04-4703-cr

To Be Argued By:
CALVIN B. KURIMAI

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 04-4703-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

RALPH F. VITALE,
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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STATEMENT OF JURISDICTION

The district court (Robert N. Chatigny, Chief Judge) had subject matter jurisdiction over this federal criminal case 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 appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the district court erred in not disclosing to the defendant the drug treatment records concerning Government witness Peter J. Trantino and instead summarizing the information contained in those records.

II. Whether the district court erred in not conducting an evidentiary hearing concerning a speculative claim by the defendant of juror bias; where the husband of one of the prosecutors realized after trial that he had had a passing professional acquaintance with the husband of a juror.

III. Whether, in light of the Supreme Court's holding in *United States v. Booker*, this case must be remanded for resentencing.

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Preliminary Statement

On May 11, 2004 the defendant-appellant Ralph Vitale was convicted after a jury trial in the United States District Court for the District of Connecticut (Robert N. Chatigny, C.J.), of five counts of bank fraud in violation of 18 U.S.C. § 1344. As a result, the defendant was sentenced principally to fifty-one months in prison.

The defendant raises two challenges to his conviction on appeal, neither of which has merit. First, the defendant claims that the district court violated his Sixth Amendment right to confront an adverse witness when it refused to disclose confidential records about drug treatment undergone by the witness at a time subsequent to the events about which the witness was to testify. As explained below, however, there was no Sixth Amendment violation because the defendant was provided the substance of the information contained in those records both through the witness's direct examination, and through a summary provided by the district court after *in camera* inspection of the records.

Second, the defendant raises a meritless claim that the district court failed to hold a hearing regarding potential juror bias. After the trial, the Government learned that the husband of one of the Government's attorneys was distantly acquainted with one of the jurors, whom he encountered briefly after the jury returned its verdict. The Government promptly notified the court and the defense. The district court properly followed the dictates of the Supreme Court and this Court in declining to hold an evidentiary hearing into potential juror bias based upon the speculative nature of the defendant's claim in this regard.

Finally, because the defendant preserved his claim that *Blakely v. Washington* rendered the mandatory application of the Sentencing Guidelines unconstitutional, the defendant's sentence should be vacated and the case remanded for sentencing.

Statement of the Case

On December 13, 2001, Charles J. Hoblin waived indictment and pleaded guilty to a one-count information charging him with defrauding Fleet Bank in connection with five loans, in violation of 18 U.S.C. § 1344, Docket No. 3:01-CR-268 (RNC). *See* Government's Appendix ("GA") at 2-3.

On July 17, 2002, a federal grand jury in Connecticut returned a one-count indictment charging Peter J. Trantino and Ralph F. Vitale with defrauding Fleet Bank in connection with the same five loans identified in the information to which Charles J. Hoblin had pleaded guilty, in violation of 18 U.S.C. § 1344, Docket No. 3:02-CR-262 (RNC). See Defendant-Appellant's Appendix ("DA") at 1-4; GA 10.

Trantino and Vitale pleaded not guilty on September 27, 2002, and each was released on a $25,000 nonsurety bond. GA 11; DA 4-5.

On July 24, 2003, Trantino pleaded guilty to a five-count superseding information charging violations of 18 U.S.C. § 1344 in connection with the five Fleet loans, and his bond was continued pending sentencing. GA 13.

On July 24, 2003, a federal grand jury returned a five-count superseding indictment charging Vitale with violations of 18 U.S.C. § 1344. DA 7, 16-23.

On August 5, 2003, Vitale pleaded not guilty to all counts of the superseding indictment and his bond was continued pending trial. DA 7.

Jury selection in *United States v. Ralph F. Vitale*, Docket No. 3:02-CR-262 (RNC), was held on April 13, 2004. DA 10.

On April 29, 2003, trial to a jury on the superseding indictment commenced before the Honorable Robert N. Chatigny, Chief United States District Judge. GA 10.

On May 11, the defendant was found guilty on all counts charged in the superseding indictment, and sentencing was scheduled for August 16, 2004. DA 12.

On June 21, 2004, Peter J. Trantino was sentenced to the custody of the Attorney General for a term of time served, placed on supervised release for three years, ordered to pay restitution of $12,000, and assessed $50. GA 14.

On August 16, 2004, Ralph F. Vitale was sentenced to the custody of the Attorney General for fifty-one months on counts one through five of the superseding indictment, those sentences to be served concurrently, placed on supervised release for five years on each of counts one through five to run concurrently, ordered to pay restitution jointly and severally with Charles J. Hoblin in the amount of $323,500, assessed $250 and denied bond pending appeal. DA 13, 137-153.

The defendant filed a timely notice of appeal on August 18, 2004. He is currently serving his sentence. DA 154.

On January 7, 2005, Charles J. Hoblin was sentenced to the custody of the Attorney General for twenty-seven months, placed on supervised release for three years, ordered to pay restitution of $323,750 jointly and severally with Ralph F. Vitale and assessed $100. GA 6.

On January 14, 2005, the defendant moved this Court for a remand to the district court for resentencing based upon *United States v. Booker,* 125 S.Ct. 738 (2005). DA 155.

On or about February 14, 2005, the Government moved for a limited remand pursuant to *Booker* and *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). GA 97-102.

Both motions for remand were denied on July 13, 2005. GA 103.

STATEMENT OF FACTS

Beginning in late 1995 and continuing through April 1996, defendant Ralph F. Vitale, Charles J. Hoblin and Peter J. Trantino schemed to defraud Fleet Bank. The scheme involved the submission of six fraudulent Easy Business Banking loan applications and supporting documents resulting in an actual loss to Fleet of $422,500. DA 148. The five loans charged in the indictment accounted for $335,750 of the actual loss of $422,500.

Hoblin and Trantino pleaded guilty, and each testified against the defendant. A detailed account of the evidence introduced at trial against the defendant can be found in paragraphs 7 through 57 of the Presentence Report ("PSR") which the defendant has filed under seal with this Court.

Generally, in 1995 and 1996, Charles J. Hoblin was an accountant and tax preparer doing business as Hoblin Business Consultants. Peter J. Trantino was a Fleet Bank loan officer/business development officer. In January 1995, the two met when Hoblin was seeking information about Fleet's recently-begun Easy Business Banking ("EBB") loan program on behalf of one of his clients. One of Trantino's responsibilities was to market the EBB loan program, and to submit two EBB loan applications per week to Fleet's underwriting department. After Trantino and Hoblin met, the latter became a productive source of completed EBB loan applications.

Hoblin met defendant Ralph F. Vitale in the early Fall of 1995 through Vitale's daughter-in-law whom Hoblin had assisted with an EBB loan application. Vitale had several inventions for which he was purportedly seeking financing. Hoblin enlisted Trantino because of his banking knowledge and his banking connections. Vitale initially sought a $500,000 business development loan. In late November 1995, after it became obvious that obtaining such a loan would not be feasible, Vitale became interested in a Fleet EBB loan.

EBB loans were available only to established businesses. Therefore, Vitale and Hoblin created false

financial information for a corporation called Endura Jet Tape. Because Vitale had a poor credit rating, his sister was named as president on the loan application. Trantino reviewed the loan application and realized that it contained false information, but he did nothing to prevent its submission to Fleet. The loan was approved in December 1995. Because the loan was approved without being questioned by Fleet's underwriting department, Vitale decided to seek additional loans. In all, there were five additional fraudulent loans.

The five loans, one for each of five purported corporations, were presented to Fleet Bank from on or about January 22, 1996, through on or about March 22, 1996. Each of the five loan applications requested $100,000. The financial information for each of the five applicant corporations set forth on each loan application, as well as on the Internal Revenue Service ("IRS") Form 1120 that accompanied each application, was totally fabricated by Hoblin and Vitale. With Vitale's agreement, a different business client of Hoblin was the purported president of each corporation, and each client's most recent IRS Form 1040 was also submitted as part of the loan package. Those clients, of course, were totally unaware that the financial information and tax returns were used. Trantino's role was to witness the purported signature of each loan applicaton, submit each loan to the underwriting department, and shepherd each loan through the application process.

SUMMARY OF ARGUMENT

I. The defendant sought access to the drug treatment records of Government witness Peter Trantino, pursuant to the Sixth Amendment of the Confrontation Clause. The district court correctly denied the defendant's request. The court adequately protected the defendant's right to confront and cross-examine Trantino by summarizing the contents of those records, which described the witness's drug treatment history concerning a period of several years after the events about which Trantino testified. The district court's summary of those records, coupled with the witness's testimony on direct examination, provided the defendant with more than sufficient information to cross-examine Trantino. Even assuming *arguendo* that there was a violation of the Confrontation Clause, any such error was harmless beyond a reasonable doubt.

II. The district court did not err in declining to conduct an evidentiary hearing on the defendant's speculative claim of potential juror bias. Government co-counsel's husband viewed the trial for approximately forty minutes one day, and believed he recognized one of the jurors as an acquaintance of a former professor and graduate program director at the UCONN Health Center. After the jury returned its verdict, he encountered the juror in the professor's office, and realized the juror was the professor's wife, whom he had known only very casually at least fourteen years earlier. His conversation with the juror was brief and innocuous. At jury selection, Government co-counsel had told the prospective jurors her husband's last name. The juror in question did not indicate that she recognized the name, nor is there any

indication in the record that she recognized the husband during the forty minutes he watched the trial one day. Under all the circumstances the district court found the defendant's claim of possible juror bias entirely speculative and correctly denied the defendant's request for an evidentiary hearing.

III. The defendant preserved his objection to his sentencing under the Sentencing Guidelines based upon *Blakely v. Washington,* 542 U.S. 296 (2004). Therefore, the sentence in this case must be vacated and the case remanded for resentencing as directed by this Court in *United States v. Fagans*, 406 F.3d 138 (2d Cir. 2005).

ARGUMENT

I. THE DECISION OF THE DISTRICT COURT NOT TO DISCLOSE WITNESS PETER J. TRANTINO'S DRUG TREATMENT RECORDS DID NOT VIOLATE THE DEFENDANT'S CONSTITUTIONALLY PROTECTED RIGHT OF CONFRONTATION

A. Statement of Facts

As part of discovery in this case, the Government turned over to the defense a report of an interview of Peter J. Trantino that had been conducted by an agent of the Federal Bureau of Investigation ("FBI") on August 10, 2001. In that interview, Trantino advised the agent that he was in a court-ordered drug treatment program following

his arrest in June 2001 for a drug offense.[1] Also, prior to the beginning of the trial, the government advised the defendant that, during the period of time relevant to the indictment, Trantino was "a heavy user of prescription pain killers." DA 30-35.

On April 13, 2004, the Government gave a witness list to the defendant. DA 10. On it Trantino was identified as a Government witness. On April 29, 2004, the defense caused a trial subpoena to be served on the APT Foundation, Inc., the owner and operator of the Orchard Drug Rehabilitation Clinic, for the production, on May 3, 2005, of "all records of drug and psychiatric/psychological counseling pertaining [to] Peter Trantino, DOB 2/22/58, SS# 045-42-64." GA16; DA 34. Thereafter, the APT Foundation and Trantino moved to quash the subpoena pursuant to certain provisions of the United States Code and the Connecticut General Statutes. GA 16-28, 29-37.

Trantino was called to testify on May 4, 2004. Prior to the commencement of his testimony, the district court initially took up the issue of Trantino's motion to quash the subpoena directed to APT. DA 28. The court inquired of the defense why the records sought by the subpoena would be helpful to the defense case. Counsel for the defendant replied that information in the records went to Trantino's ability to recall and, with respect to psychiatric problems, his credibility. He also theorized that the Government might have facilitated Trantino's entry into a drug treatment program so that he would make a better

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[1] The time of the conduct charged in the indictment was January 1996 through April 1996.

witness, thus creating a potential bias issue. That, he contended, went to the right of the defense to confront and cross-examine a crucial Government witness. DA 29-32.

Defense counsel observed, quite apart from the drug treatment records issue, that Trantino had no criminal record, causing him to suspect the likelihood that the Government had intervened on Trantino's behalf with State officials resulting in the drug charge not being pursued. He further speculated that, even if the Government had not intervened on Trantino's behalf, there still would exist a potential for bias because, having escaped a criminal conviction, Trantino would feel that "he owes some gratitude," although toward whom Trantino might feel some gratitude was not explained. DA 32. The Government assured the court that it had not intervened in any way in the disposition of Trantino's drug arrest. DA 33-34.

In his direct testimony, Trantino told about a neck injury he received in mid-summer of l995 that required physical therapy for several months and, ultimately, surgery. For the remainder of l995, he took vicodin as prescribed to him by his neurologist. It was during this period that he began his association with codefendant Ralph F. Vitale, and continued his business association with co-schemer Charles J. Hoblin. GA 39-44.

At the conclusion of approximately two-thirds of Trantino's testimony, the court revisited the issue of the drug records. Counsel for Trantino earlier had indicated there was no objection to an *in camera* review of those records. DA 33. Upon revisiting the issue, the court

inquired of Trantino's counsel if he opposed disclosure of any portions of the records that were relevant to the defense of the case. Trantino's counsel told the court that he needed to speak to his client, and, pending that, he did object. DA 36-37.

The Government advised the court that it would further explore the witness's use of vicodin, but that was an issue apart from Trantino's drug treatment. DA 37. The use of vicodin occurred leading up to and during the period of the fraudulent loans charged in the indictment, late 1995 through April 1996. DA 16-23, 43.

Trantino again testified on direct examination that he took vicodin until his surgery in early 1996, at which time he was prescribed tylox, another narcotic pain killer. He took tylox for six to eight weeks thereafter. GA 45-48. Trantino denied that taking vicodin before his surgery or tylox after his surgery affected his performance at the bank, and, in fact, he received commendations from his superiors during that time. GA 45-48.

Trantino was initially approached by the FBI on August 10, 2001, and he began cooperating with the Government on June 3, 2003. All substantive FBI interviews of him were conducted after that date, and his testimony before the grand jury occurred in July 2003. DA 43-45.

The court had recognized the witness's strong privacy interest in statements made by him to personnel involved in his treatment, as well as an extremely strong public interest in maintaining the privacy of those statements. It

opined that it could not logically explore the history of Trantino's substance abuse without revealing what he had said during the course of his treatment. If the witness consented to such a disclosure, the court would present it in summary fashion. DA 42.

Prior to the conclusion of Trantino's testimony, the court addressed the issue of the defendant's access to the drug treatment records. The court made the decision, over the objection of Trantino's counsel, to summarize the information in the records that seemed to it "at least arguably germane to the needs of the defense to thoroughly cross-examine consistent with the right to confrontation." DA 46. The court advised the parties of Trantino's history of heroin abuse beginning in l998, "long after the transactions at issue [in the case]," and his subsequent treatment efforts. DA 47-8. The court concluded that if Trantino testified consistently with that summary, it saw no reason to disclose the records themselves. DA 48.

The defense then formally moved that the records be disclosed pursuant to the Confrontation Clause and *Davis v. Alaska,* 415 U.S. 308, 316 (1974) and, if its motion were denied, that the records be sealed and marked as a court exhibit for possible appellate review. *Id.* The court replied that it had made no final ruling but that if Trantino forthrightly acknowledged the points that the court had disclosed, that would end the inquiry. DA 49.

When Trantino resumed his direct testimony, he admitted his addiction to opiates prior to l998, and to his use of heroin beginning in early l997. He described his

treatment history beginning in late 1997, or early l998 on an outpatient basis for about one year. GA 49-50. He was treated as an inpatient in 2000, followed by three to four months of outpatient treatment. In late March or the beginning of April 2001, he again sought treatment at a detox center and was subsequently transferred to the APT Foundation. Trantino last used heroin in April 2002. He was being treated at the APT Foundation and on a methadone maintenance program at the time of his trial testimony. GA 51-55.

At the conclusion of Trantino's testimony, the court found no need to make additional disclosures of the witness's drug treatment records. GA 56.

On cross-examination, Trantino was again questioned about his use of opiates prior to his neck surgery, and his subsequent use of heroin beginning in l997. GA 57-58. The use of heroin did not affect his ability to function at work, GA 608, and he took it only "to feel normal." His employers were not aware of his addiction, although they did know he was in a methadone maintenance program. Trantino's heroin usage was not daily, and he did not combine it with other drugs. GA 59-64. Trantino testified that he had been taking methadone for a couple of years, including the period of his cooperation leading up to and including his testimony. The methadone, however, did not affect his memory. GA 64-66.

B. Governing Law and Standard of Review

The Sixth Amendment guarantees the right of the accused in all criminal prosecutions "to be confronted with the witnesses against him." U.S. Const., amend. VI. The Confrontation Clause "provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and he right to conduct cross-examination." *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987) (plurality opinion with respect to Part III.A) (facts below). Cross-examination provides "the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

The Supreme Court has distinguished between cross-examination designed to reveal "possible biases, prejudices or ulterior motives of the witness as they may relate directly to issues or personalities in the case" and cross-examination that is a "general attack on the credibility of the witness." *Davis*, 415 U.S. at 316. The Sixth Circuit has suggested that the former is a constitutionally protected right but the latter is not. *See Boggs v. Collins*, 226 F.3d 728, 737 (6th Cir. 2000), *cert denied*, 532 U.S. 913 (2001) (citing *Davis*, 415 U.S. at 321 (Stewart, J., concurring). The Supreme Court "has never held -- or even suggested -- that the longstanding rules restricting the use of specific instances and extrinsic evidence to impeach a witness's credibility pose constitutional problems." *Hogan v. Hanks*, 97 F.3d 189,191 (7th Cir.1996). And simply labeling an argument about general credibility "to be one of 'motive' without articulating a theory of motive or partiality does not

implicate the rights carefully outlined in *Davis*." *Boggs*, 226 F.3d at 741.

Even when it is shown that bias, prejudice or motive is implicated, the right of cross-examination is not unfettered or illimitable. The Supreme Court has emphasized that "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that in effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (per curiam) (emphasis in original). The trial judge possesses "wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986); *see also United States v. Sasso*, 59 F.3d 341, 347 (2d Cir. 1995).

The discretionary authority of the trial judge to limit constitutionally protected cross-examination, however, "comes into play only after there has been permitted as a matter of right sufficient cross-examination to satisfy the Sixth Amendment." *Greene v. Wainright*, 634 F.2d 273, 275 (5th Cir. 1981) (internal quotation marks omitted). A judge does not impermissibly limit cross-examination "if the jury is in possession of facts sufficient to make a 'discriminating appraisal' of the particular witness's credibility." *United States v. Roldan-Zapata*, 916 F.2d 795, 806 (2d Cir. 1990) (quoting *United States v. Singh*, 628 F.2d 758, 763 (2d Cir. 1980)). Hence, the Confrontation Clause does not come into purview when

the defense is not prohibited from engaging in cross-examination that would expose the facts from which jurors "could appropriately draw inferences relating to the reliability of a witness." *Davis*, 415 U.S. at 318.

Access to confidential records claimed by the defense to be necessary to effective cross-examination can potentially implicate the Confrontation Clause. However, in *Ritchie*, 480 U.S. at 39 (1987), the Supreme Court upheld the lower court's decision to deny pretrial disclosure, pursuant to a subpoena, *id.* at 54, of a protective service agency's records to a defendant charged with raping his daughter. A plurality of the Court held that the Confrontation Clause merely assures that the defendant has the right to fully question witnesses at trial and does not require the disclosure of confidential agency records. *Id*.

The probative value of confidential medical psychiatric records is gauged by the nature of the condition, the "temporal recency or remoteness of the history," and the proximity in time of the information contained therein to the events about which the witness testified. *Sasso*, 59 F.3d at 348 (no indication that prior delusional state or prescribed medications affected witness's ability to perceive and understand events about which she testified); *see also United States v. Lindstrom*, 698 F.2d 1154, 1166 (11th Cir. 1983) (nondisclosure of witness's mental health records that embraced the time period of the alleged conspiracy about which the witness testified was error); *United States v. Partin*, 493 F.2d 750, 764 (5th Cir. 1974) (medical records disclosed that, shortly before crime occurred about which witness testified, he had voluntarily

committed himself to a hospital reporting auditory hallucinations and complaining that at times, he thought himself to be another person and failure to disclose them to defendant was error). "[T]he failure to produce a psychiatric report does not in itself effect a constitutional deprivation where . . . the record does not contain evidence of any deep or sustained mental problems which would directly bear upon the credibility of the witness." *White v. Jones*, 636 F. Supp. 772, 777 (S.D.N.Y. 1986).

Further, treatment for mental illness is distinguishable from treatment for drug addiction. Records reflecting a witness's mental condition during the period about which he is testifying are highly probative of credibility, whereas records of drug treatment during a similar period may not be so. *United States v. Thompson*, 976 F.2d 666, 671 (11th Cir. 1992) (per curiam) (lack of probative value of drug treatment records made them admissible only for purpose of impeaching witness's credibility if she testified contrary to statements made by her during course of drug treatment).

In determining what appropriately may be disclosed considering, *inter alia*, a state's "compelling interest" in the privacy of confidential records, an *in camera* review of the relevant records and partial disclosure of the information contained therein is permissible. *See Ritchie*, 480 U.S. at 60; *United States v. Butt*, 955 F.2d 77, 84-85, 87 (1st Cir. 1992).

Violations of constitutional rights, including the Sixth Amendment right to confront adverse witnesses, are reviewed *de novo* subject to harmless error analysis. "It is

well established that violations of the Confrontation Clause, if preserved for appellate review, are subject to harmless error review." *United States v. McClain*, 377 F.3d 219, 222 (2d Cir. 2004) (finding that admission of co-conspirators' guilty plea allocutions violated Confrontation Clause, but error was harmless). "[A]ssuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." *Van Arsdall*, 475 U.S. at 684.

C. Discussion

1. The Defendant Failed to Set Forth an Adequate Factual Predicate for Disclosure of Trantino's Drug Treatment Records

The Confrontation Clause protects cross-examination designed to reveal "possible biases, prejudices or ulterior motives" of a witness, *see Boggs*, 226 F.3d at 737, though it likely does not protect cross-examination on other bases for attacking a witness's credibility. Either way, however, the defense must "lay an appropriate foundation" for the production of a confidential report concerning a Government witness's psychiatric (or, in this case, drug treatment) history to enable a trial court "to assess the constitutional significance of its non-production." *Jones*, 636 F. Supp. at 776.

As Peter J. Trantino was about to begin his direct testimony on May 4, 2005, the court invited defense counsel to explain why Trantino's drug treatment records

that it had subpoenaed would be helpful to the defense. Counsel responded that the records went to the witness's ability to recall and to his credibility. [2] DA 29-31. Almost as an afterthought, he theorized that the Government might have facilitated Trantino's entry into a drug treatment program to make him a better witness. He then speculated that it was likely the Government had intervened on Trantino's behalf with state officials resulting in the drug charge not being pursued. Government intervention, he claimed, raised the issue of bias, DA 31-32, thus supporting his claim for the treatment records. *Id*.

Counsel went on to argue that, even if the Government had not intervened on Trantino's behalf, a potential for bias would still exist because, having escaped a criminal conviction, Trantino would feel that he "owes some gratitude", DA 32, although toward whom he might feel some gratitude was not explained. The Government assured the court that it had not intervened on Trantino's behalf. DA 33-4. Plainly the defense failed to lay an appropriate foundation for the production of treatment records as they might relate to bias, prejudice, or an ulterior motive. *See Jones*, 636 F.Supp. at 776. Nor did he articulate any other nonspeculative basis for which the records would be useful, given (as discussed below) that the records dealt with a time period after the offense

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[2] Counsel said the witness's psychiatric problems would have a bearing on his "credibility" and "ab[ility] to testify." DA 31. There was never any suggestion, however, that the drug treatment records contained any "psychiatric related information" as defense counsel claimed. DA 31.

conduct in question. Because the defendant relied entirely on speculation (which was refuted by the Government, and which was found groundless upon the district court's *in camera* inspection of the records in question -- inspection which this Court may repeat if it desires,[3] he simply was not entitled to access to the records.

2. The Nondisclosure of Trantino's Confidential Drug Treatment Records Did Not Limit Impermissibly His Cross-Examination.

A defendant's right of cross-examination under the Confrontation Clause is not impermissibly limited if the jury has sufficient facts to appraise a witness's credibility. *See Roldan-Zapata*, 916 F.2d 806. The jury had such facts in this case. Even before the district court ruled on the defendant's request for the drug treatment records, some aspects of Trantino's history of drug usage were before the jury. During the first part of his direct examination, he testified about his use of vicodin. GA 39-40. Later during his direct examination he testified about his use of tylox. GA 45-48.

Moreover, the district court supplemented the witness's testimony with a summary of the witness's drug treatment records. The court correctly recognized that Trantino had

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[3] The defendant requested that, if the court denied his request for Trantino's drug treatment records, the records be sealed and marked as a court exhibit for possible appellate review.

a strong privacy interest in statements he had made during the course of his treatment, and that there was a strong public interest in maintaining the privacy of those records. *See Ritchie*, 480 U.S. at 60. Nevertheless, prior to the conclusion of direct testimony and, over the objection of the witness's counsel, the court summarized the information in the records that it believed "at least arguably germane to the needs of [the defense] to fully and thoroughly cross-examine consistent with the right to confrontation." DA 46.

The court advised the parties of Trantino's history of heroin abuse and his subsequent treatment efforts. The court concluded that if Trantino testified consistently with those records, it saw no reason to disclose the records themselves. DA 46-47. When direct examination resumed, Trantino candidly described his addiction to opiates, his use of heroin and his treatment beginning in late 1997 or early 1998 and continuing to the time of trial, including his use of methadone. GA 51-55. Thus, by the end of Trantino's direct testimony, the defendant was fully apprised of the witness's drug history from mid-1995 through May 5, 2004. It was not surprising, therefore, that the court declined to make additional disclosures of the drug treatment records. GA 56.

On cross-examination, the defense utilized the information which it has been provided. Counsel questioned Trantino about his use of opiates prior to his neck surgery, and the beginning of his heroin usage. GA 57-58. Trantino told the jury that using heroin did not affect his ability to work, GA 60, and that he took it only "to feel normal," GA 61. His heroin usage was not daily

and he did not combine it with other drugs. GA 62-63. He admitted keeping his heroin addiction from his employers, but testified that they knew he was in a methadone program. GA 54-64. Trantino denied that methadone affected his memory. GA 65. Finally, he testified that he used heroin while he had a drug charge pending, and while he was in the methadone program. GA 64-66. The period of his methadone usage included the time he cooperated with the government as well as his testimony at trial. GA 64-66.

Plainly, the defense had the opportunity to freely question Trantino about his drug history as well as any impact his drug usage had on his ability to perceive and recall events, without the disclosure of the drug treatment records themselves, *see Ritchie*, 480 U.S. at 54, and the jury had ample evidence before it to make a "discriminating appraisal" of Trantino's credibility, *Roldan-Zapata*, 916 F.2d at 806. In short, the district court's summary of Trantino's history of drug treatment more than adequately permitted the defense to adequately confront the witness. *See Ritchie*, 480 U.S. at 60; *Butt*, 955 F.2d at 85-87.

The cases relied upon by the defendant to support his argument that the district court erred in not disclosing Trantino's drug treatment records are legally and factually distinguishable.

For example, in *Davis*, unlike the present case, there was a Confrontation Clause violation because (1) the defendant had been precluded from pursuing particular lines of cross-examination; and (2) those lines of cross-

examination would have provided a basis for arguing to the jury that the witness was biased. In *Davis*, the Supreme Court held that a trial court had violated the defendant's constitutional right to cross-examine a government witness, Green, about his being on juvenile probation at the time he discovered that a stolen safe had been discovered near his home. Green provided key testimony at trial, explaining that he had seen the defendant holding a crowbar near the spot where the safe was later discovered, and that he had picked the defendant out of a photospread provided by the police shortly afterwards. 415 U.S. at 309-10. The defense had sought to discredit Green's identification of the defendant by introducing evidence of Green's prior juvenile adjudications. The defense theory was that "[n]ot only might Green have made a hasty and faulty identification of petitioner to shift suspicion away from himself as one who [stole the safe], but Green might have been subject to undue pressure from the police and made his identifications under fear of possible probation revocation. Green's record would be revealed only as necessary to probe Green for bias and prejudice and not generally to call Green's good character into question." 415 U.S. at 311. The trial court sustained government objections to the defense's line of questioning, and thereby closed off this entire basis for arguing bias to the jury.

In the present case, by contrast, the defense was permitted to question Trantino at some length about his drug use as well as his drug treatment, based in part on the information provided through the district court's summary of Trantino's drug treatment records. Unlike *Davis*, the defense was not prevented from pursuing a potential line

of questioning. Moreover, the defense has never explained how Trantino's drug treatment records could conceivably have supported a claim that Trantino was biased, prejudiced, or harbored an ulterior motive for his testimony. *Compare id.* at 316.

Nor does the defendant's invocation of *Lindstrom* or *Partin* advance his cause, because each of those cases involved withheld psychiatric records that would have supported the defense theory that the witness was somehow impaired during the period covered by the offense, and was therefore impaired in some material respect with respect to his or her testimony. No such issue is present in the case at bar, since Trantino's records treatment involve only treatment for drug addiction after the offense conduct in question.

In *Lindstrom*, the Eleventh Circuit simply quoted in dicta a law review article that listed drug addiction as one of many mental defects which could conceivably affect a witness's testimony. 598 F.2d at 1160. Drug addiction was not, however, at issue in *Lindstrom*. Instead, the case involved a witness who had been diagnosed on multiple occasions as, among other things, schizophrenic, suicidal-homicidal, and delusional. *Id.* at 1160-62. It was no stretch for the appellate court to hold that such information would have provided ample fodder for cross-examination, where the mental illnesses in question would have squarely supported the defense theory that the witness had fabricated her testimony to follow through on a delusional vendetta against the defendants. *Id.* at 1162-66. *See also id.* at 1166 (holding that "cumulative evidence of the psychiatric records suggests that the key witness was

suffering from an ongoing mental illness which caused her to misperceive and misinterpret the words and actions of others, and which might seriously affect her ability 'to know, comprehend and relate the truth' . . . . More particularly, it hints that the witness' reactions to doctors and lawyers, and thus to the [defendants] might be especially distorted."). Of central importance was the fact that *Lindstrom* involved "treatment of a continuing mental illness" embracing the time period of the alleged conspiracy [about which the witness testified]." *Id*. at 1166.

Similarly, in *Partin*, the court erroneously declined to disclose records of a Veterans Administration Hospital that showed a key Government witness voluntarily committed himself, a few months before the crime about which he testified, for auditory hallucinations and thoughts that he was some other person. *Id*. at 764. The record in the present case unambiguously establishes that Trantino's drug problems postdated the offense conduct in question, and thus there can is no basis for a claim that his drug addiction might have impaired his mental functioning during the time period relevant to this case.

In the present case, there existed no drug treatment records for the period of the events charged in the indictment about which Trantino testified. The treatment records began in approximately the summer of 2001, more than five years after the end of the scheme to defraud Fleet Bank. While it might be argued that those records could contain information probative of Trantino's ability to testify accurately at trial, *see United States v. Mazzola*, 217 F.R.D. 84, 89 (D. Mass. 2003), the defendant chose only

to inquire superficially about the possible impairment of the witness. The only question that the defense ever asked of the witness regarding the possible effects of his drug treatment on his recollection of relevant events is whether methadone impaired his memory, to which Trantino responded that it did not. GA 65. That defense counsel never probed further was his own choice, not due to any limitation imposed by the district judge.

As for the defendant's contention that the district court's *in camera* review of Trantino's drug treatment records and subsequent summary of what it deemed to be relevant was erroneous, such a procedure in appropriate circumstances is permissible. *See Ritchie*, 480 U.S. at 60; *Butt*, 955 F.2d 87. In the instant case, inasmuch as the records were remote in time from the events about which Trantino testified, and in light of the information that the defendant received from the court's summary and the witness's direct examination, he had "an opportunity for effective cross examination." *Fensterer* 474 U.S. at 20. The district court acted well within its discretion in limiting the defendant's access to potentially intrusive and only marginally relevant information. *See Van Arsdall*, 475 U.S. at 697; DA 42.

Finally, even assuming *arguendo* that the defendant should have been permitted access to Trantino's drug treatment records for purposes of cross-examination, any error was harmless beyond a reasonable doubt. *See Van Arsdall*, 475 U.S. at 684; *McClain,* 377 F.3d at 222. "The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was

harmless beyond a reasonable doubt." *Van Arsdall*, 475 U.S. at 684. Reviewing courts must consider "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Id*. In addition, "the availability of other opportunities to elicit the same information on cross-examination is significant in determining whether a defendant's constitutional rights have been violated." *United States v. Klauer,* 856 F.2d 1147, 1149 (8th Cir. 1988). A new trial is not warranted if "the government can show beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *United States v. Casamento,* 887 F.2d 1141, 1179 (2d Cir. 1989).

In similar cases, appellate courts have held that even assuming trial courts erred in exclusion of certain records, such error was harmless. *See United States v. Simmons*, 964 F.2d 763, 768-70 (8th Cir. 1992) (holding that exclusion of probation records was harmless violation of Confrontation Clause, because witness was impeached effectively on cross-examination and there was overwhelming evidence of defendant's guilt); *Drew v. United States*, 46 F.3d 823, 827-28 (8th Cir. 1995) (holding, in context of *Brady* claim with slightly less stringent harmlessness standard, that government's failure to disclose medical records did not "undermine confidence in outcome" because witness was effectively cross-examined regarding drug treatment and depression, and jury had sufficient basis to make informed decision); *see*

also Tapia v. Tansy, 926 F.2d 1554, 1557-58 (10th Cir. 1991) (holding that loss of preliminary hearing tapes did not violate defendant's right to confrontation because jury had enough information to evaluate credibility of witness and any additional impeachment that could have come from access to the tapes would have been cumulative).

In this case, the judge adequately summarized the pertinent parts of the witness's treatment history after conducting an *in camera* review of the records. Moreover, the history of the witness's substance abuse was extensively explored on direct examination, and the defense was given ample opportunity to question and impeach the witness on this subject. In this case, then, the "damaging potential of the cross-examination" of witness Trantino was "fully realized" even without providing the defense with access to the treatment records themselves. Any further questioning of Trantino based on the records would have been cumulative, in light of the judge's synopsis of their contents. The decision to prevent the defense from reviewing the records themselves did not undermine confidence in the jury's verdict. Therefore, any error would have been harmless beyond a reasonable doubt.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S REQUEST FOR A POST-TRIAL HEARING ON JUROR BIAS GIVEN THAT DEFENDANT'S CLAIM WAS HIGHLY SPECULATIVE

A. Relevant Facts

The district court conducted jury selection in this and another criminal case on April 13, 2004. Preliminary questioning of all prospective jurors for both cases was conducted simultaneously and counsel for both cases were present. During voir dire in the first case, the name of the spouse of one of the prosecutors in this case, Assistant United States Attorney Lisa Perkins ("AUSA Perkins") arose conspicuously. *See* DA 64. Juror No. 241 sitting on the voir dire panel indicated she recognized AUSA Perkins as someone possibly related to someone she knows with a different last name. *Id.* AUSA Perkins noted that her husband's last name is Sparkowski and Juror No. 241 declared that she knows AUSA Perkins' in-laws with the last name Sparkowski. DA 65. AUSA Perkins then stated that "everyone" knows her in-laws, DA 65, prompting laughter in the courtroom.

Juror No. 230 then stood up and asked if AUSA Perkins' husband is *Jason* Sparkowski. *Id*. at 65-66. After AUSA Perkins confirmed this, Juror No. 230 explained that he attended and graduated high school with Jason Sparkowski. *Id.* At 66. The district court then commented that it may be "time for [AUSA Perkins] to resign from the U.S. Attorney's Office if we're going to get any cases tried here," DA 66, followed by more courtroom laughter.

Juror No. 230 was later excused during jury selection for this case after again raising his connection with AUSA Perkins' husband. *Id.* at 68. None of the jurors selected for this case indicated they knew or were acquainted with AUSA Perkins or her husband, Jason Sparkowski.

On May 17, 2004, following the jury verdict in this case, the Government disclosed to the district judge and defense counsel via letter that AUSA Perkins had discovered after trial that her spouse was professionally acquainted from 1984 through 1990 with the husband of one of the jurors in this case, Barbara Setlow. DA 61. The Government explained that Dr. Peter Setlow is a Professor at the University of Connecticut Health Center ("UCHC") in Farmington, Connecticut, and was Director of the Molecular Biology and Biochemistry Graduate Program from which Jason Sparkowski graduated in 1990.[4] *Id.* Although he had contact with Dr. Setlow during graduate school from 1984 through 1990, Dr. Sparkowski did not socialize with the Setlows and knew Mrs. Setlow only casually as the spouse of Dr. Setlow.

Following graduate school, Dr. Sparkowski left Connecticut and from 1990 through 2000, lived and worked in Washington, D.C., where he first met AUSA Perkins in 1998. *Id.* They married in 2000 and thereafter moved to Connecticut. Dr. Sparkowski began working at UCHC in June 2003 as an Assistant Research Professor in a different department than Dr. Setlow. *Id.* From the time

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[4] Peter Setlow and Jason Sparkowski are doctors of philosophy ("Ph.D."), research scientists, not medical doctors, and they have never worked together. *See* DA 62, 97.

of his return to UCHC in mid-2003 until after the verdict in this case, the only contact Dr. Sparkowski had with Dr. Setlow was a few brief passing conversations in the parking lot and hallway at the large facility in Farmington, Connecticut, none of which occurred during the trial in this case. *Id.* Moreover, until after the verdict in this case, Dr. Sparkowski had not had any contact or conversation with Barbara Setlow since at latest 1990. *Id.*

On Friday, May 7, 2004, Dr. Sparkowski attended the six-day trial as a spectator for approximately forty minutes. DA 62. At that time, he thought he recognized juror Setlow as an acquaintance of Dr. Setlow whom he had met many years before. *Id.* AUSA Perkins did not learn that Dr. Sparkowski had attended the trial until she arrived home late that night, nor did she learn that Dr. Sparkowski recognized juror Setlow when he attended the trial. *See* DA 97.

After trial concluded on May 11, 2004, AUSA Perkins called her husband at his lab to advise him of the outcome. *Id.* Thereafter, Dr. Sparkowski went to Dr. Peter Setlow's lab intending to ask Dr. Setlow if his wife had recently served on a jury. When he walked into Dr. Setlow's lab, he found both Dr. Setlow and his wife, Barbara. *Id.* A brief conversation ensued during which Mrs. Setlow confirmed she had been on jury duty and Dr. Sparkowski commented that he thought he recognized her when he attended the trial one morning. *Id.* Mrs. Setlow gave no indication that she had seen Dr. Sparkowski in the courtroom during trial. *Id.* During their brief conversation, Mrs. Setlow did not offer any details regarding the jury's deliberations and commented only on her experience as a juror. *Id.*

Subsequently, and on the basis of the Government's disclosure, the defendant moved for an evidentiary hearing on potential juror bias. The district court heard argument on the motion prior to sentencing in the case. DA 90-98. After thoroughly evaluating the defendant's claim, the district court denied the motion. In denying the motion, the district court explained that while a hearing would no doubt easily dispose of the issue, it was important to heed this Court's repeated admonitions against calling jurors in for post-trial inquiries. DA 98-99. In this regard, the court explained:

> As a practical matter, a judge in this situation might think that the better part of valor would be to simply go ahead and call the juror in and see what she has to say. I'm tempted to do that because I have little doubt that we could resolve this very quickly.
>
> On the other hand, the Court of Appeals has rightly emphasized that such post trial inquiries of jurors should not be undertaken lightly. I agree that there needs to be a substantial showing to warrant that type of inquiry no matter how convenient it might be to the Court.

Id. The district court noted that the defense was not claiming there had been a impropriety, but rather was asking for an inquiry "to find out if maybe there was some kind of an impropriety." The court found that to be entirely speculative. DA 98-99. The district court further commented on the voir dire in this case:

> The voir dire was as Ms. Perkins describes it. I remember being struck by what occurred at the time. I thought to myself, gee, maybe Ms. Perkins' husband should run for office.
>
> This juror, Ms. Setlow, was present. I have no reason to think that she wasn't doing her duty. . . . And she gave us no reason to think that she had any relationship, direct or indirect, with Dr. Sparkowski, although she had an opportunity to tell us, and presumably would have told us.

Id. [5]

Based on the circumstances of voir dire and the speculative nature of the claimed bias, the district court concluded the defendant could not meet this Court's stringent standard for requiring a post-trial inquiry to determine the existence of juror bias. *Id.* at 99-100. Accordingly, the district court denied the motion.

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[5] During argument on the motion, defendant's counsel had no recollection of Jason Sparkowski's name having come up during voir dire. *See* DA 95 ("MR. SCOENHORN: I don't recall Ms. Perkins mentioning her husband during the voir dire process.").

B. Governing Law and Standard of Review

This Court has repeatedly emphasized that "courts are, and should be, hesitant to haul jurors in after they have reached a verdict in order to probe for potential instances of bias, misconduct or extraneous influences." *United States v. Sun Myung Moon*, 718 F.2d 1210, 1234 (2d Cir. 1983). Thus, this Court has held that a post-trial jury inquiry is required "only when reasonable grounds for investigation exist," *id.*, and has further concluded that

> [r]easonable grounds are present when there is clear, strong, substantial and incontrovertible evidence, . . . that a specific, nonspeculative impropriety has occurred which could have prejudiced the trial of a defendant. A hearing is not held to afford a convicted defendant the opportunity to 'conduct a fishing expedition.'

Id. (internal citations omitted) (quoting *United States v. Moten*, 582 F.2d 654, 666-67 (2d Cir. 1978) and citing *King v. United States*, 576 F.2d 432, 438 (2d Cir. 1978)); *see also United States v. Ianniello*, 866 F.2d 540, 543 (2d Cir. 1989) ("The gravity of granting such a request should not be underestimated, . . . because even a post-verdict evidentiary hearing raises serious questions. 'The duty to investigate arises only when the party alleging misconduct makes an adequate showing of extrinsic influence to overcome the presumption of jury impartiality.'") (citations omitted). This Court has additionally recognized the important policy reasons supporting application of the above-described standard including the need to avoid harassment of jurors, prevent meritless post-verdict

applications for review, prevent the increased risk of jury tampering, and prevent uncertainty in jury verdicts. *See King*, 576 F.2d at 438; *United States v. Rosario*, 111 F.3d 293, 298-99 (2d Cir. 1997); *United States v. Schwarz*, 283 F.3d 76, 97 (2d Cir. 2002).

This Court reviews the district court's denial of an evidentiary hearing for determining the existence of potential juror bias for abuse of discretion. *See Moon*, 718 F.2d at 1235 ("It is up to the trial judge to determine the effect of potentially prejudicial occurrences, . . . , and the reviewing court's concern is to determine only whether the trial judge abused his discretion when so deciding.") (citing *Smith v. Phillips*, 455 U.S. 209, 217 (1982)); *United States v. Burrous*, 147 F.3d 111, 117 (2d Cir. 1998) (district court did not abuse discretion in refusing to question jurors regarding extent to which juror removal might have tainted their deliberations); *United States v. Hillard*, 701 F.2d 1052, 1064 (2d Cir. 1983) ("the trial court has wide discretion in deciding how to pursue an inquiry into the effects of extra-record information [on jurors]"); *United States v. Abrams*, 137 F.3d 704, 708 (2d Cir. 1998) ("We review a trial judge's handling of juror misconduct for abuse of discretion."); *United States v. Connolly,* 341 F.3d 16, 33-34 (1st Cir. 2003) ("We review the district court's response to an allegation of juror misconduct only for abuse of discretion.") (citations omitted).

C. Discussion

Because the defendant did not, and could not, make the substantial, non-speculative showing necessary to trigger

a post-trial evidentiary hearing into potential juror bias, the district court properly exercised its discretion in denying his motion for such a hearing. The defendant's request for a post-trial inquiry was based on a very distant professor/student connection between one of the prosecutors' spouses and the husband of a juror, discovered and disclosed promptly by the Government after trial concluded in this case.

The Government's disclosure makes clear that the past connection from 1984 through 1990 between the juror's husband, Dr. Peter Setlow, and the prosecutor's husband, Dr. Sparkowski, was simply that between a professor & program director, and a student. DA 61-62. The two did not have a personal or social relationship, nor have they ever worked together. *Id.* In addition, after his return to UCHC in June 2003, Dr. Sparkowski had only brief occasional contact with Dr. Setlow in the parking lot and hallway, and he did not see or speak to Dr. Setlow during the trial. Further, until *after* the trial verdict in this case, Dr. Sparkowski had not had any contact whatsoever with the juror, Mrs. Setlow, for at least 14 years. *Compare* Def. Brief at 2, 38, 40-41 (repeatedly mischaracterizing the connection between the juror and the prosecutor's husband as "personal" and a "working relationship"); *see also* DA 92, 94 (arguing that juror had a social relationship with the prosecutor when there is no record that AUSA Perkins has ever met this juror and inaccurately describing Dr. Setlow and Dr. Sparkowski as "work colleagues" and mentor/mentee).

Nonetheless, the defendant urged the district court and now urges this Court that he was and is entitled to question

this juror post-verdict, along with the juror's husband, the prosecutor's husband, and the prosecutor,[6] to explore whether some potential bias could have played a role in the verdict. The defendant argues such bias might exist *if* the juror, Mrs. Setlow, recognized Dr. Sparkowski by face *and* name during his forty-minute visit as a trial spectator on May 7, 2004, as a student of her husband's 14 years prior to trial, then made the spousal connection between Dr. Sparkowski and AUSA Perkins disclosed during voir dire on April 13, 2004.[7] *See* Def. Brief at 41 ("the possibility of juror bias caused by the realization that she knew the prosecutor's husband, both personally and professionally, entitled him, at a minimum, to an evidentiary hearing to explore the issue," again mischaracterizing the connection

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[6] Though he specifically told the district court he did not seek to question AUSA Perkins, DA 91, he now seeks to do so based on his allegation that AUSA Perkins "withheld" information about her husband's occupation during jury selection, Def. Brief at 46. *See also* DA 95 (defendant's counsel representing to the district court that he did not recall "Ms. Perkins mentioning her husband during the voir dire process.").

[7] The defendant's argument is akin to the "six degrees of separation" theory that every person on Earth is separated from every other person through a chain of acquaintances with no more than five links. *See United States v. Bobo,* 2004 WL 1982513, *10 (N.D. Ala. Aug. 30, 2004) (noting, "for example, you might be connected to President Bush by five degrees if your former boss married a woman whose brother once cut hair in the president's favorite Texas barbershop [and] [y]ou might be similarly connected to Bush's Democratic rival, U.S. Sen. John Kerry, if your son had a friend whose sister once waited tables at a Boston sandwich shop favored by Kerry.").

as personal); DA 93, 95 (arguing the potential bias at issue "arose after the trial had started" *if* the juror saw Dr. Sparkowski when he attended the trial for less than one hour *and* she then made the connection between him and the prosecutor).[8] As the district court properly concluded, the possible bias alleged by the defendant is so highly speculative it clearly did not meet this Court's standard for hauling in a juror (and her husband) post-verdict to investigate the allegation. *See Moon*, 718 F.3d at 1234 ("Reasonable grounds [for post trial investigation] are present when there is clear, strong, substantial and incontrovertible evidence . . . that a specific, nonspeculative impropriety has occurred which could have prejudiced the trial of a defendant.") (internal citation omitted).

Nor do the cases cited by the defendant in his brief change this conclusion. *Compare Remmer v. United States*, 347 U.S. 227 (1954) (requiring trial judge to conduct a jury tampering hearing with all interested parties

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[8] Even more speculatively, the defendant argues he should be allowed to also question the juror's husband, Dr. Setlow, because *if* the juror realized she recognized the husband of the prosecutor as someone that her husband lectured 14 years ago, she *might* have had a conversation with her husband, Dr. Setlow, prior to the verdict in which her husband tried to influence her to vote based on his distant connection to the prosecutor's husband. *See* DA 91 (explaining "[w]e'd ask them . . . whether or not there were . . . [a]ny discussions between the juror and Dr. Setlow about the recognition of Dr. Sparkowski's wife as being one of the prosecutors in this case prior again to the jury verdict in this matter . . . .").

present, where juror was approached by third party offering a bribe in exchange for a favorable verdict, the FBI investigated the incident, FBI report was reviewed by the trial judge and prosecutor, and the judge determined juror was nonetheless unbiased without disclosing the incident to the defense); *Schwarz*, 283 F.3d at 98 (juror affidavits present clear evidence of specific improprieties); *Ianniello*, 866 F.2d at 543 (post-trial jury hearing required where "affidavits of three jurors alleging specific acts of inappropriate conduct" submitted); *United States v. Colombo*, 869 F.2d 149, 151 (2d Cir 1989) (remanding for hearing where reasonable grounds existed to believe that juror lied during voir dire), *appeal after remand*, 909 F.2d 711 (1990). *See also United States v. Purdy*, 144 F.3d 241, 246-47 (2d Cir. 1998) (district court properly excused a juror where reasonable grounds shown to indicate bias due to juror's husband having made contact with the defendant's wife and co-defendant during trial).

The defendant conflates and mischaracterizes the facts in *Purdy*, *supra*, in an effort to support his claim that the district court erred in denying his request for an evidentiary hearing. *See* Def. Brief at 45 ("if an innocuous comment between a juror's spouse and the defendant's spouse in *Purdy, supra*, provided a sufficient basis to conduct a hearing that ultimately led to that juror's dismissal, then the defendant submits he is entitled, at the very least, to a hearing to determine whether Mrs. Setlow possessed any knowledge of the relationship between her husband and the prosecutor's husband, as well as whether Dr. Sparkowski's presence in the courtroom influenced her vote."). In *Purdy*, this Court held that the district court properly excused a juror whose husband had been present

for trial and had approached the defendant's wife and a co-defendant, identified himself as the husband of a juror and expressed views sympathetic with the defense, 144 F.3d at 246-47, hardly "innocuous" behavior.

Unlike in *Purdy*, here there was no contact between the juror and the prosecutor's husband *during the trial or in the fourteen years before the trial*. Nor has there been any suggestion by the defendant that the brief and innocuous *post-trial* conversation that occurred between Dr. Sparkowski and juror Barbara Setlow was in any way improper. Certainly, this post-trial contact could not have influenced the prior-rendered verdict. Moreover, Jason Sparkowski's name arose conspicuously during jury selection as the spouse of AUSA Perkins, and other members of the jury pool indicated they knew him and/or his parents. Yet, none of the jurors selected for this case, including Barbara Setlow, indicated they knew him or recognized his name.

In sum, the district court acted well within its discretion in concluding that the very distant, attenuated connection between a juror and the husband of one of the prosecutors, four degrees removed from the prosecutor, was simply too speculative to warrant an evidentiary hearing into potential juror bias.

III. THE DEFENDANT IS ENTITLED TO A REMAND FOR RESENTENCING IN LIGHT OF *UNITED STATES V. BOOKER*

A. Relevant Facts

The Probation Office calculated the defendant's total offense level at 20. It began at a base level offense of 6. U.S.S.G. §§ 3D1.2(d) and 2F1.1(a). His offense level was increased by 10 based upon a loss calculation of $700,000, which included the intended loss ($100,000 for each of the five loans charged in the indictment) and relevant conduct (two uncharged loans with an intended loss of $100,000 each). U.S.S.G. §§ 1B1.3 and 2F1.1(b)(1)(K). An additional two points for more than minimal planning based upon repeated false loan applications and the use of Charles J. Hoblin's clients' financial information was recommended. U.S.S.G. § 2F1.1(b)(2)(A). Finally, a two-level enhancement was recommended for the defendant's role in the offense as a manager or supervisor pursuant to U.S.S.G § 3B1.1(b). PSR ¶¶ 60-68.

The Probation Office placed the defendant in Criminal History Category III based upon multi-year prison sentences imposed following each of his felony convictions in 1982 and 1986. PSR ¶¶ 71-3.

Based on a total offense level of 20 and a criminal history category of III, the defendant's guideline imprisonment range was 41 to 51 months. PSR ¶ 90.

The defendant objected to several paragraphs of the PSR, including the calculation of the defendant's total

offense level. GA 75-78. He generally denied liability for any uncharged fraudulent conduct and argued that, because the jury did not determine the amounts obtained pursuant to the loans, those amounts could not be attributed to him. *Id*. He denied knowledge of any impropriety regarding the uncharged Endura Jet Tape loan. He claimed to have been duped by Charles J. Hoblin and Peter J. Trantino, and characterized the Probation Office's conclusion that the defendant directed the actions of Hoblin and Trantino, PSR ¶ 63, as "preposterous." *Id*.

The Government responded to the defendant's objections based upon the evidence introduced at trial and the jury's verdicts of guilty. DA 82-4.

The defendant also submitted a sentencing memorandum. GA 87. In it he argued that, under *Blakely v. Washington*, 124 S.Ct 2531 (2004), his sentence could not be enhanced constitutionally based upon facts not found by the jury. Nowhere in his memorandum did he challenge the Probation Office's reasoning in recommending the guideline enhancements. GA 79-84.

The Government also submitted a sentencing memorandum in which it supported the Probation Office's intended loss and relevant conduct calculations, and the recommendations of enhancements for more than the minimal planning and role in the offense. DA 70-74. In its memorandum the Government argued that *Blakely* did not affect the sentencing guidelines.

The defendant was sentenced on August 16, 2004. DA 86. The court noted that the defendant had preserved his

position that, under *Blakely*, the guidelines are unconstitutional to the extent that a sentencing court can make findings that increase punishment based upon a preponderance of the evidence standard. The court then observed that, within the week, this Court had instructed that sentencings were to proceed as if *Blakely* did not apply to the guidelines. *See United States v. Mincey*, 380 F.3d 102 (2d Cir. 2004), *cert. granted, judgment vacated by Ferrell v. United States*, 125 S.Ct 1071 (2005). It then asked the defense if it disagreed with the adjustments suggested by the Probation Office. DA 100-01.

The defendant argued that he had nothing to do with the two loans on which the Probation Office had relied in calculating the loss based upon relevant conduct. PSR ¶ 61; DA 101-02. He also seemed to suggest that the appropriate loss calculation was actual loss, that is, more than $350,000, rather than an intended loss of more than $500,000. DA 103.

Further, the defendant disputed that he was a leader or supervisor in the bank fraud scheme, DA 103-04, claiming that distinction belonged to Charles J. Hoblin.

The Government, at the court's invitation, explained why, under the guidelines, either the Endura Jet Tape loan or the Bell Auto and Marine loans, and certainly both, would put the intended loss at over $500,000. DA 105-08. Thereupon, the court found that the Endura Jet Tape loan was correctly counted as relevant conduct. It found it to be essentially a carbon copy of the other fraudulent loans. The court found it extremely unlikely that Hoblin concocted it without the defendant's substantial input. DA

110. It declined to consider the Bell Auto and Marine loan. DA 111.

The defendant did not challenge the factual finding that his conduct involved more than minimal planning. DA 114-15. He did, however, argue against the adjustment for role in the offense, claiming he didn't have the "skills" to direct anyone. DA 115-16. The Government then explained why it believed the defendant was the manager or supervisor in the fraudulent loan scheme. DA 116-18. Despite the defendant's attempt to refute the Government's explanation, DA 118-21, the court, after analyzing U.S.S.G.§ 3B1.1, Application Note 4, found that the adjustment for role in the offense was warranted. DA 121-24.

Finally, the court addressed the defendant's objections to the PSR. The court found that the statements of fact set forth in paragraphs 4 through 57 of the PSR are "based on evidence [presented at trial] that the jury apparently did believe." DA 132. As for sentence enhancements recommended by the Probation Office, the court summarized its earlier findings that those enhancements were appropriate. DA 132-33.

Thereafter, the court sentenced the defendant to imprisonment for fifty-one months, explaining its reasons for so doing. DA 137- 42.

B. Discussion

After sentencing in this case, the Supreme Court announced its decision in *United States v. Booker*, 125 S.

Ct. 738 (2005), wherein it "excised subsection 3553(b)(1) of Title 18, thereby eliminating the requirement that the Sentencing Guidelines be applied in a compulsory manner," thus rendering this Court's decision in *Mincey* erroneous. *United States v. Fagans*, 406 F.3d 138, 140 (2d Cir. 2005). Because the defendant in the instant case preserved the error, DA 100, this Court's plain-error analysis announced in *United States v. Crosby*, 397 F.3d 103, 108-14 (2d Cir. 2005), is inapplicable and reversal and a "remand for resentencing without any further adjudication" is warranted. *Fagans*, 406 F.3d at 141; *United States v. Lake*, 2005 WL 1941387 (2d Cir. Aug. 15, 2005).

CONCLUSION

For all the reasons set forth above, the judgment of conviction should be affirmed but the sentence should be vacated and remanded for the limited purpose of resentencing in light of *Booker*.

Dated: August 18, 2005

Respectfully submitted,

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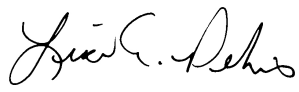

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CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 11,283 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

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