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)

BRIEF FOR DEFENDANT-APPELLANT BRADLEY STINN

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PRELIMINARY STATEMENT

The judgment on appeal was entered by the Honorable Nina Gershon of the United States District Court for the Eastern District of New York. The rulings and decisions of the district court on review are unreported.

JURISDICTIONAL STATEMENT

Following a jury trial, Bradley J. Stinn was convicted of one count each of: conspiracy to commit securities fraud, mail fraud, and wire fraud, in violation of 18 U.S.C. § 1349; securities fraud, in violation of 18 U.S.C. § 1348; and mail fraud, in violation of 18 U.S.C. § 1341. A-283–84; SPA-29.[1] The district court entered a final judgment of conviction on May 4, 2009, sentencing Stinn to twelve years' imprisonment (concurrent on each count), three years' supervised release, and restitution in the amount of $4,393,575. SPA-75–84; SPA-38 (Dkt. 364). Stinn filed a timely notice of appeal on May 11, 2009. SPA-85; SPA-38 (Dkt. 368).

The district court had jurisdiction under 18 U.S.C. § 3231. This Court has jurisdiction to review the judgment under 28 U.S.C. § 1291. The district court and

[1] Defendant-Appellant has submitted a Special Appendix pursuant to Local Rule 32(d), because the Appendix exceeds 300 pages. References to items in the Special Appendix begin with "SPA-," and references to items in the Appendix begin with "A-."

this Court previously denied Stinn's motions for release pending appeal. See A-318–19, SPA-38 (Dkt. 367) (district court); A-320 (Second Circuit).

STATEMENT OF ISSUES

1. Whether the district court erred in giving the jury a conscious avoidance instruction.

2. Whether the individual or cumulative effect of the district court's rulings during jury deliberations coerced a guilty verdict.

STATEMENT OF THE CASE

Defendant-Appellant Bradley J. Stinn was the CEO of Friedman's Jewelers, a publicly traded company consisting of approximately 700 retail stores. See A-287 (Ex. 16). Friedman's sold jewelry principally to low-and middle-income customers, and, in keeping with its decades-old business model, about half of its sales were made on store credit. *Ibid.* This case involves Friedman's financial reporting about the health of its credit portfolio. More particularly, the government alleged that Stinn and other Friedman's executives—principally, Victor Suglia, Friedman's CFO—conspired to make misleading disclosures about Friedman's credit policies and credit portfolio. Stinn was indicted on three counts: (1) conspiracy to commit securities fraud, mail fraud, and wire fraud; (2) securities fraud; and (3) mail fraud. See A-23–25.

From the very beginning, however, the government's case suffered from at least two serious problems. First, it rested squarely on the testimony of Suglia, who—across seven days on the witness stand—claimed that he had manipulated Friedman's financial reports at Stinn's direction. But Suglia was an incurably vulnerable witness: He admitted on the stand that he had committed accounting fraud at Friedman's on at least two prior occasions, in almost exactly the same manner charged here and, even more significantly, that he did so *entirely without Stinn's knowledge*. See A-56–57, A-143–44. Suglia further acknowledged that he had offered to implicate Stinn only after being caught red-handed in an unrelated scheme to defraud another company of $12 million, again *conceding that Stinn had no knowledge of that misconduct*. See A-101–09, A-111–12.

Nevertheless, Suglia insisted that *this* time, Stinn was in on—indeed, the architect of—the scheme. Suglia's proof? He claimed to have had one-on-one conversations with Stinn each quarter in which Stinn personally directed Suglia to manipulate various pieces of data in order to improve Friedman's financial results. See, *e.g.*, A-48–48, A-88, A-89–90, A-91–92, A-146, A-150. But Suglia could not point to a single record of any such meeting among the hundreds of thousands of documents produced in the course of the government's investigation—no e-mail, no calendar entry, no phone record, no notes. *E.g.*, A-146–47. Suglia's reward for his testimony? A plea agreement and a sentence of probation (Stinn was sentenced

to 12 years' imprisonment). Compare A-326–30 (Suglia's judgment of conviction) with SPA-75–84 (Stinn's judgment of conviction). Not surprisingly, Suglia's credibility was under a sustained attack at trial; the government, however, had little choice but to rely on him, because not a single other witness testified to personal knowledge of these purported one-on-one meetings.

The second major defect in the government's case was its very premise. A central facet of the prosecution's theory was that Stinn had approved statements in Friedman's SEC filings about Friedman's business practices and credit policies knowing that those statements were false. First, Stinn signed Friedman's 10-K, which stated that the company "generally" charged-off delinquent credit accounts when they became 120 days past due. A-289, A-293, A-301. Second, Stinn echoed a statement in Friedman's 10-K that the company followed "strict" credit application guidelines (A-299), stating that "the most important thing [with respect to credit] is that we stick to our disciplines and stay tight." A-307 (Ex. 36) & A-53–54.

But the government had good reason to worry that neither statement would give rise to conviction. For one thing, the words "generally" and "strict" are highly (if not insolubly) ambiguous. The jury might not have thought either statement sufficiently precise to find an intent to defraud. For another, the evidence indisputably showed that neither term could possibly be read too literally.

For example, the government's own witnesses testified that Friedman's had consistently disclosed that it charged-off delinquent accounts only at the end of a fiscal month (not instantly upon the 120th day of delinquency) and that, for indisputably valid business reasons, some months it did not charge-off any accounts at all, no matter how delinquent. See A-35, A-66–67, A-71, A-140–41, A-170–71. The government also was unable to dispute that Friedman's had openly stated that credit-granting decisions were ultimately made by employees and that exceptions to stated guidelines were expressly contemplated by published policies. See A-301 (2002 10-K) (Ex. 16); A-311-14 (Ex. 673). The government therefore had serious reason to fear that it would fail to persuade all 12 jurors that Stinn intended to mislead Friedman's investors by reaffirming that the company "generally" charged off at 120 days and followed "strict" credit application procedures.

In short, this was an exceedingly close case at trial. For purposes of this appeal, however, we do not dispute that—if the jury believed Suglia's story—the evidence met the bare minimum to withstand a sufficiency challenge. But it is essential to appreciate just how precarious the government's case truly was, because each of the legal errors raised in this appeal gave the government an improper vehicle for eliding those fundamental weaknesses in its case. As explained in detail below:

- The district court effectively diluted the government's burden of proof by giving a conscious avoidance instruction as an alternative to proving that Stinn actually knew that Friedman's statements were materially misleading. The instruction was completely unwarranted, because the government did not introduce a shred of evidence that Stinn deliberately *avoided* acquiring knowledge of the alleged fraud. The district court's professed justification for the charge—as well as theories offered by the government in post-trial proceedings—have been squarely rejected by this and other courts. And the error in giving the instruction was absolutely critical: It invited the jury to convict even if it did not believe Suglia's thoroughly impeached testimony.

- The district court made a series of mutually reinforcing errors during jury deliberations that effectively coerced a guilty verdict.

    - After days of deliberation (and growing discord evidenced in the jury's notes), the jury claimed to have reached a unanimous verdict. But when the jury was polled, one juror stated in open court that "guilty" was not her vote, and the district court then erred in denying the defense request for a mistrial, administering an *Allen* charge, and sending a fundamentally dysfunctional jury back to deliberate.

    - The district court erred again in dismissing the holdout juror for ostensible misconduct (which had been falsely described by an accusatory note from other jurors) without even attempting to comply with the level of scrutiny required before dismissing a lone holdout for acquittal.

    - The district court then sealed Stinn's fate by seating an alternate juror who had witnessed the holdout's dissent from the verdict in open court, was informed of the juror's dismissal, but was then directly *prevented* from learning that the holdout was dismissed for reasons supposedly unrelated to her refusal to acquiesce in a guilty verdict. Not surprisingly, the jury returned a guilty verdict on all three counts just a few hours later.

  Any one of these errors was highly damaging to the defense; taken together, they were absolutely devastating and irreparably skewed the jury's deliberations in favor of conviction.

STATEMENT OF FACTS

All three counts in the indictment were based on allegations that Stinn had misrepresented Friedman's credit and charge-off practices and had manipulated the associated financial data describing the company's credit portfolio. The conspiracy and securities fraud counts alleged a scheme encompassing all of Friedman's financial statements from January 2001 to December 2003. See A-23–25 ¶¶ 47-48, 49-50. The mail fraud count was based on a prospectus the company issued in September 2003 in connection with a secondary stock offering, which the government alleged contained the same essential misrepresentations contained in Friedman's financial statements. See A-25 ¶¶ 51-52.

I. Friedman's Business Model

For decades, Friedman's business was selling jewelry to primarily low- and middle-income customers. An essential component of that business model was to offer store credit to customers, and about half of Friedman's sales—which reached $436 million in 2002—were made on credit. See A-291. Extending credit to its customers not only allowed Friedman's to make sales to customers who otherwise might not be able to make cash purchases, it also provided significant additional revenues for the company in the form of interest charges and related fees. Friedman's encouraged its credit customers to make their payments in person at their local store, which helped build personal relationships between customers and

Friedman's store personnel and increased foot traffic that sometimes led to additional sales. See, *e.g.*, A-174–75.

Some credit customers, of course, did not make timely or full payments on their accounts. Friedman's devoted considerable resources to monitoring and attempting to collect on delinquent accounts, and the company maintained and reported certain statistics related to the credit portfolio. Two of those statistics are principally relevant here:

- the Allowance for Doubtful Accounts ("ADA") – Like most publicly traded companies, Friedman's used the accrual method of accounting, under which revenue was booked when a sale was made, regardless of whether the customer paid cash or would be paying over time on store credit. Friedman's estimated the percentage of credit sales that would not ultimately be paid—the ADA—and reduced revenues by that amount. Friedman's set the ADA at 10.0% for Fiscal Years 1999, 2000, 2001, and 2002. A-290. In 2003, the ADA increased to 10.5%. A-93, A-98, A-310 (Ex. 175).

- the Net Charge-off – In the lines directly adjacent to the ADA estimate in Friedman's 10-K, the company reported the actual dollars that it charged-off. The company reported the Net Charge-off in three forms: net dollars; "as a percentage of net sales"; and "as a percentage of credit revenues." A-287. Accordingly, investors could compare whether the ADA's *estimate* of credit accounts that would not be paid was too low or too high relative to the actual dollars Friedman's charged off in a particular period.

Friedman's thus made no secret of the fact that the ADA and the actual Net Charge-off figures were different every year. The 10-K also listed a variety of other data about Friedman's credit portfolio, including the percentage of

"[a]ccounts receivable greater than 90 days past due" and the percentage of such accounts "less than 30 days past due." A-290.

Although delinquent accounts were eventually charged off and deducted from Friedman's reserve, the company was *not* seeking to avoid delinquent accounts at all costs. Virtually any system for assessing creditworthiness will prove imperfect: Some people who appear to be solid credit risks will ultimately default, while some people who do not qualify for credit would have paid in full. The key to profitability is to find the point at which the additional sales generated by granting additional credit cease to be profitable. For Friedman's, which earned significant profit margins on its inventory and derived additional revenue from credit transactions, extending credit to less-than-perfect customers was a sound strategy—indeed, it was indispensable to Friedman's decades-long success.[2]

[2] A simple hypothetical illustrates the point. Suppose Friedman's had a profit margin of 40% on each item it sold and that Friedman's earned, on average, an extra 10% in interest and fees for each credit account that was fully paid. Thus, for every $1,000 worth of jewelry that was purchased on store credit and paid off, Friedman's earned $500. The question for Friedman's, then, was whether a particular customer wishing to make a purchase on store credit was at least 50% likely to pay the account in full. If so, then Friedman's would earn a profit by making sales to customers presenting that credit profile, even though a number of those customers would not ultimately pay and the credit portfolio would contain a larger number of delinquent accounts.

II. Friedman's Disclosures Of Its Charge-Off And Credit Practices

This case did not turn on whether Friedman's charge-off or credit-granting policies were, standing alone, appropriate. Rather, the government alleged that Friedman's had inaccurately or insufficiently disclosed those policies to investors. See, *e.g.*, A-231 (summation), SPA-44–45 (rebuttal); see also A-41.

With respect to charging off delinquent accounts, Friedman's stated in its Form 10-K that the company's "policy is *generally* to write-off in full any credit account receivable if no payments have been received for 120 days." A-289, A-293, A-301 (emphasis added). The 10-K did not further define that policy, nor did it indicate what it meant in practical terms "generally" to charge-off accounts that were 120 days overdue.

That disclosure was approved by Friedman's outside auditor, Ernst & Young ("E&Y"), which (it was undisputed) was fully aware that Friedman's did not automatically charge off every account on its 120th day of delinquency. See A-141–42, A-206, A-262 (summation). That is so for two reasons. First, Friedman's made charge-off decisions only at the end of a fiscal month—*e.g.*, if an account's 120th day of delinquency fell on the 5th day of a fiscal month, it was not even considered eligible for charge-off until several weeks later. See A-66–67, A-71. Second, it was also widely known (including to E&Y) that Friedman's longstanding practice was not to charge-off any accounts in two fiscal months

(typically December and October) because it wanted store personnel to focus on sales efforts rather than collections during those months. See A-35, A66–67, A-140–41, A-170–71. Accordingly, at least twice each year, accounts would not even be *eligible* for charge-off until they were at least approximately ***150*** days delinquent. The government did not contend that either practice was improper or somehow inconsistent with Friedman's disclosures.

With respect to its credit policies, Friedman's stated in its Form 10-K that "[w]e conduct credit approval and collection procedures at each store and follow internal company guidelines to evaluate the credit worthiness of our customers and to manage the collection process." A-293. Friedman's emphasized that its store managers, known as Store Partners, "are responsible for the management of all store-level operations, including sales, *credit extension* and collection, payroll and personnel matters." A-288 (emphasis added). The company further stated that, "[t]o support our store-level credit program, we have developed a standardized scoring model and system for extending credit and collecting accounts receivable according to our strict credit disciplines." A-289. In the section of the 10-K listing various "RISK FACTORS" the company faced (A-294–300), the company stated that "THE FUTURE OF OUR CREDIT BUSINESS IS UNCERTAIN, WHICH MAY CAUSE SIGNIFICANT FLUCTUATIONS IN OUR OPERATING RESULTS." Under that heading, the company explained:

> We adhere to strict credit application guidelines in determining whether our customers qualify for credit. During a downturn in general economic conditions, as we are currently experiencing, or local economic development such as plant closings, fewer of our customers may qualify for credit, and we may suffer a higher rate of non-payment, either of which could have a material adverse effect on our business, financial condition or result of operations. As we expand our store base into new markets, we obtain new credit accounts, which present a higher risk than our mature credit accounts, as these new customers do not have an established credit history with us. Since it takes time to evaluate the credit characteristics of our new customers, we may experience initial uncertainty in our credit portfolio.

A-299–300.[3]

These disclosures drew no objection from E&Y, which was fully familiar with the "internal company guidelines" Friedman's maintained. Under those

[3] Government witness William Milligan—Friedman's Vice President of Corporate Credit—testified that Friedman's credit department collected New Account Analysis ("NAA") data for its stores on a daily, weekly, and monthly basis, and regularly reported that information to the Board. The NAA represented a cumulative, weighted average of credit risk across the company and was derived from the required customer credit application information keyed in at the store. A higher NAA score would typically correlate with higher delinquency and charge-off rates. See A-177–79. At Friedman's, a NAA score below eight percent indicated that the store's credit was "tight," which meant that the store was "being too conservative in extending credit." A-190. On the other hand, if a store's NAA score was above ten percent, that store was considered "too aggressive." A-182. Milligan testified that Friedman's "general rule of thumb was [that] the NAA percent should be somewhere between eight and ten percent." *Ibid.* The evidence introduced at trial showed that the NAA remained close to eight percent during the charged period. *E.g.*, A-304 (September 2002) (Ex. 26); A-193 (December 2002). Milligan testified that it was very important to Stinn that the NAA score for the company's entire credit portfolio be low, but that Friedman's policy was not to keep the number too low, such that customers with profitable credit profiles were being turned away. See A-190–91.

guidelines—which were published in the company's training and operating materials available to every employee in the company (A-311–14)—the credit application process worked as follows: The company entered certain standardized customer data (income, job history, etc.) into a computerized credit scoring program, which determined a customer's initial credit eligibility. *Ibid.*; see also A-300. But each Friedman's manager had authorization to grant credit outside the initial eligibility determination at a level set according to his or her position in the company. See A-311–14; see also A-216. For example, regional managers could grant up to $3,000 of credit, and so on up the line. See A-313. Indeed, the 10-K elsewhere referenced that discretionary approval process, stating that "[c]redit sales in excess of the limits determined by the scoring model require approval from regional credit supervisors." A-301.[4]

[4] The word "strict" appears just twice among the 40,000+ words in Friedman's 2002 10-K; both instances are quoted above (pp. 11, 12, *supra*). The government, by contrast, used that word nearly 50 times in questioning nine different witnesses at trial. See A-40–41 (Pan), A-46–47, A-76–77, A-94–96, A-149 (Suglia), A-68–71 (Greene), A-151–54 (Nesbitt), A-158–59, A-162–63 (Mauro), A-194–96, A-200–03 (Stein), A-204 (Parshall), A-208–15 (Joseph), A-217–22 (Cook).

III. Victor Suglia

The linchpin of the government's case was Victor Suglia, Friedman's CFO. Suglia's testimony dominated the trial, consuming four days on direct examination, and three more on cross-examination, re-direct, and re-cross. Suglia testified pursuant to a plea and cooperation agreement (A-42), and the government relied on him at every turn to supply the necessary link to Stinn. The origins of Suglia's decision to cooperate figured significantly in the trial, and thus merit specific discussion here.

A. The Capital Factors Fraud

Suglia first came to the attention of the government as a result of a civil lawsuit filed by a company called Capital Factors, which was lender to one of Friedman's suppliers, Cosmopolitan Gem. At the request of his friend and benefactor (a former Friedman's employee named Bob Morris, who worked at Cosmopolitan Gem), Suglia engaged in a scheme to induce Capital Factors to loan millions of dollars to Morris and Cosmopolitan Gem. A-100–02. Among other things, Suglia: fabricated Friedman's invoices to make it appear that Friedman's owed Cosmopolitan Gem millions of dollars (A-45, A-101–03, A-113); lied in response to direct inquiries by Capital Factors about how much money Friedman's owed Cosmopolitan Gem (A-103–05, A-115, A-118–19); and deliberately caused Friedman's to send $1.5 million to Cosmopolitan Gem, knowing that the payment

was intended for another vendor and that the delay in reversing the error would further the scheme (A-106–08). Suglia perpetrated the Capital Factors fraud with the help of Friedman's Vice President/Controller, John Mauro. See, *e.g.*, A-118.

Suglia admitted, as did Mauro, that they committed the Capital Factors fraud entirely without Stinn's knowledge. See A-109 (Suglia); A-168 (Mauro). All told, Suglia helped Morris defraud Capital Factors of approximately $12 million. A-105. Both men agreed to cooperate with the government in this case only after being caught red-handed in that scheme. See A-134–36 (Suglia); A-165–67 (Mauro). Indeed, in stark contrast to the one-on-one, uncorroborated conversations Suglia claimed to have had with Stinn about the conduct charged in this case, Suglia left a paper trail a mile long when defrauding Capital Factors. As a result, he was utterly defenseless against those charges and thus had little choice but to try to curry favor with prosecutors.

B. Suglia's Solo Accounting Fraud At Friedman's

The Capital Factors fraud was not the only instance in which Suglia committed fraud at Friedman's while concealing it from Stinn. As two Friedman's employees had revealed (A-184–86 (Milligan), A-60–64 (Greene)), and as Suglia later admitted to investigators, he had directed subordinates to falsify Friedman's financial data to make it appear as if payment had been received on delinquent accounts. More particularly, Suglia testified that he had ordered employees in the

company's finance department to "manually re-age" delinquent accounts—*i.e.*, to enter data into the company's computer system falsely indicating that the customer had made a payment on the account—so that it would appear that more customers were current on their accounts. A-56–57, A-143–44. Suglia admitted that he could "recall" having done so a "[c]ouple times." A-56–57. Suglia acknowledged that he ordered this "manual re-aging" of delinquent accounts entirely without Stinn's knowledge or involvement. A-143–44. And, as with the Capital Factors fraud, there were documents evidencing Suglia's manipulation. *E.g.*, A-186 (Milligan testimony referencing Suglia memorandum).[5]

It was also undisputed that both Suglia and Mauro had specifically ordered subordinates to conceal information from Stinn. For example, Milligan testified that Suglia instructed him and Friedman's President, Doug Anderson, that "some things are done without [Stinn's] knowledge and we clean-up after ourselves." A-187. Mauro admitted to issuing similar decrees. See A-315 ("Do not give this [charge-off] information to Brad if you kn[ow] what I mean.") (Ex. 785); A-173 (Mauro acknowledging same).[6]

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[5] Mauro, Suglia's confederate, likewise confessed to engaging in accounting fraud at Friedman's without Stinn's knowledge. Mauro admitted that he maintained a secret "cookie jar" reserve to cover unexpected accounting issues. A-172.

[6] Milligan was not prosecuted for his conduct at Friedman's. *E.g.*, A-188–89. The district court denied the defense's motion to compel immunity for Anderson (A-

C. Suglia's Claims Of Misconduct By Stinn

According to Suglia, Friedman's engaged in a variety of practices that were not properly disclosed to investors and thereby rendered Friedman's financial statements misleading. But Suglia claimed that, unlike the other frauds that he had successfully concealed from Stinn, *this* time Stinn was in on the scheme. As principally relevant here:

- Suglia testified that Stinn was aware of and condoned a process the government called "scooping," by which Friedman's would continue to collect on delinquent accounts for several days past the end of a fiscal period and then report artificially low "currency" percentages for that fiscal period. A-50–51. Suglia and other government witnesses acknowledged that this process was known to virtually every management employee at Friedman's (including hundreds of local store managers), and that it was openly discussed on weekly conference calls with numerous participants. A-51 (Suglia); A-38 (Greene); A-34 (Stokum).[7]

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30), whose statements had been disclosed before trial pursuant to the government's *Brady* and *Giglio* obligations. Anderson had told the government, among other things, that he was unaware of any incident involving falsifying documents or reporting incorrect financial data at Friedman's. See SPA-12 (Dkt. 91), A-1–3 (Aug. 6, 2007, letter).

[7] To be clear, even under the government's theory, "scooping" did not affect Friedman's reported cash flow because the company accurately posted the cash to the fiscal period in which a payment arrived. "Scooping" affected only whether an account that was delinquent by 120 days or more as of the end of a fiscal period—*and for which a payment was actually received within several days of the end of the period*—was charged-off from Friedman's accounts receivable. At trial, the defense introduced evidence showing that "scooping" had little (if any) impact on Friedman's reported revenues beyond the initial period in which it was implemented. See A-198–99. According to the government's witnesses, the

- Suglia testified that Stinn approved statements that Friedman's followed "strict credit disciplines," despite knowing that Friedman's "had exceptions to that policy and there was nothing strict about it." A-46. Suglia claimed that Stinn "was very hands-on and was very involved in the credit process." A-146.

- Suglia claimed that Stinn personally set the ADA percentage so that Friedman's would meet its revenue target and then directed Suglia to prepare a bogus "migration analysis" to justify the number to Friedman's auditors. A-59; A-73–75.

- Suglia testified that, in the summer of 2002, Stinn refused to disclose to investors the existence of a computer glitch that resulted in a batch of delinquent accounts showing up in the system as current. Suglia testified that when he informed Stinn about these so-called "x-files," Stinn ordered that none of them should be charged-off immediately and that the revenue effect of the discovery should be drawn out over several quarters. A-82–85, A-89–90. (Suglia acknowledged, however, that Stinn had instructed him to tell Friedman's lenders about the x-files but that he had failed to do so because, Suglia claimed, "there may have been some miscommunication." A-78–79.)

- Suglia testified that, in response to a decision by the firm's auditors regarding the accounting treatment for a tax gross-up payment for restricted stock awards to senior Friedman's executives, Stinn proposed that Suglia use an amount reserved for payment of future investment banking fees to cover the expense. A-91–92.

Suglia claimed that Stinn "orchestrated" this fraud in a series of meetings or phone conversations the two men had near the close of each fiscal period. A-231; see, *e.g.*, A-48–49, A-88, A-89–90, A-91–92, A-146, A-150. No one else (not even Suglia's admitted co-conspirator, John Mauro) was present for even one of

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practice long predated the period charged in the indictment. See A-155, A-160–61 (Mauro); A-176, A-183 (Milligan).

these alleged conversations. See A-48; A-256 (summation). Nor was Suglia able to produce a single document corroborating these meetings—no notes, no e-mails, no calendar entries. A-146–47.

Suglia was rewarded handsomely for his testimony. Despite being entirely defenseless in the Capital Factors fraud, and despite confessing that he had personally, and without Stinn's knowledge, manipulated Friedman's financial results on prior occasions, Suglia was permitted to plead guilty to a single count of conspiracy. A-326. And whereas Stinn was ultimately sentenced to 12 years' imprisonment (SPA-76), Suglia received a term of probation. A-327.[8]

IV. Stinn's Trial

Near the close of evidence, the court indicated at least twice that it intended to deliver the government's requested conscious avoidance instruction. On both occasions, the defense objected to the instruction, arguing that the government had failed to prove that Stinn had deliberately *avoided* acquiring knowledge of the alleged misconduct. See A-223–24, A-226–28. Nevertheless, the court included the instruction in its charge to the jury. See SPA-50–51.

The court delivered its charge late in the afternoon on March 12, 2008. SPA-49. The jury deliberated for the next full day, but relations among the jurors

[8] Mauro was likewise sentenced only to probation. See A-322.

quickly soured. One juror disavowed a "guilty" verdict in open court (SPA-56), and the other jurors accused that juror of having "questionable" "integrity." SPA-59 & A-281. Over the defense's objection, the district court responded to the jury's dysfunction by delivering an *Allen* charge (SPA-60–62), effectively singling out the juror who had just voted for acquittal. Shortly thereafter, the court literally singled out the holdout by dismissing her from the jury, also over the defense's objection. SPA-71. The court substituted the first alternate juror (SPA-74), and the reconstituted jury returned a guilty verdict less than three hours later. A-273.

SUMMARY OF ARGUMENT

The district court committed a series of highly prejudicial errors during the most critical stages of the trial.

I. The court offered the jury a legally invalid path to conviction, by instructing the jurors that they could vote to convict Stinn under a conscious-avoidance theory of knowledge. The government did not even attempt to prove the necessary factual predicate for such an instruction—*i.e.*, that Stinn "deliberately avoided confirming" the key fact of whether Friedman's disclosures were materially misleading. To the contrary, the government's entire case sought to prove that Stinn had *actual* knowledge of the fraud, which consisted largely of Victor Suglia's testimony that he personally discussed the essential elements of the fraud with Stinn.

The government cannot prove that this error was harmless beyond a reasonable doubt, because its evidence of actual knowledge consisted almost entirely of the highly compromised testimony of Suglia. Suglia admitted that he had perpetrated an unrelated, multi-million-dollar fraud and had committed other accounting fraud at Friedman's (in remarkably similar fashion to the conduct charged here)—all of which, Suglia confessed, he had concealed from Stinn. The conscious avoidance instruction thus irreparably prejudiced the defense, because it allowed jurors to vote to convict Stinn even if they disbelieved Suglia's claims that, unlike his prior frauds, *this* time Stinn was involved in his misconduct.

II. The court erred by coercing a guilty verdict through a series of self-compounding errors during jury deliberations. The court's *Allen* charge—delivered after the identity of the holdout juror was revealed in open court—was impermissibly coercive under the remarkable circumstances of this case. The court's subsequent decision to *dismiss* the holdout juror under FED. R. CRIM. P. 23(b) cannot possibly survive this Court's "meticulous scrutiny." The district court utterly failed to scrutinize the circumstances surrounding the majority's bid to secure the holdout's dismissal, and it made no findings that the holdout juror's actions had prejudiced deliberations in any way. The court erred yet again when, instead of granting the defense's request for a mistrial, it substituted an alternate juror who had witnessed the holdout juror's rejection of the "guilty" verdict, the

court's delivery of the *Allen* charge, and the holdout juror's dismissal, and then was left to conclude that the dismissal was related to the holdout's refusal to vote to convict. Standing alone—and certainly taken together—the district court's errors were highly prejudicial. They were highly coercive toward the holdout juror and jurors who might have reconsidered their votes to convict; resulted in the removal of a known vote for acquittal; and sent a powerful signal to the remaining jurors and the newly substituted alternate that a guilty verdict was to be returned. In light of this extraordinary confluence of events, the district court's errors effectively coerced a guilty verdict.

ARGUMENT

I. The District Court Erred In Giving A Conscious Avoidance Instruction, And That Error Severely Damaged The Defense

The government's eggs were firmly in the basket of its star witness, Victor Suglia, who asserted without equivocation that Stinn had actual knowledge of the alleged wrongdoing. But Suglia was a perilously vulnerable witness, and the government had good reason to fear that one or more jurors would not believe his uncorroborated claims.

The government therefore sought and obtained a conscious avoidance instruction, which effectively allowed jurors who disbelieved Suglia's story to vote to convict based on the supposition that Stinn *should have* known what Suglia and

his confederate were up to. But there was no evidentiary basis for such an instruction, and that is hardly surprising. The government, having propounded through Suglia the theory that Stinn had directly "orchestrated" the fraud (A-231), was wary of offering a competing "fallback" theory of conscious avoidance (which presupposes that Stinn did *not* "orchestrate" the fraud). Having so clearly cast its lot with an "actual knowledge" theory—and having predicated that theory on the precarious shoulders of Victor Suglia—the government cannot possibly meet its burden to show that the erroneous conscious avoidance instruction was harmless beyond a reasonable doubt.

A. Standard of Review

This Court "review[s] a claim of error in jury instructions *de novo*, reversing only where, viewing the charge as a whole, there was prejudicial error." *United States* v. *Aina-Marshall*, 336 F.3d 167, 170 (2d Cir. 2003).

B. Background

As explained above (pp. 3-4, 14-19, *supra*), Suglia's testimony was both critical to the government's case and subject to sustained attack by the defense. Concerned that Suglia's credibility could not withstand his confessions of multiple prior acts of fraud without Stinn's knowledge, and the complete absence of evidence corroborating his supposed one-on-one meetings with Stinn to discuss the

charged fraud, the government sought an alternate path to conviction by requesting a conscious avoidance instruction.

The defense objected to the requested instruction, arguing that the government had failed to introduce evidence that Stinn had deliberately *avoided* acquiring knowledge of the alleged misconduct. A-223–24. The government's theory of the case, the defense explained, was that "Mr. Suglia did manipulations [of Friedman's financial data] at the express behest of Mr. Stinn." A-224. In the district court's view, however, a conscious avoidance instruction was warranted because Stinn had "direct[ed]" the fraud but had delegated implementation of certain details to Suglia: "There was evidence from Mr. Suglia that Mr. Stinn said to him, take care of it, and Mr. Suglia understood that to mean that he was to falsify the records it seems to me classic conscious avoidance. *He is directing it.*" A-224 (emphasis added). In addition, the court stated, Stinn had argued "that [he] relied on the accountants, that he relied on the outside auditors, as if he didn't know what was going on." A-229.

The Court therefore instructed the jury (in relevant part) as follows:

> [I]t is sufficient, of course, if the evidence satisfies you beyond a reasonable doubt that the defendant was actually aware he was, for example, making or causing a misrepresentation or material omission to be made. Alternatively, in determining whether the defendant acted knowingly, you can consider whether the defendant deliberately closed his eyes to what would otherwise have been obvious to him. For example, if you find that the defendant was aware of a high probability that a statement was false, and that he

> deliberately sought to avoid knowledge of the statement's falsity, you may infer that the defendant knew the statement was false.

SPA-50–51.

C. There Was No Factual Predicate Supporting The Conscious Avoidance Instruction

It is well settled that a conscious avoidance instruction "may only be given if (1) the defendant asserts the lack of some specific aspect of knowledge required for conviction, and (2) the appropriate factual predicate for the charge exists." *United States* v. *Ferrarini*, 219 F.3d 145, 154 (2d Cir. 2000) (citation omitted). The first element is not at issue here: The defense asserted that the government had not proved that Stinn knew Friedman's statements to shareholders were materially misleading. The government failed, however, to meet the second element, and the district court therefore erred in giving the instruction.

1. A factual predicate for the instruction does not exist unless there is proof beyond a reasonable doubt that the defendant "deliberately avoided confirming" the disputed fact. *United States* v. *Svoboda*, 347 F.3d 471, 480 (2d Cir. 2003) (citing *United States* v. *Lara-Velasquez*, 919 F.2d 946, 951-52 (5th Cir. 1990)). The question is not whether the defendant claimed a mere lack of knowledge, but whether he took *deliberate action* to avoid acquiring that knowledge. The so-called "ostrich instruction" is best understood

> by thinking carefully about just what it is that real ostriches do (or at least are popularly supposed to do). They do not just fail to follow through on their suspicions of bad things. They are not merely *careless* birds. They bury their heads in the sand so that they will not see or hear bad things. *They deliberately avoid acquiring unpleasant knowledge.*

United States v. *Giovannetti*, 919 F.2d 1223, 1228 (7th Cir. 1990) (second emphasis added); see also *United States* v. *Rodriguez*, 983 F.2d 455, 458 (2d Cir. 1993) ("fail[ing] to learn [of wrongdoing] through negligence" not the same thing as conscious avoidance). Thus, a conscious avoidance instruction is not warranted unless there is evidence that the defendant affirmatively shielded his eyes from actual knowledge of the wrongdoing.

Moreover, it matters what kind of information the defendant avoided. It is not sufficient that the defendant failed to learn some particular detail of the alleged offense. Rather, the defendant must have "buried his head in the sand" with regard to "'some specific aspect of knowledge *required for conviction.*'" *United States* v. *Nektalov*, 461 F.3d 309, 314 (2d Cir. 2006) (emphasis added) (quoting *Aina-Marshall*, 336 F.3d at 170). That is, the missing information must be a "*key* fact," *Rodriguez*, 983 F.2d at 458 (emphasis added), and not merely incidental to the essential question of liability.

2. No such evidence was admitted at trial. As explained above (pp. 17-19, *supra*), the government's case rested squarely on the shoulders of Victor Suglia. Across his seven days on the stand, Suglia said nothing even remotely suggesting

that Stinn had *avoided* acquiring knowledge as to whether Friedman's disclosures were materially misleading. To the contrary, Suglia asserted that he had personally discussed with Stinn falsifying Friedman's financial reports. *E.g.*, A-48–49. In fact, the government elicited testimony that left no room for doubt that Suglia's story was one of actual knowledge, not conscious avoidance:

> Q. So, what was said during these meetings about how the final number was going to be arrived at?
>
> [Trial Counsel]: Objection.
>
> THE COURT: Overruled.
>
> A. The process that we would go through typically, we'd have this discussion one to two weeks after the quarter was over, we would have a roll up of what the financials looked like at that point in time. We would discuss basically what the target that we were, you know, we were shooting for and, of course, we would be looking at other factors but we would basically arrive at a number that was what we felt we could justifiably report and get away with and from that point we would then, you know, manipulate the accounting records and basically cook the books to arrive at that number.

A-49.

More particularly, Suglia claimed that Stinn was personally involved in each one of what the government called "the scheme's five greatest hits." A-232. Suglia testified that Stinn was actually aware "that the charge-off was held open at the end of Friedman's fiscal quarters" (*i.e.*, "scooping") (A-51); that Stinn was "hands-on" with Friedman's credit portfolio (A-146) and therefore knew that disclosures describing "strict" credit disciplines were false; that Stinn personally

set the Allowance for Doubtful Accounts percentage (A-59); that Stinn was aware of the x-files problem and ordered Suglia not to charge-off those accounts or disclose their existence (A-82–86, A-89–90); and that Stinn himself proposed using an unrelated reserve to pay for the tax expense associated with an executive compensation award (A-91–92, A-150). Thus, Suglia claimed quite clearly (if not persuasively) that Stinn was actually aware that Friedman's financial reports were materially misleading. The government confirmed as much in its summation, arguing that Suglia (and his co-conspirator, Mauro) had simply "carried out the defendant's orders." A-245.

Having committed to Suglia's testimony that he personally discussed each element of the fraud with Stinn, the government did not (indeed, credibly *could not*) attempt to prove that Stinn merely *avoided* acquiring such knowledge. The witnesses other than Suglia who spoke with any firsthand knowledge of Friedman's operations largely confined their testimony to describing periodic meetings or conference calls attended by numerous Friedman's employees—sometimes including Stinn, sometimes not. See, *e.g.*, A-156–57 (Mauro); A-32–33 (Stokum); A-36–37 (Greene); A-180 (Milligan). None testified that Stinn avoided learning about the alleged falsity of Friedman's disclosures. It should come as no surprise, then, that the government repeated its refrain of actual knowledge

throughout its closing arguments. *E.g.*, A-233–44, A-246–54, A-255 (summation); SPA-46–48 (rebuttal).

3. The district court did not give the conscious avoidance instruction because it concluded that there was sufficient testimony that Stinn avoided learning that Friedman's financial statements were materially misleading. Rather, it gave the instruction because Suglia had testified that Stinn "direct[ed]" the fraud but left it to Suglia to implement some of the supporting entries in Friedman's financial records. A-224. That is, the district court believed that the instruction was appropriate based on Suglia's testimony that Stinn actually discussed the fraud with Suglia and ordered him to manipulate supporting financial data.

Contrary to the district court's surmise, however, openly discussing a fraud and then ordering a subordinate to "take care of it" is not conscious avoidance at all, much less "classic conscious avoidance," as the district court supposed. A-224. As explained above (pp. 25-26, *supra*), conscious avoidance turns on whether the defendant avoided "some specific aspect of knowledge required for conviction.'" *Nektalov*, 461 F.3d at 314 (quoting *Aina-Marshall*, 336 F.3d at 170). The government's theory was that Stinn approved Friedman's disclosures of its charge-off and credit policies knowing that they were misleading. Suglia claimed to have explicitly discussed that fact with Stinn on multiple occasions. Exactly *which* journal entries Suglia manipulated to provide supporting detail within

Friedman's records was not a fact "required for conviction." Were it otherwise, a conscious avoidance charge would be permitted in virtually every conspiracy case, because a defendant will almost always be unaware of at least one act a co-conspirator claims to have committed in furtherance of the conspiracy. Here, Suglia claimed that Stinn knew the "key" fact in dispute: whether the financial statements were misleading. *Rodriguez*, 983 F.2d at 458. Whether Stinn also knew a subordinate fact—*e.g.*, precisely how Suglia generated a document for the file justifying the allowance for doubtful accounts that he claimed Stinn had arbitrarily set—is beside the point.[9]

4. The government evidently shares the district court's confusion. When opposing bail pending appeal, the government proposed a series of meritless arguments in support of the instruction. First, the government claimed that the instruction was warranted because "Stinn's primary defense was that the responsibility for the conduct underlying the unlawful activity rested solely with

[9] To the extent that the district court suggested that Stinn had invited the conscious avoidance charge by claiming that he "relied on . . . outside auditors, as if he didn't know what was going on" (A-229), that only further illustrates the district court's confusion and the absence of a legitimate basis for the instruction. A defendant's claim that "he didn't know what was going on" does not warrant a conscious avoidance instruction. What matters is whether the defendant has deliberately *turned away* from acquiring the knowledge. *Svoboda*, 347 F.3d at 480. Evidence that Stinn believed that Friedman's outside auditors had discharged their duties is not the same thing as claiming that Stinn turned a blind eye to information.

his employees and that he knew nothing of their wrongdoing." Gov't 2d Cir. Bail Opp. 17. That, of course, misapprehends the doctrine entirely. A defendant who claims that he lacked the requisite knowledge because he delegated the relevant tasks to others is not guilty of *avoiding* knowledge. Only when there is proof beyond a reasonable doubt of *willful* avoidance of knowledge can the instruction be given.

Nor was the government correct in citing *United States* v. *Walker*, 191 F.3d 326 (2d Cir. 1999), in support of its claim that Stinn's case was a "paradigmatic" instance of conscious avoidance. See Gov't 2d Cir. Bail Opp. 17. *Walker* involved a lawyer who had instructed his clients to sign *blank* immigration forms and then dispatched his employees to fill in stories justifying asylum. 191 F.3d at 331-32. The defendant would sometimes then review the completed applications, *id.* at 332, many of which contained "substantially identical" stories, *id.* at 330. Here, by contrast, there was no evidence that Stinn signed anything resembling "blank" financial reports or reviewed reports containing self-evidently false information. To the contrary, the government insisted (through Suglia) that Stinn had directly "order[ed]" Suglia to prepare false reports. A-245. That is not evidence of conscious avoidance.

Similarly, the government has claimed that merely "den[ying] knowledge of accounting manipulations" warrants a conscious avoidance charge, citing *United*

States v. *Ebbers*, 458 F.3d 110, 124-25 (2d Cir. 2006). Gov't 2d Cir. Bail Opp. 17. Not so. In *Ebbers*, this Court upheld a conscious avoidance instruction because the defendant himself "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.*" 458 F.3d at 124-25 (emphases added). Here, there was no evidence that Stinn did anything remotely similar; to the contrary, Suglia was at pains to claim that Stinn was "very hands-on" with Friedman's financial operations. A-146. The fact that the government believes *Ebbers* helps its case betrays its fundamental misunderstanding of when a conscious avoidance charge is appropriate.

Finally, the government has asserted that the instruction was warranted because of "evidence that Stinn was confronted with proof of the falsity of Friedman's financials." Gov't 2d Cir. Bail Opp. 18. This Court has squarely held, however, that "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.'" *Nektalov*, 461 F.3d at 316 (emphases added) (quoting *United States* v. *Sanchez-Robles*, 927 F.2d 1070, 1074 (9th Cir. 1991). That rule recognizes the essential distinction between evidence that goes to show actual knowledge and evidence that the defendant deliberately *turned away* from

acquiring such knowledge. The latter is the critical prerequisite to a conscious avoidance instruction; were it otherwise, a conviction could be returned based simply on a juror's belief that a defendant who did not shield his eyes nevertheless should have known about the alleged wrongdoing. Indeed, that is precisely the improper inference the government has urged by pointing to evidence it claims shows that Stinn "was *confronted* with evidence of the falsity of Friedman's financials." Gov't Dist. Ct. Bail Opp. 11 (emphasis added) (SPA-37 (Dkt. 351)).

D. The Government Cannot Establish That The Instruction Was Harmless Beyond A Reasonable Doubt

Because the erroneous instruction compromised Stinn's constitutional right to require the government to carry its burden, his convictions must be overturned unless the government can establish that the error was harmless "beyond a reasonable doubt." *United States* v. *Barnhart*, 979 F.2d 647, 652 (8th Cir. 1992) (quoting *United States* v. *Hasting*, 461 U.S. 499, 510-11 (1983)); see *ibid.* ("The improper use of the willful blindness instruction does affect constitutional rights because it creates a risk that the defendant will be convicted because he acted negligently or recklessly."); see also *Ferrarini*, 219 F.3d at 154 ("An erroneously given conscious avoidance instruction constitutes harmless error if the jury was charged on actual knowledge and there was '*overwhelming* evidence' to support a finding that the defendant instead possessed *actual* knowledge of the fact at

issue.") (quoting *United States* v. *Adeniji*, 31 F.3d 58, 64 (2d Cir. 1994)) (first emphasis added). The government cannot meet that standard.

The government's proof of actual knowledge rested almost exclusively on the testimony of Victor Suglia.[10] As explained above (p. 3, *supra*), Suglia testified that he and Stinn engaged in a series of uncorroborated, one-on-one conversations in which they openly discussed the wrongdoing. As a general matter, it is difficult to say that an erroneous conscious avoidance instruction is harmless beyond a reasonable doubt where "the evidence of [the defendant's] knowledge came down to a credibility determination." *Barnhart*, 979 F.2d at 653 (holding that erroneous conscious avoidance instruction was not harmless error). But Suglia's testimony is an especially inauspicious peg on which to hang the government's case for harmlessness.

For starters, it was undisputed that Suglia and Mauro had committed the multi-million-dollar Capital Factors fraud entirely without Stinn's knowledge or involvement. See A-109–10 (Suglia); A-168 (Mauro). Accordingly, the notion

[10] To appreciate the centrality of Suglia's testimony to the government's case, one need look no further than the sentence he received as a result of the government's 5K1 letter. Despite having confessed to every aspect of the fraud with which Stinn was charged, to the unrelated, multi-million-dollar Capital Factors fraud, and to having unilaterally manipulated Friedman's financial reports on at least two prior occasions *without* Stinn's involvement, Suglia was sentenced only to a term of probation. See A-327. Stinn, by contrast, was sentenced to 12 years' imprisonment. See SPA-76.

that Stinn's purported co-conspirators might have concealed from him the wrongdoing alleged in this case was hardly implausible. What is more, Suglia confessed that, well before the scheme alleged in the indictment supposedly commenced, he had on multiple occasions directed subordinates to manually re-age accounts receivable (even where no payment had been received) to help improve Friedman's financial reports. A-56–57, A-143–44. Suglia admitted that he did so entirely without Stinn's knowledge. A-143–44.

To like effect, another government witness testified that Suglia explicitly stated that "some things are done without [Stinn's] knowledge and we clean-up after ourselves." A-187. Similarly, Suglia's confederate, Mauro, testified that he maintained a secret "cookie jar" reserve to cover unexpected accounting issues. A-172. And he admitted that, like Suglia, he had told other Friedman's employees to conceal information from Stinn. See A-315 (Ex. 785) ("Do not give this [charge-off] information to Brad if you kn[ow] what I mean."); A-173 (Mauro acknowledging same). In short, the jury could readily have disregarded Suglia's claim that Stinn had actual knowledge of the fraud. It could, instead, have concluded that, as with the Capital Factors fraud, as with the manually re-aged receivables, and as with Mauro's cookie jar, Stinn was kept in the dark by Suglia and his confederate Mauro. That is reason enough to reject any suggestion that the conscious avoidance charge was harmless.

But there is more. It was undisputed that Suglia began cooperating with the government only *after* being caught red-handed in the Capital Factors fraud. See A-134–36. Having no meaningful defense to those charges—and no remotely plausible means to suggest that Stinn was involved in it—Suglia had little choice but to look for ways to curry favor with the government. The defense thoroughly impeached Suglia's credibility on this score at trial. See, *e.g.*, A-121–38, A-256–61, SPA-42–43. Where the government's star witnesses offer testimony purporting to establish the defendant's actual knowledge only *after* being caught in an *unrelated* fraud and have admitted engaging in accounting manipulations outside the alleged conspiracy, their credibility is squarely at issue and their claims that the defendant had "actual knowledge" can hardly be described as "overwhelming."

II. The District Court's Rulings During Jury Deliberations Were Erroneous and Prejudicial

Soon after the jury received its instructions and returned to the jury room, it became clear that deliberations in this case would not proceed in the usual fashion. A series of notes to the court and the conduct of individual jurors during deliberations evinced a deep discord among the jurors. That conflict reached its boiling point when the jury was polled in open court after claiming to have reached a unanimous verdict on two counts: One juror revealed that "guilty" was *not* her

vote. SPA-56. Her fellow jurors reacted by telling the court that they "c[ould] not continue deliberations" with that juror. SPA-59 & A-281.

The district court responded to these remarkable events by committing a series of mutually reinforcing errors that effectively coerced a guilty verdict. Rejecting a defense request for a mistrial, the district court returned the dysfunctional jury to continue deliberations, issuing an *Allen* charge that was highly coercive toward the known holdout juror and toward the other jurors who might have reconsidered their views. SPA-60–62. More troubling still, the court soon thereafter dismissed the holdout juror for purported misconduct, making no real effort to find a less drastic alternative to dismissing the lone dissenter for acquittal. SPA-71. Finally, the district court replaced the holdout juror with an alternate who had witnessed the holdout dissent from the supposed guilty verdict in open court but who was prevented from learning that her dismissal was related to supposed misconduct rather than her refusal to acquiesce in a guilty verdict. SPA-74. Any one of these errors would warrant a new trial; taken together, they undoubtedly emboldened the majority's view of guilt and coerced the final verdict.

A. Standard Of Review

This Court must apply a more rigorous standard of review to the district court's rulings in light of their compound effects and the known presence of a holdout vote for acquittal. Generally, a trial court's decision to deliver an *Allen*

charge is reviewed for abuse of discretion. *United States* v. *Robinson*, 560 F.2d 507, 517-18 (2d Cir. 1977) (en banc). While the decision to dismiss a juror for good cause is also generally reviewed for abuse of discretion, this Court "subject[s] a Rule 23(b) dismissal to 'meticulous' scrutiny in any case where the removed juror was known to be the sole holdout for acquittal." *United States* v. *Thomas*, 116 F.3d 606, 624-25 (2d Cir. 1997) (quoting *United States* v. *Hernandez*, 862 F.2d 17, 23 (2d Cir. 1988)). The district court's decision to deny a defense request for mistrial after a Rule 23(b) dismissal and proceed to verdict is typically subject to an abuse-of-discretion standard. *Cf. United States* v. *Ruggiero*, 928 F.2d 1289, 1300-01 (2d Cir. 1991).

B. Background

The jury reported that it was "making good progress" after the first full day of deliberations (A-264 & A-275), but relations quickly deteriorated. On the second day of deliberations, the jury sent a note claiming that "one juror [wa]s unwilling to deliberate." A-266 & A-276. The court reread its instructions on the duty to deliberate, telling the jury: "Do not hesitate to change your opinion if you are convinced that another opinion is correct." A-268. The conflict among jurors, however, continued unabated. See, *e.g.*, A-269 & A-277 (jury note read in open court on third day alleging that "one juror refuses to consider evidence or other

jurors' opinions"). At least two different jurors—in separate incidents—left the jury room and attempted to speak directly with the court. See SPA-53.

On the fifth day of deliberations, the jury sent a note stating that it wished to submit its "unanimous verdict on two counts." SPA-53 & A-278. The jury foreperson read a guilty verdict on Counts Two and Three. SPA-55 & A-279–80. The court then polled the jury, but Juror No. 10 stated in open court that "guilty" was not her verdict. SPA-56. The jury alternates were present in court and witnessed this incident. See SPA-54. The court sent the jury back to its deliberations room, instructing that it "should continue its deliberations." SPA-56. The defense moved for a mistrial, which was not granted. See SPA-57–59.

Shortly thereafter, the jury sent a note claiming that it "c[ould] not continue deliberations since one juror agreed to the verdicts rendered and then recanted when in the courtroom," and it accused that juror (Juror No. 10) of having "questionable" "integrity." SPA-59 & A-281. The defense renewed its motion for a mistrial. SPA-59. The court denied that motion, and instead delivered an *Allen* charge—despite the fact that Juror No. 10's identity as the holdout vote for acquittal had just been revealed in open court. SPA-60–62. Among other things, the court told the jury that it was "desirable that a verdict be reached," and that "after extended discussions jurors may well reach agreement." SPA-61. It then instructed the jury to return to its deliberations. SPA-61–62.

The jury soon sent another note. Focusing its attention even more sharply on Juror No. 10, the jury told the court—falsely, as it turned out—that Juror No. 10 "had spoken to an attorney last night to determine which of the charges were the most serious." SPA-63 & A-282. In fact, as Juror No. 10 explained when she was questioned individually by the court, she had asked her sister, a Portuguese literature professor in Brazil (not an attorney), about "the difference between conspiracy and fraud," but she emphasized that they had not discussed the case or any of its details, and that she had not shared her sister's response with the other jurors. SPA-65–68. Juror No. 10 also provided insight into how badly the deliberative process had broken down, explaining that she had "told the jury, listen, I have a doubt," which caused the other jurors to "start[] screaming with [*sic*] me, [and] said I want you out of the jury. Whatever I was writing to the judge, explain I can't talk [*sic*], nobody let me talk." SPA-68–69.

The defense renewed its request for a mistrial, which the court denied. SPA-70. Over defense counsel's objection, the court stated that "the juror's misconduct is not curable" and dismissed her. SPA-71–72. The court then recalled the remaining jurors and alternates and informed them of the dismissal. SPA-73–74. The court substituted the first alternate, instructing the reconstituted jury "not to speculate on why" Juror No. 10 had been dismissed. *Ibid.* After deliberating for

less than three hours—by contrast, the originally constituted jury had been out for five days—the jury returned a guilty verdict on all counts. A-273–74.

C. The District Court's *Allen* Charge Was Unduly Coercive

The district court first erred during deliberations when it delivered an *Allen* charge following the reading of the partial verdict and the polling of the jury. The court's charge was unduly coercive and denied Stinn the right to a fair trial.

1. Courts have long recognized that, once the court learns the identity and inclination of a lone holdout juror, even a modified *Allen* charge can be unduly coercive. See, *e.g.*, *United States* v. *Hynes*, 424 F.2d 754, 757 (2d Cir. 1970) (citing "foreknowledge of the numerical split [in the jury]" as an "aggravating circumstance" heightening the danger of coercion); see also *United States* v. *Williams*, 547 F.3d 1187, 1207 (9th Cir. 2008) (ordering new trial where court gave modified *Allen* charge after holdout juror revealed her identity to the court); *Jiminez* v. *Myers*, 40 F.3d 976, 981 (9th Cir. 1994) ("A single vote stood between defendant and conviction. In such a case 'the most extreme care and caution were necessary in order that the legal rights of the defendant should be preserved.'") (quoting *Burton* v. *United States*, 196 U.S. 283, 307 (1905)).

This Court requires "an individualized determination" of coercion. See *United States* v. *Crispo*, 306 F.3d 71, 77 (2d Cir. 2002) (quoting *Robinson*, 560 F.2d at 517). The district court's *Allen* charge was impermissibly coercive under

the compelling circumstances of this case. First, the charge followed an earlier instruction to continue deliberations, including a reminder that jurors should "not hesitate" to change their opinions if they became convinced another opinion was correct. See A-268. It is well established that "the chances of coercion may increase with each successive appeal by the court to the jurors to try to reach a verdict." *Robinson*, 560 F.2d at 517.

More importantly, the charge followed several days of obvious conflict among the jurors regarding the essential question of guilt and complaints by the majority directed against Juror No. 10, including an accusation aimed specifically at her integrity. SPA-59 & A-281. The charge itself came on the heels of Juror No. 10's disavowal of a purportedly unanimous verdict on two of the three counts in open court. Yet it utterly failed to acknowledge the complete breakdown in juror relations, and instead instructed the 11-1 jury to try again to reach a verdict. Everyone in the courtroom—including the alternate who would eventually join the jury—reasonably would have perceived the charge as directed at the dissenting juror. And a juror in the majority would have understood that such pressure would follow any attempt to reconsider a guilty vote.

At least one court of appeals has squarely held that "reversal is necessary if the holdout jurors could interpret the [*Allen*] charge as directed specifically at them—that is, if the judge knew which jurors were the holdouts *and* each holdout

juror knew that the judge knew he was a holdout." *Williams*, 547 F.3d at 1207 (quoting *United States* v. *Ajiboye*, 961 F.2d 892, 894 (9th Cir. 1992)) (citing in turn *United States* v. *Sae-Chua*, 725 F.2d 530, 532 (9th Cir. 1984)). Such was precisely the case here. Following jury polling, the court and everyone else knew that Juror No. 10 was the holdout vote for acquittal, *and* Juror No. 10 knew that they knew. The possibility for coercion simply could not have been any greater.

In the district court, the government acknowledged that Stinn would prevail on this issue under the Ninth Circuit's decision in *Williams*. See Gov't Dist. Ct. Bail Opp. 27 (SPA-37 (Dkt. 351)). The government insisted, however, that *Williams* was "directly contrary" to this Court's decision in *United States* v. *Robinson*, 560 F.2d 507 (2d Cir. 1977) (en banc). *Ibid.* As Stinn explained below (Def. Dist. Ct. Bail Mtn. 20-21 (SPA-33 (Dkt. 328))), *Robinson* is not on point here because the holdout juror's identity in that case was revealed "voluntarily and without solicitation" when she sought advice in a note to the court. 560 F.2d at 516-17. Moreover, unlike in this case, the jury in *Robinson* continued to deliberate for some time after the *Allen* charge, which "strong[ly] indicat[ed] that the effect of the charge was minimal." *Id.* at 517-18.

2. Even though Juror No. 10 was eventually dismissed from the jury that rendered the verdict, the district court's error in delivering the *Allen* charge was not

harmless because "subsequent deliberations were prejudicially compromised." *Ruggiero*, 928 F.2d at 1299-1300.

Juror No. 10's open-court dissent from the verdict strongly suggested that she had already experienced overwhelming pressure to vote with the majority against her personal beliefs, or that the majority had falsely claimed unanimity in its note. In either event, deliberations were already past "a useful end." *Crispo*, 306 F.3d at 77. This is further evidenced by the jury note sent soon after the *Allen* charge proclaiming that "[t]he rest of the jury feels any further deliberations are futile." SPA-63–64 & A-282.

Under such circumstances, the court's charge had the improper effect of reinforcing the majority's view of guilt. *Cf. Jiminez*, 40 F.3d at 981 (court's instruction to deadlocked jury to continue deliberations "sent a clear message that the jurors in the majority were to hold their position"). The charge sent the same message to the alternate who would later join the jury. By failing to disavow or even acknowledge the majority's personal attacks against Juror No. 10, and instead ordering the jury to continue deliberating to verdict, the court's charge implicitly endorsed the majority's position and ultimately contributed to a coerced guilty verdict.

D. The District Court Improperly Dismissed The Holdout Juror Whose Actions Were Neither Prejudicial Nor Incurable

The coercive effect of the *Allen* charge was augmented, many times over, by what happened next. The jury sent out a note falsely accusing Juror No. 10 of speaking with an attorney "to determine which of the charges were the most serious," and claimed that additional deliberations would be futile. SPA-63–64 & A-282. Even after learning that the majority's note was false—and without finding any prejudice or even inquiring whether Juror No. 10 could follow the court's instructions going forward—the court dismissed her. SPA-71. That dismissal was improper and served to entrench further the majority's views on guilt.

1. To be sure, a district court's decision to remove a juror for "good cause" is typically discretionary. However, this Court has held that such a decision must be "meticulously scrutinized" after deliberations have begun and where the juror to be dismissed is the lone holdout for acquittal. *Hernandez*, 862 F.2d at 23; *United States* v. *Samet*, 207 F. Supp. 2d 269, 281 (S.D.N.Y. 2002) ("in this Circuit . . . a juror's status as a holdout *is* a 'red flag' that will result in the closest scrutiny of the District Court's decision to discharge the juror"). Even where, as here, the court's stated reason for dismissing the holdout juror is not directly tied to that juror's view of the evidence, "[t]he presence of a holdout lends heightened significance to the district court's duty of inquiry." *United States* v. *Ginyard*, 444 F.3d 648, 654

(D.C. Cir. 2006) (district court has "enhanced duty" to determine good cause when faced with holdout juror); *cf. United States* v. *Simmons*, 560 F.3d 98, 110-11 (2d Cir. 2009) (recognizing as "close" case the question of dismissal of possible holdout juror: "[A] district court might consider evidence of a divided jury to counsel restraint before excusing a juror.").

In *United States* v. *Thomas*, 116 F.3d 606 (2d Cir. 1997), this Court recognized at least two constraints on a district court's otherwise broad discretion in dismissing a juror for misconduct. First, trial courts must articulate "a sufficient evidentiary basis" for finding that a holdout juror's refusal or unwillingness to follow the law warrants removal. *Id.* at 618. *Thomas* reaffirmed the court's "inherent authority to conduct inquiries in response to reports of improper juror conduct and to *determine whether a juror is unwilling to carry out his duties faithfully and impartially*." *Id.* at 617 (emphasis added); see also *id.* at 621 ("The presiding judge can make appropriate findings and *establish whether a juror is biased or otherwise unable to serve*.") (emphasis added). Thus, the court's focus and its findings must be forward-looking. *E.g.*, *United States* v. *Baker*, 262 F.3d 124, 132 (2d Cir. 2001) (affirming dismissal of holdout juror who herself told the judge that she had made up her mind in advance of deliberations and thereafter refused to deliberate).

Second, *Thomas* cautioned that, "[i]f the record evidence discloses *any* possibility that the *request* to discharge stems from the juror's view of the sufficiency of the government's evidence, the court must deny the request." 116 F.3d at 621-22 (emphases added); see also *United States* v. *Symington*, 195 F.3d 1080, 1085 (9th Cir. 1999) ("It is undisputed that if this is true—if the other jurors did seek to remove [the holdout] because they disagreed with her views on the merits—then dismissal of [the holdout] was improper."). Thus, district courts are not permitted simply to disregard specific and demonstrated efforts by an overzealous majority to secure dismissal of a holdout juror.

2. The district court ignored both admonitions here. First, the trial court failed to articulate a "sufficient evidentiary basis" for its decision to remove Juror No. 10. The court made no findings that Juror No. 10 was "biased," "unwilling to carry out [her] duties faithfully and impartially," or "otherwise unable to serve" going forward in the deliberations. As in *Thomas*, Juror No. 10 "said nothing to the court to indicate that [s]he was unwilling to follow the court's instructions." 116 F.3d at 623.

The court offered no explanation as to how Juror No. 10's actions had created any prejudice, or why her participation in future proceedings would be unproductive. The court made no finding—and there is no evidence—that Juror No. 10 ever discussed the details of the *case* with her sister. Nor did she admit to

following anyone else's "instructions" on the law. When asked whether the foreperson's note was true, Juror No. 10 emphatically responded: "Of course not, Your Honor." SPA-65. When pressed by the court—which stated: "I want to know who it is that you spoke to about the case"—Juror No. 10 corrected the court's characterization of her actions: "It is – I didn't spoke [*sic*] about the case, Your Honor, I just ask [*sic*] a question." *Ibid*. Juror No. 10 explained that she had simply asked her sister—who was not an attorney—about the English definitions of "fraud" and "conspiracy." SPA-66–67.

Second, there is ample evidence that the majority jurors raised the issue of Juror No. 10's discussion with her sister only because of her status as the holdout vote for acquittal. The jurors were clearly frustrated with Juror No. 10, and had indicated that deliberations were at a standstill. And although multiple jurors had violated the court's instructions by exiting the deliberations room and attempting to speak with the court, Juror No. 10 was the only juror singled out for punishment.

3. Even though the district court made no finding of prejudice, any prejudice could have been mitigated simply by instructing Juror No. 10 to disregard her sister's proposed definitions and to follow the court's instructions. "In many instances, the court's reiteration of its cautionary instructions to the jury is all that is necessary." *United States* v. *Thai*, 29 F.3d 785, 803 (2d Cir. 1994) (affirming district court's decision to restate jury instructions after jury had twice

engaged in premature deliberations). This Court's decision in *Sher* v. *Stoughton*, 666 F.2d 791 (1981), is a helpful point of comparison. There, jurors had received anonymous calls urging them to convict the defendant and had violated the court's instructions by discussing the calls among themselves. The Court held that those violations were cured by *voir dire* and curative instructions. *Id.* at 794-95; see also *United States* v. *Lara-Ramirez*, 519 F.3d 76, 87 (1st Cir. 2008) ("Although the issue does not arise often, we have held that curative instructions are an appropriate remedy when jurors are exposed, during their deliberations, to extraneous materials.") (citation omitted); *Dist. Council 37* v. *N.Y. City Dep't of Parks and Recreation*, No. 93 Civ. 2580 (AGS), 1995 WL 739512, at *11 (S.D.N.Y. Dec. 14, 1995) (no evidence of prejudice where juror stated after the verdict that he had consulted dictionary and attorney about the meaning of the word "pretextual," which appeared on the verdict form); *State* v. *Squiers*, 896 A.2d 80, 86-88 (Vt. 2006) (juror researched statutes and potential sentences at public library, which was cured by judge asking whether he could disregard what he had found and follow the court's instructions, and by instructing the other jurors to disregard anything relayed by the misbehaving juror).

Removing Juror No. 10 violated Stinn's rights to due process and to a unanimous jury. "Removal of a holdout juror is the ultimate form of coercion." *Sanders* v. *Lamarque*, 357 F.3d 943, 944 (9th Cir. 2004). The court's error once

again "sen[t] a strong message to the remaining 11 jurors that the trial court endorsed their proclivity for conviction and implicitly encouraged them to 'hold their position.'" *Perez* v. *Marshall*, 119 F.3d 1422, 1429 (9th Cir. 1997) (Nelson, J., dissenting). It strengthened that message for the alternate juror as well.

E. The District Court's Substitution Of The Alternate Juror Was Inherently Coercive

The court erred again when it seated the alternate to replace Juror No. 10. The alternate juror was placed in an incurably coercive situation, and, not surprisingly, promptly joined the majority in convicting.[11]

1. Courts have long recognized the pressure faced by alternate jurors who join a deliberating jury, especially one that has already voted to convict. *Cf.* *United States* v. *Razmilovic*, 507 F.3d 130, 137 (2d Cir. 2007) (manifest necessity to declare mistrial where "'there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors'") (quoting *Arizona* v. *Washington*, 434 U.S. 497, 509 (1978)); *United*

[11] Contrary to the government's suggestion (Gov't 2d Cir. Bail Opp. 15), defense counsel did *not* consent to substitution of the alternate juror. The defense moved for a mistrial and, only after that motion was denied, agreed that substituting an alternate juror was preferable to proceeding with the 11 jurors who had already voted to convict. See SPA-71–73; see also A-271–72 (defense counsel explaining: "I was confronted with a choice that I didn't think I should even have to make because I thought there should be a mistrial."); A-316–17 (letter brief seeking mistrial before new deliberations began) (SPA-29 (Dkt. 279)).

States v. *Lamb*, 529 F.2d 1153, 1156 (9th Cir. 1975) (en banc) ("The inherent coercive effect upon an alternate juror who joins a jury that has, as in this case, already agreed that the accused is guilty is substantial."); *Perez*, 119 F.3d at 1429 (Nelson, J., dissenting) ("A replacement juror, no matter how novel or persuasive her argument for . . . acquittal may have been, would have been hard-pressed to overcome the trial court's implied admonition [through an earlier *Allen* charge] to the original jurors to hold their ground and convict.").

"An alternate juror replacing a regular juror after the jury has commenced its deliberations may be unable to participate equally with the other jurors." *United States* v. *Quiroz-Cortez*, 960 F.2d 418, 420 (5th Cir. 1992). That is because "[t]here is a danger that the other jurors will have 'already formulated positions or viewpoints or opinions' in the absence of the alternate juror and then pressure the newcomer into passively ratifying this predetermined verdict, thus denying the defendant the right to consideration of the case by twelve jurors." *Ibid.* (internal quotation omitted); see also *State* v. *Banks*, 928 A.2d 842, 848-49 (N.J. Super. Ct. App. Div. 2007) (where jury has already rendered partial verdict, it is "unrealistic" to believe that new member will have meaningful opportunity to participate in deliberations).

2. That is precisely what happened here. The district court's earlier actions had created an overwhelming risk that the final verdict would be coerced. There

can be no doubt that the other jurors had "already formulated positions" about the case, because they had previously attempted to return a guilty verdict. Moreover, the alternate had witnessed the open-court proceedings recounting discord among the jurors and had witnessed Juror No. 10's dissent from the partial verdict. She then saw the *Allen* charge and the court's removal of Juror No. 10. More troubling still, the alternate was *not* privy to the final jury note accusing Juror No. 10 of speaking with an attorney, and therefore reasonably could have inferred that Juror No. 10 was dismissed for refusing to vote "guilty" with the other jurors. Indeed, the court instructed the alternate "not to speculate on why or discuss anything" relating to Juror No. 10's dismissal with the other jurors. SPA-73–74. The danger of coercion under these circumstances was overwhelming.

It should come as no surprise, then, that the reconstituted jury returned a verdict on all counts less than three hours later (A-273–74)—notwithstanding the fact that the original jury had engaged in almost five days of deliberations after a trial spanning nearly six weeks. See, *e.g.*, *Lamb*, 529 F.2d at 1156 n.7 (recognizing the "obvious coercive effect" suggested by a short final deliberative period). The brevity of this final deliberation period is even more compelling in light of the court's earlier statement to the jury that "[t]his has been a long trial and you've been deliberating less than two days." A-268. The court's statement provides further support for the notion that a three-hour deliberation period after nearly six

weeks of trial was simply not reasonable. The district court erred by putting the alternate juror in an inherently coercive situation instead of granting the defense's motion for a mistrial.

F. The Cumulative Effect Of The District Court's Rulings Requires Reversal

"It is well-settled in this circuit that the effect of multiple errors in a single trial may cast such doubt on the fairness of the proceedings that a new trial is warranted, even if no single error requires reversal." *United States* v. *Fell*, 531 F.3d 197, 233 (2d Cir. 2008); see also *United States* v. *Grunberger*, 431 F.2d 1062, 1064 (2d Cir. 1970) (cumulative effect of errors at trial required reversal and remand). Even if it were possible to defend one, two, or even all three of the district court's decisions in isolation, the combination of these remarkable events had a powerful effect on the jury and effectively coerced a guilty verdict. In short sequence, the identity of the holdout juror for acquittal was revealed in open court during an aborted partial verdict, and the district court promptly followed that disclosure with an *Allen* charge. The district court then erroneously dismissed the holdout juror—after learning that she had sustained repeated attacks by the majority based on her views of the case, and without making a meaningful inquiry into whether she could continue to serve going forward. Finally, the district court substituted an alternate juror who had witnessed the juror's dissent from the guilty

verdict and her dismissal, and was left to conclude that the latter was the direct result of the former.

In reviewing the district court's series of rulings, this Court must "take account of what the error meant to [the jury], not singled out and standing alone, but in relation to all else that happened." *Kotteakos* v. *United States*, 328 U.S. 750, 764 (1946). In this case, the court's three mutually reinforcing errors introduced "a significant risk that a verdict [might] result from pressures inherent in the situation rather than the considered judgment of all the jurors." *Washington*, 434 U.S. at 509. The net effect of the court's decisions, even if unintentional, was to embolden the majority's view, discredit the holdout's position, and effectively coerce a guilty verdict, which the newly constituted jury returned in very short order. The cumulative effect of the court's rulings provides an independent ground for reversal.

CONCLUSION

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

Dated: October 21, 2009

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the typeface and volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) because the typeface is 14-point Times New Roman, and the number of words in this brief is 13,113 according to the count of Microsoft Word 2003.

/s/
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CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2009, 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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