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04-4081(CON)-cr

To Be Argued By:
Walter E. Dellinger

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

MARTHA STEWART and PETER BACANOVIC,

Defendants-Appellants.

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

BRIEF FOR DEFENDANT-APPELLANT MARTHA STEWART

Walter E. Dellinger
Pamela A. Harris
Jeremy Maltby
Matthew M. Shors
Toby Heytens*
Maritza U.B. Okata
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, D.C. 20006-4001
Telephone: 202-383-5300

Martin G. Weinberg
MARTIN G. WEINBERG P.C.
20 Park Plaza, Suite 905
Boston, Massachusetts 02116

David Z. Chesnoff
GOODMAN & CHESNOFF
520 South Fourth Street
Las Vegas, Nevada 89101

Attorneys for Defendant-Appellant Martha Stewart

** Admitted only in Maryland*

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PRELIMINARY STATEMENT

Defendant-Appellant Martha Stewart ("Stewart") appeals a judgment of conviction entered by the Honorable Miriam Goldman Cedarbaum of the U.S. District Court for the Southern District of New York. The unreported order barring Stewart from arguing that she had not committed insider trading is available at 2004 WL 113506. The order denying Stewart's motion for a new trial or an evidentiary hearing based on juror misconduct is reported at 317 F. Supp. 2d 432. The order denying Stewart's motion for the same relief based on governmental misconduct is reported at 323 F. Supp. 2d 606. The other challenged rulings are unreported.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 18 U.S.C. § 3231. The judgment of conviction was entered July 19, 2004. SPA 133.[1] Stewart filed a timely notice of appeal on July 16, 2004. JA 1866-67. This Court has jurisdiction under 28 U.S.C. § 1291.

[1] Numbers preceded by "JA," "SA," and "SPA" reference the Joint Appendix, the Supplemental Appendix, and the Special Appendix, respectively. "Tr." refers to the trial transcript; all cited pages are included in the Joint Appendix at Tab 32. "GX" refers to Government Exhibits at trial. "Lawrence Tr." refers to the transcript of Lawrence Stewart's trial; all such cited pages are included in the Supplemental Appendix.

INTRODUCTION

Martha Stewart was never charged with insider trading. But a barrage of pretrial leaks and in-court accusations left the indelible impression that she was guilty of that offense. Tarring Stewart with an uncharged, highly inflammatory crime was fundamentally unfair; that unfairness was compounded by rulings that barred Stewart from responding to those charges and prevented the jury from understanding what was—and was not—properly before it. Governmental and juror misconduct further undermined the integrity of the proceedings.

At bottom, Stewart's trial turned on one question: *Why* did she sell the last small remnant of her holdings in ImClone Systems, Inc. ("ImClone") on December 27, 2001? Stewart's answer: A preexisting agreement with her broker that he would contact her, and she would decide whether to sell, if the price fell to $60 per share or below. If fully accepted, that explanation—corroborated by testimony from a pivotal witness, as well as a critical document—would have negated the Government's theory of the case and established a firm basis for concluding that, if Stewart made any factual misstatements or material omissions during two interviews with government investigators, she did so because of honest error, faulty memory, or misunderstanding of the specific questions asked.

Two separate constitutional violations, however, seriously undermined the cornerstone of Stewart's defense. First, in contravention of the Confrontation

Clause, the Government used out-of-court testimonial statements by Stewart's co-defendant that were never subject to cross-examination to undermine *the one witness* who provided independent corroboration of the $60 agreement. Second, the Government's efforts to discredit *the one corroborating document* were led by a high-ranking Secret Service official who even the prosecutors now admit lied on the stand.

In the end, the jury found Stewart guilty of two instances of saying that she did "not recall" having discussed certain matters months previously, and for material false statements or material omissions in response to unrecorded and ambiguous questions about a minor transaction that has not itself been the basis of criminal charges. The process leading to conviction was tainted by: repeated allegations of an uncharged crime that were never rebutted or explained to the jury; the introduction of damaging testimony that was never subject to cross-examination; the use of false testimony condoned by senior Government officials; and, finally, the presence of an outspoken juror who apparently lied to be seated on the panel that judged Stewart a liar. Alone, each of these errors would warrant reversal. Together, they make an overwhelming case for setting aside this verdict.

ISSUES PRESENTED[2]

I. Whether, after a trial pervaded by allegations that Stewart had committed the uncharged crime of insider trading, the District Court erred by: (1) refusing to instruct the jury that it could not convict Stewart of insider trading and could consider evidence of uncharged conduct only for a limited purpose; and (2) barring Stewart from rebutting the Government's allegations or explaining to the jury that she had not committed insider trading.

II. Whether the Government's use of out-of-court testimonial statements by Stewart's co-defendant to discredit a key defense witness and otherwise bolster its case violated the Confrontation Clause.

III. Whether the false testimony of a high-ranking Government official, known to several other Government officials and transparent to prosecutors, requires a new trial (or, at very least, an evidentiary hearing) under the "virtually automatic" reversal rule.

IV. Whether the District Court erred in refusing to convene an evidentiary hearing to consider direct and credible evidence that one of Stewart's jurors made numerous false statements about his qualifications to sit on the jury.

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[2] This Court has consolidated Stewart's appeal with that of her co-defendant, Peter Bacanovic. The issues listed above are those addressed in this brief. Stewart also adopts and incorporates by reference the arguments contained in Parts I(C)(2), II, V, VI, and VIII of Bacanovic's brief. *See* Fed. R. App. P. 28(i).

STATEMENT OF THE CASE

On June 4, 2003, a grand jury returned a nine-count indictment charging Stewart and Bacanovic with various offenses arising from a federal investigation of Stewart's December 27, 2001 sale of 3,928 ImClone shares. JA 104-45. Stewart was charged with: conspiring to obstruct an agency proceeding, make false statements, and commit perjury, *see* 18 U.S.C. § 371 (Count One); making false statements to federal investigators, *see* § 1001 (Counts Three and Four); obstructing an agency proceeding, *see* § 1505 (Count Eight); and committing securities fraud, *see* 15 U.S.C. §§ 78j(b), 78ff; 18 U.S.C. § 2 (Count Nine).

Trial began on January 26, 2004. On February 27, the District Court granted Stewart a judgment of acquittal on Count Nine. JA 388-410. On March 5, the jury found Stewart guilty on the remaining counts. Tr. 4947-49; JA 916-18.

Stewart filed a post-verdict motion for judgment of acquittal, and new-trial motions based on both juror and governmental misconduct. The District Court denied those motions on May 5 and July 8, 2004. SPA 52-74, 89-131.

On July 16, 2004, the District Court sentenced Stewart to 5 months' imprisonment, 2 years' supervised release (including 5 months' home confinement and electronic monitoring), a $30,000 fine, and a $400 mandatory assessment. SPA 133-140. The District Court stayed the sentence pending appeal and entered

judgment on July 19, 2004.[3] This appeal followed.

STATEMENT OF FACTS

I. Stewart's Stock Sale And The Federal Investigation

ImClone is a biotechnology company whose principal product is Erbitux, an anticancer drug. Tr. 772. Its founder and former CEO, Sam Waksal, is a friend of Stewart's.

Starting in the early 1990s, Stewart acquired a sizeable amount of ImClone stock—eventually reaching 51,800 shares—for her company's pension fund. Tr. 800, 828. In 1999, Stewart directly purchased 2,500 ImClone shares through an account at Morgan Stanley; that stake later doubled because of a stock split. Tr. 828-29.

Stewart disposed of almost all these ImClone shares during the fall of 2001, a period when the Food and Drug Administration ("FDA") was considering whether to approve Erbitux for public sale. In October, Stewart sold all 51,800 shares in the pension fund account at $61 per share. Tr. 800, 830. That November,

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[3] On September 15, 2004, Stewart asked the District Court to vacate the stay, explaining that the best interests of the company she founded—and of the employees, business partners, and others whose interests depend on its continued success—required her to begin serving her sentence as soon as practicable. This course was the only way to establish a date certain for Stewart to resume fully her contributions to the company and thus eliminate uncertainty about her future status and that of the company. On September 21, the District Court vacated the stay. SPA 149. Stewart is currently incarcerated at the Federal Prison Camp in Alderson, West Virginia.

she irrevocably offered the remaining 5,000 shares for sale in response to a tender offer from Bristol-Myers Squibb; the partial acceptance of that offer left her with 3,928 shares. Tr. 830. Stewart later transferred that small remnant—which amounted to just 7% of her former ImClone holdings—to Merrill Lynch, where she held an account managed by Bacanovic, who also managed accounts for Waksal and members of his family. Tr. 800.

In November and December 2001, Stewart and Bacanovic reviewed her portfolio and agreed on a plan to sell certain shares to generate losses for tax purposes. Tr. 801, 833-34. A worksheet maintained by Bacanovic in connection with Stewart's accounts, printed on Friday, December 21, listed each of Stewart's holdings at Merrill Lynch and their market value as of December 20.[4] Tr. 805-06. The worksheet also contained handwritten notes and marks in blue ink. The stocks sold in accordance with the tax-loss selling arrangements had check marks next to their listings. Tr. 806. Three others—Apple, Nokia, and ImClone—were circled to indicate that they were to be considered for sale but not to be sold on December 21.[5] Tr. 806-07, 835. Next to the ImClone listing was the handwritten notation: "@60"—reflecting Bacanovic's commitment to call Stewart when ImClone was

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[4] The worksheet, marked GX 81 at trial, appears at JA 441 (Tab 28).

[5] Bacanovic had recommended that Stewart hold Apple and Nokia a little longer to maximize her return. Tr. 834-36. When that happened on Monday, December 24, Bacanovic sold those stocks before leaving for vacation. Tr. 835-36.

trading in that range (just below the price Stewart obtained for her pension account shares) so that she could decide whether to sell. Tr. 2503. On December 24, ImClone was trading above $60 per share. Tr. 836.

During the evening of December 25, 2001, ImClone and Waksal received advance notice that the FDA would reject ImClone's application for Erbitux. Tr. 892. On the morning of December 27, Bacanovic's assistant, Douglas Faneuil, received a series of communications from Waksal's daughters and accountant, all seeking to dispose of the Waksal family's ImClone shares. Tr. 1482-84, 1490-91, 1501-03. Faneuil called Bacanovic, who had been vacationing in Florida since December 24, to discuss these requests. Tr. 1503. Faneuil and Bacanovic together called Stewart's office, Tr. 1503-04, but learned she was unavailable. Tr. 2109. Stewart's assistant, Ann Armstrong, took this message: "Peter Bacanovic thinks ImClone is going to start trading downward." Tr. 774, 2109, 2724. At the time of the call, there was a clear downward pressure on the stock, even though the NASDAQ as a whole was trending up. Tr. 4060-61.

Later that day, while waiting at a Texas airport en route to Mexico, Stewart used her cell phone to call Armstrong. Armstrong relayed several messages, including Bacanovic's, then connected Stewart to several people at her company, Martha Stewart Living Omnimedia, Inc. ("MSLO"). Tr. 2114, 2130-31. After those conversations ended, Stewart asked Armstrong to call "Peter's office."

Tr. 2130.

What happened next is important to understanding what later became a critical issue: whether Stewart reasonably believed that she talked that day to Bacanovic. Armstrong pressed "conference," got an outside line, dialed Bacanovic's number, and, after she got an answer, connected Stewart. Tr. 2132. According to Faneuil, he picked up the phone and answered: "Merrill Lynch, Peter Bacanovic's office." Tr. 1560. Armstrong did not recall knowing who answered Bacanovic's phone, or telling Stewart who was on the line. Tr. 2132-33.

Stewart's call to Merrill Lynch lasted 2 minutes, 29 seconds. Tr. 2789. After receiving a quote for ImClone's stock price, Stewart directed Merrill Lynch to sell her shares, Tr. 1562, 2237, shares that she had already offered for sale the previous month in response to a tender offer. At that time, ImClone's stock price was approximately $58.90; the average sale price of Stewart's 3,928 shares was $58.43. JA 110-11. 7.7 million ImClone shares were traded on December 27, Tr. 3145, meaning that Stewart's sale represented just over *0.05%* of all trading activity that day.

On Friday, December 28, the FDA formally notified ImClone of its decision. After the market closed—at $55.25 per share, Tr. 1093, 1122—ImClone publicly announced the denial, Tr. 892. When the market reopened on Monday, December 31, ImClone was trading at $45.39. Tr. 1093.

That day, Merrill Lynch began an internal investigation regarding the Waksals' and Stewart's trading of ImClone stock on December 27. Tr. 1083-91. On January 2, 2002, acting on a referral from Merrill Lynch, the SEC launched its own investigation. Tr. 2233. The United States Attorney's Office ("USAO") began a parallel investigation around the same time. JA 112.

On January 3, SEC attorneys Helene Glotzer and Jill Slansky interviewed Faneuil by telephone, in the presence of Merrill Lynch legal and compliance personnel. Tr. 1351-53. According to Glotzer, Faneuil said that, after his communications with the Waksals and Bacanovic, he received a call from Stewart, who requested and obtained a quote on ImClone's price, then directed him to sell her shares. Tr. 2236-38.

On January 7, the same SEC and Merrill Lynch officials participated in a telephone interview of Bacanovic, who had just returned from vacation. Tr. 1353, 2240. According to Glotzer, Bacanovic said that, around December 20, 2001, he and Stewart decided that they would sell her ImClone shares if their price fell to $60 or below, that he called Stewart on December 27 to inform her that ImClone's price was falling to that range, and that Stewart sold her shares based on that information and their preexisting agreement. Tr. 2241.

Stewart returned from vacation on January 6, and went to work the next day. No telephone records or other evidence indicate that she had any contact with

Bacanovic between December 27 and that date. Tr. 847, 2847. Soon thereafter, however, Stewart found herself caught up in a federal investigation of alleged insider trading.

The Government started with a "suspicion"—now known to be false—that Stewart had sold on a "tip" from Waksal about ImClone's impending negative news from the FDA. Tr. 848, 1090, 2586. On January 25, 2002, the USAO contacted MSLO's General Counsel, seeking to interview Stewart. Tr. 2498-99. Three days later, the SEC issued an "Order Directing Private Investigation and Designating Officers to Take Testimony" in connection with its ImClone investigation. Tr. 2243; JA 154-56. Around that time, the SEC served Merrill Lynch with a document request concerning Stewart's accounts. In response, Bacanovic produced the "@60" worksheet. Tr. 1214-19.

On January 31, Stewart asked her assistant to retrieve her telephone messages from late December and early January. Tr. 2155. Sitting at Armstrong's computer, Stewart changed Bacanovic's December 27 message to read: "Peter Bacanovic re imclone." Tr. 2156-57. After doing so, however, Stewart immediately directed Armstrong to restore the original wording. Tr. 2157.

Accompanied by her attorneys, Stewart voluntarily participated in an interview at the USAO on February 4, 2002. Present were an Assistant United States Attorney ("AUSA"), SEC attorneys Glotzer and Slansky, and FBI Agent

Catherine Farmer. Tr. 2245, 2275. Contrary to agency policy, the SEC attorneys did not advise Stewart that the SEC had issued a formal order of investigation. Tr. 2436-37. Nor did they provide the standard warnings given as a matter of policy and practice to SEC witnesses. Also contrary to SEC regulations, they did not give Stewart a copy of SEC Form 1662, which expressly states that any false statements during the interview could result in a felony prosecution under 18 U.S.C. § 1001. Tr. 2407-11. Finally, though the AUSA told Stewart that it was "important to be truthful," the Government did not place her under oath. Tr. 2246, 2410-11.

Virtually no record was made of the February 4 meeting. There was no video or audio recording, and no court reporter was present. Tr. 2518-19, 2526-27. The entire government record consists of Agent Farmer's handwritten notes, which record neither the questions posed, Tr. 2526-27, nor everything Stewart said in response. (Indeed, whereas Bacanovic's 2 hour, 50 minute SEC deposition yielded a 163-page typed transcript, Farmer's notes of Stewart's 2-hour interview were only 25 pages long. Tr. 2521-23.) Although they would later form the basis for a felony prosecution, Stewart had no opportunity to review Farmer's notes or Farmer's subsequently drafted report to confirm their accuracy. Tr. 2519-20.

According to Glotzer and Farmer, Stewart explained that, after tendering her ImClone shares, she and Bacanovic decided that she would sell the remaining

shares if the stock price fell to $60 or below. Tr. 2250, 2502-03. Stewart said that on December 27 she received a message to call Bacanovic, spoke to him, and, upon learning that ImClone was trading below $60, directed him to sell all her shares. Tr. 2250-51, 2504-05. Stewart also stated that she sold because "she didn't want to be bothered over her vacation with it," Tr. 2251, 2505, and that, during the same conversation, she and Bacanovic also "briefly discussed Martha Stewart Living's stock price as well as K-Mart," Tr. 2251, in which Stewart has substantial interests. According to Glotzer and Farmer, Stewart also stated that since December 27 she had spoken with Bacanovic "two or three times," and that they had had only one "public arena" conversation about ImClone, in which Bacanovic told her that the SEC had questioned Merrill Lynch regarding ImClone trading, but not that it had questioned him. Tr. 2253-55, 2507.

The SEC took Bacanovic's sworn testimony on February 13, 2002. Bacanovic testified that, on the morning of December 27, he was in regular contact with Faneuil about the Waksals' efforts to sell their ImClone shares. JA 446-50. During one of those calls, Bacanovic testified, he and Faneuil called Stewart to inform her of ImClone's price; learning that she was in transit, they left a message. JA 451-52. Bacanovic also testified that because he was not available when Stewart returned the call, she spoke with Faneuil. JA 452. According to Bacanovic, he told Stewart that Merrill Lynch was reviewing the ImClone trades

internally, but never mentioned the SEC's investigation. JA 502-03. Bacanovic also told the SEC that he had a worksheet reflecting the discussion regarding the $60 agreement. JA 504-05. Bacanovic denied telling Stewart that Waksal was selling his shares on December 27, JA 510-11, or that the SEC had interviewed him, JA 512.

On April 10, 2002, Stewart participated in a second interview by telephone. On the call were Stewart, her attorney, the AUSA who had conducted the February 4 interview, SEC attorneys Glotzer, Slansky and Laurent Sacharoff, and Agent Farmer. Tr. 2245, 2275.

During this interview, again conducted without warnings or an oath, Stewart reiterated that she sold her shares on December 27 after speaking with Bacanovic and learning ImClone's price. Tr. 2276. The Government did not tell Stewart what it already knew—that Bacanovic and Faneuil had each stated that she had spoken with Faneuil, not Bacanovic. Stewart also stated that she *did not recall* speaking with Bacanovic about the Waksals or "being told that any of the Waksals were selling their stock." Tr. 2276, 2593-94.

Notwithstanding the pending SEC and USAO investigations, in early June 2002, a congressional subcommittee was conducting its own investigation of Stewart's ImClone sale. Though these proceedings generated no findings or legislation, they produced numerous leaks, saturating the press with reports—now

known to be false—that Stewart sold her ImClone stock after being "tipped" by Waksal about the FDA's decision on Erbitux. *See, e.g.*, JA 181 (quoting Rep. Greenwood).

In June 2002, facing this barrage of false press reports and overwhelmingly negative media coverage, Stewart made several public statements, both directly and through representatives. JA 182-83, 185, 187. Those statements asserted that Stewart's stock sale was lawful, explained (as she had in her interviews with federal prosecutors and investigators) that she sold based on a preexisting $60 arrangement with her broker, denied having possessed any nonpublic information, and indicated that she was cooperating fully with the authorities.

About one year later, on June 4, 2003, a grand jury returned a nine-count indictment against Stewart and Bacanovic; a superseding indictment amplifying the same charges followed on January 5, 2004. Though the superseding indictment did not charge insider trading, it explicitly invoked facts, theories, and terminology relevant only to that crime. *See, e.g.*, JA 235-37 (describing Merrill Lynch's policies concerning client information, "Insider Trading," and "Inside Information"), 239 (Waksal's efforts to sell ImClone shares on December 27, 2001 "constituted confidential, nonpublic information"), 241 (describing investigation about whether Stewart's trades violated "federal securities law and regulations that prohibit trading on the basis of material, nonpublic information").

The superseding indictment charged Stewart and Bacanovic with various offenses arising from alleged efforts to conceal what the Government claimed was the true reason for Stewart's ImClone sale: that Bacanovic had directed Faneuil to tell Stewart about the Waksals' efforts to sell their shares. JA 233-34. Count Three alleged seven false statements during the February 4 interview,[6] JA 424-26, and Count Four alleged three false statements during Stewart's telephone interview on April 10,[7] JA 426-27. Count Eight, in turn, alleged that Stewart had obstructed an agency proceeding by providing false and misleading information during her interviews. JA 434. Count One charged Stewart and Bacanovic with conspiring to make false statements, obstruct an agency proceeding, and commit perjury. JA 420-421. Finally, Count Nine alleged that Stewart's public statements about the sale of her *personal ImClone holdings* constituted securities fraud with respect to *MSLO*. JA 139-41.

II. Pre-Trial Proceedings

Before trial, the defense moved to dismiss Count Nine, arguing that: (1) the Government could not, as a matter of securities law, satisfy the "materiality" or "in

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[6] The redacted superseding indictment submitted to the jury eliminated one specification from Count Three. *See* Tr. 4298. All references to the specifications herein are based on the redacted superseding indictment.

[7] Although both Counts Three and Four alleged that Stewart, in addition to making the false statements enumerated in the ten specifications, "concealed … material facts," JA 424, 427, neither count specified what material facts Stewart allegedly concealed or the basis for any duty to disclose.

connection with" requirements; and (2) the charges violated due process, risked rendering the underlying laws unconstitutionally vague, and violated the First Amendment. Stewart Mem. Supp. Omnibus Pre-Trial Mot. 29-86 (Oct. 6, 2003). Though calling Count Nine "unquestionably … novel," the District Court denied Stewart's motion. SPA 6.

Stewart also moved to strike the insider trading terminology pervading the indictment. *See supra* at 15 (listing examples). The District Court denied this motion, *see* SPA 10-11, and later barred Stewart from offering evidence or even *arguing* that she had not committed insider trading, SPA 48-49. The District Court stated, however, that if the Government presented arguments or evidence that "Stewart's trading was illegal," "it w[ould] open the door to defense evidence that the conduct was not illegal." SPA 48-49.

Finally, Stewart moved to strike certain specifications of Counts Three and Four, arguing that they were immaterial and/or literally true, and thus could not establish liability under 18 U.S.C. § 1001. Stewart Mem. Supp. Omnibus Pre-Trial Mot. 97-104. The District Court denied that motion. SPA 9-10.

III. Trial

Consistent with the indictment's repeated references to insider trading, the Government's basic theory at trial was that Stewart and Bacanovic agreed to cover up the "secret tip" from Bacanovic that supposedly prompted the sale of Stewart's

ImClone shares. Bacanovic's worksheet, the Government argued, was not an independent piece of evidence confirming the existence of a preexisting agreement, as the defense claimed, but rather an after-the-fact fabrication designed to mislead investigators. During the interviews, the Government alleged, Stewart made several other false statements designed to support the "cover story" that she and Bacanovic had created. Tr. 4448, 4528; JA 115-18, 122-23.

To support this theory, the Government called Faneuil, who testified that he told Stewart on December 27 that the Waksals were attempting to sell their ImClone shares. Tr. 1560-62. Faneuil also claimed that he had felt pressure from Bacanovic to lie to investigators about the basis for Stewart's ImClone sale, Tr. 1758, and that, although Faneuil never spoke to Stewart after December 27 about the matter, Bacanovic assured him that they were "all on the same page," Tr. 1609. Government witnesses also told the jury that: (1) *after* directing that her shares be sold, Stewart tried unsuccessfully to reach Waksal on December 27, Tr. 1066-69; (2) Stewart altered Bacanovic's telephone message before directing Armstrong to change it back, Tr. 2155-57; and (3) Stewart told her friend Mariana Pasternak during their vacation in Mexico that Waksal was selling his ImClone shares, Tr. 3387-93. As discussed more fully below, *see infra* Argument II, the Government also made extensive use of Bacanovic's SEC testimony to support its theory. Finally, to support its claims that Stewart made materially false statements

and concealed material facts, the Government called Glotzer and Farmer, each of whom relied extensively on Farmer's incomplete notes and report. *See supra* at 12.

Attempting to discredit Bacanovic's worksheet, the Government called Lawrence Stewart ("Lawrence"),[8] the Laboratory Director and Chief Forensic Scientist of the United States Secret Service. Tr. 3272. Lawrence testified that he personally had tested the worksheet, Tr. 3277-82, 3285, 3322, that the "@60" notation reflected a different ink than the other marks, Tr. 3297, 3301, and that there was no way to determine whether multiple pens had been used to create the other marks, Tr. 3311, 3314-15. Lawrence also flatly stated that he and his lab *had not* reached any conclusions about a "dash" that appeared on the worksheet (adjacent to the "Apple Computers Inc" listing). Tr. 3294-95. Initially, Lawrence claimed, the dash was not tested because it appeared that the testing process might leave insufficient ink for the defense expert's testing, and that lab policy prohibited testing under that circumstance. Tr. 3294-96. By the time the Government examined the worksheet again in 2004, Lawrence further asserted, there was insufficient ink to determine whether the dash had been made with the same ink as the "@60" notation. Tr. 3296-97. Lawrence's testimony sought both to prove the affirmative crime of falsifying the worksheet and to discredit the worksheet as a

[8] This brief uses the District Court's convention for avoiding confusion between Martha Stewart and Lawrence Stewart. *See* SPA 101.

piece of exculpatory evidence confirming a preexisting "@60" agreement.

To rebut the Government's claims, the defense argued that there *was* a preexisting agreement that Stewart would decide whether to sell her shares if the price fell to $60 or below. The existence of that agreement was crucial in two respects: *first*, it contradicted the Government's theory that the defendants had fabricated a "cover story," and, *second*, it eliminated any motive to lie about other peripheral matters.

To establish the existence of the agreement, the defense relied on two critical pieces of evidence. The first was testimony from Heidi DeLuca. An accountant who works at MSLO, DeLuca testified that she spoke with Bacanovic in November 2001 about an understanding that Stewart's shares would be sold if the price reached $60. Tr. 3805-06. The second was Bacanovic's worksheet. Supporting the defense's contention that the different ink used in the "@60" notation reflected merely that Bacanovic had used multiple pens on the worksheet *before* the sale of Stewart's ImClone shares, a defense expert testified that the ink used to write "@60" was the same as that used for the dash and that other marks on the page were also made with different pens.[9] Tr. 3710, 3742.

As for the other allegedly false statements—which did not go directly to the

[9] This analysis thus supported the defense claim that the "@60" notation was made contemporaneously with Bacanovic's determination to sell or sale of Stewart's Apple stock (that is, on or about December 21 or 24, 2001).

existence of a preexisting agreement to sell—the defense contended that those statements were literally true, immaterial, or the result of mistake and poor recollection rather than intentional falsity. There was no basis, the defense argued, for concluding that Stewart's statement that she "decided to sell her ImClone stock … because she did not want to be bothered over her vacation" was not literally true (that is, that it was not *one of the reasons* why Stewart sold the shares); absent a record of the questions actually posed, *see supra* at 12, it is impossible to know if Stewart was directed to disclose *all* of the reasons, the *main* reason, or *the* reason why she sold on that particular day. Moreover, the record amply established that Stewart was by then a confirmed seller of ImClone shares; having recently irrevocably tendered all her remaining ImClone holdings, the decision to do so at her broker's prompting required little attention and was unlikely to stay in her memory.

The statement that Stewart's December 27 phone call with her broker included discussion of her MSLO and Kmart stock, as well as her ImClone holdings, the defense claimed, was plainly immaterial even if it was false. In addition, because Stewart had very significant holdings in MSLO and Kmart, she discussed those stocks regularly and could easily have mistakenly remembered discussing them on that day. Finally, the defense argued that the evidence was insufficient to demonstrate that Stewart's statement about discussing Kmart and

MSLO was even false. When asked whether Stewart "sa[id] anything during th[e] conversation about Kmart," Faneuil—the only person who could have testified on this issue—stated only: "Not that I recall." Tr. 1565. Faneuil was never asked whether he and Stewart discussed MSLO stock.

Similarly, there was no proof at trial, the defense argued, that Stewart *knowingly* lied, and was not simply mistaken, when she stated that she had spoken to Bacanovic rather than to Faneuil on December 27. As the circumstances surrounding that phone call amply document, *see supra* at 8-9, neither Armstrong nor Faneuil had reason to believe that Stewart *knew* she was speaking to Faneuil.

As to Stewart's statement that she did not recall the answer to a Government question about Bacanovic's December 27 message, Pearl's notes of the February 4, 2002 interview (which, unlike Farmer's, contained both the Government's questions and Stewart's answers) reflected that Stewart was not asked *whether* there was a written record of Bacanovic's message, which she might have been expected to remember, but rather *when* Bacanovic had left that message—a question to which Stewart responded, "I don't know," an entirely plausible response.[10] *See* Tr. 4162, 4753-56; *see also* Tr. 2573.

The defense also emphasized the paucity of evidence of a conspiracy

[10] "AUSA: At what time had [Bacanovic] left a message for [Stewart] to call him on December 27? [Stewart]: Does not know. [Stewart's attorney]: Agrees to send them the phone log." Tr. 4162.

between Stewart and Bacanovic. The record reflected little contact between the defendants during the relevant period, ample innocent justification (their ongoing business relationship) and historical precedent for their few communications, and no direct evidence of the substance of their communications. Tr. 4701-03. The defense also argued that fundamental discrepancies in their statements to the Government about essential matters—such as when Stewart and Bacanovic agreed to sell "@60," whether Stewart spoke to Bacanovic or Faneuil on December 27, whether Bacanovic discussed the "@60" agreement with DeLuca, and whether Bacanovic had told Stewart about the SEC investigation—provided strong evidence that Stewart and Bacanovic had not coordinated their stories as part of a conspiracy to deceive. Tr. 4695-4700.

Finally, the defense attempted to rebut the Government's grand motive for the alleged false statements, obstruction, and conspiracy: the alleged improper, insider trade on December 27. Every effort by the defense to prove that the trade was lawful and proper—and therefore provided no motive to lie, obstruct, or conspire—was thwarted by the District Court. *See infra* at 38-39.

Before closing arguments, the District Court entered a judgment of acquittal on Count Nine. Tr. 4231, 4447. "[A] reasonable juror could not, without resorting to speculation and surmise," the District Court concluded, "find beyond a reasonable doubt that Stewart's purpose [in issuing her public statements] was to

influence the market in MSLO securities." JA 403.

On March 5, 2004, the jury returned guilty verdicts on the remaining counts. Tr. 4947-49; JA 916-18. The jury found Stewart guilty of conspiracy and obstructing an agency proceeding, and found that Stewart knowingly lied when she stated that:

- she spoke to *Bacanovic* and, after learning that ImClone was trading below $60 per share, directed him to sell her shares (Count Three, Specification Two; Count Four, Specification Three);
- her conversation with Bacanovic also addressed her MSLO and Kmart holdings (Count Three, Specification Three);
- she sold her ImClone stock on December 27 because she did not want to be bothered during her vacation (Count Three, Specification Four);
- she did not know *whether* there was a phone message from Bacanovic on December 27 in the log maintained by her assistant (Count Three, Specification Five);
- after December 27, she had spoken with Bacanovic only once about ImClone, in a discussion limited to "public arena" matters, and Bacanovic had not told her that he had been questioned by the SEC (Count Three, Specifications Six and Seven); and
- she *did not recall* whether she and Bacanovic discussed Waksal on

December 27 or whether she was told that day that any of the Waksals were selling their stock (Count Four, Specification One).

The jury found, however, that the Government had not proved beyond a reasonable doubt that Stewart falsely stated that she had a preexisting agreement to sell her ImClone shares at or below $60 per share, JA 916-17 (Count Three, Specification One; Count Four, Specification Two), and also acquitted Bacanovic of the charge that he had altered the worksheet by including the "@60" notation, JA 918 (Count Five).

IV. Post-Trial Proceedings

A. Rule 33 Motions

Relying on evidence that surfaced after the verdict, Stewart filed motions under Federal Rule of Criminal Procedure 33 seeking a new trial because: *first,* serious juror misconduct had denied Stewart her constitutional right to a fair trial; and, *second,* the Government's prosecution of Lawrence for perjury at Stewart's trial undermined all confidence in the verdict. In each case, the District Court denied the request for a new trial and for an evidentiary hearing. SPA 52-74, 89-131.

B. Sentencing

Stewart did not dispute the Probation Department's calculation assigning her an offense level of 12 under the Federal Sentencing Guidelines. She did, however,

argue that the Supreme Court's decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), rendered the Guidelines unconstitutional and inapplicable to her. Mot. & Morvillo Aff. (July 8, 2004). The District Court denied that motion on July 13, 2004. SPA 132. At the sentencing hearing, the District Court rejected Stewart's arguments for a downward departure and sentenced her under the Guidelines. JA 1820-39.

SUMMARY OF ARGUMENT

I. Stewart was not charged with insider trading. But a series of erroneous rulings allowed the Government to make insider trading the central theme of its case, while prohibiting Stewart from defending herself against those allegations. After a trial dominated by talk of stock fraud, the District Court erred by refusing Stewart's requests for limiting instructions that would have told the jury that it could not convict her of the charged crimes on the basis of uncharged criminal activity and that it could consider insider trading evidence only for certain narrow purposes.

II. At trial, the Government repeatedly used out-of-court testimonial statements by Bacanovic during his SEC interviews for their truth value against Stewart. The Government asked the jury to credit Bacanovic's statements in attacking the credibility of a key defense witness, in bolstering its affirmative case, in corroborating its chief witness, and in undermining the veracity of Stewart's

interview statements to government investigators. These uses of out-of-court testimony, never tested by cross-examination, cannot be reconciled with *Crawford v. Washington*, 124 S. Ct. 1354 (2004).

III. Lawrence's testimony was a critical part of the Government's effort to discredit the worksheet corroborating Stewart's preexisting agreement to sell her ImClone stock. It was false in respects so significant that the Government subsequently prosecuted him for perjury. That Lawrence testified falsely was known to at least four other Government officials and transparent to prosecutors. Given the critical nature of Lawrence's testimony—and the tremendous impact that learning that a senior law enforcement official had testified falsely on a central, disputed issue in the case would doubtlessly have had on the jury—it cannot seriously be maintained that "there is *no* reasonable likelihood that [Lawrence's] false testimony *could have* affected the judgment of the jury." *United States v. Wallach*, 935 F.2d 445, 456 (2d Cir. 1991) (internal quotations omitted). And even if the record established so far were not itself fully sufficient to warrant reversal, the facts presented to the District Court—especially when coupled with revelations from Lawrence's recent perjury trial—*at the very least* mandate an evidentiary hearing.

IV. The District Court erred by refusing to hold a hearing to consider evidence that juror Chappell Hartridge lied to secure a seat on the jury. Well-

settled law requires a hearing when "reasonable grounds" for investigation exist. That standard was more than met by substantial evidence that Hartridge had made false statements during *voir dire*, raising serious questions about his impartiality and making it impossible for the *voir dire* process to screen for potential bias.

ARGUMENT

I. HAVING PERMITTED THE GOVERNMENT TO TAR STEWART WITH ALLEGATIONS OF INSIDER TRADING, THE DISTRICT COURT ERRED BY REFUSING TO GIVE A LIMITING INSTRUCTION AND BY BARRING STEWART FROM RESPONDING

Stewart was never charged with insider trading. But the Government was relentless in intimating that she had committed that crime. From start to finish, the Government emphasized that Stewart's case was about "cheating investors in the stock market" through a "secret tip" that "led[] Stewart to dump" her ImClone shares at the expense of ordinary investors, who lost "millions of dollars." Tr. 769, 775 (opening statement); *see* Tr. 4788 (rebuttal). Given the pervasive talk of insider trading that colored the entire trial, Stewart was entitled to have the jury told exactly what she was—and was not—accused of, and cautioned about the limited purpose for which that evidence could be considered. She was also entitled to defend herself against the Government's allegations. The District Court's contrary rulings constitute reversible error.

1. As noted earlier, *see supra* at 15, the superseding indictment contained facts, language, and legal theories that could be relevant *only* to insider trading. When Stewart moved to strike that terminology, the Government responded that it would "argue and present proof at trial that one of the defendants' motives in committing the crimes charged was to cover up *their insider trading* on December 27, 2001." Tr. 2362 (emphasis added). At the same time, the Government wrote that Stewart and Bacanovic should be "free to … offer proof … that they did not commit insider trading." JA 282.

The Government indeed put insider trading before the jury. In the fourth sentence of its opening statement, the Government said: "This is a case … about cheating investors in the stock market." Tr. 769. Mere lines later, it stated that "a secret tip that no other investors of ImClone had" is what "led Martha Stewart to dump *all* of the [ImClone] shares … that she held." Tr. 769 (emphasis added). Investors without such "secret tips," the Government argued, lost "*millions of dollars*" when ImClone's price fell dramatically after the Erbitux announcement, Tr. 775 (emphasis added)—a statement that had nothing to do with whether Stewart lied to investigators, but everything to do with suggesting that she

committed insider trading.[11] All told, the Government used the words "secret" or "tip" *22 times* during its opening statement.

The Government sustained that theme throughout its case. Luciano Moschetta—Merrill Lynch's "Director of Compliance Advisory Services," who told the jury that his responsibilities involved looking out for "insider trading, market manipulation" and "things of that nature," Tr. 919—testified that information that an insider like CEO Waksal is "selling his shares" is "material" and "non-public." Tr. 1026; *see* Tr. 985 (broker who shared one client's trades with another client could subject Merrill Lynch to a "criminal investigation" for passing on "inside information"). SEC attorney Glotzer described her agency as being "responsible for protecting investors and maintaining the integrity of the securities markets," Tr. 2227, and said that, "in an insider trading case," the SEC pays particular attention to "the person who traded" because "we think it's very important to make sure that people who are industry participants … are certainly not committing any securities law violations," Tr. 2229. The Government did even better with Faneuil, asking point blank: "Did there come a time when you were

[11] The statement was grossly misleading for another reason as well. As noted above, Stewart's December 27 sale represented approximately *0.05%* of the ImClone shares traded that day. *See supra* at 9. Even if *one single investor* had purchased all of Stewart's 3,928 shares on December 27 at the average price of $58.43, that investor would have lost $51,221.12 when the market reopened following ImClone's public announcement. Though this is certainly a sizeable sum, the Government's repeated inflammatory intimation that Stewart's sale cost other investors "millions of dollars" was simply false.

working at Merrill Lynch when you did something illegal?" Tr. 1443. Faneuil's answer: "Yes …. I told one client about what another client was doing and then lied about it to cover up."[12] Tr. 1443.

Just as damaging, the Government linked and attempted to equate Stewart's December 27 sale with the *Waksals*' clearly unlawful conduct on that day. The jury heard that Sam Waksal and Stewart were close friends who had vacationed together, Tr. 1061-62, and that Waksal had known that a decision on Erbitux would be coming no later than December 31, 2001, Tr. 874, 892. The Waksals' and Stewart's "suspicious[ly]" connected activities on December 27 and ImClone's precipitous stock drop on December 28, Tr. 1085-91, 1190-91, the jury learned, led to those trades being referred to the SEC, Tr. 1104, and the SEC's commencement of a "formal" insider trading investigation of "Sam Waksal … and certain of his family members as well as Martha Stewart," Tr. 2231-33, 2243; *see* Tr. 2234-35, 2241; *see also* Tr. 1070-74 (testimony that Waksal asked his assistant to "type up letters and change the dates of those letters"). Even in cross-examining Heidi DeLuca, the Government made sure to ask her *five times* whether she was aware of an "insider trading" investigation of the Waksals. Tr. 3975-76.

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[12] The Government also elicited that Stewart retained a "securities fraud" specialist, Tr. 3020, and later argued that Faneuil felt "the need to get a lawyer" because he "knew he [had] provided secret information to Martha Stewart about the Waksals selling," Tr. 4474.

The Government sounded the same notes in closing argument, beginning by emphasizing that Stewart had been "tipped off" that "Waksal and members of his family were dumping their ImClone stock on the eve of an expected critical announcement from the FDA." Tr. 4448. Stewart, the Government argued, understood the significance of those sales, and thus lacked an "innocent" state of mind on December 27, Tr. 4481, and knew that she had done "something bad enough" to warrant a cover-up, Tr. 4482; *see* Tr. 4784-85 (Stewart "knew she wasn't supposed to have" information regarding the Waksals' sales). Although Stewart was not "*tipped directly* from the Waksals," Tr. 4820 (emphasis added), the Government added, she knew her decision to trade on another "tip"—that the Waksals were trading—"looked as bad *as it in fact was*," Tr. 4505 (emphasis added). In total, the Government referred to "secret" or "tip" *28 times* in its closing and rebuttal.

All this argument and evidence was clearly designed to suggest not just that Stewart had a motive to lie, but that she had *committed* insider trading. And the unfair prejudice resulting from these allegations—which hung like a cloud over the entire proceeding—was compounded by the District Court's erroneous refusal to clarify for the jury what Stewart's trial was and was not about, as well as erroneous evidentiary rulings that prohibited Stewart from defending herself.

2. Seeking to minimize the improper prejudice from these relentless and inflammatory references to uncharged conduct, Stewart asked that the jury be cautioned that: (1) she was not "charged with Insider Trading in this case"; (2) the jury could "only consider that which was presented in court in relation to the charges in the Indictment"; and (3) it "may consider Insider Trading only insofar as it pertains to motive for the obstruction charge." JA 334 (full request).

The District Court rejected the proposed instructions, Tr. 4404-24, and omitted their substance from the final jury charge, *see* Tr. 4847-90 (jury charge); *see also* Tr. 4890-91 (defense counsel renewing exception to the District Court's charge and the court stating that it deemed all objections preserved). That decision—which this Court reviews *de novo*—constituted reversible error. *See United States v. Dove*, 916 F.2d 41 (2d Cir. 1990) ("Whether jury instructions were properly given is a question of law that this court reviews *de novo* ….").

Evidence of alleged insider trading was relevant, if at all, only to establish motive for the crimes actually charged. As noted above, that purported use of the evidence was a fig leaf. But, regardless of that fact, where evidence is admitted for such a purpose, rather than to establish the elements of the charged crime, a trial court *must* give an appropriate limiting instruction, explaining the uses to which the evidence may, and may not, be put. *See* Fed. R. Evid. 105 ("When evidence which is admissible … for one purpose but not admissible … [for]

another … purpose is admitted, the court, upon request, *shall* restrict the evidence to its proper scope and instruct the jury accordingly." (emphasis added)); *Hale v. Firestone Tire & Rubber Co.*, 756 F.2d 1322, 1334-35 (8th Cir. 1985) ("Once evidence admissible for one purpose but inadmissible for another is admitted, the trial court cannot refuse a requested limiting instruction." (internal quotation marks omitted)); *see also United States v. Levy*, 731 F.2d 997, 1004 (2d Cir. 1984) ("Even if the evidence was found admissible, Levy would have been entitled to a requested cautionary jury instruction that the evidence could only be considered for the purpose offered"); *Pattern Criminal Jury Instructions of the District Judges Ass'n of the Sixth Circuit*, No. 7.13 (1991).

Such limiting instructions are especially important where challenged evidence concerns uncharged criminal conduct. In such cases, the court must instruct that "[t]he defendant is not charged with committing any crime other than the offenses contained in the indictment." 1 (Criminal) Sand *et al.*, *Modern Federal Jury Instructions* 3-6 (2004); *see* 1A O'Malley, *et al.*, *Federal Jury Practice and Instructions* 162, § 12.09 (2000) ("The defendant is not on trial for any act or any conduct not specifically charged in the indictment."). Without such admonition, there is no basis for presuming that the jury did not make improper use of inflammatory evidence of other criminal activity. *See, e.g., Murray v. Superintendent, Ky. State Penitentiary*, 651 F.2d 451, 453 (6th Cir. 1981).

Rather than demonstrating why no limiting instruction was necessary, each of the District Court's stated reasons for refusing Stewart's request demonstrates why the proposed instruction was in fact essential. *First*, the District Court repeatedly observed *to defense counsel* that "[a] secret tip is different from insider trading." Tr. 2104, 4407-09, 4412-13. But the District Court did nothing to alert *the jury* to that critical distinction. Both in everyday vernacular and the specialized language of securities law, phrases like "secret tip," "dumping" stock, "cheating investors," and "material nonpublic information" mean one thing: insider trading. Given the District Court's earlier decision to bar evidence or argument that Stewart had *not* engaged in insider trading, *see infra* at 38-39, only Stewart's proposed instructions offered any hope of helping the jury grasp the supposed distinction between "secret tips" and insider trading.

In addition, even if the jury could possibly have understood that trading on a "secret tip" was not unlawful, the Government went out of its way to assert that the "tips" to Stewart were improper, immoral, and venal. According to the Government, "secret tips" allowed Stewart to profit at the expense of others and caused everyday investors in ImClone to lose "millions of dollars." *See supra* at 29-30 & n. 11. There thus remained a serious risk that the jury would punish Stewart for "bad" and "unfair"—even if not unlawful—conduct. *See United States v. Bradley*, 5 F.3d 1317, 1321 (9th Cir. 1993) (recognizing "danger that the jury

will punish the defendant for offenses other than those charged, or at least that it will convict when unsure of guilt, because it is convinced that the defendant is a bad [person] deserving of punishment") (internal quotations omitted). Only a limiting instruction, directing the jury that it could convict only for the offenses charged, and not for other "bad" conduct, could have addressed that severe risk.

Second, the District Court thought it unclear whether Stewart's alleged conduct in fact constituted illegal insider trading. Tr. 2103, 4406. But the issue was not whether Stewart *could have been* charged with insider trading, it was whether she *was*. The District Court's apparent skepticism of the legality of Stewart's conduct on December 27, 2001 did not relieve the court of its obligation to instruct the jury properly on the actual charges.

Finally, the District Court was unquestionably correct "that it is inappropriate in a case in which insider trading is not charged as a crime to draw the jury into an issue which is really not before them." Tr. 2181; *see* Tr. 4405 ("I think it is confusing and misleading, in a case in which insider trading is not charged, I am not instructing the jury as to what insider trading is, for insider trading to be injected … into the trial."). But the Government's evidence and presentations had already placed insider trading "before" the jury. When the District Court denied Stewart's instruction, it was far too late to go back and decide anew that the proceedings should not be "complicated" by references to insider

trading. At that point, the only question was whether the jury would get any guidance about how to place in context what it had heard about insider trading, as well as the limited purposes—if any—for which it could properly consider that evidence.

The District Court's failure to instruct the jury requires reversal. Evidence of illegal insider trading unfairly converted a marginal false statements prosecution into a case about "cheating investors" in the stock market.[13] The Government clearly sought to—and did—capitalize on the public outcry against corporate misconduct by suggesting—erroneously, *see supra* at 30 n. 11—that Stewart's trading on December 27, 2001 cost ordinary investors "millions of dollars." Because the District Court declined to give any instructions cabining the jury's use of that evidence, there can be no confidence that Stewart's conviction rested on the crimes charged, rather than on suspicions of uncharged insider trading. Exercising *de novo* review over the District Court's jury instructions, *see Dove*, 916 F.2d at 45, this Court should find them insufficient and reverse Stewart's convictions.

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[13] Juror Chappell Hartridge appeared to have believed that he voted to convict Stewart of insider trading. The guilty verdicts, he reportedly said, represented "a victory for the little guy who loses money in the markets because of *these types of transactions*, the people who lose money in 401(k) plans." JA 936 (emphasis added). Stressing Stewart "was a former stockbroker," Hartridge suggested that "she knew what she was doing, and what she was doing was wrong." JA 946. Hartridge also speculated that the verdict "might give the average guy a little more confident feeling that (he) can invest in the market and everything will be on the up and up." JA 936 (alteration in original).

3. The erroneous refusal to give a limiting instruction was merely the culmination of a series of incorrect rulings. Accepting the Government's representation that it would offer evidence about insider trading only to show "motive," the District Court entered a pretrial order barring defense counsel from clarifying to the jury that Stewart had not committed insider trading, SPA 48, notwithstanding the Government's prior statement that the defense should be "free to … offer proof … that they did not commit insider trading," JA 282. Even after the Government "open[ed] the door" by "present[ing] arguments or evidence that tend[ed] to show that … Stewart's trading was illegal," SPA 48, the District Court—contrary to its pretrial promise—prevented Stewart from defending herself. The court barred a securities expert, Professor Marc Steinberg, from telling the jury that Stewart's ImClone sale did not violate securities laws, Tr. 2103-04, 2179-84, 2221-23, 3664-65, prevented Stewart from cross-examining Faneuil fully about whether he thought he was violating the law on December 27, Tr. 1963, 1975, and forbid defense counsel from arguing in closing that the "tip" she received was not unlawful, Tr. 4738.

Those rulings guaranteed that the jury received an entirely one-sided picture of Stewart's conduct on December 27, thus denying Stewart her constitutional right to a fundamentally fair trial. *See Taylor v. Kentucky*, 436 U.S. 478, 487 (1978); *see also Pennsylvania v. Ritchie*, 480 U.S. 39, 56 & n.13 (1987) (Due

Process and Compulsory Process Clauses give defendants the right to "put before a jury evidence that might influence the determination of guilt"); *Washington v. Schriver*, 255 F.3d 45, 56 (2d Cir. 2001) (right applies to exclusion of expert witnesses); *United States v. Onumonu*, 967 F.2d 782, 786-89 (2d Cir. 1992) (where ultimate issue was whether defendant "subjective[ly] belie[ved]" he was carrying diamonds instead of drugs, ruling barring defense from presenting expert testimony about the practices of diamond smugglers was reversible error because such evidence was relevant, would have helped the jury, and its wrongful exclusion had prejudiced the defense). Alone—and especially when coupled with the erroneous failure to give Stewart's proposed limiting instructions noted above—these errors require reversal.

II. THE GOVERNMENT'S USE OF BACANOVIC'S TESTIMONIAL STATEMENTS VIOLATED THE CONFRONTATION CLAUSE

The Government's case against Stewart rested substantially on the words and veracity of her co-defendant. Most critically, the Government made Bacanovic a central part of its attack on Heidi DeLuca, the one witness who provided independent corroboration of the $60 agreement that was so critical to Stewart's defense. The Government also used Bacanovic to shore up its case, particularly by bolstering its star witness and contradicting Stewart's statements during her interviews. Peter Bacanovic was, without question, a key Government "witness" against Stewart.

But Bacanovic did not testify at trial. Instead, the Government asked the jury to credit various out-of-court statements made during his two formal SEC interviews. Stewart attended neither session, and the Fifth Amendment prevented her from compelling Bacanovic to undergo cross-examination at trial.

The Supreme Court's intervening decision in *Crawford v. Washington*, 124 S. Ct. 1354 (2004), makes plain that the Government's use of Bacanovic's testimonial statements violated the Confrontation Clause. The Government cannot show that this constitutional wrong did not affect Stewart's substantial rights. The numerous and serious violations of this "bedrock procedural guarantee," *id.* at 1359, call into serious question the fairness of Stewart's trial and the integrity of its result. Accordingly, this Court should set aside her convictions. *See* Fed. R. Crim. P. 52(b); *United States v. Bruno*, 383 F.3d 65, 77-80 (2d Cir. 2004) (reversing false-statement conspiracy conviction on plain-error review).

A. Permitting The Government To Use Bacanovic's Testimonial Statements For Their Truth Value Against Stewart Was "Error"

1. Out-of-court testimonial statements may not be used as substantive evidence against a criminal defendant

"In all criminal prosecutions the accused shall enjoy the right … to be confronted with the witnesses against him." U.S. Const. amend. VI. Despite this absolute language, *Ohio v. Roberts*, 448 U.S. 56 (1980), held that the Confrontation Clause permitted admission of out-of-court statements falling within

a "firmly rooted hearsay exception" or otherwise bearing "particularized guarantees of trustworthiness." *Id.* at 66.

Three days *after* the jury's verdict, however, the Supreme Court overruled *Roberts*, replacing its "reliability" standard with a bright-line rule drawn from the history of the Confrontation Clause.[14] "Where testimonial statements are involved," Justice Scalia wrote for seven Justices, "we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'" *Crawford*, 124 S. Ct. at 1370; *see id.* ("Admitting statements deemed reliable by a judge is *fundamentally at odds* with the right of confrontation." (emphasis added)). After *Crawford*, "testimonial statements of a witness who [does] not appear at trial" may not be admitted or used against a criminal defendant unless the declarant is "unavailable to testify, and the defendant ha[s] had a prior opportunity for cross-examination." *Id.* at 1371.

[14] *Crawford* is fully applicable here. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) ("[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases … pending on direct review or not yet final …."). As Bacanovic's brief notes, both defendants brought *Crawford* to the District Court's attention during the post-trial motions phase. *See, e.g.*, JA 1033.

2. Bacanovic's statements were testimonial

Under any definition, Bacanovic's sworn SEC deposition constituted testimony.[15] Indeed, both the Government and the District Court repeatedly used that exact term to describe the interview. *E.g.*, Tr. 785 ("[T]hey put [Bacanovic] under oath to give formal testimony"); JA 337-39 (nine references to Bacanovic's SEC "testimony"); SPA 91 (District Court states that "Bacanovic testified under oath before the SEC").[16]

Bacanovic's declarations, moreover, bear all the hallmarks of "core" testimonial statements. Bacanovic knew he was speaking with Government agents investigating crimes.[17] The setting was formal: The Government ordered Bacanovic's attendance by subpoena, Tr. 2260-62; placed him under oath,

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[15] Bacanovic's statements on January 7, 2002 were also testimonial for purposes of the *Crawford* rule. Tr. 2238-41 (Bacanovic knew he was speaking with Government agents, was accompanied by counsel, was admonished to be truthful, and the interview followed a question-and-answer format).

[16] For additional examples by the Government, *see, e.g.*, Tr. 4536, 4515, 4520; JA 275-76. For the District Court, *see, e.g.*, Tr. 2179, 2348, 4012.

[17] *See Crawford*, 124 S. Ct. at 1364-65; *United States v. Rashid*, No. 03-2199, 2004 WL 2008681, at *5 (8th Cir. Sept. 10, 2004) (statements made during interviews with an FBI agent were testimonial); *United States v. Sanner*, 313 F. Supp. 2d 896, 901-02 (S.D. Ind. 2004) (statements to DOJ antitrust attorneys); *United States v. Mikos*, No. 02 CR 137-1, 2004 WL 1631675, at *6 (N.D. Ill. July 16, 2004) (statements to HHS agents during a "formal healthcare fraud investigation"). *Cf. United States v. Saget*, 377 F.3d 223, 229 (2d Cir. 2004) (statements not testimonial where the declarant was unaware he was speaking with a confidential informant).

JA 444[18]; recorded his words for future use, Tr. 2262[19]; and used "structured … questioning," *Crawford*, 124 S. Ct. at 1365 n. 4. In short, because Bacanovic had every reason to "expec[t] that [his] … statement[s] might be used in future judicial proceedings," *United States v. Saget*, 377 F.3d 223, 229 (2d Cir. 2004), those statements were testimonial under *Crawford*.

3. The Government used Bacanovic's statements for their truth value

The Confrontation Clause, it is now clear, barred use of Bacanovic's testimonial statements for their truth value against Stewart. *See Crawford*, 124 S. Ct. at 1374; *see also id.* at 1370 n. 9. But that is exactly what the Government did. Again and again, it relied upon Bacanovic's veracity to strike at the heart of Stewart's defense and to bolster its own case.

The most dramatic examples occurred when the Government made Bacanovic's words a central part of its attempt to discredit the one witness who corroborated the existence of the $60 agreement. During the defense case, DeLuca testified that she spoke with Bacanovic in November 2001 about selling Stewart's personal ImClone shares if the price reached a certain level. Tr. 3805-06. At that

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[18] *See United States v. McClain*, 377 F.3d 219, 221 (2d Cir. 2004) ("plea allocutions constitut[e] testimony," in part because they are made "under oath").

[19] *See Crawford*, 124 S. Ct. at 1364 ("An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."); *id.* at 1365 n. 4 (noting that the statements had been "recorded").

time, DeLuca testified, Bacanovic said that "he felt ImClone was a dog" and that "when the shares came over from Morgan Stanley to Merrill Lynch that he felt that *he could set a floor price of 60 or 61*, just in case the stock continued to fall, as like a safeguard." Tr. 3806 (emphasis added). Bacanovic also said, according to DeLuca, that "he would speak to Martha personally about" this plan. Tr. 3806, 3937-42; *see also* Tr. 2256-57 (Stewart told investigators that she and DeLuca "have the same recollection" about the $60 agreement), 2503 (similar), 2627 (Stewart stated she and Bacanovic reached the $60 agreement in "late October/early November").

This was powerful evidence. Not only did DeLuca's testimony corroborate Stewart's account of her actions (thus countering the Government's allegation that Stewart had lied about why she sold), but it also could have supported a conclusion that Stewart knew she had done nothing wrong and therefore had no reason to dissemble *about anything*. If credited, DeLuca's testimony substantially increased the odds of acquittal on all counts. Not surprisingly, Stewart's counsel relied significantly on it during his closing argument. Tr. 4703, 4713, 4718-19, 4730.

The importance of DeLuca's testimony is underscored by the ferocity of the Government's efforts to discredit it. The Government attacked DeLuca's character, faulting her for having met with defense counsel, Tr. 3926-28, accusing her of billing MSLO for Stewart's personal expenses, Tr. 3981-86, and voicing

suspicions about her annual raise and bonus, Tr. 3978-80, 3998-99. The Government also expended great effort attempting to show that a document that DeLuca said *corroborated* her in-court testimony about when exactly she had spoken with Bacanovic was actually from a different time period. Tr. 3943-54, 3960, 3964-65. Through it all, however, DeLuca remained firm that—whatever the date of that document—she *had* spoken with Bacanovic sometime in November 2001 about a $60 floor for Stewart's ImClone shares. Tr. 3967-68, 3989-90, 3994.

But the Government had one remaining card: Bacanovic's SEC testimony. The Government's final piece of evidence was an audio recording in which Bacanovic denied ever discussing the $60 agreement with DeLuca. Tr. 4224-25. The jury heard Bacanovic's *actual voice* contradict the defense's star witness:

> Q. Did you talk to Heidi [DeLuca] at all about, you know, "Martha Stewart told me that once the stock hits 60, I should sell"?
>
> A. I don't get into that level of detail with Heidi.
>
> Q. *So, the issue of the stock at $60 didn't come up with Heidi?*
>
> A. *No.*
>
> MS. SLANSKY: And Heidi never brought it up to you?
>
> A. *No.* She only brought it up to me in terms of adding gains to the account.

JA 520 (emphases added).[20]

Though a more blatant *Crawford* violation would be hard to imagine, the Government's use of Bacanovic to attack DeLuca was far from over. During its initial closing argument, the Government replayed this excerpt, contending that it provided the ultimate proof that DeLuca was a liar and that Bacanovic did not believe the principal defense witness. "[Y]ou heard Peter Bacanovic *testify*," the Government told the jury, "that he *never talked to Heidi DeLuca* about any agreement to sell it at 60. (Audiotape played)." Tr. 4536 (emphases added).

The same pattern continued in rebuttal. A critical part of Faneuil's story was an assertion that DeLuca told him in early January that Stewart's sale had resulted in a gain, Tr. 1585-86; this realization, according to Faneuil, led Bacanovic in his January 7 statement to abandon his previous "tax-loss" story and "invent" the $60 agreement, Tr. 1586-87. In summation, Stewart's counsel raised serious questions about this version of events. Relying upon DeLuca's testimony, spreadsheets, and business and tax records—all showing that DeLuca had not recognized Stewart's ImClone sale as a taxable event in 2001 until after Bacanovic's January 7 SEC interview—defense counsel argued that the DeLuca-Faneuil conversation actually happened long *after* Bacanovic first spoke with investigators. Tr. 4716-17.

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[20] The referenced material, GX 285-B, as well as GX 285-A, are partial transcripts of GX 285, which is an excerpt of an audio recording of Bacanovic's February 13 testimony. Tr. 2262, 3589, 4224-25.

The Government responded, once again, by invoking Bacanovic's testimony. Tr. 4800. When Bacanovic "was questioned by the SEC," the Government told the jury, "[he] said [that the realization that Stewart's sale had resulted in a gain] occurred *shortly after Christmas* …. (Audiotape played)." Tr. 4801 (emphasis added); JA 519-20. Once again, the Government argued, Bacanovic's out-of-court statements proved that Faneuil was right and DeLuca was wrong. Tr. 4801; *see* Tr. 4462 ("Peter Bacanovic told you about this conversation just like Doug Faneuil did.").

In rebuttal, the Government continued using Bacanovic's testimony to challenge DeLuca's assertion that she and Bacanovic had discussed selling at $60 during the fall of 2001. Bacanovic's statement that he had been "surprise[d]" in late December "to learn that ImClone was [still in Stewart's] account," the Government argued, proved that "this isn't something that has been discussed all throughout the fall." Tr. 4814; JA 487. The truth, said the Government, was clear: "[T]he Heidi DeLuca conversation didn't happen." Tr. 4814. This last use of Bacanovic's testimonial statements for their truth value also directly attacked *Stewart*'s credibility, because she had told investigators that she and Bacanovic discussed selling her ImClone holdings at $60 sometime in October or November of 2001. *See* Tr. 2250, 2502-03.

Though the use of Bacanovic to challenge DeLuca—and, through DeLuca, Stewart herself—represented the most vivid *Crawford* violations at Stewart's trial, the Government also relied on Bacanovic's truthfulness to bolster its case and hinder Stewart's defense in other ways. The Government used Bacanovic's SEC testimony to establish the background of Stewart's relationship with Bacanovic and her dealings with Merrill Lynch, critical context that would have been difficult to provide through other means. JA 360. The Government used Bacanovic's words to support its assertion that Stewart viewed her ImClone holdings as "loyalty stock" that she would not have sold unless she knew that Waksal was selling. Tr. 4479 ("[Y]ou heard it from Peter Bacanovic in his *testimony.* (Audiotape played). Ladies and gentlemen, this was loyalty stock." (emphasis added)); *see* Tr. 4478-80; JA 488-89. And the Government relied upon Bacanovic to demonstrate that Stewart was watching ImClone closely during the fall of 2001, undercutting the claim that any technically inaccurate statements resulted from the passage of time coupled with the fact that the issue had not been terribly important to her. Tr. 4479 ("Peter Bacanovic *testified* that Martha Stewart had told him that she understood that ImClone was expecting great news right around the corner." (emphasis added)); Tr. 4452, 4520; JA 489-90.

The Government also used Bacanovic to corroborate several portions of Faneuil's story, bolstering his credibility. As noted earlier, the Government used

Bacanovic to support its claim that Faneuil, not DeLuca, was right about the timing of an important conversation. *See supra* at 46-47. The jury heard Bacanovic testify that Faneuil was on the line when Bacanovic left a message for Stewart on the morning of December 27, 2001, JA 450-51, limiting Stewart's ability to challenge Faneuil's assertions that he knew what was said. The Government used Bacanovic's words to corroborate Faneuil's assertion that Stewart spoke and placed her order with him, not Bacanovic. Tr. 4504 ("And you learned that in [his February 13] *testimony*, Peter Bacanovic did admit that he was not the one that handled Martha Stewart's trade, he testified it was Doug Faneuil." (emphasis added)); JA 452. Finally, Bacanovic's out-of-court statements supported Faneuil's claim that Bacanovic and Stewart spoke several times during January 2002, JA 478-81, making it harder to argue that there was insufficient evidence of contact between them to find the "agreement" necessary to prove a conspiracy.

All these examples have one thing in common: Bacanovic's statements could only advance the Government's case *if they were true.* And, as demonstrated above, the Government plainly used the statements in ways that required the jury to consider them for purposes the Confrontation Clause forbids. *See Richardson v. Marsh*, 481 U.S. 200, 211 (1987) (Confrontation Clause violated when prosecution uses evidence permissibly admitted for one purpose for a different, improper purpose); *Douglas v. Alabama*, 380 U.S. 415, 419 (1965) (same). *Cf. Tennessee v.*

Street, 471 U.S. 409, 414-15 (1985) (no reversible violation where the court had thrice cautioned the jury not to consider statements for their truth).

B. The Error Was "Plain"

The second requirement for relief under Rule 52(b) is that the error must be "plain." *See United States v. Olano*, 507 U.S. 725, 734 (1993). That standard is easily satisfied here. As explained in the previous Section, Bacanovic's statements were obviously testimonial and the Government clearly used them for their truth. Nothing more is required. *See United States v. Thomas*, 274 F.3d 655, 667 (2d Cir. 2001) (en banc) ("An error is 'plain' if it is 'clear' or 'obvious' at the time of *appellate consideration*." (emphasis added) (*quoting Johnson v. United States*, 520 U.S. 461, 467-68 (1997))).

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

"Generally, in plain error review under Rule 52(b), … the defendant bears the burden of persuasion as to prejudice." *United States v. Viola*, 35 F.3d 37, 41 (2d Cir. 1994). But to "penalize defendants for failing to challenge entrenched precedent," this Court has recognized, "would … insis[t] upon omniscience on the part of defendants about the course of the law that we do not have as judges" and "only encourage frivolous objections and appeals." *Id.* at 42. Accordingly, where, "a supervening decision alters settled law … the burden of persuasion as to prejudice (or, more precisely, lack of prejudice) is *borne by the government*." *See*

id. at 41 (emphasis added). Because *Crawford* overruled an earlier Supreme Court decision with respect to testimonial statements, it obviously "alter[ed] settled law." *See Bruno*, 383 F.3d at 78 (*Crawford* "chang[ed] the legal landscape"); *United States v. McClain*, 377 F.3d 219, 221 (2d Cir. 2004) (*Crawford* "departs from," "substantially alters," and "redefines the Court's Sixth Amendment jurisprudence"). Accordingly, the Government has the burden of showing that the numerous and serious *Crawford* violations at Stewart's trial did not "substantially influence the jury." *United States v. Jean-Baptiste*, 166 F.3d 102, 108 (2d Cir. 1999). It cannot do so.

First, Bacanovic's testimony involved "issue[s] that [were] plainly critical to the jury's decision." *Bruno*, 383 F.3d at 80 (citations omitted). As explained above, the most flagrant *Crawford* violations arose from the Government's attempts to discredit DeLuca, whose testimony could hardly have been more "critical" to Stewart's defense. Tr. 4813 (rebuttal argument that the defense case "boils down to … [w]hat the defendants told you when they were being interviewed by the SEC, *and Heidi DeLuca*") (emphasis added). The jury apparently thought Bacanovic's testimonial statements important too, asking to rehear both portions of his recorded SEC testimony and Glotzer's testimony about his unrecorded testimony on January 7, 2002. Tr. 4898, 4904.

Second, the Government "emphasized" Bacanovic's testimony in the "presentation of its case and in its arguments to the jury." *Bruno*, 383 F.3d at 80 (citations omitted). Bacanovic was the last witness from whom the jury heard, and that portion of his testimony was presented to rebut a key defense witness. In addition, the Government deemed Bacanovic's SEC testimony sufficiently important to replay portions at numerous points during its closing arguments.[21]

Finally, "the case was close," *id.*, as demonstrated by the jury's "not guilty" verdicts on several of the most significant specifications, *see supra* at 25. Accordingly, the numerous Confrontation Clause violations that pervaded this trial cannot be dismissed as harmless. Indeed, for the reasons stated above, Stewart would prevail even if the onus were on her to show prejudice.

D. The Numerous And Serious Violations of Stewart's Right to Confront *All* Of The Witnesses Against Her Seriously Affected The Fairness of Her Trial And The Integrity Of Its Result

The Confrontation Clause lays down a "bedrock procedural guarantee." *Crawford*, 124 S. Ct. at 1359. Unlike other constitutional doctrines—most notably, the Fourth Amendment's exclusionary rule, *see Stone v. Powell*, 428 U.S. 465 (1976)—the Confrontation Clause reflects a historically informed decision about the best method for determining fundamental questions of guilt or innocence. *See Crawford*, 124 S. Ct. at 1370 ("The Clause … reflects a judgment, not only

[21] In addition to the examples already cited, see Tr. 4489, 4490, 4491, 4511, 4513, 4520, 4523, 4527, 4529, 4537, 4540, and 4801.

about the desirability of reliable evidence (a point on which there could be little dissent), but about *how reliability can best be determined*." (emphasis added)); *id.* ("[O]pen examination of witnesses … is much more conducive to the *clearing up of truth*." (quoting 3 W. Blackstone, *Commentaries on the Laws of England* 373 (1768) (emphasis added)).

Not all *Crawford* violations warrant relief under Rule 52(b). Some cases may involve technical or isolated errors, or wrongfully admitted testimony regarding points tangential to the real issues in dispute, or about matters essentially uncontroverted at trial. *Cf. United States v. Cotton*, 535 U.S. 625, 633-34 (2002) (declining to correct *Apprendi* violation, because evidence of drug quantity was "overwhelming" and "essentially uncontroverted"); *Johnson*, 520 U.S. at 470 (refusing to grant plain-error relief because the evidence of the omitted element of "materiality" was "essentially uncontroverted at trial").

But none of those considerations apply in this case, where the *Crawford* violations were flagrant and extreme. The Government used Bacanovic's testimony to build its case and undermine the foundation of Stewart's defense. The Government *repeatedly* used out-of-court statements, untested by cross-examination, to challenge the central premise of Stewart's defense, to set the stage for its own case, and to bolster the credibility of its key witness. Far from being supported by "overwhelming" evidence, the points on which the Government

asked the jury to credit the truth of Bacanovic's statements were hotly contested at trial. In short, Stewart's trial embodied "the principal evil at which the Confrontation Clause was directed": "the civil-law mode of criminal procedure['s] … use of *ex parte* examinations as evidence against the accused." *Crawford*, 124 S. Ct. at 1363. The *Crawford* violations at trial thus "seriously affect[ed]" both the "fairness" of the proceedings and the "integrity" of the result reached. *Olano*, 507 U.S. at 736 (internal quotation marks and citation omitted). Accordingly, this Court should correct the errors and order a new trial.

III. THE DISTRICT COURT ERRED BY DENYING STEWART'S MOTION FOR A NEW TRIAL BASED ON GOVERNMENTAL MISCONDUCT AND BY REFUSING TO CONVENE AN EVIDENTIARY HEARING

The Government's assault on the single most important piece of documentary evidence in Stewart's trial was captained by a high-ranking Secret Service official who, even the Government now concedes, lied on the stand. Even more shockingly, at least four Government officials, including two Secret Service Bureau Chiefs, knew that Lawrence had lied but concealed the truth until after Stewart's conviction.

This Court has made clear that reversal is "virtually automatic" where the Government "knew or should have known" of perjury by one of its witnesses. *United States v. Wallach*, 935 F.2d 445, 456 (2d Cir. 1991) (quoting *United States v. Stofsky*, 527 F.2d 237, 243 (2d Cir. 1975)). That standard is triggered here for

two independent reasons. *First*, because Lawrence and several of his Secret Service colleagues operated as part of the prosecution team, they *are* "the Government" for purposes of the "virtually automatic" rule. *Second*, because they possessed the same information that immediately alerted one of Lawrence's colleagues to the possibility that he had lied—a possibility that the colleague quickly and easily confirmed—the prosecutors, at the very least, *should have known* about Lawrence's perjury. Because the Government cannot demonstrate that "there is *no* 'reasonable likelihood' that [Lawrence's] false testimony *could have* affected the judgment of the jury," *Shih Wei Su v. Filion*, 335 F.3d 119, 126-27 (2d Cir. 2003) (emphasis added), Stewart's convictions must be reversed. *See United States v. Rivalta*, 925 F.2d 596, 597 (2d Cir. 1991) (this Court conducts "independent examination" to determine whether a district court properly applied "virtually automatic reversal" standard).

A. Factual Background

As explained in Argument II, *supra*, the unconstitutional use of Bacanovic's testimony to attack DeLuca fatally undermined one pillar of Stewart's defense. That left one other: Bacanovic's worksheet. The worksheet—the only piece of documentary evidence addressed in all three opening statements, Tr. 786-87 (Government), 805-09 (Bacanovic), 834-36 (Stewart)—was the *only* exhibit that supported the defense theory that Stewart planned to sell her shares "@60" and the

only document that supported the Government's theory that the $60 agreement was an after-the-fact fabrication. The document's legitimacy was therefore a critical issue.

The prosecutors fully appreciated the significance of the worksheet. To attack its authenticity, they brought in Lawrence, the Laboratory Director and Chief Forensic Scientist of the United States Secret Service, Tr. 3272, who introduced himself to the jury as "*the* national expert for ink," Tr. 3273 (emphasis added). To ensure the point did not elude the jury, the prosecutors asked: "How many national experts are there?" Lawrence replied: "There is just one." Tr. 3273.

Lawrence's unequaled stature established, the examination turned to the Government's theory that Bacanovic added "@60" to the worksheet only after Stewart's stock sale. The "@60" notation, Lawrence testified, was in a different ink than "the remaining entries" on the document. Tr. 3297, 3301. This critical judgment, according to Lawrence, flowed from his extensive *personal* participation in testing the document in 2002 and 2004. *E.g.*, Tr. 3322 (Q. "[I]s it your testimony that you actually conducted the hole punching and spotting of the chromographic plate that occurred in connection with these tests?"; A. "Observed, participated and reviewed."); *see also* Tr. 3277-78, 3281-82, 3322.

Lawrence also testified that, in 2002, the Secret Service's Forensic Services Division ("FSD") made a conscious decision—dictated by internal policy—not to

test the "dash", *see supra* at 19-20, because of concerns that doing so would not leave enough ink for testing by the defense. Tr. 3294-96. By 2004, Lawrence asserted, the dash lacked sufficient remaining ink to determine whether it matched the "@60" notation. Tr. 3296-97.

Dr. Albert Lyter, a forensic chemist specializing in inks and papers, testified for the defense, Tr. 3691, challenging Lawrence's conclusions in two key respects. *First*, Dr. Lyter testified, the "@60" notation was *not* the only mark on the worksheet written in that particular ink. Rather, the dash that Lawrence had claimed the Government never tested was written in the same ink, Tr. 3710, thus supporting the defense claim that the "@60" was written on or before December 24, 2001, *see supra* at 20 n. 9. *Second*, Dr. Lyter explained that a technique called "densitometry" showed that the remaining marks on the page—that is, those other than the dash and the "@60"—were made by *at least* two additional pens. Tr. 3738-43. If credited by the jury, this testimony would have provided powerful support for the defense's contention that Bacanovic had simply used multiple pens on the worksheet before the sale of Stewart's ImClone shares, dispelling any questions about the legitimacy of the "@60" notation.

The prosecutors recalled Lawrence as their sole rebuttal witness.[22] Lawrence told the jury that densitometry could not show whether one or more pens had been used on the document. Tr. 4190, 4195. When confronted with evidence that several of his FSD colleagues had proposed a textbook that included a chapter concerning the uses of densitometry, Lawrence asserted that he had "seen the proposal for the chapter," Tr. 4199; *see id.* (Lawrence stating that he was "aware" of the proposal), suggesting that its existence would give him no cause to rethink his own opinion.

In fact, Lawrence had lied. He lied when he said that he—*the* national expert for ink and the witness whom the prosecutors called to the stand—had performed the crucial 2002 tests. (The tests had actually been performed by Susan Fortunato, a woman without an impressive title and from whom the jury never heard.) Lawrence also lied when he claimed familiarity with the proposal by his colleagues concerning what he had so solemnly told the jury could not be done. JA 1133-37.[23]

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[22] The other major aspect of the prosecutors' rebuttal case was to play a portion of Bacanovic's SEC testimony that they later asked the jury to credit for its truth value. *See supra* at 45-46. Thus, both pieces of testimony presented during the Government's rebuttal were infected by serious violations of Stewart's constitutional rights.

[23] Evidence presented at Lawrence's recent perjury trial demonstrates that he lied about other significant matters as well. *See infra* at 75-76 n. 30 (describing revelations during Lawrence's trial).

Nor did Lawrence's lies go unnoticed: At least four other Government officials knew of his false testimony before, during, or just after he testified:

- Fortunato, the Secret Service Analyst and ink expert who actually tested the worksheet in 2002, knew that Lawrence had not personally participated in that testing;
- Bureau Chief Benjamin Moore, who attended a pre-trial meeting with Lawrence, Fortunato, and the prosecutors at which Fortunato described her testing, also knew that Fortunato had performed the tests. When Lawrence testified on February 19 that he too had participated in the tests, Moore immediately suspected that Lawrence had lied; as he listened to Lawrence's testimony, Moore wrote "oh-oh" in his notebook and thought, "[W]e might have a problem here." JA 1237. Moore then confirmed that Lawrence had lied simply by asking Fortunato about it;
- Another Bureau Chief, Richard Dusak, learned from Moore about Lawrence's lies and responded by attending Lawrence's rebuttal testimony, where Dusak witnessed Lawrence lie again about his purported familiarity with the book proposal. (Lawrence confessed to Dusak that "he had never heard about" the proposal. JA 1243.);

- Analyst Brittany King, who had a personal relationship with Lawrence, received numerous text messages that revealed Lawrence's intention to lie on the stand. *See infra* at 64.

None of these Government officials saw fit to inform the court, the prosecutors, or defense counsel of the "problem." *Eighty days* passed before office politics led Lawrence's enemies in the FSD to come forward. By then, of course, Stewart had long since been found guilty.

Three months after Stewart's trial, prosecutors secured a grand jury indictment against Lawrence based on the two lies described above. These false statements, the Government-drafted indictment alleged, were sufficiently "material" to support a perjury conviction. *See* SA 9, 12.

Stewart promptly moved for a new trial, explaining that, under this Court's precedents, reversal is "virtually automatic" where, as here, the Government either "knew or should have known" of perjury by one of its witnesses. *See Wallach*, 935 F.2d at 456 (quoting *Stofsky*, 527 F.2d at 243). The District Court refused to order a new trial, holding that the "virtually automatic" rule did not apply, and that, even if it did, reversal was still unnecessary because there was no reasonable likelihood

that Lawrence's perjury could have affected the verdict.[24] SPA 89-131. The District Court also denied Stewart's request for an evidentiary hearing. SPA 130-31.

B. The "Virtually Automatic" Reversal Rule Governs This Appeal

The "virtually automatic" reversal rule applies here for two independent reasons. First, because Lawrence and the FSD acted as an "arm of the prosecution" with respect to Stewart's case, their knowledge of Lawrence's false testimony *is* knowledge of the Government. Second, the prosecutors themselves,

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[24] The District Court rightly assumed that Lawrence testified falsely (*see* SPA 107), and Lawrence's recent acquittal does not undermine that approach. That verdict establishes *only* that the Government did not prove all the elements of perjury beyond a reasonable doubt. It is settled, however, that a defendant seeking a new trial because of false testimony by a government witness need not meet that standard. Rather, the defendant must only demonstrate "*by a preponderance of evidence*, that the witness committed perjury." *Culbreath v. Bennett*, No. 01-CV-6337 (CJS), 2004 U.S. Dist. LEXIS 16352, at * 71 (W.D.N.Y. Aug. 11, 2004) (emphasis added) (citing *Ortega v. Duncan*, 333 F.3d 102, 106 (2d Cir. 2003); *see also United States v. Williams*, No. 99-1124, 1999 U.S. App. LEXIS 27390, at *4-*5 (2d Cir. Oct. 25, 1999) (affirming denial of new trial where defendant did not establish "by a preponderance of the evidence" that witness testified falsely); *Vickers v. Barling*, No. 77 Civ 5405 (GLG), 1978 U.S. Dist. LEXIS 18261, at *6 (S.D.N.Y. Apr. 20, 1978) (defendant carried the "burden of proving, by a preponderance of the evidence, the knowing use of perjured testimony at trial").

The evidence here easily satisfies that standard. In obtaining the indictment, the Government necessarily convinced a grand jury that there was probable cause to believe that Lawrence had committed perjury. By taking the case to trial, moreover, the prosecutors manifested a belief that the evidence would establish it beyond a reasonable doubt. (Should this Court have any doubts on the matter, the proper course would be to remand for a hearing, at which the District Court could also address the additional perjury and apparent *Brady* violations that came to light during Lawrence's trial. *See infra* at 75-76 n. 30.)

at very least, *should have known* that Lawrence had lied on the stand. The District Court's contrary conclusions are both factually and legally flawed.

1. Lawrence and the other high-ranking law enforcement officials who knew that his testimony was false *were* "the Government"

The "virtually automatic" rule is triggered if Lawrence or any of the other governmental officials who knew of his false testimony "acted as an arm of the prosecution." *Wedra v. Thomas*, 671 F.2d 713, 717 n.1 (2d Cir. 1982). Yet the District Court concluded that the knowledge of these Secret Service officials could not be "attributed" to the prosecutors because they were not "*law enforcement officers* who were actually involved in the *investigation* of [Stewart]." SPA 113 (emphases added). That conclusion is legally erroneous and factually insupportable.

As to the legal standard: This Court has emphatically rejected the District Court's formalistic notion that only "law enforcement" officials involved in the "strategy of investigation or prosecutorial preparation of the case" can be "part of the prosecution" in applying the virtually automatic reversal rule. *See United States v. Rosner*, 516 F.2d 269, 279 (2d Cir. 1975) (rejecting argument that "an undercover agent can never be part of the 'prosecution'").[25] Indeed, any such limit

[25] *See also United States v. Morell*, 524 F.2d 550, 554-55 (2d Cir. 1975) (holding that an Agent of Bureau of Narcotics and Dangerous Drugs acted "as an arm of the prosecutor" given his participation in the investigation).

would be inconsistent with the Supreme Court's approach to prosecutorial duties under *Brady v. Maryland*, 373 U.S. 83 (1963). In *Kyles v. Whitley*, 514 U.S. 419, 437 (1995), the Supreme Court held that *all* persons "acting on the government's behalf in the case, including the police" are part of the prosecution for purposes of the Government's *Brady* obligations. There is no reason to apply a different rule in the context of false testimony. Thus, the "virtually automatic" reversal rule applies whenever *any* governmental official "acting on the government's behalf in the case against the accused" has actual knowledge of false testimony. *Freeman v. United States*, 284 F. Supp. 2d 217, 227 (D. Mass. 2003).[26] This includes "individuals involved at *all* stages," *United States v. Ruiz*, 711 F. Supp. 145, 147 (S.D.N.Y. 1989) (emphasis added), "both investigative and prosecutorial personnel," *United States v. Heinz*, 983 F.2d 609, 617 (5th Cir. 1993).

When properly understood as addressing whether the relevant government officials "work[ed] in conjunction with either the police or the prosecutor," *United States v. Sanchez*, 813 F. Supp. 241, 247 (S.D.N.Y. 1993), the standard is easily

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[26] Expert witnesses may clearly fall within that category. *See People v. Cornille*, 448 N.E.2d 857, 865 (Ill. 1983) (reversing conviction tainted by government expert's false testimony regarding qualifications); *State v. DeFronzo*, 394 N.E.2d 1027, 1032 (Ohio Ct. C.P. 1978) (reversing conviction because crime lab expert falsely testified about credentials). The case for reversal here is stronger than in *Cornille* or *DeFronzo*, which both involved lies on the "collateral" issue of credentials. By contrast, Lawrence's perjury went to the heart of the case: the competing accounts of the "@60" notation offered by the Government and defense experts.

satisfied here. Lawrence worked closely with prosecutors both before and during trial. He directed the team supervising Dr. Lyter's 2003 examination of the worksheet; spent days in New York before trial preparing questions for the prosecutors; participated in important strategic decisions, including those arising from the FSD's handling of the worksheet; prepared for a *Daubert* hearing on Dr. Lyter; and conducted additional research and testing before rebuttal testimony. *See* Stewart Reply Br. Supp. Mot. for New Trial Based Upon Government Misconduct 6-7 (June 30, 2004). The prosecutors contested none of this below, and affirmatively conceded that they "consulted with [Lawrence] on trial strategy." Gov't Mem. Opp. to Defs.' New Mots. for a New Trial 21 (June 24, 2004).

The importance and intimacy of Lawrence's collaboration with the prosecutors is graphically illustrated by his contemporaneous text messages to Agent King. The prosecutors, Lawrence wrote, "want me to prepare their questions," JA 1519, and were "nervous about the ink sue [Fortunato] didn't test," JA 1561; *see* JA 1558 ("NY is worried about the other marking"), 1719 ("they based their indictment on sues fuckedup report"). Lawrence discussed being on a "conf call with three of them worried about what [defense expert] lyter will do," JA 1559, noted that his return might be delayed if "the prosecution g[ets] dealt another blow," JA 1561, and wrote that he had been tasked to "research a book … to show it is bs or self serving for lyter," JA 1570.

Nor is Lawrence the only link between the FSD and the prosecutors. Other Secret Service officials—particularly Fortunato—also "worked in conjunction" with the prosecutors. In July 2002, nearly a year before this case was indicted, Fortunato analyzed the "@60" worksheet to determine whether a crime had been committed. Tr. 3272-77, 3295. The prosecutors "based their indictment" on that analysis, *see* JA 1719, specifically invoking "Bacanovic's alteration of the worksheet (i) as an act in furtherance of the conspiracy charged against [both defendants], (ii) as the basis for a false documents charge against Peter Bacanovic, and (iii) in connection with one perjury specification against Peter Bacanovic." SA 5-6.

Finally, even if knowledge of "law enforcement" personnel were required to trigger the "virtually automatic" reversal rule, the test is met here. The Secret Service—including the FSD—*is* a "law enforcement agency," as Lawrence himself testified at trial. *See* Tr. 3732; *see also* Lawrence Tr. 91 (testimony of Agent Farmer).[27] And FSD's role in this particular case—performing tests that led to the decision to indict—unquestionably falls within its investigative law enforcement function. Accordingly, even if involvement by "law enforcement" personnel were

[27] *See also* http://www.ustreas.gov/usss/mission.shtml ("The United States Secret Service is mandated by statute and executive order to carry out two significant missions: protection and criminal investigations"); "Investigative Mission", at http://www.ustreas.gov/usss/investigations.shtml ("The Secret Service was established as a law enforcement agency in 1865.").

required—though in fact it is not—the District Court erred in crediting the Government's post-trial representations that the "FBI was the sole law enforcement agency that participated in this investigation." JA 1683.

2. At very least, the prosecutors "should have known" that Lawrence lied

The virtually automatic reversal rule applies for another independent reason: Even if the prosecutors did not actually detect the falsity of Lawrence's testimony during Stewart's trial, they should have done so. *See Wallach*, 935 F.2d at 457.

By January 9, 2004, if not before, it would have been unreasonable not to have known that Fortunato, and no one else, conducted the 2002 testing on the worksheet.[28] On that day, three prosecutors and two FBI agents attended the same meeting with Lawrence and Fortunato that Chief Moore did and heard the same statements about *Fortunato*'s testing of the document. The prosecutors "asked Fortunato about *her testing* of the evidence in the case"; Lawrence, in contrast, was asked only about "the policies and procedures of the Service's laboratory," and said nothing to suggest that he, too, had participated in the testing. JA 1235 (emphasis added).

Indeed, the prosecutors also appear to have believed, after that meeting, that Fortunato, and not Lawrence, conducted the 2002 testing. On February 18, the day

[28] Even before that date, the prosecutors knew that only Fortunato's name appeared on the 2002 report. Lawrence was unmentioned, either as an author or supervisor.

before Lawrence's testimony, the Government informed the court that "originally someone else did the preliminary—[Lawrence's] subordinate did the first round of tests" in 2002, and that Lawrence "reviewed those in January [2004] and issued a new report." Tr. 3178; *see also* Tr. 3179 ("It is my understanding that [Lawrence] redid the test that *his subordinate had done* previously …." (emphasis added)). The Government's opening questions were to the same effect. Tr. 3277.

And yet, when Lawrence took the stand shortly thereafter, he flatly claimed that he had *personally* "[o]bserved, participated [in] and reviewed" both sets of testing. Tr. 3322. The prosecutors did not challenge these statements.

In contrast, Moore, who had also attended the January 9 meeting convened and attended by the prosecutors, had no difficulty spotting Lawrence's false testimony. When Lawrence testified that he had worked side by side with Fortunato in testing the worksheet in 2002, *see supra* at 19, 56, Moore realized that this claim was inconsistent with the entire tenor of the January 9 meeting, writing "oh-oh" in his notebook and thinking, "[W]e might have a problem here." JA 1237. One simple act was all it took for Moore to confirm what he already suspected: He asked Fortunato. (Indeed, a check of the supervisor's calendar revealed that Lawrence was not even in the office on the days of the critical testing. JA 1237-38.) Unlike Chief Moore, however, the prosecutors never took

that simple step, though Lawrence's testimony had contradicted what they had heard on January 9 and what they had told the court just the day before.

Prosecutors have a duty not only to reveal exculpatory evidence, but also to "learn of any favorable evidence known to the others acting on the government's behalf in the case." *Kyles*, 514 U.S. at 437; *see Brady*, 373 U.S. at 87. When Lawrence's testimony departed from their prior understanding of events, the prosecutors had to perform at least *some* investigation. The ease with which Moore discovered Lawrence's false testimony makes clear that answers would not have been hard to find.

But the prosecutors did nothing. Instead, it appears that "given the importance of [the] testimony to the case, the prosecutors … consciously avoided recognizing the obvious—that is, that [Lawrence] was not telling the truth." *Wallach*, 935 F.2d at 457. Such willful blindness triggers the "virtually automatic" reversal rule.

C. There Is A "Reasonable Likelihood" That Lawrence's False Testimony "Could Have" Affected The Jury's Verdict

Under the "virtually automatic" reversal rule, "the conviction must be set aside unless there is *no* 'reasonable likelihood' that the false testimony *could have* affected the judgment of the jury." *Filion*, 335 F.3d at 126-27 (emphasis added). The "virtually automatic" reversal rule means what it says: "The phrases—'reasonable likelihood,' 'could have affected'—'mandate a virtual automatic

reversal of a criminal conviction.'" *United States v. Williams*, 233 F.3d 592, 594 (D.C. Cir. 2000) (quoting *Stofsky*, 527 F.2d at 243). For at least four reasons, the District Court's holding that Stewart was not entitled to relief cannot withstand this Court's "independent examination." *Rivalta*, 925 F.2d at 597.

First, the jury's acquittals of Bacanovic on the false document count and both defendants on the false statement specifications related to the "@60" notation *do not show* that the "jury did not rely on Lawrence Stewart's testimony to convict." SPA 117. An "acquittal does not … conclusively establish[] the untruth of all of the evidence introduced against the defendant," *United States v. Rodriguez-Gonzalez*, 899 F.2d 177, 181-82 (2d Cir. 1990); indeed, the Supreme Court has rejected as "pure speculation" claims that acquittals and convictions on different counts reveal what the jury did and did not believe in terms of evidence, *see United States v. Powell*, 469 U.S. 57, 64-65 (1984). As this Court has explained: "A court knows only what the jury's verdicts were, not what the jury found, and it is not within the province of the court to attempt to determine the reason or reasons for verdicts …." *United States v. Acosta*, 17 F.3d 538, 546 (2d Cir. 1994).

This case demonstrates the soundness of that fundamental principle. The partial acquittal on the "@60" charges does not establish that the jury disregarded Lawrence's testimony, or that revelation of his lies would not have affected the jury's deliberations. It shows only that the jury did not unanimously find the

Government proved those counts beyond a reasonable doubt. Every juror might have thought them proven by clear and convincing evidence; eleven may have thought them proven beyond a reasonable doubt. If anything, the acquittals only highlight the importance of the false testimony. This was a close case—the jury acquitted on the counts involving the Government's core theory and convicted on more peripheral misstatements. Any factor might have tipped the balance for Stewart, and there is more than a "reasonable" chance that Lawrence's lies "could have" affected the jury's judgment.

It may be true, as the District Court noted, that "[i]t would not have been *inconsistent* for the jury to find that defendants did make the $60 agreement, but that the agreement was not the *reason* for the sale." SPA 119 (first emphasis added). But that is not the test. Instead, the issue is whether the Government can show that there is "*no* reasonable likelihood that the false testimony *could have* affected the judgment of the jury." *Filion*, 335 F.3d at 126-27 (emphasis added and internal quotations omitted).

Second, Lawrence's testimony—and his lies—were *not* "collateral to the facts in dispute." SPA 119-20. By focusing so heavily on the worksheet's importance "to the prosecutio[n]," SPA 120, the District Court overlooked that it was also vital *exculpatory* evidence as to all the counts and specifications. The Government's entire presentation rested on the premise that Stewart and Bacanovic

had "invented" the $60 agreement and various accompanying details to cover up the "real reason" for Stewart's sale. Stewart's defense was exactly the reverse: the $60 agreement was the "real reason" for the sale, she had no reason to lie, and any allegedly inaccurate statements during her interviews resulted from mistake or misunderstanding, inaccurate memory about a relatively insignificant transaction, or faulty note taking by a Government agent. Because the "@60" notation was one of only two pieces of independent evidence (the other being DeLuca's testimony) supporting the existence of the $60 agreement, any challenge to its authenticity—regardless whether proven beyond a reasonable doubt to the satisfaction of all twelve jurors—was critical to Stewart's defense.

Lawrence's false testimony critically bolstered the Government's attack on the worksheet's validity. The identity of the person who "performed [a given set of] forensic tests" may often have "nothing to do with the[ir] validity." SPA 121.[29] But this was far from a normal case. By introducing himself to the jury as the *only* "national expert for ink," Tr. 3273, and repeatedly stating that he had *personally* "[o]bserved, participated [in] and reviewed" both sets of testing, Tr. 3322, Lawrence lent considerable force to the Government's claims that: (1) the "@60" notation was written in a different ink than "the remaining entries" on the document, Tr. 3297, 3301; and (2) densitometry—the technique employed by Dr.

[29] Testimony at Lawrence's trial makes clear that he also testified falsely to cover up crucial flaws in the testing itself. *See infra* at 75-76 n. 30.

Lyter—*could not* show whether more than one additional pen made the remaining entries, Tr. 4190, 4195. *See People v. Cornille*, 448 N.E.2d 857, 865 (Ill. 1983) (stressing that prosecutors had "relied upon the credibility imparted by [the witness's] expertise"). Lawrence's false statements that he was "familiar" with his FSD colleagues' book proposal, moreover, made his rejection of that technique appear to be the product of considered reflection rather than merely the efforts of a law enforcement official to undercut the testimony of a key defense witness. *Cf.* JA 1570 (Lawrence noting request that he "research a book … to show it is bs or self serving for lyter").

The District Court's analysis of independent evidence of Stewart's guilt, SPA 122, was similarly flawed. Citing *United States v. Wong*, 78 F.3d 73 (2d Cir. 1996), the District Court reasoned that "where independent evidence supports a defendant's conviction," subsequently discovered perjury "will not warrant a new trial." SPA 108-09 (quoting *Wong*, 78 F.3d at 82). That is true, as *Wong* held, when the governing rule is the ordinary *new evidence* standard. *Id.* at 79. But the "virtually automatic reversal" standard is different. *See Wallach*, 935 F.2d at 456-58. The Supreme Court has made this precise point clear. *See Kyles*, 514 U.S. at 435 n. 8 (distinguishing between "reasonable likelihood" and "sufficiency of the evidence" standards). The inquiry here requires only *any* reasonable likelihood

that the false testimony *could* have affected the jury's judgment—a different standard, easily satisfied here.

Third, the District Court erred by limiting its analysis to the impact of Lawrence's actual testimony, and failing to account for the likely impact on the jury of the revelation of his lies during trial. This Court has made clear that in considering a motion for a new trial on grounds of perjury, "the court should assume that the jury would have had before it the newly-discovered evidence not only for its probative value with respect to the issues but *also to demonstrate that the witness had perjured himself.*" *Stofsky*, 527 F.2d at 246 (emphasis added); *see Ortega v. Duncan*, 333 F.3d 102, 109 (2d Cir. 2003).

Had Lawrence, his Secret Service colleagues, or the prosecutors fulfilled their obligations, the jurors would have learned that a high-ranking law enforcement official had lied to them in a case that involved false statements and rested crucially on the credibility of Government officials. Stewart would also have been able to demonstrate that Lawrence viewed the 2002 testing as "fuckedup" and that the prosecutors had believed they were going to lose the case "big time." As one of Stewart's trial prosecutors acknowledged at Lawrence's trial, revelations of this nature "would have been a big problem for the case, for the prosecutors, for [Lawrence] …. [The Government is] not allowed to put on perjured testimony at any time, and would have to tell the jury, the judge, the defense counsel, that a

witness had lied. So it would make a big difference in that respect." Lawrence Tr. 473.

Finally, notwithstanding the District Court's detours into inappropriate standards of review and speculation about what motivated the jury verdict, the "no reasonable likelihood" inquiry is straightforward in this case. By prosecuting Lawrence the Government conceded that his perjury was "material" to the jury deciding Stewart's case. That fact alone mandates reversal. *See United States v. Guariglia*, 962 F.2d 160, 164 (2d Cir. 1992) (rejecting "[the] strained reasoning" that "different tests are applied in deciding whether a statement is material for perjury purposes and in deciding whether perjured testimony warrants reversal of a conviction").

D. At A Minimum, This Court Should Remand For An Evidentiary Hearing

The undisputed record facts make clear that "the Government" knew and that the prosecutors, at very least, should have known that Lawrence lied during his testimony at Stewart's trial. Where (as here) *either* is true, the "virtually automatic" reversal rule applies and this Court should reverse Stewart's convictions.

But even if these points were somehow in doubt, the Court would still need to remand for an evidentiary hearing. Unless this Court agrees with Stewart's position that the record is fully sufficient to reverse now, further inquiry is

essential to determine whether: (1) Lawrence and the FSD were sufficiently involved in this case that their knowledge of his lies is that of the Government; (2) the prosecutors knew or should have known that Lawrence had testified falsely; and (3) the Government complied with its *Brady* obligations. The record will not bear a decision *against* Stewart on any of those points. The prosecutors' post-trial affidavits are in significant tension with the events of February 18 and 19, with Moore's immediate detection of the lies, with additional facts that have come to light in the Government's prosecution of Lawrence, and even with each other. Despite Stewart's pending demand for various materials, the Government has not even produced copies of notes from the critical January 9, 2004 meeting—much less the patently exculpatory materials that it has now both used in its case against Lawrence and produced to Lawrence's lawyers.[30]

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[30] Testimony, evidence, and pleadings at Lawrence's trial demonstrated that: (1) Lawrence's perjury was "critically important," Lawrence Tr. 34; (2) the perjury "could have" affected the jury, *see* SA 25; (3) the Secret Service is a "law enforcement agency" and the FSD is its "crime lab," Lawrence Tr. 93, 99; (4) Lawrence's conduct was "investigatory" in nature, Lawrence Tr. 91; (5) Fortunato described *her* testing to the prosecutors on January 9, 2004, Lawrence Tr. 155-62, 165-66; (6) AUSA Burck's recollection of the January 9 meeting conflicts with the testimony of every other participant in that meeting, Lawrence Tr. 87, 366; and (7) the USAO now concedes that the Government's post-trial filings (upon which the District Court relied in denying Stewart's motion for a new trial) were not "precise" and understated the extent to which Lawrence and the defense ink expert disagreed at trial, Lawrence Tr. 667.

During Lawrence's trial, moreover, it became apparent that the Government had withheld *Brady* materials, including at least two documents that raise questions about the *validity* of the FSD's testing of the worksheet.

First, testimony referenced an August 5, 2002 memorandum from Fortunato (Lawrence Trial Gov't Ex. 122), noting that the FBI had directed her to test "*all* entries" *regardless* of the effect on the worksheet. Lawrence Tr. 140-41 (emphasis added). Yet, Fortunato disregarded this instruction and falsely wrote in her 2002 report that the "@60" was different from "*all*" the other entries on the worksheet. Tr. 3319, 3325. That memorandum, plainly exculpatory material and part of the "laboratory file" requested by Stewart, would have: (1) supported an argument that FSD's 2002 testing of the "@60" worksheet sought to obscure or suppress exculpatory information; (2) undermined Lawrence's testimony at Stewart's trial that the dash was not tested in 2002 because of FSD policy; and (3) constituted powerful evidence that the prosecutors should have known of the FSD's sabotage and Lawrence's false testimony.

Second, the testimony at Lawrence's trial also referenced a January 16, 2004 "summary" provided by Fortunato to Lawrence (Lawrence Trial Gov't Ex. 137). Among other things, this summary stated that "physical exams" and "infrared results" from the 2004 testing showed that "the horizontal line" (*i.e.*, the dash) "was the *same* as the 'at 60' ink." Lawrence Tr. 181 (emphasis added). If produced, this summary would have: (1) undercut Lawrence's 2004 report and his testimony at Stewart's trial that the results of attempting to test the dash in 2004 were inconclusive, Tr. 3296-98; and (2) revealed that Lawrence's testimony that there was not enough ink left following the defense testing was a lie. *Compare* Tr. 3296-97, *with* Lawrence Tr. 175-79 (Fortunato testifying that *in 2004* she used the remaining ink from the dash to conduct two chemical tests other than the vital chemical comparison with the "@60" notation). If this summary had been produced, it would have established a pattern of suppressing forensic results favorable to the defense.

Two days after learning of these materials, Stewart wrote the USAO, renewing her demand for materials "related to Lawrence's preparation and testimony as well as the … investigation of, discovery of and criminal complaint against [him] for perjury," including the FSD's laboratory file and all exculpatory material withheld by the Government. JA 1893-1902. Stewart's counsel is currently reviewing the Government's response. JA 1905-09.

Counsel recognizes that the new material cited in this footnote is from the record in Lawrence's case, not this one. The existence of this material, however, vividly demonstrates the essential information that could have been explored at an evidentiary hearing. That hearing should still be held in the event that this Court does not order a new trial.

IV. SERIOUS ALLEGATIONS OF JUROR MISCONDUCT REQUIRED AN EVIDENTIARY HEARING

A. Background

No juror was as eager to tell his story as Chappell Hartridge. The only juror who spoke publicly the day the verdict was announced, Hartridge convened an impromptu press conference on the courthouse steps. In the following days, Hartridge continued to seek the spotlight, making numerous pronouncements. As noted above, his comments were deeply disturbing. *See supra* at 37 n. 13.

Even as Hartridge's post-verdict remarks illuminated the extent of unfair prejudice at trial, the defense received information calling into question the manner in which Hartridge got on the jury. Like hundreds of other candidates, Hartridge completed a questionnaire designed to screen for for-cause challenges and identify areas for follow-up inquiry. Hartridge, it now appears, provided many false responses. For example:

- Hartridge denied having been "accused of, charged with, or convicted of any crime," SPA 60, and asserted the only time he had ever "been in court" was for a dispute with his landlord, SPA 60-61. A woman with whom Hartridge used to live, however, submitted an affidavit stating that he was arrested, arraigned, and jailed for several days in 1997 after he violently assaulted her. JA 981-82;

- Hartridge stated that none of his "family member[s]" had been "questioned by law enforcement, accused of, charged with, or convicted of any crime." SPA 60. But records filed with the District Court demonstrate that one of Hartridge's sons was convicted of burglary in 2000. SPA 70;
- Hartridge denied ever having "[b]een accused of wrongdoing on a job." SPA 71. There is evidence, however, that Hartridge: (1) was accused of and confessed to embezzling funds from the Kingsbridge Little League when serving as its volunteer treasurer, JA 960-61; and (2) may have been fired by Citibank for drug-related misconduct, JA 962; and
- Hartridge said neither he nor "anyone close to" him had ever "[b]een sued." SPA 68. But court records document four civil *judgments*—two against Hartridge, one against his wife, and another against them jointly—entered between 1990 and 2002 in amounts ranging from $1,815 to $11,392, JA 963, 966-79; SPA 68.

Concerned that Hartridge's apparent misrepresentations implicated his fitness to serve on a jury charged with deciding whether others made intentional false statements and called into question whether *voir dire* had fulfilled its purpose of "exposing possible biases," *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984), Stewart requested a new trial or an evidentiary hearing to investigate whether and why Hartridge lied on his jury questionnaire. *See, e.g.*,

Stewart Reply Mem. in Further Supp. of Mot. for a New Trial Pursuant to Fed. R. Crim. P. 33, at 8-10 (Apr. 14, 2004) (three-page argument why Stewart was entitled to a hearing).

The District Court rejected both requests. SPA 52-74. Beginning with the domestic violence incident, the court noted that the questionnaire had not contained the words "arrests and arraignments," SPA 61, surmised that Hartridge "may have believed" that New York law gave him the right to lie, SPA 61-62, and concluded that, even if Hartridge had deliberately concealed the incident, that act would not demonstrate "a bias … that would have supported a for-cause challenge." SPA 68. Though acknowledging "serious question[s]" about whether Hartridge "deliberately omitted information concerning his son's arrest," the District Court found it "difficult to see how" the underlying facts "could justify an inference that Hartridge would be biased against these defendants." SPA 70. Turning to the embezzlement allegations, the District Court declared that "[a] volunteer position … is not a job," faulted Stewart for submitting "affidavits containing hearsay statements from individuals with no personal knowledge," and reasoned that because "the [Little League] board declined to take action … it is not clear that [Hartridge] was formally 'accused' of anything." SPA 71-72. Deeming Stewart's evidence "tenuous and unverifiable," the court declined even to consider whether Hartridge acted wrongly in failing to disclose the circumstances

surrounding his termination by Citibank. SPA 72. Hartridge, the court conjectured, "may have forgotten" about the older and smaller judgments against him and may not have known "about the judgments against his family members." SPA 69. And though it thought Hartridge's failure to mention a five-figure judgment entered in 1997 "questionable" and surmised that "he may have deliberately omitted it," the court chastised Stewart for not explaining "how the fact that a court has entered a judgment against a prospective juror supports an inference that the individual would be biased against the defendants in a completely unrelated case." SPA 69.

Despite the numerous unanswered questions identified in its own opinion, the District Court also rejected Stewart's request for a hearing. In a three-sentence paragraph bereft of citation to precedent or the record, the District Court concluded no hearing was needed because: (1) Stewart had "not offered a single, nonspeculative question, the answer to which would show bias or prejudice"; (2) "none of the information Hartridge is accused of withholding would give rise to an inference of bias"; and (3) given the "unprecedented level of publicity" that Stewart's trial had received, "permit[ting] an inquiry based on such scant evidence … would do serious damage to the policies that justify limitations on postverdict juror scrutiny." SPA 73-74.

B. The Number and Nature Of Hartridge's Apparent Lies Necessitated An Evidentiary Hearing

Despite understandable reluctance "to haul jurors in after they have reached a verdict," a trial court *must* convene a hearing concerning possible juror misconduct whenever "reasonable grounds for investigation exist." *United States v. Moon*, 718 F.2d 1210, 1234 (2d Cir. 1983); *see Dyer v. Calderon*, 151 F.3d 970, 974 (9th Cir. 1998) (en banc) ("A court confronted with a colorable claim of juror bias must undertake an investigation of the relevant facts and circumstances."). A party satisfies this "reasonable grounds" standard by presenting "clear, strong, substantial and incontrovertible evidence … that a specific, non-speculative impropriety has occurred." *United States v. Ianniello*, 866 F.2d 540, 543 (2d Cir. 1989) (quotation marks and citation omitted). Although courts should avoid "fishing expedition[s]," *United States v. Moten*, 582 F.2d 654, 667 (2d Cir. 1978), a proffer need not "be irrebuttable" in its tendency to show an impermissible bias, for "if the allegations were conclusive, there would be no need for a hearing." *Ianniello*, 866 F.2d at 543.

Stewart's filings comfortably satisfy the "reasonable grounds" standard. As set forth above, Stewart presented direct and credible evidence—including affidavits and court records—that many of Hartridge's answers were false. That showing is more than enough to warrant further inquiry. *See United States v. Shaoul*, 41 F.3d 811, 815 (2d Cir. 1994) (juror who failed to disclose that his

niece's husband was an AUSA made available for post-verdict questioning); *United States v. Langford*, 990 F.2d 65, 67 (2d Cir. 1993) (hearing held after court records showed juror had not disclosed "a number of arrests and convictions"). Although "no verdict in the Second Circuit has been overturned on the basis of juror nondisclosure under the *McDonough* test," SPA 57, *all* the Second Circuit jury-bias cases cited by the District Court included post-trial inquiries. *See United States v. Greer*, 285 F.3d 158, 166 (2d Cir. 2002) (district court "held a full evidentiary hearing"); *Shaoul*, 41 F.3d at 814; *Langford*, 990 F.2d at 67; *United States v. Colombo*, 869 F.2d 149, 150 (2d Cir. 1989) (remanding for evidentiary hearing).

In concluding no hearing was necessary, moreover, the District Court committed at least three errors of law. *See Koon v. United States*, 518 U.S. 81, 100 (1996) ("A district court by definition abuses its discretion when it makes an error of law."). *First*, the District Court should not have speculated what Hartridge *might have* thought or remembered.[31] *See Green v. White*, 232 F.3d 671, 676 (9th Cir. 2000) (absent evidence that juror was actually confused, trial court "committed clear error" in excusing false answer on the grounds that the question had been vague); *Dyer*, 151 F.3d at 976 ("[A] judge investigating juror bias must find facts, not make assumptions."). *Cf. Moten*, 582 F.2d at 664 (when known

[31] *See, e.g.*, SPA 62 ("Hartridge may have understood …."), 65 (Hartridge "was very likely responding …."), 69 (Hartridge "may have forgotten ….").

facts warrant exploration, "[o]ften, the only way this exploration can be accomplished is by asking the jury about it"). *Second*, the District Court should have considered the evidentiary picture as a whole, rather than analyzing each instance of apparent deception in isolation. *See Green*, 232 F.3d at 678 n.10 (faulting earlier decisionmakers for not "look[ing] at all of the facts as a whole"; "any one of these incidences might be harmless in isolation[, b]ut when [the juror's] behavior is viewed as a whole, a much more sinister picture emerges").

Finally, the court failed to consider that an exploration of *why* Hartridge lied would supply the necessary proof of bias. Though lies during *voir dire* do not automatically warrant a for-cause challenge, *see McDonough*, 464 U.S. at 556; *Langford*, 990 F.2d at 69, "in most cases, the honesty or dishonesty of a juror's response is the best initial indicator of whether the juror in fact was impartial," *McDonough*, 464 U.S. at 556 (Blackmun, J., joined by Stevens, J., and O'Connor, J., concurring) (fifth, sixth, and seventh votes for Court's opinion and judgment). It is well-established, moreover, that a showing that a juror lied *for purposes of securing a seat on the jury* satisfies both parts of the *McDonough* test. *See Greer*, 285 F.3d at 172 ("[A] lie which simultaneously demonstrates both dishonesty and partiality … will satisfy both prongs of the test."); *see also McDonough*, 464 U.S. at 554 (emphasizing importance of a juror's "motives for concealing"); *Langford*, 990 F.2d at 69-70 (contrasting lies told "only to avoid embarrassment" with those

motivated by "desire to sit on the jury"); *Colombo*, 869 F.2d at 151 (intentional lie about material fact told with aim of getting on jury "indicate[s] an impermissible partiality on the juror's part").[32]

Record facts already provide more than "reasonable grounds" to warrant closer inspection. If Hartridge truly lied as often as it appears, that pattern of deception—on such a wide range of topics—would itself support an inference that he lied to secure a seat on the jury. *See Dyer*, 151 F.3d at 983 (stressing juror had "lie[d] materially and repeatedly in response to legitimate inquiries about her background"); *Green*, 232 F.3d at 676 (emphasizing "pattern of lies, inappropriate behavior, and attempts to cover up his behavior"). If Hartridge's failure to disclose his domestic violence arrest sprang from a belief that such incidents are not serious, that could demonstrate an attitude towards women that might have supported a for-cause challenge. *Cf.* Marianne Garvey & William Neuman, *Ex Rips Martha Juror*, N.Y. Post, Apr. 2, 2004, at 22 (Gail Outlaw quoted as saying:

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[32] As Judge Kozinski explained in *Dyer*:

> The individual who lies in order to improve his chance of serving has too much of a stake in the matter to be considered indifferent. Whether the desire to serve is motivated by an overactive sense of civic duty, by a desire to avenge past wrongs, by the hope of writing a memoir or by some other unknown motive, this excess of zeal introduces the kind of unpredictable factor into the jury room that the doctrine of implied bias is meant to keep out.

151 F.3d at 982.

"[Hartridge] used to tell me he thought women were below him."). Had Hartridge disclosed that he had experienced arrests and repeated lawsuits without ever being formally charged with a crime, follow-up questioning may have revealed that he harbored suspicions that anyone actually so charged must be guilty. *Cf. Colombo*, 869 F.2d at 151 (had juror not lied, "appellant might have asked for follow-up questions … to determine if there were grounds for a causal challenge"). Because the District Court's erroneously refused to convene a hearing, however, Hartridge's true motives remain a mystery.

Accordingly, if this Court does not reverse Stewart's convictions, it should remand for an evidentiary hearing regarding Hartridge's conduct during *voir dire*.

V. IF NECESSARY, THE COURT SHOULD PERMIT SUPPLEMENTAL BRIEFING ON THE APPLICABILITY OF THE FEDERAL SENTENCING GUIDELINES

As this Court knows, *Blakely v. Washington*, 124 S. Ct. 2531 (2004), has raised serious questions about the constitutionality of the Federal Sentencing Guidelines. Before sentencing, Stewart sought an order declaring the Guidelines unconstitutional and inapplicable to her. *See supra* at 26. The District Court denied that motion, and sentenced Stewart under the Guidelines. *See id.*

Since then, this Court has rejected a post-*Blakely* challenge to the Guidelines. *United States v. Mincey*, 380 F.3d 102 (2d Cir. 2004) (*per curiam*). The *Mincey* panel, however, held its mandate pending the Supreme Court's

forthcoming decisions in *United States v. Booker*, No. 04-104, and *United States v. Fanfan*, No. 04-105, and declared that "the parties will have until 14 days following the Supreme Court's decision to file supplemental petitions for rehearing." *Id.* at 106; *see United States v. Cimino*, 381 F.3d 124, 130 (2d Cir. 2004) (same stay-of-mandate order).

If *Booker* and *Fanfan* are handed down before this Court has ruled on Stewart's appeal, the Court should order supplemental briefing. If the Court resolves the appeal before *Booker* and *Fanfan* are decided, it should follow the precedent set by *Mincey* and *Cimino.*

CONCLUSION

For the foregoing reasons, this Court should vacate the judgment of conviction. Failing that, the Court should: (1) remand for evidentiary hearings regarding juror and governmental misconduct; but (2) hold its mandate pending further briefing on the impact of *United States v. Booker*, No. 04-104, and *United States v. Fanfan*, No. 04-105.

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Respectfully submitted:

O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, D.C. 20006-4001
(202) 383-5300

By: Walter E. Dellinger
Pamela A. Harris
Jeremy Maltby
Matthew M. Shors
Toby Heytens*
Maritza U.B. Okata

Martin G. Weinberg
Martin G. Weinberg, P.C.
20 Park Plaza, Suite 905
Boston, MA 02116

David Z. Chesnoff
Goodman & Chesnoff
520 South Fourth Street
Las Vegas, NV 89101

Attorneys for Appellant Martha Stewart

*Admitted only in Maryland

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it does not exceed 21,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and the Court has granted Appellant permission to file an oversized brief; and

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

Walter E. Dellinger, Esq.
Of O'MELVENY & MYERS, LLP

O'MELVENY & MYERS, LLP
1625 Eye Street, NW
Washington, D.C. 20006-4001
Attorneys for Appellant Martha Stewart

CERTIFICATE OF SERVICE

I hereby certify that, on October 20, 2004, true copies of the foregoing Brief of Defendant-Appellant Martha Stewart were served by hand upon the following:

Karen Patton Seymour, AUSA
United States Attorney's Office
Southern District of New York
One Saint Andrew's Plaza
New York, NY 10007
(212) 637-2508

Richard M. Strassberg
Goodwin Procter LLP
599 Lexington Avenue
New York, NY 10022
(212) 813-8800
Attorneys for Defendant-Appellant Peter Bacanovic

_____
Walter E. Dellinger, Esq.