APPENDIX C

Petitioner's Reply Brief to Tenth Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case 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

REPLY BRIEF OF DEFENDANT-APPELLANT

ORAL ARGUMENT IS REQUESTED

Respectfully submitted,

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I. SUFFICIENT EVIDENCE EXISTED TO PRESENT ENTRAPMENT TO THE JURY.

A. The Legal Standard.

Wright was "entitled to" an entrapment instruction if the record shows "sufficient evidence" to sustain entrapment. *Mathews v. United States*, 485 U.S. 58, 63 (1988). "[A]lthough the degree of proof required to submit an entrapment defense to a jury has been described as only 'slight' or 'some' evidence, the test is whether the evidence, regardless of amount, creates a factual issue." *United States v. Fadel*, 844 F.2d 1425, 1430 (10th Cir. 1988). "Slight evidence" and "some evidence" mean *any* evidence. *See Mitchell v. Maynard*, 80 F.3d 1433, 1445 (10th Cir. 1996)("some evidence" standard met by showing "any evidence"); *see United States v. Humphrey*, 208 F.3d 1190, 1207-1208 (10th Cir. 2000)("a defendant is entitled to an instruction ... if there is any evidence..."). The Government confuses *sufficiency* of the evidence (a question of law) with the *weight* of the evidence (a fact question). It irrelevantly argues *weight* for 18 pages. Wright does not assert the Government entrapped him *as a matter of law*. *United States v. Nguyen*, 413 F.3d 1170, 1177 (10th Cir. 2005). He argues merely that sufficient evidence exists entitling him to the jury instruction.

The Government ignores that "[f]or purposes of determining the sufficiency of the evidence to raise the jury issue, the [evidence] most favorable to the defendant should be accepted." *United States v. Vincent*, 611 F.3d 1246, 1250 (10th Cir. 2010). Under *Fadel*, if *any* evidence is favorable to Wright then denial of the instruction was erroneous. So the

Vincent standard must relate to *character* of evidence – not *amount.* If evidence is indirect, incomplete, circumstantial, conflicting, contradictory or ambiguous such that it may support (i) ultimate findings on entrapment, or (ii) inferences that *lead to* such ultimate findings, then the jury, not the Court, decides the ultimate factual issue.

B. There is sufficient predisposition evidence.

Wright admitted predisposition evidence. Lee Raynor testified that, prior to the July 2016 Burch meeting, Wright despised Stein for being "full of hate." (R6.5109). Raynor testified Wright regularly dealt with the Somali refugee and Muslim communities in summer 2016. (R6.5100-5103). Charles Alicia testified Wright had personal relationships with other Muslim immigrants. (R6.5134-5137). To contradict, the Government argues Wright factually is predisposed because he said "negative things about Muslims." Hardly. In 2016, researchers found 43.1% of Americans (140 *million* Americans) freely admitted distrusting Muslims, believing them more likely to engage in terrorist activity than non-Muslims.[1] But the FBI reported only 127 anti-Muslim assaults and a total 307 incidents of anti-Muslim hate crimes in 2016.[2] It is far-fetched to suggest

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[1] *Fear of Muslims in American Society: Chapman University Survey of American Fears*, Wilkinson College, Chapman University, October 16, 2018 (available at: <https://blogs.chapman.edu/wilkinson/2018/10/16/fear-of-muslims-in-american-society/>)(last accessed: May 18, 2020); United States Census Bureau, Press Release, *Census Bureau Projects U.S. and World Populations on New Year's Day*, release no. CB16-TPS.158. United States Census Bureau, December 28, 2016 (available at: <https://www.census.gov/newsroom/press-releases/2016/cb16-tps158.html>)(last accessed: July 13, 2020).

[2] Katayoun Kishi, *Assaults against Muslims in U.S. surpass 2001 level*. Pew Research Center, November 15, 2017 (available at: <https://www.pewresearch.org/fact-

evidence of racially-charged words alone indicates predisposition to commit violent crimes. Regardless, this goes to weight and not sufficiency. The evidence reconciling Wright's pre-July 2016 relationships with his sudden criminal agreement *after* July 2016? Dan Day's testimony.

C. There is sufficient inducement evidence.

Inducement evidence need support a finding only minimally beyond affording Wright mere opportunity or facility to commit a crime. *United States v. Yarbrough*, 527 F.3d 1092, 1100 (10th Cir. 2008). Day testified to a litany of facts supporting this inference. Wright first appears in the Government's timeline after the Kearney County Fair beginning July 17, 2016[3], (R6.3528), when he appears at the Burch recruiting meeting. Day did not recollect "that [Wright] was part of the meeting," meaning he did not recall Wright actively participating in the meeting. (R6.3460, 3528). Then Day contrarily testified that Wright was enthusiastic. (R6.3635, 3637-3638). If one believes Day's later testimony, Wright transformed from being a person with zero criminal history, (R7.120), good relations with Muslims and Somalis, who hated Stein, to a criminal, fully-committed Stein ally in a plot to harm those people; a large plot hole. The

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tank/2017/11/15/assaults-against-muslims-in-u-s-surpass-2001-level/>)(last accessed: May 18, 2020).

[3] *See* Josh Harbour, *Turtle race a staple for Kearny County Fair*. Garden City Telegram Online, July 19, 2016 (available at: <https://www.gctelegram.com/1f5723bd-7462-5bce-9ca6-e8309fcffead.html>)(last accessed: July 8, 2020)("the fair, which began Sunday and will continue until Thursday").

jury had the right to fill that gap with inferences supported, even minimally, by the evidence.

Wright was not convicted of using or attempting to use a weapon of mass destruction to harm the 312 West Mary Street residents. He was convicted of *agreeing* to do so (*i.e.* conspiring), lowering the bar of Government conduct necessary to find inducement. It is easier to elicit an agreement than to induce follow-through on such agreement. *See State v. Soltys*, 636 A.2d 1061, 1066 (N.J. Super. App. Div. 1994)("while one can be unlawfully persuaded to agree to participate in a crime designed to injure another, it is quite another thing to undertake the additional acts and to do it"). Wright may show inducement by demonstrating that the idea *to agree* came from Dan Day, or merely that Day persuaded Wright *to agree*. When the Government indicts a conspiracy instead of crimes embodying the object of such a conspiracy (like attempt), it accepts the risk of this lower bar for inducement.

Day's testimony supports an inference he induced Wright *to agree* at or prior to the Burch meeting. Day testified (i) he became Stein's vetting officer prior to June 2016, (ii) as vetting officer he recruited others, (iii) he acted in such role on multiple occasions, (iv) he acted as such at the Burch meeting, and (v) that Wright was present at that meeting. Day's own testimony supports a logical inference that while acting in his

"persona" as Stein's recruiting officer, he did – in fact – successfully "recruit" Wright (Day's own word, meaning "to persuade"[4]) sometime on or before the Burch meeting.

Day testified he continuously goaded Wright to meet with undercover agent "Brian." A rational juror could conclude that Day used similar pressure tactics to goad Wright to agree. Day also testified to (i) having financial problems, and (ii) being paid tens of thousands of dollars from the FBI in exchange for his reports. A jury could reasonably infer Day could not financially afford to *wait* for crimes to report; he needed to *create* them. It is not a stretch that Day needed Wright to agree with Stein or Allen, and took it upon himself to actively recruit Wright. Regardless of the weight of the Government's other evidence, Day's testimony, when viewed favorably to Wright, sufficiently supports logical inferences casting reasonable doubt on whether he did not induce Wright. The jury, if given the opportunity, *could have* found such evidence persuasive.

D. The Government misapplies *United States v. Vincent.*

The *Vincent* Court held that evidence is insufficient just because "law enforcement employs *any* degree of persuasion." 611 F.3d at 1250 (emphasis added). But *Vincent* concerns the *purpose* for which inducement tactics are employed, not weight. The *Vincent* Court importantly found the government agent's "conduct can be fairly characterized as" inducement. *Id.* at 1250. However, the government agent's coercion

[4] "recruit." *Dictionary.Cambridge.org*. Cambridge Dictionary, 2020. Web. 8 July 2020; "recruit." *CollinsDictionary.com*. Collins Dictionary, HarperCollins Publishers, 2020. Web. 8 July 2020.

was merely for the purpose of "infiltrating … drug enterprises" by "ingratiat[ing] [himself] to drug dealers." *Id.* The evidence here supports a finding Day recruited Wright to join *Day and Stein*'s enterprise; not that he induced Wright *to introduce him to* Stein's enterprise. Additionally, the bar for inducement is lower in this case. Wright was accused of *conspiracy*, an inchoate crime, *supra.* The *Vincent* defendant was indicted on actual distribution of controlled substances, not on *conspiracy*. *Id.* at 1248. Wright was entitled to an instruction on entrapment.

II. RULE 801(d)(2)(E) ISSUES.

The Government bore the burden of proving by a preponderance the existence of the following facts in connection with each alleged co-conspirator statement by Stein, Allen or other person, to admit such statements against Wright: (i) a conspiracy existed at the time of the statement, (ii) the declarant was a member of that conspiracy, (iii) Wright was a member of that conspiracy, (iv) the statement was made during the conspiracy, and (v) the statement was made in furtherance of the conspiracy. Fed. R. Evid. 801(d)(2)(E); *Bourjaily v. United States*, 483 U.S. 171, 181 (1987)(preponderance); *United States v. Perez*, 989 F.2d 1574, 1577 (10th Cir. 1993)(proponent's burden); *United States v. Sinclair*, 109 F.3d 1527, 1533 (10th Cir. 1997)(Rule 801(d)(2)(E) elements). Due to the complexity of Rule 801(d)(2)(E)'s foundational requirements, and the complexity arising from constitutionally-required limiting instructions for statements deemed *inadmissible* under Rule 801(d)(2)(E) but admissible for other purposes, *see Bruton v. United States*, 391 U.S. 123, 130 (1968)("denial of due process to rely on a jury's presumed ability to

disregard"), this Court prefers Rule 801(d)(2)(E) issues to be wholly addressed in pretrial proceedings specifically for this purpose, sometimes called "*James* proceedings." *United States v. Townley*, 472 F.3d 1267, 1273 (10th Cir. 2007); *United States v. James*, 590 F.2d 575 (5th Cir. 1979).

The Government focuses on only two of those elements: the "existence of a conspiracy" element and its relation to the "during the conspiracy" element. Wright's objection is not so limited in scope. Wright objects to the admission of *all* non-Wright statements against him on the grounds that the District Court abused its discretion by engaging in unlawful manners of proof. The question presented is whether the District Court's accepted manner of proof constituted an abuse of discretion.

A. The District Court abused its discretion by utilizing an exhibit-by-exhibit analysis.

1. Issue preserved.

First, at the beginning of the *James* hearing, defendants' raised *multiple* objections to review of categories, whole transcripts, and excerpts of transcripts. (R6.698-699, 700, 750, 772). Second, since 1994 the phrase "statement," as used in Rule 801, is defined as *one* assertion of a *single* fact. *Williamson v. United States*, 512 U.S. 594, 599 (1994). When Wright moved on January 11, 2018 for a *James* hearing "to determine whether any alleged co-conspirator *statements* are admissible under FRE 801(d)(2)(E)," (R1.1022), and when defendants objected on March 19 specifically seeking review of "statements," defendants were necessarily objecting on these exact grounds.

Alternatively, equitable principles require this Court to find the issue is properly preserved. *See Malone v. Avenenti*, 850 F.2d 569, 574 (9th Cir. 1988). First, equity requires this Court to find the issue preserved because the District Court, to maintain its arbitrary trial schedule, refused to allot sufficient time to conduct a *James* hearing in accord with *Williamson*. (R6.1608, 1614, 1617-1618)("you've got 10 to 15 seconds to explain an objection"). Additionally the district court lulled the parties into the reasonable belief that it preserved this issue by granting the *Government*'s motion, "for purposes of clarity of the record and to ensure a complete record for any appeal" to "admit these complete [*James*] transcripts into the record." (R3.1286-1287)(Govt. Motion, Doc. 480); (R1.52)(Text Entry Order, Doc. 485).

2. The District Court abused its discretion, and committed plain error.

The phrase "statement," as used in Rule 801(d)(2)(E) is singular and specific. One assertion of a single fact constitutes a "statement." Plainly, Rule 801(a) defines "statement" as "***A*** person's oral assertion [not assertions, plural] … if ***THE*** person intended ***IT*** as ***AN*** assertion." Fed. R. Evid. 801(a). Rule 801(d)(2)(E) states: "***A*** statement that meets the following conditions is not hearsay: … ***THE*** statement is offered against an opposing party..." Fed. R. Evid. 801(d)(2)(E)(emphasis added). The dictionary defines "statement" as "***A*** verbal assertion or nonverbal conduct intended as ***AN*** assertion."[5] *Williamson*, binding authority, flatly rejects the District Court's implied definition, and its procedure examining a "broader narrative." *See Williamson*, 512 U.S.

[5] *Black's Law Dictionary* 1539 (Bryan A. Garner ed., 9th ed., West 2009).

at 599-604; *see accord. United States v. Hammers*, 942 F.3d 1001, 1010 (10th Cir. 2019)("We have rejected the notion 'that an entire narrative ... may be admissible'"). Because the District Court's *James* process violated Rule 801(d)(2)(E) in contravention of the *Williamson* and *Hammers* binding authority, it constituted an abuse of discretion.

If the issue was not properly preserved, the District Court committed plain error because it (i) committed *Williamson* error, (ii) such error was obvious and clear since *Williamson* was direct, on-point and binding for over 20 years, (iii) the error affected Wright's due process and Confrontation Clause rights, *see United States v. Oldbear*, 568 F.3d 814, 820 (10th Cir. 2009)("evidentiary ruling infringes a defendant's due process rights ... [if] the [evidentiary] ruling manifests a clear error in judgment"); *see also United States v. Garcia*, 994 F.2d 1499, 1505-1506 (10th Cir. 1993)("Defendant's Sixth Amendment right to confrontation was not violated by the *proper* admission of the coconspirator statements"), and (iv) erroneous admission of *thousands* of *Williamson* statements by Stein, Allen and others, against Wright (the bulk of the agreement element evidence, *i.e. conspiracy)* seriously affected fairness and integrity of the trial. *United States v. Gonzalez-Huerta*, 403 F.3d 727, 7320733 (10th Cir. 2005).

3. *Faulkner* and *Roberts* distinguished.

United States v. Faulkner, 439 F.3d 1221, (10th Cir. 2006), is distinguishable. Without describing its *James* procedures, we know only that the *Faulkner* district court admitted audio recordings embodying *Williamson* statements. Nothing discusses whether the district court's mechanics matched those in this case, or whether the district court

used a *James* procedure in accordance with *Williamson* and *Hammers*. Even assuming, *arguendo*, the district court engaged in narrative analysis instead of statement analysis, nothing in the opinion indicates the defendant objected on *Williamson* grounds. The *Faulkner* defendant exclusively raised a Confrontation Clause objection on appeal not present here. 439 F.3d at 1222. Last, the *Faulkner* district court admitted as evidence for *James* purposes the actual audio recordings, not just transcripts as happened in this case. Simply, *Faulkner* fails to state facts sufficiently granular to suggest it is instructive in Wright's case.

At first, *United States v. Roberts*, 14 F.3d 502 (10th Cir. 1993), appears more problematic. The *Roberts* district court admitted at its *James* hearing transcripts containing "440 pages of statements" and "917 telephone calls." *Id.* At 513. However, *Roberts* is distinguishable. First, the *Roberts* defendant appealed on grounds that "the government's summarized proffer could not provide the factual basis" to admit co-conspirator statements against him. *Id.* In this case, Wright does not challenge the Rule 801(d)(2)(E) *conclusions* the District Court reached based on the Government's proffered transcripts. Instead, Wright challenges the District Court's Rule 801(d)(2)(E) *process* that led to Rule 801(d)(2)(E) conclusions, *infra*. Second, the *Roberts* district court ordered the government to provide a detailed proffer, including "the evidence it intended to use, the witnesses who would be called, the background of the statements, and who made them," *Id.* at 513. The District Court did not require the Government to do so in Wright's case. Third, and most importantly, the Supreme Court's 1994 *Williamson* opinion superseded

this Court's 1993 *Roberts* opinion, which this Court recognized in 2019. *Hammers*, 942 F.3d at 1010.

B. The District Court abused its discretion by permitting the Government to proceed by proffer.

Hearsay is generally inadmissible because it is presumed unreliable. *United States v. Smalls*, 605 F.3d 765, 780 (10th Cir. 2010). But "[t]he presumption may be rebutted by appropriate proof" of factual circumstances guaranteeing trustworthiness. *Bourjaily*, 483 U.S. at 179. For Rule 801(d)(2)(E) purposes, those facts are those set forth in *Sinclair*. 109 F.3d at 1533. This effectively turns a *James* hearing into an evidentiary hearing, at which the Government must admit evidence sufficient to prove each *Sinclair* fact.

Generally, the Rules of Evidence do not apply in *James* proceedings. *See United States v. Owens*, 70 F.3d 1118, 1124 (10th Cir. 1995). However, because the Government bears the burden of proving *Sinclair* facts by a preponderance, due process prevents the District Court from permitting the Government to proceed *exclusively* by offers of proof ("proffers") when defendants dispute and/or deny them. Proffers are merely the Government's representation of facts the evidence *would* show, *if* evidence were admitted. When Wright disputed the Government's claims of what facts its evidence *would* show *if* presented, the burden shifted back to the Government – as the proponent – to actually present evidence proving its asserted *Sinclair* facts. The District Court has zero discretion to make factual findings based on disputed proffers. *Id.* ("the district court has the discretion to consider any *evidence*" admitted at a *James* hearing). To do

otherwise strips a *James* proceeding of its adversarial nature and turns it merely into a Government slide show with the District Court's imprimatur.

The District Court failed to consider evidence beyond the Government's proffer despite Wright's objection. First, the Government misrepresents the manner of its proof-of-facts, suggesting that it presented "audio clip excerpts of defendants' recorded statements." (Govt. Br. at 146). This is patently false. The Government admitted no evidence embodying the statements or their circumstances (such as audio recordings) and called no witnesses to testify to the statements or their circumstances (such as Dan Day or FBI Agent Robin Smith). The District Court permitted the Government to proceed exclusively through written proffer, in the form of disputed, unverified and untruthful transcripts. (R6.697-698). The defendants objected to proceeding by proffer. (R6.700)("We are not willing to accept proffers"). Wright specifically objected to proceeding solely by proffer, instead of requiring the Government to admit actual evidence or testimony. (R6.776). The District Court abused its discretion by proceeding by proffer anyway.

The Government always bore the burden of proving all five *Sinclair* facts in connection with every co-conspirator *Williamson* statement. By way of example (applicable to every statement admitted pursuant to Rule 801(d)(2)(E)), consider the following from one of the Government's transcripts:

> CHS: So you think Curtis is, would be on board about anything, or do you?

(Wright Br. at 10). The Government's form of presentation constitutes a proffer of *several Sinclair* facts as to that one *Williamson* statement.

Consider the Government's use of punctuation. Rule 801(d)(2)(E) permits only a co-conspirator's factual *assertion* (*i.e.* a "statement") to be admitted against a defendant. When the Government uses a period, it characterizes the declarant made a factual assertion. When it uses a question mark, it asserts the declarant asked a question. But humans do not say what they mean. And so when Wright objects to a proffer, the burden shifts to the Government to prove that, in fact, an alleged *James* statement is intended as a factual assertion. It is inadmissible if the utterance is intended, instead, as a question, as sarcasm, or any other of hundreds of meanings a declarant might intend. This is not parsing language. Humans rely on many factors to interpret the intent of a declarant in making a particular utterance. In fact, while linguists recognize five basic *sentence* types, they recognize 150 illocutionary acts which our brains process instantly to determine meaning and intent of an oral declarant.[6] In the case of transcripts, the Government asserts merely one of two declarant intents that the District Court might otherwise reject if considering the actual *sound* of a declarant's voice, such as via audio recordings or a witness' opinion that the statement was, in fact, a declaration and not another illocutionary utterance.

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[6] *See* John R. Searle, *A Classification of Illocutionary Acts*. Language in Society, vol. 5, no. 1 (April 1976) at 7; *see also* Julia Hirschberg, Presentation, *Intonation and Computation: Sarcasm*. (2017) at 7.

More important here, Rule 801(d)(2)(E) required the Government to prove that a declarant and Wright were members of the same conspiracy. Via the transcripts, the Government proffers the identity of a declarant, and the marriage of such person to a particular statement. Consider, again, the statement above. Therein, the Government unmistakably proffers that a person known as "CHS" is, in fact, the declarant of the statement: "So you think Curtis is, would be on board about anything, or do you?" Wright's objection constituted a denial that a person known as "CHS" was, in fact, the declarant of *that* statement (and, by implication, a denial the declarant was a member of the same conspiracy). Thus, the burden shifted to the Government to admit evidence *proving* that "CHS" was, in fact, the declarant of that statement, *and* that "CHS" was factually Wright's co-conspirator.

An idiosyncrasy in this case exacerbates the harmful effect of the District Court's abuse of discretion on this particular *Sinclair* element. In the midst of trial, after the *James* hearing, Dan Day denied on cross-examination that a man named Ernest Lee was present at a particular meeting. Seeking to refresh the witness' memory, Wright's counsel showed him a copy of a Government-prepared transcript attributing certain statements made at that meeting to a declarant identified as "Ernest Lee." After reviewing the transcript, Day denied its accuracy: Ernest Lee was not present, so he *could not* have made the statements attributed to him. FBI Special Agent Amy Kuhn later testified that those same transcripts – represented to the District Court as verified and truthful – were, in fact, unverified and untruthful. She then testified there was no way to know how far such untruthfulness extended throughout the transcripts. (Wright Br. at 7-8).

Those unverified, untruthful transcripts constituted the full extent of the Government's proffer in the *James* hearing. If they were untruthful when Day and Kuhn testified to their accuracy at trial, then they were untruthful when the District Court admitted them in the *James* hearing. And, in fact, Wright *denied* their accuracy at the *James* hearing by objecting to proceeding by proffer. Had the District Court not abused its discretion, then Wright would have unconvered the untruthfulness of the Government's proffer (*i.e.* the transcripts) prior to trial. The District Court's denial of Wright's objection resulted in hundreds, if not thousands, of statements unlawfully admitted against him under the guise of Rule 801(d)(2)(E).

III. COUNT 3 (18 U.S.C. § 1001) ISSUES.

A. The record supports no *Williams* materiality prong.

The Government cites no *Williams* evidence in the record even generally. While not dispositive, the Government told the jury in its closing that it "has no obligation to provide [it] evidence of" materiality. (R6.5526). And while erroneously submitting the matter to the jury, the District Court specifically found "that there [was] no evidence of materiality." (R6.5223-5224). The Supreme Court expressly crafted an "effect on the listener" standard alone. *United States v. Gaudin*, 515 U.S. 506, 509 (1995)("natural tendency to influence … the decision of the decisionmaking body"). Wright asks this Court to apply the three-prong materiality test it established in *United States v. Williams*. (*See* R6.5229-5230); (Wright Br. at 32); 934 F.3d 1122, 1128 (10th Cir. 2019). While the Government has no obligation to admit evidence for the *sole* purpose of proving

materiality, *United States v. Verrusio*, 762 F.3d 1, 20-21 (D.C. Cir. 2014), *Williams* still requires the record to reflect *some* evidence, even if admitted for a different purpose, which tends to prove *Williams* facts.

First, nothing in the record identifies Wright's allegedly untrue statements. The Government merely lists *characterizations* of Wright's alleged material statements, but never identifies Wright's actual words. (R1.339-340); (Govt. Br. at 154). Second, the record fails to reflect evidence of a decision the FBI was considering. The alleged statements were made to FBI Special Agent Robin Smith. Smith never testified. The one FBI employee to testify, Amy Kuhn, never testified about a decision she, Smith or the FBI in general were considering. The only witness queried about an *FBI* decision was *KBI* agent Adam Piland, who knew of no FBI decision at issue at the time.

Last, the record fails to reflect any evidence of how Wright's specific statement(s) had a "natural tendency" to influence *any* FBI decision(s). The Government merely averred the allegedly untruthful statements were self-proving of their "natural tendency" because *truthful* statements "would [have led] to a very different investigation." (R6.5226). The District Court adopted this reasoning. (R6.5223, 5236)("deprived the Government of the benefit it would have had from truthful cooperation"). Ultimately, the Government asked the jury to speculate "how differently things would have gone" had Wright told the truth. (R6.5526). Notwithstanding, § 1001(a)(2) prohibited Wright from making *material false* statements (not an affirmative duty to tell the truth). No evidence in the record supports any *Williams* prong.

B. This Court must disregard the Government's overtures to overturn *Williams* and *Gaudin*.

The Government implicitly asks this Court to gut its 2019 *Williams* decision and, by extension, *Gaudin*. First, the Government relies on the Eighth Circuit's 2016 *Robinson* decision and the First Circuit's 2013 *Mehanna* decision for the proposition that a materiality finding may be sustained so long as Wright "made false statements to the FBI *in an effort to* influence its investigation by deflecting suspicion from himself." *United States v. Robinson*, 809 F.3d 991, 1000 (8th Cir. 2016)(emphasis added); *United States v. Mehanna*, 735 F.3d 32, 54-55 (1st Cir. 2013). These cases unreasonably expand the scope of *Gaudin* beyond its narrow "effect on the listener" standard. Contradictorily, *Robinson* and *Mehanna* adopt an "intent of the declarant" standard. These courts unreasonably assume that because a defendant *intends* statements to influence investigators that such statements *can* influence investigators. Also, *Gaudin* – via *Williams*' second prong – sustains the conviction *only* if there is evidence of a discrete decision the FBI was making at the time. *Robinson* and *Mehanna* permit a conviction to stand even if no actual decision was being considered, so long as evidence exists to find that a statement was intended "to influence [an] investigation" *generally* or "to misdirect" investigators *generally*. 809 F.3d at 1000; 735 F.3d at 54-55. And so second, relying on the Seventh Circuit's 2010 *Lupton* decision, the Government dangerously asks this Court to expand the proposed "intent of the declarant" standard to cases in which statements at issue "*stand **absolutely no** chance of succeeding*." *United States v. Lupton*, 620 F.3d 790, 806-807 (7th Cir. 2010)(emphasis added). Last, the Government asks this Court to adopt an

even more expansive end-run around *Gaudin*. Following from *Robinson*'s "intent to influence an investigation generally" standard, the Government asks this Court to overturn or viciously expand the second *Williams* prong by adopting the 2010 D.C. Circuit's *Moore* decision for the proposition that "a statement is material if it has a natural tendency to influence, or is capable of influencing, … *any* … *function* of the agency to which it was addressed. *United States v. Moore*, 612 F.3d 698, 701 (D.C. Cir. 2010)(emphasis added).

Ultimately, the Government asks this Court to sustain a materiality finding if there is evidence (i) of an FBI decision being considered which his statements had a natural tendency to influence, *or* (ii) that Wright's statements merely *intended* to influence the investigation generally (even if they had zero natural tendency to do so), *or* (iii) that Wright's statements had any natural tendency to influence *any function* of the FBI, whether related to a decision or investigation or not. Notwithstanding due process violations the Government invites, *infra*, this Court must reject the Government's overtures. The Government ignores three considerable factors. First, none of these cases controls. Second, *Williams* is not a minority decision. These cases reflect three different standards of materiality, *in addition* to the properly attenuated *Williams* standard. This Circuit is no more in the minority than any of the others. Third, the Government's reliance on *stare decisis* fails. This Court had constructive knowledge of *Robinson* (2016), *Mehanna* (2010), *Lupton* (2013), and *Moore* (2010) when it decided *Williams* in 2019. This Court constructively *rejected* those other circuits' holdings in favor of its own

reasonably narrow *Williams* materiality test. The Government offers no logical or reasonable basis to reject or expand *Williams* other than "other circuits do it differently."

C. Alternatively and in addition to the foregoing, 18 U.S.C. § 1001(a)(2) is unconstitutional as applied.

Constitutional due process demands the Government prove *every* element of an enumerated offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970); *Gaudin*, 515 U.S. at 509. A criminal offense violates due process for overbreadth if, as construed, it reaches conduct Congress never intended to prohibit or which otherwise is protected.[7] *See Ward v. Utah*, 398 F.3d 1239, 1247 (10th Cir. 2005); *see also United States v. Booker*, 543 U.S. 220, 273-274 (2005)(Stevens, J., dissent)(concerning "extraordinary overbreadth" of construction of Sentencing Reform Act). A criminal offense violates due process for vagueness if, as construed, "it fails to give ordinary people fair notice of the conduct it punishes, or [is] so standardless that it invites arbitrary enforcement." *United States v. Johnson*, 135 S. Ct. 2551, 2556 (2015).

1. The District Court applied a constitutionally overbroad standard.

Despite specifically finding no evidence fulfilled the *Williams* test, (R6.5223-5224, 5229-5230)("there is no evidence of materiality"), the District Court applied a non-*Gaudin/Williams* standard. It permitted the issue to go to the jury on the theory Wright's statements "deprived the Government of the benefit it would have had from truthful

[7] John F. Decker, *Overbreadth outside the First Amendment*. 34 N.M. L. Rev. 53, 54, 105-107 (2004).

cooperation." (R6.5223, 5236). This was an overbroad construction on the materiality element, falling well outside the scope of *Williams*, and even *Robinson*, *Mehanna*, *Lupton* and *Moore* because it ignores Congressional intent and creates a *fifth* standard.

First, the District Court's construction of the materiality element imposed on Wright an affirmative duty to cooperate with the FBI. Contrarily, Congress clearly signals its intent to impose merely a proscriptive duty to refrain from making *materially* untruthful statements. 18 U.S.C. § 1001(a)(2). Second, Congress' plain language signals its intent that "untruthfulness" and "materiality" are statutory elements separate and distinct from each other, *each* of which must be proven beyond a reasonable doubt. By conflating truthfulness of statements with materiality of statements, the District Court treated untruthfulness as *per se* materiality; that once statements are proven untruthful, they are also necessarily proven material.

This construction exceeds Congressional intent. If Congress intended untruthfulness to constitute *per se* materiality, it never would have made materiality an express element of a § 1001(a)(2) offense. Congress amended § 1001 in 1996 specifically to *include* the statutory materiality element. 110 Stat. 3459; Pub. L. 108-458, title VI, § 6703(a) (Oct. 11, 1996). The District Court's construction here defeated Congress' unambiguous intent and is overbroad as applied.

2. The Government encourages an unconstitutionally vague and overbroad materiality standard.

Constitutional due process does not impose impossible standards of specificity on Congress. *United States v. Welch*, 327 F.3d 1081, 1094 (10th Cir. 2003). However, it does

require this Court to adopt a standard that discourages arbitrary enforcement and "give[s] ordinary people fair notice of the conduct it punishes." *Johnson*, 135 S. Ct. at 2556. The Government advocates a materiality standard that is so wide-ranging it is no standard at all.

The Government relies on three cases in which when this Court upheld § 1001(a)(2) convictions when factually the FBI was the agency to whom the statements were made. However, the Government admits that such cases do not actually address the issue. (Govt. Br. at 157). The constitutional issue arises because the Government advocates a construction which, similar to the District Court's error, conflates two separate elements of § 1001(a)(2): the "materiality" element and the "jurisdiction" element. Specifically, the Government advances its theory that it fulfills the Congressionally-imposed statutory element of "materiality" so long as there is evidence in the record that the statements have any capability of influencing a mere agency *function*. 612 F.3d at 701. This is error.

Before 1996, "materiality" was *not* a statutory element. It was a judicially-imposed element. *Cf. Julian v. United States*, 463 U.S. 1308, 1310 (1983)("Title 18 U.S.C. § 1001 requires a finding that applicant misled a Government official by material false statements"). In 1996, Congress amended § 1001 to punish any person who "in any matter *within the jurisdiction* of any department or agency … makes any *materially* false, fictitious, or fraudulent statement or representation." 110 Stat. 3459 (emphasis added). Prior to and since 1996, courts have held that statements which pervert "any government *function*" fulfill *Gaudin*'s "government *decision*" element. Except that traditionally,

"government function" language has always risen exclusively within the context of the "agency jurisdiction" element. *E.g. United States v. Rodgers*, 466 U.S. 475, 479-481 (1984); *see also e.g. Brogan v. United States*, 522 U.S. 398, 403 (1998). Whether by applying this "government function" standard broadly to encompass the whole *Gaudin* materiality standard, or by applying it to the second *Williams* prong as a form of "government decision," the constitutional effect is to render out Congress' plain words that materiality for § 1001(a)(2) purposes implicates a "decision," and not simply a "matter within the jurisdiction" of the agency to whom the statements are made.

In the context of an FBI investigation, Congress' limitation makes sense. After all, the FBI's function is to *investigate* crime. While we hope they do so successfully (*i.e.* that they actually *detect* crime), Congress' language is not outcome-based. So long as the core ability for the FBI to investigate crime is not "perverted" or otherwise capable of being influenced, then it does not matter whether statements may hinder ultimate *detection* of crime. While this may seem to unreasonably parse language, this is an important distinction because *every* statement – true or not – has an ability to influence an investigation. The Government's suggestion renders the Congressionally-mandated materiality standard moot. If *every* untrue statement necessarily influences an investigation, then *no* untrue statement can be said to be immaterial. But since materiality is an element to be proven beyond a reasonable doubt, logic dictates that Congress contemplated circumstances when untrue statements may be immaterial, even when made during an FBI investigation.

The Government's standard constructively criminalizes all untrue statements as *per se* material, despite Congress' clear contrary intent that § 1001(a)(2) should not reach all untrue statements simply because they are "jurisdictional." Thus, this construction would be overbroad. Additionally, unless the Government can articulate circumstances in which untrue statements made to the FBI during a criminal investigation have *no* tendency to influence the investigation in *some* way (*i.e.* are *not* material under the Government's proposed standard), then the construction of § 1001(a)(2) fails for vagueness because reasonable people have no notice of how to comport their conduct with the statute.

IV. CUMULATIVE ERROR.

Wright generally rests on his claims in his initial brief. However, be reminded no fair "trial is possible without a grounding in doctrine and a working knowledge of the Federal Rules of Evidence."[8] To the extent the record reflects either contempt or neglect for the rules, it can hardly be said that Wright's trial was fair.

As to Wright's Rule 106 motion, the Government accuses Wright of acting in bad faith. (Govt. Br. at 161). Every law school student knows evidence or testimony may be admissible or inadmissible on *many* grounds, for *many* purposes. The District Court erroneously held that Wright waived his Rule 106 motion by failing to raise it during pre-trial proceedings limited in scope to the Government's Rule 801(d)(2)(E) motions. This

[8] Dennis D. Prater, et al., *Evidence: The Objection Method, Third Edition*. LexisNexis, Virginia (2007) at v.

constitutes contempt for the rules. The substantive Rule 106 motion was that the Government's cherry-picking was separately misleading; intended to create an inference the defendants *only* met to conspire, thus their agreement was sincere. This Court never gets to this question. The District Court abused its discretion by erroneously ruling Wright *waived* the motion. The record reflects no signal from the District Court how it *might* have ruled on substance of the Rule 106 motion *but for* the erroneous waiver finding. This Court may not institute itself as a post-hoc fact finder to speculate what the District Court *might have* done.

As to the Government's Rule 106 motion, the Government glosses over and misrepresents its misconduct. The Government never invoked Rule 106. Instead, the Government invoked Rule 801 to *prevent* Wright from playing Exhibits 1107 and 1108 in their entirety during Wright's cross-examination of Day, just so the Government could play them in their entirety on re-direct to encourage a jury inference that Wright's counsel was less than forthcoming and, thus, untrustworthy. *See United States v. Torrez-Ortega*, 184 F.3d 1128, 1137 (10th Cir. 1999)(prosecutorial misconduct arises if government engages in "conscious and flagrant attempt to build its case out of inferences from use of the testimonial privilege"); *see also United States v. Christy*, 916 F.3d 814, 824-825 (10th Cir. 2019)("improper comments at trial include … distorting the record by misstating the evidence; making derisive comments about opposing counsel in front of the jury"). It was the Government's gameplaying to which Wright objected, but which the District Court denied. Thus, the District Court abrogated its Rule 611(a) duty to "exercise reasonable control over the mode and order of … presenting evidence so as to

(1) make those procedures effective for determining the truth; [and] avoid wasting time." Fed. R. Evid. 611(a). It violates all norms of courts as institutions of impartial justice to protect gamesmanship instead of sincere fact-finding.

Last, as to Day's inconsistent statements, the Government misrepresents the law. While Rule 608 does not permit a "trial within a trial," it gives Wright the absolute right to ask Day whether he recalled stating under oath to the Social Security Administration that he reported all of his income on an SSA application while knowing that he did not report any of his FBI income on that application. While Rule 608 may have, on Day's denial, prevented Wright from admitting the application, the District Court denied Wright his absolute right to inquire under Rule 608.

V. OTHER CLAIMS.

Wright rests on his initial brief.

CONCLUSION

For the foregoing reasons, this Court must grant Wright's prayers for relief.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,491 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). 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 17th day of July, 2020, 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.

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