09-2002

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

BRADLEY STINN,

Defendant-Appellant.

On Appeal From The United States District Court
For The Eastern District Of New York
No. 07-cr-113 (NG)

REPLY BRIEF FOR DEFENDANT-APPELLANT BRADLEY STINN

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The government devotes fully 20 pages of its brief to a highly partisan—and at times plainly misleading—account of the case, even though Stinn has raised only two purely legal challenges to the judgment of conviction. When, at long last, the government turns to the issues on appeal, its approach is flawed at every turn. With respect to the conscious avoidance instruction, it continues to conflate evidence of actual knowledge with evidence (and there was none) of a deliberate effort to avoid actual knowledge. And the government's approach to the remarkable series of events during jury deliberations—the issuance of an *Allen* charge on the heels of a holdout juror's identification in open court, dismissal of that holdout, and the substitution of an alternate who could have concluded only that the dismissal was driven by the holdout's dissenting views—is to divide and conquer. But the government's compartmentalized responses fall short, and the government fails entirely to reckon with the mutually reinforcing coercive effect of each error.

I. There Was No Factual Predicate For The Conscious Avoidance Instruction, And The Government Cannot Show That Giving It Was Harmless Beyond A Reasonable Doubt

A. The Government's Defense Of The Instruction Confirms That It Shares The District Court's Misunderstanding Of What Constitutes A Valid Factual Predicate

The government concedes that the district court based its decision to give the conscious avoidance instruction on Victor Suglia's testimony that Stinn, after

deciding to falsify Friedman's financial statements, directed Suglia to "take care of it" without specifying *how* certain financial entries were to be manipulated. Gov't Br. 23. The government is wrong, however, to suggest that such testimony can supply a legal basis for the instruction. *Id.* at 27.[1]

The government's argument hinges on *United States* v. *Walker*, 191 F.3d 326 (2d Cir. 1999), which it contends authorizes a conscious avoidance instruction whenever "a supervisor denie[s] knowledge of his employees' fraudulent conduct but where he reviewed their work and was confronted with evidence of falsity." Gov't Br. 27. That characterization, however, omits the essential facts that distinguish true conscious avoidance from mere negligent or even reckless supervision.

Walker was an immigration attorney charged with submitting false asylum applications for hundreds of clients. 191 F.3d at 330. Walker sometimes

[1] The government first attacks two arguments that Stinn does not make. The government claims that Stinn's "primary contention" is that the instruction was inappropriate because "the government's primary theory is that the defendant had actual knowledge." Gov't Br. 25. The government cannot cite a page in Stinn's brief where that argument appears, and this is not the first time the government has mischaracterized our argument. See Dist. Ct. Bail Opp. 13; 2d Cir. Bail Opp. 19. Nor is it the first time we have explained the basic distinction between the ability to pursue a conscious avoidance theory in the alternative (which is permissible) and obtaining that instruction without introducing the supporting factual predicate (which is not). Dist. Ct. Bail Mtn. 11; Dist. Ct. Bail Reply 10; 2d Cir. Bail Mtn. 15; 2d Cir. Bail Reply 8.

The government also attributes to Stinn the contention that only direct (not circumstantial) evidence can supply the factual predicate for a conscious avoidance charge. Gov't Br. 26. Here too, the government cannot identify where such an argument appears in Stinn's brief, because we have never made it.

personally drafted fabricated stories claiming political or other persecution warranting asylum. *Id.* at 332. Such evidence, of course, would be evidence only of actual knowledge. But Walker also had a practice of having his subordinates complete the applications, which was the basis for his claim that he did not know that many of the applications contained false information. *Id.* at 337. The critical facts giving rise to a conscious avoidance instruction—which feature prominently in the Court's opinion but are nowhere in the government's description of the case—were that (1) Walker directed his clients to sign *blank* immigration forms and then handed them to his subordinates for completion, *id.* at 331, 332, 333; and (2) Walker sometimes reviewed the completed applications, in which the same "stories were repeatedly employed almost *word-for-word*, with certain phrases appearing in identical fashion," *id.* at 331. Those facts made *Walker* a "paradigmatic" example of conscious avoidance.

There is nothing even remotely similar in this case. For starters, there is no suggestion that Stinn signed "blank" financial statements. Nor is there any evidence that Friedman's statements evidenced anything like the "word-for-word" repetition in *Walker*, which would have given even the most inattentive reader reason to suspect wrongdoing. Friedman's financial reports were lengthy documents containing highly detailed and complicated financial and other data,

and were not "self-evidently" false. If *Walker* is the government's paradigm, it bears no resemblance to this case.

A far better example of conscious avoidance in the corporate context is *United States* v. *Ebbers*, 458 F.3d 110 (2d Cir. 2006). In that case, as here, the government alleged that the defendant CEO had consciously avoided knowledge that the company's financial statements were false. *Id.* at 124. This Court affirmed the conscious avoidance instruction because the defendant "testified to practices that would allow a jury to find that he was consciously avoiding information: using a procedure for *signing documents he didn't bother to read in full*, including the 10-Ks, and tossing the management budget variance report in the trash *without reading it*." *Id.* at 124-25 (emphasis added). The Court was careful, however, to differentiate this necessary proof of *avoidance* from evidence—such as the defendant's attendance at meetings and review of certain reports—that showed "that Ebbers either actually knew or was aware of the high probability" of the falsity of financial statements. *Id.* at 124.[2] That is because the factual predicate inquiry consists of two subparts: first, whether the defendant "was aware of a high probability of the fact in dispute"; and second, whether he then "consciously *avoided* confirming that fact." *United States* v. *Ferrarini*, 219 F.3d 145, 154 (2d

[2] The government previously relied on *Ebbers* to support the conscious avoidance instruction in this case. See 2d Cir. Bail Opp. 17. That decision is now conspicuously absent from its brief.

Cir. 2000) (alterations and citation omitted) (emphasis added). The second subpart requires evidence that the defendant actually buried his head in the sand like the ostrich for which the instruction is named.

Here, the government ignores that critical distinction. It argues merely that "Stinn was confronted with evidence of the falsity of Friedman's financial statements." Gov't Br. 27. To that effect, it recites eight bullet points purportedly showing that Stinn "received" certain reports; was "advised" of aggressive sales practices; "participated" in calls when objectionable practices were discussed; and was "advised" of and possessed reports and information regarding the x-files. *Id.* at 28-29. But none of that evidence indicates that Stinn deliberately *avoided* learning that Friedman's financial statements were false. The most the government's evidence could possibly suggest is that Stinn had knowledge that *should have* led him to investigate further. But "fail[ing] to learn [of wrongdoing] through negligence" cannot support a conscious avoidance instruction. *United States* v. *Rodriguez*, 983 F.2d 455, 458 (2d Cir. 1993).

That confusion is also what leads the government to quote language from *United States* v. *Svoboda*, 347 F.3d 471 (2d Cir. 2003), stating that "'the same evidence that will raise an inference that the defendant had actual knowledge of the illegal conduct *ordinarily will also raise the inference that the defendant was subjectively aware of a high probability of the existence of illegal conduct.*'"

Gov't Br. 26 (quoting 347 F.3d at 480) (government's emphasis) (internal quotation omitted). But such "subjective[] aware[ness] of a high probability of the existence of illegal conduct" is not sufficient to support a conscious avoidance charge. There must still be proof of actual *avoidance*. That is why this Court has repeatedly held that "[e]vidence sufficient to find actual knowledge does not necessarily constitute evidence sufficient to find conscious avoidance." *United States* v. *Kaplan*, 490 F.3d 110, 127-28 (2d Cir. 2007) (citing *Ferrarini*, 219 F.3d at 157); see also *United States* v. *Nektalov*, 461 F.3d 309, 316 (2d Cir. 2006) ("[A] conscious avoidance instruction is not appropriate where the only evidence alerting a defendant to the high probability of criminal activity is direct evidence of the illegality itself.") (internal quotation omitted).

Unable to point to any proper evidence, the government resorts to arguing that "the sheer magnitude, duration, and number of transactions comprising the fraud, all of which occurred while Stinn was Friedman's' CEO and Suglia's direct supervisor, provided substantial support for a conscious avoidance instruction." Gov't Br. 29. The government's argument urges precisely the inference the law forbids—*i.e.*, that Stinn should have known about the fraud because his subordinates committed fraudulent acts while he was CEO. By the government's reasoning, a CEO is virtually always subject to a conscious avoidance charge for a fraud that occurs on his watch, no matter how well concealed. Indeed, this case

perfectly illustrates the fallacy of the government's assertion: Suglia and John Mauro confessed to perpetrating—*and concealing from Stinn*—multiple, multi-million dollar frauds at Friedman's, including accounting manipulations that bore a striking resemblance to the fraud charged here. See Aplt. Br. 15-16.

It is hardly surprising, then, that the cases the government cites in support of its "sheer magnitude" theory do not establish such a sweeping proposition. *Svoboda* first held that the appellant had inadequately raised his objection to the conscious avoidance charge. 347 F.3d at 480. In dictum, the Court stated that the charge was proper in any event because (1) the defendant "knew that [his co-conspirator] was . . . privy to confidential financial information"; (2) "the timing of [the defendant's] trades was suspicious"; and (3) the defendant "realized large returns, up to 400%, on [his] trades." *Id.* at 480-81. The court thus based its conclusion on specific evidence that the defendant had turned a blind eye to the obvious, *not* on observations about the overall scope or duration of the alleged conspiracy. Likewise, in *United States* v. *Fletcher*, 928 F.2d 495 (2d Cir. 1991), the multiplicity of transactions was but one of many factors—including the "use of aliases," a defendant's possession of a "silent interest" in a partnership, the partnership's failure to file tax returns, "the use of fraudulent invoices," and "surreptitious movements of funds in the Bahamas"—supporting the instruction. *Id.* at 503. And in *United States* v. *Gurary*, 860 F.2d 521 (2d Cir. 1988), the

defendants themselves issued $136 million worth of false invoices for which no goods were ever transferred. The court pointed to the multiplicity of transactions in response to the defendants' argument that they could not have known that the purchasers of those invoices would use them to obtain illicit tax benefits. *Id.* at 526. None of those cases stands for the proposition that a CEO is subject to a conscious avoidance charge merely because subordinates committed numerous acts of fraud on the defendant's watch.

Stranger still is the government's reliance on a case upholding the use of a conscious avoidance instruction where a defendant is found in possession of narcotics but denies knowing what he is carrying. Gov't Br. 31 (citing *United States* v. *Ramirez*, 320 F. App'x 7, 11 (2d Cir. 2009)). Corporate documents are not "contraband," and the government does not point to a single case applying this theory to the corporate context. In any event, even crediting the government's statement that "Stinn received numerous internal documents *revealing* the falsity of Friedman's' financial statements" (Gov't Br. 31) (emphasis added)—which, as we explain below, is a bogus assertion (*infra* pp. 12-14)—that would be evidence of *actual* knowledge, not of *avoiding* knowledge.

Finally, the government claims that there "was direct evidence that Stinn ignored bad news and deliberately avoided learning the details of certain accounting manipulations." Gov't Br. 32. Once again, the government misses the

mark. The fact that Friedman's personnel allegedly "complained" to Stinn that the company's credit practices could be improved (*ibid.*) does not show that Stinn avoided acquiring knowledge. Nor does it matter that Stinn supposedly "ignored" those complaints by failing to respond in a certain way (*ibid.*). The government does not claim that Stinn avoided learning about these problems; rather, it claims that he did not take corrective action. This is just another iteration of the government's claim that Stinn *should have* known based on the information conveyed to him that the financial statements were false. See *Ferrarini*, 219 F.3d at 157 ("[W]e have held that conscious avoidance cannot be established when the factual context *should have apprised* the defendant of the unlawful nature of his conduct . . . and have instead required that the defendant have been shown to have *decided* not to learn the key fact.") (internal quotation, citations, and alterations omitted).

The government's reliance on Suglia's testimony that, after directing Suglia to falsify Friedman's reports, Stinn "really didn't care" about "how" Suglia performed specific manipulations is likewise misplaced. The government does not deny (Aplt. Br. 26, 29-30) that a defendant must avoid knowledge of the "*key* fact" in dispute, *Rodriguez*, 983 F.2d at 458 (emphasis added), not simply the details of a particular plan. But the government then claims that if the jury "disbelieved Suglia's claim that Stinn picked the final earnings number," it nonetheless could

have drawn the inference that Stinn avoided learning that the financial statements were false because Stinn was not interested in accounting details. Gov't Br. 34. The very premise of the government's assertion is flawed: Suglia said there were one-on-one meetings with Stinn with the specific purpose of setting earnings figures; the defense contended that these meetings never took place. If, as the government now posits, the jury disbelieved Suglia, there was no other testimony (from Suglia or any other witness) that Stinn was informed of unspecified "accounting problems" but specifically avoided learning what they were.

B. The Government Has Not Met Its Burden To Show That The Instruction Was Harmless Beyond A Reasonable Doubt

The government does not dispute that it bears the burden of showing that an erroneously given conscious avoidance instruction was harmless beyond a reasonable doubt. See Aplt. Br. 33 (citing and quoting *United States* v. *Barnhart*, 979 F.2d 647, 652 (8th Cir. 1992) (quoting in turn *United States* v. *Hasting*, 461 U.S. 499, 510-11 (1983))). To meet that standard, it must identify "overwhelming" evidence that Stinn possessed *actual* knowledge that Friedman's financial statements were false. *Ferrarini*, 219 F.3d at 154. The government has not met that heavy burden.

The government does not dispute that evidence resting on "a credibility determination" cannot constitute "overwhelming" evidence of actual knowledge.

Barnhart, 979 F.2d at 653; see Aplt. Br. 34. Nor does the government dispute that the credibility of its star witness and his confederate was subject to sustained attack at trial. In fact, the government does not even mention the multiple separate frauds which Suglia and Mauro confessed to committing entirely without Stinn's knowledge. See Aplt. Br. 14-16. The government likewise does not deny that Suglia and Mauro offered to implicate Stinn only after being caught red-handed in the $12 million Capital Factors fraud, or that they had previously committed accounting fraud at Friedman's—in almost exactly the same manner as the fraud charged here—and that Suglia had specifically instructed other Friedman's executives that "some things are done without [Stinn's] knowledge and we clean-up after ourselves." A-187; see also A-315 (Mauro instructing subordinate to withhold information from Stinn). Nor could the government corroborate those crucial one-on-one meetings Suglia claimed to have had with Stinn. Accordingly, the government cannot rely on the testimony of Suglia and Mauro to claim that the error in giving the conscious avoidance charge was harmless beyond a reasonable doubt.

That is fatal to the government's argument. While the government's brief reads as if Suglia was just one witness among many, nothing could be further from the truth. Suglia was on the stand for *seven trial days*. Contrary to the government's assertion that "every major aspect of the fraudulent scheme was conclusively shown by documentary evidence and non-accomplice testimony"

(Gov't Br. 34), Suglia delivered testimony that was crucial to the government's case on every single issue. Indeed, the government's brief cites Suglia's testimony (and exhibits introduced through him) some *216 times*, although it acknowledges Suglia as the source in just a fraction of those instances.[3] Put another way, if Suglia's testimony was anything less than critical to the government's case, why did Suglia receive *probation* for his involvement in every aspect of the charged fraud (not to mention his free pass for the $12 million Capital Factors fraud), while Stinn received 12 years in prison? In the face of all that, the government's suggestion that this case did not rest squarely on the shoulders of Victor Suglia borders on the absurd.

What remains of the government's case does not approach proof beyond a reasonable doubt—much less "overwhelming" evidence—that Stinn had actual knowledge that Friedman's financial statements were false. The government relies primarily on testimony and documents related to Friedman's weekly operations conference calls. See Gov't Br. 35-36. According to the government, Stinn's participation in some of those discussions gave him actual knowledge of "rampant noncompliance with Friedman's' credit guidelines," "major earnings manipula-

[3] The government also relies heavily on the equally unreliable Mauro, citing his testimony and associated exhibits 33 times.

tions," and "falsification of the aging statistics" through so-called "scooping." *Id.* at 35. The government's claims are wildly exaggerated.

For starters, participation in conference calls attended by dozens of Friedman's employees—none of whom testified that they objected to Friedman's public financial statements based on information discussed in the calls—does not constitute "overwhelming" proof of fraud. What is more, the credit exception reports circulated and discussed in these calls did not reflect anything close to "rampant noncompliance" with credit guidelines. Undisputed testimony established that the exception reports showed *negligible* deviation from those policies: In FY 2000, only 0.46% of the 824,504 new credit transactions appeared in the exception reports (DX 4186); in FY 2001, it was 0.69% of 923,594 transactions (DX 4187); in FY 2002, it was 0.56% of 922,200 transactions (DX 4188); in FY 2003, it was 1.22% of 895,745 transactions (DX 4189).[4] And it was also undisputed that Friedman's New Account Analysis—a cumulative, dollar-weighted risk indicator for *every single* credit transaction the company

[4] The government's suggestion that credit exceptions "typically exceeded 20%" (Br. 10) and later "reached a high of 52.3%" (*id.* at 11-12) is the worst sort of misdirection. While the government admits that those percentages were for accounts in excess of $3,000 (*id.* at 11), the government fails to mention that those accounts were a minuscule portion of credit accounts at Friedman's, which catered to middle- and low-income customers. And while the government asserts that those exception rates were "representative" of other types of accounts (*id.* at 10), it does not dispute—nor could it—that no such information appeared on the exception reports that were provided to Stinn.

consummated—remained consistently in the "tight" range. See Aplt. Br. 12 n.3 (explaining same). This is hardly the stuff of "rampant noncompliance."

Similarly, the government makes much of testimony stating that Stinn was advised of the x-files problem, suggesting that Friedman's should have charged-off those accounts immediately upon their discovery. Gov't Br. 36. But it was undisputed that, because the x-files had not aged properly in Friedman's computer system, there had been no collection efforts on those accounts, and therefore charging them off immediately would have made no sense. Likewise, the government's claim that Stinn "knew that Friedman's continued to keep over $3 million in x-files accounts on its books at 2002 fiscal year-end" in spite of unsuccessful collections efforts (Gov't Br. 36-37) is vastly overstated. The document upon which the government relies for that proposition (GA521) is a September 30, 2002, e-mail from Suglia to Bill Milligan and Doug Anderson—not to Stinn—in which Suglia claims to have "mentioned" their treatment of the x-files to Stinn and conveys a purported request by Stinn for more information. The defense, of course, argued that Stinn was entitled to rely on advice from Suglia (who, it bears repeating, was Friedman's CFO), and there was ample undisputed evidence that Suglia did not hesitate to conceal information from Stinn—indeed, Suglia himself admitted that Stinn had ordered him to tell Friedman's lender (Bank of America) about the x-files problem but that he had failed to do so. Even the government's

non-accomplice witness on this subject, Bill Milligan, testified that *he* proposed to Stinn that the x-files not be charged-off until "the end of December" (GA 127)—*i.e.*, three months *after* Friedman's fiscal year-end.

Without Suglia, the government's evidence of actual knowledge likely would not have passed even a sufficiency test. That is particularly true in light of the hopelessly ambiguous benchmarks by which Stinn's supposed misstatements were measured. As explained previously (Aplt. Br. 4-5, 10-13), the government's case turned on the claim that Stinn knew that Friedman's did not "generally" charge off accounts at 120 days or follow "strict" credit application guidelines.[5] How much movement in the charge-off date is permissible before the company is no longer "generally" charging off at 120 days? How many exceptions are permitted before the company's credit disciplines are no longer "strict"? Particularly against that amorphous backdrop, the government cannot credibly suggest that it proved actual knowledge by such an overwhelming margin that the error in giving the conscious avoidance charge was harmless beyond a reasonable doubt.

[5] The government misleadingly suggests that "*stores* did not have discretion to grant credit over the limit set by Friedman's' scoring model" (Gov't Br. 8 (emphasis added)), ignoring the undisputed fact that regional managers explicitly had such authority. Aplt. Br. 13; A-301, A-313. Thus, credit exceptions and encouragement from supervisors to seek approval for such sales (*e.g.*, "nobody walks until the big dog talks") were plainly contemplated by Friedman's public disclosures.

The government's claim that an erroneously given conscious avoidance instruction is *always* harmless—without regard to the strength of evidence of actual knowledge—is wrong. In *United States* v. *Adeniji*, 31 F.3d 58, 63 (2d Cir. 1994), this Court stated only that it "presumed" that the jury did not base its verdict on conscious avoidance where the factual predicate was lacking. The Court nevertheless examined the evidence of actual knowledge and expressly concluded that it was "overwhelming." *Id.* at 64. The government does not identify a single decision reading *Adeniji* to hold that such errors are *per se* harmless. To the contrary, this Court has since held repeatedly—often citing *Adeniji*—that evidence of actual knowledge must be overwhelming to excuse an erroneously administered conscious avoidance instruction. See, *e.g.*, *Kaplan*, 490 F.3d at 128; *United States* v. *Quattrone*, 441 F.3d 153, 181 (2d Cir. 2006); *United States* v. *Aina-Marshall*, 336 F.3d 167, 171 (2d Cir. 2003); *Ferrarini*, 219 F.3d at 154.

Moreover, this is the last case in which to adopt or apply a rule that an erroneously given conscious avoidance charge is automatically harmless. This case turned on Suglia's credibility. The conscious avoidance charge allowed jurors to conclude that—even if they did not believe Suglia's claims that (in contrast to his prior frauds) he actually told Stinn about the wrongdoing—Stinn *should have* known. Relieving the jury of its burden to reach unanimity on Suglia's credibility was a critical blow to the defense.

Finally, the government's claim that the error is harmless because "the government did not argue this theory during summation" (Gov't Br. 39) is downright misleading. The government confines that claim to "summation," presumably because it cannot deny what it said in its rebuttal argument to the jury: "And for anyone to believe that the defendant didn't actually know about [the fraud], *you would have to conclude that he intentionally turned a blind eye to it.*" Tr. 4387 (emphasis added). Any suggestion that the government did not expressly urge the jury to convict on a conscious avoidance theory is demonstrably false.

II. The Government Cannot Defend The District Court's Rulings During Jury Deliberations

A. The *Allen* Charge Was Unduly Coercive And Irreparably Tainted Subsequent Deliberations

1. The charge was both unnecessary and coercive

The government's threshold argument—that Stinn's challenge to the *Allen* charge is "foreclosed" by Fed. R. Crim. P. 31(d) (Gov't Br. 51)—should be rejected. The mere fact that a district court "*may* direct the jury to deliberate further" after polling reveals a lack of unanimity does not mean that it is always appropriate to do so, especially where, as here, deliberations have become completely dysfunctional. Rule 31(d) gives district courts options, but it does not purport to authorize instructions that, in the context of a particular case, are coercive.

The government's efforts to shoehorn this case into one of the Court's decisions upholding *Allen* charges (Gov't Br. 51-54) are also misguided. This was not a run-of-the-mill case in which the jury was deadlocked on all counts and requested guidance from the court. *Cf. United States* v. *Crispo*, 306 F.3d 71, 75-76 (2d Cir. 2002). To the contrary, this was a decidedly precarious situation, and the government knew it: After Juror 10 dissented from the verdict in open court, government counsel acknowledged that he had "never actually been in this situation before," and therefore was "not sure what the right thing" to do would be. Tr. 4617. In fact, government counsel proposed that the court "do absolutely nothing" (SPA-57), recognizing that "the *Allen* charge may be premature, to be perfectly candid." Tr. 4632; see also Tr. 4632-33 ("The *Allen* charge would be appropriate on Count One but, as I said, I think it is premature on Two and Three"). In short, the jury was *not* deadlocked in the traditional sense on Counts Two and Three, yet the court sought on its own initiative to reinforce its message "that a verdict be reached." SPA-61.

That message was unduly coercive under the "totality of the circumstances." *United States* v. *Robinson*, 560 F.2d 507, 517 (2d Cir. 1977) (en banc). The government attempts to prove otherwise, but does so by examining only select pieces of this remarkable confluence of events and by looking at each piece in

isolation. That approach is contrary to this Court's mandate that coercion be evaluated on a case-by-case basis in light of *all* of the circumstances.

The government observes, for example, that the court's charge was not worded as a "traditional" *Allen* charge. See Gov't Br. 45-46, 52. Courts have long held, however, that even a "modified" *Allen* charge can be unduly coercive. *E.g.*, *Lowenfield* v. *Phelps*, 484 U.S. 231, 237 (1988) (even mild *Allen* charge must be considered "in its context and under all the circumstances") (internal quotation omitted); *United States* v. *Williams*, 547 F.3d 1187, 1204 (9th Cir. 2008). And, in any event, the government is simply wrong that the court's charge did not "offer an opinion that a verdict should be reached." Gov't Br. 52. That assertion is contradicted by the very first sentence of the charge, which stated: "This case, as I think is obvious, is important both to the government and to the defendant and *it is [] desirable that a verdict be reached*." SPA-61 (emphasis added). Under the remarkable circumstances of this case, virtually *any* formulation of an *Allen* charge would have been impermissibly coercive.

The government also argues that the trial court's instruction "was not coercive *merely* because it was the court's second appeal to the jurors to try to reach a verdict." Gov't Br. 54 (emphasis added). We have never disputed that multiple *Allen* charges may be appropriate in certain circumstances. But each successive appeal to the jury necessarily increases the risk of coercion, *Robinson*,

560 F.2d at 517, and here the public identification of both the holdout and the majority jurors only magnified that pressure. Those effects were palpable: The court reminded the jury of its duty to deliberate on the second day of deliberations, following a note from the jury stating that it was at a "standstill" and "need[ed] [the court's] guidance." A-266; A-276. By the time the court issued the *Allen* charge two days later—on the heels of the aborted partial verdict and the note accusing Juror 10 of possessing "questionable" "integrity" (A-281)—the jury room had devolved into personal attacks and recriminations.

Tellingly, the government has not cited any case upholding an unsolicited *Allen* charge administered immediately after the identity of a holdout juror was revealed in open court. And though the government now claims otherwise (Gov't Br. 56 & n.5), it previously conceded that Stinn would succeed on his challenge under the Ninth Circuit's decision in *United States* v. *Williams*, 547 F.3d 1187 (9th Cir. 2008). See Dist. Ct. Bail Opp. 27 (acknowledging that *Williams* "held that the giving of an *Allen* charge is *per se* reversible error where the judge knows the identity of the holdout jurors and the holdouts are aware that he knows their identity"). The government now seeks to distinguish *Williams*, arguing that it applies only "where a deadlocked jury reveals its numerical split to the Court" (*i.e.*, not where a split is revealed on polling after a verdict), and "only to charges

directing the jury to 'consider changing positions.'" Gov't Br. 56 n.5. Both supposed distinctions are illusory.

For one thing, the jury in *Williams* was not deadlocked. 547 F.3d at 1204. In any event, the court made clear that it did not matter *how* jurors' individual votes were disclosed. That circumstance was "overshadowed" by the "most important consideration": whether the holdout's identity (as opposed to merely the jury's numerical split) became known. *Id.* at 1205-06. Second, *Williams* did not limit its holding to *Allen* charges directing the jury to "consider changing positions." To the contrary, *Williams* explicitly recognized that the *Allen* charge at issue was of the "neutral variety" (*id.* at 1206), but nonetheless concluded that it was impermissibly coercive.

Williams is not "contrary to the law in this Circuit" (Gov't Br. 56 (discussing *Robinson*, 560 F.2d at 511-12, 516-18)), because the potential for coercion in *Williams*—and in this case—far exceeded that in *Robinson*. For starters, the *Allen* charge in *Robinson* did not follow on the heels of identification of the holdout juror in open court, making it less likely that the jury would perceive the charge as pressuring the holdout to change her vote and emboldening the jurors in the majority to adhere to theirs. Equally important, the deliberations preceding the *Allen* charge in this case and in *Williams* were far more contentious than those in *Robinson*. *E.g.*, *Williams*, 547 F.3d at 1203 (holdout's note reported "strong"

"presence" of "prejudice" in the deliberation room). What is more, the holdout's identity in *Robinson* was not made known publicly, and this Court explicitly noted the significance of that fact. See 560 F.2d at 517 (disclosure of holdout's name to counsel "might, if this became known to her, embarrass her and have the contrary effect of leading her to yield rather than adhere to her views"). Lastly, defense counsel in *Robinson* specifically agreed that additional deliberations were warranted, whereas both here and in *Williams*, defense counsel immediately moved for a mistrial.[6]

Finally, the government argues that the *Allen* charge here was not coercive, because the jury was deadlocked on Count 1 and expected to receive further instructions on that count. See Gov't Br. 57-58. This argument misses the mark entirely. The jury's reported deadlock and the court's statement that it "may" have further instructions (GA-193–194) occurred a full day before the *Allen* charge. Following the attempted verdict, the court sent the jury back to deliberate on *all three counts*, and the majority promptly responded by accusing Juror 10 of "recant[ing]" her vote on two of those counts. See A-281. The *Allen* charge—which was phrased generally and not limited to Count 1—immediately followed.

[6] Contrary to the government's assertion (Br. 56-57), the Sixth Circuit's decision in *Lyell* v. *Renico*, 470 F.3d 1177 (6th Cir. 2006), bears no meaningful resemblance to this case. *Lyell* was a habeas case holding only that there had been no due process violation when the trial court continued polling the jury after one juror expressed a dissenting view.

Thus, the government's contention that the earlier discussions about the deadlock on Count 1 somehow overrode the clear targeted effect of the charge has no basis in the record.

2. Juror 10's dismissal did not moot the charge's coercive impact

The government also errs in arguing that the coercive impact of the *Allen* charge was "rendered harmless" by Juror 10's dismissal. Gov't Br. 48. First, Stinn's claim of coercion is not "directly refuted" by *United States* v. *Ruggiero*, 928 F.2d 1289 (2d Cir. 1991). See Gov't Br. 46-48, 50-51. In *Ruggiero*, the defendants faced a third trial for offenses related to the Gotti crime organization. Significantly, and as the government itself argued on appeal, the trial court did *not* know before either of its two *Allen* charges that there was a holdout for acquittal. See 928 F.2d at 1293 (jury notes stated only that "[o]ne juror refuses to vote" and that "a juror refuses to discuss the case at all"); *id.* at 1294 & n.4 ("no note had been received to indicate that the jury was deadlocked," and juror told court that "his fellow jurors had been 'trying to persuade [him] to vote *one way or the other*'") (emphasis added). That is decidedly different from the situation facing Juror 10, who had definitively identified herself in open court as the holdout vote for acquittal.

Moreover, the *Ruggiero* Court was careful to note that if the juror in question had been "improperly discharged, of course, or if the jury's subsequent deliberations were prejudicially compromised, independent grounds for reversal would result." 928 F.2d at 1300 (emphasis omitted). Both circumstances are present here. The court's improper dismissal of Juror 10 is discussed below. And, as we have explained (Aplt. Br. 43-44), the *Allen* charge prejudicially compromised subsequent deliberations by emboldening the majority jurors' views of guilt.

Neither *Ruggiero* (nor any case cited by the government) holds otherwise. The defendants in *Ruggiero* did not raise the issue whether the *Allen* charge had a coercive impact on the jurors who had voted to convict, and this Court's opinion therefore did not address it. That is not surprising, since *none* of the jurors in *Ruggiero* had revealed their individual votes. Here, by contrast, nine jurors in the majority stood up in open court and publicly aligned themselves with a guilty verdict. Moreover, in *Ruggiero*, the effect of the *Allen* charge truly was isolated to the dismissed juror, who ultimately admitted that he was incapable of participating in deliberations for reasons that were, by his own admission, unrelated to his view of the evidence. In this case, however, Juror 10 never agreed with the majority's position that she refused to deliberate. Thus, even after her dismissal, the other

jurors could have reasonably viewed the court's charge as aimed not at her failure to deliberate, but at her dissent.

The government offers no response to that common-sense concern. Instead, it argues that *Ruggiero* was characterized by "greater juror dissension" than this case (Gov't Br. 50), and—more remarkably still—that here there was "no evidence of any conflict amongst the jurors concerning the merits of the case" before Juror 10's revelation of her conversation with her sister. Gov't Br. 55. But the fact that Juror 10 dissented from the verdict in open court belies that assertion. So does the course of deliberations up to that point, including the jury's note accusing Juror 10 of having "questionable" "integrity." See A-281.

More fundamentally, the government errs in presuming that the jury's conflict stemmed from Juror 10's refusal to deliberate—as opposed to a disagreement about the merits of the case. There is *no* evidence specifically identifying Juror 10 as the juror in the early notes. See A-276–77. But even if there were, it is scarcely surprising that a majority of jurors voting to convict might *accuse* the dissenter of refusing to deliberate. In other words, this is precisely the record one would expect where a hostile majority sought the court's intervention to end disagreement with the holdout vote for acquittal.

B. The Government Fails To Show That The Dismissal Of Juror 10 Survives The Requisite "Meticulous Scrutiny"

The government does not dispute that the decision to remove a holdout juror is subject to "'meticulous scrutiny.'" Aplt Br. 38 (quoting *United States* v. *Thomas*, 116 F.3d 606, 624-25 (2d Cir. 1997)). And yet the government's first mention of that standard comes at the *end* of its defense of the district court's dismissal of Juror 10. See Gov't Br. 64-65. That is because the government cannot credibly dispute that the district court dismissed Juror 10 without even asking her whether she could continue to serve, much less satisfying the heightened burden that the law imposes before dismissing a holdout.

Stinn does not, as the government claims, "concede [that] there is no evidence that the judge removed Juror 10 for any reason relating to her views on the evidence." Gov't Br. 65. Juror 10 was the focal point of the majority jurors' attacks—which themselves contained false allegations—precisely because of her dissenting view as to Stinn's guilt. And the purpose of heightened scrutiny is to ensure that a holdout is not removed, subconsciously or otherwise, for reasons related to her views on the evidence. *E.g.*, *United States* v. *Ginyard*, 444 F.3d 648, 654 (D.C. Cir. 2006) (even where request to excuse holdout does not stem from juror's view of evidence, court has "enhanced duty" to determine good cause). Surely the dismissal of a holdout juror is not insulated from appellate review

simply because the district court did not state on the record that removal was directly related to the holdout's views on the merits. Indeed, the law requires heightened scrutiny of such decisions precisely because, as in this case, holdouts are often subject to false and unfair complaints by their fellow jurors. Accordingly, the government's cases discussing the broad discretion afforded generally under Rule 23(b) are inapposite. So too is the government's observation that the district court avoided questioning Juror 10 "concerning her thoughts on the merits of the case." Gov't Br. 65. Following the aborted partial verdict, her views on the merits were abundantly clear.

The government is also wrong in claiming that Stinn cites "no evidence" demonstrating that the majority jurors acted with improper motive in reporting Juror 10's conversation with her sister. Gov't Br. 61. The majority mis-characterized Juror 10's conduct by claiming both that she spoke to "an attorney" and that they discussed "which of the charges were the most serious." A-282. And the majority's motives are not "irrelevant," as the government urges. See Gov't Br. 62. The court's dismissal of Juror 10 in response to this misleading note doubtless reinforced the remaining jurors' views of the correctness of their position, and coerced the guilty verdict. It matters little that the other jurors were not so bold as to explicitly "request that Juror 10 be removed" (*id.*), because they

clearly sought that result by accusing her of wrongdoing and attacking her "integrity."

The government is also wrong to presume that Juror 10 was "unable or unwilling" to follow the trial court's instructions *on the law* (Gov't Br. 60-61), simply because she had disobeyed the court's *procedural* instruction not to discuss the case with others. In any event, Juror 10's conversation with her sister demonstrates how simple it would have been to remedy any confusion: Juror 10 did not discuss any facts of the case with her sister, she did not share the substance of her conversation with other jurors, and the examples given by her sister were so nonsensical that they left no lasting impression. See SPA-65 (Juror 10 reporting, after the discussion: "I have a huge, you know, issue in my head, I don't know the meaning."). The district court did not even try to clarify Juror 10's understanding of the law, which would have been simple enough to do by repeating the relevant instructions. That failure stands in stark contrast to *Ruggiero*, where the court specifically asked the juror whether he could "'render a fair and impartial verdict'" and the juror confessed that he could do so only "'[u]p to a point.'" 928 F.2d at 1297. This is precisely the point of "meticulous scrutiny": The district court must do what it can—or, at the very least, do *something*—to determine whether a holdout can continue to serve.

Indeed, the government offers no response to Stinn's argument (GA224, Tr. 4665-67) or authorities (Aplt. Br. 48-49) demonstrating that Juror 10's ostensible misconduct was readily curable. Nor does the government dispute that Juror 10's actions did not prejudice deliberations in any way. See Aplt. Br. 47-48. And the government's suggestion that this Court's decision in *Thomas* in fact created an affirmative "duty" for the court to dismiss Juror 10 (Gov't Br. 61) goes much too far. To the extent any dicta in *Thomas* created a "duty" to dismiss a juror, it was expressly limited to jurors intent on engaging in nullification. 116 F.3d at 616-17. There is no evidence Juror 10 was of this sort.

Recognizing that the trial court's findings were wholly inadequate, the government continues to allude to other unstated reasons as to why Juror 10 deserved to be dismissed. For example, the government argues that Juror 10 "repeatedly demonstrated an inability to follow the court's instructions" (Gov't Br. 63), highlighting both her purported refusal to deliberate and her exiting the jury room. But as explained above, the government's self-serving reading of the jury notes does not prove that Juror 10 refused to deliberate. In fact, the only unambiguous evidence we have—Juror 10's own explanation to the court—indicates exactly the opposite. See SPA-68–69 (Juror 10 explaining that she "told the jury, listen, I have a doubt and I spoke," but that "nobody let [her] talk."). And the government fails to mention but does not dispute that another juror left the jury

room during deliberations as well. See Aplt. Br. 48. Neither rationale justifies Juror 10's dismissal under the "meticulous scrutiny" standard.

C. The District Court Abused Its Discretion By Proceeding To Verdict After Juror 10's Dismissal

The government first argues that the trial court's decision to deny the defense's request for a mistrial and proceed to verdict with an alternate juror can be reviewed only for plain error. Gov't Br. 66-67. That is absurd. Stinn's position was most certainly "brought to the court's attention." Fed. R. Crim. P. 52(b). Following the majority's misleading note about Juror 10, the defense argued, time and again, that the court should grant a mistrial. *E.g.*, SPA-70, SPA-71. Defense counsel acceded to substitution of the alternate only *after* the court announced that it would not grant a mistrial, and that the only other option was to submit the case to the 11 jurors who had essentially already voted to convict. See SPA-71–73. Even then, however, the defense continued to press for a mistrial. *E.g.*, SPA-74.

Most egregiously, the government seeks plain error review while ignoring the fact that the defense expounded on its position in a letter brief filed with the court *before* the reconstituted jury began its deliberations. See A-316–17. That letter renewed the mistrial request and explained why it was impossibly coercive for the court to continue either with 11 jurors *or* the alternate. *Ibid.* ("Adding an alternate after the verdict has been read in open court has the same effect as

directing a guilty verdict."). Counsel then vigorously debated those issues before the district court which, once again, denied a mistrial. See Tr. 4677-80. Accordingly, the government's claim that Stinn did "not preserve for appeal his challenge to the addition of an alternate" (Gov't Br. 67) borders on the frivolous.

As for the merits of the district court's decision to seat the alternate, the government completely misapprehends how the events leading up to the alternate's participation coerced Stinn's convictions. See Gov't Br. 69-70. The point is not that the *Allen* charge administered after Juror 10's open court dissent was aimed directly at the alternate—at that point, no one knew the alternate would be seated. Rather, as we have explained and as the government does not dispute, the alternate had witnessed the jury's conflict, Juror 10's dissent from the verdict, the court's *Allen* charge, and Juror 10's removal from the jury, but did *not* know of Juror 10's ostensible misconduct. The alternate therefore joined the jury with the likely misimpression that Juror 10 had been dismissed because of her dissent from the verdict. Under those powerful circumstances, substitution of the alternate contributed overwhelmingly to coercing a guilty verdict.[7]

[7] The government misleadingly states that the alternate was "sequestered." Gov't Br. 45. Although the alternate did not participate in deliberations before replacing Juror 10, as explained above, the alternate was privy to everything that took place in open court.

To be clear, Stinn has never contended that the trial court erred in failing to read to the alternate the majority's note accusing Juror 10 of misconduct. *Contra* Gov't Br. 70. Thus, the government's argument that plain error review should apply on that basis (*id.* at 67 & n.6) is a red herring. Stinn, of course, would not have requested that the note be read—both because it was false and because it would have only underscored the jury's hostility toward Juror 10. It does not follow, however, that the court's decision to seat the alternate rather than declare a mistrial was correct. The district court may have been in a tough spot, but it is well established that "a mistrial is as much a part of the jury system as a unanimous verdict." *Williams* v. *United States*, 338 F.2d 530, 533 (D.C. Cir. 1964).

The government does not cite a single decision upholding substitution of an alternate juror under similar circumstances. And while the government complains that the authorities cited in Stinn's brief pre-date the amendment to Rule 24 (see Gov't Br. 69), it cannot deny that the risk of coercion discussed in those cases remains a valid concern. *E.g.*, *United States* v. *Quiroz-Cortez*, 960 F.2d 418, 420 (5th Cir. 1992) (discussing risk that alternate may be unable to participate equally where "other jurors . . . have already formulated positions") (internal quotation omitted). Nor does it matter that the district court generally had authority under Rule 24(c)(3) to substitute an alternate (Gov't Br. 68-69) and authority under Rule 23(b)(3) to accept an 11-juror verdict (*id.* at 72). As with the government's Rule

31(d) argument, having authority is not the same thing as discharging that authority appropriately under the circumstances.

Finally, the government's assertion notwithstanding, there undoubtedly *is* "evidence that the alternate and the remaining jurors did not comply with the judge's direction to restart deliberations anew." Gov't Br. 71. For one thing, it is undisputed that, at the time of the court's *Allen* charge, there existed a good-faith deadlock on Count 1. See *id.* at 58 (observing that court did not know identity of minority jurors as to Count 1, or even the numerical split). The government does not explain how the reconstituted jury was able to resolve that deadlock *and* reach a new verdict on the other counts in less than three hours, given that this had been a six-week trial, and that the original jury had deliberated for nearly five days.

The government agrees that post-substitution deliberation time is relevant to determining coercion (Gov't Br. 71) but, oddly, believes that this circumstance cuts in its favor. In fact, the short final deliberation period is additional proof that the final verdict was coerced. As the government observed below (Dist. Ct. Bail Opp. 15-16), the original jury had asked for exhibits and the reading back of testimony several times. And the court had previously admonished the jury to continue deliberating after two days. Thus, the final deliberation period of a few short *hours*—when deliberations were supposedly beginning *anew*—demonstrates

that Stinn was severely prejudiced by the trial court's handling of jury deliberations.

D. The Cumulative Effect Of The District Court's Errors Independently Requires Reversal

Finally, the government fails to confront the cumulative effect of these errors. Throughout its brief, the government analyzes each aspect of the trial court's decisions in isolation, as though they were not part of one remarkable chain of events. The government also lists other, more prejudicial actions that the trial court could have taken, but did not. *E.g.*, Gov't Br. 73.

The government ignores the point. Even if the district court's individual decisions did not constitute reversible error, the coercion stemming from the *cumulative* effect of those actions would still require reversal. *E.g., United States* v. *Sepulveda*, 15 F.3d 1161, 1196 (1st Cir. 1993) ("a column of errors may sometimes have a logarithmic effect, producing a total impact greater than the arithmetic sum of its constituent parts"). Here, the nature and number of the district court's errors, the interrelationship of those errors, the court's refusal to adopt less coercive measures, and the weakness of the government's case (*ibid.*) all worked to prejudice Stinn. And importantly, the timing of the court's errors, which occurred in short sequence during the most "critical stage" of trial,

Ruggiero, 928 F.2d at 1299, meant that their combination "pack[ed] a greater punch" than might otherwise be the case. *Sepulveda*, 15 F.3d at 1196.

The government cannot point to a single case where *any* court has upheld anything close to the same combination of mutually reinforcing errors that occurred here. The government's only response is to suggest that guilt was a foregone conclusion, because "prior to any of the challenged rulings, the original 11 jurors had arrived at guilty verdicts on Counts Two and Three," and "upon Juror 10's dismissal, these guilty verdicts would have been allowed to stand." Gov't Br. 73-74. But the government's *post hoc* justification is itself flawed.

First, the court did not poll the last two jurors after Juror 10 repudiated her guilty vote, and therefore we cannot know with certainty that 11 jurors would have accepted a guilty verdict—even before any of the challenged rulings. And the government's argument proves nothing as to Count One, on which the jury was indisputably deadlocked. Moreover, the fact that it would have been "lawful" for the court to accept a verdict from 11 jurors after dismissing Juror 10 means only that the court's earlier errors would have had no impact on the alternate. It does *not*, however, erase the impact of those errors on the original jurors. This Court cannot simply ignore the potential coercive effect of the court's rulings on those jurors, who should have been unfettered to change—or, perhaps in the case of Jurors 11 and 12, adhere to—their views.

CONCLUSION

For the foregoing reasons, Stinn respectfully requests that his convictions on all counts be vacated.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This reply brief complies with the type-volume limitation set by the Court's order, dated March 5, 2010, granting Appellant's Unopposed Motion for One-Week Extension of Time and for Leave to File an Oversized Reply Brief of No More than 8,500 Words, because the brief contains 8,500 words according to the count of Microsoft Word 2003.

The brief complies with Federal Rule of Appellate Procedure 32(a)(5) because the typeface is 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2010, I caused the foregoing to be filed with the Court by Federal Express overnight delivery and by e-mail to criminalcases@ca2.uscourts.gov, and caused additional copies to be served by Federal Express overnight delivery and by e-mail upon the following counsel:

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