19-3936(L), 19-4122(CON)

United States Court of Appeals

for the

Second Circuit

UNITED STATES OF AMERICA,

Appellee,

– v. –

JEREMY SHOR, ANILESH AHUJA, AKA NEIL,

Defendants-Appellants.

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

BRIEF OF *AMICUS CURIAE* NEW YORK COUNCIL OF DEFENSE LAWYERS IN SUPPORT OF APPELLANTS

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INTEREST OF *AMICUS CURIAE*

The New York Council of Defense Lawyers ("NYCDL") is a not-for-profit professional association of approximately 350 lawyers, including many former federal prosecutors, whose principal area of practice is the defense of criminal cases in the federal courts of New York.[1] NYCDL's mission includes protecting the individual rights guaranteed by the Constitution, enhancing the quality of defense representation, taking positions on important defense issues, and promoting the proper administration of justice. NYCDL offers the Court the perspective of experienced practitioners who regularly handle some of the most complex and significant criminal cases in the federal courts.

For NYCDL and its members, there is perhaps no ruling of greater concern than one that curtails a criminal defendant's Sixth Amendment right to cross-examination. In the trial below, the district court imposed a rule denying the defense all requests for recross-examination as to new evidentiary assertions that the government repeatedly elicited on redirect examination of multiple, key witnesses. Such a categorical bar undermined the truth-finding process and

[1] The Government and Defendants-Appellants have consented to the filing of this amicus brief. Accordingly, this brief may be filed without leave of Court, pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure. *Amicus* affirms that no counsel for a party authored this brief in whole or in part, nor did any person, other than *amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

rendered the trial fundamentally unfair.

As a practical matter, cross-examination is often the only mechanism available to the defense as a meaningful guard against unjust convictions. Under the existing rules of federal criminal procedure, defendants have exceedingly limited options to mount a defense case. Defendants lack the prosecutor's access to search warrants, grand jury subpoenas for sweeping review of any documents, and subpoenas for sworn testimony even from hostile witnesses. Except in rare circumstances, the defendant cannot even compel the production of documents before trial. Even if favorable fact witnesses are found, they typically refuse to testify in court, broadly invoking their Fifth Amendment rights against self-incrimination. These are just some of the many limitations that defendants confront in their efforts to prepare for a meaningful defense at trial.

Even the tool of cross-examination is dulled. Criminal defense counsel do not enjoy the luxury of prior, sworn deposition testimony of adverse witnesses, which their civil counterparts deem indispensable for disputes about mere money. Instead, counsel typically have, at most, 3500 material (*i.e.*, government memos or notes purporting to summarize witness interviews) that are produced by the government mere days before such witness' testimony. Counsel is then generally expected to commence cross within minutes of

hearing the witness' narrative.

Yet, for all its limitations, cross-examinations are crucial to the truth-finding process because they regularly uncover lies, mistakes and hidden biases. That is a fact known to every experienced trial lawyer in the Anglo-American adversarial tradition. It is the most important procedural mechanism in our criminal justice system for ensuring the government's burden of proof does not reduce to a mere formality.

At issue on appeal is a district court practice truncating this long-standing protection against unjust verdicts. Presumably in pursuit of efficiency, the court categorically denied all requests for recross-examination, no matter how new and damaging the evidence that emerged on redirect examination. NYCDL has a powerful interest in explaining how erroneous and harmful the district court's practice was to the fairness of the trial below and to the criminal justice system as a whole.

SUMMARY OF ARGUMENT

This Court should reject any rule, practice or policy curtailing the right of cross-examination of new evidentiary assertions. Whether elicited by the government on direct or redirect, its evidence must be tested in what the Supreme Court has called "the crucible of cross-examination." *Crawford v. Washington*, 541 U.S. 36, 61 (2004). Denial of the right of cross-examination "calls into

question the ultimate integrity of the fact-finding process" itself. *Ohio v. Roberts*, 448 U.S. 56, 64 (1980).

Here, the district court applied a "rule" denying any requests for recross-examination (A-351): "I don't permit recross" (A-348).[2] The court then consistently rejected every basis the defendants articulated for recross, although the government repeatedly elicited new matters on its redirect examinations.

Doubtless, the district court's rationale for this bar was to promote the perceived value of trial efficiency, but that interest is trivial when compared to a criminal defendant's Sixth Amendment right to defend him or herself. The right to cross-examination has been embedded in the idea of fair trials for centuries and has garnered the consistent support of the Supreme Court in a long line of cases grounding that right in the Sixth Amendment to the Constitution. Every Court of Appeals that has addressed the precise question at bar has easily concluded that the constitutional right to cross-examination must, *a fortiori*, extend to recross-examination where the government elicited new evidentiary assertions on redirect. The district court's blanket denial was wholly inconsistent with this long and uniform case law.

Indeed, such a ban on recross is especially prejudicial because of the impact

[2] Citations to "A" herein shall be to the Appendix filed at Dkt. 95-98. "Ahuja Br." refers to the brief of Appellant Ahuja and "Shor Br." refers to the brief of Appellant Shor.

that unchallenged redirect evidence can have on juries. Redirect is supposed to be a sharp, focused effort to rehabilitate a witness after initial cross-examination. If, instead, the "rehabilitation" includes new evidentiary assertions, the jury cannot help but notice the last-minute insertion, for the evidence stands apart. Nor will it go unnoticed to the attentive jury that the defense did not even offer to challenge it or that the presiding judge would not permit a challenge. Jurors can easily infer from these circumstances that the new assertions are more likely true. The harm to a defendant cannot be measured, especially where, as here, the government relied on the new, unchallenged evidence during its summation. Under these circumstances, the government cannot meet its high burden of demonstrating that the violation of confrontation rights was harmless beyond a reasonable doubt.

NYCDL urges the Court to make clear that express or implicit bars on recross-examinations are improper and violate the Sixth Amendment right of confrontation. The convictions should be vacated and the matter remanded for a new trial as to both Appellants.

ARGUMENT

THE DISTRICT COURT'S BLANKET DENIAL OF RECROSS-EXAMINATION VIOLATED APPELLANTS' SIXTH AMENDMENT RIGHT TO CONFRONTATION.

A. The Governing Law

1. *The Sixth Amendment Guarantees Defendants The Right To Challenge The Government's Evidence Through Cross-Examination.*

A defendant's right to cross-examine the government's witnesses at a criminal trial is guaranteed by the Confrontation Clause of the Sixth Amendment. *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974) ("[T]he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination"). "The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution." *Pointer v. Texas*, 380 U.S. 400, 404 (1965). The right is so basic, the due process clause of the 14th Amendment demands its extension to all State authorities as well. *See Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) ("The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process."); *Pointer*, 380 U.S. at 403 ("We hold today that the Sixth Amendment's right of an accused to confront the witnesses against him is likewise a fundamental right and is made obligatory on the States by the Fourteenth Amendment.").

The right to confront and cross-examine witnesses "have ancient roots," *Greene v. McElroy*, 360 U.S. 474, 496 (1959), and "is a concept that dates back to Roman times," *Crawford*, 541 U.S. at 43.

Cross-examination is so firmly rooted in the Anglo-American legal tradition because of its critical importance in guarding against error or injustice. As Jeremy Bentham wrote: "Against erroneous or mendacious testimony, the grand security is cross-examination." 5 Jeremy Bentham, *Rationale of Judicial Evidence Specially Applied to English Practice* 212 n. (London 1827). John H. Wigmore declared that cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth." 3 John H. Wigmore, *Evidence* § 1367, 27 (2d ed. 1923); *see California v. Green*, 399 U.S. 149, 158 (1970) (quoting from Wigmore). Less sweeping, but no less emphatically, the Supreme Court observed: "certainly no one experienced in the trial of lawsuits[] would deny the value of cross examination in exposing falsehood and bringing out the truth in the trial of a criminal case." *Pointer*, 380 U.S. at 404.

Thus, cross-examination has been called the "crucible" in which the reliability of evidence must be tested. *Crawford*, 541 U.S. at 61; *Davis v. Alaska*, 415 U.S. at 316 ("Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested."). It is "more than a desirable rule of trial procedure. It . . . helps assure the accuracy of the

truth-determining process," *Chambers*, 410 U.S. at 295, for it is "a means of separating hearsay from knowledge, error from truth, opinion from fact, and inference from recollection." *The Ottawa*, 70 U.S. 268, 271 (1865). It ensures a process by which "facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased." *Alford v. United States*, 282 U.S. 687, 692 (1931).

The Court explained what is at stake: "opportunity to show that a witness is biased, or that the testimony is exaggerated or unbelievable . . . can make the difference between conviction and acquittal." *Pennsylvania v. Ritchie*, 480 U.S. 39, 52-53 (1985). The Court has thus "been zealous to protect these rights from erosion." *Greene v. McElroy*, 360 U.S. at 497. Denial of cross-examination rights "calls into question the ultimate integrity of the fact-finding process" itself, *Ohio v. Roberts*, 448 U.S. 56, 64 (1980), and "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Brookhart v. Janis*, 384 U.S. 1, 3 (1966).

Rule 611 of the Federal Rules of Evidence, as well as case law, afford a trial judge certain discretion to limit the extent of examinations, but given the constitutional significance of cross-examination, such discretion is necessarily circumscribed. Courts have discretion "to impose reasonable limits on . . . cross-examination based on concerns about, among other things, harassment, prejudice,

confusion of issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). Such limits "are not violations at all, obviously because they can have no impact on the fairness of the trial." *Id*. at 685 (White, J., concurring).

The district court, however, cannot curtail examinations that challenge the government's evidence, because such limitations would impact the fairness of a trial. "[D]iscretionary authority to limit cross-examination comes into play only after there has been permitted as a matter of right sufficient cross-examination to satisfy the Sixth Amendment." *United States v. Mayer*, 556 F.2d 245, 250 (5th Cir. 1977); *Hartzell v. United States*, 72 F.2d 569, 585 (8th Cir. 1934) (same). As the Court in *Alford* framed it: "[t]he extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court. It may exercise a reasonable judgment in determining when the subject is exhausted." 282 U.S. at 694. But the right to examine the "appropriate subject of inquiry" cannot be abridged.

2. Defendants Have an Equal Right to Recross-Examination of New Evidence Elicited on Redirect.

Every Court of Appeals to consider the issue has ruled that the constitutional right of cross-examination applies equally to new evidence elicited by the government on redirect. As the Fourth Circuit held: "[t]o deny recross examination on [a] matter first drawn out on redirect is to deny the defendant the

right of any cross-examination as to that new matter. The prejudice of the denial cannot be doubted." *United States v. Caudle*, 606 F.2d 451, 458 (4th Cir. 1979). The Third Circuit put it even more bluntly: "recross is to redirect as cross-examination is to direct. To allow redirect examination on new material but deny recross on the same material is to violate both the Confrontation Clause and fundamental principles of fairness." *United States v. Riggi*, 951 F.2d 1368, 1375 (3d Cir. 1991).

Other Circuit Courts have uniformly reached the same conclusion. *See United States v. Payne*, 437 F.3d 540, 546 n.5 (6th Cir. 2005) ("[T]he reliability of new matters drawn out during redirect examination is as important as the reliability of new issues raised on direct examination. Thus, when new matters are elicited on redirect, the Clause requires 'testing in the crucible of recross-examination.'"); *O'Brien v. Dubois*, 145 F.3d 16, 26-27 (1st Cir. 1998) (state court's judgment that "a criminal defendant has a Sixth Amendment right to recross-examination if such questioning attends a new matter elucidated for the first time on redirect examination . . . is eminently reasonable. . . . No other understanding of the Confrontation Clause's application to recross-examination would be objectively reasonable"), *overruled on other grounds by McCambridge v. Hall*, 303 F.3d 24 (1st Cir. 2002); *United States v. Fleschner*, 98 F.3d 155, 158 (4th Cir. 1996) (adopting "applicable rules" from *Riggi and Caudle* that "if a new subject is raised

in redirect examination, the district court must allow the new matter to be subject to recross-examination."); *United States v. Baker*, 10 F.3d 1374, 1404 (9th Cir. 1993) ("Allowing recross is within the sound discretion of the trial court except where new matter is elicited on redirect examination, in which case denial of recross as to that new matter violates the Confrontation Clause."); *United States v. Jones*, 982 F.2d 380, 384 (9th Cir. 1992) ("Because new matters were brought out during redirect, [trial judge's] blanket prohibition [on recross-examination] violated Jones' right of confrontation."); *United States v. Morris*, 485 F.2d 1385, 1387 (5th Cir. 1973) ("'A party has a right to re-cross examination only where new matter is brought out on re-direct examination.'" Quoting *Hale v. United States*, 435 F.2d 737, 749-50 (5th Cir. 1970)).

These conclusions conform to well-established trial procedures at common law. *See* Francis Wharton, *A Treatise on the Law of Evidence in Criminal Issues* 406 (8th ed. 1880) ("Whenever explanation is required of answers on re-examination, then the cross-examining party may re-cross-examine, confining himself to the new matter introduced on the reexamination."); 8 William M. McKinney, *Encyclopedia of Pleading and Practice under the Codes and Practice Acts, at Common Law, in Equity and in Criminal Cases* 129 (1897) ("Where a party, on re-examination, elicits new matter which is material and relevant to the issue, the opposing party is entitled to cross-examine the witness thereon as a

matter of right."); 4 John H. Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* 69 (2d ed. 1923) ("No doubt cases may arise in which a re-direct examination may make relevant certain new evidence for which there was no prior need or opportunity, and for this purpose a re-cross-examination becomes proper; in such cases it is sometimes said to be a matter of right.").

This Court implicitly agreed with the foregoing authorities in *United States v. Vasquez*, 82 F.3d 574 (2d Cir. 1996). There, the government elicited on redirect examination certain testimony that had not been given on direct examination. The district court denied recross because "'[i]t's sort of a blanket preclusion, unless I get a sense that something has happened that you really need perhaps some further inquiry'." *Id*. at 576. Without extended discussion, this Court concluded that such preclusion was error (albeit harmless in light of other evidence in the case, including the cross-examination that had been conducted). *Id*. Implicit in this brief ruling is the reasoning more fully expressed in the foregoing Circuit Court decisions: if a new matter has been raised on redirect examination, the Sixth Amendment requires the trial court to permit the defense to conduct recross-examination.

This conclusion hardly requires argument, for it flows logically. As the Eleventh Circuit put it, "by denying Appellant an opportunity to recross-examine

regarding new material elicited from Herrera on redirect, the court *a fortiori* abridged the Confrontation Clause." *United States v. Ross*, 33 F.3d 1507, 1518 (11th Cir. 1994). Whether the government's evidence against the defendant is offered on direct examination or redirect examination, the constitutional requirement is the same: the defense must be able to test the reliability of that evidence in "the crucible of cross-examination."

B. The Blanket Denial of Appellants' Recross-Examination Rights Violated The Sixth Amendment.

Here, the district court imposed a blanket "rule" denying all requests for recross-examination (A-351), stating: "I don't permit recross" (A-348); "No. No recross, not for the reasons you've described," which Ahuja's counsel sought in order to address new evidence elicited on redirect of a key cooperating witness. (A-351). The court advised the defendants not to expect recross "going forward" (A-354), and characterized its position against recross "[a]s a matter of practice." (A-354). When a defense motion later argued that the ban on recross would violate defendants' Sixth Amendment rights, the district court still denied the renewed request, stating that, while it could not "exclude the possibility of recross-examination," it "very, very rarely, if ever, allow[s] it" as a "matter of practice." (A-377).

At one point, the district court suggested the "theoretical possibility" of recross (A-354), without identifying the conditions that might actualize that

possibility. The court then consistently rejected every basis the defendants articulated for recross, no matter how often the government elicited new matters on redirect examination throughout the course of the trial. (*See*, *e.g.*, A-350-51, 354, 356-65; 377, 399-400, 544-45; 565; 610-11 (denying recross after government admitted two new exhibits during cooperator's redirect).) Thus, in both words and in practice, the district court applied an inflexible rule denying any requests for recross-examination.[3]

Of course, whether the ban was a blanket rule or effectively a rule is inconsequential. What matters is the effect. In *Vasquez*, the district court had left open the possibility of recross by saying "'[i]t's sort of a blanket preclusion, unless

[3] At a different point in the trial, the district court *sua sponte* offered Ahuja's counsel the opportunity to recross one government witness after redirect. (A-576). The defense had not sought to recross this witness and did not do so. (*See* Ahuja Br. at 15). Any suggestion that this incident demonstrates the absence of a blanket denial of all requests for recross would be meritless. *See Riggi*, 951 F.2d at 1372 (district court imposed unconstitutional "absolute" ban on recross even if it later "relented, little by little, until it eventually lifted its absolute bar"). The Sixth Amendment right to cross-examination is the defendant's right, to be exercised when and if it suits his or her defense to do so. A district court's unexpected offer to lift what had otherwise been a blanket bar for a relatively inconsequential witness only underscores the arbitrariness of the court's "rule." It does not dissipate the prejudice to the defense of the denial of each and every one of its requests for recross examination, without explanation.
Indeed, if anything, as discussed *infra* at 23, the *sua sponte* offer compounded the prejudice to the defense. The jury was left to infer that the court may have denied prior defense requests for recross because there was no legitimate basis for challenging the new evidence rather than because of the court's "rule" against recross.

I get a sense that something has happened that you really need perhaps some further inquiry','" but went on to bar recross of new testimony elicited during redirect examination. This Court concluded the denial was inappropriate. 82 F.3d at 576. Likewise, in *Jones*, the Ninth Circuit explained that whether or not the lower court actually had an absolute ban on re-cross examination mattered less than what its language reasonably led the defense counsel to believe. 982 F.2d at 384 (where defense counsel reasonably believed court had "an absolute ban on recross examination," defendant's rights were violated "[b]ecause new matters were brought out during redirect.").

Denial of the right of cross-examination or its "significant diminution . . . requires that the competing interest be closely examined." *Chambers*, 410 U.S. at 295. Yet, here, the record is devoid of any explanation as to what "competing interest" the district court sought to protect in denying each one of Appellants' requests for recross. Apparently, the trial judge has enforced this "rule," "policy" or "practice," in other criminal trials, *see* Ahuja Br. at 15-16, and one assumes the objective is efficiency, but that interest cannot withstand even modest scrutiny, much less the close examination required by law. What weight should courts give to saving one day (at most) of total time on recross when a defendant's constitutional rights and the very integrity of a six-week trial is at issue? The question answers itself.

Thus, the government offers a different explanation for the blanket denials. In post-trial proceedings, it denied having elicited any "new matter" on redirect examination. (Dkt. 42-1 at 16-18). Appellants' briefs amply demonstrate that, in fact, the evidence repeatedly elicited by the government on redirect was new and materially so. (Ahuja Br. at 31-41; Shor Br. at 56-57). We will not repeat those points but do address the government's striking, and wholly erroneous, theory of what constitutes "new matter." It suggested that no new matter was elicited on redirect examination because the new evidence related to Ahuja's scienter, or knowledge of the mismarking scheme – a topic already addressed during the direct and cross-examination of each witness at issue. (Dkt. 42-1 at 16-17). According to the government, Dole's new testimony on redirect that Ahuja knew about the corrupt broker Dinucci was not a "new matter" because it related to Ahuja's knowledge of mismarking (Dkt. 42-1 at 15-16), and, likewise, the two new exhibits introduced during the redirect examination of another government witness, Dinucci, were not new because they too were probative of Ahuja's knowledge. (Dkt. 42-1 at 17).

There is no legal support for the government's novel theory about "new matter," and it makes little sense. Every direct examination of every government witness is required to be relevant to some element of the offense, and scienter is often the most hotly contested element. Whether Appellants had the requisite *mens*

rea or scienter was the key issue in the trial (as it is in virtually every white collar criminal trial), but it was only on redirect examination that the government saw fit to elicit a new piece of evidence on the topic. For example, as to Ahuja, one new evidentiary assertion on redirect was the defendant's alleged knowledge of a corrupt broker. (*See* Ahuja Br. at 12). As to Shor, the government entered into evidence on redirect a text message exchange purporting to show that Shor was motivated by greed, not by lack of criminal intent, in marking down his book. (*See* Shor Br. at 5, 65).

If Appellants were to be denied recross-examination on the basis that an element of the crime was already the subject matter of cross-examination, there would be practically no basis for recross in any criminal case.

That is not the law. In *Baker*, the Ninth Circuit rejected a very similar contention to that suggested by the government here. It held that "the district court [had] applied an overly narrow definition of 'new matter,'" when it barred recross "if the questions fell within an 'area' or 'subject matter' for which cross-examination had previously been available." 10 F.3d at 1405. There, the defense counsel was precluded from recrossing a government expert relating to his qualifications because that subject matter had already been examined on cross. Counsel had sought to address a particular point elicited by the government on redirect, namely, that in many other cases, parties had stipulated to the witness's

expertise. *Id*. The appeals court held that by denying recross on the ground that the witness's qualifications had already been explored, the district court violated the defendant's Sixth Amendment rights because "[a]lthough [the witness's] expertise was not a new subject, the government introduced the matter of defense stipulations to [his] expertise for the first time on redirect. The Confrontation Clause required the opportunity for cross-examination as to this newly elicited and potentially damaging testimony." *Id*.

"New matter," then, is new evidence in the form of testimony or document. And that is precisely what the government repeatedly elicited during redirect examination, without the defense being permitted to challenge it. Not only was Dole's testimony that Ahuja knew of Dinucci a new assertion, it was materially different evidence. *See United States v. Blankenship*, 846 F.3d 663, 669 (4th Cir. 2017). Dole's unchallenged testimony strengthened the inference that Ahuja knew of the mismarking scheme. *See Riggi*, 951 F.2d at 1368 (government witness's redirect testimony materially changed significance of his earlier testimony on direct in that it definitively implicated Riggi in heading organized crime); *Baker*, 10 F.3d at 1405 (redirect raised new matter when witness testified that flask could produce significantly more methamphetamine than the amount he had testified it could produce on direct).

The government's reliance on the exhibits introduced during redirect of its

witnesses removes any doubt they constituted new and materially different information. During its summation, the government highlighted one of the two exhibits (A-644-645), and the jury specifically requested both exhibits during deliberations (A-736). The government also highlighted in summation a text-message exchange ("I dropped the bonus line . . . just now") admitted during Dole's redirect and argued that it related to Shor's motivation for marking down his book more than 10 days previously. (A-663); *see* Shor Br. at 53.

This Court in *Vasquez* cited the government's references in summation to the evidence elicited on redirect as a basis for finding that recross should have been permitted. 82 F.3d at 574. Having relied on the evidence to urge and obtain convictions, the government should not now be heard to claim they did not constitute "new matters" warranting recross-examination.

C. The Constitutional Violation Was Not Harmless

The constitutional violation of Appellants' cross-examination rights requires reversal of the convictions because it was not harmless error. To analyze the effect of an improper denial of cross-examination rights, "[t]he correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." *Van Arsdall*, 475 U.S. at 684. This heavy burden is squarely on the government "to establish harmlessness, even in the absence of an

offer of proof [by defendant]." *Riggi*, 951 F.2d at 1377. This makes eminent sense because cross-examinations are "necessarily exploratory," *Alford*, 282 U.S. at 691, and it is not possible to know how a jury would have reacted to cross-examination as it unfolded. *See Davis v. Alaska*, 415 U.S. at 317 (declining to "speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted [the defense] line of reasoning had counsel been permitted to fully present it"). Thus, the Court should presume that:

> Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial.

Alford, 281 U.S. at 692. *See also Smith v. Illinois*, 390 U.S. 129, 132-33 (1968) (quoting *Alford* and reversing conviction where cross-examination was improperly curtailed).

Where, as here, the defense was precluded from cross-examining multiple factual assertions made for the first time on redirect examination, the government cannot meet its burden of overcoming this presumption beyond a reasonable doubt. This is especially so in light of the number of ways in which the inability to cross-examine the new evidence may well have affected the jury's deliberation and its assessment of the government witnesses. (*See* Ahuja Br. 42-45; Shor Br. 43-44;

56-57). Each scenario is plausible, and assuming – as we must – the "full[] realiz[ation]" of the "damaging potential of the cross examination," *Van Arsdall*, 475 U.S. at 684, one cannot conclude beyond a reasonable doubt that the preclusion of recross-examination did not matter to the outcome.

The Supreme Court has rejected harmlessness arguments in far less egregious contexts. In *Smith v. Illinois*, for example, the Sixth Amendment violation that required reversal was precluding defense counsel from inquiring into a witness's true name and address. Defense counsel had had a full opportunity to cross-examine the witness, and the witness even conceded he previously used a false identity. 390 U.S. at 131. Thus, the dissenting opinion argued forcefully that defense counsel already knew the witness' name because he had previously represented him; thus, "counsel was asking routine questions, to which he already knew the answers, and [] his failure to get answers in court was of no consequence." *Id*. at 135. Yet the Court by an 8-to-1 majority rejected this approach, postulating instead the uses to which a defendant might have put the cross-examination that was not permitted. "The witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself." *Id*. at 131. *See also Davis v. Alaska*, 415 U.S. at 318 (although counsel had an opportunity to cross-examine the State's

witness as to "whether" he was biased, cross-examination should have been permitted to explore "why" he might be biased, so that "jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness.").

Indeed, while Sixth Amendment jurisprudence has largely focused on the right of cross-examination and not recross, the circumstances under which redirect testimony is adduced at trial materially magnify the prejudice to the defendant if recross is improperly denied. This is true because the jury's attention is most rapt during the drama of the exchange between adversaries during direct, cross, and redirect. The witness has usually delivered a planned, smooth, and convincing narrative during direct examination; the narrative is shaken and undermined during cross-examination; on redirect examination, the prosecutor typically poses highly focused questions to "rehabilitate" the witness and punctuate the high points of the narrative delivered on direct examination. The nature and form of the questions make clear to the jury the purpose of the redirect examination: to repair the damage done on cross. This exchange has the full attention of the jury for a key question they must decide is whether the witness is a liar or otherwise unreliable.

In this setting, if the prosecutor goes beyond rehabilitating the witness to eliciting new and materially different assertions of fact, the new and unfamiliar evidence is highly likely to become a focus of the jury (even if the government

does not urge the jury to rely on the evidence, as it did here). The context of rehabilitation also invites jurors to regard the new information as bolstering the witness and the reliability of his or her narrative, rather than as new evidence that must be separately evaluated for reliability.

It becomes critical under these circumstances that the defendant have some response, for the jury is waiting. The jury in the trial below, for example, had been led to believe that recross to challenge the government's evidence might occur. (*See* A-243 (during preliminary jury instructions, court instructing jury recross may occur); A-577 (in presence of jury, court *sua sponte* offered defense the opportunity to recross-examine a witness, which defense had not sought. *See discussion supra* at 14, n.3). If defense counsel seeks recross and is denied, as often occurred here, the jury could naturally conclude the judge determined the new evidence should remain unchallenged. If, on the other hand, defense counsel does not seek recross (believing the court to have imposed a bar on recross), the jury can easily conclude that the defense conceded the new point. Either way, the jury is left with little choice but to conclude the evidence may be accepted as fact. Even worse, it could reasonably conclude that the general reliability of the witness has been established, because the government was permitted to rehabilitate the witness with new evidence that was not or could not be challenged.

Here, of course, the government compounded the prejudice by urging the

jury in summation to rely on the new evidence to find guilt. It relied on witness Dole's information elicited only during redirect (A-654-655, 656-657, 662, 676) and urged the jury to consider and accept as reliable evidence one of the two exhibits introduced on redirect of a witness. (A-654-55). The attentive jury not only asked for that exhibit but the other exhibit introduced during redirect as well. (A-736). The government's methodical reliance on the new evidence, as well as the jury's demonstrated interest in it, belie the government's current claims that the error was harmless.

Van Arsdall offers a fitting bookend. There, the Court held that denial of the Sixth Amendment right of cross-examination requires harmless error analysis and remanded to the Delaware Supreme Court to perform that review. 475 U.S. at 687. On remand, Delaware's highest court concluded that the State failed to carry its burden of showing harmlessness beyond a reasonable doubt: "Although the evidence pointing to Van Arsdall's guilt was strong, it was not overwhelming." *Van Arsdall v. State*, 524 A.2d 3, 13 (Sup. Ct. Del. 1989). After conducting a close examination of the record, the court offered a series of pathways by which the jury might have acquitted had cross-examination into bias of the government witness been permitted, *id*. at 10-13, and concluded that, in the end, allowing cross "may have affected the jury's view of the strength of the prosecution's case as a whole." *Id*. at 12.

That same conclusion is inescapable here.

CONCLUSION

For the reasons stated above, the Court should vacate Appellants' convictions and grant their request for a new trial.

Dated: New York, New York
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Respectfully submitted,

NEW YORK COUNCIL OF DEFENSE LAWYERS

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I certify that, according to the word-count feature of the word processing program, this brief contains 5722 words, including headings, footnotes and quotations, but excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and therefore is in compliance with the type-volume limitations set forth in Rule 32(a)(7)(B).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionately spaced typeface using Microsoft Word 2010 and in 14-point Times New Roman font.

Dated: New York, New York
May 8, 2020

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