17-593

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—

RICHARD CUNNIFFE, ROBERT STEWART, AKA BOB,

Defendants,

SEAN STEWART,

Defendant-Appellant.

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

BRIEF AND SPECIAL APPENDIX FOR DEFENDANT-APPELLANT [REDACTED]

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INTRODUCTION

This appeal arises from an exceedingly close trial, in which the jury deliberated for five days and reached a verdict only after an *Allen* charge. The entire case turned on a single hearsay statement of dubious reliability. The district court unfairly tipped the scales in the government's favor by erroneously admitting that statement and then repeatedly denying the defendant any meaningful opportunity to rebut it. As a result, the jury saw a distorted, one-sided picture, and the trial was fundamentally unfair.

Sean Stewart, a young investment banker with a promising career, was accused of "tipping" his father Robert about deals before they were publicly announced. He testified at trial and readily acknowledged that he was very close to his father, routinely confided in him, and even occasionally mentioned potential deals. It was undisputed that Robert had traded and tipped others who had traded based on this inside information. The sole question for the jury was whether Sean had expected Robert to keep the information confidential or to trade on it. Put another way, did Robert betray Sean's trust by misappropriating information, or was Sean in on the deal?

Almost none of the government's evidence shed light on that dispositive question. Most of it merely demonstrated what was undisputed—that Robert had traded on information he learned from Sean and tipped two colleagues Sean did not

know. There was no admissible direct evidence that Sean intended his father to trade, nor any plausible reason why he would have risked his bright future just so his father could make a relatively insignificant amount of money.

The only direct evidence of guilt was a hearsay statement by Robert to one of his tippees, in which he claimed that Sean once had said, "I can't believe it. I handed you this on a silver platter and you didn't invest." The district court wrongly admitted this hearsay under Federal Rule of Evidence 804(b)(3) as a statement against penal interest, even though Robert was *denying* insider trading. Then, in a series of erroneous rulings, the court compounded its error by stymying every defense effort to rebut the statement. The court refused to allow the defense to impeach the hearsay with Robert's other statements repeatedly denying Sean's involvement, even though Rule 806 permits such impeachment. Then the court rebuffed all efforts to compel Robert's testimony. These rulings enabled the government to present the damning statement as conclusive evidence of Sean's guilt. It played this trump card over and over—from the outset of its opening statement to the culmination of its rebuttal closing.

This Court should vacate the conviction, grant a new trial, and afford Sean Stewart the "meaningful opportunity to present a complete defense" that the Constitution guarantees. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (internal quotations omitted).

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 18 U.S.C. §3231. Judgment was entered on February 24, 2017. (SPA-18).[1] Stewart timely appealed. (A-770). This Court has jurisdiction under 28 U.S.C. §1291.

ISSUES PRESENTED

1. Whether Sean Stewart was deprived of a fair trial because the district court erroneously:

(a) admitted the "silver-platter" statement under Rule 804(b)(3) as against Robert's penal interest even thought it was plainly self-exculpatory;

(b) refused to permit impeachment of the statement under Rule 806 with Robert's post-arrest statements denying Sean's involvement; and

(c) prevented the defense from calling Robert as a witness.

2. Whether the sentence, apparently the longest in this Circuit for any "tipper" who made no money, was procedurally unreasonable because the court miscalculated the Guidelines range by including the gains of Robert's tippee.

[1] "SPA" refers to the Special Appendix; "A" refers to the Appendix. The final two documents in the Appendix have been filed under seal pursuant to the district court's orders in the proceedings below.

STATEMENT OF THE CASE

A. Procedural History

Sean Stewart appeals a judgment of conviction entered by the United States District Court for the Southern District of New York (Swain, J.), following a jury trial. The rulings at issue are unreported.

The indictment charged Robert and Sean Stewart with conspiracy to commit securities fraud and tender-offer fraud, 18 U.S.C. §371 (Count One); conspiracy to commit wire fraud, 18 U.S.C. §1349 (Count Two); securities fraud, 15 U.S.C. §§78j(b) & 78ff (Counts Three to Eight); and tender-offer fraud, 15 U.S.C. §§78n(e) & 78ff (Count Nine). (A-43-59).

On August 12, 2015, Robert pleaded guilty to one count of conspiracy to commit insider trading. On May 4, 2016, he was sentenced to probation.

Trial against Sean began on July 25, 2016. On August 17, 2016, the jury returned a guilty verdict on all counts. (A-586-87).

On February 1, 2017, the court denied Sean's post-trial motions. (SPA-6).

On February 17, 2017, the court imposed a sentence of 36 months' imprisonment, followed by three years' supervised release. (A-755-56). Sean is to voluntarily surrender in June 2016.

B. Factual Background

1. Sean's Relationship With His Family

Growing up in suburban Long Island, Sean enjoyed a close and loving relationship with his parents, Robert and Claudia. (A-276-77). He remained particularly close to them as an adult. They regularly went on vacation together. He often spoke to them by phone, sometimes multiple times per day, and they frequently exchanged emails.

Their communications were particularly frequent between 2011 and 2014, a tumultuous period for Sean: he got married, bought an apartment, had a child, helped his mother and maternal grandmother with serious health problems, lost his paternal grandmother, was promoted, took a new job, was promoted again, loaned his father a substantial sum of money, and separated from his wife. (A-300-20, A-323-41, A-348-49, A-359-61, A-364-65, A-367-96, A-398-404, A-406-07; DX1-10, DX100-15, DX126-28, DX137-59, DX161-212, DX215-27, DX230-506, DX606, DX640; GX506, GX511, GX517, GX535, GX537, GX541, GX547, GX566-80, GX623, GX634, GX665, GX701-06, GX708, GX2105, GX2157-79, GX3005-13, GX3068). The emails introduced at trial reflect unusually close communication about these personal matters. (A-693, A-698-705, A-714). They also reflect that Sean routinely shared professional accomplishments and

frustrations with his parents. (A-304-09, A-348-49, A-351-63, A-375-76, A-402, A-694-97, A-706-13).

2. Sean's Career Trajectory

After graduating from Yale in 2003, Sean worked at JP Morgan Chase ("JPM") as an analyst in the mergers and acquisitions group. (A-279-80). In 2006, he was promoted and began to specialize in the health care industry. By 2010, at age 30, he was promoted to vice president, and was making approximately $500,000 per year. (A-283-84). In this position he assigned work to about 40-50 younger employees and had significant responsibilities for recruiting and firm-wide initiatives addressing diversity and "work/life balance." He was in regular contact with the bank's leadership, who often told him about upcoming deals. (A-285-87).

In September 2011, Sean left JPM to join a former colleague and mentor at a smaller well-regarded investment bank, Perella Weinberg Partners ("Perella"). He started as a director specializing in health care mergers and acquisitions. (A-347-48). He performed well and took on increasingly important roles in advising his clients. (A-350-51). In December 2013, he was promoted to managing director, the second-highest position at the bank. (A-359).

Before his career was destroyed by his arrest, Sean was well-liked and respected professionally, and he loved his work. (A-150-51, A-281-85, A-365-66).

He was progressing rapidly, making about $750,000 annually, and on track to become the youngest partner in Perella's history. (A-351, A-359-60; PSR ¶195).

3. Robert's Insider Trading

Between February 2011 and October 2014, Robert traded securities of five public companies involved in deals that Sean learned about through work. In each instance, Robert purchased securities based on confidential information that the company was likely to be acquired and sold them after a subsequent public announcement. (A-194/623-25). He also shared the confidential information with two business associates, Mark Boccia and Richard Cunniffe.

Although Sean did not remember mentioning all these companies to his father, in his trial testimony he readily acknowledged he must have done so given Robert's trading. (A-305-07, A-351-53, A-357-58, A-360-61). However, he insisted that he never intended his father to trade on the information, believed his father would keep it in confidence, and had no idea his father was facing financial problems. (A-137/88-89, A-138-39/94-96, A-139-40/98-102, A-276-79, A-307-09, A-321-22, A-332-33, A-351-58, A-361, A-402, A-408, A-469-73, A-541-42). There was zero evidence that Sean knew about Robert's tipping Boccia or

Cunniffe. (A-170, A-172, A-221-22, A-251-52, A-353). In fact, Sean never met Boccia (A-162, A-173), and at most met Cunniffe once in passing.[2]

The government made much of the undisputed fact that sharing confidential information with outsiders violated the internal policies of Sean's employers. (A-142-43/137-42, A-146-48/224-35, A-152-61, A-174-92, A-409-15). While regrettable, such conduct is not in itself criminal. Indeed, insider-trading law recognizes that people share inside information with close relatives expecting those relatives to keep the information confidential. The "misappropriation" theory of insider-trading liability is often applied in such family situations. The trading relative can be liable for breaching his duty to the insider-source, who is the *victim* of the breach. *See*, *e.g.*, *SEC v. Yun*, 327 F.3d 1263, 1272-73 (11th Cir. 2003) (spouses); *United States v. Chestman*, 947 F.2d 551, 580 (2d Cir. 1991) (en banc) (Winter, J., concurring in part and dissenting in part). Indeed, SEC Rule 10b5-2 recognizes that someone who "receives or obtains material nonpublic information from his or her spouse, parent, child, or sibling," is generally presumed to have a "duty of trust or confidence" prohibiting their trading on such information. 17 C.F.R. §240.10b5–2(b)(3).

[2] Cunniffe claimed to have once met Sean briefly in the parking lot of the company where Robert worked. (A-220-22, A-273-74). However, at trial the government did not ask him to identify Sean, and Sean had no recollection of having met him. (A-353).

Robert's illegal trading began in February 2011, when he purchased Kendle International ("Kendle") stock in his own account. (A-593). Beginning in February 2011, Robert also asked Boccia and Cunniffe to buy options on his behalf. Boccia purchased call options in Kendle, as well as KCI, another acquisition target, for himself and Robert from February to June 2011. (A-163-65, A-168-70, A-589). Cunniffe purchased KCI options for himself and Robert from April to June 2011. (A-195/648, A-591). Both Boccia and Cunniffe traded for themselves as well.

The Kendle sale was publicly announced in May 2011, and the KCI acquisition in July 2011. Robert sold his Kendle securities in May 2011 for less than $10,000 in profits. (A-588, PSR ¶ 51). Boccia made a small profit on his Kendle trades, but lost about $10,000 when his KCI options expired worthless before the deal announcement. (A-166-67, A-170-71, A-592). Cunniffe, by contrast, netted over $70,000 when he exercised his KCI options (A-197, A-272, A-591), while Robert made only a fraction of that amount (A-272, A-590). Cunniffe continued trading with Robert through 2014. He developed and implemented their trading strategy, deciding when to trade and at what price. (A-201-08, A-215-18, A-224-25, A-238-43, A-271).

Sean first learned of his father's Kendle trading several weeks after the KCI trades, when Robert's name appeared on a Financial Industry Regulatory Authority

("FINRA") list of individuals who had traded Kendle securities shortly before the deal announcement. On July 19, 2011, following standard practice after such announcements, FINRA asked JPM whether any employees privy to confidential information had been in contact with individuals on this lengthy list. (A-683). Robert's name appeared on page six. (A-690).

On July 26, 2011, JPM in-house lawyer Ryan Hickey sent an email to personnel involved in the Kendle deal, requesting recipients who knew anyone on the list to contact her, and a follow-up email on August 2, 2011. (A-594, A-629). Sean responded stating he did not know anyone on the list. (A-255-58, A-664). Hickey transmitted the information she had received to FINRA, whereupon the FINRA examiner asked Hickey to see Sean's response. Hickey's team then asked Sean to look at the list again. (A-259). Sean did and promptly notified compliance that his father's name was on it. (A-342-43).

Sean told his wife about this discovery and confronted Robert that evening. Robert was embarrassed and nervous, and claimed he had invested because he saw a news article or heard a rumor. Sean did not believe him and asked angrily why he would do something so foolish. (A-344). The next day, Sean met with compliance and lied because he was afraid the truth would jeopardize his career. (A-345). He admitted that Robert was his father, but falsely denied having shared any confidential information about Kendle with him. He also minimized his

contact with his parents during the months prior to the deal announcement. (A-265-67). Sean later called his father and told him never to engage in such trading again. Robert promised he would not do so. (A-346).

Sean believed Robert would keep his word. About six months after moving to Perella, he resumed confiding in his father about work. (A-356). But Robert again betrayed Sean's trust and resumed his illegal trading activities with Cunniffe. The two men traded in Gen-Probe in April 2012, Lincare from May to June 2012, and CareFusion from August to October 2014. (A-198-249). Although Cunniffe told Robert they would split the profits 50/50, he only gave Robert about 10-20% of the profits. (A-268-69). Robert's total profits over the entire four-year period were about $150,000 (A-66), whereas Cunniffe made over $1 million (A-250-51, A-270; PSR ¶146).

Sean did not receive any proceeds from this trading. At trial, the government claimed that Sean had a pecuniary motive, pointing to some wedding expenses that Sean's parents paid in June 2011. (A-425-26, A-435). However, there was no evidence linking those payments to any information Sean shared in 2011, and most of the trades, and Robert's profits, occurred in 2012 and 2014. Moreover, the Stewarts paid for the same items for Sean's brother, who also got married in 2011. (A-422-23).

Significantly, Robert did not engage in any illegal trading for over two years, between June 2012 and October 2014, even though he continued to experience financial problems and Sean continued to have access to confidential information about other Perella deals. Indeed, shortly after having made almost $20,000 on Gen-Probe and more than $50,000 on Lincare in 2012, Robert asked Sean to loan him $35,000, which Sean did. (A-209, A-228, A-383-86; A-692). In September 2014, Sean also had financial problems stemming from his separation and had to take a loan from UBS. (A-405). If Sean had been a knowing participant in the conspiracy, he could have simply given Robert new "tips" instead of cash and demanded a share of the profits instead of taking out a loan.

4. Investigation

In May 2013, an SEC investigator telephoned Robert about Kendle. Following the conversation, the SEC closed its investigation. (A-144-45/213-18).

On March 11, 2015, two FBI agents confronted Cunniffe about his insider trading. (A-252-54). He began cooperating the next day. He recorded at least three conversations with Robert, on March 24, April 16, and May 4, 2015, respectively. The silver-platter statement (quoted in full below) occurred near the end of the first conversation, a rambling discussion about Robert's encounters with law enforcement.

On May 14, 2015, the FBI arrested Sean and Robert. Robert waived his *Miranda* rights and gave a lengthy recorded statement in which he repeatedly denied that Sean had known about his trading or uttered the silver-platter statement. The jury heard none of this.

C. Trial Proceedings And Sentencing

The jury addresses, evidence, and charge lasted eight trial days. The government presented current and former employees from JPM, Perella, and some of the companies involved in the deals, as well as various government and FINRA officials. Boccia testified pursuant to a grant of immunity, and Cunniffe testified pursuant to a cooperation agreement. During its jury addresses, the government repeatedly invoked the "silver-platter" statement as "devastating" proof of guilt. (A-565; *see also* A-134/77-79, A-135/83, A-455, A-461-62, A-466, A-560, A-566-68).

Sean testified in his own defense. He explained his close relationship with his parents and acknowledged sharing confidential information with them and his wife, but repeatedly denied intending Robert to trade on the information. He specifically denied making the silver-platter comment. (A-408). The defense also called Sean's mother, Claudia, who testified principally about how frequently she and Robert saw and spoke with Sean. (A-419-21). In addition, the defense showed that numerous calls between Sean and his parents' phones had been

omitted from government charts to counter the government's attempt to link the pattern of calls to Robert's trading. (A-416-18; DX1-5).

The jury deliberated for five days before reaching its verdict. During deliberations, the jury requested, *inter alia*, to have the Cunniffe recordings replayed and sought clarification of the elements of insider trading. (A-570-72, A-574). On the third day, in response to a note the court described as "a very, very specific indication [the jurors] believe they're deadlocked," the court gave a modified *Allen* charge. (A-576-84).

At sentencing, the court determined the Guidelines range was 63-78 months but, finding this excessive, imposed a 36-month sentence. (A-753-55).

SUMMARY OF ARGUMENT

The government had no direct proof that Sean had tipped his father intending for him to trade, and there was ample evidence that Robert had betrayed Sean by exploiting information he was supposed to have kept confidential. Other than Sean, the only person who could speak to this dispositive issue was Robert. However, the government was determined to keep his testimony from the jury. Instead, it relied on his dubious hearsay statement and then resisted every defense effort to challenge the truthfulness of that statement. The district court rewarded these efforts by erroneously admitting the statement and then depriving Sean of his right to rebut it. This Court has not hesitated to vacate convictions in similar

circumstances. *See*, *e.g.*, *United States v. Litvak*, 808 F.3d 160, 183-84 (2d Cir. 2015); *United States v. Murray*, 736 F.3d 652, 659 (2d Cir. 2013). It should do so again here.

1. Individually and collectively, the district court's evidentiary errors deprived Sean of due process and a fair trial.

The district court erroneously admitted the "silver-platter" hearsay under Rule 804(b)(3). It is well settled, however, that a self-exculpatory statement is not against a declarant's penal interest even if it is part of an otherwise self-inculpatory narrative. *See Williamson v. United States*, 512 U.S. 594 (1994).

The court then excluded Robert's post-arrest statements exonerating Sean, even though a hearsay declarant's credibility may be attacked with "any evidence that would be admissible for those purposes if the declarant had testified as a witness." Fed. R. Evid. 806. This ruling depended upon a crabbed interpretation of inconsistency that cannot be reconciled with controlling precedent, much less common sense.

The court thwarted Sean's efforts to put Robert's live testimony before the jury by approving Robert's bogus assertion of the Fifth Amendment. [redacted]

[redacted] The court also wrongfully refused to direct the government to grant Robert immunity, despite the government's discriminatory use of its immunity power and the critical significance of his testimony.

2. The district court incorrectly calculated the Guidelines range by erroneously attributing Cunniffe's trading gains to Sean even though there was no evidence Sean knew or could have foreseen that his father would tip another person. The result was the longest sentence in this Circuit that we are aware of for a person convicted of "tipping" who did not make a penny.

STANDARDS OF REVIEW

This Court reviews evidentiary rulings for abuse of discretion, *United States v. Dupree*, 706 F.3d 131, 135 (2d Cir. 2013), mindful that "[a] district court by definition abuses its discretion when it makes an error of law," *Koon v. United States*, 518 U.S. 81, 100 (1996). It reviews *de novo* questions of law about Fifth Amendment privilege, *see, e.g.*, *United States v. Greenfield*, 831 F.3d 106, 114 (2d Cir. 2016), and whether evidentiary rulings violate a defendant's Sixth Amendment rights, *see United States v. Rivera*, 799 F.3d 180, 184 (2d Cir. 2015). A district court's refusal to order the government to grant immunity is reviewed for abuse of discretion. *See United States v. Ebbers*, 458 F.3d 110, 118 (2d Cir. 2006). *But see United States v. Alvarez*, 358 F.3d 1194, 1216 (9th Cir. 2004) (applying *de*

novo review). Finally, in reviewing sentences, this Court examines issues of law *de novo* and factual findings for clear error. *United States v. Baldwin*, 743 F.3d 357, 360 (2d Cir. 2014).

ARGUMENT

I. SEAN STEWART WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL

The centerpiece of the government's case was Robert's vague statement that "years ago," Sean said, "I handed you this on a silver platter and you didn't invest in this." Before trial, the government proclaimed this "silver-platter" statement as "devastating" and "damning proof." (Dkt.101 at 11, 15-16). It was the first evidence the government mentioned in its opening (A-134/77-79), and the last thing it argued in both closings (A-466 (ordinary investor "doesn't get[] served on a silver platter"); A-567-68 (quoting statement in full and again labelling it "devastating" at end of rebuttal); *see also* A-135/83, A-455, A-461-62, A-560, A-565-66 (additional mentions of statement in jury addresses)). After the verdict, the United States Attorney made the statement the key soundbite in his press release trumpeting the conviction. *See* Dep't of Justice, Managing Director of Investment Bank Found Guilty of Insider Trading Charges, www.justice.gov/usao-sdny/pr/managing-director-investment-bank-found-guilty-insider-trading-charges (Aug. 17, 2016) ("Sean Stewart took his clients' most sensitive corporate secrets

and fed them to his father on a silver platter for quick and illegal profits.").[3] At sentencing the government repeatedly invoked the statement. (A-737-38; Dkt. 234 at 9, 11, 15-16, 18).

The admission of the statement, and the district court's refusal to permit the defense any avenue to challenge it, violated Sean's due process rights and rendered his trial fundamentally unfair. This Court should vacate the judgment and grant a new trial.

A. The "Silver-Platter" Statement Should Never Have Been Admitted

The "silver-platter" statement was hearsay that was not within any exception or exclusion. The district court nonetheless found it was against Robert's penal interest and admitted it under Rule 804(b)(3). That ruling flatly contravenes *Williamson v. United States*, 512 U.S. 594, 600-01 (1994), which holds that self-exculpatory statements like Robert's tale of refusing to trade illegally do not satisfy Rule 804(b)(3), even if they are part of a narrative that is otherwise self-inculpatory.

[3] Reporters who covered the trial likewise recognized the statement's critical role in the government's case. *See, e.g.*, Peter J. Henning, *An Insider Trading Case that Pits Father Against Son*, N.Y. Times (Aug. 23, 2016) ("a crucial piece of evidence"); John Riley, *Insider-Trading Trial Focuses on Long Island Father-Son Duo*, Newsday (July 27, 2016) (a "key piece of evidence" in a case that was not "a slam dunk"); William Gorta, *Ex-JPM Banker Denied 'Silver' Bullet in Admissibility Dispute*, Law360 (July 15, 2016) ("a lead weight").

1. Background

On May 18, 2016, the defense moved in limine to exclude the following portion of the first recorded conversation between Cunniffe and Robert as inadmissible hearsay:

> Robert: Yeah. I mean I still remember being [indiscernible] years ago. Sean would always say, ah I can't believe you [indiscernible]. Said I can't believe it. I handed you this on a silver platter and you didn't invest in this, and you know. I said, Sean, did you ever get a call from the SEC, like I'm gonna actually do this [indiscernible] and he says [indiscernible]. I mean [laughter]. Yeah, that [indiscernible].

(Dkt.101 Ex.C at 8).

The district court denied the motion, finding the account admissible as against Robert's penal interest. (A-84-85).[4]

2. Robert's Statement Does Not Satisfy Rule 804(b)(3)

The rule against hearsay reflects the "particular hazards" of out-of-court statements: "The declarant might be lying; he might have misperceived the events which he relates; he might have faulty memory; his words might be misunderstood or taken out of context by the listener." *Williamson*, 512 U.S. at 598. The methods

[4] The government also argued that Robert's account could be admitted as a co-conspirator statement under Rule 801(d)(2)(E), but the district court did not rely on that Rule or make the requisite Rule 104(a) findings to support admissibility. (A-85-86); *see also United States v. Al-Moayad*, 545 F.3d 139, 173 (2d Cir. 2008) (listing required findings). And for good reason, as the statement does not qualify. (*See, e.g.*, Dkt. 97 at 14-15; Dkt. 105 at 10-12; A-70-73, A-77-80).

for minimizing these dangers in court—"the oath, the witness' awareness of the gravity of the proceedings, the jury's ability to observe the witness' demeanor, and, most importantly, the right of the opponent to cross-examine"—are unavailable for hearsay. *Id.* Accordingly, the enumerated exceptions are limited to certain types of statements that "are less subject to these…dangers." *Id.*

Rule 804(b)(3) codifies one such exception, for statements by an "unavailable" declarant, where "a reasonable person in the declarant's position would have made [the statement] only if the person believed it to be true because, when made, it…had so great a tendency…to expose the declarant to…criminal liability." This determination is made "in light of all the surrounding circumstances." *Williamson*, 512 U.S. at 604. The statement also must be "supported by corroborating circumstances that clearly indicate its trustworthiness." Fed. R. Evid. 804(b)(3)(B). The "silver-platter" statement satisfies neither of these criteria.

a. The statement was not self-inculpatory.

Under *Williamson*, a statement is not admissible under Rule 804(b)(3) merely because it is part of a longer narrative that also included self-inculpatory statements. The statement must *itself* be directly self-inculpatory, as the facts of *Williamson* illustrate.

After being stopped driving a car containing cocaine, declarant Reginald Harris told the DEA conflicting stories implicating both Williamson and himself, but consistently stated that Williamson owned the cocaine. 512 U.S. at 596-97. The Supreme Court ruled it was error to admit Harris' entire story: the statements implicating Williamson had to be analyzed separately since, under Rule 804(b)(3), "statement" means "a single declaration or remark," not a "report or narrative." *Id.* at 599. Additionally, Rule 804(b)(3) "does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory" or are "collateral" (*i.e.*, in close proximity) to self-inculpatory ones. *Id.* at 600-01. As the Court explained, "[s]elf-exculpatory statements are exactly the ones which people are most likely to make even when they are false; and mere proximity to other, self-inculpatory, statements does not increase the plausibility of the self-exculpatory statements." *Id.* at 600. For instance, "the parts [of Harris' account] that implicated Williamson…did little to subject Harris himself to criminal liability"; indeed, "[a] reasonable person in Harris' position might even think that implicating someone else would decrease his practical exposure to criminal liability." *Id.* at 604. The Court thus remanded for the lower courts to examine Harris' statements individually and determine which ones were "truly" self-inculpatory. *Id.*

Williamson requires exclusion of Robert's account of Sean's statement. The account is clearly self-exculpatory: Robert describes an occasion on which he *declined* to trade on information Sean supposedly gave him. To be sure, Robert arguably inculpates himself in other portions of the conversation. But those statements involve entirely different incidents, implicating *Williamson*'s admonition that "mere proximity to other, self-inculpatory, statements does not increase the plausibility of the self-exculpatory statements." *Id.* at 600. If anything, the "silver-platter" statement is more collateral to the self-inculpatory statements than was the case in *Williamson*. Unlike here, the *Williamson* statements involved the same incident, and the self-inculpatory aspects were intertwined with those inculpating Williamson. Yet the statements about Williamson still did "little to subject Harris himself to criminal liability." *Id.* at 604.

The ruling below is also inconsistent with this Court's decisions. Every Second Circuit decision affirming admission under Rule 804(b)(3) after *Williamson* involves statements that directly and unambiguously implicate the declarant in wrongdoing. *See, e.g.*, *United States v. Gupta*, 747 F.3d 111, 127-29 (2d Cir. 2014) (declarant discusses trading on defendant's inside information); *United States v. Persico*, 645 F.3d 85, 102 (2d Cir. 2011) (declarant describes meeting with defendant to avoid FBI surveillance); *United States v. Wexler*, 522

F.3d 194, 201-03 (2d Cir. 2008) (declarant discusses his and defendant's roles in fraud); *United States v. Williams*, 506 F.3d 151, 154-55 (2d Cir. 2007) (declarant states he and defendant committed triple homicide); *United States v. Saget*, 377 F.3d 223, 225, 231 (2d Cir. 2004) (declarant discusses his and defendant's gun-running); *United States v. Moskowitz*, 215 F.3d 265, 268-69 (2d Cir. 2000) (declarant admits participating in fraud with another individual), *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36 (2004). The finding below lies well outside the ambit of these cases.

b. The district court failed to apply the controlling legal standard.

Instead of following *Williamson*, the district court erroneously held that Robert's statement was inculpatory. The court acknowledged that the statement "supports the conclusion that Robert knowingly refused insider tips from Sean," but "nonetheless" found it was "probative of [his] alleged collusion with Sean and makes it more likely that [his] other investments in Sean's clients were the product of insider information provided by Sean." (A-85).

First, this makes no sense. Robert explicitly *denied* trading on inside information. That does not suggest collusion and whatever tenuous inferences it might permit about Sean's alleged involvement, an express disavowal of wrongdoing is, by definition, self-exculpatory. Plainly, the statement that Robert had rebuffed his son's supposed invitation to trade was not sufficiently inculpatory

that he only would have uttered it if true, as required to overcome the prohibition against hearsay. *See Williamson*, 512 U.S. at 603-04.

Second, the district court misread the purported source for its erroneous "probative" standard, this Court's decision in *Gupta*. There this Court described the Rule 804(b)(3) test as whether a "reasonable person in the declarant's shoes would perceive the statement as detrimental to his or her own penal interest…in light of all the surrounding circumstances." 747 F.3d at 127 (internal quotations omitted). The court noted in passing that to be self-inculpatory, a statement "need not have been sufficient, standing alone, to convict…so long as it would have been probative in a criminal case against him." *Id.* (internal quotations omitted). It never suggested that mere probativeness would suffice if the statement was self-exculpatory, as Robert's was. Indeed, the Court affirmed because the statements directly implicated the declarant in insider trading. *Id.* at 128-29 (declarant described trading or plans to trade after receiving inside information).

The "probative" language in *Gupta* merely reflects the common-sense point that sometimes "statements that are on their face neutral may actually be against the declarant's interest." *Williamson*, 512 U.S. at 603. For instance, "'I hid the gun in Joe's apartment' may not be a confession of a crime; but if it is likely to help the police find the murder weapon, then it is certainly self-inculpatory." *Id.*

But Robert's statement was not facially "neutral" (much less against his interest); it was exculpatory.[5]

Third, mere probativeness does not satisfy Rule 804(b)(3). If it did, the result would have been different in *Williamson*. Harris' statements regarding Williamson demonstrated he was not an unwitting dupe, but rather knew who owned the cocaine in his trunk and the delivery details. These statements also provided perhaps the best evidence that Harris was complicit in a conspiracy and not acting alone. Under the standard the district court adopted, the statements would be admissible even though they "did little to subject Harris himself to criminal liability." 512 U.S. at 604; *see also*, *e.g.*, *United States v. Jackson*, 335 F.3d 170, 176, 178-79 (2d Cir. 2003) (exculpatory statement inadmissible even though probative of declarant's understanding of conspiracy's inner workings and hierarchy); *United States v. Tropeano*, 252 F.3d 653, 655-59 (2d Cir. 2001) (declarant's admission he conspired with more than one person inadmissible because in context not sufficiently self-inculpatory); *United States v. Kostopoulos*, 119 F. App'x 308, 310-11 (2d Cir. 2004) (declarant's musings about whether to trade on inside information inadmissible even though probative of wrongdoing).

[5] The only other post-*Williamson* Second Circuit case alluding to "probativeness," *Persico*, affirmed the admission of statements that facially inculpated the declarant. *See* 645 F.3d at 99, 102 (declarant stated he met defendant in particular location to evade FBI surveillance).

c. The statement lacks adequate corroboration.

Rule 804(b)(3) also requires that the statement be "supported by corroborating circumstances that clearly indicate its trustworthiness." This "is not an insignificant hurdle"; the inference of trustworthiness "*must be strong*, not merely allowable." *United States v. Salvador*, 820 F.2d 558, 561 (2d Cir. 1987) (emphasis added; internal quotations omitted). This Court has required "corroboration of both the *declarant's* trustworthiness as well as the *statement's* trustworthiness." *United States v. Doyle*, 130 F.3d 523, 544 (2d Cir. 1997) (quoting *United States v. Bahadar*, 954 F.2d 821, 829 (2d Cir. 1992)). Neither can be satisfied here.

First, the court failed to address whether Robert was a credible source. The government conceded he had lied on numerous occasions, including during other parts of his recorded conversations with Cunniffe. He also denied to the FBI that Sean had knowingly "tipped" him. The court's failure to consider whether these inconsistencies undermined Robert's credibility was itself error. *See Doyle*, 130 F.3d at 544 (excluding statements by declarant given his "inconsistent stories").

Second, there was no way to corroborate the statement's trustworthiness. Robert claimed Sean made the statement during a conversation involving only the two of them, in response to Robert's *not* acting on information Sean had allegedly shared. As such, it is essentially unverifiable—and for precisely this reason, the

district court should have been extremely leery of deeming it admissible. It is impossible from the face of the statement to assess whether Robert was lying, whether his memory failed him, or even (assuming this conversation ever took place, which again there is simply no way of knowing) whether he was accurately conveying what Sean had said. The many inaudible words in the recording raised additional questions about the statement's trustworthiness.

The court erroneously found adequate confirmation of the statement's truthfulness in three notably equivocal factors. It pointed to apparent references in other parts of the conversation to the Kendle transaction. (A-85). But those references do not corroborate the truth of Robert's statement about an entirely different occasion when Robert supposedly did *not* trade. Second, the court highlighted that Robert was speaking to a co-conspirator. (*Id.*). But how does this make any more likely that Robert was not paraphrasing, or misremembering, or misunderstanding, even if he was not flat out lying? The same questions undercut the court's third factor, the references to regulatory inquiries that "in fact occurred." (*Id.*). How do these references provide any basis to be confident that other purported events Robert described also happened—especially when, on at least one other occasion, Robert told Cunniffe that Sean did not know about his trading (A-681), and repeatedly reiterated this to the FBI (*see* Dkt.120 Ex.B)? *See*

Jackson, 335 F.3d at 179 (declarant's conflicting assertions undermined corroboration requirement); *Bahadar*, 954 F.2d at 829 (same).

B. The District Court Compounded Its Error By Preventing The Defense From Impeaching The Silver-Platter Statement

After erroneously admitting Robert's account of the silver-platter statement, the court thwarted every defense effort to rebut it. As a result, the jury never heard powerful evidence that Sean never made the supposedly "devastating" statement. The court's most egregious error was refusing to admit under Rule 806 Robert's post-arrest denials that Sean had known about his trading or had made this comment. The district court applied the wrong legal standard and refused to admit the impeachment material because, in its view, Robert never "specifically denied" Sean had uttered the silver-platter statement. That ruling is inconsistent with Rule 806 and this Court's precedents and deprived Sean of a fair trial.

1. Background

The defense sought to introduce, *inter alia*, the following portions of Robert's post-arrest FBI interview under Rule 806:

> STEWART: I don't think [Sean] had any idea that I would trade on any of this stuff—I didn't mention that I did to him…
> AGENT: If that's true, how do you explain [the silver-platter] comment you made to Rick…
> STEWART: I think I was just saying to Rick because Sean said, "Uh y'know, all these deals—if you were trading—you could have made like millions of dollars"…and I said, "Sean, nobody's going to trade and make millions of dollars on this stuff." That wasn't his intention.

AGENT: So why was Sean giving you this information?
STEWART: I think he was just proud of the fact that he was doing deals and y'know, almost like…hey, this deal is going to go way up…not intending that somebody was going to trade on it.

* * *

STEWART: …I've never, I've never discussed this with Sean.
AGENT: Of course you have. You definitely discussed this with Sean.

* * *

STEWART: I don't think Sean has any idea I ever traded on any of this information.

* * *

AGENT: So, you don't—Sean wasn't giving you the information so that you could trade?
STEWART: No.
AGENT: What was he expecting you to do with it? Nothing?
STEWART: I don't know, I think he was just—you know—kind of bragging. Sean's bragging about, "Hey, I'm working on this deal, that deal."

* * *

AGENT: And he never knew you traded on…
STEWART: …Any of these others.
AGENT: …Lincare, Gen-Probe, CareFusion?
STEWART: No.
AGENT: Sean didn't know this?
STEWART: Sean didn't know that.
AGENT: Are you sure?
STEWART: I'm—I've never had that discussion with him—with Sean.

* * *

AGENT: …Sean never knew that you were trading?
STEWART: No.

* * *

STEWART: He has no idea. Sean doesn't even know I traded.

* * *

STEWART: I—you know what—I, I think he was just—like I said…just saying, "this is what I'm working on," "oh, look at this, look at that." He had no clue—I'm telling ya—He doesn't know anything about this all—you know… And I'll be honest, he drinks too, he's got a drinking problem."

* * *

AGENT: And you're convinced that Sean didn't know what you guys were doing?
STEWART: Yes—that—I can, honestly…
AGENT: With the exception of Kendle because you guys talked about it, right?
STEWART: Right, after the fact, after the fact…
AGENT: So why did he get mad at you? Why did he get mad at you and say, "I served this up to you on a silver platter and you didn't invest in it"…?
STEWART: Um, I think that—that day, he was clearly drinking.
AGENT: You remember that day specifically?
STEWART: I remember—y'know—during that period, because he was getting divorced, he's—y'know—and um, he just said…I think he might've said, "Y'know, Uh, y'know, I said I was working on this deal—gee, if you had invested, you would've made millions of dollars."

* * *

STEWART: …He doesn't know we—Rick traded in any of this stuff—he doesn't know we made money…

* * *

STEWART: …I'm telling you—he—I've never ever had a conversation with him, other than that FINRA one, about anything with uh…
AGENT: …With Rick?
STEWART: …with Rick or trading or any of that.

(Dkt.120 Ex.B).

The court acknowledged that "Robert, in the Post-Arrest Statement, offers various explanations of why Defendant may have made the 'silver platter' statement, and proffers another purported statement on the same subject matter and a version of what Defendant 'might' have said." (SPA-3). However, it refused to admit the statements because "Robert never specifically denies that Defendant made the 'silver platter' statement itself" and therefore "there is no

inconsistency…that warrants the admission of the Post-Arrest Statement under [Rule 806]." (SPA-3-4).

2. The Statements Were Clearly Admissible Under Rule 806

Rule 806 permits attacking a hearsay declarant's credibility with "*any* evidence that would be admissible for [impeachment] purposes if the declarant had testified as a witness." This includes evidence "showing that the declarant made inconsistent statements" prior to or after the hearsay declaration. *United States v. Trzaska*, 111 F.3d 1019, 1024 & n.1 (2d Cir. 1997). Robert's post-arrest statements plainly satisfy this standard.

If Robert had testified Sean once said, "I can't believe it. I handed you this on a silver platter and you didn't invest in this," he could have been impeached in at least two ways with his post-arrest statements.

First, Robert denied that Sean had made the silver-platter statement both times the FBI asked about it. The first time the agent asked about his "comment to Rick [Cunniffe]," Robert acknowledged making the statement, but told the agent that what Sean had actually said was, "Uh y'know, all these deals—if you were trading—you could have made like millions of dollars." The second time the agent asked, Robert again denied that Sean made the silver-platter statement, asserting that when Sean had "been drinking," "he might've said, 'Y'know, Uh, y'know, I

said I was working on this deal—gee, if you had invested, you would've made millions of dollars.'"

Second, Robert repeatedly denied that Sean intended Robert to trade on the shared information or had "any idea" that Robert had done so. Rather, Robert told the FBI Sean was merely "proud of the fact that he was doing deals" and was "bragging" about his work.

The district court nonetheless excluded the evidence because Robert never "specifically denied" Sean had made the silver-platter statement. This unduly crabbed interpretation of inconsistency is not the law. Under the court's view, "Sean said X" and "Sean said Y" are not inconsistent; to be inconsistent, the second statement must be "Sean did not say X." But this Court has held that statements "need not be diametrically opposed" to be inconsistent. *Trzaska*, 111 F.3d at 1024. Impeachment is permitted if there is "any variance between the statement and the testimony that has a reasonable bearing on credibility," or if the jury could "reasonably find that a witness who believed the truth of the facts testified to would have been unlikely to make" the statement offered to impeach. *Id.* at 1025 (internal quotations and alterations omitted); *see also Ebbers*, 458 F.3d at 123 (quoting *Trzaska*).

The statements here easily meet that standard. If Robert actually believed Sean had made the silver-platter statement, which indicates Sean had indeed

"tipped" Robert intending him to trade, he would not have said that Sean had merely commented, when drunk, that Robert could have made millions if he had traded. Nor would he have repeatedly insisted that Sean was simply "bragging" about work and had "no idea" Robert would trade. At the very least, which version to believe was for the jury to decide.

The statements here are no less inconsistent than those in cases where this Court has found Rule 806 satisfied because the impeachment material reasonably could be interpreted to undermine the hearsay's credibility, even though it did not *directly* contradict the hearsay—and even though the declarant did not "specifically deny" uttering the hearsay. *See, e.g.*, *United States v. Myerson*, 18 F.3d 153, 160-61 (2d Cir. 1994) (holding "there was little question" that out-of-court statement denying defendant's involvement in fraudulent billing could be used to impeach other hearsay statements in which the individual recounted the defendant "kept saying 'feed me, feed me, feed me,'" and wanted "these bills at 300 and I just can't get them there"). These include cases where, like here, a post-arrest statement provided the impeachment material. *See, e.g.*, *United States v. Rosario*, 111 F.3d 293, 295-96 (2d Cir. 1997) (declarant's denial during proffer that co-defendant was heroin dealer admissible to impeach recorded conversation in which the two discussed heroin trafficking); *United States v. Vegas*, 27 F.3d 773, 782 (2d Cir. 1994) (declarant's inconsistent statements regarding his

knowledge of heroin seized from his apartment admissible to impeach his post-arrest denials that defendant had supplied him with drugs).

This Court's cases interpreting Rule 613 (applying the same standard for inconsistency to in-court testimony) reinforce the low standard for admissibility. Indeed, even an omission can demonstrate inconsistency. For instance, in *United States v. Strother*, 49 F.3d 869, 875 (2d Cir. 1995), the Court allowed testimony that the defendant had asked the witness to take a certain action to be impeached with a memorandum the witness had prepared omitting reference to the request. *See also United States v. Perrone*, 936 F.2d 1403, 1412 (2d Cir. 1991) (defendant's offer to set up cocaine deal was inconsistent with testimony he never had dealt drugs; while the offer "did not flatly contradict his testimony…it nevertheless was relevant to his credibility"); *United States v. Carr*, 584 F.2d 612, 618 (2d Cir. 1978) (testimony can be impeached with prior silence).

Other circuits similarly allow impeachment even when the statements are not facially inconsistent. *See, e.g.*, *United States v. Rosales-Aguilar*, 818 F.3d 965, 968-69 (9th Cir. 2016) (in illegal reentry case, allowing impeachment of statement that, at time X, defendant did not remember crossing border, with statement that, at earlier time Y, he had remembered); *United States v. Mack*, 572 F. App'x 910, 915, 935 (11th Cir. 2014) (statement that defendant "knows exactly what we're doing" admissible to impeach statement that defendant had been led to believe he

was transporting money and not drugs); *United States v. Meza*, 701 F.3d 411, 426 (5th Cir. 2012) ("[E]xplanations and denials run the gamut of human ingenuity, ranging from a flat denial, to an admitted excuse, to a slant, to a disputed explanation, or to a convincing explanation. Whether flatly denied or convincingly explained, the inconsistency can stay inconsistent."); *United States v. Richardson*, 515 F.3d 74, 84-85 (1st Cir. 2008) (allowing impeachment of defendant's trial testimony that he only took temporary possession of firearm as middleman with his recorded statements that "I want it" and "I'll take it"); *United States v. Wali*, 860 F.2d 588, 589-91 (3d Cir. 1988) (statements that (i) individual named "Hadji" would supply drugs and (ii) defendant "Wali" did not traffic drugs were inconsistent, given government argued they were same person).

These cases flatly reject the district court's cramped view of inconsistency. The court cited *Trzaska and Ebbers*, but as explained, both cases apply the "reasonableness" / credibility-assessment test. Neither supports the court's reading of Rule 806.

C. The District Court Conducted An Inadequate Inquiry Into Robert's Invocation Of The Fifth Amendment And Erroneously Sanctioned It

After the court erroneously thwarted the defense's efforts to impeach Robert's "silver-platter" story with his post-arrest statements, Sean exercised his only remaining option: He subpoenaed his father, who had already pled guilty and

been sentenced, to testify. Robert then asserted his Fifth Amendment privilege. At this point, to protect Sean's Sixth Amendment rights to compulsory process and a fair trial, the court should have conducted a searching, particularized examination into the validity of Robert's invocation. Instead, the court conducted a perfunctory inquiry that reached patently incorrect conclusions and unfairly deprived Sean of his constitutional right to present Robert's testimony to the jury.

1. Background

After the Rule 806 motion was denied, the defense learned Robert would take the Fifth and moved to compel his testimony. The court ordered a hearing, and both sides submitted their intended topics of examination to the court and Robert's counsel.[6] At the hearing, Robert said he would refuse to answer questions

[6] [redacted]

on all the proposed topics, and the court ordered an *in camera* review of his reasons. (A-124-26, A-129).

[redacted]

In a subsequent discussion during the trial, the only reason the court gave for finding the invocation valid was "the prospect of perjury charges if Robert now testifies" contrary to the earlier statement "indicating Sean['s] culpability." (A-260-61; A-262 (noting that government might decide that Robert's statements "on the stand in this trial are perjurious")).

As the defense pointed out, the ruling left Sean with "absolutely no ability to confront Robert Stewart in any way." (A-131). In post-trial motions, Sean argued that the court's inquiry was insufficient, and that the fear of a potential perjury prosecution based on future trial testimony was not a valid ground to assert the privilege; only the fear that a *truthful* answer could "create a substantial and real hazard…permits invocation of the Fifth Amendment." *United States v. Apfelbaum*, 445 U.S. 115, 131 (1980) (internal quotations omitted). The court rejected the argument, denying that the risk of trial perjury was the basis for its ruling despite its earlier contrary statement. (SPA-13).

[redacted][7]

2. The District Court's Inquiry Was Inadequate

The Fifth Amendment privilege may be invoked only by a witness with "reasonable cause to apprehend danger from a direct answer." *Hoffman v. United States*, 341 U.S. 479, 486 (1951). A witness asserting the privilege bears the burden of proving his right to invoke it, *Estate of Fisher v. Comm'r of IRS*, 905 F.2d 645, 649 (2d Cir. 1990), and the court must carefully assess the witness' announced reasons for invoking the privilege, *id.* at 648; *accord United States v. Edgerton*, 734 F.2d 913, 921 (2d Cir. 1984) (assessing "stated reason" for claim). The court may not accept the witness' "say-so." *Hoffman*, 341 U.S. at 486; *accord United States v. Zappola*, 646 F.2d 48, 53 (2d Cir. 1981) (court erred in "simply accept[ing] [the witness'] blanket assertion").

Rather, "*as to each question* to which a claim of privilege is directed, the court must determine whether the answer to that particular question would subject the witness to a 'real danger' of…[in]crimination." *Fisher*, 905 F.2d at 649

[7] Robert pled guilty to conspiring to trade on inside information from in or about February 2011 through April 2015, involving securities of Kendle, KCI, Gen-Probe, Lincare, and CareFusion. (*See* A-43-53; A-63-64). He was sentenced to probation before Sean's trial began.

(emphasis added) (quoting *Rogers v. United States*, 340 U.S. 367, 374 (1951)); *accord Zappola*, 646 F.2d at 53 (court must "undertake a particularized inquiry to determine whether the assertion was founded on a reasonable fear of prosecution *as to each of the posed questions*") (emphasis added). A particularized inquiry is required because "only questions which might elicit incriminatory answers are barred by a proper fifth amendment claim." *United States v. Bowe*, 698 F.2d 560, 566 (2d Cir. 1983). Moreover, where, as here, the witness' invocation curtails a defendant's ability to present his case, the court must carefully balance the defendant's Sixth Amendment rights against the witness' Fifth Amendment interests. *See United States v. Vavages*, 151 F.3d 1185, 1192 (9th Cir. 1998); *see generally Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) ("The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process.").

[redacted] The court later denied it was obligated "to force Robert to expose information" by soliciting his anticipated responses "to each specific question," (SPA-13), but misread the only case, *Fisher*, that it cited in support of this conclusion. As *Fisher* explains, the whole point of an *in camera* proceeding is to obtain precisely that information, outside of the government's presence. *See* 905 F.2d at 650 ("[A]n *in camera*

conference is consonant with the notion that a witness need not surrender 'the very protection that the privilege is designed to guarantee' in order to invoke it.") (quoting *Hoffman*, 341 U.S. at 486); *see also Edgerton*, 734 F.2d at 919 (witness bears burden of explaining invocation even though it "forces a witness to come dangerously close to doing that which he is trying to avoid").

The district court also attempted, post-trial, to justify its cursory scrutiny because "the expressed rationale for Robert's invocation was identical with respect to each topic," and "the Court was familiar with the record and the interrelatedness of the proposed areas of inquiry." (SPA-13). But the danger of self-incrimination was hardly apparent here. Rather, the theoretical exposure Robert faced from many proposed areas of inquiry was—and remains—murky. [redacted] Under these circumstances, a particularized, question-by-question inquiry into his announced reasons for invoking the Fifth Amendment was necessary. *See Fisher*, 905 F.2d at 649; *Edgerton*, 734 F.2d at 919-22; *Bowe*, 698 F.2d at 566; *Zappola*, 646 F.2d at 53; *cf. Sterling Nat'l Bank v. A-1 Hotels Int'l, Inc.*, No. 00-cv-7352, 2004 WL 1418201, at *2 (S.D.N.Y. June

23, 2004) (Lynch, J.) ("[I]t is not the Court's job to parse the transcript, guessing at the basis of assertions of privilege as to each question.").

A searching examination was particularly important because the court had deprived Sean of his only other means of attacking the alleged silver-platter statement. *See Vavages*, 151 F.3d at 1192; *cf. United States v. Nunez*, 668 F.2d 1116, 1121 (10th Cir. 1981) ("Where the witness which the defendant seeks to cross-examine…provid[es] the crucial link in the prosecution's case, the importance of full cross-examination is necessarily increased."). As Judge Learned Hand once explained, the privilege against self-incrimination "should not furnish one side with what may be false evidence and deprive the other of any means of detecting the imposition." *United States v. St. Pierre*, 132 F.2d 837, 840 (2d Cir. 1942). [redacted]

3. The District Court's Proffered Reasons Do Not Justify Robert's Invocation

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

In sum, Robert could have testified, consistently with his post-arrest interview and without facing any real risk of self-incrimination, that he had not discussed his intent to trade with Sean, and that Sean had never uttered the silver-platter statement. The district court had considerable latitude to control the scope of the examination so as to allow this testimony, thereby protecting Sean's Sixth

Amendment rights, while still respecting Robert's Fifth Amendment interests. Alternatively, the court readily could—and should—have revisited its decision to admit the silver-platter statement. *Cf. Klein v. Harris*, 667 F.2d 274, 289 (2d Cir. 1981) (where witness' refusal to testify "precludes the defendant from testing the truth of the witness' prior testimony, the trial judge must strike the prior testimony"; failure to take "such corrective action deprives the defendant of his sixth amendment right of confrontation"). Instead, it allowed Robert to avoid testifying entirely, even though Robert [redacted] nor faced any real risk of self-incrimination, leaving Sean "absolutely no ability to confront [him] in any way." (A-131).

The court's approach [redacted] reflects a troubling "heads, the government wins, tails the defendant loses" approach. [redacted] The double standard here is stark, inexplicable, and antithetical to the Constitution's guarantees of due process and fair trial.

D. The District Court Erroneously Refused To Order The Government To Grant Robert Immunity

The district court next refused to compel the government to grant Robert immunity, thus foreclosing completely any possibility of showing that Sean never made the "silver-platter" statement. It did so despite clear evidence the government had selectively immunized witnesses and frightened Robert from testifying, and despite the critical importance of his testimony. This misapplication of the controlling standard requires vacatur.

1. The government's refusal to immunize prospective witnesses may violate a defendant's due process rights. *United States v. Dolah*, 245 F.3d 98, 105 (2d Cir. 2001), *abrogated on other grounds by Crawford*, 541 U.S. 36; *Ebbers*, 458 F.3d at 118. A defendant challenging the refusal must make a two-prong showing. *First*, the defendant must show the government (1) used immunity in a "discriminatory" fashion, (2) forced a witness to take the Fifth by "overreaching," or (3) engaged in "manipulation" by deliberately denying immunity to gain a tactical advantage. *Ebbers*, 58 F.3d at 119. The government's decision to confer immunity on prosecution but not defense witnesses may be a "discriminatory use," where not "obviously based on legitimate law enforcement concerns." *Id.*; *Dolah*, 245 F.3d at 105-06. "Overreaching" may include intimidation, threats, or harassment that dissuades a witness from testifying. *See Ebbers*, 58 F.3d at 119; *see also United States v. Pinto*, 850 F.2d 927, 932 (2d. Cir 1988) (reversal required

if government's conduct "interfered substantially with a witness' free and unhampered choice to testify") (internal quotations omitted).

Second, the defendant must show the evidence is "material, exculpatory and not cumulative and is not obtainable from any other source." *United States v. Burns*, 684 F.2d 1066, 1077 (2d Cir. 1982). "The bottom line at all times is whether the non-immunized witness's testimony would materially alter the total mix of evidence before the jury." *Ebbers*, 458 F.3d at 119.

2. Both prongs are met here. *First*, the government granted Boccia, but not Robert, immunity. On similar facts, this Court found a discriminatory use of immunity in *Dolah*. There, the government selectively immunized witnesses it found helpful, but introduced only certain out-of-court statements of other witnesses, refusing them immunity to prevent any cross-examination. *See* 245 F.3d at 100, 105. This Court recognized the "essential unfairness of permitting the Government to manipulate its immunity power to elicit testimony from prosecution witnesses who invoke their right not to testify, while declining to use that power to elicit from recalcitrant defense witnesses testimony." *Id.* at 106.

There is also disturbing evidence of government overreach. [redacted]

[redacted]

Second, Robert's testimony would have "materially alter[ed] the total mix of evidence." *Ebbers*, 458 F.3d at 119. [redacted] In his affidavit in support of Sean's motion for a new trial, Robert averred that he would have testified that he had not discussed his trading with Sean until after the arrest (except, in the case of the Kendle trading, until after the FINRA inquiry). (*See* Dkt.227 Ex.A., R. Stewart Aff. ¶¶1-2). This evidence, from the one person who could corroborate Sean's testimony that he had not "tipped" Robert or made the "silver-platter" statement, was material, exculpatory, and non-cumulative. Indeed,

it would have been the key defense testimony in the case—which is precisely why the government fought tooth and nail to keep it from the jury.

3. The court found the government's selective grant of immunity justified because Boccia was less culpable than Robert, who had played a "central role" in the conspiracy. (A-263). But Robert already had pled guilty and been sentenced for this conduct. Indeed, the only apparent exposure from which Robert could have been immunized related to allegedly false statements to law enforcement and as-yet uncharged trading. The government had long known of this conduct but had declined to charge it. Refusing to immunize Robert for conduct the government already had declined to prosecute could serve no "legitimate law enforcement concerns." *Ebbers*, 458 F.3d at 119. To the contrary, its only apparent purpose is the baldly tactical objective of concealing exculpatory testimony from the jury.

As to government overreach, the court refused to fault the government for communicating that, if Robert testified consistently with his prior statements to law enforcement, which the government believed were false, "he could be subject to additional charges, including perjury." (SPA-16). But Robert could not have asserted the Fifth to avoid perjury charges, and the only reason for the government to communicate this information was to dissuade Robert from testifying. Courts have recognized that such techniques are improper attempts to intimidate potential

defense witnesses that may require reversal. For example, where the government contacted a potential witness' attorney to "remind him" of the consequences of perjury, the Fourth Circuit stated:

> Such calls are unnecessary because most witnesses in criminal cases are aware of the laws against false swearing. Such calls are also dangerous and foolish—dangerous because they can violate a defendant's due process right to present his defense witnesses freely, and foolish because of the warnings given by this court and others.

United States v. Teague, 737 F.2d 378, 381-82 (4th Cir. 1984); *see also United States v. True*, 179 F.3d 1087, 1088, 1090 (8th Cir. 1999) (misconduct to warn witness he faced perjury and false statement charges if he contradicted earlier statement); *Vavages*, 151 F.3d at 1188-93 (vacating conviction where government warned witness he faced perjury charges if he testified consistently with past statements); *United States v. Viera*, 819 F.2d 498, 502-03 (5th Cir. 1987) (vacating conviction; government warning that witness would be charged with perjury if he testified falsely was threat, not good-faith reminder); *United States v. MacCloskey*, 682 F.2d 468, 475-76, 479 (4th Cir. 1982) (vacating conviction where government warned counsel he would be "well-advised" to remind client she could be re-indicted if she incriminated herself).

[redacted]

[redacted]

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Individually and cumulatively, these errors rendered the trial fundamentally unfair. The "silver-platter" statement was the only direct proof of criminal intent—the government's pièce de résistance. Accordingly, its erroneous admission, and the district court's erroneous refusal to permit the defense any means to challenge it, plainly prejudiced Sean and require a new trial. *See United States v. Groysman*, 766 F.3d 147, 162 (2d Cir. 2014) (granting new trial based on erroneous admission of evidence "central to the prosecution's strategy"); *United States v. Vayner*, 769 F.3d 125, 133-34 (2d Cir. 2014) (granting new trial because erroneously admitted proof "played an important role in the government's case, which the AUSA augmented by highlighting the evidence in her summation"); *United States v. Biaggi*, 909 F.2d 662, 692 (2d Cir. 1990) ("Where evidence of a defendant's innocent state of mind, critical to a fair adjudication of criminal

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charges, is excluded, [this Court has] not hesitated to order a new trial."); *United States v. Detrich*, 865 F.2d 17, 21 (2d Cir. 1988) ("Had the excluded statement been admitted, it might have enhanced appellant's credibility on the crucial issue of his *mens rea*…. We cannot find it harmless to exclude a statement that would have supported the main theory of the defense.") (internal quotations omitted).

Indeed, the jury deliberated for five days, a telling sign of how close the case was. *See, e.g.*, *Wood v. Ercole*, 644 F.3d 83, 96 (2d Cir. 2011) (granting new trial where jury deliberated into third day, indicating "a difference among them as to...guilt") (internal quotations omitted); *Zappulla v. New York*, 391 F.3d 462, 471 (2d Cir. 2004) ("length and deliberative conduct" by jury contributed to finding that "[p]rosecution's [c]ase [w]as [w]eak"); *United States v. Grinage*, 390 F.3d 746, 752 (2d Cir. 2004) (pointing to *Allen* charge in finding prejudice).

Each of the errors, standing alone, merits vacatur. Their cumulative effect was to present a one-sided view of the government's key piece of evidence and stymie all efforts to challenge it, rendering the trial fundamentally unfair and violating due process. *See Taylor v. Kentucky*, 436 U.S. 478, 488 n.15 (1978) ("[T]he cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness…."); *United States v. Haynes*, 729 F.3d 178, 197 (2d Cir. 2013) (combined errors "call into serious doubt whether the defendant received the due process guarantee of fundamental fairness

to which she and all criminal defendants are entitled"); *Al-Moayad*, 545 F.3d at 178 (together errors denied "due process of law and fundamental fairness") (internal quotations omitted).

II. AT A MINIMUM, THE CASE SHOULD BE REMANDED FOR RESENTENCING

Resentencing is necessary where the trial court has committed a significant procedural error, including improperly calculating the Guidelines range. *See United States v. Dorvee*, 616 F.3d 174, 179 (2d Cir. 2010). The calculation here was incorrect because the district court erroneously determined Sean should be held responsible for both Robert and Cunniffe's trading gains under U.S.S.G. §2B1.4. Had Sean been held responsible for only Robert's $150,000 of profits, his Guidelines Range would have been only 33 to 41 months. But the court adopted the government's argument that the FINRA inquiry had "spooked" Sean and Robert, leading them to decide Robert should not trade in his own account (Dkt.234 at 5, 14), and therefore, it was reasonably foreseeable that Robert would subsequently use someone else's account to trade, and that this person would trade for himself (A-723-25). Consequently, the court held Sean responsible for the more than $1 million that Cunniffe made, raising his Guidelines range to 63 to 78 months.

There are two defects in this analysis. *First*, to hold Sean responsible for Cunniffe's trading under U.S.S.G. §1B1.3(a)(1)(B), the court had to make specific

findings that "the activity was foreseeable to [Sean]" and that it was within "the scope of the criminal activity" that he agreed upon. *United States v. Bouchard*, 828 F.3d 116, 129 n.6 (2d Cir. 2016) (internal quotations omitted); *accord United States v. Studley*, 47 F.3d 569, 574, 576 (2d Cir. 1995) (remanding for resentencing due to court's failure to make findings on scope of agreement); *United States v. Platt*, 608 F. App'x 22, 30-31 (2d Cir. 2015) (same); *see also United States v. Getto,* 729 F.3d 221, 234 n.11 (2d Cir. 2013) ("[T]he scope of conduct for which a defendant can be held accountable under the sentencing guidelines is significantly narrower than the conduct embraced by the law of conspiracy.") (internal quotations omitted). The court did not make the latter finding and had no basis to do so. There was no evidence whatsoever suggesting that Sean ever agreed that his father could tip others. There was ample evidence, however, that the vast majority of Cunniffe's profits fell outside Cunniffe's agreement with Robert. The two men had agreed to split the profits 50/50, but Cunniffe flatly lied to Robert about how much they had made and kept the lion's share of the profits for himself. (A-268-69). If these profits were not within the scope of Cunniffe's agreement with Robert, they could not have been within the scope of any agreement with Sean.

Second, the court's foreseeability rationale is inconsistent with the evidence. Sean was quite familiar with FINRA inquiries (he had previously received 15-20 inquiries about other deals (A-288-99)), so if, as the government maintained, he

knew Robert was trading, he would not have been surprised to see his father on the list. And obviously the inquiry is not what prompted Robert to trade in others' accounts; he had arranged for Boccia and Cunniffe to trade for him *before* the inquiry. Without the FINRA theory, there is nothing to support the court's conclusion. Sean had at most met Cunniffe once in passing, and there was zero evidence he knew Robert had tipped anyone. Indeed, because Cunniffe flatly lied to him about how much they had made, even Robert could not have foreseen all of Cunniffe's trading gains.

The court ultimately imposed a sentence of 36 months—well below the bottom of the incorrectly calculated range of 63 to 78 months, but above the bottom of the correct range of 33 to 41 months. Remand is necessary for the district court to recalculate the Guidelines range and determine whether a below-Guidelines sentence would remain appropriate under the correct range. *See Dorvee*, 616 F.3d at 181 ("[A]n incorrect calculation of the applicable Guidelines range will taint…a non-Guidelines sentence, which may have been explicitly selected with what was thought to be the applicable Guidelines range as a frame of reference.") (internal quotations omitted).

CONCLUSION

For the foregoing reasons, this Court should vacate the convictions and grant a new trial, or remand for resentencing.

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

The undersigned counsel of record for Defendant-Appellant Sean Stewart certifies pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) that the foregoing brief contains 13,027 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), according to the Word Count feature of Microsoft Word 2011; and that this brief has been prepared in 14-point Times New Roman.

Dated: June 1, 2017

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