17-593

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

SUPPLEMENTAL BRIEF FOR DEFENDANT-APPELLANT

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In a case so thin the jury deliberated for almost as long as they heard evidence and required an *Allen* charge to reach verdict, the "silver-platter" statement likely tipped the scales in favor of conviction. There was no other direct evidence Sean Stewart intended his father to trade on the information he had shared. The government repeatedly stressed the "devastating" nature of the statement and highlighted the phrase "silver platter," with its strong connotations of an *intentional* tip.

Robert's post-arrest statements, by contrast, suggested that Sean had never "served up" tips on a "silver platter," but had merely observed that Robert could have (but did not) profit from the inside information. The government fully capitalized on its successful efforts to keep the jury in the dark about the impeachment material. At the peroration of its rebuttal, the prosecution berated Sean for failing to "explain" the silver-platter statement—knowing full well he could not "explain" it because the evidence that he had said something far more benign was concealed from the jury.

This Court recently emphasized that "[i]t is . . . the province of the jury to evaluate competing narratives" when deciding whether a person disclosed confidential information "with the expectation that [the recipient] would trade on it . . ." *United States v. Martoma*, 869 F.3d 58, 71 (2d Cir. 2017) (internal quotations omitted). In this case, however, the jury was deprived of any meaningful

opportunity to evaluate the competing narratives and make its own informed choice between them. This rendered the trial fundamentally unfair.

I. THE "SILVER-PLATTER" STATEMENT WAS INADMISSIBLE

A. The "Silver-Platter" Statement Was Inadmissible Under Rule 804(b)(3)

The prior briefs detail why admission of the silver-platter statement was legal (not mere factual) error, because it was based on a misinterpretation of *Williamson v. United States*, 512 U.S. 594 (1994). (*See* Br.18-25; Reply.Br.5-10). Accordingly, we focus here on why the government's supplemental arguments fail.

Whether a statement is inculpatory under Rule 804(b)(3) depends on whether a particular statement, not the declarant's entire narrative, is inculpatory. *Williamson*, 512 U.S. at 599. Non-self-inculpatory statements are inadmissible even if they (1) are made within a broader, generally self-inculpatory narrative; or (2) are collateral to self-inculpatory ones. *Id.* at 600-01.

Ignoring this binding authority, the government, like the district court, erroneously applies a broad "probativeness" standard. But its own citations demonstrate that probativeness at most elucidates the primary inquiry: whether a reasonable person in the declarant's shoes would perceive the specific declaration as against his penal interest—not whether the narrative as a whole inculpates him. *See, e.g.*, *id.*; *United States v. Gupta*, 747 F.3d 111, 127 (2d Cir. 2014).

Taken to its logical extreme, the government's strained view of probativeness would cause the 804(b)(3) exception to swallow the hearsay rule. For example, in *United States v. Tropeano*, this Court held that a statement made in a plea allocution—a plainly inculpatory narrative—was inadmissible because the statement itself was not self-inculpatory. 252 F.3d 653, 658-59 (2d Cir. 2001). Clearly, the statement would have been probative; but if that had been enough, the case would have come out the other way.

The silver-platter statement is clearly exculpatory because it describes an occasion when Robert supposedly did *not* trade on inside information. The assertion that it shows that Robert refrained from trading due to "fear of regulatory oversight" following a May 2013 SEC call (G.Supp.Br.9), is factually baseless. *The government* told the jury that the reason Robert didn't trade during this period was that at the time, Sean had no access to inside information. (A-453). Furthermore, Robert said Sean had made the statement "years ago," suggesting it must have made been made much earlier than 2013. (Dkt. 101 Ex.C at 8).

B. Rule 801(d)(2)(E) Does Not Provide A Valid Alternative Rationale

The district court expressly did "not rely on the co-conspirator exception" (A-86), and made no factual findings under Rule 104(a) to which this Court could even defer. It is well-settled that appellate courts should not rule on or make their own factual findings as to a theory of admissibility on which the district court

never relied. *See, e.g., United States v. Woods*, 561 F. App'x 270, 274-75 (4th Cir. 2014) (refusing to consider hearsay argument because district court made no factual findings and "appellate court[s] . . . do not make such factual findings"); *United States v. Mickens*, 977 F.2d 69, 72 (2d Cir. 1992); (Reply.Br.6).

The district court's remark that this was "a discussion between admitted co-conspirators that relates to the use and precaution, if you will, taken with respect to sensitive information," (A-86), was not a factual finding under the Rule 801(d)(2)(E) test. The "co-conspirators" the court was referring to were Robert and *Cunniffe*, but admission required finding a conspiracy between Robert and *Sean*. *See United States v. Al-Moayad*, 545 F.3d 139, 173 (2d Cir. 2008).[1]

In any event, the statement would have frustrated or thwarted the conspiracy, not furthered it (Reply.Br.14-15), and was at most idle chatter. *See, e.g., United States v. Mulder*, 273 F.3d 91, 103 (2d Cir. 2001); *United States v. Johnson*, 927 F.2d 999, 1002 (7th Cir. 1991). One of the government's own cases demonstrates this. In *United States v. Desena*, it was error to admit hearsay from a co-conspirator describing the defendant's amateurish arson attempts, because this was "casual storytelling in a bar, more than two years after the event." 260 F.3d 150, 157-58 (2d Cir. 2001). Likewise, Robert's offhand comment to Cunniffe during an

[1] If the evidence of a Robert-Sean conspiracy was so "overwhelming," *see* (G.Supp.Br.4), then why has the government conceded that any error in admitting the silver-platter statement was *not* harmless? Oral Argument at 19:38 – 19:56.

hour-long rambling conversation in a restaurant about something Sean said to him "years ago" (Dkt.101 Ex.C at 8), was mere idle chatter, not made with the goal of "elicit[ing] cooperation or assistance in achieving the common scheme," *United States v. Foster*, 711 F.2d 871, 880 (9th Cir. 1983).

II. ROBERT STEWART'S POST-ARREST STATEMENTS WERE ADMISSIBLE UNDER RULE 806

1. Rule 806 provides that when "a hearsay statement . . . has been admitted in evidence, the declarant's credibility may be attacked . . . by *any evidence* that would be admissible for those purposes if the declarant had testified as a witness." Notably, the Rule provides *greater* latitude to a party attacking a *hearsay declarant* than an in-court witness. For instance, it allows use of an inconsistent statement to impeach "regardless of when it occurred or whether the declarant had an opportunity to explain or deny it," Fed. R. Evid. 806, even though a testifying witness can only be impeached with a prior statement and must be permitted to explain or deny the inconsistency, *see id.* advisory committee's note. This makes sense, because the party against whom hearsay is admitted has been deprived of the most effective way to test the declarant's credibility—the opportunity to cross-examine him. *See Crawford v. Washington*, 541 U.S. 36, 61 (2004) ("reliability can best be determined" by "testing in the crucible of cross-examination"); David F. Binder et al., *Hearsay Handbook* § 5:1 (4th ed. 2017) (party against whom a hearsay statement is admitted "should have the right to

impeach the credibility of the [declarant] by whatever other means are available" and is not bound by the "confrontation requirements set forth in Fed. R. Evid. 613(b)" because "the party has no opportunity to cross-examine the witness").

Here the district court took the opposite tack, erroneously applying a miserly definition of inconsistency, in which only a specific denial of the hearsay statement counts. As previously explained (*see generally* Br.31-35; Reply.Br.15-21), that is the wrong legal standard. It contravenes this Court's teaching that the statements "need not be diametrically opposed" to be considered "inconsistent." *United States v. Trzaska*, 111 F.3d 1019, 1024 (2d Cir. 1997). Instead, the statement offered to impeach should be admitted for that purpose if there is "[*a*]*ny* 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 (emphasis added) (internal quotation marks omitted); *see also United States v. Grant*, 256 F.3d 1146, 1154-55 (11th Cir. 2001) (rejecting "narrow" definition of inconsistency and holding statements improperly excluded because they could have been used to impeach declarant had he testified).

That standard is readily satisfied here. If Robert Stewart had testified that "years ago," Sean had said, "I handed you this on a silver platter and you didn't

invest in this" (Dkt.101 Ex.C at 8), a skillful defense attorney plainly would have been permitted to attack his credibility with questions along the following lines:

- Your testimony is that Sean Stewart complained that he handed you inside information on a "silver platter" and you didn't use it to trade, correct?
- Suggesting that he gave you the information intending for you to trade on it, correct?
- But when you were questioned by the FBI after your arrest, you characterized Sean's statement very differently, didn't you?
- In fact, you told the FBI that Sean had merely remarked that you could have made money if you had traded, right?
- Not that he intended you to trade, right?
- For instance, when the agent asked how "you explain a comment you made to Rick, that Sean got angry with you when he gave you this information on a silver platter," you responded by saying Sean had actually said something different, didn't you? (Dkt. 120 Ex.B at 1).
- In fact, you responded that Sean actually said "Uh y'know, all these deals—if you were trading—you could have made like millions of dollars," right? (*Id.* at 2).
- And you told the agent that trading on the information "wasn't [Sean's] intention," right? (*Id.*)
- And later in this interrogation, when the agent again asked why Sean "got mad at you" and said, "I served this up to you on a silver platter and you didn't invest in it," you again replied that Sean had actually said something different, right? (*Id.* at 11).
- That second time, you told the agent that you thought Sean "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," right? (*Id.*)

- Sean's statement was just an offhand comment, right?

- He wasn't telling you he shared the information with you so that you could trade, right?

- In fact, you specifically told the agent multiple times that Sean never intended for you to trade, right?

- When you were asked "why was Sean giving you this information," you responded, "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," right? (*Id.* at 2).

- And when you were asked, "What was he expecting you to do with" the information, didn't you say "he was just – you know – kind of bragging. Sean's bragging about, 'Hey I'm working on this deal, that deal'"? (*Id.*)

- You also told the agent that you "never discussed" your trading with Sean, didn't you? (*Id.*)

- The agent asked whether Sean was "giving you the information so that you could trade," and you said, "No," didn't you? (*Id.*)

- And in fact, you promised Sean you would not trade after the FINRA incident, right?

- And you never told Sean about your trading after that, right?

- That's why you told the agent "Sean doesn't even know [you] traded," right? (*Id.* at 8)

- And that's why you said, "[h]e had no clue" about it, right? (*Id.*)

- And that's why you said he "doesn't know anything about this at all," right? (*Id.*)

- And that's why, even though the agent twice asked you to confirm that Sean made the silver-platter statement, you didn't do that either time, correct?

This hypothetical cross-examination of Robert demonstrates that the variance between the silver-platter statement and the post-arrest statements "has a reasonable bearing on [Robert's] credibility," which is sufficient under Rule 806. *Trzaska*, 111 F.3d at 1025; *United States v. Ebbers*, 458 F.3d 110, 123 (2d Cir. 2006). To be sure, Robert's post-arrest statement could not have been elicited by such examination, but a skilled defense attorney could have effectively broken it down and used it as a powerful tool in closing argument.

2. The government's latest attempt to defend the erroneous exclusion of this important impeachment material fares no better than its prior arguments. *First*, its claim that the statements did not actually impeach because Robert "implicitly adopted and reconfirmed" the silver-platter statement (G.Supp.Br.11), is nonsense. After all, if Robert had merely "reconfirmed" his earlier version, why bother objecting at all? Why did the government labor so mightily to keep the statements out if they just "reconfirmed" the prosecution's case?

The government objected because there is a world of difference between what Robert told Cunniffe that Sean had said, and what Robert told the FBI Sean had said. The Cunniffe version—"I handed you this on a silver platter"—was heavy artillery; fodder for damning jury arguments that Sean "served up tips to his father on a silver platter, expecting that his father would profit from that stolen information," (A-134/79 (opening); *accord* A-135/83), and gave "his own family a

special advantage over the ordinary investor . . . who doesn't get[] served on a silver platter." (A-466). It was laden with the implication that Sean intended his father to trade—the critical issue at trial.

By contrast, the version Robert recounted to the FBI was just an offhand observation that Robert "could have made like millions of dollars" if he had traded. (Dkt. 120 Ex.B at 2). There was no implication Sean was "scolding" his father for not trading. (*Cf.* A-462-63 (government summation)). Robert used the more benign phrasing to describe Sean's statement not once, but *both* times the agent asked him about it. Yet the government flatly ignores the second response by misleadingly quoting only Robert's comment that Sean was "clearly drinking" (G.Supp.Br.11) and omitting Robert's description of the statement: "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." (Dkt. 120 Ex.B at 11). Simply put, it is the difference between intentionally tipping inside information and merely communicating that he believed his father was not inclined to steal.

Second, the notion that the post-arrest statements about whether Sean knew Robert was trading are inadmissible "because Robert was incompetent to opine about [Sean's] state of mind" (G.Supp.Br.12), is sophistical. No mind-reading was needed here. Sean would only know Robert was trading if Robert had told him so. Robert's statements that he believed Sean was unaware of his trading and that he

never told Sean he had been trading were thus relevant, based on personal knowledge, and admissible to show that Sean did not intend Robert to trade. Indeed, Robert's own state of mind was itself at issue, because if he thought that Sean believed he was not trading, that would show there was no illegal tip-and-trade conspiracy. *See* Fed. R. Evid. 803(3); *United States v. DeJesus*, 806 F.2d 31, 35 (2d Cir. 1986) (statement about declarant's state of mind satisfied Rule 803(3) because it tended to prove defendant's participation in conspiracy).

Finally, the government largely ignores this Court's test for inconsistency: whether the post-arrest statements had a "reasonable bearing on credibility." *Trzaska*, 111 F.3d at 1025. Instead, the government simply parrots its earlier erroneous arguments about the controlling cases, and has no answer to the points in our Reply Brief on this subject. (*Compare* G.Supp.Br.13 *with* Reply.Br.16-19).

The fact is, numerous cases from this and other Courts of Appeals have held that statements far less inconsistent than those here were sufficiently divergent to satisfy Rule 806. (*See* Br.33-35). *See also* Oral Argument at 23:17 – 24:55. We will not rehash our prior discussions of those many cases, but we urge the Court to scrutinize them because they provide strong support for reversal here. The government was unable previously to distinguish them (*see* Reply.Br.19-21), and appears to have abandoned the effort in its supplemental brief.

III. THE RULE 806 ERROR PLAINLY WAS NOT HARMLESS

Given the impact the exclusion of the post-arrest statements had on Sean's Sixth Amendment right to present a meaningful defense, the government should be required to demonstrate that the error was harmless beyond a reasonable doubt. *See, e.g.*, *Lyons v. Johnson*, 99 F.3d 499, 503 (2d Cir. 1996) (reviewing exclusion of defense evidence under *Chapman* standard). But it cannot meet its burden even under the standard for non-constitutional evidentiary errors, because there is no way to "conclude with fair assurance" that the Rule 806 error "did not substantially influence the jury." *United States v. Litvak*, 808 F.3d 160, 184 (2d Cir. 2015).

First, the harmfulness of the exclusion of Robert's post-arrest statements must be evaluated in light of how powerfully inculpatory the silver-platter statement was. The "importance of . . . unrebutted assertions to the government's case" is a critical factor in assessing prejudice caused by the exclusion of defense evidence. *Id.*; *accord United States v. Scully*, 877 F.3d 464, 475 (2d Cir. 2017). Here, the government repeatedly argued to the jury that the statement showed that Sean intended for his father to trade. The government began its opening statement claiming that Sean had "served up tips to his father on a silver platter, expecting that his father would profit" (A-134/79), and then reiterated that argument near the end of its opening (A-135/83). The government repeatedly invoked the statement as damning evidence of Sean's criminal intent. *See, e.g.*, A-461 ("Bob says on those tapes that his son Sean Stewart chided him for failing to invest based on tips

handed to him on a silver platter . . . He says the defendant tried to give him more tips . . . ."); A-462-63 ("Of course the defendant knew about his father's investments. That's how he knew to scold Bob Stewart for not trading on some of the tips."). The prosecution also used the loaded "silver-platter" phrasing to end its closing with the powerful argument that Sean had improperly "used inside information to give his own family a special advantage over the ordinary investor . . . who doesn't get served on a silver platter." (A-466).

In rebuttal, the government improperly seized on the defense's *inability to rebut* the hearsay, saying: the "tapes are devastating to [Sean's] defense, and he knows it." (A-566). And it sharply rebuked Sean for his supposed inability to "explain" the statement. After reading the silver-platter passage in its entirety and giving lip service to Sean's testimony denying that he had made this statement, the prosecutor said: "But for this one even Sean Stewart couldn't come up with an explanation. He just left if for [defense counsel] to argue. Why? Because it's devastating, because those tapes show beyond any reasonable doubt that Sean Stewart is guilty." (A-568). This was a damning last word, and an argument the government would have been in no position to make if the post-arrest statements had been admitted. That in itself demonstrates just how prejudicial the inability to rebut the claim that Sean had made the silver-platter statement was. *See, e.g.*, *Litvak*, 808 F.3d at 187-88 (exclusion of defense testimony prejudicial where

witness would have refuted government's jury arguments).

Second, Sean lacked other means to rebut the statement, further demonstrating prejudice. *See, e.g.*, *id.* at 184 ("extent to which the defendant was otherwise permitted to advance the defense" is key harmlessness factor). Sean's attempt to call Robert to the stand failed because the district court erroneously permitted Robert to take the Fifth and refused to compel the government to immunize him. (*See* Br.35-53; Reply.Br.21-27).

Third, this was a very close case. The government had no other direct evidence that Sean intended for his father to trade. *See United States v. Vayner*, 769 F.3d 125, 133-35 (2d Cir. 2014) (error not harmless where "prosecution's case . . . was far from overwhelming"). As explained, the government conceded the statement was so important that any error in its admission would not be harmless. The length of the jury's deliberations, and the need for an *Allen* charge, further underscore the point. The government blithely asks this Court to reject the "suggestion that the length of the jury's deliberations should bear on the harmlessness analysis" (G.Supp.Br.15), but this Court has repeatedly *held* that *long deliberations* evidence prejudice, *see* (Br.54 (discussing caselaw)), and the government cites no authority supporting its contrary position.[2]

[2] The government strains to find some unrelated explanation for the length of the deliberations. (G.Supp.Br.15). But the jury asked for the recordings early in its

Finally, the post-arrest statements would not have been cumulative. The government points to three snippets of a different recorded conversation between Robert and Cunniffe. (G.Supp.Br.14). But the admission of other evidence on a similar subject does not render the error harmless. *See Scully*, 877 F.3d at 475 (vacating conviction due to exclusion of defense evidence). That is particularly true here, since none of the admitted comments bears on *what Sean actually said*—whether he chastised Robert for not using tips "served up on a silver platter," or merely mused that Robert could have made money. These brief remarks that Robert had not told Sean he had invested, and that Sean said "I am working on this" or "that," hardly provided the same impeachment fodder as the extensive material in the post-arrest interview, in which Robert: *repeatedly* insisted he had not told Sean about his investing, did not think Sean knew about it, and most importantly, twice described Sean's remark in a benign way that lacked the bite the government attributed to the supposed "angry" "silver-platter" statement.[3]

This Court should grant a new trial.

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deliberations (A-570), and the government conceded that any error in admitting the silver-platter statement was *not* harmless. Having done so, it cannot pretend the jurors took five days and needed an *Allen* charge to reach a verdict because they were debating some issue other than whether Sean intended his father to trade.

[3] Robert's statements on the April 16 recording are far less "inconsistent" with the silver-platter statement than his post-arrest statements. The government cannot credibly assert that, on the one hand, the post-arrest statements are not inconsistent, but on the other, statements even less inconsistent somehow cured the error.

Dated: New York, New York
March 29, 2018

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CERTIFICATE OF COMPLIANCE

The undersigned counsel of record for Defendant-Appellant Sean Stewart certifies pursuant to Federal Rule of Appellate Procedure 32(g) that the foregoing brief complies with the Court's March 1, 2018 order.

Dated: March 29, 2018

/s/ Alexandra A.E. Shapiro

Alexandra A.E. Shapiro