No. 13-12009-F

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GEORGE CAVALLO, PAULA HORNBERGER, and JOEL STREINZ,

Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Florida, Tampa Division
Case No. 8:10-cr-550-EAK-MAP, Hon. Elizabeth A. Kovachevich

APPELLANT'S BRIEF

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United States v. *Cavallo*, No. 13-12009-F

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1 and 26.1-3, the following is an alphabetical list of the trial judges, attorneys, persons, and firms with any known interest in the outcome of this case:

1. American Home Mortgage (ticker symbol AHMNQ) – Victim;
2. Bank of America, N.A. (ticker symbol BAC) – Victim;
3. BB&T Co. (ticker symbol BBT) – Victim;
4. Borghetti, Anne, Esq. – Trial counsel for Joel Streinz;
5. Burns, P.A. – Appellate counsel for George R. Cavallo;
6. Burns, Thomas A., Esq. – Appellate counsel for George R. Cavallo;
7. Capital One Bank (ticker symbol COF) – Victim;
8. Cavallo, George R. – Defendant-Appellant;
9. Cream, Anita M. – Assistant United States Attorney;
10. Hornberger, Paula L. – Defendant-Appellant;
11. Iglesias, Stephen V., Esq. – Appellate counsel for Paula L. Hornberger;
12. JLO Properties, LLC – Victim;
13. JP Morgan Chase (ticker symbol JPM-D) – Victim;

14. Kovachevich, Honorable Elizabeth A. – United States District Judge;

15. Krigsman, Cherie L. – Assistant United States Attorney;

16. Law Office of Stephen V. Iglesias, P.A. – Appellate counsel for Paula L. Hornberger;

17. McNamara, Linda Julin – Assistant United States Attorney, Deputy Chief, Appellate Division;

18. O'Neill, Robert E. – United States Attorney;

19. Pizzo, Honorable Mark A. – United States Magistrate Judge;

20. PNC Bank (ticker symbol PNC) – Victim;

21. Rhodes, David P. – Assistant United States Attorney, Chief, Appellate Division;

22. Samek, Sharon C., Esq. – Trial counsel for George R. Cavallo and Paula L. Hornberger;

23. Scheller, Fritz J., Esq. – Appellate counsel for Joel Streinz;

24. Streinz, Joel – Defendant-Appellant;

25. Tuite, Christopher P. – Assistant United States Attorney;

26. Unger, Karen L., Esq. – Trial counsel for George R. Cavallo and Paula L. Hornberger.

July 19, 2013

/s/ Thomas Burns
Thomas A. Burns

STATEMENT REGARDING ORAL ARGUMENT

This appeal involves a juror misconduct allegation following a three-month jury trial. It raises novel legal issues in a complex factual setting. Cavallo therefore respectfully asks the Court to grant counsel for Defendants-Appellants and the Government 15 minutes each for oral argument.

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STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

The District Court had subject-matter jurisdiction under 18 U.S.C. § 3231 because Defendant-Appellant George Cavallo was indicted (DE1) for violations of federal criminal law. This Court has appellate jurisdiction under 28 U.S.C. § 1291 because the District Court entered a final order (DE1203) denying Cavallo's post-trial motion for new trial, which Cavallo timely appealed. *See United States* v. *Carpa*, 271 F.3d 962, 963 (11th Cir. 2001) (juror misconduct appeal).

STATEMENT REGARDING ADOPTION OF BRIEFS OF OTHER PARTIES

Due to complex consolidation and scheduling issues with related Appeal No. 12-15660, Defendants-Appellants Paula Hornberger and Joel Streinz will not file their Appellants' Briefs in the instant appeal (Appeal No. 13-12009) for several weeks. After Hornberger and Streinz file their consolidated briefs addressing both appeals, Cavallo will file, pursuant to Federal Rule of Appellate Procedure 28(i), a supplemental statement describing in detail which briefs and which portions of those briefs he adopts.

STATEMENT OF THE ISSUES

1. District courts have discretion to exclude evidence of juror misconduct per *United States* v. *Venske*, 296 F.3d 1284 (11th Cir. 2002), when they find parties violated local rules prohibiting post-trial juror interviews. The District Court rejected detailed declarations of compliance with local rules in favor of Juror George's "visibly nervous" testimony without taking live testimony from Cavallo or his trial counsel Karen Unger. Did the District Court abuse its discretion or commit clear errors of fact?

2. Parties asserting juror misconduct "must be given an opportunity to prove that claim." The District Court prevented Cavallo from obtaining a declaration from Sarasota Herald-Tribune reporter Michael Braga about his independent investigation regarding Juror George's juror misconduct revelations when it sealed the post-trial juror misconduct proceedings and gagged the participants for no stated reason. Did the District Court fail to give Cavallo an opportunity to prove his juror misconduct claim?

3. District courts abuse their discretion unless they perform "full" investigations of juror misconduct allegations. The District Court

did not ask Juror George whether an innominate female juror performed legal research during deliberations per his e-mail allegation, any of the parties' proposed questions, or any *Siegelman* questions; moreover, it also failed to take testimony from other jurors, Cavallo, and Mr. Braga. Did the District Court fail to perform a full investigation?

4. Whenever defendants make a "colorable showing" that jurors were exposed to extrinsic evidence, "prejudice is presumed" and a "heavy burden" shifts to the Government to rebut prejudice. The District Court refused to apply the presumption's burden shifting because Juror George's testimony supposedly refuted his e-mail; moreover, it also concluded the alleged extrinsic information was not prejudicial in any event because it would have invoked sympathy somehow. Did the District Court misapply the presumption of prejudice?

5. To preserve the "appearance of justice" on remand, should this Court gently remind the District Court to set aside any strongly held personal views about Ms. Unger?

STATEMENT OF THE CASE

This appeal raises important questions about the manner and scope of the District Court's post-trial investigation of Juror George's allegation of juror misconduct.

A. After A Contentious Three-Month Jury Trial, The District Court Gives A Modified *Allen* Charge, Following Which Cavallo Is Convicted And Sentenced

Cavallo is a retired officer of the U.S. Coast Guard who received an honorable discharge after 20 years of service. At trial, Cavallo defended 17 counts of bank-related fraud. DE1. As the District Court itself recognized, the three-month trial and sentencing proceedings were contentious. *E.g.*, DE1175 at 4:17-19:1 ("I am prepared to do whatever needs to be done to bring everybody into professional line."). Cavallo and his wife, Defendant-Appellant Paula Hornberger, were represented by trial counsel Karen Unger. DE94. Ms. Unger is an outspoken and demonstrative criminal defense lawyer from Washington State. *See* Michael Braga, *Attorney in Sarasota flipping fraud case is 'fearless'*, Sarasota Herald-Tribune, Jan. 20, 2012. In her 32-year legal career, Ms. Unger has never been disciplined for any client- or representation-related misconduct.

At times during trial and sentencing, the District Court expressed true admiration for Ms. Unger. *E.g.*, DE1190 at 13:25-14:6 ("It's been a pleasure to try this case with these professionals. I want that noted on the record."); DE963 at 107:14-15 ("Now, Miss Unger, I'm going to compliment you."). But interpersonal conflicts related to Ms. Unger's outspoken and demonstrative style caused the District Court to express almost daily frustration with her. *E.g.*, DE1180 at 202:12-17 ("Would you stop shaking your head in front of the jury, Miss Unger."); DE1173 at 211:17-20 ("Keep it down, Karen—or I'll have to send the jury out."); *id.* at 224:16-19 ("quite frankly, moment to moment I'm not quite sure I know what Miss Unger is doing, and I don't mean any disrespect, but I think sometimes Miss Unger isn't sure what she's doing moment to moment").

After closing arguments, the District Court submitted all 17 counts to the jury. *See* DE653. Despite eight days of deliberations, the jury was unable to reach unanimous verdicts as to all counts, so the District Court gave the jury a modified *Allen* charge. DE1189 at 11:1-13:1. The next day, the jury returned unanimous verdicts acquitting Cavallo of 15 counts. DE653. But the jury found Cavallo guilty of the

remaining 2 counts: conspiracy to commit wire fraud and to make false statements to an FDIC-insured bank in violation of 18 U.S.C. § 371 (Count 1); and making false statements to an FDIC-insured bank in violation of 18 U.S.C. §§ 1014 & 2 (Count 28). DE653.

Upon return of the verdicts, the District Court discharged the jury. DE1190 at 14:16-15:7. Four months later, the District Court sentenced Cavallo to ten years in prison, five years of supervised release, and $13,228,861.74 in restitution. DE963 at 90-97. Cavallo reported to prison on July 9, 2013 and is currently incarcerated.

B. At Cavallo's Sentencing, The District Court Admonishes Juror George Without Inquiring What He Wanted To Tell Ms. Unger And Cavallo

At the outset of Cavallo's sentencing hearing, AUSA Christopher Tuite notified the District Court about an interaction that morning between Juror Patrick George, Ms. Unger, and Cavallo. DE1048 at 3:25-5:6. The District Court immediately summoned Juror George from the gallery. DE1048 at 5:7. Rather than ask Juror George what he wanted to tell Cavallo or Ms. Unger, the District Court instructed Juror George that it was "still dealing with the sentencings" and therefore "still ha[d] a continuing obligation to make sure that nothing is being said or done

that would in any way question the jury verdict." DE1048 at 5:12-15. As such, the District Court directed Juror George not to speak with the parties' attorneys during the remainder of the sentencing proceedings. *See* DE1048 at 5:16-25; *see also* DE1135 at 6-8; DE1248 at 65:16-25.

C. Juror George Sends An E-Mail To Ms. Unger That Sets In Motion The Instant Post-Trial Litigation And Appeal

About four months later, Juror George sent an e-mail to Ms. Unger. DE1044-1. In relevant part, Juror George's e-mail alleged that during deliberations, an innominate female juror had "looked up things on the Internet even though we were told not to" and "knew one of the defendants that plead[ed] guilty only received house arrest and no jail time." DE1044-1. This e-mail set in motion the instant post-trial litigation and appeal.

D. Based On Juror George's E-Mail, Cavallo Files The Motion For Evidentiary Hearing Regarding Juror Misconduct

Based on Juror George's e-mail, Cavallo filed a Motion For Evidentiary Hearing Regarding Juror Misconduct (DE1044).[1] In this Motion, Cavallo argued he was entitled to an evidentiary hearing because

[1] Cavallo subsequently supplemented the Motion's legal analysis with a Notice Of Supplemental Authority (DE1130).

he made a colorable showing that the jury was exposed to extrinsic evidence. DE1044 at 5-8. As a result of this extrinsic exposure, Cavallo contended he suffered a reasonable possibility of prejudice. DE1044 at 8-11.

Moreover, Cavallo explained that the Government had no basis for opposing an evidentiary hearing, because consideration of the e-mail allegation was consistent with Middle District of Florida Local Rule 5.01(d) and Federal Rule of Evidence 606(b).[2] DE1044 at 12-13. In that regard, the Motion asserted that a direct or indirect juror interview prohibited by Local Rule 5.01(d) "simply is not what happened here." DE1044 at 12. To determine whether to order a new trial, the Motion suggested that the District Court conduct the inquiry herself by asking 12 questions about exposure to extrinsic information that this Court approved in *United States* v. *Siegelman*, 40 F.3d 1159, 1190-91 (11th Cir. 2011).

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[2] In relevant part, Local Rule 5.01(d) provides: "No attorney or party shall undertake, directly or indirectly, to interview any juror after trial in any civil or criminal case except as permitted by this Rule." M.D. Fla. Local Rule 5.01(d). Similarly, Rule 606(b)(2)(A) provides in pertinent part that during inquiries into the validity of a verdict, jurors "may testify about whether extraneous prejudicial information was improperly brought to the jury's attention." Fed. R. Evid. 606(b)(2)(A).

E. The District Court Convenes An Organizational Hearing, Seals The Proceedings, Gags The Participants, Appoints Counsel For Juror George, And Schedules Evidentiary Hearings

Upon consideration of the Motion For Evidentiary Hearing, the District Court convened an organizational hearing, sealed the proceedings, and gagged the participants. DE1056; DE1241. The District Court did not state any basis for the seal and gag order other than *ipse dixit* (DE1056) and a quip that "I feel this deserves *in camera* treatment out of respect for the jury, the jury's decision in this case." DE1241 at 9:25-10:2. Additionally, anticipating his potential exposure to criminal contempt prosecution, DE1044 at 16; DE1241 at 14 (sealed sidebar), the District Court appointed Assistant Federal Public Defender Alec Hall to represent Juror George, DE1126; DE1137; DE1159; DE1151 at 5:4-9, 17:17-19:9. Finally, the District Court scheduled evidentiary hearings (DE1128; DE1129; DE1140) and directed the parties to submit proposed questions and forbidden areas of inquiry for Juror George. DE1241 at 9:4-17, 14:10-23, 15:16-25.

F. The Parties Submit Proposed Questions For Juror George, And Cavallo Files The Memorandum Of Law Regarding Juror George's Exposure To Criminal Liability

As directed, the parties submitted proposed questions and forbidden areas of inquiry for Juror George before the first evidentiary hearing. DE1131; DE1132.[3] All of the parties' proposed questions went through Juror George's e-mail allegation regarding extrinsic information piece by piece. DE1131 at 8-11; DE1132 at 10-11. Additionally, Cavallo asked several questions about extrinsic information jury access to extrinsic information more generally, including the *Siegelman* questions. DE1131 at 19-20.

Anticipating that Juror George might try to invoke his Fifth Amendment privilege, Cavallo also filed a Memorandum Of Law Regarding Juror George's Exposure To Criminal Liability. DE1135. That Memorandum Of Law contended Juror George's expected testimony did not expose him to any potential criminal liability for perjury or contempt of court. DE1135 at 4-10.

[3] Defendant-Appellant Streinz's Proposed Questions To Juror George apparently remains under seal.

G. At The First Evidentiary Hearing, The District Court Interrogates Juror George Without Asking Any Of The Parties' Proposed Questions, And He Invokes His Fifth Amendment Privilege

At the first evidentiary hearing, the District Court did not ask any of the parties' proposed questions or the *Siegelman* questions. *See* DE1248. Instead, the District Court went in a different direction. *See* DE1248.

At the outset, Juror George testified he recognized, authored, and sent the February 20 e-mail. DE1248 at 19:19-20:20. Then, the District Court launched an extensive interrogation into whether Juror George remembered the questions and answers he gave at voir dire, its trial prohibitions against performing legal research and looking at the Internet, its practice of awarding stars to jurors each time they correctly recited this prohibition in open court, the replacement of a juror during trial, the availability of alternate jurors, the *Allen* charge, the ability to send messages to the District Court, the fact Juror George never sent such a message, the timing of his revelation, the postverdict secrecy of petit jury deliberations, and the sidebar at Cavallo's sentencing proceeding. DE1248 at 20:21-57:8.

Throughout this interrogation, the District Court changed the pitch and volume of its voice, DE1172 at 1-2, read extensive portions of the trial proceedings into the record, DE1248 at 20:21-57:8, expressed its displeasure with Juror George's answers by asking the same extensive question twice, DE1248 at 52:17-56:14, 65:17-24, and suggested he had done something wrong by not reporting the innominate female juror's misconduct to the District Court earlier, DE1248 at 50:20-51:18, or discussing another juror's consideration of extrinsic information, DE1248 at 66:1-8. But other than its attempt to recast the petit jury's privilege to preserve the secrecy of their deliberations as Juror George's obligation, DE1248 at 66:1-8, nowhere did the District Court identify any instruction or oath that would have imposed upon Juror George any such duty. *See* DE1248 at 65:21-66:8. Regardless of their purpose, these questions had the effect of intimidating Juror George. *See* DE1172 at 1-2. Visibly shaken, DE1203 at 11, Juror George repeatedly answered "Yes." *See* DE1248 at 20:21-57:8.

The District Court then inquired about Juror George's contacts with Defendants-Appellants and their lawyers. DE1248 at 58:12-61:17. Juror George testified that, at sentencing, Ms. Unger approached him

and said she "had questions" for him, and that Cavallo introduced himself, but they did not exchange contact information. DE1248 at 60:10-61:17. Juror George then testified that in February 2013, "Out of the blue I got a call from George Cavallo." DE1248 at 62:21-22. Juror George testified Cavallo obtained his contact information from Michael Braga, initiated the calls, called him 8-10 times, said Ms. Unger had requested Juror George to send her an e-mail, and supplied him with Ms. Unger's e-mail address. DE1248 at 62:23-67:20.

After a brief recess, AFPD Alec Hall invoked Juror George's Fifth Amendment privilege "at this time" as to the substance of the February 20 e-mail. DE1248 at 71:16. Cavallo moved orally (DE1248 at 81:5-11) and subsequently in writing (DE1145) to share the sealed Memorandum Of Law Regarding Juror George's Exposure To Criminal Liability with AFPD Hall. The District Court denied these requests without prejudice (DE1146), continued the evidentiary hearing for about two weeks, and directed counsel to propose additional questions. DE1248 at 76:4-22, 92:19-25.

H. The Parties Submit Follow-Up Questions For Juror George

The parties submitted follow-up questions for Juror George. DE1147; DE1148; DE1163.[4] Cavallo's questions focused on the fact that Juror George was never instructed and never swore any oath to police and report other jurors' conduct. DE1148 at 1. Cavallo also again inquired about the exposure to extrinsic information. *See* Streinz's Notice Of Filing Questions.

I. Cavallo Files His Mobile Phone Records, Which Contradict Juror George's Prior Testimony

Immediately before Juror George testified at the second evidentiary hearing, Cavallo filed a Notice Of Filing George Cavallo's Mobile Phone Records.[5] Those records showed that the only contacts between Juror George and Cavallo were as follows: (1) Cavallo sent a text message to both of Juror George's telephone numbers at 10:49 A.M. and 11:04 A.M. on February 19, 2013; (2) Juror George sent a response text message at 9:45 A.M. on February 20, 2013; (3) Juror George placed an 18-minute call to Cavallo two minutes later at 9:47 A.M. on February

[4] Defendant-Appellant Streinz's Notice Of Filing Questions apparently remains under seal

[5] The Notice Of Filing George Cavallo's Mobile Phone Records remains under seal.

20, 2013; (4) Cavallo placed a 5-minute call to Juror George at 2:25 P.M. on February 20, 2013; and (5) Cavallo placed a 7-minute call to Juror George at 11:30 A.M. on February 21, 2013. These phone records contradicted Juror George's prior testimony that Cavallo repeatedly contacted him 8-10 times. Additionally, these phone records do not show any calls or text messages between Cavallo and Ms. Unger (206-XXX-7344) during the month of February until after Juror George placed his first call to Cavallo on February 20, 2013.

J. At The Second Evidentiary Hearing, Juror George Relinquishes His Fifth Amendment Privilege, But The District Court Again Does Not Ask Any Of The Parties' Proposed Questions

At the outset of the second evidentiary hearing, AFPD Hall stated Juror George would relinquish his Fifth Amendment privilege. DE1247 at 13:18-23. But rather than asking Juror George any of the parties' proposed questions, asking the *Siegelman* questions, asking about his e-mail, or asking about the substance of his juror misconduct allegations, the District Court once again delved into the contacts between Cavallo and Juror George. DE1247 at 16:12-21:10. When confronted with Cavallo's mobile phone records, Juror George retreated from his prior testi-

mony and admitted that the Notice Of Filing described all his contacts with Cavallo. DE1247 at 16:20-21:5.

K. Cavallo Contends The Investigation Of Juror Misconduct Remains Incomplete

Upon conclusion of Juror George's testimony, the District Court directed counsel to submit "a memo or anything else" addressing Local Rule 5.01(d), Federal Rule of Evidence 606(b), and related Eleventh Circuit case law. DE1247 34:9-35:11. The Government and Defendant-Appellant Streinz filed memoranda of law. DE1166.[6] Cavallo filed several papers: Memorandum Of Law Regarding Incomplete Investigation Of Juror Misconduct (DE1168); Declaration Of Karen Unger (DE1168-1); Declaration Of George Cavallo;[7] Motion To Interview Juror Patricia (DE1169); Motion To Subpoena Michael Braga And Other Jurors To Testify (DE1170); and Objection To The Manner Of The Court's Inquiry Of Juror George (DE1172).

[6] Defendant-Appellant Streinz's Memorandum Regarding Jury Misconduct Issue apparently remains under seal.

[7] The Cavallo Declaration apparently remains under seal.

1. The Memorandum Of Law Regarding Incomplete Investigation Of Juror Misconduct

Cavallo's Memorandum Of Law Regarding Incomplete Investigation Of Juror Misconduct (DE1168) argued that Local Rule 5.01(d) did not permit the District Court to prematurely halt its investigation because Juror George revealed his juror misconduct allegations unilaterally and excitedly, and any technical violation was innocent and accidental. DE1168 at 13-16. Likewise, Cavallo contended Rule 606(b) did not permit the District Court to exclude the e-mail itself, because the Rule permits testimony and evidence regarding extrinsic influences. DE1168 at 17-18. And even if the District Court excluded the e-mail and rejected Cavallo's and Ms. Unger's declarations, Cavallo asserted Mr. Braga's independent journalistic investigation constituted an independent source of the information. DE1168 at 18. Finally, the Memorandum contended the District Court's questioning of Juror George was inadequate because it failed to directly question Juror George about extrinsic influence, question the innominate female juror, or explore the substance of Juror George's e-mail. DE1168 at 19-22.

2. Ms. Unger's And Cavallo's Declarations

In support of the Memorandum Of Law, Cavallo filed declarations from Ms. Unger and himself.[8] These declarations contradicted much of Juror George's testimony.

Ms. Unger averred that her only contact with Juror George was when he walked over to her at Cavallo's sentencing and said hello. DE1168-1 at 1. Moreover, Ms. Unger averred that she "neither solicited, requested or instructed anyone else to direct anyone to send me the attached e-mail." DE1168-1 at 1.

Cavallo's declaration averred the following: Cavallo candidly admitted that, without anyone's advice or encouragement, he obtained Juror George's telephone numbers from the Internet and then sent brief introductory text messages. Cavallo Decl. ¶ 5. The next morning, Juror George sent a text message in response and 2 minutes later placed an 18-minute telephone call to Cavallo in which he unilaterally and excitedly revealed his juror misconduct allegations. *Id.* ¶ 6. At no time did

[8] Cavallo's confidential attorney-client communications are protected by the attorney-client privilege. Cavallo did not waive that privilege. As such, both declarations had to be drafted with that concern in mind.

Cavallo ask any questions, because Juror George spoke so quickly and excitedly. *Id.* ¶ 9.

Specifically, Juror George volunteered that a female juror had performed legal research on the Internet during deliberations and discovered that a corrupt banker implicated in the instant fraud scheme but charged in a different case, *United States* v. *Whitehead*, No. 8:11-cr-498 (M.D. Fla. filed Sept. 26, 2011), had received a sentence of only four months' home confinement. *Id.* ¶¶ 7-8. Additionally, Juror George revealed that two or three other jurors may also have read the same story online. *Id.* ¶ 8. Given the *Allen* charge and the light sentence, the jury convicted Cavallo of conspiracy and one substantive count. *Id.* Near the conclusion of this telephone conversation, Juror George asked Cavallo to call him back later with contact information for Ms. Unger. *Id.* ¶ 10.

Nobody advised or encouraged Cavallo to return Juror George's call or to encourage Juror George to write an e-mail to Ms. Unger, but Cavallo called Juror George back that afternoon. *Id.* ¶ 11. This second call lasted 5 minutes. Notice Of Filing George Cavallo's Mobile Phone Records at 1. Without discussing Juror George's previous allegations, Cavallo confirmed Ms. Unger's e-mail address, but said he could not

provide her phone number because she could not speak with him. Cavallo Decl. ¶ 11. Later that day, Juror George sent the e-mail to Ms. Unger, which laid out his juror misconduct allegations. *Id.* ¶ 14.

Again without anyone's advice or encouragement, Cavallo called Juror George the following morning at 11:50 A.M. as a courtesy just to tell him they could not speak again. *Id.* ¶ 15. This third call lasted 7 minutes. Notice Of Filing George Cavallo's Mobile Phone Records at 1. But Juror George's wife or girlfriend answered the call, so Cavallo was on hold for about 5 minutes while she went into the backyard to find him. Cavallo Decl. ¶ 15. Cavallo did not ask Juror George whether he had e-mailed Ms. Unger, because he already knew that. *Id.* Instead, Cavallo simply told Juror George that they could not speak any further. *Id.* Juror George said he appreciated the call. *Id.* Juror George then asked whether he could talk to Mr. Braga. *Id.* Cavallo responded that he was aware of no prohibition, so it was Juror George's decision. *Id.* That was the extent of their 2-minute conversation. *Id.* Later that day, Cavallo read the full text of Local Rule 5.01(d) for the first time. *Id.* ¶ 16.

Mr. Braga subsequently told Cavallo he had independently called and interviewed Juror George and confirmed his prior allegations of juror misconduct, with a few additional details. *Id.* ¶ 22. Cavallo had nothing to do with Mr. Braga's interview of Juror George. *Id.* ¶ 21. Based on his independent interviews, Mr. Braga published a series of investigative articles in the Sarasota Herald-Tribune. *Id.* ¶ 24. These investigative articles explained how Juror George determined that a female juror performed legal research on the Internet during deliberations. *Id.* ¶¶ 25-26.

Before the District Court sealed the juror misconduct proceedings and gagged the participants, Mr. Braga offered to execute a declaration on Cavallo's behalf. *Id.* ¶ 27. That declaration would have attached true and correct copies of his articles, declared he is an objective investigative journalist who performed his own independent investigation of the juror misconduct allegations, and declared that his articles were the result of his independent interviews and investigation. *Id.*

Finally, Cavallo also averred that he did not concoct this narrative at the last moment to respond to Juror George's testimony. *Id.* ¶ 29. Rather, the core of his story has remained consistent since February 20,

2013 to everyone he told it: Juror George tried to start a conversation at sentencing, and Cavallo sent Juror George a text message four months later, but it was Juror George who excitedly and unilaterally revealed his juror misconduct allegations without Cavallo asking him any questions. *Id.* And it was Juror George who wanted to e-mail Ms. Unger. *Id.*

3. Other Papers

Cavallo's other papers requested the District Court to grant Defendants-Appellants permission to interview the innominate female juror (DE1169) and to subpoena Mr. Braga and other jurors to testify (DE1170). Additionally, Cavallo objected to the manner of the District Court's inquiry of Juror George. DE1172. Specifically, Cavallo contended the District Court asked a lengthy series of unnecessary questions and altered the pitch and volume of its voice when asking Juror George questions, both of which had the predictable effect of intimidating him. DE1172.

L. The District Court Enters The Order Denying In Part The Motion For Evidentiary Hearing Regarding Juror Misconduct, And Cavallo Timely Appeals

In a 20-page Amended Order (DE1203), the District Court denied the Motion For Evidentiary Hearing Regarding Juror Misconduct (DE1044) and all of Cavallo's other motions and objections.

Near the outset, the District Court stated that the "only evidence of juror misconduct proffered" by Cavallo was Juror George's e-mail (DE1203 at 10), even though Cavallo had previously filed his own declaration and proffered the likely averments of Mr. Braga (DE1168 at 19; *see also* DE1170). Moreover, the District Court declared that there was "no dispute that a violation of the rule occurred here" (DE1203 at 11), even though Cavallo repeatedly contended he had complied with Local Rule 5.01(d). DE1044 at 12; DE1168 at 13-16.

At any rate, the District Court explained that Juror George apparently contradicted his e-mail allegation when he testified that no jurors provided him with extraneous information, he did not personally view any extraneous information, he never witnessed another juror observing extraneous information, and he reaffirmed his verdict. DE1203 at 8. But critically, the District Court did not note its failure to ask Ju-

ror George whether other jurors accessed extraneous information during trial or deliberations, notwithstanding the fact that it was other jurors' misconduct that prompted Juror George's allegations in the first place.

Moreover, the District Court attempted to justify its limited inquiry of Juror George during the evidentiary hearings—even though he relinquished his Fifth Amendment privilege—because it was "privy to information that perhaps Juror George's attorney is not, and, therefore, is better suited to protect Juror George's right against self-incrimination." DE1203 at 7 n.6. In this regard, the District Court did not address Cavallo's arguments in the Memorandum Of Law Regarding Juror George's Exposure To Criminal Liability (DE1135) that Juror George did not face any potential or theoretical exposure to perjury or criminal contempt prosecution. Nor did the District Court mention that the only reason it was privy to information that AFPD Hall was not was because it had sealed the juror misconduct proceedings (DE1056), gagged the participants (DE1056), and denied without prejudice (DE1146) Cavallo's requests (DE1248 at 81:5-11; DE1145) to unseal that Memorandum Of Law as to AFPD Hall.

With respect to Cavallo's declarations, the District Court ruled it had not "authorize[d]" them (DE1203 at 11), even though it had directed the parties to file a "memo or anything else." DE1247 34:9-35:11. Furthermore, without taking live testimony from Cavallo or Ms. Unger, the District Court decided to "discount any fact in Mr. Cavallo's affidavit that contradicts Juror George's testimony" out of hand for two reasons. First, the District Court was "leery" of Cavallo's "eleventh hour attempt to set aside the jury's verdict almost a year after it was announced, and almost four months after the defendants were sentenced." DE1203 at 12. Second, the District Court ruled Cavallo had diminished credibility as a convicted felon. DE1203 at 12. These credibility determinations, however, did not take account of how Cavallo corroborated his averments with mobile phone records and contemporaneous documentary evidence that contradicted Juror George's testimony.

Similarly, the District Court rejected Ms. Unger's declaration as "unsupported and vague." DE1203 at 13 n.13. In doing so, the District Court did not consider that Ms. Unger had never been disciplined for any client- or representation-related misconduct in her 32-year career or that she was bound by the attorney-client privilege to maintain the

secrecy of confidential attorney-client communications except when necessary to "prevent reasonably certain death or substantial bodily harm" or to "prevent the client from committing a crime." Wash. R. Prof'l Conduct 1.6.

In short, the District Court accepted Juror George's account of his interactions with Cavallo as true:

> Accepting Juror George's version of the accounts, the Court finds that Mr. Cavallo contacted Juror George and, playing off Juror George's emotions, specifically inquired about the jury's deliberations. The Court also finds that Mr. Cavallo relayed that information to Ms. Unger, who, instead of directing Mr. Cavallo to have no further contact with Juror George, and instead of immediately notifying the government and this Court of the inappropriate contact, then directed Mr. Cavallo to compel Juror George to send her an email disclosing information about the deliberations and the mental impressions of several jurors.

DE1203 at 13. In making these factual findings, the District Court did not mention Cavallo's request to subpoena Mr. Braga's testimony. DE1170.

Relying on *United States* v. *Venske*, 296 F.3d 1284 (11th Cir. 2002), the District Court concluded Cavallo and Ms. Unger violated Local Rule 5.01(d) and therefore excluded Juror George's e-mail as a sanction. DE1203 at 14-15.

Nevertheless, the District Court proceeded to consider the e-mail's substance and concluded Cavallo suffered no reasonable possibility of prejudice. DE1203 at 2, 18-19. Specifically, the District Court ruled that Juror George's testimony contradicted the e-mail's allegations, so "there was no exposure to extraneous information." DE1203 at 10, 18. "Given a choice between the unsworn solicited email and the sworn testimony of Juror George, the Court specifically finds that there is no evidence of any juror consulting extraneous information." DE1203 at 18. But the District Court never mentioned that it never asked Juror George the question at the heart of the juror misconduct proceedings: whether other jurors accessed extraneous information during trial or deliberations.

Moreover, the District Court concluded that any "exposure that allegedly occurred would have been, in any event, harmless" because "it would have invoked sympathy for the defendants." DE1203 at 10, 18. But the District Court never explained what was so sympathetic about the "sentencing of a related defendant before a different judge" that the Government had carried its heavy burden of rebutting the presumption of prejudice.

At any rate, having rejected prejudice, the District Court declined to question any of the remaining jurors. DE1203 at 18. In doing so, the District Court relied on the Second Circuit's decision in *United States* v. *Ianniello*, 866 F.2d 540 (2d Cir. 1989), instead of this Court's decisions in *United States v. Brantley,* 733 F.2d 1429 (11th Cir. 1984), and *United States* v. *Forrest*, 620 F.2d 446 (5th Cir. 1980). Once again, the District Court did not mention Cavallo's request to subpoena Mr. Braga's testimony. DE1170.

Ultimately, the District Court denied all of Cavallo's motions and objections. DE1203 at 1 n.2, 19. In doing so, the District Court bemoaned the post-trial proceedings as a "costly exercise" "levied on a federal court system bereft of adequate resources," criticized Cavallo as "a defendant looking for a second bite at the apple," demeaned the "professional attitude displayed in this case" by Ms. Unger, stated it was "inclined to report" Ms. Unger to a grievance committee, and disparaged Ms. Unger as an "an out of state lawyer that is willing to win at all costs." DE1203 at 13 n.9, 19. Cavallo timely appealed. DE1194.

STANDARD OF REVIEW

This Court reviews the denial of a "motion for new trial and an evidentiary hearing based on alleged juror misconduct and extrinsic influence on jurors for abuse of discretion." *United States* v. *Venske*, 296 F.3d 1284, 1290 (11th Cir. 2002). "A district court abuses its discretion if it applies an incorrect legal standard, follows improper procedures in making the determination," "makes findings of fact that are clearly erroneous," or "appl[ies] the law in an unreasonable or incorrect manner." *Klay* v. *Utd. Healthgroup, Inc.*, 376 F.3d 1092, 1096 (11th Cir. 2004) (citations omitted).

Factual findings whether parties "engaged in post-trial contact with jurors" are reviewed for clear error. *Venske*, 296 F.3d at 1290. "Review for clear error does not mean no review." *United States* v. *Crawford*, 407 F.3d 1174, 1177 (11th Cir. 2005). Rather, clear error exists when this Court is "'left with a definite and firm conviction that a mistake has been committed.'" *United States* v. *Devegter*, 439 F.3d 1299, 1303 (11th Cir. 2006).

SUMMARY OF THE ARGUMENT

1. The District Court abused its discretion and committed clear errors of fact when it relied on *United States* v. *Venske*, 296 F.3d 1284 (11th Cir. 2002), in concluding Cavallo and Ms. Unger intentionally violated Middle District of Florida Local Rule 5.01(d).

Local Rule 5.01(d) forbids parties and lawyers from directly or indirectly interviewing jurors after trial. But Cavallo averred that it was Juror George who unilaterally revealed juror misconduct and wanted to e-mail Ms. Unger, and that any technical local rule violation was innocent. Likewise, Ms. Unger averred that she had not directly or indirectly advised anyone to encourage Juror George to send her the e-mail. Accepting these averments as true, Cavallo complied with Local Rule 5.01(d): the Rule forbids post-trial juror "interview[s]," not contacts.

In rejecting Cavallo's and Ms. Unger's declarations out of hand, however, the District Court misplaced its reliance on *Venske*. This was an abuse of discretion. In *Venske*, the district court did not conclude defendants had violated Local Rule 5.01(d) until it had taken live testimony from all of the witnesses and made credibility choices. But unlike *Venske*, the District Court did not take live testimony from Cavallo and

Ms. Unger. As such, the District Court was in no position to make such credibility choices.

Relatedly, the District Court also committed clear errors of fact when it rejected Cavallo's and Ms. Unger's declarations in favor of Juror George's "visibly nervous" testimony. District judges commit a clear error of fact when this Court has a definite and firm conviction that a mistake has been committed. The District Court rejected Cavallo's lengthy and corroborated declaration and Ms. Unger's professional declaration in favor of Juror George's "visibly nervous" testimony that Cavallo violated local rules because Cavallo was a convicted felon and Ms. Unger's declaration (limited by the attorney-client privilege) was "unsupported and vague."

But it was the manner of the District Court's inquiry itself that caused Juror George to embellish his testimony. Moreover, the District Court's basis for rejecting Cavallo's declaration as a convicted felon did not address how he corroborated his averments with contemporaneous documentary evidence. Finally, the District Court's basis for rejecting Ms. Unger's declaration as "unsupported and vague" did not consider that Cavallo had not waived the attorney-client privilege.

2. The District Court denied Cavallo an opportunity to prove his juror misconduct claim when it prevented him from obtaining Mr. Braga's declaration. The District Court sealed the post-trial juror misconduct proceedings and gagged the participants without any stated reason. This seal and gag order was improper because it was not supported by any compelling government interest. More to the point, it prevented Cavallo from obtaining Mr. Braga's declaration.

During the sealed proceedings, Cavallo proffered that Mr. Braga would aver Juror George independently revealed his juror misconduct allegations to him during his independent journalistic investigation. Even if Cavallo otherwise had violated Local Rule 5.01(d), Mr. Braga's averments would constitute an independent source of the juror misconduct allegation. The failure to consider this proffer denied Cavallo an opportunity to prove his claim.

3. The District Court abused its discretion when it failed to perform a "full" investigation of the juror misconduct allegation. During its investigation, the District Court did not ask Juror George whether an innominate female juror performed legal research during deliberations per his e-mail allegation, any of the parties' proposed questions, or any

questions regarding extraneous influence this Court approved in *United States* v. *Siegelman*, 640 F.3d 1159 (11th Cir. 2011). Moreover, the District Court also failed to take live testimony from other jurors in mistaken reliance on a Second Circuit decision instead of this Court's precedent. Likewise, the District Court did not question Cavallo or Mr. Braga. Had the District Court asked the correct questions or taken live testimony from the correct witnesses, its investigation would have uncovered juror misconduct.

4. The District Court abused its discretion when it misapplied the presumption of prejudice. Whenever defendants make a "colorable showing" that jurors were exposed to extrinsic evidence, "prejudice is presumed" and a "heavy burden" shifts to the Government to rebut prejudice. The District Court refused to apply the presumption's burden shifting because Juror George's testimony supposedly refuted his e-mail. Moreover, it also concluded the alleged extrinsic exposure was not prejudicial in any event because it would have invoked sympathy. Both of these rulings were wrong. Had the District Court correctly applied the presumption of prejudice, it would have concluded Cavallo suffered a reasonable possibility of prejudice.

5. To preserve the "appearance of justice" on remand, this Court should gently remind the District Court to set aside any strongly held personal views about Ms. Unger.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE DISTRICT COURT ABUSED ITS DISCRETION AND COMMITTED CLEAR ERRORS OF FACT WHEN IT MISPLACED ITS RELIANCE ON *UNITED STATES* V. *VENSKE*

The District Court misplaced its reliance on *United States* v. *Venske*, 296 F.3d 1284 (11th Cir. 2002), when it excluded Juror George's e-mail, because *Venske* is readily distinguishable. In doing so, the District Court abused its discretion and committed clear errors of fact.

Had the District Court accepted Cavallo's and Ms. Unger's declarations as true, Cavallo would have complied with Local Rule 5.01(d). But the District Court abused its discretion when it made credibility choices without taking live testimony from Cavallo and Ms. Unger. Moreover, the District Court committed clear errors of fact when it accepted as true Juror George's "visibly nervous" testimony in the face of a frightening inquiry instead of Ms. Unger's professional declaration and Cavallo's candid and corroborated declaration.

A. Accepting Cavallo's And Ms. Unger's Declarations As True, Cavallo Complied With Local Rule 5.01(d)

Accepting Cavallo's and Ms. Unger's declarations as true, Cavallo did not violate Local Rule 5.01(d). It was Juror George who unilaterally and excitedly revealed his juror misconduct allegations. And even if there were some technical violation, it was innocent and accidental.

1. *Venske* Permits Exclusion Of Juror Misconduct Evidence When Parties Violate Local Rule 5.01(d)

In *Venske*, the defendants sought a new trial because the jury considered extrinsic information. 296 F.3d at 1287. To support this allegation, they hired a private investigator to pretend to be writing a book in order to indirectly interview the jury foreman. *Id.* at 1288. Specifically, a private investigator surreptitiously interviewed the jury foreman after trial ostensibly "as part of a book-writing project sponsored by [a defendant's] brother-in-law." *Id.*

The district court took live testimony from the two defendants and the two private investigators. *Id.* at 1289. After doing so, the district court "discredited testimony that the juror interviews were conducted as part of a book-writing project," and instead concluded the two defendants and their private investigators had "'knowingly and intention-

ally engaged in a scheme to defy'" Local Rule 5.01(d). *Id.* at 1289. The district court therefore excluded the only evidence as to those defendants and refused to hold further evidentiary hearings. *Id.*

On appeal, this Court affirmed the district court's factual finding that the parties "were involved indirectly in interviewing the jury foreman in clear violation of Local Rule 5.01(d)" as not clearly erroneous. *Id.* at 1291.

2. Ms. Unger Did Not Scheme With Cavallo To Violate Local Rule 5.01(d)

Ms. Unger averred she did not scheme with Cavallo to violate Local Rule 5.01(d). Instead, Ms. Unger averred that her only contact with Juror George was when he walked over to her at Cavallo's sentencing and said hello. DE1168-1 at 1. Moreover, Ms. Unger averred that she "neither solicited, requested or instructed anyone else to direct anyone to send me the attached e-mail." DE1168-1 at 1. These averments are consistent with Local Rule 5.01(d)'s dictates.

3. Cavallo Did Not "Interview" Juror George In Violation Of Local Rule 5.01(d)

Cavallo averred Juror George revealed his allegations of juror misconduct unilaterally and excitedly. This too is consistent with Local Rule 5.01(d).

Local Rule 5.01(d) provides that ordinarily "[n]o attorney or party shall undertake, directly or indirectly, to interview any juror after trial in any civil or criminal case." M.D. Fla. Local Rule 5.01(d). Cavallo did not "undertake, directly or indirectly, to interview" Juror George in any capacity. *Id.* Instead, Juror George attempted to begin a conversation at Cavallo's sentencing. Cavallo later provided Juror George with his telephone number via text message. Juror George then took the initiative to place a telephone call to Cavallo, then unexpectedly, unilaterally, and excitedly revealed his juror misconduct allegations. Far from an interviewer, Cavallo was merely a passive observer.

The plain text of Rule 5.01(d) forbids parties only from "directly or indirectly . . . interview[ing] any juror"; that simply is not what happened here, because Cavallo was a passive participant in a conversation that Juror George unilaterally directed.

Unlike *Venske*, the circumstances here are quite different. There was no nefarious scheme, and indeed there was not even an interview. Cavallo did nothing more than listen to Juror George's excited and unilateral revelations. Sending an innocuous text message is not an interview. Receiving a call is not an interview. Answering questions about personal matters is not an interview. Listening to excited and unilateral revelations of juror misconduct without asking any questions is not an interview. Placing courtesy calls to confirm contact information, discuss unrelated procedural matters, and inform a juror that they cannot speak anymore is not an interview. And there is no obligation to plug one's ears when a juror unexpectedly, unilaterally, and excitedly reveals juror misconduct allegations. Finally, it is worthy of note that the District Court did not rule in the alternative that even accepting Cavallo's and Ms. Unger's declarations as true, Cavallo would still have violated Local Rule 5.01(d). In short, nothing Cavallo did can be considered an "interview" within the meaning of Local Rule 5.01(d).

4. Even If Cavallo Violated Local Rule 5.01(d), It Was Innocent And Accidental

Alternatively, any technical violation of Local Rule 5.01(d) was innocent and accidental. Cavallo is not a lawyer, and did not fully under-

stand or appreciate Local Rule 5.01(d)'s limitations until he read its full text after his final call with Juror George. Cavallo's conduct is completely unlike *Venske*, in which the defendants intentionally concocted a scheme to evade Local Rule 5.01(d). 296 F.3d at 1289. Indeed, Cavallo was not even expecting Juror George to say anything about the jury deliberations when they first spoke.

For those reasons, excluding this evidence would serve none of the policies underlying Local Rule 5.01(d). That a party merely listened to a juror's unilateral revelations in a conversation that the juror initiated and excitedly directed cannot be said to cause jurors to receive "threats and needless harassment from unsuccessful parties," nor would it inevitably challenge "the finality of the jury's verdict." *Venske*, 296 F.3d at 1292.

B. The District Court Abused Its Discretion When It Made Credibility Determinations Without Taking Live Testimony From Cavallo And Ms. Unger

It was an abuse of discretion for the District Court to rely on *Venske* because it made credibility choices without taking live testimony from Cavallo and Ms. Unger.

In "both the criminal and civil context, credibility determinations generally are most reliable when the factfinder is able to observe the witness in person." *Bischoff* v. *Osceola County*, 222 F.3d 874, 881 (11th Cir. 2000); *cf. Louis* v. *Blackburn*, 630 F.2d 1105, 1109 (5th Cir. 1980) ("we have severe doubts about the constitutionality of the district judge's reassessment of credibility without seeing and hearing the witnesses himself"). Accordingly, where evidence " is squarely in contradiction as to central matters *and* requires credibility findings, a district court cannot make those findings simply by relying on the paper record but must conduct a hearing at which it may evaluate the live testimony of the witnesses." *Bischoff*, 222 F.3d at 881.

Venske implicitly recognized this, because the district court there took live testimony from all witnesses other than the juror, including the two defendants and the two private investigators. 296 F.3d at 1288. The District Court, however, dispensed with this requirement and made credibility determinations without the benefit of live testimony from Cavallo and Ms. Unger. This was an abuse of discretion that led to clear errors of fact.

C. The District Court Committed Clear Errors Of Fact When It Rejected Cavallo's And Ms. Unger's Declarations And Accepted As True Juror George's "Visibly Nervous" Testimony

Clear errors of fact exist whenever this Court is "'left with a definite and firm conviction that a mistake has been committed.'" *United States* v. *Devegter*, 439 F.3d 1299, 1303 (11th Cir. 2006). The District Court committed clear errors of fact when it accepted as true Juror George's "visibly nervous" testimony instead of Cavallo's and Ms. Unger's declarations.

1. It Was A Clear Error Of Fact To Reject Ms. Unger's Declaration

The District Court's rejection of Ms. Unger's declaration as "unsupported and vague" and its inclination "to report Ms. Unger's action (or inaction)" to a grievance committee (DE1203 at 13 n.13) revealed a basic misconception about what lawyers actually do. Moreover, it failed to consider that Ms. Unger, a respected criminal defense lawyer, had never been disciplined for any client- or representation-related misconduct in her 32-year legal career. It was therefore a clear error of fact.

Clients retain lawyers to counsel and litigate legal issues. *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981). When clients confide in

lawyers during the course of such representations, those confidential communications are protected by the attorney-client privilege. *Id.* Because the privilege belongs to clients, *Cox* v. *Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1417 (11th Cir. 1994), the flip side of this protection is that lawyers are ethically obligated to preserve inviolate client confidences except when waived by the client or in other rare circumstances. In Washington State, for example, attorneys must preserve the secrecy of confidential attorney-client communications except, for example, when necessary to "prevent reasonably certain death or substantial bodily harm" or to "prevent the client from committing a crime." Wash. R. Prof'l Conduct 1.6.

Cavallo did not waive the privilege, so Ms. Unger's declaration was hamstrung: ethically, because no exception applied, Ms. Unger could not provide a supported or detailed declaration about her communications with Cavallo. Instead, she did the next best thing and truthfully, albeit generally, averred that she "neither solicited, requested or instructed anyone else to direct anyone to send me the attached e-mail." DE1168-1 at 1. The District Court's rejection of Ms. Unger's averment as "unsupported and vague" was therefore a clear error of fact.

Additionally, the District Court's finding that Ms. Unger approached Juror George at sentencing and attempted to begin a conversation is another clear error of fact. Contrary to Juror George's testimony, Ms. Unger averred that her only contact with Juror George was when he approached her at Cavallo's sentencing, not vice-versa, and said hello. DE1168-1 at 1. There was no reason to credit Juror George's "visibly nervous" testimony over that of a respected criminal defense lawyer with 32 years' experience who has never been disciplined for any client- or representation-related misconduct. Moreover, the District Court compounded this error when it resolved this credibility issue against Ms. Unger without taking her live testimony.

2. It Was A Clear Error Of Fact To Reject Cavallo's Declaration

Likewise, the District Court committed a clear error of fact when it rejected Cavallo's declaration.

As an initial matter, it was the unnecessary and intimidating manner of the District Court's *in camera* interrogation itself that caused Juror George to embellish his testimony. Throughout the interrogation, the District Court made clear to Juror George that it disapproved of his conduct. Unsurprisingly, in an effort to appease the District Court and

quell the frightening interrogation, Juror George embellished his "visibly nervous" testimony.

The fact that Juror George cast blame on Cavallo and Ms. Unger and took no responsibility for his own actions and statements was virtually inevitable. Indeed, in related circumstances, this Court has held "a juror's denials of misconduct are an insufficient basis upon which to reject a claim of misconduct" because that would be their "natural inclination." *United States* v. *Brantley*, 733 F.2d 1429, 1440 (11th Cir. 1984); *accord United States* v. *Forrest*, 620 F.2d 446, 457-58 (5th Cir. 1980). So too here: Juror George's accusations and embellishments cannot submarine Cavallo's averments of compliance with Local Rule 5.01(d), because that simply reflects his natural inclination. And there can be no question that Juror George did embellish his testimony, because it was expressly contradicted by Cavallo's mobile phone records.

The District Court's point that Cavallo's testimony was inherently unbelievable because he was a convicted felon is difficult to understand. "A witness' status as a convicted felon may be relevant to that witness' credibility; however, it should go without saying that the factual testimony of other prisoners cannot be disallowed solely on the basis that

they are convicted felons and prisoners." *Thomas* v. *Evans*, 880 F.2d 1235, 1243 (11th Cir. 1989). Simply put, the fact that Cavallo might have diminished credibility as a convicted felon does not mean he always lies. This Court can judge for itself the painstaking detail of and contemporaneous documentary support for Cavallo's declaration in comparison to Juror George's rambling, disjointed narrative. Moreover, the District Court's reasoning in rejecting Cavallo's declaration as a convicted felon was circular, because Cavallo might be a free man and not a convicted felon if the jury had not committed misconduct and considered extrinsic evidence.

Put plainly, Cavallo told the truth, and Juror George did not. Instead, Juror George gave the answers he thought the District Court wanted to hear. The District Court's decision to credit Juror George's testimony over Cavallo's averments, which had contemporaneous documentary support, was therefore a clear error of fact. And once again, the District Court compounded this error when it resolved this credibility issue against Cavallo without taking his live testimony.

II. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DENIED CAVALLO AN OPPORTUNITY TO PROVE HIS JUROR MISCONDUCT CLAIM BY PRECLUDING MR. BRAGA'S DECLARATION

The District Court abused its discretion when it sealed the proceedings and gagged the participants,[9] because this denied Cavallo an opportunity to prove his juror misconduct claim. Specifically, the District Court's unlawful prophylactic measures prevented Cavallo from obtaining a declaration from Sarasota Herald-Tribune reporter Michael Braga, who would have averred that Juror George revealed his juror misconduct allegations to him as well. Mr. Braga's investigation constitutes an independent source of Juror George's allegations apart from any Local Rule 5.01(d) concerns.

A. No Compelling Governmental Interest Supported The Seal And Gag Order

The seal and gag order (DE1056) was not supported by any compelling governmental interest.

Ordinarily, when a district court "attempts to deny access" to court proceedings "in order to inhibit the disclosure of sensitive infor-

[9] Although district courts often conduct *in camera* investigations when juror misconduct allegations arise during trial, district courts do not typically conduct such proceedings *in camera* when allegations arise after trial.

mation, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to that interest." *Newman* v. *Graddick*, 696 F.2d 796, 801 (11th Cir. 1983) (citation omitted). In that regard, a "presumption of access must be indulged to the fullest extent not incompatible with the reasons for closure." *Id.* at 802. Although "the right to inspect and copy judicial records is not absolute," the only exceptions expressly recognized are when records would be used "to gratify private spite or promote public scandal," "as reservoirs for libelous statements," or "as sources of business information." *Nixon* v. *Warner Commc'ns*, 435 U.S. 589, 598 (1978).

The seal and gag order did not identify any compelling governmental interest or explain how holding the juror misconduct investigation proceedings under seal was narrowly tailored to serve that interest. DE1056 at 1. Nor would any exception apply. Rather, the Order simply stated it "deems it appropriate." DE1056 at 1.

B. Cavallo Was Entitled To An Opportunity To Prove His Claim Of Juror Misconduct

"A party claiming that an improperly influenced jury returned a verdict against him must be given an opportunity to prove that claim." *United States* v. *Forrest,* 620 F.2d 446, 457 (5th Cir. 1980) (collecting

cases). In such proceedings, "all interested parties" must be "permitted to participate." *Remmer* v. *United States*, 347 U.S. 227, 230, 74 S. Ct. 450, 451 (1954).

C. The Seal And Gag Order Deprived Cavallo Of An Opportunity To Prove His Claim By Preventing Him From Obtaining A Declaration From Mr. Braga

Cavallo was unable to obtain a declaration from Mr. Braga because of the seal and gag order. This deprived Cavallo of an opportunity to prove his claim.

Cavallo proffered that Mr. Braga is an objective journalist who performed an independent investigation of Juror George's juror misconduct allegations. His averments would have constituted an independent source of these juror misconduct allegations and could not have been excluded on Local Rule 5.01(d) grounds. The failure to consider Cavallo's proffer of Mr. Braga's likely averments denied him an opportunity to prove his claim.

III. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT FAILED TO PERFORM A FULL INVESTIGATION OF JUROR GEORGE'S E-MAIL

The District Court's failure to perform a full investigation of the juror misconduct allegation in Juror George's e-mail was an abuse of discretion.

A. Juror George's E-Mail Implicated Cavallo's Confrontation, Due Process, And Trial By Jury Rights

Juror George's allegation of juror misconduct implicated Cavallo's rights under the Confrontation Clause, *Sassounian* v. *Roe*, 230 F.3d 1097, 1108 (9th Cir. 2000) (a "juror's communication of extrinsic facts" also "implicates the Confrontation Clause," because the juror "in effect becomes an unsworn witness, not subject to confrontation or cross examination"), the Due Process Clause, *Smith* v. *Phillips*, 455 U.S. 209, 217, 102 S. Ct. 940, 946 (1982) (due process requires "a jury capable and willing to decide the case solely on the evidence before it"), and the Trial By Jury Clause, *United States* v. *Perkins*, 748 F.2d 1519, 1533 (11th Cir. 1984) (reversing and remanding for new trial when juror injected extrinsic evidence into jury deliberations); *accord United States* v. *Bolinger*, 837 F.2d 436, 438 (11th Cir. 1988).

1. Jurors Cannot Perform Legal Research Or Consider Extrinsic Information

Given this constitutional framework, jurors cannot perform legal research or consider extrinsic information about the trial.

When jurors independently perform their own legal research, such extrinsic evidence contaminates the entire jury. *United States* v. *Kanahele*, 951 F. Supp. 928, 935, 938 (D. Haw. 1996). The same result obtains when the jury considers media reports about the trial. For instance, this Court has routinely reversed the denial of new trial motions where jurors read a newspaper article about co-defendant's plea bargain and possible length of sentence, *United States* v. *Martinez*, 14 F.3d 543, 547-52 (11th Cir. 1994), or where jurors observed a television report about defendant's prior conviction at first trial, *United States* v. *Williams*, 568 F.2d 464, 470 (5th Cir. 1978).

2. *United States* v. *Martinez* Is Illustrative

Martinez is illustrative. There, the jury foreperson sent a note to the district court during jury deliberations stating that "one of the jurors saw a newspaper article and heard conversation about this case that indicated the possible length of the sentencing and the fact that all the witnesses who plea bargained got away with it." 14 F.3d at 547. The

jury foreperson questioned the juror in question, who answered that he or she had not "already made up [his or her] mind" and was therefore not "prejudiced." *Id.* Nevertheless, the note stated "comments have been made to indicate otherwise." *Id.* Having "pondered the matter at length," the jury foreperson notified the district court. *Id.*

The district court questioned all the jurors. *Id.* at 547-49. Upon receiving the jurors' assurances that they could "follow the law and render a fair and impartial verdict," the district court denied the defendant's motion for mistrial. *Id.* at 549. After two additional days of deliberations, the jury returned a verdict of conviction. *Id.*

This Court reversed. *Id.* at 544. As an initial matter, the defendant "met his initial burden of showing that extrinsic evidence invaded the jury's deliberations." *Id.* at 550. Among other things, the juror "informed the other jurors that Martinez faced 160 years of imprisonment if convicted" and "became aware of the publicity surrounding her participation on the jury." *Id.* Additionally, other jurors also "watched news accounts on television" and "regularly brought newspapers reporting trial events into the jury room." *Id.* Based on the jury's consideration of

this extrinsic evidence, the Eleventh Circuit therefore "assume[d] prejudice." *Id.*

The Government, however, could not meet its "heavy burden" of "rebutt[ing] that presumption" of prejudice. *Id.* Instead, not only had the juror "considered the extrinsic evidence, but . . . it impacted upon her decision-making." *Id.* at 551. This Court therefore held "the jury's improper consideration of extrinsic materials provide[d] a sufficient basis for reversing Martinez's convictions." *Id.* at 552.

B. When Colorable Juror Misconduct Allegations Arise, District Courts Must Perform "Full" Investigations

District courts must perform "full" investigations of colorable juror misconduct allegations. Juror George's e-mail was exactly such an allegation.

1. The Duty To Investigate Arises Whenever Parties Alleging Juror Misconduct Make A Colorable Showing Of Extrinsic Influence

"Where a colorable showing of extrinsic influence is made, a trial court, in the exercise of its discretion, must make sufficient inquiries or conduct a hearing to determine whether the influence was prejudicial." *United States* v. *Barshov*, 733 F.2d 842, 851 (11th Cir. 1984). "[T]he

more serious the potential jury contamination, especially where alleged extrinsic evidence is involved, the heavier the burden to investigate." *United States* v. *Caldwell*, 776 F.2d 989, 998 (11th Cir. 1985).

This "duty to investigate" arises whenever "the party alleging misconduct makes an adequate showing of extrinsic influence to overcome the presumption of jury impartiality." *Barshov*, 733 F.2d at 851. Put otherwise, "there must be something more than mere speculation." *Id.* For example, this Court has routinely concluded this standard was met when a jury foreperson sent the district court a note about a juror's exposure to extraneous sentencing information, *Martinez*, 14 F.3d at 547, a juror and her boyfriend alleged another juror told the jury that she knew the defendant's daughter and that the defendant "had 'been in this kind of trouble before,'" *United States* v. *Brantley*, 733 F.2d 1429, 1439 (11th Cir. 1984), or jurors admitted awareness of a straight news report that the defendants had been convicted of the offense at a prior trial, *Williams*, 568 F.2d at 465-66.

In response to such a colorable, adequate, and nonspeculative showing of extrinsic influence, "the trial judge 'must conduct a *full investigation* to ascertain whether the alleged jury misconduct actually

occurred; if it occurred, he must determine whether or not it was prejudicial.'" *Brantley*, 733 F.2d at 1439 (emphasis in original) (citation omitted); *accord United States* v. *Harris*, 908 F.2d 728, 733 (11th Cir. 1990) (collecting cases); *United States* v. *Bradley*, 644 F.3d 1213, 1277 (11th Cir. 2011).

2. Juror George's E-Mail Constituted A Colorable Showing Of Extrinsic Influence

Juror George's e-mail constituted a colorable showing of extrinsic influence. Far from speculating, Juror George's e-mail was clear: a female juror performed independent legal research during deliberations about a related defendant's guilty plea and lenient sentence. Indeed, she and the jury may even have considered this extrinsic evidence at or near the time of the *Allen* charge; recall that the jury returned its verdict only one day after the *Allen* charge. The potential timing and effect of this extrinsic influence could not have been more pernicious, as it could have permitted jurors to weigh Cavallo's likely punishment in the balance when they should have considered only whether the Government had met its burden of introducing evidence of his guilt beyond a reasonable doubt. At minimum, Cavallo was therefore entitled to a full investigation of the juror misconduct allegation.

C. The District Court Failed To Perform A "Full" Investigation Of Juror George's E-Mail

The District Court failed to perform a "full" investigation of the juror misconduct allegation. During its investigation, the District Court did not ask Juror George whether any juror performed legal research during deliberations per his e-mail allegation, any of the parties' proposed questions, or any questions regarding extraneous influence this Court approved in *United States* v. *Siegelman*, 640 F.3d 1159 (11th Cir. 2011). Moreover, the District Court also failed to take live testimony from other jurors, Cavallo, or Mr. Braga. Had the District Court asked the correct questions or taken live testimony from the correct witnesses, its investigation would have uncovered juror misconduct.

1. The District Court Did Not Ask Juror George Whether Any Juror Performed Legal Research During Deliberations Per His E-Mail

The District Court never asked the question at the heart of the juror misconduct issue: did another juror perform legal research, read, or relay media reports about a related defendant's guilty plea and lenient sentence during the trial? Instead, the District Court merely asked Juror George whether he personally observed extrinsic information, per-

sonally observed another juror accessing extrinsic information, or personally received extrinsic information from another juror.

But this line of testimony asks and answers the wrong questions: another juror could have easily accessed extrinsic information even if Juror George did not personally observe it or the act. And the effect on the jury would be the same. In fact, this is precisely what Juror George's e-mail alleges.

The District Court's decision not to question Juror George on this point, even though he relinquished his Fifth Amendment privilege with the advice of counsel, because he might somehow expose himself to criminal liability (DE1203 at 7 n.6) is inscrutable. Juror George was not exposed to any criminal liability because he did not commit perjury in violation of 18 U.S.C. § 1621. To be clear, Juror George followed all of the District Court's trial prohibitions against accessing extrinsic information. And contrary to the District Court's suggestion at the first evidentiary hearing (DE1248 at 66:1-8), the postverdict secrecy of deliberations is the petit jury's privilege, not its obligation. *See Clark* v. *United States*, 61 F.2d 695, 705 (8th Cir. 1932) (jury deliberations are "privileged communications"). If anything, it is the innominate female juror

who may have committed perjury. And Juror George did not commit criminal contempt because he complied with the District Court's oral order at Cavallo's sentencing proceeding, properly understood. DE1135 at 5-10. The District Court's refusal to question Juror George about the specifics of his e-mail allegation failed to perform a "full" investigation.

2. The District Court Did Not Ask Any Of The Parties' Proposed Questions

The District Court did not ask any of the parties' proposed questions. Notably, all of the parties, including the Government, proposed questions that went through Juror George's e-mail piece by piece. Indeed, Cavallo asked specific questions about Juror George's allegation that an innominate female juror performed legal research on the Internet about a related defendant's guilty plea and lenient sentence. DE1131 at 8-11. And Cavallo asked several general questions about extrinsic information. DE1131 at 19-20.

3. The District Court Did Not Ask Any *Siegelman* Questions

The District Court did not ask Juror George any of the questions about extrinsic influence that this Court expressly approved in *United States* v. *Siegelman*, which included:

> Eighth question: During the time that you were serving as a juror did you view or hear any extraneous information about the penalty that might be applicable to any Defendant if he was convicted of the charges in this case?
>
> Ninth question: During the time that you were serving as a juror did you obtain extraneous information from any source about your role as a juror, your jury service generally, or the role of the foreperson?
>
> Tenth question: During the time that you served as a juror did any other juror say or do anything that caused you to believe that he or she may have been exposed to extraneous information as I have defined it about this case from any source?
>
> Eleventh question: During the time that you were serving as a juror did you view or hear any extraneous information about either the law applicable to this case or any factual material relating to this case?

640 F.3d 1159, 1190-91 (11th Cir. 2011). Cavallo repeatedly asked the District Court to ask these questions. DE1044 at 15-16; DE1131 at 4, 15-19. The failure to ask Juror George these questions rendered the District Court's investigation incomplete.

4. The District Court Refused To Take Live Testimony From Other Jurors

The District Court mistakenly relied on a Second Circuit decision instead of this Court's precedent when it refused to take live testimony from other jurors. This denied Cavallo a "full" investigation.

At minimum, a full investigation includes the duty to question other jurors about the alleged extrinsic influence. *See Brantley,* 733 F.2d at 1440 n.20; *United States* v. *Forrest*, 620 F.2d 446, 457 (5th Cir. 1980); *see also Siegelman*, 640 F.3d at 1190-91. This duty arises because a single juror's "natural inclination" or "natural disposition" would be to deny any wrongdoing. *Brantley*, 733 F.2d at 1440; *Forrest*, 620 F.2d at 457.

But instead of citing this Court's decisions in *Brantley*, *Forrest*, or *Siegelman*, the District Court relied on the Second Circuit's decision in *United States* v. *Ianniello*, 866 F.2d 540, 544 (2d Cir. 1989), to conclude it was unnecessary to question the other jurors. At minimum, the District Court should have asked the other jurors the remaining *Siegelman* questions, including:

> Fourth question: During the time that you were serving as a juror did you view any news reports or other information relating to this case or to any Defendant from sources such as newspapers, magazine, radio, or television broadcasts or Internet sites?
>
> Fifth question: During the time that you were serving as a juror did you view any materials from any books, newspapers, Internet sites or any other source relating to any witness, any legal issue, or any factual issue related to this case?

> Sixth question: During the time that you were serving as a juror did you in any way attempt to independently investigate any facts or law relating to this case?

640 F.3d at 1190-91. The District Court's failure to apply this Court's precedent and question other jurors rendered its investigation incomplete.

5. The District Court Failed To Take Live Testimony From Cavallo Or Mr. Braga

The District Court did not take live testimony from Cavallo or Mr. Braga, which rendered its investigation incomplete.

To conduct a full investigation, the District Court needed to question all other witnesses to Juror George's revelations of juror misconduct. *See Forrest*, 620 F.2d at 458 (remanding for district court to question other jurors, marshals, and witnesses). Juror George orally revealed his allegations of juror misconduct to Cavallo and Mr. Braga. The District Court's failure to take live testimony from them therefore denied Cavallo a "full" investigation.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT MISAPPLIED THE PRESUMPTION OF PREJUDICE

The District Court's failure to apply the presumption of prejudice was an abuse of discretion. Whenever defendants make a "colorable showing" that jurors were exposed to extrinsic evidence, prejudice is

presumed" and a "heavy burden" shifts to the Government to rebut prejudice. The District Court refused to apply the presumption's burden shifting because Juror George's testimony supposedly refuted his e-mail. Moreover, it also concluded the alleged extrinsic exposure was not prejudicial in any event because it would have invoked sympathy. Both of these rulings were wrong.

A. When Extrinsic Exposure Occurs, The Presumption Of Prejudice Applies

The presumption of prejudice applies whenever extrinsic exposure occurs.

Initially, the defendant "has the burden to show that the jury has been exposed to extrinsic evidence or extrinsic contacts." *United States* v. *Ronda*, 455 F.3d 1273, 1299 (11th Cir. 2006) (collecting cases). But "[o]nce the defendant establishes such exposure in fact occurred, prejudice is presumed and the burden shifts to the government to rebut the presumptions." *Id.*

"The presumption [of prejudice] is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." *Remmer* v. *United States*, 347 U.S. 227, 229, 74

S. Ct. 450, 451 (1954). The Government cannot defeat the presumption unless it shows the jurors' consideration of extrinsic evidence was "harmless to the defendant." *Ronda*, 455 F.3d at 1299. Moreover, to be harmless, the introduction of "extrinsic evidence" must be "harmless beyond a reasonable doubt." *United States* v. *Bolinger*, 837 F.2d 837 F.2d 436, 440 (11th Cir. 1988)

B. The District Court Misapplied The Presumption Of Prejudice

The District Court improperly applied the presumption of prejudice. First, Juror George's testimony did not refute his e-mail. Second, prejudice was clear in light of the weak and circumstantial nature of the Government's case, the split verdict, the jury's consideration of a related defendant's guilty plea and sentence potentially at or near the time of the *Allen* charge, and the fact that the jury returned a verdict almost immediately after the *Allen* charge.

1. Juror George's Testimony Did Not Refute His E-Mail

Juror George's testimony did not refute his e-mail because the District Court asked and he answered the wrong questions. *See* Argument III.C.1. The District Court never asked whether another juror per-

form legal research or read media reports about a related defendant's guilty plea and lenient sentence during the trial. Even if Juror George did not personally observe extrinsic information or the act of accessing it, another juror still could have easily accessed performed legal research during deliberations. This is consistent with Juror George's testimony and his e-mail.

2. The District Court Did Not Apply This Court's Four-Factor Test Regarding Prejudice

The District Court did not apply this Court's four-factor test to determine whether the extrinsic information was prejudicial.

In assessing whether the Government has met its heavy burden of rebutting prejudice, the District Court needed to consider the "totality of the circumstances," including (1) "the nature of the extrinsic evidence," (2) "the manner in which the information reached the jury," (3) "the factual findings in the district court and the manner of the court's inquiry into the juror issues," and (4) "the strength of the government's case." *Ronda*, 455 F.3d at 1299-1300; *accord United States* v. *Siegelman*, 640 F.3d 1159, 1182 (11th Cir. 2011) (burden shifts to Government after defendant makes "colorable showing" of extrinsic influence). But the District Court did not consider *Ronda*'s four factors. In-

stead, it concluded without explanation that the lenient sentence somehow "would have invoked sympathy." DE1203 at 18. Had the District Court applied the four-factor test, it would have found prejudice.

First, the nature of the extrinsic evidence could hardly be more prejudicial. At minimum, there was a reasonable possibility that at least one juror's consideration of Cavallo's likely punishment clouded her judgment as to whether the Government carried its burden of proving guilt beyond a reasonable doubt.

Second, the manner in which the extrinsic evidence reached this juror was troubling. The jury deliberated had deliberated for over a week before returning its verdict one day after the *Allen* charge. As such, the possible timing of the extrinsic influence and the jury's almost immediate return of the verdict after the *Allen* charge strongly suggest prejudice. When extrinsic information is considered by a jury immediately before returning a verdict, "the timing of this pivotal information alone compels the conclusion that it was not harmless." *Sassounian* v. *Roe*, 230 F.3d 1097, 1110 (9th Cir. 2000). That is because "[l]engthy deliberations preceding the misconduct and a relatively quick verdict following the misconduct strongly suggest prejudice." *Id.* It matters little

that perhaps only one juror may have performed legal research herself. The "'number of jurors affected by the misconduct does not weigh heavily in the prejudice calculus for even a single juror's improperly influenced vote deprives the defendant of an unprejudiced, unanimous verdict.'" *Id.* (quoting *Lawson* v. *Borg*, 60 F.3d 608, 613 (9th Cir. 1995), and collecting other authorities); *see also United States* v. *Delaney*, 732 F.2d 639, 643 (8th Cir. 1984) ("[i]f a single juror is improperly influenced, the verdict is as unfair as if all were"). Additionally, because the juror misconduct did not come to light until after trial, the District Court "never had an opportunity to diminish the prejudicial effect of the extraneous information." *Sassounian*, 230 F.3d at 1111.

Third, the District Court did not perform a "full" investigation into the juror misconduct allegation. *See supra* Argument III. This rendered its inquiry into the juror misconduct issue inadequate.

Fourth, prejudice was also likely here because the Government presented a weak, circumstantial case that led to a split verdict.[10] It "cannot be said that the other evidence amassed at trial was so overwhelming that the jury would have reached the same result even if it

[10] Cavallo may further address the Government's weak, circumstantial case in his Appellant's Brief for Appeal No. 12-15660.

had not considered the extraneous material." *Id.* Indeed, in assessing prejudice, this Court should "'particularly take[] note of the circumstantial nature of the Government's case.'" *United States* v. *Perkins*, 748 F.2d 1519, 1534 (11th Cir. 1984) (reversing and remanding for new trial) (citation omitted).

For all these reasons, the Government did not rebut the presumption of prejudice. The District Court therefore abused its discretion when it concluded otherwise.

V. THIS COURT SHOULD GENTLY REMIND THE DISTRICT COURT TO SET ASIDE ANY STRONGLY HELD PERSONAL VIEWS ABOUT MS. UNGER

To preserve the "appearance of justice" on remand, *United States* v. *Torkington,* 874 F.2d 1441, 1447 (11th Cir. 1989), this Court should gently remind the District Court to set aside any strongly held personal views about Ms. Unger.

At trial, there were personality conflicts between the District Court and Ms. Unger. These past fireworks may have influenced the Amended Order, in which the District Court bemoaned the post-trial proceedings as a "costly exercise" "levied on a federal court system bereft of adequate resources," demeaned the "professional attitude dis-

played in this case" by Ms. Unger, stated it was "inclined to report" Ms. Unger to a grievance committee, and disparaged Ms. Unger as an "an out of state lawyer that is willing to win at all costs." DE1203 at 13 n.9, 19. Relatedly, the District Court's feelings about Cavallo's former trial counsel may have been imputed to Cavallo himself, because the District Court criticized him as "a defendant looking for a second bite at the apple." DE1203 at 19. All this "strong language" suggests the public might perceive the District Court has become "hardened against" Cavallo and his former trial counsel and might therefore have "tremendous difficulty" putting its prior findings out of mind. *Chudasama* v. *Mazda Motor Corp.,* 123 F.3d 1353, 1373 (11th Cir. 1997); *United States* v. *White,* 846 F.2d 678, 696 (11th Cir. 1988).

But reassignment on remand is too draconian a remedy here; a gentle reminder will suffice. Cavallo is well aware that the District Court has provided distinguished judicial service for four decades, including over three decades as a federal district judge in the Middle District of Florida. Aside from this one concern, Cavallo therefore has every "reason to believe that the well-respected district judge to whom this case is assigned" will "be able to apply the proper standard[s]" on re-

mand and treat him justly. *Sierra Club* v. *Flowers*, 526 F.3d 1353, 1364 n.9 (11th Cir. 2008).

CONCLUSION

For the foregoing reasons, the Court should vacate the Amended Order (DE1203) and remand for further proceedings.

July 19, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B)'s type-volume requirement. As determined by Microsoft Word 2010's word-count function, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and 11th Circuit Rule 32-4, this brief contains 12,499 words.

This brief further complies with Federal Rule of Appellate Procedure 32(a)(5)'s typeface requirements and with Federal Rule of Appellate Procedure 32(a)(6)'s type-style requirements. Its text has been prepared in a proportionally spaced serif typeface in roman style using Microsoft Word 2010's 14-point Century font.

July 19, 2013

/s/ Thomas Burns
Thomas A. Burns

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I filed the original and six copies of the foregoing Appellant's Brief and Record Excerpts with the Clerk of Court via regular mail on this 19th day of July, 2013, to:

John Ley, Clerk of Court
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I FURTHER CERTIFY that I served a true and correct copy of the foregoing Appellant's Brief and Record Excerpts via regular mail on this 19th day of July, 2013, to:

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