19-3936(L)

19-4122(CON)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

JEREMY SHOR, ANILESH AHUJA, AKA NEIL,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND SPECIAL APPENDIX FOR DEFENDANT-APPELLANT JEREMY SHOR

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PRELIMINARY STATEMENT

Jeremy Shor was convicted of participating in a fraudulent scheme to inflate the valuations at Premium Point Investments, a hedge fund where he traded legacy (i.e., pre-financial crisis) residential mortgage backed securities for less than two years between the spring of 2014 and March 14, 2016. Shor's defense was that he lacked criminal intent—in 2014 and the first half of 2015, he believed the valuations to be within the range of reasonable values for these hard-to-value illiquid securities. In the second half of 2015, as the market contracted and he faced increasing pressure from his boss, Amin Majidi, to meet performance targets, he began repeatedly alerting others at Premium Point, including both alleged conspirators (like Majidi) and non-conspirators (like Evan Jay, a former prosecutor hired as chief compliance officer in late 2015) that the fund's valuations were diverging from where he saw the market and were high. He even took it upon himself to mark down his book, or reduce the valuations, significantly at month-end October 2015, a move that Majidi swiftly overrode. And, in this key period of the charged conspiracy, Shor surreptitiously recorded approximately two dozen

interactions, including his meeting with the chief compliance officer. On March 14, 2016, with no relief in sight, he resigned.

The government's proof consisted primarily of cooperator testimony, rather than expert or quantitative analysis of the valuations over time.

A series of significant errors at trial crippled Shor's defense and require reversal, either individually or in combination. Shor was blocked from eliciting evidence that he recorded dozens of his interactions and voluntarily produced those recordings to the Securities and Exchange Commission ("SEC"), and that the recordings showed interactions that belied, rather than confirmed, intent to defraud or conspire. By contrast, the government misused improperly admitted hearsay to dismiss the recording of his compliance meeting as a ploy to increase his compensation. Shor was likewise blocked from cross-examining two cooperators on key prior inconsistent statements that aligned with his defense—proposed allocutions that were changed at the last minute to contradict his known defense and align with the government's theory. The prosecution also used the District Court's rule against recross to repeatedly elicit significant new evidence on redirect that went uncross-

examined, and elicited new theories of fraud that were not charged and disclaimed by the prosecutors. Finally, the District Court provided to the jury during deliberations a speaking indictment that prejudiced the defense and drove the jury to a conviction.

Shor did not receive a fair trial, and the convictions should be reversed.

JURISDICTION

The District Court for the Southern District of New York had jurisdiction under 18 U.S.C. § 3231. The judgment was entered on November 21, 2019, and Shor timely filed his notice of appeal on November 25, 2019. (SSPA-51; A-963).[1] This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

Whether the following errors, either individually or considered in combination, require reversal.

[1] Shor's special appendix, which is an addendum to this brief, is cited "SSPA", the appendix is cited "A", excerpts from the trial transcript provided in the appendix (at A-208) are cited by transcript page "Tr.", and the District Court docket is cited "ECF."

1. The District Court erroneously precluded Shor from offering—not for the truth of matters asserted therein—recordings Shor made of various interactions at Premium Point that were circumstantial evidence that he lacked fraudulent or conspiratorial intent.
2. The District Court erroneously blocked Shor from cross-examining two cooperating witnesses with plea allocutions they planned to deliver that aligned with Shor's defense (and contradicted the cooperators' trial testimony), or from showing that the cooperators changed those planned allocutions to curry favor with the prosecutors.
3. Shor was unconstitutionally and erroneously barred from conducting recross-examination, and the prosecution repeatedly exploited the District Court's rule against recross to present new and critical testimony and evidence on redirect.
4. The government constructively amended the indictment and committed a prejudicial variance by eliciting from an immunized witness that he engaged in a scheme with the trial defendants that was not charged and was disclaimed by the prosecution's pre-trial representations.
5. The prosecution represented that they were not offering for its truth an out-of-court statement by a Premium Point executive speculating

that Shor was motivated by greed when he reported valuation concerns to Premium Point's compliance officer, but then the prosecution relied on that erroneously admitted statement for its truth in summation.

6. The District Court erroneously provided the speaking indictment to the jury during deliberations, which prejudiced the defense and drove the jury to conviction.

STATEMENT OF THE CASE

Jeremy Shor appeals from a judgment of conviction entered on November 21, 2019 in the Southern District of New York by the Honorable Katherine Polk Failla, United States District Judge. (SSPA-51). Shor and his co-defendant Anilesh Ahuja were convicted, after a five-week jury trial, of conspiracy to commit securities fraud, securities fraud, conspiracy to commit wire fraud, and wire fraud. (ECF 226; A-58-88). On November 18, 2019, Shor was sentenced to 40 months' imprisonment. (ECF 301). After its initial entry, the judgment of conviction was amended on December 3, 2019 to alter the District Court's recommendation regarding Shor's prison designation. (SSPA-51-59). Shor timely filed his notice of appeal on November 25, 2019. (A-963).

Shor's surrender date is May 26, 2020. (ECF 352). The relevant rulings are unreported.

STATEMENT OF FACTS

The charges in this case relate to Shor's alleged participation in a hedge fund mis-marking scheme. Shor had obtained a Ph.D. in mathematics, and had been trading mortgage-backed securities for a few years prior to joining Premium Point in April 2014 as a senior trader. (Tr. 229-30, 993). At Premium Point, Shor traded legacy (i.e., pre-financial crisis (Tr. 2635)) residential mortgage-backed securities until he resigned on March 14, 2016. (Tr. 441). In his first year, the market was strong, his trades were successful, and he earned a $1 million bonus. (Tr. 2135, 2688-93). In 2015, his second year at the fund, the market for residential mortgage-backed securities took a dive and Premium Point's portfolio lost significant value. (Tr. 2275). The indictment alleged that a number of people at Premium Point, including Shor, conspired to assign fraudulently inflated valuations to the securities in Premium Point's portfolios for a time period that pre-dated and entirely encompassed Shor's time at Premium Point—January 2014 through March 14, 2016. (A-78-79).

The government's case was based on—and the majority of the trial time was devoted to—the testimony of accomplice witnesses. Three of the accomplice witnesses pled guilty to some or all of the charges lodged against Shor and testified pursuant to cooperation agreements—Amin Majidi, a portfolio manager and Shor's boss at Premium Point; Ashish Dole, Shor's assistant who was later given his first trading position; and Frank Dinucci, a broker who counted Premium Point as a client and provided Premium Point marks for bonds. One of the accomplice witnesses was immunized—James Nimberg, a former Premium Point portfolio manager and partner.

In a prosecution relating to allegedly fraudulent valuations assigned to esoteric and illiquid securities during a market contraction, the prosecution did not prove mis-marking using independent experts or extensive analysis of market data. Instead, the government relied on cooperator testimony and an analysis of Shor's book hastily conducted by Ashish Dole in the days after Shor quit. (Tr. 903-04). The trial evidence showed, however, that valuation experts at Ernst & Young ("EY")—"the external[,] . . . independent auditor" of Premium Point—conducted a valuation of the portfolio that was fundamentally inconsistent with the

government's January 2014 – March 2016 period of the fraud. (Tr. 2693, 2876). EY's valuation experts, after extensive analysis, found no need to restate valuations in 2014 or the first half of 2015, and only required restatements beginning in September 2015. (Tr. 1128-29, 2954, 2978-79).

The critical issue at trial was whether Shor had the fraudulent or conspiratorial intent required to convict him of the charges. Shor's defense theory was that the valuations assigned throughout 2014 and the first half of 2015 were within the range of reasonable valuations for these hard-to-value investments. (Tr. 179 (opening)). Even one of the prosecution's key cooperators—Majidi—admitted on cross-examination that although he thought the valuation was "aggressive" in 2014, he "thought it was within an acceptable range of illiquid assets." (Tr. 2693). When the market declined in the second-half of 2015 and Premium Point's investments began to struggle (Tr. 2275 (Majidi agreeing that "in the second half of 2015, the RMBS markets deteriorated," "particularly subprime," and "the fund's performance was declining in the second half of 2015")), Shor became uncomfortable with the valuations and sought to alert his bosses to the growing divergence between Premium Point's assigned valuations and where he saw the market. Thus, in this period

of time, Shor told Majidi that Shor was trading down a significant amount from the assigned valuations, and then on October 30, 2015, Shor told Majidi he had been trading down 10% and requested a specific direction from Majidi in writing if Majidi wanted Shor to leave his valuations unchanged. When Majidi directed Shor to leave the valuations unchanged, Shor nevertheless wrote down his book by $16 million. (Tr. 2760-77). Majidi quickly overrode Shor's pricing, and reversed the markdown. (Tr. 2777).

Then, on December 15, 2015, Shor initiated and recorded a closed-door meeting with Premium Point's newly-installed chief compliance officer, a former prosecutor with an impressive resume of compliance experience, and explained to him (albeit in technical terms and at times haltingly) many of the key features of what became the government's case. He explained that there was pressure from a partner (Majidi) on the traders to obtain valuations that would satisfy performance targets dictated to them. He also explained that Premium Point's valuations relied on brokers who were biased and thus might provide valuation data that was susceptible of abuse, that Premium Point also used "sector spreads" together with bid-side valuations to compute a mid-price for

valuation purposes,[2] and that this computed mid-price methodology might result in a "lever"—valuations rising in a declining market because bid-ask spreads would widen in such a market. (A-764-96). Finally, Shor resigned on March 14, 2016, before the prices for February were finalized. (A-830-31; Tr. 442).

A. The Exclusion of Shor's Secret Audio Recordings

Not only did Shor engage in these conversations and actions that were not typical of a willing conspirator engaged in a scheme to inflate valuations, but he *secretly recorded them*. Indeed, in the critical time period of the second half of 2015 and the beginning of 2016—approximately the same period of time for which EY required restated valuations—Shor secretly recorded dozens of interactions he had at Premium Point, both with purported co-conspirators and with people who were not alleged to be co-conspirators. (ECF 157 at 14). Shor voluntarily

[2] Although the prosecution initially claimed that the use of sector spreads was per se illegal, they later abandoned that claim (Tr. 4659 (summation: "This can be legitimate. It can result at fair value")) and instead sought to prove—based on an email exchange that took place in 2011 (nearly three years before Shor's arrival and unbeknownst to Shor)—that a single investor was misled about the use of sector spreads. (Tr. 1364-70). Premium Point's use of sector spreads was well-established when Shor arrived in 2014. (Tr. 1071).

produced these recordings to the SEC after he learned of the SEC's investigation, and the SEC provided them to the prosecutors. (ECF 157 at 14). In response to Shor's *in limine* motion arguing that the conduct and content of the recordings were admissible not for the truth of anything said, on May 28, 2019, the District Court conclusively ruled that all of the recordings were hearsay and not admissible if offered by Shor, and that Shor's conduct in creating the recordings was also hearsay and not admissible. (SSPA-1-6).

On May 29, 2019, Shor submitted a letter providing additional argument and case support for the admission of the recordings (A-164), and the prosecution opposed this "reconsideration motion." (ECF 197). In its opposition, the prosecution also requested that Shor identify the specific excerpts of the recordings he sought to admit, and on June 1, 2019, the District Court entered on the docket a text-only order "direct[ing] counsel to identify the relevant portions at counsel's earliest convenience," with the understanding that "counsel has considered the Court's earlier rulings in winnowing the portions." (A-31).

Pursuant to that order (which did not rescind the full preclusion already ordered), Shor made a two-part proposal. First, Shor proposed to

play for the jury only limited portions of a single recording—the recording of the December 15, 2015 meeting in which Shor undertook to explain to the newly-installed chief compliance officer, Evan Jay, the manner in which Premium Point conducts valuation, the way in which that process can result in valuations increasing even in a declining market, the participation of biased brokers in that process, and the fact that traders were pressured by a partner (Majidi) to meet valuation targets. (A-171-207).

Second, Shor identified additional excerpts (totaling approximately 25 statements from five recordings between July and October 2015) that Shor proposed to use during his cross-examination of Majidi "either by play[ing] the statement at issue to prove that the statement was made (played to the jury) or to refresh his recollection (played only to Mr. Majidi)." (A-171).

Those excerpts were not offered for the truth of any matters asserted therein, but for the fact that the things recorded were said, as summarized in the below table:

Excerpt (A-172-74)	**Why the excerpt is not hear-say**
July 30, 2015 recording of Amin Majidi and Jeremy Shor	

Shor: The market is probably like a point and a half, two back on bids.	This statement is not offered to prove the market, but to show Shor reporting the divergence between valuations and the market to his boss, Majidi.
August 20, 2015 recording of Neelabh Baranga, Ashish Dole, Amin Majidi, and Jeremy Shor	
Shor: I feel like up until August, we've probably been running at like you know 2 to 3%. So, uh, a little bit, you know, a little spotty if there's been uh, you know one trade or but on the sale market value it's been you know, 2 to 3% some, some periods, a little lower throughout the year. . . . . *Shor*: And uh, this last month, I would say last week, the two days, it's been up around uh, six to sev-, seven to eight. And the first two weeks, the first week or so [coughs], excuse me, of April would have been I think I'm remembering like a three to a four number.	This statement is not offered to prove the market, but to show Shor reporting the divergence between valuations and the market to his boss (Majidi), his assistant (Dole), and a non-conspirator employee in the risk department (Baranga).
Oct. 15, 2015 recording of Sriram Kannan, Amin Majidi, and Jeremy Shor	
Shor: I think that, you know, when I ran through th-, their sales from their purchases, their	This statement is not offered to prove the market levels, but to show Shor reporting both to his

stuff was down 5% from kind of an average purchase date of March. . . . . *Shor*: [A]verage purchase date was, you know, March, and it worked out to be like minus 4.7%, which is what I think around the market it is . . . . *Shor*: I, you know, so, I think you know, we have high marks . . .	boss and to a non-conspirator (Kannan, the Chief Risk Officer and a member of the valuation committee) that the marks are "high" and describing his sense of the market diverging from valuations.
Oct. 15, 2015 recording of Anilesh Ahuja, Amin Majidi, Dan Osman, and Jeremy Shor	
Shor: So, I think it's probably uh, mid high, single digits at this point, so you know seven, eight. . . . . *Shor*: Uh, I don't think 10%. So I did a, that's why it took me an extra couple of minutes, I think, you know, like a mid-high single digits as well.	These statements are not offered to prove the market (or even what Shor thought about the market), but to show Shor reporting to his boss (Majidi), the head of Premium Point and a member of the valuation committee (Ahuja), and the Head of Investor Relations and a non-conspirator (Osman), that the market is seven or eight percent off of valuations.
Oct. 30, 2015 recording of Amin Majidi and Jeremy Shor	
Majidi: How are we gonna mark it? I mean you're at month end. Um we're just gonna let the marks come in and we won't	These statements and questions are not offered to prove the market or to prove whether marks may come in that show that

really challenge and stuff like that. The, the, the, the thing is we, we can't have the marks be that different, can you, based on – *Shor*: What, what do you mean, that different? *Majidi*: Like, you know that— *Shor*: Like smooth it out so there's not twenty downs if we liquidate something? *Majidi*: No, no. So, so, so like let's say we are showing down 3% on your book, right? There's a scenario where the marks come in and they're not as bad as how we mark the book because it's kinda you're, you're trading within a point, right? So it's like, it's possible that the street is holding up marks. So we don't want it to be the kinda thing where the marks come in and you're that differently off. . . . . *Shor*: Yeah, so I mean, you know, we're selling stuff down 8 or 9%, we haven't changed the other prices in the book so –	Shor's view of the market is wrong, but are offered to show Shor reporting to his boss (Majidi) that they are trading 8 or 9% below the valuations, and to show the character of the interaction, which is not consistent with the interaction of co-conspirators engaged in a mis-marking conspiracy. They are also offered for the effect that Majidi's questions and comments had on Shor. Neither Shor's nor Majidi's questions are hearsay because questions are not assertions.

. . . . *Shor*: I mean, they're down, there's no doubt they're down.	

On June 3, 2019, the first day of trial, the prosecution sought to "moot the issue" by agreeing that identified portions of the December 15 recording could be admitted (Tr. 61-66), although inexplicably the prosecution requested that they be admitted only in transcript form (Tr. 70, 81-83). As he had in his June 1, 2019 letter (A-171), Shor explicitly explained his intention to use the identified portions of five other recordings to refresh Majidi's recollection, if necessary, or to impeach. (Tr. 61-60, 72-75). The prosecution then went further, stating that the prosecution's agreement to the admission of the identified portions of the December 15 recording was conditioned on Shor "withdrawing his motion and motion for reconsideration with respect to other statements on these recordings with the understanding that anything that might come up on impeachment we are reserving for another day." (Tr. 67-68). The District Court joined in the prosecution's effort to extract a waiver of appellate rights, stating "I don't want to have an appellate issue and I went through all of this trouble and you believe that there are other things

that you want to offer affirmatively, not as impeachment, not as refreshed recollection." (Tr. 72-73). The Court stated: "Therefore, this is in satisfaction of your pending motion for reconsideration, motion *in limine*. Yes, sir?" and Shor's counsel responded: "Yes. And theirs as well." (Tr. 74).

When, during the cross-examination of Majidi, Shor sought to do exactly what he reserved the right to do in his motion to reconsider and during the discussion of waiver on June 3, 2019—use identified excerpts from the five recordings in cross-examination either to refresh or impeach—the prosecution objected and the Court precluded this entirely proper and non-hearsay use of the excerpts. (Tr. 2724-45). Even though Shor's counsel at sidebar specifically referenced the statements by the prosecution and Court recognizing the possibility of using recording excerpts to refresh Majidi's recollection and impeach, as well as Shor's June 1, 2019 letter clearly describing that intended use (A-171; Tr. 2725-45), the Court stated "I really do feel as though this is an end run around my prior decision. Only because I wasn't more explicit last time, you get one of these. One of them. Just pick one on your chart and you can do it. You can try and do this. But otherwise no. So choose wisely." (Tr. 2745).

The District Court and the prosecution then blocked Shor from even using words from the excerpts to formulate proper leading questions for Majidi:

> Q. -- generally Mr. Shor expressing the fact that he was trading a small amount lower in July or the end of July as compared to where the book was marked, is that correct? Do you have a general recollection of that?
>
> A. I have a vague recollection of the summer, but I can't say if it was July. I remember that the trades were below the marks.
>
> Q. And Mr. Shor was expressing that to you, sir, correct?
>
> A. Yes.
>
> Q. And that continued in or about mid-July – I'm sorry, mid -- let me start again. Those conversations continued into mid-August, sir, would you agree, where Mr. Shor was expressing to you the fact that he was trading around 2 to 3 percent lower than where the book was marked?
>
> [AUSA]: Objection.
>
> THE COURT: Sustained.
>
> Q. Based on communications with Mr. Shor, sir, was it your understanding in August that the nonagency book was trading approximately 2 to 3 percent lower than the marks were currently showing at PPI?
>
> [AUSA]: Objection.
>
> THE COURT: Sustained. Please stop testifying.

Q. Sir, do you remember having conversations with Mr. Shor in the August period of 2015?

A. Yes.

Q. And let me focus you particularly on communications, if any, regarding trading versus where the book was marked. Do you recall those communications?

[AUSA]: Objection.

THE COURT: I'll allow. You may answer it, sir.

[A.] Oh, I can't separate conversations to be on the state of the portfolio to be separated between trading and just a general state of things, marks, etc.

*   *   *

Q. Okay. Well, without trying to separate into two conversations, do you recall generally having conversations in the late summer to early fall period with Mr. Shor about trading versus PPI's marks?

THE COURT: Yes or no, sir?

A. No. I remember talking about the effect of trading on PNL.

(Tr. 2746-50).

B. Blocking Impeachment of Cooperating Witnesses on Bias

Two days into trial, on June 5, 2019, the prosecution for the first time produced Majidi's proposed plea allocution. (A-837). Majidi's counsel had sent the proposed allocution to the prosecution seven months before,

on October 29, 2018—two days before Majidi plead guilty on October 31, 2018. (A-841-45, 848-51). The government did not produce this document, which was clear *Brady/Giglio* material, on its own initiative—it was prompted to do so by co-defendant Ahuja's issuance of a Rule 17 subpoena to Majidi's counsel, and Majidi's counsel's imminent compliance on June 6, 2019. (A-837).

These events were significant for a number of reasons. First, the prosecution made a late production of exculpatory evidence that should have been timely produced, as the District Court expressly found. (Tr. 478-80). Second, Majidi's proposed allocution aligned with Shor's defense and was materially different from the allocution he gave in court, which aligned with the prosecution's theory. Majidi's final allocution was inconsistent with his proposed allocution in a critical respect: it dramatically changed the time period of the fraud to "[b]etween 2014 and 2016" from "the second half of 2015." It also specifically named Shor, while his proposed allocution did not. (*Compare* A-841-45, 848-51, 852-54). Third, the email exchange between the prosecution and Majidi's counsel suggested that the differences in the proposed and given allocutions resulted from communications between them. (A-846-47

(responding in receipt of the proposed allocution, the prosecution asked: "Can you talk around 430?")).

The Court not only agreed that Majidi's proposed allocution should have been previously produced, but also that there were material differences between his proposed allocution and the one he gave in court. (Tr. 478 ("My view, when I saw this, and particularly when I compared it to the actual allocution, was that it should have been produced.")). Then, because of these failures and the "death by a thousand cuts that I've got here that I keep hearing every day about new things," the District Court ordered the prosecution to review all of its attorney communications to make sure that all discloseable material had been produced. (Tr. 478-80 ("I want something in writing from you telling me your review is done . . . I need confidence I don't currently have.")). On June 7, 2019, as a result of the District Court's order, the prosecution produced Dinucci's proposed plea allocution. (Tr. 478-80). The same three issues raised by the production of Majidi's proposed allocution were raised by Dinucci's.

Dinucci's proposed allocution was created on April 5, 2017—one day *after* the prosecution emailed Dinucci's counsel asking for a copy of it "as soon as possible." (A-838, 865-67). Dinucci's guilty plea was entered the

next day on April 6, 2017. (A-857-57). Like Majidi's proposed allocution, Dinucci's aligned with Shor's defense theory by focusing on "the middle of 2015." (A-855-56). Specifically, in his proposed allocution, Dinucci stated that he provided Premium Point favorable marks "[d]uring this time period—2015 and 2016," and that "at some point during this time period," "the [Premium Point] portfolio manager began to engage in a practice of providing me with his proposed marks." (A-855-56). Again, it did not mention Shor, who was never a portfolio manager.

When Dinucci allocuted in court on April 6, 2017, his statement had been tailored to match the prosecution's theories. (A-855-56, 862-64). He changed the timeline of the fraud to "in or around mid-2014," and stated that he provided inflated marks to Premium Point beginning "at some point after mid-2014"—exactly when Shor joined Premium Point. (A-857-61).

On June 9, 2019, Shor submitted a detailed letter regarding these events, and the Court heard argument. (A-836; Tr. 756-59). In both, Shor explained that the prosecution's late production of key cooperating witnesses' proposed allocutions triggered two separate issues: (1) Shor's determination that he needed to cross-examine Majidi and Dinucci about

the revisions, including the circumstances surrounding the revisions, and their potential for bias; and (2) potential impropriety by the prosecution in its repeated late production of *Brady/Giglio* material. (A-836; Tr. 756-59).

By Order dated June 10, 2019, the District Court denied all of the relief Shor requested and denied him the ability to cross-examine Majidi and Dinucci on their proposed allocutions. (SSPA-46-50). The Court's central focus in this order was on the second issue, i.e., the propriety of the prosecutors' conduct. After questioning the prosecutors, the District Court found that the prosecution did not act improperly in communicating with defense counsel about the allocutions. (SSPA-47; Tr. 754-91). But then the District Court went further, conflating the second issue with the first, and *precluded cross-examination* because of the finding of no impropriety—"In this regard, the Court returns to its prior finding that the prosecutors did not engage in misconduct in their communications with the Cooperating Witnesses' counsel with respect to the allocutions. *Cross-examination that disclosed this Government involvement could leave a misimpression with the jury that the Government acted improperly*." (SSPA-48 (emphasis added)). As a

secondary concern, the Court precluded cross-examination because it found that it would require the Court to explain the requirements of Rule 11, and that it might implicate the attorney-client privilege. (SSPA-49).[3]

As a result, the trial—which relied entirely on the testimony of cooperating witnesses—proceeded without Shor being able to cross-examine the two key cooperating witnesses with their prior inconsistent statements that directly supported his defense that the mis-marking did not begin until the second-half of 2015. The prosecution acknowledged the significance of Shor's timing argument in summation. (Tr. 4648 ("And timing is important here, because Mr. Shor made a lot of arguments, through his counsel, that in 2014, there was nothing going on.") (summation)).

C. The District Court's Unconstitutional Rule Against Recross-examination

The District Court informed the parties during the trial—when Dole, the first witness, was on the stand for redirect—that it does not "permit" recross as a rule. (Tr. 1230-32). The Court later stated: "I'll just

[3] After finding no impropriety and denying Shor's requests, the District Court also questioned counsel for Dinucci and Majidi. (Tr. 2044-63, 3134-42). That questioning confirmed that the proposed allocutions were client-approved and prepared for delivery in court. (*Id.*).

say again what I said last time, which was, I cannot exclude the possibility of recross-examination, but as a matter of practice, I very, very rarely, if ever, allow it, and the proper bases for me earlier were not bases on which I would allow it." (Tr. 1578). The Court did not elaborate on what bases it might permit recross.

The prosecution repeatedly exploited this rule to elicit new testimony and admit new exhibits on redirect. The new testimony elicited on redirect went to the heart of Shor's defense. The prosecution elicited on redirect that the "corrupt" or "friendly" brokers who provided Premium Point the marks they needed to meet valuation targets were referred to internally as "Shor's boys" or "Shor's guys." (Tr. 1230). The prosecution also elicited on redirect that Dole—testifying pursuant to a cooperation agreement—produced text messages to the government "voluntarily," when he had actually failed to comply with his cooperation agreement and produced hundreds of pages of text messages during trial. (A-879-88).[4] In addition, the prosecution admitted four new exhibits on

[4] The prosecution also used its redirect of EY's Jonathan Ansbacher to ask, among other new things, whether EY was ever invited "to attend meetings on street corners between Mr. Shor and other brokers" (A-550-51). This highly improper question was designed to highlight a claim the prosecution used repeatedly against Shor—that he purportedly met with

redirect in an attempt to show (unchallenged) that Dinucci was "Shor's boy" and Shor used him to get month end marks as a result of pressure, and that Shor was only motivated by compensation when he marked down his book at month-end October 2015. (A-758-59, 737-38, 739-53, 754-57).

The prosecution used all of this new, unchallenged testimony and referenced new exhibits admitted on redirect in its summation and rebuttal summation. (Tr. 4692 ("He saw it as leverage, leverage to get higher compensation. And he said as much in a WhatsApp message to Mr. Dole that's Government Exhibit 2509." (summation)); Tr. 4674 ("Mr. Dole also told you that Mr. Ahuja made specific reference to 'Shor's boy' in the context of going to get the fraudulent, wide bid-offer spreads." (summation); *See also* Tr. 4667, 4891-92, 4902, 4684); Tr. 4891 ("He was pounding away at Dinucci, liar, liar. Pants on fire. Guys, Dinucci is Mr. Shor's guy." (rebuttal summation)). During deliberations, the jury requested transcripts of testimony from Dole "[a]nd highlights of Shor's

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Dinucci on "street corners to hand off lists of prices" (Tr. 149 (opening))—but Dinucci himself refuted this claim, stating instead that he met Shor for coffee or lunch, and never met covertly on street corners to discuss marks. (Tr. 3338).

Boys," and a "[t]ranscript of govt . . . closing only to obtain evidence numbers." (A-892-93, 924; Tr. 5061).

D. The Prosecution's Misuse of Uncharged and Disclaimed Fraud Theories

As described in detail in the below argument section, the prosecution elicited from James Nimberg, a former Premium Point portfolio manager and partner, that he participated with the defendants in a fraudulent scheme based on uncharged theories of fraud, separate from the "friendly brokers" and "sector spread" theories set out in the indictment and repeatedly confirmed by the prosecutors as the only theories of fraud at issue.

E. The Prosecution's Misuse of an Out-of-Court Declarant's Opinion About Shor's Intent

The prosecution misused an out-of-court opinion about Shor's intent, which had been offered and admitted not for its truth, by relying on it in summation for its truth.

The prosecution elicited from Evan Jay (Premium Point's chief compliance officer) the out-of-court opinion of Chip Montgomery, (Premium Point's chief operating officer) that Shor reported valuation issues to Jay (in the December 15, 2015 recorded meeting) in order to

increase his bonus. (Tr. 3756). The prosecution repeatedly represented that the testimony was offered not for its truth, and the District Court admitted it only on that basis, over objection. (Tr. 3746-48). Jay told the jury the following:

> Q. Did anything happen at the end of the meeting with Mr. Shor? How did it end?
>
> A. Todd Lee, the general counsel, came into the office and said that he needed to talk to me.
>
> Q. Did you talk to Mr. Lee?
>
> A. Yes. He—Jeremy excused himself, and then Todd came into the office.
>
> Q. Was anyone with Mr. Lee?
>
> A. Chip Montgomery came in . . . .
>
> Q. Was there then a closed-door conversation?
>
> A. Yes. They wanted to know why Jeremy came into the office and what we talked about. So I explained to them what we discussed. I showed them the piece of paper that Jeremy drew on.
>
> . . . .
>
> [JAY]: *I believe that Chip had said that Jeremy was upset about his compensation or proposed compensation for that year*; that the year before, he had done really well at the firm *and that the current year when I was there he wasn't doing as well and that he was trying to stir up the pot to get some*

> *leverage against the firm for purposes of getting a larger bonus or compensation.*
>
> THE COURT: One moment, please. I want to give a limiting instruction to the jury at this point.

(Tr. 3812-13). The Court gave a limiting instruction that this testimony was admitted not for its truth, but purportedly for its effect on Jay's (irrelevant) state of mind and subsequent conduct. (Tr. 3746-50, 3814).

In summation, in direct contradiction of its own representation and of the Court's limiting instruction, the prosecution used Jay's statement for its truth and echoed its wording, stating: "If Mr. Shor was trying to report mismarking in that meeting with Evan Jay, it's sure not clear from the tape *or from what you heard from Mr. Jay. It was about his bonus*"; and "It was this one meeting so that he could get leverage for his compensation. That's what this was about." (Tr. 4697, 4699 (emphasis added) (summation)).

SUMMARY OF ARGUMENT

A series of errors rendered Shor's trial fundamentally unfair and justify reversal, either individually or in combination.

First, the District Court erroneously excluded as hearsay contemporaneous recordings Shor made of his interactions at Premium

Point that demonstrated Shor's lack of fraudulent or conspiratorial intent. Any purported waiver was unfair and ineffectual.

Second, the District Court erroneously blocked Shor from impeaching two cooperating witnesses with their prior inconsistent statements—proposed plea allocutions—that directly aligned with Shor's defense theory but were changed to curry favor with the government.

Third, the District Court unconstitionally prohibited recross-examination and deprived Shor any opportunity to cross-examine new lines of testimony and exhibits the prosecution admitted on redirect.

Fourth, the government constructively amended the superseding indictment and committed a prejudicial variance when it elicited from an immunized witness uncharged theories of fraud that the witness claimed he participated in with the defendants.

Fifth, the prosecution improperly elicited hearsay opinion about Shor's intent that it relied upon for its truth in summation.

Sixth, the District Court erred in providing the government's speaking indictment to the jury during deliberations.

ARGUMENT

Shor's conviction should be reversed. He was not permitted a fair opportunity to present his defense, cross-examine witnesses, or cross-examine new material presented for the first time on redirect. The prosecution shifted the theory of the case in the midst of trial by eliciting new and uncharged theories of fraud, and misused hearsay opinion testimony to tar Shor's report to compliance as a play for money. Finally, the delivery of the speaking parts of the indictment—which amounted to a written version of the government's summation—to the jury tainted the result.

In addition to the arguments set forth herein, Shor adopts and incorporates herein each of the arguments made by Ahuja, which equally require reversal of Shor's conviction.

I. The District Court Committed Reversible Error by Blocking Shor's Use of Audio Recordings

A. Applicable Law

This Court generally reviews "evidentiary rulings for abuse of discretion," *United States v. Cummings*, 858 F.3d 763, 771 (2d Cir. 2017), but reviews de novo the legal question of whether an offered statement is hearsay. *See United States v. Ferguson*, 676 F.3d 260, 285 (2d Cir. 2011).

Where a proffered statement is not offered for its truth, but for the fact that it was made, it falls outside the definition of hearsay, and "instead [is] admissible as circumstantial evidence of [a defendant's] state of mind." *United States v. Kohan*, 806 F.2d 18, 22 (2d Cir. 1986). In *Kohan*, this Court reversed a conviction based on the erroneous exclusion of testimony from the defendant's roomate, who was prepared to testify about three conversations between a person named Fellouris and the defendant (Lowery) in which Fellouris and the defendant discussed the (legitimate) source of funds represented by two checks Fellouris asked the defendant to help cash—checks that in reality were forged. *Id.* at 21. This Court reversed because the excluded conversations were not offered for the truth of matters asserted, but as circumstantial evidence bearing on the defendant's lack of criminal mens rea. *Id.* The statements at issue did not constitute assertions by the defendant about the defendant's state of mind,[5] and thus this Court explained that the "proffered testimony did

[5] If they had (i.e., if the witness was prepared to say the defendant said, "I am doing this because I believe the checks to be legitimate"), they would have been assertions offered for the truth (and thus hearsay under Federal Rule of Evidence 801), but would have been admissible hearsay under Federal Rule of Evidence 803(3)'s state of mind exception to the rule against hearsay. (SSPA-71-72, 74-78).

not fit within the definition of hearsay, nor, *a fortiori*, within the state of mind exception, but instead was admissible as circumstantial evidence of Lowery's state of mind—his belief that Fellouris's activities were legitimate." *Id.*

Moreover, this Court rejected the claim that the error was harmless because the government had elicited from a New York City Detective the defendant's after-the-fact recitation of Fellouris's cover story to him (that the checks were legitimate). *Id*. The Court found that the error required reversal because the *post hoc* statements were less convincing, noting: "When an erroneous evidentiary ruling precludes or impairs the presentation of a defendant's sole means of defense, we are reluctant to deem it harmless." *Id.*

B. The Exclusion of Audio Recordings Impaired Shor's Defense

The erroneous exclusion of Shor's recordings, and of the very facts that he had made them and voluntarily produced them to the SEC, crippled Shor's intent-based defense and rendered the trial unfair, for they not only excluded relevant evidence on incorrect hearsay grounds, but they permitted the prosecution to paint a misleading picture of the December 15 meeting as an isolated event purportedly designed to obtain

a larger bonus, rather than part of a months-long pattern of conduct that is inconsistent with that of a typical conspirator. Indeed, the jury's first note during deliberations requested, among other things, "Government Exhibit 886—Recorded conversation transcript," evidently because the jury believed that recorded conversations were important, and that there was only one. (A-893; Tr. 5062).

Of the approximately two dozen recordings Shor made over a key seven-month period of the charged conspiracy, portions of only two were admitted at trial—(i) a recording of his December 15, 2015 meeting with Evan Jay, Premium Point's new chief compliance officer (A-764-96); and (ii) a recording of his March 14, 2016 meeting with Ahuja to announce his resignation. (A-830-31). In the excluded recordings, Shor repeatedly told Majidi and others (including members of the valuation committee and non-conspirators) that he was trading at levels significantly below the marks assigned to the relevant bonds. None of these recordings were offered for the truth of the matters asserted therein, but rather as circumstantial evidence that Shor lacked fraudulent or conspiratorial intent. All of the recordings (except the above-mentioned two recordings) were excluded based on an incorrect hearsay ruling, and even Shor's

conduct in making the recordings was almost entirely excluded as hearsay.

The fact that Shor made these recordings was probative of his lack of criminal intent, for persons engaged in criminal conspiracies typically *avoid* making records of their conversations with conspirators. Nevertheless, the District Court flatly prohibited this argument (SSPA-43-45; *see* Tr. 4851). The District Court held: "Counsel for Mr. Shor may not argue to the jury that the fact that Mr. Shor recorded certain communications evidences his good faith, consciousness of innocence, or similar lack of intent." (SSPA-44-45). And, the District Court precluded Shor from offering evidence that he produced these recordings voluntarily to the SEC. (A-879). The District Court persisted in this ruling even after the prosecution elicited from its cooperator Dole that he produced text messages to the government "voluntarily" in order to paint Dole in a favorable light (A-879; Tr. 1248, 1831).[6] The Court then permitted the prosecution to argue the flip side—that Shor's use of his

[6] As discussed below in Point III, this claim, which the prosecution elicited with an improper leading question, was misleading, but because the prosecution elicited it on redirect, Shor was blocked from cross-examining Dole about it.

cellular phone and WhatsApp messages were conspiratorial efforts to *avoid* the creation of records that confirm his criminal intent. (Tr. 4658, 4680-83 (summation)). This was error that severely curtailed Shor's defense.

In addition, regardless of their truth, Shor's statements captured on those recordings were circumstantial evidence that Shor was not a willing participant in a mis-marking conspiracy, but instead was uncomfortable with the valuations and seeking to reduce them. This is because persons engaged in an intentional scheme to inflate valuations do not typically tell conspirators as well as non-conspirators (such as Sri Kannan, the Chief Risk Officer, who was a member of the valuation committee) the very facts *confirming* the fraudulent nature of the valuations, nor do they typically continue to remark to conspirators on the divergence from the market that is the entire goal of a mis-marking scheme. For example, one would not expect a drug trafficker to repeatedly make obvious observations to his alleged co-conspirators such as: "we are still selling cocaine this month."

In addition to remarks made *by* Shor, the recordings also included things said by others *to* Shor that bore on his intent (or lack thereof)

during key months of the alleged conspiracy. Thus, when Shor stated that the market was below valuations, Majidi (purportedly Shor's co-conspirator) did not reply: "Of course it is, we are in the middle of a conspiracy to inflate the valuations!" Instead, he said things such as:

> So, so, so like let's say we are showing down 3% on your book, right? There's a scenario where the marks come in and they're not as bad as how we mark the book, because it's kinda you're, you're trading within a point, right? So it's like, it's possible that the street is holding up marks. we don't want it to be the kinda thing where the marks come in and you're that differently off.

(A-173-74). In other words, these real-time audio recordings captured, and could have shown to the jury, the back-and-forth between purported conspirators, and Shor could have argued that this back-and-forth belied, rather than confirmed, his fraudulent or conspiratorial intent.

The prosecution's arguments to exclude this conduct and these recordings sought incorrectly to convert *non-assertions* into *implied assertions*. Thus, the prosecution argued that "the fact that Mr. Shor made the recordings . . . is in essence a statement"—presumably an implied statement by Shor to the effect of "I made these recordings because I lacked conspiratorial or fraudulent intent," or "I said the things captured on tape (regardless of whether they were true or not) because I

lacked conspiratorial or fraudulent intent." The District Court apparently accepted this transformation of circumstantial evidence into implied assertion. (SSPA-4 ("these recordings that were made really only have significance if one understands the motivation")). But this transformation would permit the hearsay rule to swallow and exclude all circumstantial evidence bearing on a person's intent. It is a dramatic and incorrect expansion of the hearsay rule to transform non-verbal conduct (or even verbal conduct not offered for its truth) into an implied assertion by the defendant of the *inference* the defendant seeks the jury to draw from the conduct. Moreover, because there is no such implied assertion in circumstantial evidence, there is no need for the government to "cross-examine" such an implied assertion; the government is simply free to *argue* a different inference. In other words, there was no dispute about what was done or said (because it was recorded and not offered for its truth), there was just a question of what could be inferred about Shor's intent from the conduct and words. As one authority has explained:

> *The problem with such a broad definition of hearsay is that it would encompass much of what is now considered circumstantial evidence, and there would be no end to what might be considered hearsay*. For example, a witness in a murder case might testify that she saw an unidentified

> stranger flee from the scene immediately after a murder. The stranger's flight implies that the stranger believed that he did something wrong, i.e. guilt. Under *Wright v. Tatham*, [7 Adolphus & Ellis 313, 112 Eng. Rep. 488 (Ex Ch. 1837), *aff'd*, v. Clark & Finnelly 670, 7 Eng. Rep. 559 (House of Lords 1838)], the witness's testimony would be excludable hearsay. Under the prevailing view in this country, it would be circumstantial evidence supporting defendant's contention that someone else committed the murder.

David F. Binder, *Hearsay Handbook, 4th* § 1.10, at 31 (2019) (emphasis added).

In short, neither the fact of the recordings nor the excerpts at issue were assertions offered for their truth, and they should not have been excluded as hearsay.

C. Any Purported Waiver Was Unfair and Ineffectual and the Error Was Not Harmless

The prosecution's and the District Court's efforts (i) to "winnow" Shor's offer of proof (after entirely excluding it) and (ii) to extract a waiver of appellate rights regarding an already-decided *in limine* motion, were unfair and ineffective. Once the District Court ruled that the recordings (and the fact of the recordings) were excluded, Shor's objection to the exclusion of evidence was preserved pursuant to Federal Rule of Evidence

103(b) and Federal Rule of Criminal Procedure 51(a).[7] In addition, under the circumstances, Shor had no choice but to agree—he was faced with an already-issued erroneous ruling precluding critical evidence and crippling his defense, and was offered the chance to salvage a small portion of his right to a defense in return for agreeing to the District Court's demand for a waiver. Moreover, even the conditions on which his waiver was extracted were breached by the Court and the prosecution, for when Shor's counsel sought to do exactly what he had described to the Court as part of the extracted waiver—use excerpts of the five identified recordings either to refresh or impeach Majidi—the prosecution objected and the Court precluded this use. (Tr. 2745).

In so doing, the District Court compounded the error in three ways. First, it breached the terms of any purported waiver, which was expressly conditioned on the ability to use the identified excerpts in precisely the manner in which Shor attempted to use them. Second, it extended its original erroneous hearsay decision by preventing any use of those

[7] Federal Rule of Evidence 103(b) provides: "Once the court rules definitively on the record—either before or at trial—a party need not renew an objection or offer of proof to preserve a claim of error for appeal." Federal Rule of Criminal Procedure 51(a) provides: "Exceptions to rulings or orders of the court are unnecessary." (SSPA-69, SSPA-81).

recordings, even to refresh recollection, or upon a failure of recollection, to impeach with a prior inconsistent statement (neither of those uses is hearsay). Third, it precluded perfectly appropriate leading questions designed to elicit (not for their truth) from Majidi the substance of Shor's repeated, non-hearsay statements to Majidi, over the course of months, that evidenced Shor's misgivings about the discrepancy between Shor's trades and the valuations assigned to the bonds and thus his lack of criminal intent. (Tr. 2746-50).

The District Court's multiple hearsay errors surrounding the recordings and Shor's complaints were reversible error, for they severely prejudiced his defense and were not harmless. *See United States v. Stewart*, 907 F.3d 677, 688 (2d Cir. 2018) (reversing conviction for non-harmless exclusion of an inconsistent statement of an out-of-court declarant and discussing harmless error standard). Even under plain error review, these errors require reversal, given the clear hearsay errors, the significance of the evidence, and the severe effect its exclusion had on Shor's defense.

II. The District Court Committed Reversible Error by Blocking Shor's Impeachment of Cooperating Witnesses

A. Applicable Law

While it is "well established that the scope and extent of cross-examination are generally within the sound discretion of the trial court," trial courts "should" allow "[w]ide latitude . . . when a government witness in a criminal case is being cross-examined by the defendant." *United States v. Pedroza*, 750 F.2d 187, 195 (2d Cir. 1984). Importantly, "the trial judge's discretion 'cannot be expanded to justify a curtailment which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony.'" *Id.* at 195-96 (quoting *Gordon v. United States*, 344 U.S. 414, 423 (1953)). In addition, this Court has held that cross-examination on bias is relevant because of its potential to expose a witness's motive to falsify testimony:

> [A]lthough a party may not cross examine a witness on collateral matters in order to show that he is generally unworthy of belief and may not introduce extrinsic evidence for that purpose . . . a party is not so limited in showing that the witness had a motive to falisfy [sic] the testimony he has given. Thus, bias or interest of a witness is not a collateral issue, and . . . extrinsic evidence is admissible thereon.

United States v. Haggett, 438 F.2d 396, 399 (2d Cir. 1971) (quoting *United States v. Lester,* 248 F.2d 329, 334 (2d Cir. 1957) and *United States v. Battaglia*, 394 F.2d 304, 314 n.7 (7th Cir. 1968)).

Moreover, when a court curtails cross-examination, which influences a defendant's substantial rights, the error is not harmless. *See Kotteakos v. United States*, 328 U.S. 750, 757 (1946). The Supreme Court explained:

> [I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. *The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error*. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Id. at 765. (emphasis added).

In *Pedroza*, this Court found that the District Court committed reversible error where a defendant was blocked from cross-examining a government witness on a topic—whether the defendant, who had been convicted of kidnapping a minor, in fact had been given consent for his custody by the government witness, who was the minor's father—that went to the heart of his defense. 750 F.2d at 194-95. This Court held that

"[t]he principal opportunity for defendants to elicit facts as to [the defense theory] ocurred on the cross-examination of [the government witness]," once the topic of the government witness's involvement in the kidnapping had been broached on direct examination and used in the government's summation argument. *Id*. at 196-97. Thus, finding itself "in no position to speculate what the cross-examination would have elicited," this Court explained that it "c[ould] not say that the prohibition on the proposed cross-examination was harmless." *Id*. at 197.

B. Blocking Impeachment with a Key Prior Inconsistent Statement and on Bias was Reversible Error

The District Court abused its discretion and committed reversible error in blocking Shor from cross-examining Majidi and Dinucci on their proposed allocutions. Both cooperators had originally planned to say under oath that the conspiracy began in 2015, which aligned with Shor's defense that the valuations assigned during 2014 and the first half of 2015 were within the range of acceptable valuations for these hard-to-value investments. (A-841-45, 855-56; Tr. 179 (opening)). These statements were inconsistent with the cooperators' trial testimony (as well as their final allocutions), which claimed that the conspiracy began in 2014. (A-848-51, 857-61). In addition, the eve-of-plea changes to the

proposed statements presented a concrete example (even absent any misconduct by any lawyer or prosecutor) of the cooperators' desire to achieve convictions. (A-846-47, 865-67).

The District Court's undue focus on the propriety of the prosecutors' conduct obscured this point—regardless of the propriety of *the prosecution's* actions, Shor was entitled to explore with *the cooperators* the way in which *the cooperators' bias* in favor of the prosecution explained the altered statements. This questioning was not cumulative because it would have presented to the jury a concrete manifestation of bias, rather than the theoretical potential for bias that was explored in general cross-examination regarding the cooperation agreements. *See Haggett*, 438 F.2d at 399.

Nor did the prejudices identified by the Court (confusion about the propriety of the prosecution's conduct or Rule 11 proceedings, and the risk to privileged communications) justify excluding this critical evidence. The jury could have been given instructions as simple as: "prosecutors are permitted to communicate with defense counsel about allocutions," and "unlike the detailed presentation of witness testimony, an allocution during a guilty plea is not designed to and never does

describe all of the details of a scheme." And, precise questioning is routinely used to steer clear of privileged communications. Indeed, the District Court itself steered clear of privileged communications when it questioned Majidi and Dinnuci's counsel about the changes in the allocutions—well after the Court had already found no impropriety and denied Shor's cross-examination. (SSPA-47-48; Tr. 2044-63, 3134-42).

This erroneous decision is not harmless. Shor's defense was based on a claim that Premium Point's marks for 2014 were reasonable valuations, a fact both Majidi and Dinucci acknowledged in their proposed allocutions but contradicted in their given allocutions, after contact with the prosecutors. In summation, the prosecution conceded the importance of the timing of the mis-marking. (Tr. 4648). The erroneous preclusion of this key cross-examination harmed Shor's defense and warrants reversal.

III. The District Court Committed Reversible Error by Blocking Shor's Recross-Examination

A. Relevant Background

The District Court revealed that it does not "permit" recross when the first witness, Dole, Shor's trading assistant at Premium Point, was on the stand for redirect. (Tr. 1232). The prosecution elicited for the first

time on redirect that the moniker for friendly or corrupt brokers who helped further Premium Point's mis-marking scheme was "Shor's guys" or "Shor's boys."

> Q. In the context of these one-on-one meetings with Mr. Ahuja, did Mr. Ahuja ever make reference to using Shor's guys in order to meet performance targets?
>
> A. Yes.
>
> Q. Tell us about those conversations.
>
> A. If you're not able to meet a performance target, the option was to go to Shor's guys to either get inflated bid offers or inflated marks to meet that target.
>
> Q. And I just want to be very specific about the meetings with Mr. Ahuja. The term "Shor's guys," is that a term that you are familiar with?
>
> A. Yes.
>
> Q. What term did Mr. Ahuja use?
>
> A. I believe it was "Shor's boys."
>
> Q. Shor's boys?
>
> A. Yeah.
>
> Q. So he didn't use the name Frank Dinucci?
>
> A. No, he did not.

(Tr. 1230).

After the prosecution had elicited this redirect testimony about "Shor's boys," the Court asked a question about scheduling and the prosecution explicitly asked: "Does your Honor permit recross?" (Tr. 1232). The Court responded, "No. . . . I don't permit recross." (Tr. 1232). Counsel for Ahuja objected—"[t]here are subject matters that have come up in the redirect that are outside the scope of the cross, for example . . . the conversations with my client regarding Shor's guys"—and the Court ruled definitively. (Tr. 1236 ("No. No recross, not for the reasons you've described."). Shor stated that he was not aware of the Court's rule against recross. The Court clarified: "It's my rule. I've mentioned that previously." (Tr. 1236). Nevertheless, defendants asked the Court to reconsider and the Court stated: "On the issue of the request for reconsideration of recross-examination, I'll just say again what I said last time, which was, I cannot exclude the possibility of recross-examination, *but as a matter of practice, I very, very rarely, if ever, allow it*, and the proper bases for me earlier were not bases on which I would allow it." (Tr. 1578 (emphasis added)). The prosecution, knowing it could continue this new line of questioning with Dole about "Shor's boys" unchallenged, did. (Tr. 1246-47 ("In the one-on-one conversations where Mr. Ahuja referred

to Shor's Boys, what, if anything, was said about the sector, the use of the sector spread in particular?")).[8]

In fact, the prosecution elicited additional new and sometimes misleading testimony on redirect, often using improper leading questions. Dole testified on redirect that his production of text messages to the government was voluntary.

> Q. You produced -- your testimony is that you produced a lot of text messages to the government?
>
> A. Yes.
>
> Q. Where did this document come from?
>
> A. I believe it came from me.
>
> Q. *And your productions to the government, were those voluntary?*
>
> A. *Yes.*

(Tr. 1248) (emphasis added)). Dole's testimony was misleading, as the prosecution and Dole were well aware, because his production was

[8] The District Court affirmatively offered recross—once in the five-week trial—during Troy Gayeski's redirect (Premium Point's primary point of contact at an investor, Skybridge). (Tr. 264, 3269). The Court stated in front of the jury: "All right [counsel for Ahuja] if you wish to have recross, I will permit it, but please understand that it may open up the door to additional re-redirect, and I don't know that you want to do that." (Tr. 3273 (emphasis added)). Counsel heeded the warning and did not recross Gayeski.

anything but voluntary: (i) he was required to produce all documents pursuant to his cooperation agreement; and (ii) Dole had failed to comply with his cooperation agreement and produced hundreds of new "text messages and WhatsApp messages in the middle of trial *after he had already been passed for cross-examination* and as a result of a subpoena served by Mr. Ahuja's counsel." (A-880 (emphasis in original)).

Dole's misleading testimony was additionally surprising because prior to Dole's redirect, Shor had been precluded from proving that he had voluntarily produced to the SEC the recordings of his conversations with alleged conspirators and non-conspirators at Premium Point. (A-879). As a result, on June 17, 2019, Shor submitted a letter to the Court implicitly objecting to this new line of testimony on redirect and requesting that he be permitted to introduce evidence regarding his own voluntary production to the SEC. (A-879-82). The Court again denied the request (Tr. 1828-32), and instead, fourteen days later, corrected Dole's misleading testimony with an instruction. That instruction, while addressing the fact that Dole produced hundreds of communications during trial and was subject to a legal obligation to produce documents to the government, still attempted to preserve his appearance of good

faith by stating that "Mr. Dole voluntarily produced certain text messages." (Tr. 4114).

In addition, the prosecution admitted four new text messages during Dole and Dinucci's redirect:

- A text message exchange between Dole and Shor from November of 2015—to support its contention that Shor's October month-end markdown of his book was designed to get compensation. (A-758-59; Tr. 1256);
- A Bloomberg chat from Dole to Dinucci, that states "I will find out who currently covers us, call, let them know the new guy who starts next month is demanding the change"—Dole claimed this message revealed how Dinucci came to be Premium Point's salesperson and that it was not sent by Dole, but by Shor, who was using his computer at the time. (A-737-38; Tr. 1265-67).
- A Bloomberg chat involving Shor, Dole, and Dinucci in which Shor messages Dinucci about getting coffee and mentions pressure regarding month end prices. (A-739-53; Tr. 3701-03); and
- A Bloomberg chat between Shor and Dinucci in which Shor references pressure to get certain marks. (A-754-57; Tr. 3696-97).

Specifically, the November 12, 2015 text messages between Shor and Dole that purported to support its contention that Shor marked down his book in late October 2015, not out of his own legitimate concerns about Premium Point's valuations, but as a ploy for compensation purposes, was particularly damning. (*See* A-758-59).

> Q. What did Mr. Shor tell you about the relationship, if any, between him marking down his book and his compensation negotiations?
>
> A. He saw it as leverage to get higher compensation, marking down the book to show that if he left, we would not be able to get the prices that we wanted and the book would be marked significantly lower.
>
> [AUSA]: If we could show the witness, the Court, and counsel Government Exhibit 2509. . . . The government offers Government Exhibit 2509.
>
> * * *
>
> Q. And Mr. Shor, in the 1:23 p.m. November 12, 2015, how long after the conversation about -- how long after the October markdown event was this text message exchange between you and Mr. Shor?
>
> A. About ten days.
>
> Q. And can you read what Mr. Shor wrote to you at 1:23 p.m. on November 12th.
>
> A. "You notice I dropped the bonus line with the boss just now right? Or at least spoke about it in the abstract."

> Q. And then you responded, "I did. Did you hear anything?" And he responds, "Of course not."

(Tr. 1256-57). Shor was unable to confront this new claim on recross—that text messages sent *ten days* after Shor marked down his book, in which he says "I dropped the bonus line with the boss *just now*," credibly could be interpreted as relating to dramatically marking down his book for October month-end, or that the mark down was compensation related.

In summations, the prosecution emphasized the un-cross-examined evidence repeatedly elicited on redirect. For example, the prosecutor argued:

> *He saw it as leverage, leverage to get higher compensation*. And he said as much in a WhatsApp message to Mr. Dole that's *Government Exhibit 2509: "You notice, I dropped the bonus line with the boss just now, or at least spoke about it."* This is November 12, just 11 days after the supposed bold move to mark down his book.

(Tr. 4692 (emphasis added) (summation)). The prosecution also used Dole's uncrossed testimony about "Shor's boys" (six times) in its summation and rebuttal summation to argue that Shor was the mastermind of the mis-marking scheme:

> Mr. Dole also told you that Mr. Ahuja made specific reference to "*Shor's boy" in the context of going to get the fraudulent,*

> *wide bid-offer spreads*. How does he even know that Shor has a boy? What does Shor have a boy for?

(Tr. 4674 (emphasis added) (summation); *See also* Tr. 4674, 4667, 4891-92, 4902, 4684). And on rebuttal summation the prosecution argued:

> I don't want to take up my whole time on Mr. Shor. I just want to hit some of the main things. [Shor's Counsel] went after -- he went after and after Dinucci. He was pounding away at Dinucci, liar, liar. Pants on fire.
>
> *Guys, Dinucci is Mr. Shor's guy*. [Shor's Counsel] said something like, well, Mr. Dinucci is anything but honest. He had like a Dinucci checklist of lies. Mr. Shor picked Mr. Dinucci.

(Tr. 4891 (emphasis added) (rebuttal summation)).

The emphasis worked—the jury specifically requested Dole's testimony and "highlights of 'Shor's Boys" during deliberations and the exhibits—admitted on unchallenged redirects—referenced in the government's closing. (A-892-93; Tr. 5061).

B. Applicable Law

Under the Sixth Amendment, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The Supreme Court, in *Crawford v. Washington*, 541 U.S. 36 (2004), unequivocably found that the Sixth Amendment's guarantee of a defendant's right to confront witnesses

against him is a "bedrock procedural guarantee." *Id.* at 42. Moreover, "[c]onfrontation means more than being allowed to confront the witness physically. Our cases construing the (confrontation) clause hold that a primary interest secured by it is the right of cross-examination." *Davis v. Alaska*, 415 U.S. 308, 315 (1974) (internal quotations omitted). Thus, the Framers chose confrontation through cross-examination, not judicial assessments of reliability, as the measure of fairness in American courts. *Crawford*, 541 U.S. at 61 ("To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.").

At least seven Circuits—the First, Third, Fourth, Fifth, Sixth, Ninth, and Eleventh—"have suggested that foreclosing recross-examination *after the government elicits one or more new issues on redirect* would constitute a Sixth Amendment violation." *United States v. Payne*, 437 F.3d 540, 547 n.5 (6th Cir. 2006) (emphasis in original); *see also United States v. Riggi*, 951 F.2d 1368, 1375 (3d Cir. 1991); *United States v. Caudle*, 606 F.2d 451, 457-58 (4th Cir. 1979); *United States v.*

Morris, 485 F.2d 1385, 1387 (5th Cir. 1973); *O'Brien v. Dubois*, 145 F.3d 16, 26-27 (1st Cir. 1998), *overruled on other grounds by McCambridge v. Hall*, 303 F.3d 24 (1st Cir. 2002); *United States v. Jones*, 982 F.2d 380, 384 (9th Cir. 1992); *United States v. Ross*, 33 F.3d 1507, 1518 (11th Cir. 1994).

As noted in Ahuja's brief, this Court's standard is unclear, but regardless, the error is reversible.

C. The District Court Unconstitutionally Denied Recross on Substantively New Testimony

Shor had no opportunity to confront, through cross-examination, any of the new evidence introduced or elicited for the first time on redirect. Accordingly, he was deprived of his Sixth Amendment right to confront the witnesses against him. *See Crawford*, 541 U.S. at 62 ("Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.").

Even if the denial of recross did not constitute a Constitutional error, it was still reversible error. The testimony and exhibits elicited on the unchallenged redirect was not only new, but the arguments the prosecution made with this evidence were central to attacking Shor's

defense. Indeed, in the jury's first note during deliberations, the jury requested Dole's new and unchallenged testimony about "Shor's boys," (A-892-93; Tr. 5061), confiming that the error was not harmless. *United States v. Swiderski*, 548 F.2d 445, 452 (2d Cir. 1977) (error not harmless where jury's note on topic indicated verdict "might well turn" on it). The conviction should be reversed.

IV. Testimony of an Immunized Government Witness Constructively Amended the Indictment or Amounted to a Prejudicial Variance

A. Relevant Background

The indictment and superseding indictment charge two fraud theories. "First, the Firm secured fraudulently inflated quotes for particular securities from corrupt brokers," also referred to as "friendly brokers" or "Shor's boys." (A-63). "Second, the Firm fraudulently calculated a so-called 'imputed mid' price for particular securities by improperly adding a so-called 'sector spread' to a bid." (A-63). The prosecution repeatedly disclaimed that it would rely on any other theory. (A-145-48).

However, in the middle of trial, the government elicited testimony from Nimberg, an immunized witness, in the following order: first, that

he participated in a fraudulent scheme to inflate valuations at Premium Point (Tr. 1530); second, that Ahuja, Majidi, Shor, and Dole participated in "this mismarking scheme" (Tr. 1531); and third, that the "scheme" Nimberg described involved entirely new theories that were not charged and disclaimed by the prosecution. He referred to the new theories as "challenge" and "pre-challenge" processes (Tr. 1560-61, Tr. 1568). Nimberg testified that Premium Point inflated its valuations through a challenge process by choosing only to challenge the lowest marks, out of an array of several marks received from brokers, in order to bring up the average valuation, and that this was "a perversion or a manipulation of the challenge process." (Tr. 1560-61). In addition, Nimberg testified that Premium Point engaged in a pre-challenge process in which Premium Point not only requested marks from brokers, but affirmatively told brokers the level of marks it desired beforehand. (Tr. 1568). Nimberg testified (with no apparent basis, and without any explanation from the prosecutor about why it was proper to elicit Nimberg's opinions on matters of law) that this pre-challenge process was "illegal." (Tr. 1570).

As a result, on June 17, 2019, Shor sent a letter objecting to this attempt to constructively amend the indictment with these new theories.

Shor requested that the Court "instruct the jury that it may *not* convict Mr. Shor for failing to challenge down the price of the counterparty marks or by engaging a prechallenge described by Mr. Nimberg." (A-889-91). The next day, the District Court stated: "I do not believe that it is a constructive amendment. I don't believe it's a prejudicial variance. To me, however, the government, having committed to identifying two species of fraud, I don't think it's appropriate for them to identify a third. And I do think that can be addressed in the instructions." (Tr. 1859-60). Ultimately, the defense concluded that a limiting instruction would not cure the constructive amendment and variance problem that the prosecution had created by eliciting Nimberg's uncharged theories of fraud, and would only exacerbate the harm by calling extra attention to Nimberg's testimony. (Tr. 4551-54). So, while expressly preserving the constructive amendment and variance objections, the defendants did not request an instruction. (Tr. 4551-54).

B. Applicable Law

"Ever since Ex parte Bain . . . was decided in 1887, it has been the rule that after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself." *Stirone*

v. United States, 361 U.S. 212, 215-16 (1960). The Supreme Court explained that "[t]he Court went on to hold in Bain: that after the indictment was changed it was no longer the indictment of the grand jury who presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney." *Id.* at 216-17 (internal quotation marks omitted).

This Court has established that "[w]hen the trial evidence or the jury charge operates to broaden [ ] the possible bases for conviction from that which appeared in the indictment, the indictment has been constructively amended." *United States v. Milstein*, 401 F.3d 53, 65 (2d Cir. 2005) (internal quotation marks omitted). A defendant prevails on a constructive amendment claim when he "demonstrate[s] that either the proof at trial or the trial court's jury instructions so altered an essential element of the charge that, upon review, it is uncertain whether the defendant was convicted of conduct that was the subject of the grand jury's indictment" *Id.* Once a defendant makes this showing, his case "require[s] reversal even without a showing of prejudice to the defendant" because "[c]onstructive amendments of the indictment are *per se*

violations of the fifth amendment." *United States v. Clemente*, 22 F.3d 477, 482 (2d Cir. 1994).

Moreover, this Court applies special consideration in determining whether a constructive amendment has ocurred where the defendant has been charged with conspiracy.

> [W]e have emphasized the need for particular vigilance in enforcing the government's burden of proof in prosecutions under § 371, in view of the 'broad range of conduct covered by the federal fraud statutes' and the risk that a defendant may be convicted of conspiracy based upon an agreement other than that specifically charged in the government's indictment.

United States v. Gallerani, 68 F.3d 611, 618 (2nd Cir. 1995) (quoting *United States v. Mollica*, 849 F.2d 723, 729 (2d Cir. 1988)). Similarly, this Court has stated that it "vigilantly enforce[s] the Fifth Amendment requirement that a person be tried only on the charges contained in the indictment returned by the grand jury" and warned that "the government in fraud cases" should not "confront[] the defendant with its theory of criminality for the first time at trial." *Mollica*, 849 F.2d at 729.

A variance occurs "when the charging terms of the indictment are left unaltered, but the evidence at trial proves facts materially different from those alleged in the indictment." *United States v. Dupre*, 462 F.3d

131, 140 (2d Cir. 2006) (internal quotation marks omitted). A variance becomes "prejudicial, and thus 'fatal to the prosecution,'" when it "infringes on the 'substantial rights' that indictments exist to protect—'to inform an accused of the charges against him so that he may prepare his defense and to avoid double jeopardy.'" *Id.* (quoting *United States v. D'Anna*, 450 F.2d 1201, 1204 (2d Cir. 1971)). This Court reviews claims of constructive amendment and prejudicial variance *de novo*. *See United States v. D'Amelio*, 683 F.3d 412, 416 (2d Cir. 2012).

C. Nimberg's Testimony Constructively Amended the Indictment or at Least Created a Prejudicial Variance

The prosecution constructively amended the indictment when it presented Nimberg's testimony that the fraudulent mis-marking scheme in which he and the defendants participated entailed new theories of mis-marking misconduct—abuse of the challenge process and purportedly "illegal" pre-challenges. (Tr. 1559-61, 1568). Nimberg's testimony invited the jury to convict on the theory that Premium Point chose not to challenge legitimate marks that happened to fall at the high end of the range of possible valuations, or on the theory that Premium Point told brokers the expected valuations prior to brokers submitting marks. Indeed, the jury specifically requested Nimberg's testimony in its first

note. (A-892-93; Tr. 5061). In other words, the prosecution's evidence at trial impermissibly broadened the bases for Shor's conviction, and thus, violated his Fifth Amendment right to have notice of the charges aginst him.

Even if not a constructive amendment, Nimberg's testimony varied from the charges in a manner that severely prejudiced the defendants. The charges did not specify, and the prosecution disclaimed, any fraud theory besides the use of friendly or corrupt brokers and the use of sector spreads, and thus Shor had no notice or opportunity to prepare a defense to Nimberg's claims that there was fraud in any challenge or pre-challenge process. *See Dupre*, 462 F.3d at 140. As a result, Nimberg's testimony created a prejudicial variance requiring reversal.

V. The Admission and Misuse of Hearsay Speculation About Shor's Motives Is Reversible Error

Shor's conviction should be reversed because the prosecution induced the District Court to admit, ostensibly not for its truth, a second-hand statement that bolstered its theory that Shor's actions and decisions in the second-half of 2015 reflected his effort to increase his compensation, rather than his legitimate concern regarding valuations. The prosecution then relied on that hearsay *for its truth* in summation.

In the context of the erroneous admission of hearsay evidence, this Court has explained that the error is not harmless, and the conviction must be reversed, unless, after evaluating the "'manner in which, in the total setting of the case, the error influenced the jury,'" the Court concludes that the error either "'did not influence the jury or had but very slight effect.'" *Cummings*, 858 F.3d at 774 (quoting *United States v. Check*, 582 F.2d 668, 684 (2d Cir. 1978)).

Over objection, the prosecution elicited from Evan Jay that when Shor's December 15 conversation with him was interrupted by other executives, Chip Montgomery, the chief operating officer, told Jay—and Jay told the jury—that Shor met with Jay because "he was trying to stir up the pot to get some leverage against the firm for purposes of getting a larger bonus or compensation." (Tr. 3746-50, 3813). The prosecution claimed that the statement was offered not for its truth, but purportedly for its effect on Jay's (irrelevant) state of mind, and the District Court admitted it solely on that basis. (Tr. 3746-50, 3813-14).

Nevertheless, in summation the prosecution used this statement for its truth and echoed its wording, stating: "If Mr. Shor was trying to report mis-marking in that meeting with Evan Jay, it's sure not clear

from the tape *or from what you heard from Mr. Jay. It was about his bonus*"; and "It was this one meeting so that he could *get leverage* for his *compensation*. That's what this was about." (Tr. 4697, 4699 (emphasis added) (summation)). By specifically echoing Montgomery's out-of-court claim, and urging the jury to rely on what it "heard from Mr. Jay," the prosecution directly relied on the out-of-court statement for its truth; the prosecution was not simply making an argument about how to interpret Shor's conduct and the content of the recorded conversation. The jury heard the content of the conversation from Shor's recording; what the jury "heard from Mr. Jay" was Chip Montgomery's out-of-court speculation about Shor's motives. This misuse of the erroneously admitted hearsay went to heart of Shor's defense and was not harmless.[9]

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[9] Not only was Montgomery's statement hearsay, but it would have been an inadmissible lay opinion or speculation even if the government had attempted to elicit it from the Chip Montgomery himself. *See* Fed. R. Evid. 701. Montgomery had no basis to speculate that Shor was motivated by greed when Shor met spontaneously with the new chief compliance officer and explained issues with valuation and pressure from Majidi. Nor did Montgomery's opinion do anything more than purport to tell Mr. Jay (and by extension, the jury) what to infer from Shor's conduct about Shor's intent—the ultimate issue in the case and the key to Shor's defense.

VI. The Speaking Indictment Should Not Have Been Submitted to the Jury

For the reasons stated in Ahuja's brief, the submission of the speaking indictment to the jury prejudiced the defense and tainted the deliberations. The convictions should be reversed.

CONCLUSION

The foregoing non-harmless errors, and those dicussed in Ahuja's brief, either individually or in combination, severely prejudiced Shor. Shor's judgment of conviction on all counts should be reversed.

Dated: New York, New York
May 4, 2020

Respectfully submitted,

By: /s/ Justin S. Weddle

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Dated: New York, New York
May 4, 2020

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