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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA	DEFENDANT BRADLEY J. STINN'S REPLY MEMORANDUM IN SUPPORT HIS MOTION FOR RELEASE PENDING APPEAL
OF - against -	
BRADLEY STINN,	07-CR-113 (NG)
Defendant.	

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

DEFENDANT BRADLEY J. STINN'S REPLY MEMORANDUM IN SUPPORT OF HIS MOTION FOR RELEASE PENDING APPEAL

The government does not suggest that Stinn is either a flight risk or a danger to his community. Nor does it contend that his appeal is for purposes of delay. In addition, the government does not dispute that Stinn's claims, if resolved in his favor, would result in reversal of his convictions. The government challenges only one element of Stinn's motion: that his appeal will raise a "substantial question of law or fact" within the meaning of 18 U.S.C. § 3143(b). The government's arguments are flawed at every turn.

As a preliminary matter, the government errs in suggesting that release is warranted only in "exceptional circumstances." Opp. 4 (quoting *United States* v. *Miller*, 753 F.2d 19, 22 (3d Cir. 1985)). That restriction is nowhere to be found in the text of the statute, nor has the Second Circuit ever adopted such a gloss. For that matter, neither has the Third Circuit—the court in *Miller* merely quoted as background a portion of the legislative history from the *District of Columbia* Bail Act, which was enacted 14 years before the federal bail statute at issue here.

Ultimately, the government acknowledges that a "substantial" question is merely one "of more substance than would be necessary to a finding that it was not frivolous." Opp. 5 (quoting *United States* v. *Randell*, 761 F.2d 122, 125 (2d Cir. 1985)); see also *Randell*, 761 F.2d at 125 (the issue need only be "fairly debatable"). For the reasons explained below and in Stinn's opening brief, each of his challenges meets this standard. Release pending appeal should be granted.

I. The Due Process Challenge Was Squarely Raised, And The Government Fails To Confront The Intractably Ambiguous Theories Upon Which Its Case Rested

The government claims that it is not even a "remotely close question" whether premising criminal liability on two alleged misstatements—that Friedman's "generally" charged-off accounts at 120 days and followed "strict" credit application policies—deprived Stinn of fair notice required by the Due Process Clause. Opp. 1; see also *id.* 5-8. The government's argument is flawed three times over. First, the government asserts that this argument will be reviewed only for plain error, but the defense explicitly raised the due process challenge—citing the very same authority relied upon here—in its motion to dismiss the indictment. Second, the government mischaracterizes our argument as a question of "proof" and then fundamentally confuses the essential distinction between facial and as-applied constitutional challenges. Third, and most glaringly, the government makes no attempt to explain how the terms "generally" and "strict" could possibly supply fair notice that the conduct at issue here was forbidden. This argument plainly presents a substantial question.

A. The Due Process Challenge Was Squarely Raised In The Defendant's Motion To Dismiss The Indictment

The government's assertion that "the defendant will raise his due process argument for the first time on appeal" (Opp. 6) need not long detain the Court. The defendant's motion to dismiss the indictment specifically argued that the indictment failed to state an offense because the terms "generally" and "strict" were not sufficiently precise to comport with due process. See Dkt. 134 at 29-30. Indeed, the motion specifically cited and discussed at length *United States* v. *Matthews*, 787 F.2d 38, 49 (2d Cir. 1986), which (as the motion explained) holds that "'[w]hen a person of ordinary intelligence has not received fair notice that his contemplated conduct is forbidden, prosecution for such conduct deprives him of due process.'" Dkt. 134 at 30 (quoting *Matthews*, 787 F.2d at 49). The motion then argued that "the indictment in this case is even more egregious than that at issue in

Matthews." *Ibid*; see also *id.* at 39 ("[O]rdinary people have no expectation that behavior that, at most, would be a violation of internal business policies and guidelines for trained accountants to make accounting judgments would subject them to criminal liability.") (citing *Matthews*, 787 F.2d at 48). Accordingly, the government cannot feign surprise that its theory of prosecution will be subject to appeal on due process grounds.

B. The Government Mischaracterizes Our Argument And Then Elides The Essential Distinction Between Facial And As-Applied Constitutional Challenges

The government contends that there is no due process problem here because "it is well-established that a conviction for securities fraud, mail fraud and wire fraud may be premised on the making of a false statement with the intent to defraud." Opp. 7. The government further claims that Stinn's due process challenge is merely a matter of whether the government's proof was sufficient. *Id.* 8. Not so. Our motion did not question the sufficiency of the government's evidence; to the contrary, it argued quite clearly that the government's theories were legally invalid because they were premised on insolubly ambiguous terms. Bail Motion 4-9. Indeed, the problem with the failure to provide Stinn with fair notice is not that the government is necessarily short on proof; rather, it is that the government could point to almost *anything* as evidence that Friedman's did not "generally" charge-off at 120 days or was not "strict" with its credit application guidelines.

The government also misapprehends—or hopes to obscure—the fundamental distinction between *facial* and *as-applied* challenges to a statute. See *Brooklyn Legal Servs. Corp. B* v. *Legal Servs. Corp.*, 462 F.3d 219, 228 (2d Cir. 2006) ("Facial and as-applied challenges differ in *the extent to which* the invalidity of a statute need be demonstrated (facial, in all applications; as-applied, in a personal application)."). We do not assert that the statutes at issue here are facially invalid—*i.e.*, that they are *never* capable of providing defendants with fair notice of prohibited conduct. Rather,

we have argued that those statutes are invalid as applied to the particular alleged statements at issue here—*i.e.*, that Stinn lacked constitutionally adequate notice that he could be held criminally liable for making statements later deemed inconsistent with hopelessly ambiguous benchmarks.

For that reason, the government's reliance on *United States* v. *Williams*, 128 S. Ct. 1830 (2008), is entirely misplaced. That case considered a "*facial*" challenge to a federal criminal statute. *Id.* at 1840 (emphasis added); see also *id.* at 1836, 1838, 1844, 1845. It did not purport to hold—as the government claims—that *as-applied* challenges turn simply on whether "the statutory requirements" are capable of sufficiently definite application in some (or even most) instances. The government's confusion notwithstanding, the Second Circuit plainly understands that a criminal statute might be facially valid but constitutionally infirm in particular applications. See, *e.g.*, *United States* v. *Hassan*, 542 F.3d 968, 980 (2d Cir. 2008) ("[W]hen a statute is precise on its face *yet latently vague*, the danger of persons being caught unaware of the criminality of their conduct is high.") (emphasis added) (quoting *United States* v. *Caseer*, 399 F.3d 828, 836 (6th Cir. 2005)); *United States* v. *Brennan*, 183 F.3d 139, 149-50 (2d Cir. 1999) (observing that mail fraud prosecution would be constitutionally suspect on due process grounds when "based on nondisclosures to sophisticated corporations in arms-length contractual insurance relationships"). And there is nothing "novel" (Opp. 8) about a court's overturning a conviction on the ground that the defendant lacked constitutionally sufficient notice that his particular conduct was criminal. See, *e.g.*, *Bouie* v. *City of Columbia*, 378 U.S. 347, 351-57 (1964) (overturning conviction based on insufficient notice that "narrow and precise" trespass statute applied to defendants' conduct); *Wright* v. *Georgia*, 373 U.S. 284, 293 (1963) (overturning conviction based on insufficient notice that breach-of-peace statute applied to defendants' conduct); *United States* v. *Poindexter*, 951 F.2d 369, 377-86 (D.C. Cir. 1991) (overturning conviction based on insufficient notice that statute

criminalizing "corruptly . . . influenc[ing], obstruct[ing], or imped[ing]" congressional investigation applied to defendant's conduct); *United States* v. *Salisbury*, 983 F.2d 1369, 1378-80 (6th Cir. 1993) (overturning conviction based on insufficient notice that statute prohibiting voting multiple times applied to defendant's conduct).

C. The Government Does Not Even Attempt To Explain How Stinn Received "Fair Notice" That His Conduct Was Prohibited

It is readily apparent why the government hopes to dodge the due process question: The government cannot explain how the legal theory it pressed here provided an intelligible standard to the defendant and to the jury.

As we explained in our motion (at 3-9), the government's case rested principally on two alleged misrepresentations. The first was that Friedman's "*generally*" charged-off accounts at 120 days; the second was that Friedman's followed "*strict*" credit guidelines. As we also explained in our motion, however, the pivotal language was insolubly ambiguous. How frequent is "generally"? How rigid is "strict"? How could Stinn have predicted how the government—or, more to the point, 12 jurors—would interpret those terms years later? The government does not even begin to answer these questions.

Nor does the government confront any of the undisputed evidence described in our motion, all of which illustrates why the terms in question lack the specificity and precision that due process requires. For example, Ernst & Young knew that Friedman's charge-off dates varied widely beyond 120 days—at least two months each year there was no charge-off at all, and in any particular fiscal month accounts eligible for charge-off would range from 120-days to approximately 145-days delinquent. Yet the term "generally" was sufficiently indefinite that Ernst & Young had no quarrel with the company's financial statements. Likewise, Ernst & Young was fully aware that Friedman's

financial statements announced that "[c]redit sales *in excess* of the limits determined by the scoring model" were approved if authorized by a supervisor. Ex. 16 (2002 10-K) at F-6 (emphasis added). But the term "strict" was so capacious that Ernst & Young levied no objection. Tellingly, the government offers no response to this evidence. It is *at least* fairly debatable whether the Second Circuit will find the government's silence persuasive.

II. The Government's Efforts To Defend The Conscious Avoidance Instruction And To Claim That It Was Harmless Are Unavailing

The government insists that "this was the 'paradigmatic case' for giving a conscious avoidance charge" (Opp. 10), but the arguments and evidence offered in support of that assertion reveal the government's fundamental misunderstanding of the law. The mere fact a supervisor denies knowledge of fraud committed by his subordinates does not justify a conscious avoidance charge; to the contrary, it is well settled that a conscious avoidance charge *cannot* be given simply because a person "must have known" about wrongdoing. The charge is appropriate only where there is sufficient evidence that the defendant has deliberately *avoided* acquiring direct knowledge of fraud. For that reason, the government's recitation of evidence that purports to show that Stinn *actually knew* that Friedman's financial statements were false misses the mark. The government's cursory claim that any error was harmless simply ignores the elephant in this particular courtroom: The government's star witness, Victor Suglia, openly admitted that he perpetrated multiple frauds at Friedman's without Stinn's knowledge. Under that peculiar circumstance, surely it is fairly debatable whether inviting the jury to convict even if the jury disbelieved the proof of actual knowledge was harmless beyond a reasonable doubt.

A. None Of The Evidence Offered By The Government Provides A Proper Legal Foundation For A Conscious Avoidance Instruction

The government first contends that *United States* v. *Walker*, 191 F.3d 326, 337 (2d Cir. 1999), holds that a conscious avoidance charge is warranted where "the defendant's primary defense was that the responsibility for the conduct underlying the unlawful activity rested solely with his employees and that he knew nothing of their wrongdoing." Opp. 10. *Walker* cannot possibly bear such weight. In that case, defendant Walker was an attorney who had been charged with submitting hundreds of false immigration forms on behalf of his clients. In addition to evidence of Walker's actual knowledge of the fraud, the government introduced evidence establishing that Walker told his clients to sign blank immigration forms; directed his employees to fill in the documents (usually including descriptions of political persecution in support of an asylum request); and then reviewed many of the forms before submission to the INS. *Id.* at 331-32. At it turned out, the applications recycled one of a handful of stories of persecution—sometimes "word-for-word"—depending on the applicant's country of origin. *Id.* at 331.

In upholding the giving of a conscious avoidance instruction, the *Walker* court relied specifically on evidence showing that Walker *deliberately avoided* knowledge that the forms were false. It specifically pointed to the fact that he "instructed [clients] to sign blank application forms"; to the fact that Walker "review[ed] the completed asylum applications," which contained "nearly identical, boilerplate stories of persecution"; and to the fact that Walker actively "solicit[ed] a group of people [at a coffeehouse] to apply for work permits." *Id.* at 333. All of that was evidence that Walker intentionally turned a blind eye to whether the stories of persecution were true. The government thus grossly mischaracterizes that case to suggest that it approved the instruction simply

because the defendant claimed that wrongdoing was perpetrated by his subordinates without his knowledge.

The defense did not "open[] the door" to a conscious avoidance charge (Opp. 10) by claiming that Suglia and Mauro were responsible for any fraud in Friedman's financial statements. Were it otherwise, a supervisor would *always* be subject to a conscious avoidance charge if his subordinates were involved in fraud. Nor, as the government appears to contend, may a conscious avoidance instruction "enable conviction upon the basis of constructive notice"—*i.e.*, simply because "a reasonable man who knew what [the defendant] knew would have inquired further and discovered the illegal activity." *United States* v. *Giovanetti*, 919 F.2d 1223, 1227-28 (7th Cir. 1990). As Judge Posner there explained, 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.

Id. at 1228. The fact that Stinn denied knowing of any fraud committed by his subordinates simply does not mean that Stinn *deliberately* avoided acquiring knowledge of their wrongdoing. See *United States* v. *Hopkins*, 53 F.3d 533, 542 (2d Cir. 1995) (conscious avoidance charge appropriate where, "on 25-30 occasions," defendant responded to presentation of doctored water samples by saying "'I know nothing, I hear nothing.'").

For similar reasons, the government's recitation of evidence purporting to show "that the defendant was confronted with evidence of the falsity of Friedman's financials" (Opp. 11) cannot justify the conscious avoidance charge. The government's bullet points allegedly show that Stinn had *actual knowledge* of fraud.[1] The Second Circuit has squarely held, however, that "a conscious

[1] For example, the government claims that exception reports provided to Stinn actually "showed that Friedman's had

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.'" *United States* v. *Nektalov*, 461 F.3d 309, 316 (2d Cir. 2006) (emphasis added). The government's claim that Stinn was "confronted" with the fraud is thus legally inadequate to support the conscious avoidance charge.

The government urges that a conscious avoidance charge was "independently" warranted in light of "the sheer magnitude, duration, and number of transactions comprising the fraud, all of which occurred while the defendant was Friedman's Chief Executive Officer." Opp. 12. The government thus unabashedly claims that knowledge should be imputed to a CEO where a large fraud happens on his watch. But that is precisely what the conscious avoidance charge *cannot* do. "If the choice is simply between a version of the facts in which the defendant had actual knowledge, and one in which the defendant was no more than negligent or stupid, the deliberate ignorance instruction is inappropriate." *United States* v. *Lara-Velasquez*, 919 F.2d 946, 951 (5th Cir. 1990).

Contrary to the government's assertion (Opp. 12), *United States* v. *Svoboda*, 347 F.3d 471 (2d Cir. 2003), did not purport to authorize a conscious-avoidance charge whenever circumstances are deemed "overwhelmingly suspicious." Read with even the slightest attention to context, the quotation does nothing more than restate the long-settled standard that the instruction is appropriate only where the defendant "deliberately avoided confirming" the fact in question. *Id.* at 480. Accordingly, the *Svoboda* court upheld the conscious-avoidance charge because: (1) the defendant "knew that [his co-conspirator] was a credit officer at [the bank] and would thus be privy to confidential financial information"; (2) "the timing of [the defendant's] trades was suspicious, [with some] occurr[ing] as little as a day before a tender offer announcement"; and (3) the defendant

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significant noncompliance to [*sic*] its credit granting policies"; that Stinn "was informed on the weekly executive calls that . . . Friedman's executives directed the sales staff to disregard the [credit] guidelines"; that "'scooping' . . . was discussed openly on the weekly executive calls in which the defendant participated"; and that "the defendant was kept up to speed with respect to the aging and charge off of the x-files." Opp. 11.

"realized large returns, up to 400%, on trades based on [his co-conspirator's] advice." *Id.* at 480-81. That is a far cry from holding—as the government contends—that the instruction is appropriate simply because a significant fraud has occurred during the defendant's tenure as CEO.

Finally, the government asserts that it was entitled to seek a conscious avoidance instruction even though it also sought to prove that Stinn had actual knowledge of the accounting fraud. Opp. 13. We have never argued otherwise. See Bail Motion at 11 ("The government is free to put on *evidence* of both actual knowledge and conscious avoidance, but it cannot merely *argue* in the alternative that the defendant must have known about alleged wrongdoing."). Our point, instead, is that proof of actual knowledge *is not the same thing* as proof of conscious avoidance. And it is no accident that the government refrained from trying to prove conscious avoidance—because evidence (if any) that Stinn deliberately *avoided* guilty knowledge would have fatally undermined the testimony of the government's star witness, who claimed he personally apprised Stinn of the fraud. The government's mischaracterization of our argument cannot obscure its failure to adduce legitimate evidence of conscious avoidance.

B. The Government Fails To Show That The Error Was Harmless, Much Less Harmless Beyond A Reasonable Doubt

The government does not dispute that, if it was error to give the conscious avoidance instruction, the government must prove that the error was harmless beyond a reasonable doubt. See Bail Motion at 13 (citing *United States* v. *Barnhart*, 979 F.2d 647, 652 (8th Cir. 1992)). The government's passing attempt to meet that heavy burden, however, is woefully inadequate.

The government does not deny that its proof that Stinn had actual knowledge of fraud rested principally on the testimony of Victor Suglia. Nor does the government dispute that Suglia's credibility was subject to a sustained attack at trial. More to the point, the government does not (and

cannot) question the fact that Suglia openly admitted that he had committed two separate frauds at Friedman's without Stinn's knowledge. In the Capitol Factors fraud, Suglia helped a friend steal millions from a third party by falsifying Friedman's invoices. Suglia also admitted that in 2000, well before the alleged conspiracy with Stinn began, he ordered subordinates to manually re-age accounts (regardless of whether a payment had been received) to improve Friedman's reported financial results. It is undisputed that Suglia did all of this without Stinn's knowledge. The government nonetheless insists that an erroneous conscious avoidance instruction was harmless, but it utterly fails to confront the fact that the linchpin of its actual-knowledge case was the testimony of a man who had twice previously committed fraud at Friedman's and concealed it from Stinn—not to mention the fact that Suglia offered to cooperate only after being caught red-handed in one of those schemes.

Unable to rehabilitate Suglia's testimony, the government claims simply that it did not rely "exclusively" on him to prove actual knowledge. Opp. 14. Even assuming that is true, the government has the harmless error test exactly backwards. The government must prove that an error was harmless beyond a reasonable doubt, not that there was *some* other evidence upon which its theory rested. See *United States* v. *Ferrarini*, 219 F.3d 145, 154 (2d Cir. 2000) (erroneous conscious avoidance instruction harmless only if there is "*overwhelming* evidence" of actual knowledge) (emphasis added) (internal quotation marks omitted). The government's conclusory reference to the Court's statement in denying the defendant's Rule 29 motion fares no better: The standard for a Rule 29 motion is whether there is sufficient evidence to support a verdict, not whether an error is harmless beyond a reasonable doubt. It is at least fairly debatable whether the Second Circuit would find this error harmless beyond a reasonable doubt.

III. The Government's Arguments Regarding The Court's Rulings During Jury Deliberations Are Erroneous And Fail To Account For The Unique Circumstances Of This Case

The government's attempts to defend this Court's rulings during jury deliberations are equally unconvincing. Stinn has raised substantial questions regarding all three issues from this "critical stage," *United States* v. *Ruggiero*, 928 F.2d 1289, 1299 (2d Cir. 1991), of the trial.

A. The Government Incorrectly Asserts That The *Allen* Charge Was Neither Unduly Coercive Nor Prejudicial

The government contends that Stinn was not prejudiced by the Court's *Allen* charge because the holdout juror (Juror No. 10) was ultimately dismissed from the jury and, in any event, the charge itself was not coercive. Opp. 24. Both arguments fail.

First, the government errs in asserting that *Ruggiero* is "strikingly similar" to this case. Opp. 23. In *Ruggiero*, the trial court did *not* know before either of its two *Allen* charges that there was a holdout juror for acquittal. The jury's notes had stated only that "[o]ne juror refuses to vote" and that "a juror refuses to discuss the case at all." 928 F.2d at 1293; see also *id*. at 1294 n.4 ("no note had been received to indicate that the jury was deadlocked"). Even during the court's *voir dire* of the individual juror referenced in the notes, that juror told the court that "his fellow jurors had been 'trying to persuade me to vote *one way or the other*.'" *Id.* at 1294 (emphasis added). There is simply no comparison between the circumstances in *Ruggiero* and the situation here involving Juror No. 10, who had been definitively identified in open court as the single holdout vote for acquittal before the *Allen* charge.

Nor is it true, as it was in *Ruggiero*, that the coercive effect of the *Allen* charge was "rendered irrelevant" by the dismissal of the lone holdout juror from the panel. Opp. 24 (quoting 928 F.2d at 1299-1300). Indeed, the court in *Ruggiero* 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 impropriety of Juror No. 10's discharge is explained in Section III.B below. In addition, the jury's subsequent deliberations were prejudicially compromised because, under the unusual circumstances of this case, the *Allen* charge had the impermissible effect of reinforcing the majority's views of guilt. *Cf. Perez* v. *Marshall*, 119 F.3d 1422, 1429 (9th Cir. 1997) (Nelson, J., dissenting).

Contrary to the government's assertions (Opp. 26-27), the record confirms that the *Allen* charge was unduly coercive not only with respect to Juror No. 10, but also with respect to the 11 jurors in the majority. After the first day of deliberations, the jury signaled that it suffered from serious conflicts. The majority jurors focused their criticism on Juror No. 10, including her views about the defendant's guilt. See, *e.g.*, Tr. 4656-57 (Juror No. 10 explaining to the Court: "I told the jury, listen, I have a doubt and I spoke," which caused the other jurors to "start[] screaming with [*sic*] me, [and] said I want you out of the jury"). Yet the Court did not directly address the majority's attacks on Juror No. 10. Instead, it first delivered a supplemental charge instructing the jurors, in pertinent part, to "not hesitate" to change their opinions if they became convinced another opinion was correct. Tr. 4582. Then, after the reading of the partial verdict and Juror No. 10's repudiation of that verdict in open court, and after the majority's note accusing Juror No. 10 of having "questionable" integrity, the Court delivered the *Allen* charge. The decision to deliver an *Allen* charge at that point likely reinforced the majority's confidence in the merits of its position.

The sequence of events following the *Allen* charge demonstrates that the charge *in fact* had the impermissible effect of reinforcing the majority's view regarding Stinn's guilt. After the charge, the majority sent a note accusing Juror No. 10 of speaking with an attorney to determine which of

the charges were the most serious, and stated that "[t]he rest of the jury feels any further deliberations are futile." Tr. 4645 (Ct. Ex. 17). As it quickly turned out, the note was false: Juror No. 10 had neither spoken with an attorney nor sought to determine the seriousness of the charges against Stinn. Nevertheless, the majority obtained the exact result it had sought—Juror No. 10 was removed from the jury.

Following substitution of the alternate juror, the reconstituted jury returned a verdict in less than three hours. The government's attempt to spin this fact in its favor (Opp. 25) is meritless. The government cannot dispute that this had been a long and complex trial, and that there had been substantial deliberations prior to Juror No. 10's dismissal. Indeed, as the government itself points out (Opp. 15-16), the original jury had asked for exhibits and the reading back of testimony several times. The brevity of the final deliberation period only further demonstrates that Stinn was ultimately prejudiced by the Court's *Allen* charge.

The government's second argument—that the language of the *Allen* charge itself was not coercive—misses the mark entirely. It is well established that even a "mild" *Allen* charge can be impermissibly coercive depending on the circumstances. *Lowenfield* v. *Phelps*, 484 U.S. 231, 237 (1988) (*Allen* charge must be considered "in its context and under all the circumstances"); see also *United States* v. *Williams*, 547 F.3d 1187, 1203 (9th Cir. 2008). In this case, under these specific circumstances, virtually *any* formulation of an *Allen* charge would have been unduly coercive.[2]

[2] The government acknowledges that Stinn would prevail on this issue under the Ninth Circuit's decision in *United States* v. *Williams*, 547 F.3d 1187 (9th Cir. 2008). See 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 insists, however, that *Williams* is "directly contrary" to the Second Circuit's decision in *United States* v. *Robinson*, 560 F.2d 507 (2d Cir. 1977). Opp. 27. As explained in Stinn's opening motion (at 20-21), *Robinson* is not on point here. More important for present purposes, it is clearly a substantial question whether the Second Circuit would read *Robinson* as the government urges, thus creating a stark split among the circuits. *See Randell*, 761 F.2d at 125 (stating that a "substantial" question is "one that very well could be decided the other way"); *United States v. Handy*, 761 F.2d 1279, 1281 (9th Cir. 1985) ("A question may nevertheless be 'substantial' . . . if it is novel, or if there is a contrariety of views concerning it in the several circuits").

Finally, the government claims (Opp. 26) that there is "no evidence" that, before the Court's *Allen* charge, Juror No. 10 had been coerced to vote against her beliefs. The fact that Juror No. 10 recanted her verdict in open court belies that assertion. Moreover, the government misstates the record on this issue: The Court expressly stated that, although it was not making a finding that Juror No. 10 had been coerced, it also would not find that she had *not* been coerced. Tr. 4627. Given how contentious deliberations had been up to the time of the *Allen* charge, the government cannot fairly claim that there was "no evidence" of coercion here.[3]

B. The Government's Proffered Justifications For The Holdout Juror's Dismissal Are Both Irrelevant And Insufficient

The government concedes that dismissal of a holdout juror must be subject to "meticulous scrutiny." Opp. 31. However, it offers no persuasive response to Stinn's argument that, before dismissing a holdout juror for "good cause," a court must find that the juror cannot engage in deliberations *going forward*. See *United States* v. *Thomas*, 116 F.3d 606, 621 (2d Cir. 1997) ("the presiding judge can make appropriate findings and establish whether a juror is biased or otherwise unable to serve"); *cf. United States* v. *Baker*, 262 F.3d 124, 132 (2d Cir. 2001) (affirming dismissal of holdout juror who herself told the judge she had made up her mind in advance of deliberations and *thereafter* refused to deliberate). Even the cases cited by the government (Opp. 29) acknowledge such a requirement. See, *e.g.*, *Ruggiero*, 928 F.2d at 1300 ("the judge must investigate the matter to determine whether the juror's ability to perform her duty impartially has been adversely affected").

It is, at the very least, fairly debatable that the Court's findings did not meet this standard, and that the record does not support such a finding in any event. For example, the government

[3] By contrast, there *is* no evidence supporting the *government's* suggestion (Opp. 27) that Juror No. 10 changed her position from "guilty" to "not guilty" only because she had spoken with her sister.

contends that Juror No. 10 could not be rehabilitated because she had already "refused to discuss the case for two days in clear violation of the charge of the Court and the supplemental instruction." Opp. 29-30. The Court, however, never found that Juror No. 10 refused to deliberate. And nowhere in the record is it established that the jury's previous notes referred to Juror No. 10. Even assuming that the jury's notes did refer to Juror No. 10, there is no reason to believe that the majority accurately characterized Juror No. 10's conduct. It is scarcely surprising that 11 jurors voting to convict might accuse the lone holdout for acquittal of refusing to deliberate. Indeed, we know for certain that the majority mischaracterized Juror No. 10's conduct in a later jury note. Accordingly, the government's proffered "refusal to deliberate" rationale simply cannot—and did not—constitute "good cause" for Juror No. 10's dismissal.

The government also claims that "the Court had concerns that Juror [No.] 10 was suffering from a medical condition that may have been preventing her from following the Court's instructions." Opp. 30. This proposed explanation is surprising, because the Court never questioned Juror No. 10 on her health issues, nor made reference to them when deciding to dismiss her.

Finally, the government claims that Juror No. 10 "repeatedly exited the jury room" during deliberations (Opp. 30), and suggests that this provides another possible reason for the Court's conclusion that Juror No. 10 could not be rehabilitated. Here, too, the government misses the mark—that was the not the Court's articulated reason for discharging Juror No. 10. And, it must be added, at least one other juror left the jury room during these contentious deliberations as well. See Tr. 4611.

Once all of the government's speculative *post hoc* explanations for dismissal have been set aside, the only relevant conduct relates to Juror No. 10 speaking with her sister (in the abstract) about the definitions of "fraud" and "conspiracy." As explained in Stinn's opening brief (at 22-25),

under the unusual circumstances of this case, such conduct—in the absence of a clear showing that Juror No. 10 lacked the "ability to perform her duty impartially" going forward in deliberations (*Ruggiero*, 928 F.2d at 1300)—does not constitute "good cause" for dismissal.

C. The Government Mischaracterizes The Record By Claiming That The Defendant Failed To Challenge Substitution Of The Alternate Juror; In Addition, Substitution Was Improperly Coercive

The government's final argument is that the defense consented to substitution of the alternate juror and therefore the Court's decision should be subject to plain error review. Opp. at 32. That is most certainly *not* the case. 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 Tr. 4667-68; see also Tr. 4678-79 (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.").

Nor does it matter that the Court had *authority* to replace Juror No. 10 (Opp. 33) with an alternate. Having authority is not the same thing as discharging that authority appropriately under the circumstances. In this case, substitution of the alternate juror was mistaken because it placed the alternate in an intolerably coercive position. The government does not contend otherwise. In particular, the government does not dispute what the alternate juror witnessed in open court (*i.e.*, open conflict among jurors, Juror No. 10's dissent from the partial verdict, and Juror No. 10's dismissal), and what the alternate did *not* see (*i.e.*, the final jury note accusing Juror No. 10 of speaking with an attorney). The Court's decision to seat an alternate juror after dismissing Juror No. 10, instead of declaring the mistrial requested by the defense, ran too great a risk of coercing the guilty verdict and presents another "fairly debatable" issue for appeal.

CONCLUSION

For the reasons stated above, as well as those stated in defendant's opening motion, defendant Bradley Stinn respectfully requests that the Court grant his motion for release on conditions pending appeal.

Dated: January 26, 2009

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I, Jennifer S. Windom, declare under penalty of perjury that:

DEFENDANT BRADLEY J. STINN'S REPLY MEMORANDUM IN SUPPORT OF HIS MOTION FOR RELEASE PENDING APPEAL

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