APPENDIX B

Petitioner's Primary Brief to Tenth Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Cast No. 19-3035

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GAVIN WAYNE WRIGHT,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Kansas

The Hon. Eric F. Melgren, United States District Judge

D.C. No. 16-CR-10141-03-EFM

BRIEF OF DEFENDANT-APPELLANT

ORAL ARGUMENT IS REQUESTED

Respectfully submitted,

KARI S. SCHMIDT, Sup. Ct. No. 11524
TYLER J. EMERSON, Sup. Ct. No. 26006
200 West Douglas, Suite 300
Wichita, Kansas 67202
P: (316) 264 – 3300
F: (316) 264 – 3423
E: karis@fcse.net
E: tyler@fcse.net

TABLE OF CONTENTS

E. Order admitting recordings with standing objections, R6.2740

F. Orders denying Wright's Rule 29 motion for judgment of acquittal and renewed motion for judgment of acquittal, R6.4507, 5236

TABLE OF AUTHORITIES

SUPREME COURT DECISIONS

TENTH CIRCUIT DECISIONS

OTHER COURT DECISIONS

STATUTES AND RULES

OTHER AUTHORITY

PRIOR OR RELATED APPEALS

This appeal is consolidated with *United States v. Allen*, No. 19-3034, *United States v. Stein*, No. 19-3030, and *United States v. Allen, et al.*, No. 19-3053 (Government's cross-appeal). The Government filed an interlocutory appeal in *United States v. Allen*, No. 17-3200. Co-defendant Stein has an appeal pending in an unrelated case, *United States v. Stein*, No. 19-3043.

JURISDICTION

This appeal is made pursuant to 28 U.S.C. § 1291, arising from a final judgment disposing of all parties' claims, arising from a federal jury trial and sentencing. (R3.1328). The defendant was convicted of one count in violation of 18 U.S.C. §§ 2, 2332a, one count in violation of 18 U.S.C. § 241, and one count in violation of 18 U.S.C. § 1001. (R3.1328). He was sentenced to 312 months. (R3.1330). He timely filed his notice of appeal on February 13, 2019. (R3.1340).

STATEMENT OF THE ISSUES

I. Whether the Government's knowing admission and publication of untruthful transcripts violated Wright's Constitutional due process rights?

II. Whether the District Court abused its discretion in connection with the Rule 801(d)(2)(E) proceedings?

III. Whether the District Court committed reversible error by denying a jury instruction on entrapment?

IV. Whether the District Court erred by denying Wright's motion for judgment of acquittal?

V. Whether the District Court's errors were cumulatively unduly prejudicial?

VI. Whether the District Court erroneously denied the defendants' motion to comply with the Jury Act?

VII. Whether the District Court erroneously applied the terrorism enhancement under U.S.S.G. § 3A1.4(a)?

SUMMARY OF THE CASE AND ARGUMENT

The theme of this case is unfairness and undue prejudice. From the Government's intentional deprivation of Gavin Wright's constitutional rights to due process and confrontation, to the District Court's numerous substantive and procedural rulings depriving Wright of his ability to present a defense, these proceedings on the whole resulted in nothing less than undue prejudice and burden on the defendant. The Government fulfilled its mission of pursuing "chargeable offenses" by representing transcripts to the defense and the District Court as "truthful," "accurate" and "verified" at the eleventh hour, while knowing those transcripts were not truthful, accurate or verified; by knowingly offering untruthful transcripts into evidence at a *James* hearing; and by knowingly publishing untruthful transcripts to the jury. The District Court denied the defense's invocation of its rights under the Federal Rules of Evidence, calling such motions "bad faith," despite the District Court's failure to follow proper *James* procedure and confusing relatively straight-forward rules of evidence ranging from Rule 106 to Rule 801, and Rules 608, 613 and 803.

The District Court deprived the jury of its role, stating that the evidentiary requirement for entrapment was quite "high," even after hearing extensive evidence from the FBI's informant about his role in recruiting and inducing Wright, as well as affirmative evidence of Wright's lack of predisposition from those who knew him best. And the District Court permitted the Government to tell the jury that it was not required to present evidence on an element of one of the crimes; that the jury could simply use its "common sense" and "imagination" instead of evidence in the record to convict. The

Government won the proceeds of the unfair process: Wright's convictions of conspiracy to use a weapon of mass destruction, conspiracy to commit hate crimes, and making materially false statements to the FBI. However, the unfairness and undue prejudice against Wright during these proceedings demands this Court to overturn his convictions and remand back to the District Court for a new *fair* trial.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY[1]

Living in the college town of Manhattan, Kansas, Gavin Wright had a thriving business with several employees and "good friends" in town. (R6.5133-5134). But in 2013, Wright's father died suddenly. (R6.5150). Reluctantly, Wright moved to rural small-town Liberal, Kansas to help his brother run the family business, G&G Homes. (R6.5150-5151). There, Wright ran the business, (R6.5151), isolated from his family in Garden City. (R6.5148, 5151). This was difficult on the "very social" Wright. (R6.5154). Wright's brother testified he "[r]eally wants to fit in, have friends." (R6.5154). But Wright had difficulty adapting and making friends in that new, small town. It was no wonder that Wright – an insecure, twice-divorced single father of a pre-teen – was "starved for adult conversation." (R6.5153-5154).

Wright was an enigma. On one hand, he was "pro-Second Amendment," (R6.5105) and carried a legal weapon. (R6.5107). But never kept it loaded. *Id.* On one hand, Dan Day – a stranger who barely knew Wright – testified that Wright agreed whole-heartedly with Patrick Stein's vitriol. (R6.3127). On the other hand, one of Wright's only actual friends in Liberal testified that "according to Gavin, [Stein] was full of hate. … They always butted heads," (R6.5109), and denied that "Gavin agreed with what Patrick Stein believed." (R6.5110). It was not shocking that Wright, a man who "always exaggerated," (R6.5105), went along to get along with men like Patrick Stein and Dan Day. It was not shocking that Wright played into the hands of Day, a paid FBI

[1] Citations are as follows: "R1.1," with "R1" indicating the record-on-appeal volume number, and ".1" indicating the page number of that volume. Sealed records are identified by the appellant's name prior to the citation *e.g.* "Wright R7.1."

informant and liar, *infra*, who set out from the beginning "to build chargeable offenses?" (R6.4022-4023).

In October 2016, the FBI arrested Wright for conspiring with co-defendants Patrick Stein and Curtis Allen to use a bomb to attack an apartment complex located at 312 Mary Street in Garden City, Kansas, motivated by hatred of Somali Muslim refugee immigrants living there; and for making false statements to the FBI. In 2018, a jury convicted him on all three counts.

I. FACTS RELEVANT TO GOVERNMENT MALFEASANCE.

Throughout the investigation, the Government instructed Day to create hundreds of hours of audio recordings. (R6.4562) The Government reduced many of those recordings to over 1,800 pages of transcripts. (R6.99,2729). Those transcripts purported to (i) identify the time of the conversation, (ii) identify the declarants present, (iii) contain statements by those declarants, and (iv) attribute statements to declarants. (R6.4778-4779). The Government then allegedly verified them for truth and accuracy in their contents. (R6.4779).

On March 21, 2018, the literal eve of trial, the Government produced to the defendants, the 1,800 pages of supposedly-verified transcripts. (R6.697, 4563, 4779). Having no basis to dispute their veracity, defense counsel relied on the candor of U.S. Attorneys Tony Mattivi and Risa Berkower that these transcripts were verified, true, and accurate. Their supposed truthfulness was the District Court's basis for proceeding with them as the Government's sole evidence at the *James* hearing, *infra*. The District Court

then permitted the Government to publish "hours of transcript[s]" to the jury throughout the trial. (R6.4562-4563).

Contrary to the Government's representations, the transcripts were *not* verified or accurate. The defendants did not discover this until after the *James* hearing and after the Government knowingly published "hours of transcript testimony" to the jury. (R6.4562). During cross-examination of Day, defendants raised concerns about the veracity of statements' attributions to specific declarants. (R6.2873). The District Court admonished the jury that the attributions were challenged, but did not identify which statements were misattributed. (R6.2883). It became clear that the transcripts contained more than minor discrepancies. Day flatly denied that a man named Ernest Lee was present at a recorded July 31 G&G meeting, though the "verified" transcript showed Lee speaking. Even after having his memory refreshed with the transcript, Day denied Lee's attendance. (R6.3532, 4780). It was not until after the Government closed its case-in-chief, after "hours of transcript testimony" and "hours of other recorded conversations with transcript[s]" had been published to the jury, (R6.4562-4563), that the full scope of the Government's misrepresentations became clear.

FBI Agent Amy Kuhn sat through the entire trial at the Government's table. She listened as the Government played the *James* statements. She watched as "the content of those transcripts" was published to the jury. (R6.4780). She witnessed Day deny the accuracy of an 80-page transcript of a 5-hour recording. On the 14th day of trial, she testified she personally verified that transcript, implying that Day's testimony was false. (R6.4786). She then recanted and testified that the transcript of the July 31 meeting was,

in fact, *not* accurate and therefore *not* truthful. (R6.4785). She agreed that the transcript falsely represented a declarant to be present who was never there. (R6.4786). Finally, she exposed the scope of the inaccuracies and untruthfulness of her transcripts: it was "very possible" that the transcripts contained other such significant factual errors. (R6.2876). The Defendants had no way to know the extent of the falsity of Kuhn's transcripts.

Kuhn, a licensed attorney and former prosecutor, (R6.4530), along with FBI Agent Robin Smith, knowingly provided to the Government's attorneys unverified, inaccurate, and untruthful transcripts. (R6.4779). Mattivi and Berkower provided those transcripts to the defense, representing them as "verified." (R6.4779). Mattivi and Berkower admitted those false transcripts and their contents as evidence at the *James* hearing, representing them to the District Court as "verified." (R6.699-700). As a ten-year veteran of the FBI and a former prosecutor herself, Kuhn watched the Government publish those false transcripts to the jury. (R6.4562-4563). But Kuhn just sat and watched and listened, never attempting to cure the misrepresentations to the U.S. Attorneys, to the defense, to the District Court, or to the jury.

II. FACTS RELEVANT TO FED. R. EVID. 801 CO-CONSPIRATOR STATEMENT ISSUES.

On January 11, 2018, the defendants moved pursuant to Fed. R. Evid. 801(d)(2)(E) for a pre-trial *James* hearing to determine admissibility of "hours upon hours" of statements by the defendants and others against each defendant pursuant to the co-conspirator hearsay rule. (R1.1022-1023). Unfortunately, the District Court insisted on

scheduling the *James* hearing for March 19, along with a series of other motions hearings. (R1.1285). March 19 was scheduled to be the first day of trial. *Id.*

Despite defendants' motions to order the Government to provide notice of the statements it intended to offer under Rule 801(d)(2)(E) at the *James* hearing, (R1.1028), the District Court failed to grant such motion in a timely fashion. In the eight-week interval between the defense motion and the motion hearing, the Government refused to identify *any* statements it wished to offer. The Government delayed, insisting that because it had produced unverified transcripts earlier during discovery (some of them over 200 pages long, over 1,800 pages in total), it therefore had complied with any *James* notice requirements. (R6.778-780). Instead, the Government insisted on conducting a Rule 801(d)(2)(E) analysis "about *categories* of statements" instead of specific statements, which the defense moved for. (R6.684). Due to this disagreement, on March 19, the District Court "set aside" all 801(d)(2)(E) matters until after opening statements. Finally, the District Court ordered the Government to identify statements it intended to offer. (R6.784, 1203-1204).

"[L]ess than 24 hours" before the *James* hearing, the Government produced to the defendants 1,800 pages of supposedly-verified transcripts containing over 500 exhibits from 9 meetings it intended to offer against Wright under Rule 801(d)(2)(E). (R6.2730). To clarify: the Government did not identify 500 *statements* in those 1,800 pages. Instead, the Government identified over 500 *excerpts* from the transcripts. (R3.1286)("The Court then ruled on admissibility under Rule 801(d)(2)(E) of each audio *clip*" – not each *statement*). Many excerpts were as long as three *pages*, and almost *all* contained *multiple*

statements by *multiple* declarants. By way of example, Government Exhibit 22H purportedly constitutes the Government's identification of one *statement* that lasts for eleven pages. Government's Exhibit 13C contained (i) a 2-page long excerpt, (ii) which identified two separate alleged declarants, (iii) each making 30 different declarations (cf. lines in a play), (iv) containing ***55 Rule 801(d)(2)(E) statements***. The first declaration alone, allegedly made by Stein, contains no less than 20 separate and discrete assertions *i.e.* Rule 801(d)(2)(E) statements:

> CHS: So you think Curtis is, would be on board about anything, or do you?
>
> STEIN: [1] Yep. [2] He uh, we didn't have a chance to talk a whole lot this morning. [3] Pretty much, the conversation was, well he, he called me back, [4] cause his customer wasn't there yet. [5] Thought he had a little bit of time. [6] I got on the phone [7] and I said uh, asked him if he had a few minutes [8] and he said yeah. [9] and I said well, come to a decision this morning. [10] I said I'm fucking done. I've had it, I've had my fill. I'm done. [11] Something's going to get done about it. [12] And I said, uh, I'm putting together a meeting for tonight [13] and it's probably going to be over in uh, the Hutch area. [14] Cause I'd already talked to Brody. [15] And I said I think you know what I mean. [16] He said yeah, [17] and then he said that that job should take him, you know, just like two or three hours to do, [18] and that he would call me back as soon as he got done with that job, [19] so we could talk some more about it, and blah, blah, blah. [20] Well, that was the last I fucking talked to him.

The fact that the exhibits each contained multiple statements is borne out directly in the record on appeal. (R6.710-717).

Defendants objected multiple times, moving the District Court to analyze the Government's *James* exhibits on a statement-by-statement basis instead of the exhibit-by-exhibit basis the Government proposed (*i.e.* the excerpt-by-excerpt basis). (R6.684)(MS. BRANNON: … In preparing for this *James* hearing, we really needed the Government to

identify what *statements* we're talking about); (R6.698-699)(MS. SCHMIDT: … I want to know what the statements are); (R6.772)(MR. PRATT: … I think that *James* hearing requires a specific look at each statement). Defendants objected to the Government's proffers. (R6.700, 750). But the District Court permitted the Government to exclusively use the transcripts as the self-proving evidentiary basis on which to make its Rule 801(d)(2)(E) *James* hearing determinations. (R6.714-715)("THE COURT: [W]e don't necessarily need to read everything that's highlighted. I can kind of see them as you point them out to me"). The Government never called a single witness or admitted evidence *other than* the transcripts as proof-of-facts regarding the identity of various declarants, the content of their alleged statements, and the factual context of those statements. Furthermore, the District Court did not rule on individual statements, but on each excerpt (*i.e.* exhibit) as a whole. In the end, the District Court ruled admissible, and the Government subsequently admitted at trial, over 350 of the Government's recordings, containing hundreds of statements admitted against Wright as co-conspirator statements, based on the rulings from the *James* hearing. (R6.2682-2695, 2740). Those statements constituted the overwhelming bulk of the evidence against Wright. Additionally, the transcripts of those statements and their declarant attributions were published to the jury via the false, inaccurate, unverified transcripts, *supra*. The District Court recognized and granted the defendants a continuing objection to admissibility of the statements. (R6.2740, 2806).

III. FACTS RELEVANT TO THE DISTRICT COURT'S ERROR DENYING WRIGHT A JURY INSTRUCTION ON ENTRAPMENT.

In 2015, Dan Day met with FBI Special Agent Amy Kuhn and became a paid informant for the FBI, (R6.2653, 2661), getting paid over $27,000 "for services rendered" to the FBI during the course of the investigation, including at least one payment for $15,000 after the defendants' arrests. (R6.2962, 3143, 3154). In late 2015, Day met Patrick Stein for the first time at a "training exercise" with a southwest Kansas militia organization. (R6.2662). In February 2016, Day joined Stein to conduct surveillance on the Somali Muslim community in Garden City, Kansas, during which Stein asked Day to join his organization: the Kansas Security Force ("KSF"). (R6.2666, 2673). Day accepted Stein's invitation. (R6.2709).

Day became the KSF's "vetting and intelligence officer." (R6.1710). His job duties related directly to recruitment: "The vetting was for new members, the possible new recruits, kind of interviewing them, weeding out people that didn't fit." (R6.2710). Over the next several months, Day and Stein actively participated in recruitment activities, including a recruitment meeting for the KSF in March 2016, at which Day first met Wright. (R6.2721). In June 2016, Day joined a meeting at Brody Benson's field where he and "Patrick Stein tried to recruit people to help him plan something." (R6.2768, 2771). In fact, Day showed up at meetings at Wright's business, G&G Homes, to recruit in September 2016. (R6.3317). Day attributed his recruitment activities as "a part of [his] persona that [he] had to keep up." (R6.2771). While his job was to avoid

"plant[ing] [any] ideas into their heads," (R6.2775), Day never denied recruiting Wright to join Day's and Stein's efforts to "plan something."

But far from avoiding planting ideas into their heads, Day contrarily testified that his role as an FBI informant was not so much to just inform, but to actively provide Wright and his co-defendants with "options." (R6.3541). In Government's Exhibit 14MM, Day explicitly told the group that his strength "would be more like help[ing] put the plan together." Day testified that "when targets were discussed among the group, [*he*] directed their attention to Garden City," a decision he "made on [his] own" without consultation with the FBI. (R6.3261, 3263). He testified that while at Brody Benson's home, "it would have been" *his* idea to "encourage and direct their attention to Garden City." (R6.3262). Day testified that the FBI approved of him "directing their attention toward Garden City." (R6.3263). Ultimately, Day testified that the FBI assigned him "to choose a target" for the group. (R6.3264). In Government's Exhibit 15K, Day points out the "Burmese mosque" at 312 Mary Street as a target for the group, even though Stein stated that he "[did not] know what building it is." Day actively encouraged preparation of a manifesto, to "put in [*his*] ideas." (R6.2863). Ultimately, the idea for purchasing a bomb came not from Wright or his co-defendants, but from Day; yet another one of the "options" he gave the group. As he testified, his job was to "introduce the idea and the opportunity" to meet with a bombmaker, (R6.3382), and then his role was "to encourage … the entire group" to meet with that bombmaker. (R6.3386). The FBI directed Day to contact the group to persuade them. (R6.3387).

Wright also admitted affirmative evidence bearing on his lack of predisposition to commit the crimes charged against him: using a bomb to harm members of the Somali Muslim community at 312 Mary Street in Garden City, Kansas. The Government overwhelmingly relied on Wright's recorded statements to prove a hatred of Somalis, Muslims, and immigrants. (*generally* R6). But even Day testified that he was "not sure" if Wright agreed to meet the bombmaker. (R6.3115). During Wright's case-in-chief, Lee Raynor testified to his personal observations of Wright's "very respectful" relationship during the same period with Dr. Husainy, a well-known Muslim immigrant in southwest Kansas. (R6.5101). Raynor testified to personally witnessing Wright's "very respectful, polite, professional … honest" interactions with the Somali community during that same period. (R6.5102). Raynor testified that "according to [Wright], [Stein] was full of hate. … They [Wright and Stein] always butted heads." (R6.5109). Charles Alicea testified that while living with Wright, he personally witnessed Wright provide a home for "a gentleman named Mir and his son," an immigrant from the predominantly-Muslim nation of Bangladesh, whom Wright "invite[d] into his home." (R6.5134, 5135, 5136). Despite the foregoing, the District Court found "that the threshold requirement for an entrapment [instruction] is relatively high, and I do not think it exists here," and therefore denied Wright's request for an entrapment instruction. (R6.5325).

IV. FACTS AND PROCEDURAL HISTORY RELEVANT TO THE DISTRICT COURT'S DENIAL OF WRIGHT'S RULE 29 MOTION.

On April 10, at the close of the Government's case-in-chief, it had admitted zero evidence on the element of materiality required in Count 3. Wright filed a motion for

judgment of acquittal. (R2.577-558, 773-782). However, because counsel electronically filed the motion from counsel's table that day, the District Court *refused* to read or consider the motion. (R6.4494). The District Court did permit Wright's counsel to make oral argument. Wright cited to the Government's failure to call FBI Agent Smith – the only federal agent to whom the statements were made – to testify to *any* discrete decision he had to make that *could have been* influenced by those statements. (R6.4495-4500). Afterward, the Government did not proffer a single way in which the investigation *could have* been influenced, but merely proffered that *some* unproffered decision *might have been able to hypothetically be* influenced, suggesting that the jury's "imagination" and speculation are substitutes for actual evidence "that establishes the materiality requirement." (R6.4500). The District Court denied Wright's motion, stating it would allow the jury "to use its common sense" instead of admitted evidence to make a finding of materiality. (R6.4507).

On April 15, at the close of presentation of all evidence and prior to submission to the jury, Wright renewed his motion for judgment of acquittal. (R2.603-611). The District Court found that "there is no evidence of materiality," (R6.5223-5224), but denied the motion and permitted Count 3 to go to the jury anyway, with the Government suggesting that the statements, themselves, were the evidence and even self-proving of the materiality element. (R6.5226). Then, in closing arguments on April 17, the Government devoted a whole 32 seconds to the issue of materiality. (R6.5526). U.S. Attorney Mattivi failed to proffer any FBI decision that Wright's statements were capable of influencing. He identified no evidence to show that Wright's statements were capable of influencing

any decision. Instead, waiting until rebuttal, he told the jury that "the Government has no obligation to provide you evidence of" materiality (materiality being "obvious" in his words). (R6.5526). He then invited the jury to merely imagine "how differently things would have gone on October 12th if Gavin Wright … had told the truth;" an appeal to the jury to speculate. (R6.5526). The jury convicted Wright on Count 3.

ARGUMENTS AND AUTHORITIES

I. WRIGHT ADOPTS ALL ARGUMENTS BY CO-APPELLANTS IN CONSOLIDATED APPEALS CASES.

Patrick Stein argues on appeal in consolidated Case No. 19-3030 that the District Court erroneously applied the terrorism adjustment under U.S.S.G. § 3A1.4(a). Curtis Allen argues on appeal in consolidated Case No. 19-3034 that the District Court erroneously denied his Jury Act challenge, and that the District Court violated his due process rights by denying an entrapment jury instruction. Wright hereby adopts by reference those arguments to the extent applicable to him and supplements as follows. Fed. R. App. P. 28(i).

A. The District Court acknowledged cultural distinctions between western Kansans and those along the I-35 corridor.

During Wright's bond reconsideration hearing in October 2017, the District Court acknowledged strong cultural differences between western Kansans and people living in the Kansas City, Topeka, and Wichita jury divisions. For example:

> THE COURT: Well, I mean, I'm a western Kansan. People typically drive decent distances. … [M]ost of us routinely drive half an hour for a gallon of

> milk, so that's not significant – if you're saying he would no longer have to live in the Garden City area, that's not a significant distinction.

(R1.755). Perhaps most significant to these proceedings is the following exchange between U.S. Attorney Risa Berkower, from the DOJ in Washington D.C., and Judge Melgren of the District Court, the self-identified "western Kansan:"

> MS. BERKOWER: … I would note, Your Honor, that to the extent that the defendant did lawfully at the time possess a large cache of guns, that's not inconsistent with his motive of going down to San Antonio and [shooting people]." …
>
> THE COURT: Yeah, if I were to lock up people in western Kansas who possessed guns, the state would be unpopulated.

(R1.780). The District Court clearly acknowledges differences not just between east coasters and middle-Americans, but also even between western Kansans and Wichitans.

B. The district court erroneously applied the terrorism adjustment.

Wright objected to the "federal crime of terrorism" adjustments. (R3.551-559; Wright 7.249-251). Those adjustments included: a 12-point enhancement to Wright's adjusted offense level, (Wright R7.118), and a criminal history enhancement to Category VI. (Wright R7.120). This resulted in a guidelines life sentence. But for the enhancements, Wright would have had an adjusted offense level of 38, and a criminal history Category I. (Wright R7.120). This would have resulted in a guidelines sentence of only 235-293 months, below not only his guidelines sentence but also below the 312 months to which he was actually sentenced. (R3.1304).

II. THE GOVERNMENT'S KNOWING ADMISSION AND PUBLICATION OF UNTRUTHFUL TRANSCRIPTS VIOLATED WRIGHT'S CONSTITUTIONAL DUE PROCESS RIGHTS.

This Court reviews allegations of governmental misconduct *de novo*. *United States v. Caballero*, 277 F.3d 1235, 1245 (10th Cir. 2002). No person shall be "deprived of ... liberty ... without due process of law." U.S. const., amt. v. When the Government "knowingly presents false evidence," it "violates due process, regardless of whether the evidence is relevant to substantive issues or to witness credibility." *Id.* at 1243. To establish a due process violation, Wright must show that the Government's evidence (transcripts) was false or fraudulent, that the Government knew such evidence was false or fraudulent, and that the evidence was material. *Id.* at 1243-1244. Alternatively, Wright may prove a due process violation by demonstrating that the Government's misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Hoxsie v. Kerby*, 108 F.3d 1239, 1243 (10th Cir. 1997).

In *Caballero*, the defendant objected to unfair surprise arising from the government providing newly-updated, verified transcripts with minor technical changes immediately prior to trial. The *Caballero* court found no prejudicial misconduct because the defendants did not allege inaccuracies, but only unfair surprise; that the defendants could have created their own transcripts; and that the trial court's admonition cured the misconduct. 277 F.3d at 1248. Unlike in *Caballero*, less than 24 hours before the *James* hearing in this case, the Government produced transcripts containing 500 exhibits, which in turn contained possibly thousands of "statements." The District Court expected Wright to be prepared to argue the next day. Worse yet, the Government represented to the

defense and the District Court that those transcripts were verified, accurate and trustworthy even though the Government knew that they, in fact, were *not*. The Government then proffered those *transcripts* at the *James* hearing, which the District Court relied on exclusively despite defense objections to proceeding by proffer. At trial, the Government knowingly published to the jury over 350 of those transcript exhibits.

The first manner of Governmental misconduct ought to be clear from circumstances of the *James* hearing. The defense for over two months requested the Government to identify particular statements. It violated due process notice requirements for the Government to produce over 500 exhibits identifying possibly *thousands* of Rule 801(d)(2)(E) statements less than 24 hours before the defendant was to be prepared to argue application of the rule to those statements. Worse yet was the Government's bad faith arguments after January 11 that it merely needed to identify "categories" of statements, instead of statements themselves, when the plain language of Rule 801(d)(2)(E) explicitly states that "*the* statement" (singular), meaning *each particular* statement, is subject to Rule 801(d)(2)(E) analysis. Furthermore, it was bad faith and a violation of due process for the Government to wait to identify those 500 exhibits and a thousand statements until *after* start of trial. This offended the notice requirements embodied under due process rules.

The second, and perhaps more egregious due process violation was the Government's knowingly-false representation to the defense and the District Court that the method-of-proof (*i.e.* the transcripts) identifying the declarants and their recorded statements were verified, accurate and trustworthy. The defense was required to use

unverified, inaccurate, and untrustworthy transcripts alone to prepare for the *James* hearing. The District Court accepted the unverified, inaccurate, and untrustworthy transcripts alone into evidence at the *James* hearing, despite the defendants' objections to proceeding on the transcripts alone (*i.e.* by proffer). FBI Agent Amy Kuhn remained silent through the *James* hearing, *knowing* that the evidence the defense and District Court relied on was significantly untrustworthy, and to an unknown degree. A licensed attorney like Kuhn should know better. The Government's inaction to cure its knowing fraud on the District Court and the defense constitutes grave misconduct that led to due process violations.

The harmfulness of the Government's conduct is immeasurable. It is impossible to tell from the record which statements, if any, are untainted. Having to presume that all transcripts were tainted, their exclusive use by the District Court in the *James* hearing led directly to over 350 recordings being admitted against Wright, including those in which he was not a participant. Those recordings were accompanied by the transcripts published to the jury, which purported to identify the declarants. The District Court admonished the jury that only the *recordings* were to be considered. However, when the District Court's admonition is that "the transcripts are given to you as a guide to help you follow what's being said," and the Government fails to elicit testimony about who actually said what, it creates the very real danger that the jury chooses to use the attributions in the inadmissible transcripts as opposed to actual evidence. And any person with a modicum of common sense knows the admonition is an egregious legal fiction invented in the name of judicial economy. Even the Supreme Court recognized the futility of such a

limiting instruction. *See e.g. Bruton v. United States*, 391 U.S. 123, 135-136 (1968); *also e.g. United States v. DeLeon*, 287 F.Supp.3d 1187, 1247 (D.N.M. March 7, 2018). Over fifty years' worth of empirical data supports one conclusion: admonitions in complex cases like this always fail to blunt the prejudicial effect at concern. J. Alexander Tanford, *The Law and Psychology of Jury Instructions*, 69 Neb. L. Rev. 71, 86 (1990).

The Government's conduct amounts to nothing less than malfeasance intended specifically to subvert Mr. Wright's due process rights. Such bad faith conduct is not harmless. The extensive use of the recordings, embodying statements, ruled admissible in the *James* hearing, based on the transcripts, infected every phase of litigation following therefrom. The more than 350 recordings admitted contained multiple statements. It is impossible to measure the harm. It cannot be said that the Government's misconduct was somehow harmless. The Government's intentional violation of Wright's constitutionally-protected due process rights requires reversal and remand for a new trial on all counts.

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN CONNECTION WITH THE RULE 801(d)(2)(E) PROCEEDINGS.

The admission of evidence is generally reviewed for abuse of discretion. *United States v. Summers*, 414 F.3d 1287, 1298 (10th Cir. 2005). A court abuses its discretion when its ruling is "based on a clearly erroneous finding of fact, or an erroneous conclusion of law or manifests a clear error in judgment." *United States v. Smalls*, 605 F.3d 765, 773 (10th Cir. 2010). Hearsay evidence is generally inadmissible. Fed. R. Evid. 802. However, "[a]dmissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary

system rather than satisfaction of the conditions of the hearsay rule." *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 667 (10th Cir. 2006). The rules of evidence take this one step further, in certain instances permitting third-party statements against the criminally accused as admissions on an agency theory: the co-conspirator statement rule embodied in Fed. R. Evid. 801(d)(2)(E). In order to be admissible against Wright, the Government had the burden to prove by a preponderance, as to each specific statement, that it [i] is offered against an opposing party, [ii] a conspiracy existed, [iii] Wright and the declarant were both members of the conspiracy, [iv] that the statement was made *during* said conspiracy, and [v] that the statement was made *in furtherance* of said conspiracy. Fed. R. Evid. 801(d)(2)(E); *United States v. Sinclair*, 109 F.3d 1527, 1533 (10th Cir. 1997). Generally, no hearsay objections become ripe until such statements are actually offered at trial. However, in cases in which the Government desires to offer a significant number of statements, this process can be unwieldy. So, in the Tenth Circuit, "[t]he strongly preferred order of proof" is for the district court to hold a hearing "outside the presence of the jury to" make Rule 801(d)(2)(E) determinations, otherwise known as a *James* hearing. *United States v. Townley*, 472 F.3d 1267, 1273 (10th Cir. 2007); *see also DeLeon*, 287 F.Supp.3d 1187 (example of proper *James* hearing procedure).

A. The District Court abused its discretion by permitting the Government to proceed by proffer instead of requiring evidence.

A proffer is merely one method of proving facts. It is simply one party implying that "evidence *will* show the following facts," and is a prelude to cooperation. However, the key to any proffer is agreement that the proffered facts are what the evidence would

show. If there is no agreement, such as by objection or denial of the fact, then the party with the burden of proof must admit evidence tending to prove such facts. In this case, the Government, as the offeror of the statements, had the burden to prove that those statements comported with Rule 801(d)(2)(E). As soon as the defendants objected to the Government's proffer of facts reflected on the face of the transcripts (such as declarant attributions), the Government had the burden to present *evidence* proving those facts. But the District Court did not require any evidence extraneous to the transcripts themselves, permitting the Government to continue to proceed by proffer. At that time, the District Court abrogated its duty as gatekeeper by not requiring the proponent of the Rule 801 evidence – the Government – to admit evidence tending to prove such facts at the *James* hearing. This was a fatal error in judgment and an abuse of discretion, compounded by the District Court's reliance on unverified, untruthful and inaccurate transcripts, *supra.*

B. The District Court abused its discretion by analyzing whole excerpts of transcripts instead of individual statements.

A "statement" for hearsay purposes constitutes "*a* person's oral assertion, written assertion, or nonverbal conduct." Fed. R. Evid. 801(a). The word "a," as used in the black-letter rule, is singular; a single assertion constitutes "a" statement. If a person makes two separate assertions in a single declaration, such as in Government's Exhibit 13C, then Rule 801(d)(2)(E) requires the district court to make specific findings and rule as to each separate statement – not the declaration as a whole. Even assuming multiple statements in one exhibit *may* survive *James* analysis, it is an abuse of discretion to

conduct Rule 801(d)(2)(E) analysis on exhibits containing *numerous* statements, instead of on the statements themselves.

For instance, Stein is alleged to have said the following in a single declaration in one single exhibit offered by the Government in the *James* hearing:

> STEIN: ... [W]e didn't have a chance to talk a whole lot this morning. ... I'm putting together a meeting for tonight.

Two separate *statements* within a single declaration. Two statements in one *exhibit*. The rule requires that *each* be found admissible against Wright under Rule 801(d)(2)(E), not merely that the whole declaration or whole exhibit generally comports with the rule. A statement such as "we didn't have a chance to talk a whole lot this morning" likely falls outside the scope of Rule 801(d)(2)(E) because it likely was not made "in furtherance" of the conspiracy. Contrarily, a statement such as "I'm putting together a meeting for tonight" in reference to a potential recruiting meeting, may more reasonably fall under the "in furtherance" rubric. A speech is not "a" statement. An uninterrupted rambling diatribe is not "a" statement. And certainly multiple pages of speeches and diatribes are not "a" statement. While soliloquys may *contain* statements, each statement within such a speech must be separately analyzed under the black letter of Rule 801(d)(2)(E).

Statements by declarants are generally admissible against the declarant alone. But a *James*/801(d)(2)(e) process is fundamental in complex conspiracy cases to prevent the jury's reliance on third-party statements (such as Stein's, Allen's or Day's) to convict the defendant (Wright); to hold the defendant accountable *only* for his statements. And for this reason, this rule is to be strictly construed in favor of the accused. *United States v.*

Rascon, 8 F.3d 1537, 1540 (10th Cir. 1993). When the District Court purports to conduct *James* analysis on the tens of even hundreds of statements in a single Government exhibit by looking at the exhibit as a whole, instead of the statements therein, the District Court abandons its role as the gatekeeper and abuses its discretion. And in a case in which over 500 *exhibits* were offered, many containing multiple statements, there is only one way to respond to the District Court's shock at the defendants' insistence that it follow the black-letter of the rule when it asked "[s]o you want us to be here all week to go through these?"

Rule 801 makes the answer to this question unequivocally "yes." If a *James* hearing must last a month based on the volume of statements offered by the Government, then it must last all month. The District Court's failure to appreciate the breadth and weight of this error may not be held against Wright. The District Court's concern for its arbitrarily-set trial schedule may not be held against Wright. The District Court's failure to order the Government to identify *James* statements until less than 24 hours before the *James* hearing may not be held against Wright. The District Court's decision to analyze *excerpts* (due to its decision to devote less than six hours to the *James* hearing in spite of the Government's *thousands* of offered statements) may not be held against Wright. (R6.1533-1671)(14:55:14 – 18:34:51); (Doc. 540)(17:52:05 – 19:53:08). And the District Court's decision to wait until after the jury had been seated and double jeopardy attached to even hold the *James* hearing may not be held against Wright. The District Court assumed the risk with each decision that it would be unable to conduct a *James* hearing in

a manner reasonably calculated to adhere to Rule 801(d)(2)(E). This was an abuse of discretion.

C. The District Court's abuses of discretion are not harmless.

The Government ultimately played hours of recordings embodying statements made by Stein, Allen, Day and others which the jury was permitted to hold against Wright. These statements constituted the bulk of the evidence against Wright and so permeated the trial process that their impact cannot be excised. Admission of the Government's exhibits at the *James* hearing constitutes a miscarriage of justice and reversible error. *See United States v. Radeker*, 664 F.2d 242, 247 (10th Cir. 1981)(internal citations omitted); *Rascon*, 8 F.3d at 1540 ("remand is necessary").

IV. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY DENYING A JURY INSTRUCTION ON ENTRAPMENT.

This Court reviews *de novo* the District Court's denial of Wright's motion for an entrapment instruction. *United States v. Scull*, 321 F.3d 1270, 1274 (10th Cir. 2003). "[P]roof that the defendant was not entrapped" is an element of any offense the Government must prove beyond a reasonable doubt, including the three of which Wright was convicted. *United States v. Duran*, 133 F.3d 1324, 1331 (10th Cir. 1998). "The question of entrapment is generally one for the jury, rather than for the court" to decide. *Mathews v. United States*, 485 U.S. 58, 63 (1988). The criminally accused "is *entitled* to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment" occurred. *Id.* (emphasis added). "Although the degree of

proof required to submit an entrapment defense to a jury has been described as only 'slight' or 'some' evidence," the evidence to submit the instruction to the jury is sufficient "regardless of amount" or quality so long as it merely puts the factual issue in dispute. *United States v. Fadel*, 844 F.2d 1425, 1430 (10th Cir. 1988). This Court must construe sufficiency of the evidence in a light most favorable to the *defendant*. *Scull*, 321 F.3d at 1275. The District Court's denial of the instruction constitutes reversible error because there was sufficient evidence supporting the defense, and requires remand for a new trial. *Cf. Duran*, 133 F.3d at 1336 ("because of the plain error in the district court's jury instructions on the defense of entrapment ... we reverse and remand this case for a new trial").

First, the Government's inducement is plainly in question. In 2015, Dan Day became a confidential informant for the FBI, therefore a "government agent" for entrapment purposes. *See id.* at 1326-1327. Anything Day did to induce Wright is Government action. The record's chronology clearly permits an inference that Day induced Wright - Wright engaged in no criminal activity prior to meeting Day. While evidence that they met prior to the conduct is "on its own" insufficient to constitute inducement, *Scull*, 321 F.3d at 1275, the evidence is still relevant to the issue and the jury may consider it with other evidence, *see id.*

Another important piece of evidence was Day's role within the Stein Group. Day testified he became the "vetting officer," a *de facto* recruiting officer. Day attended "recruitment" meetings in his role as "vetting officer." Day testified his job was to "encourage" (*i.e.* persuade) Wright to join in Stein's plan. It would have been reasonable

for the jury to infer that in playing his role, Day investigated and attempted to recruit people, including Wright. Day testified that he, in fact, played this role. To the extent that Day "took [Stein's] side" in trying to persuade others to join Stein's plan at meetings where Wright was present, it would be fair for the jury to find that Day persuaded Wright, even inadvertently.

Additionally, the jury could ignore Day's conflicting testimony that he merely "repeated" concepts mentioned by the defendants previously. The jury could accept his contrary testimony that his role in the investigation required him "to give them options" on targets and methods, despite being required to avoid "planting ideas in their heads." (R6.3541). Day testified it was *his* idea to target Garden City. Day merely visited 312 Mary Street with Stein earlier, but it was *Day* who chose 312 Mary Street as a *target*. Day is heard in recordings telling Stein and others that his strength in the group "would be more like help[ing] put the plan together." In other recordings, Day volunteers the location of the "Burmese mosque," even though none of the defendants could identify it. And the record is unequivocal: the idea to purchase a bomb came solely from Day. A jury could infer from the evidence that Day induced Wright to agree with others to use a bomb against the 312 Mary Street complex.

Furthermore, Day testified that not only was he an FBI informant, but he was a *paid* informant, receiving $33,000 total, for "services rendered." This evidence was relevant to Day's motive to encourage Wright to agree with Stein: failure to induce Wright resulted in non-payment. This was relevant because Day was homeless, (R6.4581), and he provided for his family only through "odd jobs." (R6.4583). These

facts permit a reasonable inference that Day's motivation to get paid made him work not only to *obtain* evidence, but to *create* evidence, including the inducement of Wright. The evidentiary context of Wright's and Day's relationship points to the "persuasion" or "plea" that constitutes Government inducement. *Scull*, 321 F.3d at 1275. The evidence put into dispute whether the criminal enterprise arose with Day. The evidence put into dispute whether Wright would have joined Stein and Allen in a scheme *but for* Day's activities, and put into dispute whether Wright would have *continued* in such a scheme but for Day's continued encouragement.

Second, the record is uncontroverted regarding Wright's predisposition. Prior to the offense conduct, Wright had zero criminal history and no violent history. Frustration at immigration policy, yes. But no history of *acting* on it. His brother testified that Wright lived quietly in Liberal, operating a family business. This created a genuine issue of fact. *See Sorrells v. United States*, 287 U.S. 435, 441 (1932)(error when "defendant had no previous disposition … but was an industrious, law-abiding citizen"). Just as "[a] defendant's predisposition to commit a particular crime 'may be inferred from a defendant's history of involvement in the type of criminal activity for which he has been charged,'" *Scull*, 321 F.3d at 1276, the inverse must also be true: a jury may infer from a defendant's *lack* of criminal history a lack of predisposition to commit a particular crime.

Importantly, Wright admitted affirmative evidence of his lack of predisposition to commit *these* offenses. Lee Raynor testified to his personal observations of Wright's "very respectful, polite, professional, … honest" relationship with members of the southwest Kansas Somali Muslim population. He witnessed Wright's "respectful"

relationship with Dr. Husainy, a person Wright knew to be a Muslim immigrant. Raynor also testified that "according to [Wright], [Stein] was full of hate," and that Wright did not "agree[] with what Patrick Stein believed." (R6.5109-5110). Charles Alicea testified that while living with Wright, he witnessed Wright provide a home for an immigrant family whom Wright believed to be Muslim. (R6.6134-5136, 5141). In the context of the recordings, the jury reasonably infer that Wright's actions spoke louder than his words. So an inference that Wright was simply saying awful things to court friendships is fair. And an insincere agreement is no agreement at all, *United States v. Butler*, 494 F.2d 1246, 1249 (10th Cir. 1974)("meeting of the minds"), and thus a defense to conspiracy in this case. But at the very least, such actions create a factual issue regarding Wright's predisposition to conspire to harm people simply because they are Muslim immigrants.

Third, the jury could infer inducement from the FBI's direct conduct. Kuhn testified that the FBI's intent was not just to *detect* "chargeable offenses," but specifically to "*build* chargeable offenses." (R6.4735). The Government's malfeasance supports a jury finding of inducement. After all, the Government knowingly produced untruthful transcripts to defense counsel. It also pled with potential witnesses "not to talk to the defense." (R6.4551). Kuhn advised potential witnesses that "it probably wouldn't be in [their] best interest to talk to the defense," (R6.4551-4552, 4555). Smith strongly implied to potential witnesses that defense attorneys and investigators are dishonest and not to be trusted:

> [FBI AGENT KUHN]: We have had instances in the past [in *other* cases] where defense investigators have been very misleading to witnesses, and

> we have specifically referenced those things and said, 'Just be careful and know who you're talking to.
>
> Q: In this particular case Agent Smith has advised witnesses not to trust defense counsel; is that correct?
>
> A: I don't know if he *specifically* said … to distrust defense counsel, but to 'be careful who you're talking to,' yes.

(R6.4555-4556). It was so bad the District Court noted "I'm frankly astonished the agent didn't flat-out say, 'Yeah, I told them not to trust defense counsel.'" (R6.4563). Motive and intent on the part of the FBI makes a finding of inducement more likely.

There was sufficient evidence from which the jury could infer that Day – at the FBI's instruction – induced Wright, that Wright lacked predisposition to commit the charged conduct, and that the Government engaged in intentional efforts to entrap Wright using its accomplice, Dan Day. This Court must hold that Wright was entitled to an entrapment instruction and to argue it in closing. The District Court's denial of the jury instruction constitutes reversible error; this Court must set aside Wright's convictions and remand for a new trial.

V. THE DISTRICT COURT ERRED BY DENYING WRIGHT'S MOTION FOR JUDGMENT OF ACQUITTAL.

A. The Government presented no evidence of "materiality," an element of the crime defined in 18 U.S.C. § 1001(a)(2), and so the evidence was insufficient to uphold Wright's Count 3 conviction.

This Court reviews *de novo* the District Court's denial of Wright's motions for judgment of acquittal. *United States v. Hamilton*, 587 F.3d 1199, 1205 (10th Cir. 2009). The Due Process clause requires the Government to prove every element of every offense

beyond a reasonable doubt. *Bunkley v. Florida*, 538 U.S. 835, 841 (2003). However, every element must ultimately rest on the *evidentiary* record. *United States v. Williams*, 934 F.3d 1122, 1128 (10th Cir. 2019). "Materiality" is an element of 18 U.S.C. § 1001(a)(2) that must be supported by evidence. *Id.* To prove materiality, the Government must prove that a statement "ha[s] 'a natural tendency to influence, or [be] capable of influencing the decision of the decisionmaking body to which it was addressed.'" *United States v. Gaudin*, 515 U.S. 506, 509 (1995). To be clear: it is insufficient to find materiality simply because statements are *relevant* to an investigation; they must be *material* to a specific decision. *United States v. Weinstock*, 231 F.2d 699, 701 (D.C. Cir. 1956)("relevant" is not "material"); *Gonzales v. United States*, 286 F.2d 118, 122 (10th Cir. 1960)(adopting *Weinstock*). "In determining whether the government presented sufficient evidence to support a jury's finding of materiality under § 1001, [this Court] ask[s] three questions: '(1) What statement was made? (2) What decision was the decision maker considering? (3) Was the statement capable of influencing the relevant decision?'" *Williams*, 934 F.3d at 1128 (internal citations omitted).

It is impossible to tell from the record what decision the FBI was considering, or in what way Wright's statements had a natural tendency to influence any unidentified decisions. The record fails to demonstrate this because the Government called Agent Piland of the *Kansas* Bureau of Investigation instead of Agent Robin Smith of the *Federal* Bureau of Investigation, to whom the statements were actually made, in spite of this Circuit's note that materiality is demonstrated when the Government actually examines its witnesses (*i.e.* admits evidence) on the issue, *United States v. Kingston*, 971

F.2d 481, 486-487 (10th Cir. 1992); and in spite of the DOJ's policy statement that "[m]ateriality is best shown by the testimony of a witness, generally those who make the decisions."[2]

During the hearing, Wright's counsel addressed the Government's failure to submit evidence on the last two *Williams* materiality prongs. (R6.5229). Furthermore, Wright argued that the jury's common-sense is no substitute for actual evidence. (R6.5231). The District Court denied Wright's motion anyway, holding "the jury is entitled to use its common sense" because "there was critical evidence *pertinent* to what" Wright's statements related to. (R6.4507). *Contra Weinstock*, 231 F.2d at 701. The only pseudo-pertinent evidence in the record arises from Piland, who testified that he "[did] not know" and "couldn't comment" on how "anything changed in the investigation," or might have changed, "based on what happened in" Wright's interview with Smith. (R6.4333).

During closing arguments, the Government left it in the air again. It identified the statements. But did not proffer to the jury (i) a decision to be made, or (ii) how a decision could be influenced. Instead, U.S. Attorney Mattivi misstated the law to the jury: "[T]he Government has no obligation to provide you evidence" of materiality. *United States v. Currie*, 911 F.3d 1047, 1055-1056 (10th Cir. 2018)("it is improper for the prosecution to misstate the law in its closing argument"). He invited jurors to generally and unlawfully speculate "how differently things would have gone" had Wright been truthful and, based

[2] Offices of the United States Attorneys, *911. Materiality*, Criminal Resource Manual, United States Department of Justice Website (available at: <https://www.justice.gov/usam/criminal-resource-manual-911-materiality>)(last accessed: April 15, 2018).

on those imaginings, to find the statements "material" beyond a reasonable doubt. *United States v. Jones*, 49 F.3d 628, 632-633 (10th Cir. 1995)("We cannot permit speculation to substitute for proof beyond a reasonable doubt").

The Government relied exclusively on persuasive authority for the proposition that "self-serving statements to deflect suspicion" are *per se* material. (R2.690). The Seventh Circuit's decisions in *United States v. Lupton*, 620 F.3d 790 (2010) and *United States v. Turner*, 551 F.3d 657 (2008) wholly contradict the *Gaudin*. *Gaudin* renders materiality a function of the *impact on the listener*, whereas the Government's cases make materiality a function of the *intent of the declarant*. The Seventh Circuit goes so far to hold that a materiality finding stands even if the statements "stand absolutely *no chance* of succeeding" to influence a government decision, dispensing entirely with *Gaudin*'s "natural tendency or capability" requirement. But black-letter law of *this* circuit is clear.

"Imagine how it might have gone different" is *not* the same as "statement X was reasonably capable of influencing decision Y in manner Z." It is overbroad. It is ambiguous and references some amorphous decision or set of decisions. It is an invitation to the jury to rely on outside evidence. This runs afoul of due process because no person has notice of what – exactly - § 1001(a)(2) prohibits, if it prohibits everything that a jury might imagine. And it certainly runs afoul of an old Kansas proverb: sayin' it's so don't necessarily make it so. The Government *said* the statements were material. But that don't necessarily make it so. Not with zero evidence, anyway.

B. The Government improperly indicted under 18 U.S.C. § 1001(a)(2).

"Materiality" under 18 U.S.C. § 1001(a)(2) requires a showing that the statement(s) at issue have a tendency to influence the decisionmaker to whom they are stated, *supra*. However, logic says that all statements – false or otherwise – have *some* natural tendency to influence *some* decision of listeners. The Supreme Court "has on more than one occasion invalidated statutes under the Due Process Clause of the Fifth or Fourteenth Amendment because they contained no standard by which criminality could be ascertained. … In these cases, the criminal provision is vague 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.'" *Parker v. Levy*, 417 U.S. 733, 756 (1974)(internal citations omitted). In the context of an FBI interview, § 1001(a)(2)'s materiality requirement is unconstitutionally overbroad and vague as applied.

When the Government must make a discrete decision – grant or deny a visa, grant or deny Social Security benefits, determine an objective amount for tax liability – materiality is not vague: an untruthful statement, *especially* when given under oath, has a natural tendency to influence the grant or denial or determination of such benefits or liabilities. In the context of an FBI investigation, what is the decision? To close a case file? To apply for a search warrant? To execute an arrest warrant? To apply for wiretaps? Furthermore, the materiality standard requires only that statements be "capable" of influencing such decisions, not that they be the *sine qua non* of such decisions. There is no rational nexus. Because these decisions are so ambiguous and reliant on the vagaries of which agent happens to be in charge, how he chooses to investigate, and a litany of

other X-factors, there is no objective "standard of conduct." The statute raises the specter that the accused commit crimes merely by asserting their factual innocence to *other* crimes in informal, non-testimonial settings. This supplants the role of our adversarial criminal justice system, and the very purpose of anti-perjury statutes. If the accused are to be branded convicted liars, then let it be done under oath, in court, or not at all.

But there is a road by which this Court may avoid the constitutional issue: hold that § 1001(a)(2) is inapplicable in the context of a criminal interview, as Congress intends. Congress enacted § 1001(a)(2) specifically to prevent use of false statements in order to obtain governmental benefits – *not* as a general "false statements" offense. The statute's genesis in 1863 was a means of preventing frauds on the Government "for the purpose of obtaining … the approval or payment of" a claim. Steven R. Morrison, *When Is Lying Illegal? When Should It Be? A Critical Analysis of the Federal False Statements Act*, 43 J. Marshall L. Rev. 111, 125 (2009). Congressional intent of § 1001(a)(2) is exclusively "to cover false statements made (1) with a view toward some financial benefit; (2) by someone subject to government regulation; (3) in documents required by law to be completed or certified to be true; (4) in connection with a violation of some other law; or (5) with specific intent to defraud." *Id.* at 130. It was only ever intended to be tied to the Government's power (*i.e.* "jurisdiction") to grant or deny specific claims. In this case, there is no application, claim or regulatory claim at issue which Smith had the authority to grant or deny.

The Justice Department's policy statements support this understanding of § 1001(a)(2). Section 911 of the DOJ's Criminal Resource Manual refers to decisions "on

the *application*" and the influence "on the ultimate result of the *transaction.*"[3] The Manual relies on the "often cited test for materiality" in *Weinstock*[4]: "To be 'material' means to have probative weight, i.e. reasonably likely to influence the tribunal in making a *determination* ***required*** *to* be made." 231 F.2d at 701 (emphasis added). Therefore, § 1001(a)(2) is limited to false statements made where determinations are "required" to be made *i.e.* on applications made to the Government for claims or benefits. Such determinations fall under the clear rubric summarized by Justice Ginsberg that § 1001(a)(2) offenses are intended only to prevent affirmative *harm* to the Government – not to conceal general criminality, such as in this case. *Brogan v. United States*, 522 U.S. 398, 413 (1998)(Ginsburg, J., concurring). As Justice Ginsberg writes, § 1001(a)(2)'s breadth "empowers government officers with authority … to generate felonies." *Id.* at 409. It is a way to trap the defendant, casually drawing a false statement to guarantee conviction if the substantive crime fails or to beef up a weak indictment. *Id.*

Instead, the Government must necessarily have intended to prosecute Wright's alleged "falsifi[cation], conceal[ment], or cover[ing] up by any trick, scheme, or device a material fact," as proscribed not in § 1001(a)*(2)*, but in § 1001(a)*(1)*. Both exist under the "false statements" statute, but sub-section (a)(1) has its own materiality element related to material *facts*, not hypothetical *decisions*. Often, (a)(1) offenses are referred to as "failure to speak" offenses, whereas (a)(2) offenses are referred to as "speaking" offenses. The

---

[3] U.S. Attorneys, *911 Materiality.*

[4] *Id.*

plain language of the statute suggests that (a)(1) is the vehicle by which Congress intended the prosecution of false assertions. To "falsify," or "conceal," or "cover up" are plainly *not* words implying passive conduct (such as remaining silent). Their common meanings imply *active* conduct. To "falsify" means itself to *speak* an untrue statement. To "conceal" or "cover up" requires an affirmative statement, not mere silence. As the plain language of the statute belies, the nexus for (a)(2) "materiality" is the *decision* impacted, whereas the nexus for (a)(1) "materiality" is with respect to the *fact* concealed.

A false statement charged under § 1001(a)(2) must have been made in the context of a discrete transaction between the defendant and the Government: an application that must be either approved or denied, such as an application for a change in immigration status or an application for governmental benefits. The intent is not to criminalize statements made during criminal investigations, which are exclusively the purview of § 1001(a)(1), with a materiality requirement specific to concealment of a crime, criminal activity, or a person's role in such conduct. § 1001(a)(2) is not intended by the clear implication of § 1001(a), to mean an ambiguous or hypothetical decision that *some* official may make in the midst of a criminal investigation. The other interpretation of § 1001(a)(2) quickly runs afoul of due process concerns: what is the outer limit of such decisions that at least *some* could be said to be "immaterial," and thus the element is not rendered moot? If nothing is "immaterial," there can be no factual dispute. And so there could be no materiality factual issue for a jury to resolve. This renders the Government's position on materiality a nullity as an element of the crime which the jury – as fact finder – must find.

VI. CUMULATIVE ERROR.

"'A cumulative-error analysis merely aggregates all the errors that individually have been found to be harmless, and therefore not reversible, and it analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless.' 'Unless an aggregate harmlessness determination can be made, collective error will mandate reversal.'" *United States v. Harlow*, 444 F.3d 1255, 1269 (10th Cir. 2006). Wright avers that to the extent the foregoing (as well as errors identified in co-appellants' appeals) are deemed harmless, and/or that any of the following are deemed harmless, the cumulative effect of all errors is not harmless and demands reversal.

A. The District Court abused its discretion denying Wright's invocation of the Rule 106 "rule of completeness."

During Dan Day's testimony, the Government sought to admit over 350 audio recordings. (R6.2682). Wright's counsel objected to admission of those recordings in that they constituted only excerpts of longer recordings, and asserted Wright's right under Fed. R. Evid. 106 to play the recordings in their entireties. (R6.2727-2730). The District Court overruled Wright's objection exclusively on the grounds that a Rule 106 objection should have been brought up in the *James* hearing, even though a *James* hearing applies exclusively to hearsay objections under Rule 801(d)(2)(E):

> THE COURT: So you think you're in the middle of trial, with hundreds of hours of recordings, is not the time to make a fairness determination?
>
> MS. SCHMIDT: Well, no, I think that should have been made in October.

> THE COURT: Then why didn't you move for it?
>
> MS. SCHMIDT: We asked for *James* hearings early on. We didn't get the documents, Your Honor. I would have loved to have done this two months before trial. But that didn't happen that way because we didn't get them from the Government.
>
> THE COURT: But you had them in advance of now and we, in fact, spent hours in advance of now. Do you have a general fairness argument or is this just made to obstruct the course of the trial?
>
> MS. SCHMIDT: No, this is a fairness argument.

(R6.2730-2731). The District Court suggested that defense counsel ought to have known exactly how the Government was going to present its evidence: "The Government's moving for admission now, but whether the Government's going to present them in one batch or not, you knew days ago." (R6.2732). Incredulously, the District Court then found that defense counsel made the motion in bad faith, (R6.2733), because counsel objected "solely for purposes of delay and to make the trial cumbersome," citing the fact that the defendants "wait[ed] until this precise moment to make this objection," further suggesting that "the defendants have waived this objection for the same reason because they've not made it previously, because they've known, again, no later than at [the] *James* hearing, and frankly, earlier, what the Government's plan was." (R6.2737). Such grounds were impermissible on which to overrule the Rule 106 completeness objection and demonstrated the District Court's contempt for defense counsel's assertion, and the rules of evidence.

Only when the Government offered part of any recorded statement could Wright "require the introduction, *at that time*, of any other part – or any other writing or recorded

statement – that in fairness ought to be considered at the same time." Rule 106 (emphasis added). The District Court did not rule it was unfair to require the Government to play the whole of the recordings, but merely that the timing of Wright's Rule 106 objection rendered it moot on the theory it *should have been* raised at the *James* hearing during the Rule 801(d)(2)(E) objections. This basis was impermissible.

It is Law School 101 that any number of evidentiary rules may apply to admit or exclude the same evidence. A party may raise a Rule 801 hearsay objection, a Rule 403 relevance objection and a Rule 405 prejudice objection to the same evidence. It is Law School 102 that a party has the right to invoke its rights under an evidentiary rule when the right becomes ripe, regardless whether other evidentiary issues with regard to the same evidence were taken up earlier. In this case, by its own terms, Wright was not permitted (or required) to raise his Rule 106 motion until the Government offered the recordings into evidence at trial, whether or not the District Court had taken up Rule 801 issues in connection with the statements embodied in those recordings at a pre-trial *James* hearing. Wright's Rule 106 rights simply *could not* have been waived prior to the first offering of the recordings at trial. Ruling that failure to move under Rule 106 at a pre-trial Rule 801(d)(2)(E) *James* hearing demonstrates the District Court's fatal misunderstanding of the rules of evidence. The District Court's discretion does not extend so far as to allow it to overrule reasonable objections merely because it assumed the Government and defense would present their evidence in a certain way.

This error was not harmless. Wright was accused of conspiracy, which requires the Government to show a "sincere meeting of the minds" between him and others. To the

extent the jury inferred from the sheer volume of statements and inferred that Wright *must* have sincerely agreed to participate in Stein's plan because the only thing they hear him talk about in the Government's exhibits is the alleged plot ("only serious people are so singularly focused"), it was unfair to refuse to require the Government to play the recordings in their entirety. Taking the conversations in context reasonably could have resulted in an inference that Wright actually did not discuss the plot much in relation to the other things he chose to talk about, so he must not have been serious and must not have really agreed. This was especially important for a significant number of the hours of recordings played for a duplicative purpose: to show that Stein and company made generalized hateful, violent statements about Muslims and the Somali refugee population in western Kansas to impart to the jury that if they were so narrowly focused, they must have *really meant it*, and therefore they must have sincerely agreed to commit the crimes charged.

B. The District Court abused its discretion by allowing the Government to use a Rule 106 corollary for an impermissible purpose.

At trial, Wright sought to admit all of Defendant's Exhibits 1107 and 1108, consisting of two audio recordings, lasting roughly 25 total minutes, for the non-hearsay purpose of demonstrating Wright's intent and then-present state-of-mind, (R6.3207-3208), highly relevant when "agreement" *i.e.* state-of-mind is an element of the offenses charged. The Government objected on hearsay grounds, and the District Court found that the statements did not constitute statements of Wright's then-existing state-of-mind under Rule 803(3), and that Rule 106 did not apply. (R6.3216-3218). The District Court

permitted Wright to admit only four short portions of Wright's Exhibits 1107 and 1108, which became Wright's Exhibits 1107A, 1107B, 1108A, and 1108B. (R6.3343, 3556-3558). Later that day, on re-direct, the District Court admitted Government's Exhibits 287 and 288 – which were the *exact same recordings* that Wright offered as Exhibits 1107 and 1108. It permitted the Government to play them in their entirety. (R6.3579). The Government's dishonest and fast-and-loose use of Rule 106 ultimately led to the type of unfairness Rule 106 was enacted to prevent, as explained by Wright's counsel in the aftermath:

> MS. SCHMIDT: I'd like to just make a record on what I think is unfair about what's going on. … If you will recall, I, on behalf of Mr. Wright, wanted to originally introduce the entirety of the [recordings] which the Government just played. The Government objected. They didn't have to object. Nobody made them do that. And because of that, we then had to come back to Your Honor and you approved the two clips that I played. Then the Government came back in and asked [to admit them in their entirety]. Now, I had represented to the Court that I would not object. But it looks to the jury like we're hiding something, and that's part of the unfairness. Your Honor, and that goes to the whole context, not just what was said at the time but what's being represented to the jury. And that is unfair.

(R6.3589-3590).

The District Court was wrong that Rule 803(3) prohibits statements about state-of-mind simply because the statements were made within a relatively short period of time after the arrest of an alleged co-conspirator; that being "self-serving and exculpatory" is an exception to the hearsay exclusion embodied in Rule 803(3). Furthermore, there is no requirement that statements about then-existing state-of-mind actually come under the rubric of "forward-looking statements of intent," or else the rule would describe them as "future-intent state-of-mind" statements instead of "then-existing state-of-mind"

statements. The District Court confused the plain language of Rule 803(3) with the *Hillmon* rule, which permits the jury to consider forward-looking statements of intent to do something as evidence that the declarant, in fact, did the something he said he intended to do. *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285, 295 (1892); *cf. United States v. Joe*, 8 F.3d 1488, n. 4 (10th Cir. 1993)(clear confusion between application of Rule 803(3) and the *Hillmon* rule). Wright's statements were present-tense statements about his state of mind and his then-existing intent, all of which are excluded from the definition of hearsay and admissible under Rule 803(3). The District Court's error gifted the Government an unduly prejudicial tactical advantage, and ultimately wasted time by playing the same evidence again, both of which run afoul of Wright's confrontation and due process rights.

C. The District Court abused its discretion by not permitting defense counsel to cross-examine the Government's star witness, Dan Day, regarding prior inconsistent statements made under penalty of perjury.

During Dan Day's cross-examination, Wright offered evidence against Day arising out of prior "penalty of perjury" inconsistent statements made on Social Security applications. Specifically, Day reported no income from the FBI, attesting under penalty of perjury on the Social Security disabilities benefits application that he had reported all of his income from "work." (R6.3191-3205). Wright had a reasonable basis in fact to pursue this line of questioning. The application required him to report all income received "from work." But he reported no income from his work with the FBI. Day testified about receipts he signed to the FBI representing $27,000 of income "for services rendered," *i.e.*

"from work." (R6.2962, 3143). Based on these facts, Wright's counsel sought to cross-examine Day on whether he denied having made the prior inconsistent statement. (R6.3191-3205). The District Court denied Wright this opportunity. First, on the grounds "that there's no independent or extrinsic evidence that Mr. Day's Social Security filings were fraudulent other than [Wright's] assertion," (R6.3192), and mere "speculation." (R6.3197). Second, the District Court denied on the grounds that Day's statements on the Social Security application were *not* made under penalty of perjury because "I don't see his signature" on the application, (R6.3204), despite the fact that the Social Security Administration only requires oral attestation that the applicant provides the information under penalty of perjury. (R6.3204-3205).

A witness' propensity for truthfulness is *always* in issue. *United States v. Schuler*, 458 F.3d 1148, 1153 (10th Cir. 2006). A witness may *always* be cross-examined on his "character for truthfulness." Fed. R. Evid. 608. In this circuit, prior inconsistent statements may *always* be used for impeachment purposes under Rule 613. *United States v. Caraway*, 534 F.3d 1290, 1296 (10th Cir. 2008). Nothing in the rule requires the prior statement to have been made under penalty of perjury.[5] The District Court confused Rule 608 and 613 with Rule 801(d)(1), which *does* require the prior statement to have been given under penalty of perjury to be admissible to prove the truth of the matter asserted.

[5] It bears mentioning that the District Court also fundamentally misunderstood attestation. The District Court, suggested that the penalty of perjury attaches only if the attesting person attaches his signature to a document acknowledging that his answers are provided subject to the penalty of perjury. However, this renders an absurd result. First, no statements made on a Social Security application would be subject to perjury (in spite of the attestation) because the declarants only make the attestation orally, over the phone, pursuant to SSA's standard procedures. But second, the logical conclusion would necessarily require a holding that none of the witnesses in this very trial testified subject to penalty of perjury because they, too, merely orally attested that their testimony was subject to perjury; none of them ever *signed* a written attestation.

However, if offered strictly for impeachment under Rule 608 and 613, there is no requirement that penalty of perjury ever attached – merely that the prior statement was inconsistent. If the same prior statement meets the burden under *both* rules, then it may be admitted *both* to prove the truth of the matter asserted *and* for impeachment purposes. But it need be offered for only *one* of those purposes, and must only meet the burden of the corresponding rule for such purpose. Conflating two wholly different rules of evidence, the District Court demonstrated a misunderstanding of the rules that permeated the entirety of the trial, *see e.g. supra* Rule 801(d)(2)(E) issues; *see also* the District Court ruling on 803(3) rulings that even though the plain language of the rule explicitly permits admitting statements of "motive, intent or plan" under the then-existing state-of-mind hearsay exclusion, that somehow "803(3) doesn't make [statements about] a declarant's plan an exception to hearsay." (R6.3418). On this issue, whether Day made the attestation, and if he did, whether it was in writing or orally made to the Social Security officer, is irrelevant to the Rule 608 inquiry

Under Rule 613, the defendant may *always* inquire whether a witness denies having made a prior inconsistent statement. The only limitation on the scope of that inquiry beyond the initial denial is whether *extrinsic evidence of that specific instance* is admissible. Specific instances are non-collateral, and thus admissible, if the door was opened on direct examination and the witness denies that he made the prior inconsistent statement. Specific instances are collateral, and thus inadmissible, if the door was *not* opened on direct examination. *See Schuler*, 458 F.3d at 1153. But the defendant still has the absolute right on cross-examination to ask whether the witness denies making the

specific prior inconsistent statement; a right the District Court arbitrarily and capriciously withheld from Wright given the factual basis on which Wright had to ask the question. While the rules prohibit speculative fishing, Rule 613 merely requires some rational basis to ask the initial question. Because the rule permits inquiry into prior "inconsistent" statements, and not the higher bar set by the District Court only into prior "fraudulent" statements, (R6.3193), the District Court abused its discretion by denying Wright a fundamental exercise of his rights of confrontation under both the federal rules of evidence and constitutional due process. Given Day's extensive testimony in this case, this error was not harmless because the jury may have inferred that if Day was inconsistent (perhaps even that he lied) under oath about income from his work for the FBI in this case, that he was at least less-than credible.

CONCLUSION

For the foregoing reasons, this Court should overturn Wright's convictions, dismiss with prejudice his conviction on Count 3, and remand for a new trial on Counts 1 and 2.

STATEMENT OF ORAL ARGUMENT

Counsel believes that oral argument would materially assist the Court in resolving the issues presented in this appeal, and requests oral argument be granted.

Respectfully submitted,

/s/Kari S. Schmidt
KARI S. SCHMIDT, Kan. Sup. Ct. No. 11524
/s/Tyler J. Emerson
TYLER J. EMERSON, Kan. Sup. Ct. No. 26006
Conlee Schmidt & Emerson, LLP

200 West Douglas, Suite 300
Wichita, Kansas 67202
T: (316) 264 – 3300
F: (316) 264 – 3423
E: karis@fcse.net
E: tyler@fcse.net
Attorney for Defendant-Appellant

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,593 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I relied on my word processor to obtain the word count, and it is Microsoft Word 2016. This brief complies with the type face requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in size 13, Times New Roman. I certify that the foregoing information is true and correct to the best of my knowledge and belief formed after reasonable inquiry.

/s/Kari S. Schmidt
Kari S. Schmidt

CERTIFICATIONS

Service: I hereby certify that this document, with any attachments, was electronically filed on the 12th day of November, 2019, with the Clerk of the Court using the CM/ECF system, which will send a copy with a notice of docket activity to all ECF system participants as of the time of the filing.

Privacy Redactions: I further certify that all required privacy redactions, if any, have been made.

Paper Copies: I further certify that any paper copies required to be submitted to the Court are exact copies of the versions submitted electronically.

Virus Scan: I further certify that the electronic submission was scanned for viruses using Webroot SecureAnywhere Endpoint Protection v.9.0.21.18, which is updated continuously, and according to the program is free of viruses.

/s/Kari S. Schmidt
Kari S. Schmidt