Nos. 12-15660-FF & 13-12009-FF
(Consolidated)

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

REPLY BRIEF

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STATEMENT REGARDING ADOPTION OF BRIEFS OF OTHER PARTIES

Cavallo adopts the restitution arguments in Defendant-Appellant Paula Hornberger's reply brief and the juror misconduct arguments in Defendant-Appellant Joel Streinz's reply brief.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN DECLINING TO SET ASIDE THE VERDICT FOR JUROR MISCONDUCT (GOVERNMENT ISSUE VII; CAVALLO JULY BRIEF ISSUES I-IV)[1]

The chief problem with the Government's argument (U.S. Br. at 59-83) is that it never comes to grips with the actual text of Middle District of Florida Local Rule 5.01(d). Specifically, the Government attempts to mend the textual disconnect between Middle District of Florida Rule 5.01(d)'s prohibition of "undertak[ing], directly or indirectly, to interview any juror after trial" with its desired proposition that the rule

[1] Cavallo previously argued the District Court: misplaced its reliance on *United States* v. *Venske*, 296 F.3d 1284 (11th Cir. 2002); improperly made credibility determinations without hearing live testimony from all witnesses; committed clear errors of fact in crediting Juror George's testimony over Ms. Unger's and Cavallo's declarations; denied Cavallo an opportunity to prove his claim by sealing and gagging the proceedings (which precluded Mr. Braga's declaration); failed to perform a full investigation of Juror George's e-mail by failing to ask Juror George the critical question whether any juror was exposed to extrinsic evidence (as proposed by all parties, including the Government) or taking live testimony from other jurors, Cavallo, and Mr. Braga; and misapplied the presumption of prejudice. Cavallo July Br. at 34-68.

prohibits all "post-trial *contact* with jurors." U.S. Br. at 62 (emphasis added). The Government does this by explaining that Middle District of Florida Local Rule 5.01(d) merely "codified" federal courts' "historical practice of prohibiting post-trial contact with jurors." U.S. Br. at 62. But this argument is misguided because the Government's historical and textual analysis is incorrect

First of all, even in this Circuit, the district courts have a remarkable diversity of local rules to handle post-trial interactions with jurors. The Northern District of Florida has no such local rule. *See* N.D. Fla. Local R. The Southern District of Florida prohibits lawyers, but not parties, from "conversing or otherwise communicating with a juror on any subject." S.D. Fla. Local R. 11.1(e). The Northern District of Georgia prohibits parties and lawyers from "communicat[ing] with any members of the petit jury." N.D. Ga. Local Crim. R. 47.3. The Middle District of Georgia has no such local rule. *See* M.D. Ga. Local R. The Southern District of Georgia has no such local rule. *See* S.D. Ga. Local Crim. R. The Northern District of Alabama permits parties and lawyers to "initiate" "[c]ommunications" with jurors, without prior court permission, at any time after "the day following [the juror's] release from jury service for

such term of court." N.D. Ala. Local R. 47.1. The Middle District of Alabama prohibits parties and lawyers from "initiat[ing] any form of contact for the purpose of interrogating jurors or alternate jurors." M.D. Ala. Local R. 47.1(b). And the Southern District of Alabama prohibits parties and lawyers from "interrogat[ing] jurors, or alternate jurors, either in person or in writing." S.D. Ala. Local R. 47.2.

In short, contrary to the Government (U.S. Br. at 61-62), there is no general historical practice of prohibiting all post-trial contact with jurors, even to this day. Rather, the historical reality is that some districts do, some districts do not. And the textual reality is that those districts that do have local-rule prohibitions draft them in very different ways.

It is primarily for this reason, then, that the Government's (U.S. Br. at 66-67) reliance on *Venske* is misplaced. Put simply, *Venske*, is distinguishable because in that case, 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)" was not clearly erroneous. 296 F.3d at 1291. Here, however, Ms. Unger's and Cavallo's declarations indicate they did not violate Local Rule 5.01(d). Cavallo July Br.

at 36-38. And unlike the district court in *Venske*, the District Court here did not take live testimony from Cavallo or Ms. Unger, but instead committed clear errors of fact when it rejected their declarations out of hand. Credibility determinations like these, however, cannot be made on paper records; instead, they require district courts to take live testimony. *Bischoff* v. *Osceola County*, 222 F.3d 874, 881 (11th Cir. 2000).

Instead of contesting this legal framework, the Government contends in a footnote (U.S. Br. at 68 n.12) that the invited-error doctrine bars Cavallo's argument because he did not request the District Court to take his or Ms. Unger's live testimony before it rejected it. That is not how the invited-error doctrine works. The "doctrine of invited error is implicated when a party induces or invites the district court into making an error." *United States* v. *Brannan*, 562 F.3d 1300, 1306 (11th Cir. 2009) (citation and punctuation omitted). As should be clear from its title, the doctrine applies only when a defendant takes some action that *invites* the error committed. For instance, the doctrine bars an evidentiary argument when a defendant agrees to allow a tape-recorded statement into evidence, a sentencing argument when a defendant expressly acknowledges a district court could impose a sentence of super-

vised release, or a hearsay argument when the defendant asks a government witness to relay hearsay. *Id.* (collecting authorities). Here, however, Cavallo took no action to invite the District Court to reject the declarations, and he specifically argued *Venske* was distinguishable. Doc. 1168 at 1, 14-15. The invited-error doctrine does not apply.

As for whether the District Court committed clear error in crediting Juror George's testimony and rejecting Cavallo's and Ms. Unger's declarations, there is no need to belabor the point. Simply put, the parties disagree. *Compare* Cavallo July Br. at 41-45, *with* U.S. Br. at 70-71.

The Government does not even attempt to defend the District Court's seal-and-gag order, which prevented Cavallo from obtaining a declaration from Mr. Braga. Instead, the Government speculates "any information that Braga obtained also was the result of Cavallo's and Unger's violation of the local rule." U.S. Br. at 75. That is not what Mr. Braga would have averred. Rather, as Cavallo indicated in his declaration, he first made contact with Mr. Braga to obtain Juror George's contact information. Doc. 1168-A ¶ 4. At that point, Mr. Braga thought something was afoot, and, as any investigative journalist would, he independently called Juror George to find out what that was. *See* Doc.

1168-A ¶ 27. It was not until after all of Cavallo's calls with Juror George that Cavallo asked Mr. Braga what Juror George had told him. *See* Doc. 1168-A ¶¶ 19, 21-23.

It is also unnecessary to address at length whether the District Court properly credited Juror George's testimony over his e-mail allegation 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." Doc. 1044-1. Again, the parties disagree. *Compare* Cavallo July Br. at 62-63, *with* U.S. Br. at 76-78.

In a footnote, the Government cites *United States* v. *Poe*, 556 F.3d 1113 (10th Cir. 2009), for the proposition that this Court should review Cavallo's arguments that the District Court should have questioned Mr. Braga and Juror Patricia for plain error. U.S. Br. at 78 n.16. *Poe* does not support that proposition. There, a defendant did not object to a district court's sentencing procedure before it "imposed a ten-year term of supervised release." 556 F.3d at 1128. Here, however, Cavallo asked the District Court to question Mr. Braga and Juror Patricia before the Dis-

trict Court entered the order on appeal. Doc. 1203. These issues were therefore preserved.

Finally, the Government contends (U.S. Br. at 79-83) the extrinsic evidence about Whitehead's sentence was harmless. But the Government does not mention that "prejudice is presumed," *United States* v. *Ronda*, 455 F.3d 1273, 1299 (11th Cir. 2006), that the burden of rebutting the presumption of prejudice "rests heavily upon the Government," *Remmer* v. *United States*, 347 U.S. 227, 229, 74 S. Ct. 450, 451 (1954), or that its burden is to prove harmlessness "beyond a reasonable doubt," *United States* v. *Bolinger*, 837 F.2d 436, 440 (11th Cir. 1988). This is why the Government cannot establish harmlessness.

Specifically, the Government's theory that the jury's knowledge of Whitehead's lenient sentence "would have affirmatively bolstered [Cavallo's] defense because it would have supported [his] argument that the government's cooperating coconspirators were lying just to save themselves" does not take account of the presumption or the Government's burden. If anything, it is more likely that a juror struggling with his or her verdict would have concluded, in a split-the-baby fashion, that there would be little harm in convicting Cavallo, despite the weak

evidence, because the only punishment he would receive would be a slap on the wrist. And the presumption of prejudice requires this Court to so conclude. Cavallo July Br. at 64-66.

II. THE EVIDENCE WAS NOT SUFFICIENT TO CONVICT CAVALLO IN COUNT 28 (3350 KENMORE DRIVE) BEYOND A REASONABLE DOUBT (GOVERNMENT ISSUE VI; CAVALLO OCTOBER BRIEF ISSUE I)

The Government attempts to distinguish (U.S. Br. at 55-56) *United States* v. *Phillips*, 731 F.3d 649 (7th Cir. 2013) (en banc), on two bases. Both are incorrect.

First, the Government contends *Phillips* "did not concern the sufficiency of the evidence on a section 1014 charge." U.S. Br. at 55. That supposed distinction misses the point. *Phillips* expressly explained the Seventh Circuit had "granted rehearing en banc to clarify the elements of the [§ 1014] crime and their application to charges of mortgage fraud." 731 F.3d at 650. Plainly, *Phillips*'s clarification of the elements of a § 1014 prosecution is relevant to any discussion of the sufficiency of the evidence for such a prosecution.

Second, the Government contends that because Cavallo "did not testify," and "no evidence suggested that he had not read and signed the documents himself," *Phillips* would not apply because there the defend-

ant had "testified that the mortgage broker had completed the loan application that had contained false information and that she had not read it herself or known about the inaccuracies in it." U.S. Br. at 55-56. This argument improperly shifts the burden of proof to Cavallo when the burden of introducing evidence sufficient to prove guilt beyond a reasonable doubt always belongs to the Government alone: "In a criminal case, the government must prove each and every element of a charged offense beyond a reasonable doubt." *Harvell* v. *Nagle*, 58 F.3d 1541, 1542 (11th Cir. 1995) (citing *In re Winship,* 397 U.S. 358, 90 S. Ct. 1068 (1970)).

In a nutshell, *Phillips* is why the Government cannot demonstrate the evidence was sufficient: there simply is no testimony or evidence that the loan application was already filled out when it was signed and that Cavallo signed it either with full knowledge of with willful blindness to its falsehoods. Cavallo has no obligation to prove his innocence. And the jury cannot fill that evidentiary gap with its own speculations or conjecture. Cavallo October Br. at 39-40.

The Government attempts to fill this evidentiary gap by citing documentary evidence of misrepresentations made subsequent to the

loan application. U.S. Br. at 51-53. But the indictment did not charge Cavallo with any of those misrepresentations. *See* Doc. 1 at 61. Rather, the indictment charged Cavallo with misrepresentations made "[o]n or about February 24, 2006" (Doc. 1 at 61), which was the date of the loan application (Ex. 390B1). The Fifth Amendment ensures that "a defendant can only be convicted for a crime charged in the indictment." *United States* v. *Keller*, 916 F.2d 628, 633 (11th Cir. 1990). In effect, what the Government is really asking the Court to do is to find the evidence sufficient despite a "variance" from or "amendment" of the indictment. *Id.* This the Court cannot do. *See id.* at 632-37 (reversing conviction due to constructive amendment of indictment).

III. CAVALLO'S SENTENCES ARE PROCEDURALLY AND SUBSTANTIVELY UNREASONABLE (GOVERNMENT ISSUE VIII; CAVALLO OCTOBER BRIEF ISSUE II)

The parties have comprehensively briefed the procedural and substantive reasonableness of Cavallo's sentence. *Compare* Cavallo October Br. at 44-62, *with* U.S. Br. at 83-101. Those arguments are now for the Court to resolve.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT FAILED TO HOLD AN EVIDENTIARY HEARING TO INVESTIGATE GRAND JURY MISCONDUCT (GOVERNMENT ISSUE I; CAVALLO OCTOBER BRIEF ISSUE III)

There is no need to rehash the parties' differing interpretations of the grand jury transcript. *Compare* Cavallo October Br. at 63-65, *with* U.S. Br. at 27-31. The parties disagree.

But it is necessary to explain how the Government's contention that a petit jury conviction always renders harmless grand jury misconduct is incorrect. U.S. Br. at 31 (citing *Anderson* v. *Sec'y for Dep't of Corrs.*, 462 F.3d 1319, 1326-27 (11th Cir. 2006)). *Anderson* denied a certificate of appealability to a state habeas petitioner because "Supreme Court precedent would support a holding that an indictment is not invalidated by the grand jury's consideration of perjured testimony." 462 F.3d at 1327. In habeas litigation, state petitioners cannot prevail unless they demonstrate a state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

This distinction between direct appeals and habeas litigation is important, because the fact that something might not be clear under

Supreme Court precedent does not make it unclear under this Court's precedent. *See id.* This Court has long held that a petit jury conviction does not always render harmless false testimony before the grand jury; rather, the indictment should still be dismissed when the defendant shows "an abuse of the grand jury process such as perjury or government misconduct." *United States* v. *Garate-Vergara*, 942 F.2d 1543, 1550 (11th Cir. 1991). It is for that reason that the Government misplaces its reliance on *Anderson*, and its contention that petit jury convictions render harmless grand jury misconduct is incorrect.

V. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT FAILED TO HOLD AN EVIDENTIARY HEARING TO INVESTIGATE ATTEMPTED WITNESS INTIMIDATION (GOVERNMENT ISSUE II; CAVALLO OCTOBER BRIEF ISSUE IV)

When it cites decisions from other circuits for the proposition that there was "no improper witness intimidation," the Government responds to an argument Cavallo did not make. U.S. Br. at 33-35. Cavallo did not argue witness intimidation occurred; rather, Cavallo argued this Court must remand for an evidentiary hearing to determine whether it occurred and, if so, what effect it had on the fairness of the proceedings. Cavallo October Br. at 62-65.

None of the cases on which the Government relies addresses Cavallo's argument because none involved a defendant who requested remand for an evidentiary hearing for these purposes. *See United States* v. *Fricke*, 684 F.2d 1126, 1130 (5th Cir. 1982) (no request for evidentiary hearing on remand); *United States* v. *Girod*, 646 F.3d 304, 311-12 (5th Cir. 2011) (district court did not clearly err when it found no witness intimidation based on "undisputed testimony"); *United States* v. *Jackson*, 935 F.2d 832, 847 (7th Cir. 1991) (no request for evidentiary hearing on remand); *United States* v. *Thompson*, 130 F.3d 676, 687 (5th Cir. 1997) ("threats reached only the defense lawyer," and no request for evidentiary hearing on remand); *United States* v. *Simmons*, 670 F.2d 365, 371 (D.C. Cir. 1982) (no request for evidentiary hearing on remand); *United States* v. *Viera*, 839 F.2d 1113, 1115 (5th Cir. 1988) (en banc) (no request for evidentiary hearing on remand). They are therefore inapposite.

Additionally, the Government never attempts to distinguish the principal case on which Cavallo relied (Cavallo July Br. at 66-67), *United States* v. *Schlei*, 122 F.3d 944 (11th Cir. 1997). It is *Schlei* that controls the result here. In *Schlei*, the defendant specifically "requested an

evidentiary hearing" on remand. *Id.* at 991. This Court explained that "[w]here defendants present evidence to the district court that the government intimidated a defense witness a trial court must grant a hearing to determine whether the allegations of intimidation are true." *Id.* at 992. Because the District Court did not hold such an evidentiary hearing, this Court must remand for one. *See id.*

VI. THE DISTRICT COURT COMMITTED A STRUCTURAL ERROR WHEN ITS REPEATED SIDEBARS DENIED CAVALLO OF THE RIGHT TO A PUBLIC TRIAL (GOVERNMENT ISSUE V; CAVALLO OCTOBER BRIEF ISSUE V)

The Government misplaces its reliance (U.S. Br. at 48-49) on *United States* v. *Smith*, 787 F.2d 111 (3d Cir. 1986). That case involved a witness's appeal "to prevent disclosure of the transcript of a sidebar conference containing a question to him that was proffered by the prosecution." *Id.* at 112. The district court had orally sealed the sidebar conference, then entered a written order unsealing it. *Id.* at 112-13. In dictum, the Third Circuit quoted one of Justice Brennan's concurring opinions to the effect that a "trial judge is not required to allow public or press intrusion upon the huddle" of a sidebar conference. *Id.* at 114 (quoting *Richmond Newspapers* v. *Virginia*, 448 U.S. 555, 598 n.23, 100 S. Ct. 2814, 2839 n.23 (1980)). But *Smith* did not, unlike here, involve a

defendant who objected to a district court's sidebar practice. And *Richmond Newspapers* involved a newspaper's request to attend sealed trial proceedings.

The Government's request that this Court review the sidebar argument for plain error because Streinz's made only a "half-hearted objection to the court's sidebar practice" (U.S. Br. at 49) is also misguided. Even if the objection were half-hearted, the Federal Rules of Evidence do not distinguish between sincere and half-hearted objections: "Under the contemporaneous objection rule, an issue is properly preserved if the trial court knows that an objection was made, clearly understands the nature of the objection, and denies that request." *Ferguson* v. *Sec'y for the Dep't of Corrs.*, 580 F.3d 1183, 1212 (11th Cir. 2009). The objection to the sidebar practice complied with that standard.

It is for also this reason that the Government's reliance (U.S. Br. at 50) on *Rovinsky* v. *McKaskle,* 722 F.2d 197 (5th Cir. 1984), and *Steiner* v. *United States,* 134 F.2d 931 (5th Cir. 1943), is misplaced. As Cavallo previously explained (Cavallo October Br. at 70), those cases are distinguishable because Streinz objected, whereas the defendants in those cases did not.

CONCLUSION

For the foregoing reasons, the Court should vacate the judgment and remand for further proceedings.

February 6, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. 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 3,071 words.

2. 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.

February 6, 2014

/s/ Thomas Burns
Thomas A. Burns

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I filed the original and six copies of the foregoing brief with the Clerk of Court via CM/ECF and regular mail on this 6th day of February, 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 brief via CM/ECF on this 6th day of February, 2013, to:

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