UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Appeal No. 12-3299 and 12-3663

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

NORMA LEONARD-ALLEN and
WALTER STERN III,

Defendants-Appellants.

Appeal From A Final Judgment of Conviction
Entered In The United States District Court
For The Eastern District of Wisconsin,
Honorable Rudolph T. Randa Presiding

BRIEF AND SHORT APPENDIX OF DEFENDANT-APPELLANT WALTER STERN III

ELLEN HENAK
ROBERT R. HENAK
HENAK LAW OFFICE, S.C.
316 N. Milwaukee St., #535
Milwaukee, Wisconsin 53202
(414) 283-9300

Counsel for Defendant-Appellant

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

The undersigned, counsel for the appellant, Walter Stern III, furnishes the following list in compliance with Circuit Rule 26.1 (7th Cir.):

(1) The party represented is Walter Stern III

(2) Law firms which have represented the party in this matter:

Henak Law Office, S.C.

Boyle, Boyle, and Boyle, S.C.

(3)(I) N/A

(3)(ii) N/A

Dated: January 22, 2013 s/ Ellen Henak
Ellen Henak

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions, Statutes, and Rules

Other Authorities

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BRIEF OF DEFENDANT-APPELLANT WALTER STERN III

JURISDICTIONAL STATEMENT

This is an appeal from the final judgment of conviction and sentence entered by the district court on November 20, 2012, finding Walter Stern III guilty and imposing sentence.[1] The district court had jurisdiction over this federal criminal action under 18 U.S.C. §3231. The Court of Appeals has jurisdiction to hear this appeal under 28 U.S.C. §1291. Stern filed his notice of appeal on November 21, 2012.

There are no motions for a new trial or alteration of the judgment, or any other motion which would toll the time in which to appeal pursuant to

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[1] Although the district court entered an amended judgment on January 15, 2013, to correct its designation recommendation to the Bureau of Prisons (R91; App. 1-6), that document changed nothing of substance to this appeal.

Fed. R. App. P. 4(b)(3), but there was a motion for acquittal which was filed on July 11, 2012, after the trial but before sentencing, and was denied on August 28, 2012.

There are no prior appellate proceedings in this case, but Stern's co-defendant previously filed an appeal, *United States v. Norma Leonard-Allen*, Appeal No. 12-3299, which has been consolidated with this case.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether statements made by Norma Leonard-Allen to Walter Stern III to induce him to purchase Certificates of Deposit with her money in his name, as well as his in-court statement of his reasons for purchasing the Certificates of Deposit, were not hearsay and therefore were improperly excluded at trial.
2. Whether evidence that Leonard-Allen did not even tell her own daughters of her bankruptcy made it less probable that "of course [Stern] knew" of the bankruptcy and therefore was relevant and improperly excluded at trial.
3. Whether the words "Walter Stern" which Leonard-Allen wrote in response to her bankruptcy attorney's marketing question on her intake data form was inadmissible hearsay and therefore improperly admitted at trial under Fed. R. Evid. 807 and Fed. R.

Evid. 801(d)(2)(E).

STATEMENT OF THE CASE

Walter Stern III, was indicted (R1), and was convicted (R75; App 7),[2] of the charge of one count of conspiracy to commit money laundering, contrary to 18 U.S.C. § 1956(h), following a joint jury trial with Norma Leonard-Allen (R86; R87; R89). The real issue at trial was whether Stern knew at the time that the money Leonard-Allen gave him to put into Certificates of Deposit in his name was an asset she failed to report in her prior bankruptcy proceeding when he purchased the Certificates of Deposit (R89:385 (government closing argument)). That issue itself turned on whether Stern then knew of Leonard-Allen's bankruptcy proceedings (*Id*.).

At trial, Stern three times attempted to testify about his reasons for obtaining the Certificates of Deposit, but was prevented from doing so because the district court sustained the government's objections to the testimony on grounds of hearsay (R87: 283-286; App.101-104). During the first of these attempts, the following occurred:

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[2] Throughout this brief, abbreviations are used pursuant to Fed. R. App. P. 28(e). Documents in the record are identified by the district court docket sheet number as "R___"; the following ":___" reference denotes the exhibit page number of the document. When the document is reproduced in the attached or separate appendix, the applicable appendix page number is also identified as "App. ___."

The transcript of the motion hearing of June 15, 2012 was requested and prepared but not yet included in the record. Stern has asked the court reporter to correct this oversight.

Q. Do you recall going to the bank on that date?

A. Yes, I do.

Q. And how did that come about?

A. Well, about three days or so before --

MR. GIAMPIETRO: Objection. Calls for hearsay answer.

MR. BOYLE: Not for the truth of the matter asserted, Judge. As to impact on him.

MR. GIAMPIETRO: That's not an exception to the hearsay rule.

THE COURT: Yes. The Court will sustain the objection.

(R87:283-284; App. 101-102). Another attempt followed:

Q. Prior to going there on March the 3rd, 2006, did you have an understanding of what was asked of you for you to go to the bank and purchase C.D.'s?

A. Yes.

MR. GIAMPIETRO: Objection. Calls for a hearsay answer.

THE COURT: It does, and so the objection will be sustained. Let me just say something here, Mr. Boyle. There's been quite a few objections throughout the trial on both sides relative to hearsay. And so let me explain what that is. Hearsay is what someone else said. Generally you can't -- a witness can't testify as to what someone else said. There are exceptions to that in the Rules of Evidence, but -- and when there are exceptions, then the Court will allow it. But when there aren't, then the Court will sustain the objection. Okay.

MR. BOYLE: Understood, Your Honor.

(R87:285-286; App.103-104). Stern made one final attempt but was still not allowed to testify as to his reasons:

Q. And you having control of it was to serve what purpose?

MR. GIAMPIETRO: Objection. Calls for hearsay answer.

THE COURT: That will be sustained.

(R87:286; App. 104).

Nor was Stern allowed to introduce as witnesses the daughters of Norma Leonard-Allen. Prior to the trial, defense counsel sent the government a list of potential witnesses that included Patricia Vines, Jeanette Frick, and Angela Cassity. (R18:Attach.1; App. 165-166). The letter noted that the defense would be calling them to testify that "they were unaware that their mother was going through bankruptcy." (R18:Attach.1; App. 165-166). Upon receiving this letter, the government moved *in limine* to exclude these witnesses on the ground that their testimony was not relevant. (R18:2-4; App. 156-158).

The government's motion *in limine* also sought admission, under Fed. R. Evid. 801(d)(2)(E) and Fed. R. Evid. 807, of a client intake form that Leonard-Allen filled out in preparation for her initial meeting with her bankruptcy attorney, Mary Losey (R19:8-9; App. 174-175). That form contained a question, "How did you select this office?" and four boxes, one of which read "Friend/Referral" (R38:Ex.10; R19:Ex.A; App. 177). In the box next to the words "Friend/Referral," Leonard-Allen placed a check mark and the words "Walter Stern" (R38:Ex.10; R19:Ex.A; App. 177). Stern responded to the government's motion with a motion to adjourn which set forth the argument that the intake form was not admissible (R22).

Both motions were argued at a hearing held on June 15, 2012 (Mo. Hng.

6/15/12; App. 118-154).

By decision and order dated June 15, 2012, the district court, the Honorable Rudolph T. Randa presiding, granted the government's motion and both excluded the testimony of the daughters and admitted the intake memo (R37; App.105-117). As to the daughters, the Court held that the testimony was not relevant because their lack of knowledge of Leonard-Allen's filing for bankruptcy was not probative of Stern's knowledge (R37:9-10; App.113-114). The Court based its ruling on the nature of their relationship, which was "qualitatively different from [Leonard-Allen's] relationship with Stern." (R37:9; App.113).

As to the intake from, the Court held that the form presented two levels of hearsay (R37:7-8; App.111-112). The first was the intake form itself which was admissible as a record kept in the ordinary course of business under Fed. R. Evid. 803(6) (R37:7-8; App.111-112). The second level involved the words Leonard-Allen wrote on the form (R37:8; App.112). The Court reasoned that this level was admissible against Stern as a co-conspirator statement under Fed. R. Evid. 801(d)(2)(E) based upon the preponderance of the evidence which the Court held showed a money-laundering conspiracy that existed as of the date of the form (R37:8-9; App.112-113). The Court further held, without stating its reasoning, that the form also was admissible "under the

residual hearsay exception in Rule 807" (R37:9; App.113).

After conviction, the district court sentenced Stern to one year and one day in prison and to two years of supervised release and, on November 20, 2012, the Court entered judgment (R75; App. 7). [3] On November 21, 2012, Stern filed his notice of appeal. (R77).

By Order dated December 28, 2012, this Court extended the time for filing Stern's opening brief to January 22, 2013.

STATEMENT OF FACTS

Norma Leonard-Allen petitioned for divorce from her husband, John Allen, and the case resulted in a marital settlement agreement, which they entered into on June 1, 2005 (R38:Ex.1; R86:27-28, 30). Under the terms of the agreement, they became legally separated (rather than divorced); Leonard-Allen was able to remain on Allen's insurance because he could not convert the matter to a divorce for five years;[4] and Allen paid no maintenance, but Leonard-Allen was to receive $95,000 as a settlement of property division (R86:28-29, 32, 57). The money was to be paid in four installments with $29,000 due on June 16, 2005, $20,000 due on or before November 6, 2005,

[3] Although the amendment is not relevant for purposes of this appeal, the district court filed an amended judgment on January 9, 2013, altering its prison recommendation (R91; App.1-6).

[4] The legal separation ultimately was converted to a divorce on June 14, 2010 (R86:44).

$26,000 due on or before February 1, 2006, and the final payment of $26,000 due on or before May 1, 2006 (*Id.*:29). Allen gave a mortgage to Leonard-Allen to secure the payments (*Id.*). The documents which finalized the legal separation were filed in court on July 5, 2005 (R38:Ex.3; R86:32).

Allen's attorney for the divorce was Donald E. Mayew (R86:26). Attorney Mayew never had any discussions at any time with Stern concerning the marital settlement agreement (*Id.*:29, 49).

Leonard-Allen's attorney for the divorce was Robert Grady (*Id.*:56). Attorney Grady took the case as a referral from Stern (*Id.*:58). Stern, whom Grady primarily knew as a lawyer in Kenosha and as a fellow golfer, made the first contact about the divorce case with Grady by telephone (*Id.*:58-59, 83). Grady subsequently met with Leonard-Allen and agreed to take the case (*Id.*:59). As a result of the referral, as a matter of professional courtesy, and out of concern for his client's emotional state, Grady contacted Stern when Mayew made an offer of settlement on the second day of the divorce trial (*Id.*:65, 84). Grady may have instigated this contact (*Id.*:70). He told Stern the status of negotiations and what the offer was and requested advice (*Id.*:91).

Mayew sent the first installment payment of $29,000 to Grady on June 13, 2005 (R38:Ex.2; R86:30, 60). Grady's procedure was to give the check to his secretary and have her contact Leonard-Allen to come in and sign the check

(R86:61-62). The check then would be deposited into Grady's trust account and, after the check cleared, he would take his attorney fees out of the monies, leaving the balance to Leonard-Allen (*Id*.). It is not clear when Leonard-Allen signed the first check (*id*.:62) but it was deposited into Grady's trust account on June 22, 2005 (R38:Ex.18; R87:178). In any event, although such delay was rare, it was almost six months before the money was disbursed to Leonard-Allen (R86:61). Grady never discussed either this check or the delay in disbursement with Stern (*Id*.:69).

On July 6, 2005, the day after the filing of the final papers in her legal separation, Leonard-Allen went to Attorney Mary Losey (*Id*.:110-111). As was their routine, Losey's staff gave Leonard-Allen a client intake data form (R38:Ex.10; R86:110). This intake form, among other things, sought information concerning how clients heard about Losey and, next to the words "Friend/Referral," Leonard-Allen had written a check mark and"Walter Stern" (R19:Ex.A; R38:Ex.10; R86:113; App.177) . Losey was collecting this data to aid in marketing (R86:113-114).

Stern did not contact Losey before Leonard-Allen met her and Losey and Stern had no contact while the bankruptcy case was pending (*Id*.:135-136). He had never sent her a case before and, after a search of her files, she could not find any other client intake form with his name on it (R86:124). Losey

never spoke with Stern about Leonard-Allen (*Id.*:125). Losey never called and thanked him and she never sent him any type of thank you note (*Id.*:125-126).

Losey and Leonard-Allen agreed that Losey would file a Chapter 7 bankruptcy on Leonard-Allen's behalf (R86:109, 114). Losey prepared the Chapter 7 petition and, as part of the process, she gave Leonard-Allen a questionnaire that was approximately 30 pages long which, among other things, asked Leonard-Allen to list all of her assets (*Id.*). Losey used this information to draft the bankruptcy petition and schedules, which she or her staff then reviewed with her client in great detail (*Id.*:116-118). The bankruptcy petition and schedules did not include information on Leonard-Allen's marital settlement agreement or her entitlement to receive $95,000 because Leonard-Allen did not disclose that information to Losey (*Id.*:122). That information should have been included under the law (*Id.*). Instead, the total assets listed for Leonard-Allen amounted to $30,775 (*Id.*:119). The petition and schedules were filed in bankruptcy court on September 30, 2005 (R38:Ex.11; *Id.*:117).

While the bankruptcy was pending, on November 2, 2005, Mayew sent a second installment payment of $20,000 to Grady as required by the marital settlement agreement (R38:Ex.4; R86:33; R87:179). Grady, who did not know

of the filing of the bankruptcy,[5] forwarded this check to Leonard-Allen within a day or two of receiving it (R86:63, 71). Grady never discussed this check with Stern (*Id.*:69).

In November of 2005, there was a trustee meeting in the bankruptcy case, known as a "341 hearing," at which Leonard-Allen appeared with Losey (*Id.*:119, 141, 146). At this hearing, Bankruptcy Trustee Michael P. Maxwell questioned Leonard-Allen about the information on the schedules including whether she reviewed the petition and schedules before signing them and whether she listed all her assets (*Id.*:140, 145, 146-147). The purpose of this meeting was to make sure the information in the petition was complete, truthful, and accurate (*Id.*:119-120). Despite the omission from the bankruptcy petition and schedules of any information concerning the marital settlement agreement or payments, Leonard-Allen re-affirmed and verified the petition and schedules (*Id.*: 147, 149). No testimony from anyone suggested that Stern was present at this 341 hearing.

On January 11, 2006, Grady disbursed a check from his trust account to Leonard-Allen for $24,039.50, which represented the amount from the first installment payment minus his attorney fees (R38 :Ex.20; R86:61; R87:180-181). Grady did not speak to Stern about the disbursement of the funds or the

[5] Grady had no discussions with Losey between June of 2005 and April of 2006. (R86:78).

holding of the funds in Grady's trust account (R86:69-70).

Leonard-Allen was discharged in bankruptcy on January 14, 2006 and Losey's representation of her ended (R38:13; R86:123, 148;). The court order discharging Leonard-Allen in bankruptcy precluded her creditors from legally pursuing debt collection efforts against her (R86:144). Once discharge occurs, the only way to revoke it is for the bankruptcy trustee or the United States Trustee program to bring an adversary proceeding and win (*Id*.:145). Either trustee has only a one year period in which to make this attempt to revoke the discharge (*Id*.). If an asset becomes known after that one year period, the most that can be done is to try to re-open the case to pursue it but the discharge itself cannot be revoked (*Id*.).

All creditors were notified of the discharge (*Id*.:148). Bankruptcy Trustee Maxwell never spoke to Stern about the discharge, the bankruptcy, or anything else (*Id*.:158).

Soon after the bankruptcy discharge, Mayew sent Grady the third installment payment of $20,000 (R38:Ex.5; R86:34-35). Grady forwarded this check to Leonard-Allen within a day or two of receiving it (R86:63, 71). Grady never discussed this check with Stern (*Id*.:69).

At the beginning of February of 2006, Mayew wrote to Grady and advised him that the check for the second installment payment had not been

cashed (R38:Ex.6; R86:35-36). Grady checked his file and confirmed that he sent the check to Leonard-Allen (R86:64). He then wrote to Leonard-Allen (*Id.*:71)

A few weeks later, Leonard-Allen negotiated the third installment payment in the amount of $20,000 at the Southern Lakes Credit Union, the financial institution from which it had been issued, rather than at her own bank (R38:21; R87:181-183, 189). She took out $1,000 in cash from the check and obtained a teller's check, payable to herself, in the amount of $19,000 with the balance of the proceeds (R38:21; R87:182). FBI Special Agent Michael Johnson found no evidence that Stern accompanied Leonard-Allen to the Southern Lakes Credit Union (R87:233).

According to Special Agent Johnson, the first evidence of Stern's knowledge of the monies from the marital settlement agreement in the records the agent obtained occurred on March 3, 2006 (*Id.*:240). Stern, however, testified that he first learned that Leonard-Allen had received various checks as part of her divorce settlement three days earlier (*Id.*:183).

In any event, on March 3, 2006, Stern and Leonard-Allen went to the Bank of Kenosha (*Id.*:233, 235, 283-284). Stern testified that she wanted him to take care of her money (*Id.*).

That day, Leonard-Allen negotiated the second installment payment

from the marital settlement agreement in the amount of $20,000, after having endorsed it, payable to Stern, at an unknown time (R38:Ex.19; R87:180, 224). She also negotiated the check from Grady in the amount of $24,903.50 (the balance of the first installment check of the marital settlement agreement), after having endorsed it, payable to Stern, at an unknown time (R38:Ex.20; R87:180-181, 224). In addition, she negotiated the teller's check in the amount of $19,000 from Southern Lakes Credit Union after having endorsed it, payable to Stern, at an unknown time (R38:Ex.21:2; R87:224). Stern's initials appeared on the back of each of these checks (R38:Ex.19, Ex.20, Ex.21:2).

Stern then purchased a 9-month Certificate of Deposit in the amount of $64,000 with the check from the trust account, the teller's check, the third installment payment check,[6] and $100 in cash (R38:Ex.22:3-4; R87:184, 224). Stern designated Leonard-Allen as the payable-on-death beneficiary of the Certificate of Deposit and she was listed as his "fiancee" on the form (R38:Ex.22:2; R87:310).

Almost two months later, on April 26, 2006, Mayew sent Grady the fourth and final payment of $26,000 (R38:Ex.7; R86:36). On August 4, 2006, Leonard-Allen negotiated this final installment payment at the Southern Lakes Credit Union, the financial institution from which it had been issued

[6] The aggregate amount of these checks was $63,903.50

(R38:Ex.23:2; R87: 184-186). She took out $6,000 in cash from the check and obtained a teller's check, payable to herself, in the amount of $20,000 with the balance of the proceeds (R38:Ex.23:3). At some point, she endorsed the teller's check to Stern and he subsequently signed it (*Id.*:Ex.23:2).

On December 3, 2006, after the first Certificate of Deposit reached maturity, Stern purchased a second Certificate of Deposit, this time for 12 months and in the amount of $88,398.88, with the new teller's check and the funds and interest from the original Certificate of Deposit (R38:Ex.24; R87:186-187). Again, Stern designated Leonard-Allen as the payable-on-death beneficiary of the Certificate of Deposit (R38:Ex.24:2)

Attorney Mayew eventually became aware of Leonard-Allen's bankruptcy case and, at the beginning of 2007, he wrote to Trustee Maxwell and, for the first time, made the trustee aware of the marital settlement agreement and the payments that had been made (R38:Ex.14; R86:39-40, 149-150). Maxwell immediately prepared the documents necessary to reopen the bankruptcy case because the one-year deadline for doing so was fast approaching (R86:150). The bankruptcy court reopened the case, based upon Leonard-Allen's failure to disclose the assets from the marital settlement agreement (R38:Ex.15; R86:151; R187:209).

According to Stern, the first he knew of the bankruptcy was when he

saw the papers seeking to reopen the bankruptcy and he became upset and angry (R87:293-295). He then made sure Leonard-Allen got a lawyer and, through Leonard-Allen's lawyer, assured that the trustee knew that he had the Certificates of Deposit (*Id.*:294, 296, 314). While the reopened bankruptcy case was pending, Mayew ran into Stern and Leonard-Allen at a restaurant (R86:41). Apparently, Stern was aware of Mayew's role in the reopening of the case because he said something to the proprietor to the effect of "What do you think of a lawyer who would report to the Trustee under these circumstances?" (*Id.*:42). Mayew left without responding (*Id.*)

The reopened bankruptcy case resulted in an order revoking the discharge and in Leonard-Allen providing her creditors enough money to pay all of the claims in the case at that time, which amounted to approximately $15,000 worth of claims (R86: 152-153, 156; R87:209). The case then was closed at the beginning of September of 2008 (*Id.*:153).

Leonard-Allen subsequently pled guilty to two counts of bankruptcy fraud (R87:190, 203). Specifically, she was convicted of two counts of false declaration under penalty of perjury (R38:Ex.25; R87:190, 203).

Agent Johnson, who investigated Leonard-Allen's fraud, was not satisfied and did not close the investigation (R87:191). He was aware that Stern had represented Leonard-Allen in a civil case in 2003 or 2004 and that

they subsequently were romantically involved (*Id*.). He therefore targeted Stern because he believed Stern was involved in assisting Leonard-Allen to hide the proceeds of the marital settlement agreement from the bankruptcy court (*Id*.:191, 202, 205).

Johnson sought and received an immunity order requiring Leonard-Allen to testify before the grand jury and to give information concerning Stern's involvement (R38:Ex.26; R87:191-192, 206). It also protected her from prosecution for anything she told them, with the exception of protection from prosecution for perjury (R38:Ex.26; R87:192). After the order was entered, although Leonard-Allen was not required to do so, she and her criminal defense attorney met with Johnson and Assistant United States Attorney Gordon Giampetro for two hours while the government asked about her relationship to Stern and her concealing of the proceeds of the marital settlement agreement (R87:193). The government also asked if Stern had referred her to Attorney Losey. (*Id*.). Johnson hoped that she would say that Stern had helped her commit fraud (*Id*.:207).

The government pressed her and "questioned her responses as not being forthcoming information that [they] were looking for" (*Id*.:194). Put bluntly, the government communicated that it thought she was lying (*Id*.:208). Despite this pressure, "[s]he said that Walter Stern did not know about the

bankruptcy" and she said "Walter Stern did not refer her to Mary Losey" (*Id*.:193). She repeated these assertions several times (*Id*.:239).

Although the government did not get the answers in the meeting that it hoped to hear, it forced Leonard-Allen to testify before a grand jury on October 13, 2010 (R38:Ex.27, Ex.29; R87:194). In the limited portions of testimony presented by the government at trial, Leonard-Allen indicated that she and Stern had been boyfriend and girlfriend for five or six years, beginning shortly after he represented her in a civil case (*Id*.:196). (Although she could not recall the dates (*id*.), documentation at the trial in this case showed that the civil case concluded in November of 2004 (R38:Ex.28; R87:197).)

In addition, Leonard-Allen testified twice in the grand jury that Stern did not refer her to Attorney Losey (R38:Ex. 29; R87:200, 210). Instead, she said she came to know about Losey from a prior job at Consumer Credit Counseling (R38:Ex.29; R87:200). She also insisted twice before the grand jury that Stern did not participate in her bankruptcy fraud (R87:209-210).

Stern testified at trial that he did not know at the time of the marital settlement agreement that Leonard-Allen was contemplating bankruptcy nor did he know, either at the time of the payments under the agreement or at the time he purchased the Certificates of Deposit, that she had gone to see

Attorney Losey (R87:280). Although he knew Losey, he said he had never referred any bankruptcy cases to her (*Id*.:282). He insisted that he never conspired with Leonard-Allen to hide the proceeds of the settlement from any claimant and that he never told her not to negotiate any checks until her discharge in bankruptcy (*Id*.:289).

No witness ever testified at trial that Stern knew about the bankruptcy when he obtained the Certificates of Deposit. According to Agent Johnseon, no witness ever told him that Stern knew about the bankruptcy when he obtained the Certificates of Deposit (*Id*.:254).

SUMMARY OF ARGUMENT

The government's case that Stern knowingly and intentionally was involved in Leonard-Allen's bankruptcy fraud rested on three weak legs: (1) Stern's lack of explanation of the purchase of Certificates of Deposit with Leonard-Allen's money but in his own name (R89:383-411); (2) speculation that "of course [Stern] knew" of the bankruptcy because he was her boyfriend (*see* R89: 383-411); and (3) an ambiguous reference to him on the intake data form Leonard-Allen filled out for her bankruptcy attorney (*id*.). Although weak, all were made considerably stronger by erroneous evidentiary rulings. In total, those rulings completely deprived Stern of his ability to present a defense to the charges. Worse, the destruction of any one of the government's

evidentiary supports would alone would have so weakened the government's case such that lack of the errors "had substantial and injurious effect or influence in determining the jury's verdict," *see Kotteakos v. United States*, 328 U.S. 750, 776 (1946), and thus none was harmless.

The first error consisted of precluding Stern from testifying concerning his reasons for putting Leonard-Allen's money in his name. This testimony would have undercut the government's desired inference that no explanation existed other than its desired inculpatory one. He thrice attempted to get his reasons before the jury (R87:283-286; App. 101-104), but was never allowed to testify that she wanted him to do so because she could not handle her own money (R59:5:¶4). Stern was not asserting that this reason was true but, instead, was asserting that Leonard-Allen lied to him. Because hearsay is an out-of-court statement "offered in evidence to prove the truth of the matter asserted," Fed. R. Evid. 801(c), and because he offered the statement to show the state of mind they induced in him (R87:284; App. 102), these false assertions were not hearsay and were improperly excluded from evidence. *See United States v. Norwood*, 798 F.2d 1094, 1096-1098 (7th Cir. 1986).

The second error consisted of precluding Stern from presenting evidence that Leonard-Allen did not even disclose her bankruptcy to her daughters (*See* R37:9-10; App. 113-114). This evidence would have undercut

the speculation of his knowledge that was based upon his close relationship with Leonard-Allen. Someone who has a close relationship with her children but fails to divulge embarrassing information generally is someone who is less likely to divulge embarrassing information to other people with whom she has close relationships. Relevant evidence has "*any* tendency to make the existence of any fact that is of consequence... more probable or less probable," Fed. R. Evid. 401 (emphasis added), and evidence which makes a consequential fact "less probable" is as relevant as evidence making it "more probable," Joseph M. McLaughlin, 2 Weinstein's Federal Evidence § 401.04[2][a] at 404-19 (2d ed 2012). Because the district court believed that the daughters' testimony was some sort of special "negative evidence," it failed to understand the relevance and abused its discretion in excluding it.

The third error consisted of admitting a data intake form of the bankruptcy attorney which requested marketing information concerning how a client learned of the attorney (R19:Ex.A; R38:Ex.10; R86:113-114; App. 177). On this form, Leonard-Allen, an admitted liar, cryptically wrote "Walter Stern" next to "Friend/Referral" when asked how she heard of the office (R19:Ex.A;R38:Ex.10; R86:113-114; App. 177). This response was not admissible under the residual hearsay rule, Fed. R. Evid. 807, because it lacked "circumstantial guarantees of trustworthiness." It was not admissible as a

statement of a co-conspirator because the words were not written on the form "in furtherance of the conspiracy," as Fed. R. Evid. 801(d)(2)(E) requires. No evidence at all existed that Leonard-Allen did or could have believed that the attorney, who freely advertised in the Yellow Pages and local newspaper, would hesitate in taking Leonard-Allen's bankruptcy case without a high-profile referral. The trial court therefore abused its discretion in admitting the intake data form.

STANDARDS OF REVIEW

This Court applies an abuse of discretion standard to district court rulings on evidentiary matters. *United States v. Breland*, 356 F.3d 787, 793 (7th Cir. 2004). A district court by definition abuses its discretion when it makes an error of law. *Koon v. United States*, 518 U.S. 81, 100 (1996). An evidentiary error requires reversal only if it "had substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos,* 328 U.S. at 776.

ARGUMENT

I.

NEITHER THE STATEMENTS LEONARD-ALLEN MADE TO STERN TO INDUCE HIM TO PURCHASE THE CERTIFICATES OF DEPOSIT NOR STERN'S IN-COURT STATEMENT OF HIS REASONS FOR PURCHASING THE CERTIFICATES OF DEPOSIT WERE INADMISSIBLE HEARSAY

Three times during his direct testimony, Stern was prevented from

testifying about why he put Leonard-Allen's money in his name (R87:283-286; App.101-104). Although his attorney explained that Stern sought to admit the evidence for the "impact on him" and "[n]ot for the truth of the matter asserted" (R87:284; App. 102), the district court erroneously sustained hearsay objections to Stern explaining how it came about that he went to the bank, whether he had an understanding of what Leonard-Allen had asked of him, and what the purpose of his having control of the money was (R87:284-286; App. 102-104). These rulings prevented Stern from explaining that Leonard-Allen "approached him and stated that she could not handle her money...and asked him to put the funds in her name and manage it for her" (R59:5:¶4; *see also* R93-2:2).

But none of the answers to these questions was hearsay. Stern was not seeking to admit this testimony because Leonard-Allen was telling him the truth about the money. He did not want to prove that Leonard-Allen was telling him the truth. Instead, the significance of this testimony was that any underlying statements made were lies. False assertions by their nature are not offered for their truth. *See United States v. Fluker*, 698 F.3d 988, 1000 (7th Cir. 2012) (emails concerning a mortgage transaction which contained "a number of false assertions" were not offered for their truth and therefore were not hearsay); *Norwood*, 798 F.2d at 1096-1098 (7th Cir. 1986) (individual's false

assertion to defendant concerning the individual's right to use a credit card which defendant conceded at trial was stolen was not offered for its truth and therefore was not hearsay).

This error was not harmless because excluding the testimony denied Stern the primary evidence of his defense before the jury. Without being allowed to explain why he purchased the Certificates of Deposit in Leonard-Allen's name, Stern could not provide any reason for the jury to believe that his doing so was not to hide the money from bankruptcy. Although an erroneous evidentiary ruling is reversible error only if it "'had substantial and injurious effect or influence in determining the jury's verdict,'" erroneously excluded evidence that would have been the key evidence in support of a defense "is deemed to have had a substantial effect on the jury." *United States v. Peak*, 856 F.2d 825, 834 (7th Cir. 1988) (quoting *United States v. Lane*, 474 U.S. 438, 449 (1986)).

A. To be Hearsay, a Statement Must be Made Out-of-Court and Offered to Prove the Truth of the Matter Asserted

Absent an exception in the Federal Rules of Evidence, hearsay is not admissible at trial. Fed. R. Evid. 802. To be hearsay, evidence must be: (1) a statement; (2) other than one made by a declarant while testifying; and (3) be offered in evidence to prove the truth of the matter asserted. Fed. R. Evid. 801(c). Evidence which does not have all of these components is, by definition,

not hearsay. *Id*. Thus, contrary to the district court's expressed belief in this case, hearsay is not "what someone else said." (*See* R87:285; App.103). "[W]hat someone else said," while it may be a statement, is not necessarily made out-of-court and not necessarily "offered in evidence to prove the truth of the matter asserted." *See* Fed. R. Evid. 801(c).

The purpose for which a statement is offered in evidence is key. "'Whether a statement is hearsay and, in turn, inadmissible, will most often hinge on the purpose for which it is offered.'" *Breland*, 356 F.3d at 792. The rule barring hearsay does not apply if "'an extrajudicial utterance is offered, not as an assertion to evidence the matter asserted, but *without reference to the truth of the matter asserted*.'" *Lee v. McCaughtry*, 892 F.2d 1318, 1324 (7th Cir. 1990) (quoting 6 J.H. Wigmore, Evidence § 1766 at 250 (1976)) (emphasis in original).

When a party offers in evidence an out-of-court statement that is false and that the party admits is false, that statement is not admitted to prove the truth of the matter asserted and is therefore not hearsay. *See United States v. Santos*, 20 F.3d 280, 285 (7th Cir. 1994) (holding that an IRS agent's testimony concerning the co-defendant's statement to him that the defendant owned a particular car was not hearsay when the defendant had testified that the co-defendant owned the car).

B. Stern Did Not Seek to Admit Leonard-Allen's Statements to Him for the Truth of the Matter She Asserted

As defense counsel explained to the district court, to the extent that Stern sought to testify to what Leonard-Allen told him, he did so to explain why he took the actions he did and not to establish that what Leonard-Allen said was true (R87:284; App. 102). In other words, as defense counsel stated, he wanted to introduce the evidence to show the "impact on him" of her words (R87:284; App. 102).

This case therefore is like *Norwood*, 798 F.2d at 1096-1098, in which this Court held that similar types of statements were not hearsay because they were not offered to prove the truth of the matter asserted. Although *Norwood* involved a stolen credit card and this case involves assets hidden from bankruptcy, Norwood, like Stern (*see, e.g.*, R89:416-418), did not dispute that what he used was, in fact, ill-gotten and that it was in his possession. 798 F.2d at 1097. The key issue in both cases was whether the defendant knew that what was given to him was ill-gotten. Moreover, just as Stern did (R87:283-286; App. 102-104), Norwood sought to introduce statements from the person who gave him the assets, statements he agreed were false, to show Norwood's state of mind and to support his theory of the case. 798 F.2d at 1096-97. There, as here, the government objected to all testimony concerning the statements on the grounds of hearsay. *Id*.

In holding that the statements were not hearsay, this Court noted that, "'When it is proved that D made a statement to X, with the purpose of showing the probable state of mind thereby induced in X, ... the evidence is not subject to attack as hearsay.'" *Id*. at 1097 (quoting C. McCormick, McCormick on Evidence § 249 (3d ed. 1984)). This Court explained:

> In this case, Norwood did not dispute that the credit card was stolen. Instead, he claimed that he was not aware that the credit card was stolen. Testimony about what Jeffrey said to Norwood was not offered to prove the truth of the matter asserted, but to establish the statements' effect upon Norwood's state of mind, and, therefore, was not hearsay.

Id. at 1097.

Similarly, in the case at bar, Stern did not dispute that the assets were ones that Leonard-Allen improperly hid from bankruptcy. Instead, he claimed that he was not aware of the bankruptcy. Testimony about what Leonard-Allen said to him was not offered to prove the truth of the matter asserted but to establish the statements' effect upon Stern's state of mind and, therefore, was not hearsay.

C. Improperly Failing to Allow Stern to Explain Why He Placed the Certificates of Deposit in His Name Was Not Harmless Error Because it Precluded Him from Presenting His Defense and Had a Substantial Effect on the Jury.

When someone does something unusual, people want to know why. When that conduct appears furtive, people tend to believe that it is–unless they are given another reason for that behavior. Simply saying, "I did not

intend to hide anything" is not very persuasive. But, after the erroneous hearsay rulings in this case, the inadequate bald denial was all the defense Stern was allowed. Although an evidentiary error requires reversal only if it "had substantial and injurious effect or influence in determining the jury's verdict," *Kotteakos*, 328 U.S. at 776 (1946), the error here excluded the primary evidence in support of Stern's defense and therefore requires reversal. *See Peak*, 856 F.2d at 834-835.

When, as here, evidence has been excluded, this Court recommends wariness and caution rather than a rush to invoke the doctrine of harmless error. As this Court has stated at least twice before:

> It is always perilous to speculate on what the effect of evidence improperly excluded would have been. The lay mind evaluates evidence differently from the legal mind, and while many appellate judges have substantial experience with juries and perhaps great insight into the thinking process of juries, others do not. This is a reason to be wary about invoking the doctrine of harmless error with regard to evidentiary rulings in jury cases.

Id. at 834 (quoting *United States v. Cerro*, 775 F.2d 908, 915-916 (7th Cir. 1985) (citations omitted)).

Not surprisingly then, "[w]hen erroneously excluded evidence would have been the only or primary evidence in support of or in opposition to a claim or defense, its exclusion is deemed to have had a substantial effect on the jury." *Id*. In such circumstances, it does not matter "if the evidence of guilt

was overwhelming and could not have been offset by the evidence that the defendant would have introduced if allowed to do so." *Cerro*, 775 F.2d at 916. Although this Court has considered the quality of the evidence of guilt when deciding whether an erroneous evidentiary ruling was harmless, this Court also has cautioned against relying on the weight of the evidence as the "sole basis for finding harmless error" because to do so is to "usurp the function of the jury." *Peak*, 856 F.2d at 834 n. 7.

In this case, Stern's sole defense was that he did not know about the bankruptcy and, instead, was holding Leonard-Allen's money in his own name to protect her from her own spending habits. Although he was allowed to tell the jury that he did not know about the bankruptcy, he was not allowed to introduce the only evidence of his actual reason for holding the money in his name. This evidence would have tended to disprove the intent required for conviction and therefore was vital to him. Without it, he had little chance that the jury would see placing the assets in his name as anything other than hiding it. With it, he could have created doubt in jurors' minds concerning his reasons and knowledge.

More important, the parties themselves believed that the lack of answer to this question was crucial. To bolster its weak case, the government used Stern's inability to provide that reason against him. In closing argument, the

government told the jury, among other things, that "it's interesting what Stern didn't tell you on direct examination was that, most of the explanation other than money laundering as to why that money was put in his name." (R89: 404.) The impact of this argument on the jury did not escape defense counsel who tried mightily to combat it in one-and-a-half pages of his closing by trying to remind the jury that the district court prevented them from hearing the explanation (*Id*.:413-414). But the government again exploited Stern's absence of reasons on rebuttal, stating:

> Mr. Boyle spent some time with you about, you know, expressing his frustration with the rules of hearsay, the rules of evidence in this court of law. There's good reasons for those rules.... There's wisdom in those rules. You don't need to understand that wisdom.
>
> All you need to understand is that everything he said about why they would have done this, why she [would] have put the money in his name, why we would have agreed to do this, that's all speculation. All speculation. In fact, what the judge will instruct you, as well, you can't decide this case on speculation. You have to decide this case on the evidence that's presented.
>
> So I submit to you all those arguments Mr. Boyle suggested for the good reasons why this C[ertificate of] D[eposit] would have been put in his name, those are just the argument of the attorney and not evidence in the case.

(*Id*.:448-449).

Nor is this excluded evidence outweighed by other evidence in the case. The government's case was weak. To prove that Walter Stern was guilty of conspiracy to commit money laundering, the government had to prove,

among other things, that he knew that Leonard-Allen had filed for bankruptcy, "such that he engaged in money laundering when he used those proceeds that were hidden from court and bought the C[ertificates of] D[eposit]" (R89:385 (government closing); *see also* R89:464 (jury instructions)).

The government admitted that there were no verbal admissions from Stern or Leonard-Allen of conspiracy, no documents in which they admitted conspiring, and no witnesses to whom they admitted conspiring. *(Id.*:390, 404). Its evidence of Stern's knowing and intentional involvement in Leonard-Allen's fraud stood on but three feeble legs: (1) its speculative assertion that "of course [Stern] knew" of Leonard-Allen's bankruptcy because he was her boyfriend (*see* R89:383; *see generally* R89:383-411); (2) Leonard-Allen's cryptic reference to him on Attorney Losey's intake from (R89:383-411); and (3) Stern's unexplained purchase of the certificates of deposit in his name (*id.*). None is remotely strong evidence and the destruction of any of the three easily could have caused the government's case to topple in the eyes of the jury.

As Stern's trial counsel explained, even those in a long-term marriage often hide embarrassing or deceitful conduct from each other:

> Now the Government when they say he's guilty, they believe it; and they say they have given you facts sufficient for you to find that guilt. And when he asked questions like who would do that, I don't have an answer to that except to say my

> experience in life is, there's a lot of women that are married to men that don't know they're having extramarital affairs. There's a lot of men who are married to women who don't realize that they're doing inappropriate things with credit cards. They're [sic] a lot of men who are taking drugs that hide it from their wives for years. I didn't know he was doing cocaine. I didn't know he was smoking dope because he never told me, and I never saw evidence of it. There's a lot of women who have been harmed in life by the fact that the person they loved, they were connected with, wasn't honest about things that mattered.

(R89:413)

Moreover, the meaning of a convicted liar's reference to Stern on her bankruptcy attorney's intake form is ambiguous at best. This is especially so given the total absence of any evidence of Stern's actual involvement in her bankruptcy proceedings and the absence of any direct evidence of his knowledge of those proceedings prior to Leonard-Allen's informing him of them in January of 2007, after learning that the proceedings were to be reopened due to her fraud.

Accordingly, even if we ignore the fact that the district court both erroneously excluded evidence that Leonard-Allen did not even tell her own daughters of her bankruptcy, *see* Section II, *infra*, and erroneously admitted evidence of Leonard-Allen's ambiguous and unreliable hearsay reference to Stern on Losey's intake form, *see* Section III, *infra*, the government's case against Stern was extremely weak.

The government had no direct evidence of Stern's guilt and a reason-

able jury easily could have found reason to doubt the government's case even absent the identified errors. Given the speculative - or at best ambiguous - nature of the government's other evidence, the absence of evidence explaining Stern's actions in purchasing the certificates of deposit as anything but suspicious no doubt had a substantial impact on the jury. The absence of evidence is not harmless when, as here, that evidence could create a reasonable doubt that did not otherwise exist. *See United States v. Agurs*, 427 U.S. 97, 112 (1976) (describing more restrictive "materiality" standard applicable to government's failure to disclose exculpatory information). Where the government's evidence is already of marginal sufficiency, "additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Id.* at 113.

The erroneous exclusion of Stern's testimony concerning why he put the Certificates of Deposit in his own name therefore was not harmless and he should receive a new trial.

II.

THE TESTIMONY OF LEONARD-ALLEN'S DAUGHTERS THAT THEY DID NOT KNOW OF THE BANKRUPTCY WAS RELEVANT AND SHOULD HAVE BEEN ADMITTED AT TRIAL

Stern sought to have Leonard-Allen's daughters testify at trial that "they were unaware that their mother was going through bankruptcy"

(R18:Attach.1; App. 165-166). Although not stated, his reasoning presumably was that someone who did not divulge her bankruptcy to daughters with whom she had a close relationship was less likely to divulge her bankruptcy to a boyfriend with whom she had a close relationship. "Evidence tending to make a consequential fact 'less probable' is just as relevant as evidence tending to make it 'more probable." Joseph M. McLaughlin, 2 Weinstein's Federal Evidence § 401.04[2][a] at 404-19 (2d ed. 2012). Nevertheless, the district court incorrectly held that this testimony was "negative evidence" and not relevant. (R37:10; App.114). The district court, by suggesting that the standard for this type of evidence is somehow different than that for more affirmative evidence and by assessing the weight of it, abused its discretion in excluding the testimony and the error was not harmless.

A. Evidence That Leonard-Allen Did Not Tell Her Daughters of the Bankruptcy Was Relevant.

Unlike in some state jurisdictions, "[t]he current federal rule is that '(a)ll relevant evidence is admissible." *United States v. Fearn*, 589 F.2d 1316, 1323 (7th Cir. 1978) (citing Fed. R. Evid. 402). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Even if evidence makes a consequential fact less probable rather than more probable, it is relevant

because "[e]ither type of evidence increases the factfinder's knowledge and enhances the likelihood of ascertaining the truth about the fact at issue." 2 Weinstein's Federal Evidence § 401.04[2][a] at 401-19.

In this case, the question was whether Stern knew of Leonard-Allen's bankruptcy. The government, in attempting to prove that he knew, relied heavily upon the relationship between Stern and Leonard-Allen and kept emphasizing that "they were an item" and were "romantically involved." (R89:399-400). As the government specifically argued, "it just doesn't seem credible that he's both her lawyer and romantically involved with her in helping her negotiate the [marital property agreement], but he has no idea she's in bankruptcy" *(Id.*:400). The government then again referenced not their professional relationship but their personal one (*Id.*).

But if, as the government would have it, a close relationship makes it more likely that Leonard-Allen would have shared the information she was in bankruptcy, then a close relationship and sharing are correlated for Leonard-Allen. Under this reasoning, having a close relationship and failing to share the information has *some tendency* to prove that the two are *not* correlated for her. Thus, the fact that she did not share information about her bankruptcy with her daughters is relevant, regardless whether they could monitor conversations between her and Stern. This evidence therefore is

admissible under Rule 401 which "uses a lenient standard for relevance" and makes "any proffered item that would appear to alter the probabilities of a consequential fact" relevant. *See* 2 Weinstein's Federal Evidence §401.04[2][c] at 401-23.

But the district court here improperly excluded the evidence because it considered the weight of it. "In general, in determining whether evidence is relevant, the district court may not consider the weight or sufficiency of the evidence." *Id*. §401.06 at 401-45. It is true, as the district court indicated here, that a person's relationship with her daughters can be different from her relationship with her boyfriend *(See* R37:9; App.113), but that critique of the evidence goes to its weight and persuasive power. It does not deprive the testimony of its tendency to establish a fact of consequences, namely Stern's knowledge. *See* 2 Weinstein's Federal Evidence §401.06 at 401-44 ("Any 'flaws' in the evidence generally go to its weight, not to its relevance or admissibility.").

When, as here, the government relied on the inference that "of course [Stern] knew" about Leonard-Allen's bankruptcy given their close relationship (R87:11;R89:383), the fact that she did not tell her own daughters of that bankruptcy makes it less probable that the government's desired inference is correct. The district court therefore abused its discretion in

excluding the daughters' testimony.

B. Improperly Excluding the Daughters' Testimony Was Not Harmless Error Because it Precluded Stern from Presenting His Defense and Had a Substantial Effect on the Jury.

Many individuals are either quite open or quite secretive with their family members. Jurors, whose experience "may be quite different from that of the judge," *cf.* 2 Weinstein's Federal Evidence §401.03[2][b] (discussing relevance), could have experience with either, or both, of these types of familial relationships. When the government emphasizes over and over in its closing the closeness of the personal relationship between Stern and Leonard-Allen as a way to bolster its assertion that the relationship means that "of course" Stern knew of her bankruptcy and her fraud, having evidence that Leonard-Allen failed to share the same information with close relatives such as her daughters could make the jury substantially more likely to believe that the relationship between Leonard-Allen and Stern did not automatically translate into Leonard-Allen enlightening Stern about her furtive financial dealings. As a result, the absence of the testimony of the daughters had a "substantial and injurious effect or influence in determining the jury's verdict," *see Lane*, 474 U.S. at 449, especially when combined with the other errors identified here. The error therefore was not harmless.

III.

THE WORDS "WALTER STERN," WHICH LEONARD-ALLEN WROTE IN RESPONSE TO A MARKETING QUESTION ON HER BANKRUPTCY ATTORNEY'S INTAKE DATA FORM, WERE INADMISSIBLE HEARSAY

When Leonard-Allen first visited Attorney Losey's office, she was asked to complete an intake data form which, among other things, requested information that Attorney Losey used to determine whether her marketing of her practice was effective. (R38:Ex.10;R86:113-114). The form asked, "How did you select this office?" and gave possible answers such as "Yellow pages," "Kenosha News," "Friend/Referral," and "Other." (*Id*.). Although the form itself is admissible as a business record, *see* Fed. R. Evid. 803(6), the words Leonard-Allen wrote next to "Friend/Referral" are admissible only if they are either not hearsay or come under some hearsay exception. *See* Fed. R. Evid. 802. These words were not admissible under the residual hearsay exception, Rule 807, because they lacked "circumstantial guarantees of trustworthiness" in that they were placed there by an admitted liar whom the government contended had lied, even under oath, about the matter the words purported to prove. Nor were they admissible as a co-conspirator's statement under Rule 801(d)(2)(E) because they were not written on the form "in furtherance of the conspiracy" insofar as no evidence at all existed that Leonard-Allen could or did believe that Attorney Losey was unlikely to take her bankruptcy

case without a high-profile referral. Moreover, the erroneous admission of the intake data form had a substantial effect on the jury as the form was the evidence that, as the government explained, "for [its] theory of this case ties the two of them together" (R89:394-395). The "two," of course, were Leonard-Allen and Stern.

A. The Statement on the Intake Data Form Lacked Sufficient Circumstantial Guarantees of Trustworthiness for Admission under the Residual Exception to the Hearsay Rule.

Leonard-Allen was a known liar who lied on a bankruptcy petition and under oath at a 341 hearing about her assets (R87:120, 147). Moreover, the government charged her in this case with perjury (R1). Yet the government, while speculating that Leonard-Allen might have used Stern's name to get better treatment, also argued incongruently, that Leonard-Allen "had no motive to lie to attorney Losey" (R19:7; App.173). Given these circumstances, the statement on the intake data form has no circumstantial guarantees of trustworthiness at all, let alone "equivalent guarantees of trustworthiness" to traditional Rule 803 and Rule 804 hearsay exceptions. *See* Fed. R. Evid. 807. The district court therefore erred when, without setting forth any reasoning, it held that the intake data form was admissible under Rule 807.

Rule 807 provides:

> Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not

> specifically covered by a hearsay exception in Rule 803 or 804:
>
> (1) the statement has equivalent circumstantial guarantees of trustworthiness;
>
> (2) it is offered as evidence of a material fact;
>
> (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; *and*
>
> (4) admitting it will best serve the purposes of these rules and the interests of justice.

(Emphasis added). Because the statute uses the word "and," a statement is not admissible under this rule unless it meets all four criteria. In this case, the words on the intake data form do not meet the first criterion.

In determining whether a statement is sufficiently reliable for admission under this rule, courts look to, among other things: "(1) the probable motivation of the declarant in making the statement;" (2) the circumstances; and (3) "the knowledge and qualifications of the declarant. *Cf. Cook v. Hoppin*, 783 F.2d 684, 690-691 (7th Cir. 1986) (discussing a prior, substantially similar version of Rule 807). In this case, the statement was made by a known liar who lied under oath on a bankruptcy petition and who clearly either lied to her boyfriend or to the government and the grand jury. Given her willingness to lie, nothing she says can have any "guarantees of trustworthiness,"circumstantial or otherwise.

B. The Statement on the Intake Data Form Was Not a Statement of a Co-conspirator under Rule 801(d)(2)(E).

Rule 801(d)(2)(E) of the Federal Rules of Evidence excludes as a hearsay statement one which is offered against an opposing party and "made by the party's coconspirator during and in furtherance of the conspiracy." For the statement on the intake data form to be admissible as the statement of a co-conspirator, the government had to prove, by a preponderance of evidence, that: (1) a conspiracy existed; (2) Stern and Leonard-Allen were members of that conspiracy; and (3) Leonard-Allen made the statement during the course of and in furtherance of the conspiracy. *See United States v. Prieto*, 549 F.3d 513, 523 (7th Cir. 1997) (setting forth the proof required). The rules further provide that "[t]he statement must be considered but does not by itself establish...the existence of the conspiracy or participation in it." Fed.R. Evid. 801(d)(2).

In this case, the government did not prove, by a preponderance of evidence, that Leonard-Allen wrote the words at issue "in furtherance of the conspiracy." "A coconspirator's statement satisfies the 'in furtherance' element of Rule 801(d)(2)(E) when the statement is 'part of the information flow between conspirators intended to help each perform his role.'" *Garlington v. O'Leary*, 879 F.2d 277, 283 (7th Cir. 1989) (quoting *United States v. Van Daal Wyk*, 840 F.2d 494, 499 (7th Cir. 1988)). Statements which consist of "[m]ere 'idle chatter,' narrative declarations and superfluous casual remarks"

do not satisfy this requirement. *United States v. Johnson*, 927 F.2d 999, 1002 (7th Cir. 1991). Although a statement "need not have been exclusively, or even primarily, made to further the conspiracy," *United States v. Singleton*, 125 F.3d 1097, 1107 (7th Cir. 1997), the law still requires that the statement tend to advance the objectives of the conspiracy. *United States v. Powers*, 75 F.3d 335, 340 (7th Cir. 1996). The court admitting the statement must find "some reasonable basis exists for concluding that the statement furthered the conspiracy," *United States v. Shoffner*, 826 F.2d 619, 628 (7th Cir. 1987) (citing *United States v. Moore*, 522 F.2d 1068, 1077 (9th Cir. 1975)), and "[w]hether a particular statement tends to advance the objectives of the conspiracy must be determined by the context in which it is made," *Powers*, 75 F.3d at 340.

Leonard-Allen's statement on the intake data form, in the context in which it was made, did nothing to help her file for bankruptcy and did nothing to help her hide the proceeds of the marital settlement agreement. It did nothing which tended to advance her objectives and Leonard-Allen had no reason to believe it would do so.

Attorney Losey never suggested that she would be hesitant to take a case from someone who simply walked into her office off the street, nor did she say that either she or her staff ever suggested such a thing to any client who came in the door *(See* R87:108-123). She was listed in the Yellow Pages

telephone book, thereby indicating that her services were available to the community at large (*Id*.:113-114). The advertising itself created an inference that she was actively looking for cases and the formatting of the question on the intake data form itself suggested it was a marketing question. That question supplied multiple possible answers including two publications: the Yellow Pages and the Kenosha News (R38:Ex.10). Both publications were listed prior to "Friend/Referral," suggesting they were of more importance to Losey (*Id*.).

In addition, Attorney Losey never testified that she had great respect for Stern's legal abilities or that she ever suggested as much to Leonard-Allen. Thus, there is absolutely no evidence anywhere in this record that suggests, or even allows the inference, that Leonard-Allen "may have believed that Attorney Losey would be more likely to take the bankruptcy case knowing that the referral came from Walter Stern." (*See* R19:6; App. 172 (indicating that this idea constituted the government's theory why the statement was "in furtherance")). The government's speculation is insufficient to establish, by a preponderance of the evidence, that this statement in the intake data form was made in furtherance of the conspiracy.

C. The Admission of the Statement on the Intake Data Form Was Not Harmless Error.

According to the government itself, the intake data form was its single most important piece of evidence establishing that Stern was aware of the bankruptcy (R19:8; App. 174). As the government explained in its motion *in limine* seeking to admit it, the intake data form was "more probative [than][7] any other reasonably available evidence that Stern was aware of Leonard-Allen's bankruptcy." *Id*. The form is the piece of evidence that, as the government argued in closing, "ties the two of them together," and acknowledged in his rebuttal was "the key piece of evidence" or, as defense counsel referred to the same concept, "the smoking gun" (R89:395,454). Moreover, no other evidence duplicated this information. When the prosecutor refers to erroneously admitted evidence in his closing, it not only demonstrates the importance of the evidence, *see Ghent v. Woodford*, 279 F.3d 1121, 1131 (9th Cir. 2002) but it also compounds the problem, *see Ryan v. Miller*, 303 F.3d 231, 255 (2nd Cir. 2002).

Moreover, as was discussed previously, the government's case here was weak. *See* Section I, C, *supra*. As the government admitted to the jury, the case was circumstantial and the government did not have "phone calls between these two[,]...documents...which say they [are] going to conspire to conceal

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[7] The original reads "of," which appears to be an error.

money" (R89:390, 446). The government did not have "a witness who says they admitted they were conspiring." (*Id*.:390).

Leonard-Allen's cryptic reference to Stern on the intake data form was ambiguous at best and a reasonable jury easily could have refused to draw the government's desired inference for the same reasons that it is inadmissible under Rule 807. But, however feeble it was, it remained the government's strongest evidence against Stern. When, as here, the state's key evidence is erroneously admitted, the error has "substantial and injurious effect or influence in determining the jury's verdict," *see Lane*, 474 U.S. at 449, and the error is not harmless.

CONCLUSION

For these reasons, Walter Stern III respectfully asks that the Court vacate the judgment below and order a new trial.

Dated at Milwaukee, Wisconsin, January 22, 2013

Respectfully submitted,

WALTER STERN III,
Defendant-Appellant

HENAK LAW OFFICE, S.C.

s/ Ellen Henak
Ellen Henak
State Bar No. 1012490
Robert R. Henak
State Bar No. 1016803

P.O. ADDRESS:
316 N. Milwaukee St., #535
Milwaukee, Wisconsin 53202
(414) 283-9300

RULE 32(a)(7) CERTIFICATION

I hereby certify that this brief complies with the type volume limitations contained in Fed. R. App. P. 32(a)(7) for a principal brief produced with a proportionally-spaced font. The length of the includable portions of this brief, *see* Fed. R. App. P. 32(a)(7)(B)(iii), is 10,253 words as determined using the word count of the WordPerfect word-processing program used to prepare the brief.

s/Ellen Henak
Ellen Henak