05-2630-cr

To Be Argued By:
WILLIAM J. NARDINI

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 05-2630-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

TRIUMPH CAPITAL GROUP, INC., FREDERICK W. McCARTHY, CHARLES B. SPADONI, LISA A. THIESFIELD,
Defendants,

BEN F. ANDREWS,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

STATUTES

RULES

STATEMENT OF JURISDICTION

The district court (Ellen Bree Burns, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b), and this Court has jurisdiction over the defendant's appeal of his conviction pursuant to 28 U.S.C. § 1291. The defendant does not appeal his sentence.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether, viewed in the light most favorable to the Government, there was sufficient evidence that the defendant knew that Paul Silvester, the Treasurer of the State of Connecticut, was influenced to invest state pension funds with the Landmark fund by either (a) the defendant's receipt of fees from the deal; (b) co-conspirator Christopher Stack's receipt of fees from the deal; or (c) Silvester's expectation that he would receive a portion of the fees from the deal.

2. Whether the district court manifestly abused its discretion in denying the defendant's unprecedented request that the Government disclose and obtain pre-approval of every line of questioning it intended to pursue on cross-examination of the defendant, involving specific instances of conduct probative of untruthfulness pursuant to Fed. R. Evid. 608(b).

3. Whether the defendant suffered any Sixth Amendment violation, where the district court initially ordered him not to discuss his testimony with defense counsel during an evening recess in the middle of his cross-examination; where that order was rescinded by the court, on the Government's motion, within three hours of its issuance; and where the defendant took advantage of the court's offer to permit him to consult with counsel as long as he desired the following morning before resuming the stand.

4. Whether, viewed in the light most favorable to the Government, there was sufficient evidence to conclude that the defendant had falsely told government agents that he had not discussed with Paul Silvester a corrupt fee-splitting arrangement that the defendant had entered into with co-conspirator Christopher Stack.

5. Whether the district court manifestly abused its discretion by refusing to compel the Government to immunize witnesses who invoked their Fifth Amendment privilege, or by admitting evidence relating to what these non-immunized witnesses had been told by other, testifying witnesses.

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Preliminary Statement

Before this trial, the public knew the defendant, Ben Andrews, only as a prominent Connecticut politician and a longtime leader of the state NAACP. The jury in this

case saw a different side of Ben Andrews, in a lengthy trial that exposed his corrupt relationship with the former Treasurer of the State of Connecticut, Paul Silvester.

The scheme was simple: Silvester used his absolute control over the investment of state pension funds for the benefit of himself, his friends, and his political allies. In the spring of 1998, Silvester and Andrews both decided to run for statewide office on the Republican ticket: Silvester to retain his job as Treasurer, and Andrews to become Secretary of State. At about that time, Silvester decided to place $100 million in state pension funds with an investment firm called Landmark, and arranged for Landmark to award a lucrative $1 million contract to defendant Andrews in connection with the deal. Because Silvester had already decided to do the deal, however, Andrews did not need to do anything to earn his fee. After Silvester set up Andrews' sham consulting contract, Andrews inquired as to how Silvester wanted his "share." Shortly thereafter, Silvester instructed Andrews to split his million-dollar fee evenly with a lawyer named Christopher Stack, who was close to the Treasurer. Andrews readily agreed, and hastened to have the fee-split agreement memorialized the following day. Silvester invested the $100 million. Stack and Silvester, it turned out, had a side agreement whereby they would share any fees Stack earned from state pension investments.

In November 1998, both Silvester and Andrews lost their electoral bids. Within days of the loss, Andrews went to the lame-duck Silvester to see whether he would place more state pension funds with Landmark. After

confirming that the fee-split with Stack was still in place, Silvester readily agreed to invest another $50 million with Landmark.

In the earliest stages of the investigation, Stack anonymously approached the Government and offered to reveal the Treasurer's corrupt arrangements in exchange for immunity. Shortly after learning that Stack was cooperating with the Government, Silvester admitted his wrongdoing; pleaded guilty to various corruption charges (including the transactions at issue in the present case); and agreed to cooperate with the Government. Silvester and Stack were the primary witnesses on behalf of the Government at trial. The defendant testified on his own behalf as well.

The jury ultimately convicted the defendant on all but two counts, including various bribery, fraud, money-laundering, and false-statement charges. He was acquitted only on a witness-tampering charge, and one mail-fraud count that involved the mailing of a marginally relevant letter. In essence, the jury must have credited Silvester and Stack's testimony over that of Andrews.

On appeal, the defendant raises a number of challenges to his conviction (though not to his 30-month sentence). He claims that there was insufficient evidence to support the corruption and false-statement charges; that the district court improperly refused to pre-screen all of the Government's cross-examination of the defendant pursuant to Fed. R. Evid. 608(b); that the district court violated his Sixth Amendment right to counsel when it

ordered him not to discuss his testimony with his attorney during an overnight recess during his cross-examination, but rescinded the order within three hours and afforded him an unlimited opportunity to consult with his lawyer before resuming the stand; and that the district court violated his rights by refusing to immunize two witnesses who had invoked their Fifth Amendment privilege against self-incrimination, despite his failure to demonstrate that the Government had acted in bad faith in declining to immunize them or that the witnesses' testimony would be exculpatory. For the reasons that follow, all of his claims are meritless and his convictions should be affirmed in all respects.

Statement of the Case

On October 11, 2000, a federal grand jury sitting in the District of Connecticut returned a 25-count indictment, charging the defendant and others with a variety of crimes involving Paul Silvester. JA9[1] (docket entry 1).

On January 9, 2001, the grand jury returned a 24-count Superseding Indictment against the defendant and others. JA 11 (docket entry 56), JA 53-97A (Superseding

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[1] Citations are as follows:

JA: Joint Appendix filed by defendant

GA: Government Appendix

[date] Tr. [page]: Trial transcript not reproduced in appendix

Indictment). The defendant was named in the following counts:

Count 1: Racketeering, 18 U.S.C. § 1962(c)

Count 2: Racketeering Conspiracy, 18 U.S.C. § 1962(d)

Count 3: Theft/Bribery Concerning Programs Receiving Federal Funds, 18 U.S.C. §§ 666(a)(1)(B) and 2

Counts 4-6: Mail/Wire Fraud/Theft of Honest Services, 18 U.S.C. §§ 1341, 1343, 1346, and 2

Count 7: Theft/Bribery Concerning Programs Receiving Federal Funds, 18 U.S.C. §§ 666(a)(2) and 2

Counts 8-10: Mail Fraud/Theft of Honest Services, 18 U.S.C. §§ 1341, 1346, and 2

Count 11: Conspiracy to Money Launder, 18 U.S.C. § 1956(h)

Count 12: False Statement, 18 U.S.C. § 1001

Count 13: Witness Tampering, 18 U.S.C. § 1512(b)(1)

Counts 3-6 concerned Silvester's initial investment of $100 million with Landmark in mid-1998, and the related $1 million fee awarded to Andrews and Stack. Counts 7-10 related to the investment of an additional $50 million

after the November 1998 election, together with the $500,000 fee due to Andrews and Stack

The case was eventually assigned to Senior United States District Judge Ellen Bree Burns. JA 34 (docket entry 492). For reasons unrelated to defendant Andrews, Judge Burns eventually severed the case into two groups of defendants. The first group, including defendants Charles Spadoni and Triumph Capital Group, Inc., went to trial from June 13 through July 16, 2003. On July 16, 2003, the jury returned guilty verdicts on most counts against those two defendants. On September 4, 2003, co-defendants Lisa Thiesfield and Frederick C. McCarthy pleaded guilty to Counts 18 and 19, respectively, involving violations of 18 U.S.C. § 666. On February 27, 2004, McCarthy was sentenced principally to a year and a day in prison, plus a $40,000 fine. On that same day, Triumph Capital was sentenced principally to a $4,000,000 fine. On March 4, 2004, Thiesfield was sentenced principally to 6 months of imprisonment, to be followed by 6 months of home confinement, plus a $50,000 fine. Spadoni is still awaiting sentencing.

Thus, by the time of the second trial, Andrews was the only remaining defendant. Prior to trial, the district court granted the Government's motion to dismiss Counts 1 and 2, involving racketeering and racketeering conspiracy to streamline the presentation of evidence. JA 43 (docket entries 758, 767). Jury trial commenced on October 14, 2003. JA 43. On October 29, 2003, the jury returned its verdict, finding the defendant guilty on Counts 3, 4, 5, 6,

7, 8, 9, 11, and 12, and not guilty on Counts 10 and 13. JA 46 (docket entry 796).

On July 7 and 9, 2004, the defendant filed written memoranda in support of a motion for acquittal or new trial. JA 48 (docket entries 884 and 890). On April 1, 2005, the district court issued a written ruling denying that motion both for untimeliness and on the merits. JA 50 (docket entry 914), JA 98-174 (written ruling).

On May 2 and 23, 2005, the district court held sentencing hearings. On May 23, 2005, the court sentenced the defendant to 30 months of imprisonment on each count, to be followed by three years of supervised release, all to run concurrently. The court also ordered the defendant to pay a fine of $250,000, plus $900 in special assessments. JA 52. Judgment was filed on May 25, 2005 and entered on May 27, 2005. JA 52 (docket entry 930), JA 174A-174C (judgment). An amended judgment was filed on June 1, 2005, and entered on June 9, 2005. JA 52 (docket entry 932), JA 174D (amended judgment).

The defendant filed a timely notice of appeal on the day sentence was pronounced, May 23, 2005. JA 52 (docket entry 931).

The defendant remains free on bond pending appeal. JA 52 (docket entry 926).

Statement of Facts

Based on the evidence presented at trial, the jury could reasonably have found the following facts to be true:

Paul Silvester began his tenure in state government working for then-Treasurer of the State of Connecticut Chris Burnham in the 1990s. GA121. At a certain point, Silvester became the Deputy Treasurer, and had primary responsibility for overseeing investment of pension funds maintained by the state for the benefit of numerous state and local employees. GA121-125, 163-64. Federal dollars provided a significant portion of these pension funds. By the 1990s, the pension funds under the Treasurer's control had grown to massive proportions – approximately $10 billion in 1995. GA126. The Treasurer had tremendous autonomy, and was able to decide unilaterally where to invest state pension funds.

In 1997, Treasurer Burnham left state government for the private sector, and then-Governor John Rowland[2] appointed Silvester to serve out the remaining year of Burnham's term as Treasurer. GA126. Due to a quirk of state law, Silvester took a significant pay cut upon his promotion, from about $100,000 to $50,000. GA24.

Unfortunately for the State of Connecticut, Silvester viewed his control of state pension funds as an opportunity to enrich himself as well as his friends and political allies.

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[2] Rowland later pleaded guilty to federal corruption charges unrelated to the Landmark deal.

Because there was little oversight of the state pension system, Silvester had an opportunity to steer hundreds of millions of dollars in investments toward firms which would provide lucrative consulting contracts to people he designated. GA132-36, 156-57. Silvester had a number of motives to do so. One was simple greed: He wanted some of these consulting fees to go into his own pocket, particularly in light of the pay cut he absorbed upon his promotion to Treasurer. Silvester also decided to run in for election as Treasurer in 1998, to retain the position to which he had been appointed. He needed cash to fuel his campaign, and diverted consulting fees were helpful in that regard. Silvester also kept an eye out for his friends and political allies, and in a number of instances was influenced to invest state pension funds with certain firms because those firms considered hiring certain of his associates, or paid them consulting fees.

Christopher Stack was the principal beneficiary of Silvester's corrupt largesse. Stack, a lawyer, had come to know Silvester during an earlier political campaign and while working on a number of state financial deals. GA175-77. For example, Silvester and Stack had worked closely together to create the state college-savings program known as the Connecticut Higher Education Trust (CHET), and Stack had created a firm which administered that new program. GA177-81.

While Silvester was still the Deputy Treasurer, with primary responsibility over pension investments, he and Stack entered into a corrupt agreement whereby Silvester agreed to steer consulting fees from state investments to

Stack, and Stack would hold a portion of those funds for Silvester after he got out of office. Both Silvester and Stack testified that they struck this deal at a pizza parlor in Rocky Hill, Connecticut. Silvester testified that Stack essentially offered to share with Silvester a portion of the fees that Stack would obtain if the state invested funds with a firm called Veritas. GA187-91. Stack testified that at that meeting, Silvester told him that the state would be investing in Veritas, calculated what Stack's fee from that deal would be, and said that he expected to be paid half of that fee. GA20. Although each man offered different details about the conversation, they both essentially testified that as a result of this meeting, Stack would share with Silvester a portion of the fees he received as a result of state pension investments. At a later point, Stack funneled cash to Silvester's campaign through Silvester's brother Mark Silvester, and paid $300,000 to Silvester's brother-in-law Peter Hirschl for Silvester's benefit.

Another friend and political ally of Silvester's was the defendant, Ben Andrews. Andrews was a prominent figure in Connecticut politics, and was the head of the state NAACP. GA197. Silvester knew Andrews through state politics. Moreover, Andrews' sister-in-law was Lisa Thiesfield. Thiesfield worked as Silvester's assistant at the State Treasurer's Office; she then served as his campaign manager; and he admitted having an intimate personal relationship with her as well. GA193-94. The relationship between Silvester and Andrews was one of great confidence. For example, after Burnham left office in 1997, there was some controversy over whether he should be succeeded by Burnham's chief of staff, who

reportedly had made racially derogatory comments. Silvester – then Burnham's Deputy Treasurer – conferred with Andrews about the matter; Andrews went to speak to the Governor; and Silvester was ultimately tapped for the job. GA195-99. Andrews eventually decided that he would run for the office of Secretary of State on the same statewide Republican ticket as Governor Rowland and Treasurer Silvester in the November 1998 election. GA193.

In the spring of 1998, Silvester decided to invest state pension money with a firm known as Landmark, and that Andrews should be paid as a "finder" as part of the deal. Landmark operated out of Simsbury, Connecticut, and had previously worked with the Treasurer's Office in a real-estate deal. Representatives of Landmark approached Silvester and the Treasurer's Office in April 1998, and proposed that he invest state pension money in one of its investment funds. GA202-04. Silvester was favorably disposed toward the deal, having been impressed by the firm in the real-estate transaction. GA200-02, 211. Silvester and other members of his Office met with people from Landmark about the deal. *Id.* Having decided that the Landmark fund would be a sound investment vehicle, Silvester decided that Andrews should be paid as a "finder" in connection with the deal. GA213. As Silvester explained, a "finder" is a person who puts together an investor and a money manager, and is typically paid a fee equivalent to one percent of the invested amount. GA172-73. Around this time, Andrews was working in the financial sector, having mixed success as a finder in promoting other investments to the State of Connecticut.

In the Landmark deal, of course, Andrews had not been a "finder" at all, because Silvester and Landmark had already been talking about the investment before Andrews came into the picture.

Nevertheless, Silvester decided for various reasons that he wanted Andrews to get paid fees as part of the Landmark deal. For one thing, he respected Andrews from their long political association together. GA215. From a more practical standpoint, he understood that Andrews needed to be in a sound financial situation to mount a successful electoral campaign alongside Silvester. GA216-17. To this end, Silvester called a lawyer named Jerome Wilson, who was a partner at the New York law firm then called Rogers & Wells, whom he had met through a prior deal involving an investment firm called Apollo. GA217-21, 238-41. Silvester asked Wilson (a former politician himself) to contact Landmark, and to arrange for Andrews to be hired as a finder, along the same lines that Wilson had been hired in Apollo. GA239-40. Silvester then met with Andrews, and instructed him to contact Wilson so that he could get hired as a finder by Landmark in connection with the Connecticut deal and potentially other deals. GA244-47.

In the days that followed, Andrews spoke with Silvester a number of times about the Landmark deal. GA247-53. Among other things, Andrews asked how he ought to be paid; Silvester advised that Andrews should ask for a percentage of the funds invested. GA246-48. Andrews also inquired of Silvester how much money the state would put into the Landmark fund, and Silvester

discussed a $100 million investment. GA248-49. The typical finder's fee at the time was 1%, meaning that Andrews was looking to receive a $1 million fee. GA248. During this same conversation, Andrews asked how Silvester wanted his share, and whether Silvester's boy in New York should be taken care of. GA249-50.

Silvester eventually decided that Andrews should split the Landmark fee with Stack. On June 2, 1998, all three men attended a marquee Republican fundraising event, the Prescott Bush Dinner, at the Aqua Turf Club in Southington, Connecticut. GA252-54. As the event wound down, Silvester asked Lisa Thiesfield to set up a meeting for him with Stack and Andrews after the dinner was over. GA256-57. They met at a nearby bar which the parties referred to as Sam the Clam, or the Clam Shack. GE 25; GA257-58.

At the bar, Paul Silvester told the defendant and Stack that he was tired of hearing them pitch other deals, and that he wanted them to evenly split the fee that would be paid by Landmark. GA258-59, GA332. Specifically, Silvester testified:

> Well, I told them that I didn't want them to be bringing me any more deals that for the time being that I wanted them to work out a way for them both to get paid on this one deal [Landmark] and for them to sit with Jerry Wilson and work it all out, and that would be the way I took care of both of them.

GA258. With respect to the fee, Silvester told Andrews and Stack to "split it evenly." GA332. Silvester explained to them, "here's the way you're going to be taken care of . . . ." GA259. Silvester did not want to get involved with the details of how Andrews and Stack would effectuate this fee split; he instructed them to "[s]it with Jerry Wilson and work it out." GA260-61, 306-07, 331-32. Before this conversation, of course, Silvester had already spoken with the defendant about his getting hired by Landmark. GA245-46, 261. Yet despite the fact that Silvester was now telling Andrews to give up half the $1 million fee to Stack, GA333. Andrews "was fine" with the proposal. GA261.

Christopher Stack corroborated Silvester's testimony. Stack confirmed that at the end of the Prescott Bush fundraiser, Lisa Thiesfield told him that Silvester wanted to meet him at a nearby bar. GA46. Stack went to the bar, and sat at a table in the back with Silvester and Andrews who were already engaged in conversation. GA49. Andrews was making little headway in convincing Silvester to invest funds with a firm named Smith Wiley, which was then employing Andrews. GA49-50. Silvester told Andrews, "I don't know why you're so anxious to have this done. You're going to be making fees off this other deal." GA50. Stack "had no idea what deal [Silvester] was talking about." GA50. Silvester then told Andrews that he wanted him "to split the fee" with Stack, and that he wanted Andrews "to instruct the New York lawyer to arrange that." GA50-51. Andrews had little response, and neither objected nor resisted the notion. GA51. While Silvester briefly excused himself from the

table, Stack apologetically told Andrews that he "had no idea really what was transpiring. I didn't ask for this. I didn't know anything about this." GA51. As parting instructions, Silvester told Andrews "to contact the New York lawyer and arrang[e] for this fee split." GA52. Stack never did any work in connection with the Landmark deal. GA81-82. As he explained:

> there was no need for me to do any consulting work. When I was introduced to this fund, Mr. Silvester indicated that he had already decided to make the investment, and there was really nothing for me to do.

GA82.

By 1:53 p.m. on June 3, 1998 – less than 24 hours after the Prescott Bush dinner – Rogers & Wells issued a letter memorializing an agreement whereby any fees on the Connecticut Landmark deal that were payable to Andrews would be disbursed half to Andrews personally, and half to a limited liability company set up by Stack (named "KCATS," which was Stack's name spelled backwards). The Government introduced a number of subsequently issued documents which contained minor amendments to this letter.

Some time after the June 2 meeting at the Clam Shack, Andrews brought up with Silvester the subject of the fee-split between Andrews and Stack. GA266, 329. Andrews told Silvester that "Chris [Stack] was being difficult to deal with," and that "Chris was being insistent that

documents be written in a certain way." GA266. Silvester could not remember precisely what Stack wanted to do with the documents, but had simply wanted not "to get involved [in] a detailed negotiation of how these documents were going to be written." GA266. At some point, however, Andrews suggested to Silvester "that the use of Mr. Stack in [the Landmark] transaction was going to cost [Silvester] more than it otherwise would." GA267.

When the defendant took the stand, he put a completely different spin on the conversation at the Clam Shack – yet he ultimately admitted most of the crucial facts. GA389-95. The defendant claimed that it was his idea to talk to Paul Silvester after the Prescott Bush dinner, and that they agreed to meet at a nearby bar. GA389-90. The defendant admitted that he got into an argument with Silvester in an effort to close a deal between the state and Andrews' firm, Smith Wiley. GA391. Andrews testified, "I was pressing him. I really needed to get it done." GA391. The defendant claimed that Silvester continued to resist until Stack told him to "let it go" and "do the deal" that Andrews was pressing. GA392. Silvester supposedly replied that if he was going to do the Smith Wiley deal, then Andrews was going to let Stack into "some of the deals around the country" that Andrews was going to do. GA393. According to Andrews, Stack said "Forget it, what he's saying. I don't want to do those. I'm satisfied with the Connecticut deal." GA394. Andrews testified that he then said, "we're still doing [the deal with Landmark]. Everything is fine. And Stack and I are going to meet tomorrow." GA394, 503-13. The defendant then

testified that the very next day over lunch, he and Stack consummated their fee split. GA519.[3]

On November 3, 1998, both Silvester and Andrews lost the election. GA278. Within days of their loss, Andrews came back to Silvester – now a lame duck – asking whether he would consider increasing the state pension fund's investment with Landmark. GA279; GE 8 (phone message from Ben Andrews to Stan Alfeld, the principal of Landmark, dated Nov. 12, 1998: "has good news from CT. $50 million more. Please call him home."). During this conversation, Silvester testified, "the issue of whether Mr. Stack would still be involved came up, and I suggested that he should still be involved." GA280. Silvester told Andrews that "they should just do the deal the way they did it the last time" – that is, split the fees "equally." GA280, 336-37. The new investment was to be $50 million. GA281. That meant a fee of $500,000, which

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[3] Despite the fact that Andrews and Stack formalized their division of the Landmark fee less than 24 hours after Silvester's instruction that they do so, Andrews insisted that the fee split had nothing to do with Silvester's demand at the bar. GA518-21. Andrews admitted that he met with Stack for lunch at 12:30 p.m., at which they finalized the details of their fee split, GA524-26. Andrews then called Jerome Wilson to get the deal in the works, GA528, and Wilson sent out a confirmatory fax by 1:53 p.m., 10/24 Tr. 93-95. Andrews insisted that the speed with which the fee split was consummated on June 3 had nothing to do with Silvester's demand the night before. 10/24 Tr. 95-96.

would be divided evenly between Andrews and Stack. *Id.* Silvester expected that money flowing to Stack would eventually help him as well, in line with their earlier arrangement at the Rocky Hill pizza parlor. GA281-82. Silvester testified that he was influenced to do the deal by the fact that Andrews and Stack were going to get a fee. GA282. He would not have done the deal if either of them were not going to be paid the fee. GA283, 337-39. Silvester admitted that he increased the state investment in Landmark "[b]ecause I knew my friends would be taken care of," and "I was feathering my own nest in the process." GA341.

SUMMARY OF ARGUMENT

1. There was ample evidence that the defendant was aware that Silvester was influenced to invest state pension funds with Landmark because (1) Andrews was going to receive fees from the deal, (2) Stack was going to receive a share of Andrews' fees from the deal, and (3) Silvester expected to receive a kickback. The jury was entitled to credit Silvester's testimony that Andrews himself manifested a belief that Silvester would personally profit from the deal, when he asked how Silvester wanted to receive his "share" of the fees, and suggested that Stack's involvement in the deal was going to "cost" Silvester more than it otherwise would. Moreover, there was ample proof that Silvester instructed Andrews to split his initial $1 million Landmark fee with Stack, that Andrew hastened to comply with Silvester's directive, and that Stack did nothing to advance the Landmark deal. Finally, Andrews himself did practically nothing to merit his massive

"consulting" fees. He had to understand that Silvester's intervention to get Andrews and Stack such a massive do-nothing contract at least partially motivated his decision to carry out the Landmark investment.

2. The defendant cites no case for his novel theory that the Government must obtain pre-clearance of every line of questioning it intends to pursue during the defendant's cross-examination pursuant to Fed. R. Evid. 608(b). Unlike Rule 404(b), there is no advance-notice provision contained in Rule 608(b). Moreover, it is undisputed that about a week before trial, the Government provided the defendant with a packet of materials it intended to use during the defendant's cross-examination. Because the defendant identifies only one area of questioning which was allegedly prejudicial, and because such questioning was properly admitted under Rule 608(b), his claim must fail.

3. The defendant was not deprived of his Sixth Amendment right to the assistance of counsel when the district court initially ordered that he refrain from discussing his testimony with his attorney during an overnight recess during his cross-examination, but rescinded that order during a conference call with all counsel about three hours later, out of a desire to avoid any potential appellate issues. The duration of the order was relatively brief. Moreover, the order was wholly proper because it was narrowly tailored to cover only discussions of the defendant's testimony, and the Supreme Court has held that a defendant has no Sixth Amendment right to discuss his testimony with his attorney while his testimony

is ongoing. Finally, because the district court offered to delay the commencement of trial the following morning so that the defendant could discuss his testimony with his lawyer as long as he wished prior to resuming the stand, the rescinded order at most delayed, but did not preclude, any hypothetically protected attorney-client communications.

4. There was sufficient evidence to support the jury's guilty verdict on Count 12, which charged the defendant with lying to federal agents about whether he had talked to Silvester about his fee-split arrangement with Stack. The indictment clearly charges that Andrews falsely denied having discussed the fact of the fee-split arrangement, and not merely that he denied discussing the logistics of how the fees would be paid. Likewise, Special Agent McTague clearly testified that Andrews denied having discussed not just the details of how the fees would be disbursed between Stack and Andrews, but also the very notion that Stack was to receive a portion of the Landmark consulting fee.

5. The Government's grant of immunity to Stack, and its refusal to immunize Wilson and Alfeld, did not violate the defendant's due process rights. The defendant has failed to prove, as required, that the Government conveyed immunity in a discriminatory manner to gain a tactical advantage, or that the non-immunized witnesses' testimony would be material, exculpatory, not cumulative, and otherwise unobtainable. Moreover, the admission of evidence relating to what the defendant and Silvester *said to* these non-immunized witnesses, did not deprive the

defendant of his right to confront witnesses, because, contrary to the defendant's claims, the admitted evidence did not involve statements between Wilson and Alfeld to which the testifying witnesses were not privy.

ARGUMENT

I. THERE WAS SUFFICIENT EVIDENCE THAT ANDREWS WAS AWARE THAT STATE TREASURER PAUL SILVESTER WAS AT LEAST PARTLY INFLUENCED TO INVEST STATE PENSION MONEY IN THE LANDMARK FUND BECAUSE ANDREWS, STACK AND/OR SILVESTER WAS GOING TO BENEFIT FINANCIALLY

A. Relevant Facts

The relevant facts are set forth in the Statement of Facts *supra*.

At the close of the Government's case, the defense orally moved for a judgment of acquittal, and the parties provided argument on the question. 10/20 Tr. 125-72. Counsel made several arguments. With respect to the § 666 charges in Counts 3 and 7, he argued that the Government had not proved (1) a jurisdictional nexus between the corrupt activities and federal funds, 10/20 Tr. 125-29; (2) that Silvester solicited a thing of value from Landmark, because there was no proof that Silvester had told Landmark that "if you take Ben Andrews on as a consultant, you'll get . . . this contract," 10/20 Tr. 131; or (3) that Silvester accepted a thing of value, because the

defense posited "that the person giving the bribe has to have some awareness that it is a bribe," 10/20 Tr. 134. With respect to Counts 4-6 and 8-10, the defendant argued there was insufficient proof that Andrews knew a portion of Stack's fees would be kicked back to Silvester, because Silvester's testimony to the effect that Andrews offered a kickback was "not credible." 10/20 Tr. 138; 140. With respect to Count 11 (money laundering), he made various arguments that have not been renewed on appeal. 10/20 Tr. 140-44. The district court reserved decision on that motion. 10/20 Tr. 174.

After the jury returned its verdict, the defense orally moved for a judgment of acquittal, though it provided no argument in support. 10/29 Tr. 37. Instead, defense counsel asked for 30 days to file a written memorandum. 10/19 Tr. 37.[4] With the Government's consent, the court granted the motion for an extension of time. 10/29 Tr. 37-38. On July 7, 2004 – months after the 30-day period had expired – the defendant filed his written memorandum in support of his motion for acquittal. JA 48 (docket entry). On July 26, 2004, the defendant filed a motion to permit late filing, which the district court granted on August 5, 2004. JA 49 (docket entry). In his written memorandum, the defendant did not argue (as he does on appeal) that there was insufficient evidence that Andrews was aware of

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[4] 10/29 Tr. 37 (Defense counsel: "Judge, I have within ten days to file a motion for judgment of acquittal or a motion for a new trial. Could I make those motions right now – I'm making those motions right now – and could Your Honor give me the next 30 days in which to brief them?").

any improper motivation on the part of Silvester. Instead, he raised arguments not renewed on appeal: (1) that there was insufficient evidence of a nexus between Silvester's corrupt activity and federal funding for the § 666 charges in Counts 3 and 7; and (2) that the indictment was constructively amended, or the proof at trial prejudically varied from the charges set forth in the indictment.

In its response to the defendant's motions for acquittal (and for new trial), the Government argued that the late filings were jurisdictionally barred pursuant to the strict time limits set forth in Fed. R. Crim. P. 29 and 33. JA 49 (docket entry 897). In the alternative, the Government contended that each argument was meritless.

In an unpublished written ruling, the district court denied the motions for acquittal and new trial. JA 98-174. At the outset, the district court agreed with the Government that counsel's failure to file a timely written memorandum in support of his claims violated both Rules 29 and 33, as well as Local Rule of Civil Procedure 7(a)(1) (which is incorporated by reference in Local Rule of Criminal Procedure 1(c)) of the District of Connecticut, which requires that any motion "shall be accompanied by a written memorandum of law," and that "[f]ailure to submit a memorandum may be deemed sufficient cause to deny the motion." JA 108-09. Nevertheless, in an abundance of caution, the district court held, in the alternative, that the defendant's sufficiency claims were meritless. JA 110 ("if this Court had jurisdiction over Defendant's claims, his motions would be DENIED"); JA 112-16 (rejecting claim of insufficient nexus between

federal funds and bribes); JA 116-31 (rejecting constructive-amendment and prejudicial-variance claims). The court also noted that although defense counsel had referenced Count 11 (money laundering) during its oral motion for acquittal at the close of the Government's case-in-chief, he did not raise any such claim in his written memorandum. Accordingly, the court "deem[ed] the claim abandoned." JA 131 n.12.

B. Governing Law and Standard of Review

On appeal, the defendant does not challenge the jury instructions given by the district court. Thus, nowhere in the defendant's appellate brief does he contest the court's instruction that in order to be guilty of all but one of the corruption offenses (including Count 3, premised on violations of 18 U.S.C. § 666, and Counts 4-6 and 8-9[5], premised on violations of 18 U.S.C. §§ 1341, 1343 and 1346), he had to be aware that Paul Silvester's decision to invest state pension money with the Landmark fund was motivated, at least in part, by the prospect that Andrews would receive a fee; that Stack would receive a fee; and/or that Silvester would receive a financial benefit from the deal.[6] Because Count 7 (dealing only with the $50 million

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[5] The jury acquitted the defendant of Count 10.

[6] *See* 10/28 Tr. 52 (Count 3: Silvester solicited or demanded the $1 million fee contract for the purpose of any person, including the defendant, Stack, or Silvester, intending to be influenced when making initial $100 million Landmark investment); 58 (as aider-and-abettor for Count 3, defendant (continued...)

increased investment in Landmark after the November 1998 election) was framed a bit more narrowly in that the defendant was alleged to be offering a bribe to Silvester, the jury had to conclude that Silvester was motivated by a desire to enrich Stack or himself.[7] Finally, for purposes of the money-laundering conspiracy (Count 11), the jury would have to find that the defendant knew that the "consulting contract with Landmark and the arrangement with Christopher Stack were means to make corrupt payments to Silvester." 10/28 Tr. 87.

It is settled that a defendant challenging a conviction on sufficiency grounds "bears a heavy burden." *United States v. Masotto*, 73 F.3d 1233, 1241 (2d Cir. 1996). The Court considers the evidence presented at trial in the light most favorable to the government, crediting every

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[6] (...continued)
had to share same unlawful purpose as Silvester); 70 (Counts 4-6, 8-10: "In regards to all of these counts, the government must prove that the defendant knew that Silvester had an undisclosed and improper motivation to invest or increase the investment of state pension assets with Landmark, that is to enrich the defendant, Christopher Stack, or Paul Silvester. The government need not prove the defendant was aware of *all* Silvester's unlawful purposes. The government only needs to prove that the defendant knew of *one* of these unlawful purposes.").

[7] 10/28 Tr. 61-62 (Count 7: defendant sought to influence Silvester's decision to invest additional $50 million in Landmark by offering thing of value, i.e., money to Stack and Silvester).

inference that the jury might have drawn in favor of the government. The evidence must be viewed in conjunction, not in isolation, and its weight and the credibility of the witnesses is a matter for argument to the jury, not a ground for reversal on appeal. The task of choosing among competing, permissible inferences is for the fact-finder, not the reviewing court. *See, e.g., United States v. Jackson*, 335 F.3d 170, 180 (2d Cir. 2003); *United States v. Johns*, 324 F.3d 94, 96-97 (2d Cir. 2003); *United States v. LaSpina*, 299 F.3d 165, 180 (2d Cir. 2002); *United States v. Downing*, 297 F.3d 52, 56 (2d Cir. 2002). These principles apply to both direct and circumstantial evidence. *See, e.g., United States v. Griffith*, 284 F.3d 338, 348 (2d Cir. 2000) (citing *United States v. Morrison*, 153 F.3d 34, 49 (2d Cir. 1998)). A witness's direct testimony to a particular fact provides sufficient evidence of that fact for purposes of sufficiency of the evidence review. *See United States v. Jespersen*, 65 F.3d 993, 998 (2d Cir. 1995). "The ultimate question is not whether *we believe* the evidence adduced at trial established defendant's guilt beyond a reasonable doubt, but whether *any rational trier of fact could so find*." *United States v. Payton*, 159 F.3d 49, 56 (2d Cir. 1998) (emphasis in original) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

In the district court, the defendant orally moved for a judgment of acquittal on these counts. 10/20 Tr. 144-47. This Court engages in *de novo* review of such properly preserved arguments, applying the same standard that governs a general challenge to the sufficiency of evidence. *See Jackson*, 335 F.3d at 180; *United States v. Thorn,* 317 F.3d 107, 132 (2d Cir. 2003).

C. Discussion

The defendant's sufficiency claim boils down to this: He cannot possibly have known that Silvester's decision to invest in Landmark was influenced by the consulting fees payable to Stack and Andrews, or by the prospect of Silvester receiving kickbacks, because Silvester never expressly told him so. This claim is readily dispatched.

First, Andrews' own statements, as relayed by Silvester, provided direct evidence that Andrews knew and intended that money would be kicked back to Silvester. In May 1998, after being inserted as a "finder," Andrews asked Silvester how much Connecticut would be willing to invest in Landmark, and they discussed "somewhere in the neighborhood of $100 million." GA249. Silvester testified that during this conversation, Andrews "inquired as to *how I might want my share*." GA249. (emphasis added). In that same conversation, Andrews asked Silvester "whether or not my boy in New York should be taken care of." GA250. Silvester said that Andrews did not specify whom he meant by "your boy in New York." GA250. Moreover, Silvester testified that after he instructed Andrews and Stack to split the $1 million Landmark fee, Andrews "*suggested to me that the use of Mr. Stack in this transaction was going to cost me more than it otherwise would*." GA267 (emphasis added). Although the defendant testified that he never made those statements, GA418, it was entirely within the jury's province to believe Silvester and disbelieve Andrews. Based on the defendant's own statements, there was sufficient evidence for the jury to find that Andrews had

the requisite corrupt intent for all of the corruption charges – that is, Counts 3-9 and 11.

Second, there was strong evidence – including testimony from Silvester and the defendant himself – that the defendant must have known that Silvester's investment decision was at least partially motivated by a desire to see Andrews receive a consulting fee. Such evidence was sufficient to support the requisite mens rea for Counts 3-6 and 8-9 – that is, for all the corruption counts except the money-laundering conspiracy (Count 11) and the bribe-offering (Count 7). For example, both Andrews and Silvester knew that Andrews needed money for their joint electoral campaign. Silvester testified that by the time he decided to insert Andrews as a finder in the Landmark deal, he already knew that Andrews would be his running mate on the statewide ticket. This affected Silvester's decision because

> if [Andrews] was going to be on the ticket with me, I wanted him to be in good shape, you know, financially. There was self-motivation involved, obviously, because if Ben did well on his campaign, then it would help me, because of where he's located on the ballot. . . .

GA216.

Perhaps unwittingly, Andrews' own testimony corroborated Silvester's account: Andrews confirmed that during their initial discussion about Landmark, Andrews told Silvester that his ability to run for Secretary of State

was linked to his financial situation. When describing his visit to Silvester at the Treasurer's Office during which he first learned of the Landmark deal, Andrews admitted that he was initially "pressing" Silvester to do a deal with his then-employer, Smith Wiley. Silvester then turned the conversation to whether Andrews was or wasn't going to run for Secretary of State. GA370. According to Andrews, "I told [Silvester] that's one of the reasons I got to get this thing done. . . . This is part of me finalizing my decision and I got to work it out . . . ." GA371. "I told him that I would probably be – well, I already announced it on television that I was going to leave Smith Wiley . . . if I decided to run . . . . *And I needed to look at other opportunities to take care of me and my family.* And I was looking for some ways to do that . . . ." GA371 (emphasis added). It was right after this exchange that Andrews admitted talking to Silvester about getting involved in the Landmark deal. The jury was certainly entitled to infer that Andrews knew Silvester was inserting him into the Landmark deal as a finder so that Andrews would be provided for during the upcoming campaign – and thus that Silvester's investment decision was fueled in part by the desire to get those fees to Andrews.

Andrews also must have known from the sham nature of his consulting contract that Silvester was motivated to close the Landmark deal at least partially to secure the fee for Andrews. Silvester himself testified that he decided to have Landmark hire Andrews as a "finder," GA214, 246, 248, despite the fact that there was no need for a finder in the deal because Landmark and the State had already been in contact. GA200-02, 211. Based on Silvester's

testimony, all that Andrews did in connection with the deal was to ask Silvester how much he would invest with Landmark, and to arrange to get paid. GA248-49. It would have been readily apparent to Andrews that this do-nothing deal arranged as a favor by Silvester was at least partially motivating Silvester's investment decision. Even during his own testimony, Andrews was unable to identify nearly anything specific he had done as a consultant to facilitate the Landmark deal, aside from pointlessly advising the principal of Landmark to send the State a form letter with yet another copy of the same prospectus that had already been sent on prior occasions during the deal's negotiations. 10/23 Tr. 199-200.

Third, there was ample evidence that Andrews knew Silvester agreed to the Landmark deal in part to benefit Stack. Andrews undisputedly knew that Stack was getting paid handsomely as a result of the Landmark deal, since Andrews admitted entering into the fee-split arrangement. *See, e.g.,* 10/22 p.m. Tr. 8-9, 35-37. And the jury was entitled to credit the consistent testimony of Silvester and Stack that at the Clam Shack on June 2, 1998, Silvester was the one who instructed Andrews to split his $1 million fee with Stack. The Government introduced documentary evidence, including time-stamped fax confirmation sheets, proving that by 1:53 p.m. the next day, Andrews had complied with Silvester's directive and arranged for a New York law firm to confirm the fee-split in writing. GA397-98. The jury was entitled to credit Stack's testimony that he performed absolutely no work in connection with the Landmark investment, because it was already a done deal. GA81-82. Because Andrews knew that he was giving

away half a million dollars in consulting fees to Stack in return for no services whatsoever, it had to be obvious to him that the fee-split was nothing more than a sham designed by Silvester to funnel money to Stack. And because Silvester was transparently using the Landmark deal to dump money into Stack's lap, Andrews must have understood that Silvester was motivated to do the Landmark deal in part to effectuate this sham.

For all these reasons, there was abundant evidence that Andrews was well aware that Silvester's decisions to invest in Landmark were motivated at least in part by his desire to enrich himself, Stack and Andrews.

II. THE DISTRICT COURT DID NOT MANIFESTLY ABUSE ITS DISCRETION IN DECLINING TO REQUIRE PRIOR NOTICE FROM THE GOVERNMENT ABOUT EACH SPECIFIC PRIOR ACT OF DISHONESTY WITH WHICH IT INTENDED TO IMPEACH THE DEFENDANT

A. Relevant Facts

During the course of the defendant's testimony, defense counsel requested that "close to the end of his direct examination, the Court inquire of the government, outside the presence of the jury, whether the government will seek during the cross-examination to inquire concerning . . . specific evidence of misconduct evidence under Fed. R. Evid. 608(b)." JA 174E.[8] No authority was cited in support of this unusual request, apart from the assertion that it was "believe[d]" to be "a well-established procedure." JA 174F. As defense counsel explained, he was hoping to learn what information the Government would be permitted to elicit on cross, and to take out the sting of that evidence by bringing it out on direct instead. JA 249-52; JA 227-47.

The district court denied the motion, observing that such a request was unprecedented in its years of experience on the bench. JA 236 ("I've never been asked

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[8] Counsel also referenced other-crimes evidence under Fed. R. Evid. 404(b), but the Government did not seek to introduce any such evidence on cross-examination.

to interrupt a defendant's examination of his own client with a proffer by the Government of material that it's going to offer on cross-examination. Never have I been asked to do that."), JA 237 (same). Pointing out that the Government had provided defense counsel with a substantial amount of material from which the impeaching information might be drawn, the court invited counsel to identify specific items to which there was an objection. JA 238. Counsel identified a number of such areas, including the defendant's bankruptcy, statements he made while running for Secretary of State, his work with an investment firm, school records, and several other areas. JA 238-42. The court considered these areas, and decided in its discretion to exclude instances of misconduct that were more than ten years old. GA469. In response to counsel's query as to how cross-examination could possibly proceed without the Government having pre-cleared all its impeachment material, the court responded: "I presume as we usually do. We ask the question, you object, and I sustain or overrule, I presume." JA 244.

B. Governing Law and Standard of Review

"It is essential . . . to the proper functioning of the adversary system that when a defendant takes the stand, the government be permitted proper and effective cross-examination in an attempt to elicit the truth." *United States v. Havens*, 446 U.S. 620, 626-27 (1980). In furtherance of this pursuit of the truth, Rule 608(b) of the Federal Rules of Evidence permits the impeachment of any witness (including a defendant) with specific instances of conduct that bear on their credibility:

> **(b) Specific instances of conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness . . . concerning the witness' character for truthfulness or untruthfulness . . . .

The admission of evidence pursuant to Rule 608(b) is subject to the ordinary constraints of Rules 403 and 611. *See United States v. Crowley*, 318 F.3d 401, 416-17 (2d Cir. 2003). Thus, a judge may exclude relevant evidence only if its probative value is substantially outweighed by the danger of unfair prejudice. Fed. R. Evid. 403. "The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief v. United States*, 519 U.S. 172, 180 (1997). A court should consider whether the danger of unfair prejudice may be cured short of exclusion by the issuance of an appropriate limiting instruction to the jury. *See, e.g., United States v. Rosenwasser*, 550 F.2d 806, 808-09 (2d Cir. 1977).

Pursuant to Rule 608(b), it is proper to cross-examine a witness about specific instances of conduct that are probative of his truthfulness. The most obvious examples

involve making false or misleading statements. *See, e.g., United States v. Jones*, 900 F.2d 512, 520-21 (2d Cir. 1990) (proper to impeach regarding false statements on applications for employment, apartment, driver's license, and loan, as well as on tax returns); *United States v. Sperling*, 726 F.2d 69, 75 (2d Cir. 1984) (proper to impeach regarding false credit card applications); *Lewis v. Baker*, 526 F.2d 470, 475-76 (2d Cir. 1975) (proper to impeach regarding false statements on employment application); *United States v. Reid*, 634 F.2d 469 (9th Cir. 1980) (defendant properly cross-examined on a letter written to a government agency in which he falsified name, occupation, name of business and purpose in seeking information); *United States v. Girdner*, 773 F.2d 257 (10th Cir. 1985) (defendant properly asked about particulars of a ballot fraud scheme). Such misconduct need not be criminal. *Cf. Sperling*, 726 F.2d at 75.

A district court has broad discretion to admit or exclude evidence, and so these rulings are subject to reversal only where manifestly erroneous or wholly arbitrary and irrational. *United States v. Yousef*, 327 F.3d 56, 156 (2d Cir. 2003) (manifestly erroneous); *United States v. Dhinsa*, 243 F.3d 635, 649 (2d Cir. 2001) (arbitrary and irrational).

Even where a court makes an erroneous evidentiary ruling, a conviction will not be reversed unless the error had a substantial and injurious effect upon the outcome of the trial. *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946) (harmless error standard for non-constitutional violations); *Dhinsa*, 243 F.3d at 649; *United States v.*

Smith, 727 F.2d 214, 222 (2d Cir. 1984) (erroneous admission of extrinsic evidence under Fed. R. Evid. 608(b) was harmless).

C. Discussion

As an initial matter, it should be understood what the defendant is *not* claiming: that he lacked notice of the information which the Government could use to impeach him. As the Government informed the district court, and the defense did not contest, about a week prior to trial the Government provided defense counsel with all of the materials which it intended to use in its Rule 608(b) questioning. 10/21 Tr. 8-9; JA 228; JA 238 (defense acknowledging receipt of "a whole big pile of materials"); JA 253 (defense counsel: "this is not a question of notice").

The only claim raised below, and on appeal, was that the Government should go even further than disclosing its impeachment material; it should actually describe its lines of questioning for the benefit of defense counsel, and obtain pre-clearance of all such impeachment from the district court. The defense further argued that this novel procedure should take place before the close of direct examination, so that the defense could preemptively elicit whatever impeaching material would be admitted in order to reduce the effectiveness of the Government's cross-examination. The defense predicates this claim on the language of Rule 608(b), which permits a party to cross-examine a witness by inquiring of specific instances of conduct that are probative of credibility "in the discretion

of the court." According to the defense, the phrase "discretion of the court" requires an *advance* ruling by the court as to whether any particular question may be asked.

The text of Rule 608(b) does not support the defendant's position. The phrase "in the discretion of the court" refers to the power of a district court to weigh competing interests when deciding whether certain questions are admissible. Indeed, in light of the advisory notes to Rule 608(b), the phrase seems to be nothing more than an acknowledgment of "the discretionary power of the court in permitting such testimony." *See* Advisory note to 1974 Enactment. Reference to that power simply confirms that "the overriding protection of Rule 403 requires that probative value not be outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, and that of Rule 611 bars harassment and undue embarrassment." *See* Advisory note to 1972 Proposed Rules. Nowhere in the rules or the advisory notes is there any suggestion that, in the 608(b) context, a court must employ anything other than its usual procedure of considering contemporaneous objections lodged by a party after its adversary poses a question.[9]

The Government has been unable to locate any case in which such a novel claim has even been raised, much less

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[9] The cases cited by the defendant on page 39 of his brief stand only for the perfectly uncontroversial proposition that a party *may* move for a ruling *in limine* regarding 608(b) questions. None of these cases holds that such an advance hearing is required.

endorsed by a court. The Fifth Circuit has, however, had occasion to reject a similar argument. In *United States v. Tomblin*, 46 F.3d 1369, 1388 (5th Cir. 1995), a defendant charged with bribery chose to take the stand at trial. During cross-examination, the government questioned him about "alleged acts of fraud, bribery, and embezzlement." *Id.* at 1389. On appeal, the defendant claimed that his rights had been violated because the prosecution had not provided advance notice of the information it planned to elicit on cross-examination. In this regard, he invoked the notice requirements of Fed. R. Evid. 404(b). The Court of Appeals rejected this claim, holding that "the prosecutor's questions were probative of Tomblin's character for truthfulness and were permissible under Rule 608(b)." *Id.* Because the evidence was admitted for impeachment purposes, the court explained, they were not subject to the Rule 404(b). *Id.* at 1388 n.51; *see also United States v. Sims*, 808 F. Supp. 607, 611 (N.D. Ill. 1992).

If the prosecution is not even required to provide *notice* of specific instances of conduct offered for impeachment purposes under Rule 608(b), it follows *a fortiori* that a district court cannot be obliged to rule in advance on the admissibility of such as-yet unasked questions. The unassailable logic of this proposition explains why the defense has not been able to cite a single case in which any court has required the prosecution to obtain preclearance of its intended 608(b) questioning.

Remarkably, despite the defendant's protestations that only pre-clearance of the Government's cross-examination could have protected him from undue prejudice, he

identifies only a brief portion of a two-day cross-examination which was supposedly improper: the Government's "detailed listing of the debts on the bankruptcy application" which, he claims, served only to "inform the jury that Mr. Andrews owed large amounts of money for a luxury car lease, country club dues, lawn services, and an expensive house, while at the same time failing to pay federal, state and local taxes." Def. Br. at 40.

This, of course, is not a claim that Rule 608(b) was violated; it is a garden-variety claim that the district court struck the wrong balance between the probative and prejudicial value of the evidence under Fed. R. Evid. 403. Def. Br. at 40 (claiming prejudice under Rule 403; "Allowing a 608(b) inquiry of such a nature, scope, length *unfairly prejudiced* Mr. Andrews.") (emphasis added). Such claims are reviewed only for "manifest abuse of discretion." *Yousef,* 327 F.3d at 156.

The district court did not abuse its broad discretion in allowing the Government to cross-examine the defendant about his bankruptcy petition and his SEC application, because these matters were highly probative of the defendant's untruthfulness. "A defendant makes his character an issue when he testifies." *Tomblin*, 46 F.3d at 1388; *see United States v. Reid*, 634 F.2d 469, 473 (9th Cir. 1980). Courts have repeatedly held that Rule 608(b) permits the prosecution to impeach a testifying defendant with questions about false statements he has made in the past, since they are directly probative of his veracity. *See, e.g., United States v. Redditt*, 381 F.3d 597, 601-02 (7th

Cir. 2004) (failure to mention prior conviction on employment application was permissible impeachment under 608(b)); *United States v. Jensen*, 41 F.3d 946, 957 (5th Cir. 1994) (approving questioning of defendant about false statements on bankruptcy petition under 608(b)); *United States v. Zandi*, 769 F.2d 229, 236 (4th Cir. 1985) (holding that district court did not abuse discretion in permitting impeachment of defendant with questions about false statements on employment application, loan application, tax returns, and other forms).

In the present case, the Government acted well within the bounds of Rule 608(b) when it questioned the defendant about the veracity of his statement on his SEC application that he had declared bankruptcy "as a result of my part-time investment in a restaurant that failed." JA 291. As the Government explored on further cross-examination, this statement was patently false, and illustrated the defendant's penchant for spinning the truth as it suited his needs. A cursory reading of the defendant's bankruptcy filing demonstrated that his restaurant debts constituted only a minority of his debt. The defendant's willingness to make false statements under oath to the SEC about the origins of his bankruptcy were highly probative of his veracity in general, and undercut the reliability of the testimony he gave under oath at trial. Moreover, the defendant's false statement to the SEC related back to the false statements he had made on his bankruptcy petition, which the Government had explored during an earlier portion of cross-examination. Thus, this line of questioning showed the jury that the defendant actually engaged in a *pattern* of mendacity throughout his legal and

financial affairs. Such a history of interwoven falsehoods was certainly probative of his untruthfulness in the present trial.

Finally, even assuming *dubitante* that the district court should have struck a different probative-prejudicial balance and excluded questions about the SEC application and the related list of debts in the bankruptcy petition, any error was certainly harmless. The Government properly impeached the defendant with numerous other matters, such as the defendant's failure to disclose in his bankruptcy petition that he anticipated receiving a massive commission within a week of filing. Most notably, as a rebuttal witness, the Government offered the testimony of an investment manager named Eddie Brown to refute Andrews' earlier testimony (offered gratuitously on direct examination) that Andrews had worked hard to convince a minority-owned firm owned by Brown to seek out an investment by Connecticut's pension funds, and that Andrews had been instrumental in closing that deal. 10/22 a.m. Tr. 55-56. This testimony was clearly designed to paint a picture of the defendant as a person with a solid track record of putting together investors and money managers in the world of high finance, whose work with Landmark was consistent with such respectable work. The problem with this story was that it was utterly false. As Brown testified, he had never even heard of Ben Andrews until *after* Brown had made a presentation to Silvester's predecessor in the Treasury. 10/24 Tr. 222-23. After making that presentation, Brown received a call from a person, which led Brown to contact defendant Andrews. 10/24 Tr. 223-24. Andrews asked to be hired by Brown to

represent his firm before the State of Connecticut. 10/24 Tr. 225. Shortly after Brown agreed to do so, but before Andrews actually performed any work, Brown's proposal was accepted by the State of Connecticut. 10/24 Tr. 233-36. In short, there was no truth to Andrews' testimony that his efforts were responsible for convincing Brown's firm to market a deal to the State of Connecticut, or for promoting the deal that actually closed.

Because Andrews was thoroughly impeached in so many other ways, any 608(b) error involving the inquiry into Andrews' SEC application and bankruptcy debts was undoubtedly harmless. *United States v. Schwab*, 886 F.2d 509, 514 (2d Cir. 1989) (finding harmless error where district court improperly permitted inquiry about acquitted conduct under Rule 608(b)).

III. THE DEFENDANT'S SIXTH AMENDMENT RIGHTS WERE NOT VIOLATED BY THE DISTRICT COURT'S LIMITED ORDER THAT THE DEFENDANT NOT DISCUSS HIS TESTIMONY WITH COUNSEL OVERNIGHT IN THE MIDDLE OF HIS CROSS-EXAMINATION, AND ANY HYPOTHETICAL VIOLATION WAS UNDOUBTEDLY HARMLESS

A. Relevant Facts

The defendant testified over the course of three trial days: October 22, 23, and 24, 2003. At the end of the first day, the defendant had completed his direct examination,

and was in the middle of cross-examination. Defense counsel informed the court that he intended to "talk to Ben about his testimony," and inquired as to whether that would be viewed as a violation of the court's rules. JA 125. The Government suggested to the court that such communication should not be allowed, insofar as it would not be permitted with any other witness. *Id.* The court then instructed defense counsel that he could not "talk to him about his testimony" overnight, and court immediately adjourned at 5:10 p.m. *Id.*

Within minutes, the Government expressed misgivings about the court's sequestration order, and informed both defense counsel and the court that it wished to do some quick research about the law governing overnight contact between a defendant and his counsel. By 5:20 p.m. – that is, within 10 minutes of court's adjourning – defense counsel was advised while still in the courthouse that the judge might reconsider her order. GA475 (prosecutor states that he advised defense counsel at 5:20 p.m.); GA459 (court states that defense counsel was apprised by law clerk "last night about 5:30 that this issue of your being permitted to speak to Mr. Andrews was coming up"); GA461 (same facts placed on record by prosecutor). Counsel nonetheless departed the courthouse. GA472. At the court's request, the prosecution had obtained contact information for both the court and defense counsel, JA 279E, GA445, GA472-73, and attempted to place a conference call between 6:00 p.m. and 7:00 p.m., JA 279E, GA467, GA473-74. At that point, defense counsel was on a train and poor reception precluded the conference call from being completed. GA467, 473-74. Nevertheless,

defense counsel was alerted by the Government's call that it was moving to rescind the sequestration order. GA467.

At approximately 8:00 p.m., the Government was able to effectuate the conference call. GA447. Although the call was not transcribed, the Court and the parties set forth the contents of that call in the record the following morning. GA445-68. The Government took the position that the court's order was legally correct, in light of the Supreme Court's holding in *Perry v. Leekes*, 488 U.S. 272 (1989), that a defendant does not have a constitutional right to discuss his testimony while it is in process. GA462-63. The Government had explained why it believed that the Supreme Court's earlier decision in *Geders v. United States,* 425 U.S. 80 (1976), was not dispositive, since that case had invalidated a complete overnight ban of any communication between a defendant and his attorney, including matters of trial strategy. GA463. The Government nevertheless informed the court that there was no decision of the Second Circuit on point, and that there was a decision of another circuit, *United States v. Santos*, 201 F.3d 953 (7th Cir. 2000), which was contrary to the Government's position. GA464. Although the Government indicated that it thought *Santos* was incorrectly decided, it suggested to the court that in an abundance of caution, and to avoid any possible claim of error, the sequestration order should be rescinded. GA464, 468. Defense counsel objected to the hearing on various grounds (that Andrews was not present, that the hearing was not in open court, and that there was no court reporter), and informed the court that he was now sitting in a pizza restaurant in Old Saybrook, and that Andrews

was in Hartford. GA446-47. The court granted the Government's motion, and offered to delay the start of trial the following morning. GA445.

The following morning, proceedings resumed at 10:10 a.m., GA445, so that counsel could have time to talk with his client. The court entertained argument from the parties. Although defense counsel had been informed of the likely conference call by 5:30 p.m., he represented to the court that he had not brought home any of the files he would have needed, that he had ordered a meal, and that he had drunk wine. GA447. (Counsel later represented, and the court agreed, that he was "perfectly able to conduct that conference" despite the wine. GA474.) He also represented that at 8:00 p.m. the previous night, the defendant was "seeking spiritual guidance" and could not have been reached. GA465. The court offered defense counsel additional time to meet with his client, and defense counsel requested half an hour. GA449-50. Counsel nevertheless objected that the prior day's examination was no longer as fresh in his mind as it would have been the evening before, and moved for a mistrial or in the alternative to prematurely cut off cross-examination. GA458-59. The court denied those motions. GA459. Court recessed at 10:45 a.m.. GA468. When it resumed at 11:30 a.m., the court inquired whether defense counsel had had sufficient time, and defense counsel responded that he had. GA469.

Cross-examination proceeded, and at the end of the day the Government confirmed that it was not asking for any restrictions on the defendant's overnight communications

with his attorney. 10/23 Tr. 210-11. During the trial day breaks, however, the court granted the Government's motion to prohibit the defendant from discussing his testimony with counsel, in accordance with *Perry*. GA466, 10/23 Tr. 88.

At the court's request, the defendant filed a brief written motion for mistrial, with an accompanying memorandum, on October 24, 2003. JA 45 (docket entries 787, 788). In these written pleadings, he made three arguments, none of which has been renewed on appeal: (1) that the absence of the defendant from the conference call violated due process; (2) that the absence of the public at the conference call violated his rights; and (3) that the absence of a court reporter at the hearing was objectionable. The district court denied that motion by endorsement order filed October 28, 2003. JA 45 (docket entry 789).

Further details were placed on the record the morning of October 24, 2003. Defense counsel represented that the defendant had already left the courthouse by the time the Government alerted him of the possible conference call – that is, within ten minutes of court's adjourning.[10] Counsel also represented that the defendant was seeking "spiritual guidance" from 7:30 p.m. to 8:30 p.m. that night, and had

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[10] The parties disputed whether the defendant was still in the courthouse at the time the Government informed defense counsel of the possible conference call, but the court deemed the dispute to be irrelevant, in light of counsel's ability to contact the defendant. GA479.

turned his cell phone off. GA475. Counsel agreed that he had the defendant's cell phone number, but did not call to alert him that the order might be rescinded. GA478-80.

In his late-filed motion for new trial filed on July 8, 2004, the defendant again objected to the rescinded overnight order, arguing that it violated his Sixth Amendment rights. JA 48 (docket entry 890). The district court denied the motion for untimeliness, JA 109-10, and alternatively on the merits, JA 147-56. After extensively reviewing the facts and governing law, the court concluded that its "order to Defendant not to discuss his testimony during an overnight recess, rescinded after approximately three hours, is more analogous to the brief recess and narrowly tailored prohibition in *Perry* than to the overnight denial of assistance of counsel in *Jones* and *Geders*." JA 155.

B. Governing Law and Standard of Review

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

The Supreme Court has twice had occasion to discuss the scope of a defendant's Sixth Amendment right to confer with his counsel during the course of his testimony. In *Geders v. United States,* 425 U.S. 80 (1976), the Court found reversible error where a defendant was barred from consulting with his attorney regarding *any matter* (not simply his testimony) during a 17-hour overnight break, between his direct and cross-examination. The Court

began from the premise that "[s]equestering a witness over a recess called before testimony is completed serves . . . [the] purpose . . . [of] preventing improper attempts to influence the testimony in light of the testimony already given." *Id.* at 87. The Court recognized, however, that this salutary practice of completely sequestering witnesses may sometimes conflict with a defendant's Sixth Amendment to the assistance of counsel. *Id.* at 88. The Court emphasized that during overnight recesses, a defendant may have any number of legitimate reasons to consult with his attorney:

> It is common practice during such recesses for an accused and counsel to discuss the events of the day's trial. Such recesses are often times of intensive work, with tactical decisions to be made and strategies to be reviewed. The lawyer may need to obtain from his client information made relevant by the day's testimony, or he may need to pursue inquiry along lines not fully explored earlier. At the very least, the overnight recess during trial gives the defendant a chance to discuss with counsel the significance of the day's events.

Id. Because there are more narrowly tailored ways to guard against the possibility of witness coaching, the Supreme Court held that an order "preventing petitioner from consulting his counsel about 'anything'" during the overnight break violated the Sixth Amendment. *Id.* at 91.

Thirteen years later, in *Perry v. Leeke*, 488 U.S. 272 (1989), the Supreme Court found no Sixth Amendment

violation where the defendant had been barred from consulting with counsel during a 15-minute recess between his direct and cross-examination. As the Court explained, "when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying." *Id.* at 281. This rule is grounded in the truth-seeking function of the trial itself, and not merely on the fear that counsel might engage in unethical "witness coaching."

> Cross-examination often depends for its effectiveness on the ability of counsel to punch holes in a witness' testimony at just the right time, in just the right way. Permitting a witness, including a criminal defendant, to consult with counsel after direct examination but before cross-examination grants the witness an opportunity to regroup and regain a poise and sense of strategy that the unaided witness would not possess. This is true even if we assume no deceit on the part of the witness; it is simply an empirical predicate of our system of adversary rather than inquisitorial justice that cross-examination of a witness who is uncounseled between direct examination and cross-examination is more likely to lead to the discovery of truth than is cross-examination of a witness who is given time to pause and consult with his attorney.
>
> "Once the defendant places himself at the very heart of the trial process, it only comports with basic fairness that the story presented on direct is

> measured for its accuracy and completeness by uninfluenced testimony on cross-examination."

Id. at 282-83 (quoting *United States v. DiLapi*, 651 F.2d 140, 151 (2d Cir. 1981) (Mishler, J., concurring)) (footnote omitted). The Court distinguished the overnight recess involved in *Geders*

> because the normal consultation between attorney and client that occurs during an overnight recess would encompass matters *that go beyond the content of the defendant's own testimony* – matters that the defendant does have a constitutional right to discuss with his lawyer, such as the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain. It is the defendant's right to unrestricted access to his lawyer for advice on a variety of trial-related matters that is controlling in the context of a long recess. The fact that such discussions will inevitably include some consideration of the defendant's ongoing testimony does not compromise that basic right. But in a short recess in which it is appropriate to presume that nothing but the testimony will be discussed, the testifying defendant does not have a constitutional right to advice.

488 U.S. at 284 (citation omitted) (emphasis added). Finally, the Court clarified that trial judges are not required to forbid consultation between defendants and their lawyers during trial recesses. *Id.* Given the

circumstances, a judge might consider permitting such consultation. *Id.* "Alternatively, the judge may permit consultation between counsel and defendant during such a recess, *but forbid discussion of ongoing testimony*." *Id.* n.8 (emphasis added).

Once a court concludes that a defendant has actually been deprived of counsel for Sixth Amendment purposes within the meaning of *Geders* and *Perry*, no showing of prejudice is necessary for reversal. *Perry*, 488 U.S. at 278-79.

An appellate court reviews *de novo* a ruling as to whether a defendant has been deprived of the assistance of counsel under the Sixth Amendment. *See United States v. Miguel*, 111 F.3d 666, 669 (9th Cir. 1997) (reviewing *Geders/Perry* claim *de novo*); *cf. United States v. Levy,* 377 F.3d 259, 264 (2d Cir. 2004) (reviewing ineffective-assistance claim *de novo*).

C. Discussion

The defendant argues that he should be granted a new trial because he was denied the right to consult with his attorney during an overnight break in his cross-examination. This claim fails for three reasons. First, the order was sufficiently brief – it was rescinded within less than three hours, and counsel was almost immediately on notice that it might be rescinded – that it amounted only to a brief interruption in communications between counsel and client. Second, the order was narrowly tailored to preclude only conduct that the Supreme Court held in

Perry is not protected by the Sixth Amendment – that is, discussions between the defendant and his attorney about his ongoing testimony. Third, any temporary interruption in attorney-client communications was immediately cured by the rescission of the order at 8:00 p.m., and by the defendant's opportunity to discuss his testimony with counsel as long as desired before resuming the stand the following morning.

First, the duration of the restriction was limited. It is undisputed that the district court's ruling was in place for approximately three hours – from the time court adjourned at 5:10 p.m. until the time of the conference call at 8:00 p.m. on October 22, 2003. Counsel was free to talk to his client about his testimony at any point after 8:00 p.m. that night. Moreover, the district court offered to delay the start of trial the following morning for as long as the defendant wished, to allow him time to meet with his attorney and discuss his testimony. The defendant in fact took advantage of this opportunity. Defense counsel asked for half an hour and took forty-five minutes. Before trial resumed, the court asked counsel whether he had had enough time, and counsel replied that he had.

This three-hour-long order was brief enough in duration to fit under the rubric of temporary interruptions in attorney-client communications that are permissible under *Perry*. In *Perry*, the Supreme Court upheld a blanket restriction on attorney-defendant communications that spanned a 15-minute trial recess. This and other courts have held that similar orders during even longer recesses are permissible under *Perry*.

For example, in *Serrano v. Fischer*, 412 F.3d 292 (2d Cir. 2005), *cert. denied*, 2006 WL 386597 (Feb. 21, 2006), this Court affirmed a denial of § 2254 relief where a trial court had precluded counsel from talking to the defendant about his testimony during a 90-minute trial recess as well as during a shorter recess in the defendant's cross-examination.[11] Central to this Court's analysis in *Serrano* was the fact that defense counsel had given varying and ambiguous indications as to whether he intended to discuss the defendant's testimony during the 90-minute break. *See* 412 F.3d at 301. In light of these mixed signals, "the judge was again entitled to presume that testimony would be discussed during the recess, particularly in that the lunch recess interrupted a key moment in the cross-examination, when defense counsel had an incentive to influence his client's testimony." *Id.* Thus, because it appeared that counsel planned to engage in impermissible discussions – that is, to talk about the defendant's testimony in the midst of cross-examination – this Court viewed the state judge's limitation as consistent with *Geders* and *Perry*.

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[11] Although this decision came in the context of a § 2254 petition, in which a federal court must uphold a state court's reasonable construction of then-existing Supreme Court precedents, the Court did not suggest that the result would have been any different in light of other decisions of this Court. Nor did the Court suggest that it would have independently reached a different conclusion about whether there had been a Sixth Amendment violation.

Other courts have similarly concluded that recesses longer than 15 minutes can fall within the rule of *Perry*. *See Albrecht v. Horn*, 314 F. Supp. 2d 451, 476 (E.D. Pa. 2004) (finding no Sixth Amendment violation where court banned all attorney-client contact during two-hour recess in the midst of cross-examination because "the sole relevant topics of discussion would be either the testimony itself or issues which directly bear on it"); *State v. Rodriguez*, 839 So.2d 106, 124 (La. App. 2003) (holding that complete ban on attorney-client contact during 100-minute lunch recess did not violate Sixth Amendment); *Wooten-Bey v. State*, 318 Md. 301, 308, 568 A.2d 16, 20 (Md. 1990) (holding that ban on discussion of defendant's testimony during 75-minute lunch break did not violate Sixth Amendment).

Second, the scope of the order was quite limited, and precluded only discussion of the defendant's testimony – that is, it precluded only discussions which indisputably fall outside the ambit of the Sixth Amendment's protections. As the Supreme Court held in *Perry*, "when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying." 488 U.S. at 281. In the present case, defense counsel has not claimed that the no-testimony rule impaired his ability to discuss legitimate topics which are protected by the Sixth Amendment, "such as the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain." *Id.* at 284. Instead, counsel candidly proclaimed his desire to discuss the defendant's testimony with him, JA 125, Def. Br. 51 – precisely the sort of conduct that

Perry said is *not* protected by the Sixth Amendment. As one state court has explained:

> It is vital in the search for truth that cross-examination should be a cornerstone of the adversary system. It is antithetical to the process of truth-seeking that any witness be permitted to consult with counsel during cross-examination to be "coached" on what to say, or not say, or how-to-say-it, or how to control or "put a better face on" testimonial damage already done. This rule normally applies to a defendant in a criminal case during a short recess when the defendant elects to take the stand in his or her own defense and thereby becomes a witness. The fortuitous intervention of an overnight recess during the cross-examination of a defendant should not be an occasion for coaching which could not otherwise occur.

Webb v. State, 663 A.2d 452, 459-60 (Del. 1995).

Put another way, there can be no Sixth Amendment violation where the only communications that were in fact precluded by the Court's order were communications that fall outside the scope of the Sixth Amendment. Although this Court has not had occasion to rule on this precise question, it has pointed out in another context that "[t]he difference between *Perry* and *Geders* is not the quantity of communication restrained but its constitutional quality." *United States v. Padilla*, 203 F.3d 156, 160 (2d Cir. 2000) (finding no Sixth Amendment violation where district

court properly ordered defense counsel not to inform clients of ongoing investigation into acts of obstruction by defendants). "Thus, communications between a defendant and his counsel about matters relating to defendant's role as a witness may be restricted to preserve the trial's truth-seeking function." *Id.* In this case, the district court restricted a category of communications which had no protected "constitutional quality" according to *Perry*, and which related exclusively to the defendant's "role as a witness." Accordingly, there was no Sixth Amendment violation. *See also Morgan v. Bennett*, 204 F.3d 360 (2d Cir. 2000) (affirming, in relevant part, denial of § 2254 relief where trial court ordered defense counsel not to inform defendant that witness would testify, for fear that witness might be intimidated by defendant's colleagues).

Consistent with this view, certain courts have held that the Sixth Amendment, as interpreted by *Perry*, permits a trial judge to bar defendants from discussing their testimony with counsel during overnight recesses. *See, e.g., State v. Conway*, 108 Ohio St. 3d 214, 232, 842 N.E.2d 996, 1021 (2006) (finding no Sixth Amendment violation where defendant "was prohibited from discussing his uncompleted testimony with counsel, the trial court did not order him not to meet or consult with counsel about other matters during the overnight recess"); *Snyder v. State*, 104 Md.App. 533, 561-63, 657 A.2d 342, 356-57 (Md. App. 1995) (no Sixth Amendment violation from overnight ban limited to defendant's discussing testimony); *Webb v. State*, 663 A.2d 452, 458-59 (Del. 1995) (reversing conviction where judge ultimately imposed broad ban on overnight access to attorney, but

stating that judge's initial admonition only that defendant not discuss his *testimony* with anyone overnight was permissible under *Geders* and *Perry*).

Although other courts have held that overnight bars on attorney-client communication violate the Sixth Amendment, even if the order is limited to discussions of the defendant's testimony, this Court has suggested that a focus on the length rather than the nature of a sequestration order conflicts with this Court's interpretation of *Geders* and *Perry*. Thus, in *Serrano*, the Court contrasted its focus in *Padilla* on the "constitutional quality" of the restricted communications with the New York Court of Appeals' focus on the length of an overnight recess during which communications regarding testimony were barred. *See Serrano*, 419 F.3d at 299 (citing *People v. Joseph*, 622 N.Y.S.2d 505 (1994) (reversing for weekend ban on defendant's discussing testimony with counsel in midst of direct examination)). To the extent that other courts have found similar testimony-only bars to be objectionable under the Sixth Amendment, they likewise stand in tension with this Court's emphasis on the "constitutional quality" of the precluded communications. *See, e.g., United States v. Santos*, 201 F.3d 953, 965 (7th Cir. 2000) (finding Sixth Amendment violation in light of *Perry* and *Geders* where court ordered defendant not to discuss his testimony with counsel overnight, after direct and before cross-examination); *United States v. Cobb*, 905 F.2d 784, 791-92 (4th Cir. 1990) (holding, in light of *Geders* and *Perry*, that weekend bar on defendant's discussing ongoing cross-examination with defense counsel violated Sixth

Amendment); *State v. Futo,* 932 S.W.2d 808, 815 (Mo. Ct. App. 1996) (finding Sixth Amendment violation where court precluded defendant from discussing testimony during overnight recesses).[12]

Third, because the court rescinded the order at 8:00 p.m. and further offered to delay the start of trial the following morning for as long as the defendant wished to discuss his testimony with counsel, any interruption in communication was sufficiently cured, such that the defendant was not actually or constructively denied the assistance of counsel during a critical stage of trial (i.e., his testimony). In other words, the defendant was able to take the stand after having received the advice of counsel on any topic he wished to discuss; and counsel was able to consult with his client about any topic before trial resumed. Although this issue does not seem to have arisen often, the few courts to consider the issue have agreed that

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[12] Two other circuits have ruled in the defendant's favor on this issue, though both decisions pre-date *Perry*, and one of them was ultimately vacated for unrelated reasons. *See Mudd v. United States*, 798 F.2d 1509 (D.C. Cir. 1986) (holding that weekend bar on defendant's discussing testimony after completion of direct but before commencement of cross-examination violated Sixth Amendment); *United States v. Romano*, 736 F.2d 1432 (11th Cir. 1984) (finding Sixth Amendment violation where court ordered defendant not to discuss his testimony with counsel during recess that spanned five days), *vacated in part on reh'g on other grounds*, 755 F.2d 1401 (1985).

there is no Sixth Amendment violation where a defendant who has been precluded from communicating with counsel during a limited period of time is afforded an opportunity to consult with counsel prior to re-taking the stand.

For example, in one state case, a defendant was unable to call his lawyer from jail during an overnight recess. The state appellate court found no Sixth Amendment violation because the defendant was given a full opportunity to consult with counsel the following morning, and no time limit was placed on that consultation. *See State v. Stover*, 126 Idaho 258, 262, 881 P.2d 553, 557 (Idaho Ct. App. 1994). As the court explained:

> Under these circumstances, assistance of counsel was not denied – it was only briefly delayed. Where, as here, the court learns of the State's interference before trial resumes, then stops the proceeding and allows the defendant adequate time to confer with his attorney and prepare his defense before continuing with the trial, the initial denial of counsel itself has been rectified. The defendant cannot then complain that he was required to go through any part of the criminal proceeding without the aid of counsel.

Id.

Other courts have reached similar conclusions. In *Wooten-Bey v. State*, 76 Md. App. 603, 615, 547 A.2d 1086, 1092 (1988), *aff'd*, 318 Md. 301, 568 A.2d 16 (1990), the intermediate appellate court held that

deprivation of counsel during an hour-long lunch recess was mitigated by a recess called immediately thereafter to allow the defendant to consult with his lawyer. (The Maryland Supreme Court affirmed on the grounds that there had been no Sixth Amendment violation at all.) Similarly, in *McFadden v. State*, 424 So.2d 918 (Fla. App. 1983), the court found that a trial judge had cured any prejudice flowing from an error in forbidding counsel from discussing testimony with the defendant during a day-and-a-half break, where the defendant was permitted to confer with counsel before proceeding further. Somewhat analogously, the Ninth Circuit has rejected the claim that a defendant was deprived of his Sixth Amendment right to counsel by virtue of his pretrial detention two hours away from his place of trial. The Court reached that conclusion in part because the defendant and counsel "were free to communicate by telephone" and were able to communicate freely following a day of pretrial motions. *United States v. Lucas*, 873 F.2d 1279, 1280 (9th Cir. 1989). *See generally Jones v. Vacco*, 126 F.3d 408 (2d Cir. 1997) (reserving question of whether next-day rescission of overnight bar on consultation can cure Sixth Amendment violation; holding that defendant's Sixth Amendment rights were violated where trial court banned attorney from speaking with defendant about "anything" during overnight break in cross-examination, where there was insufficient evidence that ban was rescinded the following day, and trial did not resume until four days later).

The defense also makes two nonlegal arguments against orders forbidding a defendant from discussing his testimony with defense counsel during his cross-

examination, but the Supreme Court expressly rejected each of these arguments in *Perry*. First, the defendant argues that no-discussion orders "accomplish[] little" because the defendant observes each witness's testimony – presumably allowing him to tailor his testimony without his lawyer's help. Def. Br. 50. This argument was considered and disregarded in *Perry*, 488 U.S. at 281-82 (acknowledging that defendants are exempt from witness sequestration by virtue of Sixth Amendment Confrontation Clause, yet upholding restrictions on attorney-client communications that are bound to focus on testimony). Second, the defendant argues that there cannot be any need for prohibiting a defendant from discussing his testimony with counsel, absent either an allegation of inappropriate behavior by defense counsel or an identifiable impact on cross-examination. Again, *Perry* rejected this notion, and held that no-contact rules can avoid problems beyond unethical witness coaching, and that insulating a defendant-witness during his testimony generally promotes the truth-seeking goal of trials. *See* 488 U.S. at 282.

To the extent the defendant suggests that regardless of the Sixth Amendment question, Def. Br. 48, a district court simply has no authority to restrict communications between a defendant and his counsel, his claim is defeated by *Geders*.

> [In *Geders*,] [t]he Court acknowledged that the trial judge, as "governor of the trial . . . must have broad power to cope with the complexities and contingencies inherent in the adversary process." [425 U.S.] at 86 (citation and internal quotation

> marks omitted). This includes a "broad power to sequester witnesses before, during, and after their testimony," in order to restrain, *inter alia*, "improper attempts to influence the testimony" or tailoring of the testimony to that of earlier witnesses. *Id.* at 87.

Serrano, 412 F.3d at 298.

Finally, to the extent that the defendant complains that other witnesses were not subjected to sequestration orders, Def. Br. 48-49, his claim is unavailing. First, because he did not request any such orders, he cannot complain that none were entered. Second, the same claim was raised and rejected by this Court in *Serrano*: "Nothing in *Geders* requires a trial judge to adopt an all-or-nothing approach in order to comply with the Sixth Amendment." 412 F.3d at 302. Third, the record reflects the Government's understanding that Judge Burns did, in fact, have a general rule prohibiting parties from consulting with witnesses about their testimony during the pendency of cross-examination. Indeed, it was defense counsel, not the prosecution, who initially brought up the question of overnight contact with the defendant; the prosecution simply responded that the defendant ought to be subject to the same rules applicable to all other witnesses. *See* JA 279 (in response to defense counsel's request to talk to defendant about his testimony during overnight break, prosecutor asks court "to follow what the Court's standard procedure is on this. And I understand that to be the case. I'm not asking for anything different."); JA 304 (court precludes contact between defense counsel and defendant

during trial recesses: "It would appear that the witness, a defendant witness, is treated just like any other witness as far as I can tell from the cases we've read."). Fourth, the cross-examination of Stack demonstrates that the Government adhered to a rule of not discussing a witness's testimony during cross-examination. 10/16 Tr. 102 (Stack testifies that he did not discuss his testimony with government agents during lunch break).

IV. THERE WAS SUFFICIENT EVIDENCE THAT THE DEFENDANT KNOWINGLY MADE A FALSE STATEMENT TO FEDERAL AGENTS ABOUT HOW STACK GOT INVOLVED IN THE LANDMARK DEAL AND WHETHER THE DEFENDANT EVER DISCUSSED WITH SILVESTER THE FEE-SPLIT ARRANGEMENT BETWEEN THE DEFENDANT AND STACK

A. Relevant Facts

Count 12 of the Superseding Indictment charged the defendant with making a false statement to federal agents during the investigation of the matters at hand. Specifically, it alleged as follows:

> On or about July 16, 1999, in the District of Connecticut, defendant, BEN F. ANDREWS, in a matter within the jurisdiction of the Federal Bureau of Investigation ("F.B.I.") and the Internal Revenue Service Criminal Investigative Division ("IRS-CID"), both agencies of the executive branch of the

> Government of the United States, did knowingly and willfully make a materially false, fictitious, and fraudulent statement and representation, in that defendant BEN F. ANDREWS told special agents of the FBI and of the IRS-CID who were then investigating the actions of Paul J. Silvester, the former Treasurer for the State of Connecticut, *that he (ANDREWS) had contacted Christopher Stack to become involved in an investment deal by the State of Connecticut with Fund A because he felt that Stack would be helpful in finalizing the deal with the Treasurer, but that he (ANDREWS) had not discussed this arrangement with Stack in front of Paul J. Silvester,* when in truth and in fact, as the defendant BEN F. ANDREWS there and then well knew, after defendant BEN F. ANDREWS had offered to kickback to Paul Silvester a portion of the fees that ANDREWS would earn from the investment of state pension assets with Fund A, Paul Silvester directed ANDREWS to take on Christopher Stack as a partner and split the payment resulting from the investment with Fund A.

JA 80 (emphasis added).

As discussed in more detail below, the Government offered testimony from Special Agent Joseph McTague that Andrews had made the false statements outlined in Count 12. GA346-51, 366-68, 376-81. Even when he took the stand, Andrews did not meaningfully contest the accuracy of Agent McTague's testimony. He simply

testified that he had construed the agents' questions quite narrowly, and that his answer was truthful. GA425-26.

1. The False Statements

Special Agent Joseph McTague testified that during the investigation of this case, he and FBI Special Agent Charles Urso had interviewed defendant Andrews at Andrews' office on July 16, 1999. 10/21 Tr. 18. During the interview, they asked Andrews how the 50/50 split of fees between Andrews and Stack had come about. GA346. Andrews told the agents that "it was his idea." GA347. In response to the agents' questions, Andrews "said that it had been his idea to ask Mr. Stack to join in with him, that at the time Mr. Stack was well-known." GA346-47. According to Andrews, "he called Mr. Stack and . . . they had set up a meeting. They met at a restaurant over food and beer, and at the meeting he asked Mr. Stack to join in with him." GA347. As the agents were speaking with Andrews about Stack, Andrews made no reference to Silvester. GA347. Andrews claimed that he wanted to bring Stack into the Landmark deal because "he was not certain that he would be able to get Mr. Silvester's attention and he thought that Mr. Stack would be able to get Mr. Silvester's attention." GA348. According to Agent McTague, Andrews denied ever discussing the fee-splitting arrangement with Silvester:

> He said that he had not. He said that at some point – at the same time they met in the restaurant, they had also met at a fund-raiser; and at the fund-raiser, they had – he had met with Mr. Stack and Mr.

> Silvester, that they had discussed the Landmark deal *but not their fee-splitting arrangement*.

GA348-49 (emphasis added); *see also* GA359. Andrews also claimed to the agents why he would not have discussed the fee-split arrangement with Silvester:

> He said he would consciously avoid that type of discussion. He said that it was none of Mr. Silvester's business and *that he recognized that it would be inappropriate for him to have that type of discussion in front of Mr. Silvester;* and he said that Mr. Silvester – *splitting the fee was nothing that Mr. Silvester had encouraged.*

GA349 (emphasis added); *see also* GA359.[13]

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[13] In a misguided portion of cross-examination, the defense attempted to impeach Agent McTague with his handwritten notes of the interview with defendant Andrews. GA360-63; Def. Ex. E. Defense counsel suggested that none of Agent McTague's notes corroborated his testimony that Andrews had said that he never told Silvester that he had arranged for a split with Stack, and that it would have been inappropriate for him to have discussed this with Silvester. GA362. On re-direct, the Government pointed to a portion of Agent McTague's notes that had been overlooked on cross. Specifically, Agent McTague had written: "Nothing that Silvester encouraged. He understands the significance of discussing with Silvester; he would consciously avoid that type of discussion." GA364.

On direct examination, Andrews agreed that the agents had asked whether he "had ever discussed the arrangements with Stack in front of Silvester." GA426. He claimed to have understood the question very narrowly, to mean that he had never discussed "the arrangements for payment and how it was going to work and all of that. And the answer was no." GA426.

2. Motion for Acquittal

The defense orally moved for a judgment of acquittal on Count 12 at the close of the Government's case-in-chief. 10/20 Tr. 144-47. Counsel argued that the indictment had been drafted in a way that "does not provide the Defendant with notice of the charge against him." 10/20 Tr. 145. The defense essentially claimed that the term "arrangement" was too "vague," and that "the evidence they had is that the discussions that they had with Ben were ambiguous." 10/20 Tr. 147; *see also* 10/20 Tr. 172. The district court reserved decision. 10/20 Tr. 174. The defense orally moved for a judgment of acquittal after the verdict, but offered no supporting argument until months after the court-imposed deadline had passed.

The district court denied the defendant's written motion for acquittal for untimeliness. JA 110. Out of an abundance of caution, the district court also held that even if the motion had been timely, it would have been denied on the merits. JA 110, 135. With respect to Count 12, the district court agreed with the Government that it "had only to prove that Andrews had discussed the arrangement to include Stack in the deal in front of Silvester, and then had

knowingly and willfully told the special agents of the FBI and IRS-CID that he had not." JA 133. The court reviewed the testimony of Silvester, Stack, and Agent McTague. It noted that Silvester testified he had discussed the fee-split on several occasions with Andrews, and that Stack had testified that the fee-split was discussed at the Clam Shack. JA 134. Accordingly, the court found the evidence sufficient on Count 12. JA 135.

B. Governing Law and Standard of Review

Section 1001(a)(2) of Title 18 of the United States Code provides that "whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully . . . (2) makes any materially false, fictitious, or fraudulent statement or representation" is guilty of an offense.

The law governing evidentiary sufficiency claims is set forth in Part I.B *supra.*

C. Discussion

The defendant challenges his conviction on Count 12 for making a false statement on the ground that it is "impossible . . . to define with any precision the meaning" of the false statement alleged in the indictment, to the extent it claims that Andrews denied having discussed his "arrangement with Stack" in Silvester's presence. Def. Br. 55. According to the defendant, he believed when speaking to the agents that the "arrangement" referred only

to the details of of how Rogers & Wells received consulting fees from Landmark, and then disbursed those funds to Mr. Andrews and Stack's limited liability company ("KCATS"). The defendant concedes that if "'this arrangement' means the *mere fact* that Mr. Andrews would split his fee with Stack, then Mr. Andrews' answer was untruthful, since, as he testified at trial, he had participated in a discussion of this matter at the post-Prescott Bush-dinner meeting." Def. Br. 56. Contrary to the defendant's claim, however, neither the indictment nor the agents' conversation with the defendant was ambiguous.

First, the indictment clearly alleges that Andrews falsely denied having discussed Stack's involvement in the Landmark deal in front of Silvester. The indictment alleged that Andrews falsely told the agents "that he (ANDREWS) had contacted Christopher Stack *to become involved in an investment deal by the State of Connecticut with Fund A* because he felt that Stack would be helpful in finalizing the deal with the Treasurer, but that *he (ANDREWS) had not discussed this arrangement with Stack* in front of Paul J. Silvester." JA 80 (emphasis added). The indictment makes no mention of detailed payment arrangements between Rogers & Wells or KCATS. Instead, the referenced "arrangement" is clearly the one discussed in the previous clause of the same sentence – that is, having Stack "become involved in an investment deal by the State of Connecticut with Fund A [i.e., Landmark]." Thus, the indictment leaves no doubt about what Andrews is alleged to have denied discussing with Silvester.

Second, Agent McTague's testimony makes it clear that Andrews denied not merely discussing with Silvester the payment details of his fee split with Stack, but also Stack's very involvement in the Landmark deal. It was entirely within the province of the jury to credit Agent McTague's testimony that Andrews denied having discussed with Silvester his agreement with Stack to split the Landmark fees. More precisely, Agent McTague testified that Andrews admitted having met with Stack and Silvester at the fundraiser, and "that they had discussed the Landmark deal *but not their fee-splitting arrangement*." GA348-49 (emphasis added); *see also* GA359. This testimony alone is sufficient to support the conviction on Count 12.

The context of Andrews' remarks only reinforces the conclusion that he denied discussing the fact of Stack's involvement, and not just the payment details, in front of Silvester. Agent McTague testified that Andrews embellished his story during the interview by emphasizing that "he would consciously avoid that type of discussion. He said that it was none of Mr. Silvester's business and *that he recognized that it would be inappropriate for him to have that type of discussion in front of Mr. Silvester;* and he said that Mr. Silvester – *splitting the fee was nothing that Mr. Silvester had encouraged."* GA349 (emphasis added); *see also* GA359. If Andrews's reference to the "fee-splitting arrangement" had meant only the mundane, technical details of how checks would be cut to Stack, it would have been nonsensical for him to add that he would have "consciously avoid[ed]" such a conversation with Silvester on the ground that such a

discussion would have been "inappropriate." It was the fee-split itself, and not the method of payment, that was "inappropriate" and hence not fit for conversation with the State Treasurer. Moreover, if Andrews had really been referring only to the mechanics of the fee split, his further comment that "splitting the fee was nothing that Mr. Silvester had encouraged" would have been a *non sequitur*. Based on all of Andrews' statements to Agent McTague, they could properly conclude that he denied having discussed the fact of Stack's involvement in the Landmark deal with Silvester. Because the defendant concedes that such a statement was untruthful, Def. Br. 56, there is sufficient evidence to support the jury's unanimous guilty verdict on Count 12.

V. THE DISTRICT COURT DID NOT MANIFESTLY ABUSE ITS DISCRETION BY REFUSING TO COMPEL THE GOVERNMENT TO IMMUNIZE WITNESSES WHO INVOKED THEIR FIFTH AMENDMENT PRIVILEGE, OR BY ADMITTING EVIDENCE RELATING TO WHAT THESE WITNESSES WERE TOLD BY OTHER, TESTIFYING WITNESSES

A. Relevant Facts

During the course of the trial, reference was made to two persons who were involved in the defendant's dealings with Landmark: (1) Jerome L. Wilson, a lawyer at the New York firm Rogers & Wells, which entered into a contract with Landmark, and which in turn entered into a contract with the defendant; and (2) Stanley F. Alfeld, who was the Chairman of Landmark during the period in question. Each, through counsel, stated that he would assert his Fifth Amendment privilege if called to testify. *See* JA 42 (docket entry 747). The Government refused to immunize these witnesses. *Id.*

The defendant now claims that there were two instances at trial where the Government's refusal to grant immunity created an unfair advantage that deprived him of due process. *See* Def. Br. at 58-60. The first involved the testimony of Paul Silvester, who was asked on direct examination: "Mr. Silvester, could you explain to the jury, very brief, what you did in connection with the Landmark deal? . . ." GA137. Silvester's answer began: "Well, it was similar to what I did with the Triumph deal. I had – ",

at which point defense counsel interrupted the answer and objected on various grounds. *Id.* The court overruled the objection, and Government counsel tried again: ". . . if you could just go on and answer the question – which I did ask – which is, essentially, could you described what you did wrong in connection with the Landmark deal?" GA138. This question drew new objections, which the court overruled, and Silvester answered: "The Landmark deal is – what I did there is I invested money in this organization and I asked them to pay – I – through an intermediary, I asked them to pay – ", at which point defense counsel objected and asked for a mistrial. GA139-40. One of the grounds for the objection was that, according to the defense, Silvester's testimony was an attempt to convey that which might have occurred during a private meeting between Alfeld and Wilson. GA142-43. The court denied the request for a mistrial and overruled the objection, GA143-44, 150, and defense counsel then requested that the court compel the Government to grant immunity to Alfeld and Wilson, GA144, 149. The court denied this request as well. GA150. The Government then asked its question one last time, and Silvester gave his complete response:

> I made a decision to invest in Landmark, but before doing so, I went to a gentleman by the name of Jerry Wilson and asked him to speak to Landmark and arrange for Mr. Andrews and Mr. Stack to be paid a finders fee.

GA155. Silvester also admitted that, as a result, he was influenced to do the Landmark deal, and that he did in fact

invest in Landmark. GA155. Nowhere did Silvester speculate about what Wilson might have said to Alfeld in any private conversation.

The second event addressed by the defendant involves a portion of the Government's cross-examination of the defendant, in which the Government explored the defendant's claimed role in the Landmark deal. 10/23 Tr. 198. The defendant testified that he "vaguely" remembered that, in response to a forthwith subpoena, he provided the FBI with (among other things) a memo from Wilson to Alfeld. *Id.* He also recalled that, in the memo, Wilson told Alfeld that the defendant would be providing Alfeld with a letter. *Id.* at 198-99. The defendant then explained that he did not draft a letter for Landmark (as mentioned in the memo), but that he verbally told Wilson what the letter should say. *Id.* at 199. The defendant confirmed that he saw the letter ultimately prepared by Wilson. *Id.* at 200. When Government counsel provided the defendant with a draft letter and asked whether it was the same one, defense counsel objected. *Id.* The question was withdrawn, and the defendant was asked whether the letter was "a draft prepared by Jerry Wilson based on the information that you communicated to him?" *Id.* at 201. The defendant answered, "It seems very similar to the discussion I had with Jerry Wilson, yes, but these are Jerry's words." *Id.* The Government then inquired about another letter that was sent by Alfeld to the Treasurer's office on Landmark's letterhead, and asked whether the defendant's "consulting services" were in large part responsible for the creation of this letter. *Id.* at 202-03. The defendant testified:

> It appears to be the letter that Mr. Alfeld sent Landmark. I wasn't there, but it is related to the draft, and the draft relates to a conversation I had with Jerry Wilson. So it is just a very small portion of my discussion that I had with Jerry Wilson.

Id. at 203. The Government then offered both letters, and court admitted them over objection. *Id.* After continued defense objection (*id.* at 203-05), the Government withdrew its offer regarding the Alfeld letter and offered just the draft. *Id.* at 205. The defense continued to object, based on the mistaken claim that the defendant never said he saw either letter, and requested voir dire. *Id.* The court refused, and the draft letter was marked as Exhibit 80 and shown to the jury. *Id.* at 206. The Government concluded its questioning for the day by establishing that the draft letter provided the Treasurer's office with the same rudimentary information that Landmark had provided months before, without the defendant's help. *Id.* at 207-09. The final letter was not admitted into evidence. GA485-86.

The next day, defense counsel again insisted on conducting voir dire in regard to the draft letter. GA482-86. In response to defense counsel's questions – and in conflict with his earlier testimony – the defendant testified that the first time he ever saw Government Exhibit 80 was the day before. GA487. The defendant also offered that "[t]his letter reflects much of what I – some of what I talked about with Mr. Wilson." GA489. Defense counsel then reiterated his objection to the letter, based on the grounds of authentication. GA491-93. The court refused

to rescind its order of admission (GA499), and the defense argued that his confrontation rights were violated by admission of the letter, because he was unable to question Alfeld or Wilson about it. GA499-02. The court rejected these claims. GA502.

B. Governing Law and Standard of Review

As a general rule, the Government cannot be required to seek immunity for the benefit of the defense. *See United States v. Turkish,* 623 F.2d 769, 777 (2d Cir. 1980). However, in certain narrow circumstances, due process concerns may compel the Government to choose between seeking to confer immunity for its own witnesses as well as the defense's, or not seeking immunity at all. *See United States v. Dolah,* 245 F.3d 98, 105 & n.5 (2d Cir. 2001), *abrogated on other grounds by Crawford v. Washington,* 541 U.S. 36 (2004); *United States v. Bahadar,* 954 F.2d 821, 826 (2d Cir. 1992). This choice must be made only where the defense can carry the burden of proving the following three elements:

> (1) the Govenment has engaged in discriminatory use of immunity to gain a tactical advantage; (2) the witness's testimony is material, exculpatory and not cumulative; and (3) the testimony must be unobtainable from any other source.

United States v. Ballistrea, 101 F.3d 827, 837 (2d Cir. 1996) (internal citations and quotation marks omitted); *see United States v. Diaz,* 176 F.3d 52, 115 (2d Cir. 1999) ("The defendant bears the burden of showing that each of these elements is present."). While the breadth of the first

element is not entirely clear (*see Dolah*, 245 F.3d at 105-06), the Court of Appeals has held that the Government's use of immunity for some of its own witnesses, but not for others, cannot by itself satisfy this element. *See United States v. Todaro,* 744 F.2d 5, 10 (2d Cir. 1984) ("The number of witnesses immunized by the Government, without more, would not support a finding of this type of misconduct."); *Turkish,* 623 F.2d at 777 (fairness considerations alone cannot require the government to seek immunity); *see also Ballistrea,* 101 F.3d at 837 ("Nothing in the record indicates that the Government had granted immunity to its witnesses, and refused to grant immunity to defendant's witnesses, in order to gain a tactical advantage."); *Burns,* 684 F.2d at 1077 ("[W]e find unpersuasive appellant's claims that the government engaged in either overreaching or manipulative use of immunity to gain a tactical advantage.").

A trial court's decision not to compel the Government to forego its immunized testimony or confer immunity should be reviewed for abuse of discretion and subject to harmless error analysis. *See Dolah*, 245 F.3d at 106-07.

C. Discussion

The defendant has utterly failed to satisfy *any* of the three elements required to raise a due process violation. The defendant's claim of discriminatory abuse is based solely on the facts that one Government witness (Stack) was granted immunity, and other testifying and non-testifying co-conspirators were given plea and cooperation agreements. Clearly the extension of immunity to one Government witness is insufficient to prove that the

Government acted in a discriminatory manner to gain a tactical advantage. *See Todaro,* 744 F.2d at 10.

The defendant's assertions that Wilson and Alfeld's testimony would have been material, exculpatory and not cumulative, and otherwise unobtainable, ring equally hollow. As the defendant concedes, these witnesses consistently refused to make any comments regarding the case. *See* Def. Br. at 62. Thus there is simply no knowing what these witnesses would say. The defendant wishfully invites the court to *infer* that the witnesses' testimony would be favorable to him,[14] based on what the defendant, himself, said at trial as well as the testimony of other Landmark witnesses. *Id.* Yet, the defendant ignores the fact that, at sentencing, the district court found that he lied during trial, and the jury, too, necessarily rejected his testimony. As for the Landmark witnesses, they uniformly testified that they knew of no real work actually performed by the defendant, nor did they know of any private discussions between Wilson and Alfeld. In short the

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[14] The defendant argues "[W]e believe that . . . if Wilson and Alfeld had testified, they would have denied knowledge of any illegitimate purpose associated with their consulting relationship." Def. Br. at 62-62. This point, even if true, is wholly irrelevant. As the district court properly held: "Whether Landmark knew it was giving a bribe is immaterial." JA 113 n.5 (rejecting sufficiency challenge to § 666 charges in Counts 3 and 7).

defendant falls well short of satisfying the last two elements of the three-part test.[15]

The defendant attempts to side-step the three-part analysis by claiming that the Government sought to gain an unfair advantage by introducing evidence relating to Wilson and Alfeld and then "denying" the defendant the opportunity to confront them. But this is not what happened. While the defendant claims that Silvester was improperly allowed to testify about conversations between Wilson and Alfeld (Def. Br. at 61), the record reveals that Silvester only testified: (a) "I asked them [Landmark] to pay – I – through an intermediary, I asked them to pay – "; and (b) "I went to a gentleman by the name of Jerry Wilson and asked him to speak to Landmark and arrange for Mr. Andrews and Mr. Stack to be paid a finders fee." GA139-40, 155. Thus, contrary to the defendant's claims, Silvester did not testify about any unknown conversation between Wilson and Alfeld, but only testified about what

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[15] If an inference alone were sufficient to satisfy this showing, then the Court would be in the untenable position of having to weigh the trial witnesses' testimony (and possibly other facts) for the purpose of determining what the missing witnesses would likely say. Under such a scenario, rather than looking solely to the testimony of the defendant and the Landmark witnesses (who knew nothing of what the missing witnesses had to say), the Court more reasonably could look to the Government's cooperating witnesses (who actually met with the missing witnesses and testified about these conversations) and "infer" that the missing witnesses would likely testify in a manner that would not be helpful to the defense.

he said to Wilson and why he said it. It should go without saying that it was proper for Silvester to testify about his bribe-demand, in a case that was primarily about his bribery.

Likewise, the defendant overstates what occurred at trial in regard to the draft letter from Wilson to Alfeld. The Government established during cross-examination of the defendant that he did little, or nothing, to earn his million-dollar fee. One thing that the defendant claimed to do was advise Landmark about how to approach the Treasurer's Office. The defendant repeatedly admitted that the draft letter addressed from Wilson to Alfeld reflected his communications with Wilson on this matter. Yet this draft letter simply informed the Treasurer's Office of basic information that had been provided to that office months before. Thus, the letter demonstrably showed the "work" that the defendant had supposedly done to earn his fee, and revealed that, in truth, his "work" amounted to nothing more than a sham. The fact that the defendant admitted that this letter was the product of his communications with Wilson was a sufficient basis for its introduction. *See* Fed. R. Evid. 901, Advisory Notes, Example (4) ("a document or telephone conversation may be shown to have emanated from a particular person by virtue of its disclosing knowledge of facts known particularly to him"); *id.* ("similarly, a letter may be authenticated by content and circumstances indicating it was in reply to a duly authenticated one"); *United States v. Addonizio,* 451 F.2d 49, 71 (3d Cir. 1971) ("[i]t is clear that the connection between a message (either oral or written) and its source may be established by

circumstantial evidence."); *see also United States v. Tropeano,* 252 F.3d 653, 661 (2d Cir. 2001) (district court has broad discretion to determine whether a piece of evidence has been properly authenticated).[16]

In sum, the Government's grant of immunity to Stack, and its refusal to immunize Wilson and Alfeld, did not violate the defendant's due process rights. Nor did the Government's introduction of evidence relating to conversations that witnesses had with these persons (but not about conversations to which the witnesses were not privy) violate the defendant's confrontation rights.

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[16] Even if the draft letter was not properly authenticated, any error would be harmless because the letter simply confirmed the defendant's testimony about the "work" he performed. *See Kotteakos v. United States,* 328 U.S. 750, 764-65 (1946); *U.S. v. Chin,* 371 F.3d 31, 39 (2d Cir. 2004).

CONCLUSION

For each of the foregoing reasons, the judgment of the district court should be affirmed.

Dated: March 23, 2006

Respectfully submitted,

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CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief exceeds the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), and that it is calculated by the word processing program to contain approximately 20,080 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.

The Government has filed herewith a motion for permission to file an oversized brief, in light of the complexity of the issues, and particularly the need to provide significant factual context for resolution of the sufficiency and Sixth Amendment issues.

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Addendum

18 U.S.C. § 666 (1998). Theft or bribery concerning programs receiving Federal funds

(a) Whoever, if the circumstance described in subsection (b) of this section exists--

(1) being an agent of an organization, or of a State, local,or Indian tribal government, or any agency thereof--

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that–

(i) is valued at $5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more; or

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of

value of $5,000 or more;

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

(c) This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

(d) As used in this section--

(1) the term "agent" means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative;

(2) the term "government agency" means a subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent establishment, commission, administration, authority, board, and bureau, and a corporation or other legal entity established, and subject to control, by a government or governments for the execution of a governmental or intergovernmental program;

(3) the term "local" means of or pertaining to a political subdivision within a State;

(4) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(5) the term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.

18 U.S.C. § 1001 (2000). Statements or entries generally

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully–

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years . . . or both.. . . .

18 U.S.C. § 1341 (1998). Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. . . .

18 U.S.C. § 1343 (1998). Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or

property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both. . . .

18 U.S.C. § 1346 (1998). Definition of "scheme or artifice to defraud"

For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

Fed. R. Evid. 608
Evidence of Character and Conduct of Witness

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.