completely ignores this critical distinction.

The government also ignores that, through accounting witnesses Andersen and Urbizo, it attempted to prove a GAAP violation. (G.Br.29). It pretends these witnesses testified about MiMedx's "internal criteria" for recognizing revenue, not GAAP. (G.Br.5; *see* G.Br.23). Yet nothing in the record suggested MiMedx had its own, separate criteria for revenue recognition. Indeed, on the very transcript pages the government cites, Andersen confirmed that MiMedx was required to adhere to GAAP—which are "basically the rules of accounting"—"[b]ecause that's what's required when you're registered with the SEC as a public company." (SA-6). As a result, he testified, MiMedx applied the GAAP revenue recognition criteria to "mak[e] sure that the accounting was correct and that the financial statements were correct." (A-219).

Accordingly, Andersen and Urbizo testified extensively about GAAP. For instance, the government alleged that certain revenue should not have been recognized for CPM, Stability, and First Medical because there was a right of return; for CPM and SLR because of payments those companies received; and for Stability because there was no signed agreement. (Br.8-12; A-767, A-771-72, A-778, A-781-82). But, as Andersen and Urbizo confirmed, "GAAP" dictates whether "a company [may] recognize revenue even where there is a right of return" or there is "no agreement in place…when payment was due," and whether a payment to a customer "should have reduced" revenue. (A-270-71, A-646, A-655). As the government admits, whether revenue was "falsely inflated" depends on whether "'withheld facts would have altered'" how the "GAAP…accounting rules" applied. (G.Br.29 (quoting *United States v. Cuti*, 720 F.3d 453, 460 (2d Cir. 2013)). In determining whether revenue was false, what matters is the "GAAP…accounting rules"; if they were followed, revenue was properly recognized, but if they were not, it was "falsely inflated." That is why here, unlike in *Rigas*, *Ebbers*, and *Simon*, the government needed to prove a GAAP violation.

B. The Government Did Not Prove A GAAP Violation

The government did not meet this burden. Although Andersen and Urbizo testified about GAAP, their testimony did not establish a GAAP violation, and the government either ignores or fails to meaningfully address why.

1. First, the government failed to establish what GAAP required, let alone that MiMedx failed to meet those requirements. (Br.30-35, 38-40). The government does not dispute that Andersen and Urbizo contradicted themselves and each other regarding what the requirements were and how they applied to the transactions at issue, or that there were legitimate "difference[s] of opinion on [these] accounting matters." (Br.32-36). Nor does the government dispute that the GAAP revenue recognition criteria are ambiguous and inconclusive. (Br.38-40). For those reasons, as the opening brief explained, the reported revenue cannot be considered false. Where "a defendant is charged with false reporting based on" an "ambiguous" standard, the government must prove that "its interpretation…is the only objectively reasonable" one or "the defendant's statement was also false under [defendant's] alternative, objectively reasonable interpretation." *United States v. Harra*, 985 F.3d 196, 204 (3d Cir. 2021); *accord Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 69 (2007). The government nowhere addresses these authorities.

2. Second, the government offered no expert testimony on the subject of GAAP. As the opening brief explained, the district court erroneously admitted Andersen's and Urbizo's opinions about GAAP in the guise of lay opinion in violation of the Federal Rules of Evidence. (Br.28-37). A "lay opinion" must be "the product of reasoning processes familiar to the average person in everyday

life." *United States v. Garcia*, 413 F.3d 201, 215 (2d Cir. 2005); *accord United States v. Cabrera*, 13 F.4th 140, 149 (2d Cir. 2021). The complexities of GAAP revenue recognition—where even the accountants, Andersen and Urbizo, could not agree on how to apply the byzantine 347-page ASC 605 and other applicable authorities—obviously do not qualify. *See*, *e.g.*, *Wallace v. Andeavor Corp.*, 916 F.3d 423, 429 (5th Cir. 2019) ("opinion on the application of tax accounting definitions" requires "expert" proof based on "specialized accounting knowledge"). The government is unable to offer any response to these precedents and instead simply offers its own conclusory assertion that "[n]o authority requires expert testimony to prove allegations of accounting improprieties." (G.Br.29).

Acknowledging the critical nature of the accountants' lay opinion testimony, the government attempts to defend its admission under *Cuti* (G.Br.84-86), but its reliance on *Cuti* is misplaced. In *Cuti*, unlike here, "the defendants did not dispute that [GAAP] rules were appropriately and consistently applied." 720 F.3d at 457. Thus, when lay witnesses testified that withheld information would have impacted the accounting treatment, the defendants did not disagree. The application of these "undisputed accounting rules" was "straightforward" in *Cuti*, and the witnesses' "reasoning process" therefore was "transparent to the jurors." *Id.* at 458. Accordingly, there was no need to have an expert explain anything to the *Cuti* jury. The lay testimony sufficed.

But the opposite was true here—the accounting rules were not "undisputed" or "straightforward." Unlike in *Cuti*, it was not "transparent" whether or how, under those rules, any revenue was inflated. On the contrary, Andersen and Urbizo offered a haphazard, shifting, and contradictory analysis susceptible to legitimate difference of opinion. This is why expert proof was required: An "average person in everyday life" could not understand the issue, because the way it was presented to the jurors was incoherent and impossible for them to understand. *Garcia*, 413 F.3d at 215. The issue was, in other words, far too "technical" and "specialized" for lay testimony. *Id.*; (Br. 37). Expert proof was required, and the government's proof was insufficient without such an expert.

C. The Jury Was Improperly Instructed Regarding GAAP

If the Court does not reverse for insufficient proof of a GAAP violation, it should grant a new trial because the jury was improperly charged. As explained in the opening brief, the district court erroneously (1) conveyed that misleading the auditors was the same thing as misleading investors, and (2) conflated materiality with falsity. (Br.40-44). The government's defense of these instructional errors is meritless.

First, when the jury asked whether "misleading the auditors would operate as a deceit upon purchasers or sellers of MiMedx stock" (A-836), the district court should have clarified that these are different things. The district court not only

failed to state that they are different things; it conflated the two when they are separate and distinct. The conspiracy count included a charge that Petit agreed with others to mislead the auditors, whereas the securities fraud count charged him only with misleading investors. (Br.42-43). Yet the district court's response to the jury note blessed and reinforced the jury's misapprehension of the issue, by suggesting that the jury "understood fully" how a defendant can be "guilty of securities fraud." (Br.43). It confused matters further by suggesting that a deceit on the auditors is somehow "circumstantial evidence" that revenue was inflated in disclosures to investors. (Br.43). But even if information is not disclosed to auditors, that would impact the financial statements only if, under GAAP, disclosing that information would have necessarily reduced the amount of revenue recognized.

The government has no legitimate response to this. Instead, it appears to suggest that none of this matters because the government was not required to prove that MiMedx's reported revenue was false. The government says "statements" which are "arguably true" can deceive investors if they are "calculated to deceive." (G.Br.40 n.5). In other words, the government appears to be saying that if a defendant aspires to deceive investors, but does not actually lie, the defendant may be guilty of securities fraud. But that is just plain wrong. A statement to investors cannot "violate either §10(b) of the [Exchange] Act or Rule 10b–5…without any

deception." *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 476 (1977); *see United States v. Finnerty*, 533 F.3d 143, 148 (2d Cir. 2008) ("The language of §10(b) gives no indication that Congress meant to prohibit any conduct not involving…deception" or "market manipulation");[1] 15 U.S.C. §78j(b) (defendant must "use or employ" a "deceptive device" to violate §10(b)). "So the question is, what did [the defendant] say or do that was deceptive" to investors? *Finnerty*, 533 F.3d at 148. Indeed, the government elsewhere admits that it was obliged to show that Petit made "an untrue statement of a material fact"—namely, that he deceived investors by misstating MiMedx revenue. (G.Br.26 (citing Rule 10b–5)).

Second, instead of explaining that the government must prove both a false statement and its materiality, the district court erroneously instructed the jury that either would suffice. (Br.41). The government admits this was error, but claims the error was harmless because (1) the written charge stated the law correctly, and (2) the transcript must be inaccurate since the defendants did not object on the spot. (G.Br.36-41). But, as explained (Br.41 n.4), written instructions do not cure such an error. Furthermore, "the government's contention that the transcript is not accurate does not take into account that in the absence of a motion to correct or modify the record under Federal Rule of Appellate Procedure 10(e), we accept as

[1] "Manipulation" is a term of art irrelevant here. *See Santa Fe*, 430 U.S. at 476.

accurate the transcript of the district court proceedings." *United States v. Sussman*, 709 F.3d 155, 180 (3d Cir. 2013) (brackets omitted).

II. THE JURY INSTRUCTIONS ON SCIENTER ERRONEOUSLY LOWERED THE GOVERNMENT'S BURDEN OF PROOF, AND THE GOVERNMENT FAILED TO PROVE WILLFULNESS

A. The Willfulness Instruction Was Legally Erroneous

The government claims that 15 U.S.C. §78ff, the statute at issue here, "does not require proof that a defendant knew he was acting unlawfully" and that its interpretation is "consistent" with willfulness's definition in "other statutory regimes." (G.Br.43). This argument is contrary to Supreme Court precedent, this Court's most recent decision interpreting the statute, and the government's own requests to charge.

1. In *Bryan v. United States*, 524 U.S. 184 (1998), the Supreme Court held that, "[a]s a general matter, when used in the criminal context, a 'willful' act is one undertaken with a 'bad purpose.' In other words, in order to establish a 'willful' violation of a statute, *'the Government must prove that the defendant acted with knowledge that his conduct was unlawful.*'" *Id.* at 191-92 (emphasis added). The government buries *Bryan* in a footnote (G.Br.45 n.6) and then ignores its key language and misrepresents the Supreme Court's analysis.

First, the government quotes the first sentence of the *Bryan* passage out of context to argue that general knowledge of unlawfulness is not required. But the

government omits the next sentence of the passage, which says the opposite: that "in order to establish a willful violation of a statute, the Government must prove that the defendant acted with knowledge that his conduct was unlawful." The Supreme Court's directive is clear and unambiguous.

Second, the government draws the wrong lesson from *Bryan*'s posture. While it is true the Supreme Court rejected the defendant's argument that "willfulness" requires proof he knew he was violating a particular law, *Bryan* is unequivocal that willfulness *does* demand at least *general* knowledge of unlawfulness. *Bryan* thus confirms that general knowledge of illegality is an essential element of securities fraud.

Third, the government fails to address *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007), in which the Supreme Court reaffirmed *Bryan*'s teaching that "willfulness" in criminal statutes requires general knowledge of unlawfulness. (Br.45, 63). The Court held that, for purposes of civil statutory violations, it is sufficient for a plaintiff to prove reckless disregard of a legal duty. By contrast, the Court stressed, "[i]t is different in the criminal law. When the term 'willful' or 'willfully' has been used in a criminal statute, we have regularly read the modifier as limiting liability to knowing violations." 551 U.S. at 57 n.9. Citing *Bryan*, the Court emphasized that it has "consistently held that a defendant cannot harbor such

[willful] criminal intent unless he 'acted with knowledge that his conduct was unlawful.'" *Id.* The government has no answer and thus simply ignores *Safeco*.

2. This Court's most recent pronouncement on the meaning of "willfully" in §78ff(a) fully embraced our reading of *Bryan* and its application to the securities fraud offense here. In *United States v. Kosinski*, 976 F.3d 135 (2d Cir. 2020), the Court confirmed that, following *Bryan*, in securities fraud cases "the Government must prove that the defendant acted with knowledge that his conduct was unlawful." *Id.* at 154. The Court expressly held that, "[w]hile *Bryan* made these pronouncements in the context of a federal firearms conviction, *this court has recognized that its definition of willfulness is generally applicable*." *Id.* (emphasis added).

The government concedes knowledge of unlawfulness is required in insider-trading cases but insists that a lower standard of "willfulness" applies to other forms of securities fraud. (G.Br.44-45) (citing *United States v. Kaiser*, 609 F.3d 556, 569 (2d Cir. 2010)). This defies logic and elementary canons of statutory construction. The word "willfully" cannot be interpreted to mean two different things within *the same subsection* of a statute. *See*, *e.g.*, *United States v. Balogun*, 146 F.3d 141, 145 (2d Cir. 1998) (courts "presume that Congress does not employ the same word to convey different meanings within the same statute"). And the government is plainly wrong when it attempts to marginalize *Kosinski* as part of

the "line of insider-trading cases" that "endorse[d] a higher standard" for that offense only. (G.Br.44). To the contrary, *Kosinski* put an end to any such dual standard; it clarified that the meaning of the word "willfully" in §78ff does not depend on the species of securities fraud of which the defendant was convicted. Citing *Kaiser*, the Court held that "willfully" has the same meaning for both insider trading cases and securities fraud cases such as this: It requires "a securities defendant's awareness" of "the general unlawfulness of his conduct." 976 F.3d at 154. That holding, which the government simply ignores, readily disposes of its argument.[2]

Finally, the government invokes the old aphorism that "ignorance of the law" is not a defense (G.Br.42), but that is a red herring here, because the standard is general (rather than specific) knowledge of unlawfulness. In fact, both the Supreme Court and this Court have already said as much and thus foreclosed this argument as well. *See Bryan*, 524 U.S. at 196 ("knowledge that the conduct is unlawful" "does *not* carve out an exception to the traditional rule that ignorance of

[2] The *Kosinski* Court also approved Judge Raggi's statement in her dissent in *United States v. Cassese*, 428 F.3d 92 (2d Cir. 2005), that *Bryan* applies to all securities fraud prosecutions. *See Kosinski*, 976 F.3d at 154 n.14 (noting Judge Raggi "concluded—correctly—that the only proof of knowledge required to establish a willful violation of the Exchange Act is the defendant's awareness of the general unlawfulness of his conduct"). Petit cited Judge Raggi's dissent in his opening brief (Br.46), yet the government ignores that opinion too.

the law is no excuse"); *Kosinski*, 976 F.3d at 154 (the *Bryan* requirement does not create an exception to "the traditional rule that ignorance of the law is no excuse").

3. The government's argument here also conflicts with its own position in the district court. At trial, it conceded that willfulness entails knowledge of unlawfulness and requested a jury charge that required the government to "prove that the defendant was aware of the generally illegal nature of his acts." (A-99). The government offers no explanation for its about-face on appeal.

4. The government claims any instructional error was harmless because the jury rejected Petit's arguments that he acted in good faith and lacked an intent to defraud. (G.Br.46-47). But this is circular and ignores the controlling standard.

First, "willfulness" is a separate element, distinct from knowledge and intent to defraud. The latter two are elements of civil securities fraud, but in criminal cases *more* is required—and that more is willfulness. Indeed, willfulness is what distinguishes civil from criminal securities fraud. *Cassese*, 428 F.3d at 98. Willfulness thus constitutes an independent and additional scienter element in criminal cases. And since the jury was not required to find that Petit was aware his conduct was unlawful, its guilty verdict plainly does not establish that it would have found willfulness had it been properly instructed.

Second, the government ignores that, in closing argument, it hammered home this incorrect instruction repeatedly by arguing that Petit knew his conduct

was "wrong," rather than unlawful. (A-773, A-783, A-788; *see* Br.50). It is disingenuous for the government now to argue that the instructional error was harmless beyond a reasonable doubt. *See*, *e.g.*, *United States v. Silver*, 864 F.3d 102, 123-24 (2d Cir. 2017) (finding instructional error not harmless based on government's summation); *United States v. Skelos*, 707 F. App'x 733, 737 (2d Cir. 2017) (same).

Third, the government ignores that an instructional error is not harmless unless the government demonstrates that it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Neder v. United States*, 527 U.S. 1, 18, (1999); *accord United States v. Quattrone*, 441 F.3d 153, 180 (2d Cir. 2006). "The harmless error inquiry requires [the appellate court] to view whether the evidence introduced was 'uncontested and supported by overwhelming evidence' such that it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *United States v. Newman*, 773 F.3d 438, 451 (2d Cir. 2014) (quoting *Neder*, 527 U.S. at 18), *abrogated on other grounds*, *Salman v. United States*, 137 S. Ct. 420, 425 (2016). In other words, this Court must reverse if it is "conceivable that a properly instructed rational jury" would not have convicted. *Silver*, 864 F.3d at 122.

That is clearly the case here. As discussed in the opening brief, the auditors rarely met with Petit, and the government's accountant-witnesses disagreed with

each other (and with other MiMedx accountants) on key points about how GAAP applied. (Br.49). Moreover, Petit's anger with Brian Martin over the latter's "crazy, fraudulent scheme…that someone would go to jail for" shows he would not have engaged in a scheme he knew to be unlawful. (Br.49). And this was, by any measure, an exceedingly close case; the jury deliberated for over three days and acquitted Petit on the conspiracy count. This is not sufficiency review; under *Neder*, the government has the burden of showing harmlessness, and the Court may not draw inferences in the government's favor. *See United States v. Mejia*, 545 F.3d 179, 199 n.5 (2d Cir. 2008).

Furthermore, the incoherence of the auditor testimony made it impossible for the government to establish willfulness. The government's brief is conspicuously silent on this point. The government does not dispute that Andersen and Urbizo not only failed to identify the applicable GAAP rules allegedly violated, but offered conflicting opinions and conceded that reasonable minds could differ as to whether revenue could be recognized. How could Petit have knowingly inflated revenue if the government, instead of proving the standard governing revenue recognition, established that there is no such standard, because the requirements are uncertain and ambiguous? Petit cannot have willfully violated a law without knowing what the law is, and it is now undisputed that Petit had no way of knowing that here.

A new trial is required because it is at least "possible" that the jury would not have convicted absent the erroneous instruction. *McDonnell v. United States*, 136 S. Ct. 2355, 2375 (2016).

B. The Conscious Avoidance Instruction Lacked The Necessary Factual Predicate

The government does not dispute that, once Petit received Andersen's email raising accounting concerns about MiMedx's revenue recognition (A-1163), he promptly forwarded that message to the audit committee so it could conduct an independent investigation. (Br.53-55; *see* G.Br.67). Far from deliberately avoiding Andersen's concerns, Petit invited a review by the company's accounting experts. As a matter of law, therefore, the conscious avoidance instruction lacked the requisite factual predicate, and the district court erred by giving it. *See Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011) ("defendant must take deliberate actions to *avoid* learning of th[e] fact"); *United States v. Ferrarini*, 219 F.3d 145, 154 (2d Cir. 2000) (instruction "may only be given if...the defendant… consciously *avoided* confirming th[e] fact"); (*see also* Br. 51-53).[3] The district

[3] The government intimates that the defendants might have acceded to charging conscious avoidance in their proposed jury instructions. (G.Br.58-59). But they submitted those proposals pre-trial, well before the government put on its case, and it is common at that stage for parties to propose preferred language for instructions that may (or may not) become applicable depending upon the proof. Regardless, at the charge conference, defendants clearly and strenuously objected to any conscious avoidance instruction. (A-729-33).

court compounded this error by also preventing the jury from learning of Petit's proactiveness and reference of the issue to the audit committee (on which he did not sit).

The government's various efforts to contest or downplay this instructional error are unavailing.

1. The government's argument is based on an erroneous premise about what knowledge it had to prove. Because the securities fraud count alleged that revenue was inflated, the knowledge question for the jury was whether Petit knew the revenue numbers were incorrect. But the government skirts that issue and instead focuses only on whether he knew of the "need to disclose additional facts" about the transactions. (G.Br.67). It asserts, for example, that Andersen's email created "a high probability" that the defendants should provide further information, and says they avoided confirming whether they in fact had to do so. (G.Br.60). According to the government, therefore, Petit's role in triggering the accounting review is "irrelevant" to conscious avoidance. (G.Br.67).

But this makes no sense as a theory of conscious avoidance. For starters, Andersen's email said nothing about any "need to disclose additional facts." What is more, the jury instruction did not even mention this purported disclosure obligation; it addressed only whether the defendants understood "that the revenue was improperly recorded" or "fraudulently inflated" and told the jury it could

substitute conscious avoidance for actual knowledge of "that fact." (A-829). Indeed, when the government urged the district court to give a conscious avoidance instruction, it similarly focused on the propriety of MiMedx's revenue accounting: It argued that Andersen's email "put[] the defense on notice of his own concerns about revenue recognition issues that relate to…three of the four distributors" (A-732) and alerted the defendants that "there's accounting irregularities going on here." (A-729).

Moreover, the jury acquitted Petit of conspiring to mislead MiMedx's auditors. The substantive count of which he was convicted alleged a fraud on MiMedx's shareholders concerning the company's reported revenue, based on a jury instruction that required that he "know[]" the reported revenues were inflated. (A-76, A-826-28). That was the knowledge issue the government targeted in its closing arguments, in which it repeatedly claimed the defendants "knowingly inflated MiMedx's revenue" and that it was "ridiculous" for them to claim they "didn't know that the transactions in this case were problematic." (A-768, A-787). As to *that* knowledge question—the only one at issue—the government does not and cannot maintain that Petit's email to the audit committee is irrelevant, let alone consistent with conscious avoidance. Nor can it plausibly deny that the district court erred by inviting the jury to convict on a conscious avoidance theory based on an incomplete and misleading record.

2. The government contends that the jury did hear evidence "about Andersen's concerns being raised to the audit committee." (G.Br.67). But that misses the point, which is that the district court prevented the jury from learning that it was *Petit* who initiated the committee's investigation. (Br.53-55). In other words, Petit invited an inquiry; he did the opposite of sticking his head in the sand. But the jury never learned about that. What little they did learn—that the audit committee interviewed Andersen—was irrelevant to Petit's state of mind.

3. The government also argues that "going into detail about the audit committee's work" would have introduced "inadmissible hearsay." (G.Br.68). But the "detail" of the committee's review is not the issue. For purposes of conscious avoidance, the only salient fact was that Petit triggered an investigation into MiMedx's revenue accounting. Petit's opening brief explains why proof of that fact was plainly admissible and not hearsay. (Br.54-55). The government does not even dispute its admissibility.

4. The government argues that nothing precluded the defendants from asking Andersen about the basis for the committee's investigation or offering the committee's memo into evidence. (G.Br.68). But that is simply untrue. The district court excluded *all* evidence about the investigation except two discrete items: (i) whether Andersen was interviewed, and (ii) whether he was asked questions. (Br.53-54). Any attempt by the defense to relitigate that ruling would

have been futile. *See Osborne v. Ohio*, 495 U.S. 103, 124-25 (1990) (defendant need not continue to press issue once court makes its ruling clear "in no uncertain terms," as further objection would have been "patently futile"). In any event, the district court was well aware of the basis for the committee's investigation because the defendants made a full proffer that Petit was the instigator. (A-729, A-731-32). By the time of the charge conference, it was plain that there was no "sound basis" for a conscious avoidance instruction. (G.Br.68). Yet the court gave the instruction anyway.

5. The instruction was also improper because there was no evidence that Petit consciously "*decided* not to learn the key fact." *Ferrarini*, 219 F.3d at 157. Whether that key fact is the propriety of MiMedx's revenue accounting (as framed at trial) or the need to provide additional facts to accountants and auditors (as the government reframes it on appeal), the government even now is still unable to identify *any* evidence that Petit consciously avoided learning it. That in itself demonstrates that the instruction was given in error. *See*, *e.g.*, *United States v. Macias*, 786 F.3d 1060, 1063 (7th Cir. 2015) (conscious avoidance instruction erroneous where defendant "failed to display curiosity, but…did not *act* to avoid learning the truth").

6. Notably, the government does not even suggest that the error in giving the conscious avoidance instruction without a factual basis was harmless. That

amounts to a concession that any error in giving the instruction requires a new trial. *See United States v. Giovanetti*, 928 F.2d 225, 226-27 (7th Cir. 1991) (per curiam) (government's failure to raise harmless error in its brief "signals its acquiescence that if there was error, it indeed was prejudicial," and waives argument). *See also Neder*, 527 U.S. at 18 (government has burden to demonstrate harmless error).

C. The Conscious Avoidance Instruction Conflicts With Controlling Precedent

The district court further erred by discarding the government's proposed charge in favor of its own preferred language. The government does not dispute that the court's instruction (unlike its own requested charge) did not require the jury to find a defendant was aware of a "high probability" of a fact in order to find conscious avoidance, or that it failed to include an "actual belief" caveat as part of the instruction itself. As a result, the instruction directly defied this Court's precedents and was plainly erroneous. *See*, *e.g.*, *Kaiser*, 609 F.3d at 566 (Second Circuit has "long held [it] essential for an accurate conscious avoidance instruction" to contain both "the 'high probability' [and] the 'actual belief' language"); *United States v. Feroz*, 848 F.2d 359, 360 (2d Cir. 1988) (per curiam) ("[T]he district judge should instruct the jury that knowledge of the existence of a particular fact is established (1) if a person is aware of a high probability of its existence, (2) unless he actually believes that it does not exist."); (*see also* Br.55-59). In its opposition, the government ignores these precedents, insists that

"talismanic weight" should not be given to an instruction's "exact wording," and creatively reinterprets the words in the charge given here. (G.Br.71 (quoting *United States v. Schultz*, 333 F.3d 393, 414 (2d Cir. 2003)). Its arguments fail for multiple reasons.

1. This Court has repeatedly found reversible error, and even plain error, when an instruction is legally incorrect because of its imprecise wording. *See*, *e.g.*, *United States v. Birbal*, 62 F.3d 456, 460 (2d Cir. 1995) (finding plain error in burden of proof instruction that included "you *may* acquit the defendant on the basis of the presumption of innocence," instead of you *must* acquit). Whatever linguistic flexibility *Schultz* might excuse, it does not permit a conscious avoidance instruction to omit the two essential elements mandated by *Feroz* and *Kaiser* or to convey them in terms that are less than explicit. In fact, the Court upheld the instruction in *Schultz* only because it unambiguously contained those two essential elements. *See* 333 F.3d at 414 (charge "adequately stated the law" because it "informed the jury that it could find conscious avoidance only if it found *both* (1) that [defendant]…'knew that there was a high probability [of a fact]…' *and* (2) that [defendant] did not 'actually believe' [the contrary]"); *see also Kaiser*, 609 F.3d at 566 (explaining that the *Schultz* "charge included both the phrases 'high probability' and 'actually believed,' leaving no question as to whether those ideas

were conveyed"). The government cites no authority that would allow a court to omit either of those elements—let alone both—and we are aware of none.

2. The government's textual arguments defy both grammar and common sense. The instruction's sole allusion to "high probability" advised that the jury "may, if you wish," find conscious avoidance if "*for example*,…a given defendant was aware of the high probability that the revenue was improperly recorded, but that that defendant…deliberately chose not to inquire further." (A-829 (emphasis added)). The district court did *not* instruct the jury, as this Court has repeatedly required (Br.55-56), that it *must* find the defendant was aware of a high probability of a fact before convicting under this theory.

The government says "for example" "modified only the fact that revenue was recorded," not the "high probability" language that came directly after it (G.Br.70), but that proposition conflicts with basic principles of syntax and usage. In fact, the government elsewhere concedes that "for example" rendered the "high probability" language optional and merely illustrative, not a mandatory instruction on the law. Specifically, it contends the district court's use of "*the* high probability that the revenue was improperly recorded"—which implicitly embraced the government's theory—was harmless because "for example" signaled that the entire phrase was "simply…a specific example" and not "an instruction from the District Court." (G.Br.69). The government cannot have it both ways. If "high

probability" was merely an illustrative example, then the jury was not required to find conscious avoidance, in direct violation of *Kaiser*, *Feroz*, and other binding authorities.

With respect to "actual belief," the government asserts that the good faith instruction elsewhere in the charge sufficed. (G.Br.70-71). But this Court has repeatedly and specifically required district courts to include the actual belief language in any conscious avoidance instruction. *E.g.*, *Feroz*, 848 F.2d at 361 ("actual belief" must "be incorporated into every conscious avoidance charge"). The government contends that the use of "However" to transition from good faith to conscious avoidance somehow incorporated the former into the latter. (G.Br.70-71). But in fact, "However" denoted that, having just discussed actual belief in the context of actual knowledge, the court was shifting to an "alternative basis on which the jury could find knowledge"—a theory not constrained by the same rules. *See Kaiser*, 609 F.3d at 566; *see also Richey v. Bradshaw*, 498 F.3d 344, 350 (6th Cir. 2007) ("use of the word 'however'…signal[s] a break from everything that came before it"). Yet the conscious avoidance instruction did not include the actual belief proviso. That rendered it plain error, as this Court held when

confronted with the same defect in the conscious avoidance instruction in *Kaiser*. *See* 609 F.3d at 566.

Nor can the government distinguish *United States v. Sicignano*, 78 F.3d 69 (2d Cir. 1996), on the basis that there "the prosecutor substantially relied on the conscious-avoidance theory in summation." (G.Br.71). This Court identified that as a factor that "reinforced" "[t]he possibility of juror confusion," 78 F.3d at 72, but that was not why it reversed. It was the failure to include the "actual belief" language in the conscious avoidance charge that "improperly permit[ted] the jury to convict a defendant who honestly believed that he was not engaging in illegal activity." *Id.* Likewise, here the district court presented conscious avoidance as an alternative theory of knowledge, so "it is possible that the jury could have convicted [Petit]" for mere negligence, "even if it concluded he had an actual belief" that the reported revenues complied with GAAP. *Kaiser*, 609 F.3d at 566.

3. The government nonetheless asserts that there is "no probability that [either of these errors] influenced the jury's verdict." (G.Br.72). Yet it concedes that "knowledge was the central issue in the case." (G.Br.72). And, as explained in the opening brief, there is ample doubt as to whether the jury would have convicted absent the erroneous charge: Petit's core defense was that he did not believe his actions were unlawful or that the revenues violated GAAP; the government presented no direct evidence of Petit's state of mind; the jury

deliberated for over three days and sent a note with questions about actual knowledge; and the jury acquitted Petit of conspiracy, for which there was no conscious avoidance instruction. (Br.59-62). The government does not respond to these points.

The conscious avoidance instruction was plain error regardless of whether the government discussed it in closing because, "once the conscious avoidance theory was charged, it provided a possible basis for…conviction." *Kaiser*, 609 F.3d at 566.

D. The Government Failed To Prove Scienter

The evidence was insufficient to prove knowledge or willfulness. (Br.62-63). Indeed, as discussed *supra* at 19-20, the government does not even argue that there was sufficient evidence that Petit knew he was violating the law or that MiMedx's reported revenue violated GAAP.[4]

[4] Petit joins Points I, II.B, and III of Appellant Taylor's reply brief. *See* Fed. R. App. P. 28(i).

CONCLUSION

For the foregoing reasons, this Court should reverse Petit's conviction or, at a minimum, grant a new trial.

Dated: New York, New York
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1. The undersigned counsel of record for Defendant-Appellant Parker H. Petit certifies pursuant to Federal Rules of Appellate Procedure 32(g) and Local Rule 32.1 that the foregoing brief contains 6,936 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), according to the Word Count feature of Microsoft Word 2016.

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Dated: December 2, 2021

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