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**

REPLY BRIEF 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution, Rules and Statutes

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.

REPLY BRIEF OF DEFENDANT-APPELLANT WALTER STERN III

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

Walter Stern III's defense to the charge of conspiracy to commit money laundering was that he *did not know* that the money Norma Leonard-Allen gave him to put into Certificates of Deposit in his name was money that she failed to report in her bankruptcy (R89:386). In other words, his defense was that Norma Leonard-Allen duped him into hiding her money from the

bankruptcy court. Had he been free to testify that she falsely told him that she needed that money protected from herself and her spending habits, he could have explained, and his counsel could have argued in closing, that placing money in his name helped serve her expressed goals by inhibiting her access to it. With that explanation, his most suspicious action–the use of his own name on the C.D.s–has an innocent meaning. Thus, Stern's state of mind when he placed the C.D.s in his name is not merely relevant, it is crucial. It is the heart of the defense and of the case.

Trial counsel explained Stern's intended testimony in his opening statement, such that the parties and the district court were aware of it (R86:19). When defense counsel's opening statement notifies the district court of the anticipated, but excluded, evidence, the statement serves as an adequate offer of proof. *See, e.g., United States v. Fountain*, 642 F.2d 1083, 1088 (7th Cir. 1981). The issue in this case therefore is properly preserved under Federal Rules of Evidence 103.

Despite the knowledge of the substance of the testimony, the district court three times improperly prevented Stern from testifying to the lie Leonard-Allen used to dupe him. (R87:283-286; App. 101-104). Contrary to the belief of the district court and the government, the lie was not hearsay. It could not have been admitted for its truth because it had no truth. *See* Fed. R.

Evid. 801(c); *see also United States v. Norwood*, 798 F.2d 1094, 1096-1098 (7th Cir. 1986). Moreover, because Stern's state of mind, or more specifically, his *knowledge*, was directly at issue, the statement was relevant for the purpose of state of mind and its value was not outweighed by the danger of unfair prejudice so the evidence was admissible. See Fed. R. Evid. 402, 403; cf. *United States v. Mancillas*, 580 F.2d 1301, 1309 (7th Cir. 1978) (noting that arguably truthful statements to a government agent which purportedly were offered for the agent's state of mind were not admissible because the agent's state of mind was not relevant and, in any event, any relevancy was outweighed by the danger of unfair prejudice to the defendant).

A. A Proffer of Evidence for Purposes of State of Mind Makes the Evidence Admissible as "Not Hearsay" Only If, As Here, the State of Mind Itself is Relevant and the Probative Value of the Evidence is Not Outweighed by the Danger of Unfair Prejudice

No matter how you analyze it, a lie logically cannot be admitted "to prove the truth of the matter asserted in the statement" and therefore cannot be hearsay by definition. *See* Fed. R. Evid. 801(c). Leonard-Allen's falsehood to Stern, like any other lie, therefore is not hearsay. Because it is not hearsay, it is admissible if: (1) it is relevant, *see id*. 402, and (2) its probative value is not outweighed by the danger of unfair prejudice, *see id*. 403. In any event, the government failed to object based upon relevancy or any danger of unfair

prejudice, no doubt because it could not rationally do so, and those objections therefore are forfeited. *See id.* 103. Nevertheless, the government mixes all of those potential bars to the admission of the evidence together and mistakenly asserts that "there are two lines of authority with respect to the proper application of 'state of mind' evidence," United States Br. 30, and that "these lines of authority are not easy to keep separate."

The government is wrong. There is only one proper analysis for the admission of out-of-court statements offered for the purpose of showing state of mind. Following that analysis leads to the conclusion that no person reasonably could have excluded the evidence so this Court should reverse here. *See United States v. Akinrade*, 61 F.3d 1279, 1282 (7th Cir. 1995) (setting forth the standard).

The first question in analyzing the admissibility of evidence is always whether it is relevant. Under Rule 402 of the Federal Rules of Evidence, "[r]elevant evidence is admissible unless," among other things, another rule of evidence provides otherwise. Rule 802, which generally bars admission of hearsay, is one of those other rules of evidence that may be applicable in some circumstances. It is not applicable here for the reasons explained in Stern's opening brief at pages 22-33 and in *Norwood*, 798 F.2d at 1096-1098. The second, somewhat related, question is whether "its probative value is

substantially outweighed by a danger of...unfair prejudice." Fed. R. Evid. 403.

The government's so-called other-line-of-authority does not conflict with *Norwood* and is merely a line of cases that holds that background statements made to government law enforcement agents and offered for the *agent's* state of mind are either not relevant or, if relevant, are more prejudicial than probative. Thus, for example, in *Mancillas*, 580 F.2d at 1309, this Court noted that whether to admit evidence of a tip to a government agent "with a direct charge of specific criminality," which was offered to "explain the flurry of investigative activity" was a "question of relevance and prejudice, not of hearsay." The evidence was, at best, "of only minimal 'consequence to the determination of the action.'" *Id*. at 1310. This Court explained that allowing "testimonial repetition of a declarant's out-of-court charge that the defendant would engage or was engaged in specific criminality would seem to create too great a risk" of unfair prejudice and held that any probative value of the evidence was substantially outweighed by the danger of unfair prejudice. *Id*. Thus, the statement to law enforcement in *Mancillas* was inadmissible by operation of Rules 402 and 403, rather than by operation of Rule 802 or the definition of hearsay in Rule 801(c).

Other cases the government cites, *see* United States Br. 31-32, use a similar analysis in similar circumstances. *See United States v. Sesay*, 313 F.3d

591, 599 (D.C. Cir. 2002) (statements by witnesses at the scene to police were not relevant if not offered for the state of mind of police); *United States v. Evans*, 216 F.3d 80, 85 (D.C. Cir. 2000) (statement to FBI agent that defendant was involved in drug trafficking was not relevant if offered for the agent's state of mind).

Although the last two cases the government cites, *United States v. Gomez*, 529 F.2d 412, 416-17 (5th Cir. 1976), and *United States v. Arbolaez*, 450 F.2d 1283, 1290 (11th Cir. 2006), superficially support a reading that statements admitted to prove an agent's state of mind can be considered hearsay, this reading does not hold up to closer analysis. Both of these cases essentially turn on the concern that any probative value may be outweighed by unfair prejudice. *Arbolaez*, 450 F.2d at 1290; *Gomez*, 529 F.2d at 416-17. This type of analysis is that conducted under rule 403 and not under Rule 801.

Moreover, both cite to *United States v. Rodriguez*, 425 F.2d 485, 486-487 (5th Cir. 1975), which also discusses admissibility in terms of unfair prejudice. *See Arbolaez*, 450 F.2d at 1290; *Gomez*, 529 F.2d at 417. In *Rodriguez*, *id.* at 485, the trial court admitted an informant's tip to a law enforcement agent only to show why the agent did what he did. The Fifth Circuit considered a limiting instruction which explained the purpose of the admission, but rejected it because "the nature of the testimony was such that even this pre-admission

warning was probably insufficient to remove the statements from the realm of hearsay." *Id*. at 487. In other words, the court believed that the jury *would use it for its truth* despite any instruction and it therefore should be treated as though it were hearsay; the court was not suggesting that admission of it actually *was* hearsay.

But just because a statement concerning criminal behavior, made to a law enforcement agent, is not very relevant does not mean that a statement concerning innocent reasons for action, made to a defendant, is not highly relevant. Although the government did not object to the proffered testimony on relevance grounds, evidence is relevant if "it has any tendency to make a fact more or less probable" and "the fact is of consequence in determining the action." Fed. R. Evid. 401. As to probability, if Leonard-Allen lied and gave Stern a plausible reason that the money should be in his name and inaccessible to her–as Stern was precluded from testifying-- it is less probable that Stern put the money in his name to hide it from the bankruptcy court. As to whether the fact was of consequence, the government itself characterized the main issue in this case as being one of exactly what Stern knew (R89:385). The evidence therefore was highly relevant.

Nor does the excluded lie to Stern present any of the dangers of unfair prejudice which lurked in the cases involving statements to law enforcement

agents and Rule 403 therefore should not exclude it. Leonard-Allen's statement, unlike that of the tipsters or informants in *Mancillas*, 580 F.2d at 1310, or in any of the other cases the government cites, does not involve "testimonial repetition of a declarant's out-of-court charge that the defendant would engage or was engaged in specific criminality." *See id*.

Thus, this Court has only one line of authority and must follow *United States v. Norwood*, 798 F.2d 1094, 1096-1098 (7th Cir. 1986), which holds that statements such as Leonard-Allen's lie are not hearsay if not offered for the truth of the matter asserted. Here, as in *Norwood*, *id*. at 1096-1097, the defendant's state of mind is relevant and crucial to a key issue in the case: whether the defendant knew what was given to him was ill-gotten. Here, as in *Norwood*, *id*., the excluded statements were made to the defendant and the statements were lies.

Moreover, despite the suggestion to the contrary in the government's brief, United States Br. 31 n.9, it makes no difference whether the statement was one of another defendant nor whether the declarant was available to be cross-examined. The government itself cites no cases for the proposition that either of these factors should matter and Stern can find none. Moreover, although other hearsay rules mention availability, *see* Fed. R. Evid. 803, 804, Rule 801(c), which defines hearsay, does not.

Exclusion of the lies Leonard-Allen told Stern as well as Stern's reasons for putting the C.D.s in his name therefore clearly was error.

B. 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.

Claiming you have an innocent reason is not the same as being able to give that innocent reason. When a teacher catches Billy with Timmy's lunch, it does not suffice for Billy to say, "I had a reason." Unless Billy explains, "Timmy asked me to hold it while he went to the water fountain so it would not get wet," Billy is likely to be in trouble. Similarly, allowing Stern to testify that he did not know of Leonard-Allen's bankruptcy when he put her funds in his name is not the same as allowing him to testify that he did so at her request to protect it from her spendthrift self. *Cf. Davis v. Alaska*, 415 U.S. 308, 318 (1974) (defendant constitutionally entitled to elicit evidence, not merely regarding whether a particular witness is biased, but why the jury should believe the witness is biased and therefore not credible).

The government's own brief unintentionally demonstrates the difference and, to claim the opposite, as the government does, *see* United States Br. 34, is disingenuous. The government suggests that a statement from Leonard-Allen that "she did not want it in her care" or a statement from Stern that he "was going to care for that money and protect it" should have been

sufficient for Stern's defense. *Id.* Nevertheless, the government argues that the excluded evidence "might suggest an innocent reason for having the funds in his hands" but could not possibly explain Stern putting the money in his name. *See id*. 35-36.

The government might be correct if all that was at issue was whether Stern was to care for the money. But, as the excluded testimony would have established, Stern was to care for the money and protect it *from a particular person:* its owner. He was to prevent easy access to it from Leonard-Allen . He was "to hold the money for her so that she wouldn't give it to her children." R86:19. And putting it in his own name certainly would bar Leonard-Allen's easy access. Without the additional information, Stern simply could not explain what the government claims is necessary to explain here.

In addition, the government certainly did not act as if there were no difference at the time of trial. If there were no difference, the government would not have objected when trial counsel mentioned the likely testimony in his opening argument (*see* R87:19). If there were no difference, the government would not have fought to keep the testimony out, not just once but three times (*see* R 89:283-287; App. 101-104). If there were no difference, the government would not have pointed to what Stern was not allowed to say as a hole in his defense (R89:404) ("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"). Nor did the government just let it go on rebuttal, again noting the absence of evidence of any reasons, other than fraud, for putting the money in Stern's name (*id*.:448-449).

Trial counsel also knew there was a difference. He therefore explained the intended evidence in his opening (R86:19) and attempted to elicit the evidence from Stern (R89:283-287; App. 101-104). When that failed, he tried in closing to place the blame for the hole on the court or the government and not on Stern. (*Id*.:413-414). He first complained that it was unfair:

> And if I ask a question, and [the government] said I can't ask that question because of the rule; and the judge says, yes, Boyle, you can't ask that question because of the rule, then don't come up later and say, he was never able to answer this question when the answer would be obviously hearsay and blocked....don't come back and say there's no answer for why he did what he did. If it calls for him goading somebody else then it would be hearsay. That's not just fair. It's just not fair.

Id. He then explained that giving the answer to the question was "an impossibility." *Id*. at 414.

Moreover, the other evidence in the case is much weaker than the government would have this Court believe. *See* United States Br. 34-35. Waving the data intake form around does not guarantee conviction. It does not even come close.

The data intake form, although relatively important to the govern-

ment's case, was not definitive proof of guilt given the total lack of direct evidence. First, the data intake form, like all of the other evidence in the case, is merely circumstantial evidence. Whatever it says about Leonard-Allen's state of mind, it provides only an indirect inference as to *Stern's* state of mind. Second, the statement is from an admitted liar who pled to, and was convicted of, two counts of false declaration under penalty of perjury. (R38:Ex.25: R87:190, 203). A person who is willing to lie under oath cannot be trusted to necessarily tell the truth when far less is at stake.

Third, even if Leonard-Allen, as the government would have it, "had no motive to lie to Attorney Losey when she completed the intake form," *see* United States Br. 43, the statement on the form was at best equivocal and ambiguous. The question to which Leonard-Allen responded was not "who referred you to this office," but "[h]ow did you select this office?" (R38:Ex.10; R19:Ex.A; App. 177). Even in the unlikely event that Leonard-Allen was telling the truth, the response to the question actually asked could mean that she had heard Stern speak of Attorney Losey at some time but that he had not referred her to Losey concerning the bankruptcy or directly sent her there for any other reason. In addition, the box in which Stern's name is provided does not only say "referral," but also says "friend," which makes the possibility that she was saying that she had

heard Stern speak of Losey in some context other than her bankruptcy more likely. (*Id*.).

Had Stern been allowed to explain his suspicious-looking behavior in placing the Certificates of Deposit in his name, these weaknesses in the evidence of the intake data form would have been more apparent. Given the absence of direct evidence such as admissions from either party, telephone calls between Stern and Leonard-Allen, documents, or witnesses to any conspiracy, neither Stern nor Leonard-Allen necessarily would have been found guilty.

C. The Issue was Properly Preserved Because Trial Counsel Gave Reasons the Testimony Was Admissible and the Trial Court Had Heard the Substance of Stern's Testimony During Stern's Opening Such that the Court Understood the Substance of the Excluded Testimony, Its Significance and the Reasons Trial Counsel Believed It Admissible.

In his opening statement, trial counsel explained the substance of Stern's testimony, including how he would claim Leonard-Allen duped him into putting her funds in his name *(see* R86:19). As trial counsel stated in open court:

> Mr. Stern will testify. Mr. Stern ...will testify that Norma [Leonard-Allen] became very concerned when she got the $95,000. That she did not want it to be in her care. She wanted to make sure that Mr. Stern could, if possible, hold the money for her so that she wouldn't give it to her children. So she wouldn't have to concern herself that she, being somewhat of

a spender, that the money would start to be depleted.[1]

(*Id.*).

The district court, at the time it ruled on the government's objection to Stern's testimony, therefore was aware of the substance of the excluded evidence . Thus, although Stern's brief-in-chief inadvertently failed to note this passage, *see* Stern Br. 20, 23 (citing R59:5¶24[2]; R93-2:2), it simply is untrue that the district court was not aware of the substance of the excluded testimony. *See Fountain,* 642 F.2d at 1088 (adequate offer of proof when trial court made aware of anticipated testimony through defense counsel's opening argument).

Given this information, the questions asked of Stern made the substance of the excluded testimony apparent from context. Trial counsel tried to ask Stern (1) how he came to go to the bank; (2) whether he had an understanding of what Leonard-Allen asked of him in going there to purchase the C.D.s; and (3) what the purpose of Stern's having control of the money was. (R87:283-286; App. 101-104). The obvious answers are that Leonard-Allen asked him to go to the bank, that she was asking him to

---

[1] Although the jury heard this information in opening statements, the court immediately thereafter, at the request of the government, informed the jury that "anything that attorneys say is not evidence. It has to be supported later on by evidence" (R86:19). The presentation of this information in Stern's opening statement therefore did not alleviate the harm that accrued when the evidence itself improperly was excluded.

[2] This citation originally was incorrectly rendered as "R59:5¶4." Stern apologizes for the error.

hold the money and keep it safe from her impulses to spend it, and the control was intended to make it difficult for Leonard-Allen to get at the funds.

Because the district court had sufficient information at the time of its ruling to make an informed evidentiary ruling and this record is adequate for review, the issue here is properly preserved. *See Inselman v. S & J Operating Co.*, 44 F.3d 894, 896 (10th Cir. 1995); *Fountain,* 642 F.2d at 1088. Pursuant to Rule 103 of the Federal Rules of Evidence, an error in excluding evidence is preserved if it "affects a substantial right of the party" and "a party informs the court of its substance by an offer of proof, *unless the substance was apparent from the context*." Fed. R. Evid. 103 (a)(2) (emphasis added). This Court "does not require that a formal offer of proof be made," although an offer of proof generally should give a ground for admissibility, inform the court and opposing counsel what the proponent expected to prove, and demonstrate its significance. *United States v. Peak*, 856 F.2d 825, 832 (7th Cir. 1988). Perfection in presentation is not required, *United States v. Sweiss*, 814 F.2d 1208, 1211 (7th Cir. 1987). Instead, all that is required is that the record here show "either from the form of the question asked, or otherwise, what the substance of the proposed evidence is.'" *United States v. Sweiss*, 814 F.2d 1208, 1211 (7th Cir. 1987) (quoting *United States v. Alden*,

476 F.2d 378, 381 (7th Cir. 1973)). This case meets that standard.

Finding that the requirements of Rule 103 concerning an offer of proof are met in this case comports with Rule 102 of the Federal Rules of Evidence. That provision states that the rules

> should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.

Were this Court to hold that the offer of proof was not adequate and that the substance was not apparent from context, unjustifiable expense and delay will result because the court system eventually will deal with an action pursuant to 28 U.S.C. § 2255 alleging ineffective assistance of counsel. Trial counsel's proffer of a reason the excluded testimony was admissible (R87:285-286; App. 101-104), his three attempts to proffer the testimony (*id*.), and his recognition in both his opening and his closing of the hole left by the absence of the excluded testimony (*see* R86:19 (opening); R89:413-414 (closing)) clearly indicate his intention to preserve the issue for appeal. If he failed to do so, he had no strategic reason for doing so. In light of the importance of the evidence, *see* pages 9-11 *supra*, Stern has the basis for such an action. *See, e.g., Strickland v. Washington*, 466 U.S. 668 (1984) (a defendant must allege both deficient performance and prejudice in an ineffective assistance of counsel claim).

D. Assuming, For Purposes of Argument Only, That the Issue was Not Preserved, It was Plain Error.

Assuming, for purposes of argument only, that the issue of the exclusion of Leonard-Allen's lie to Stern was not properly preserved, this Court still should reverse because the district court's mistake was plain error. Pursuant to Rule 52 of the Federal Rules of Criminal Procedure, this Court may consider "[a] plain error that affects substantial rights."

In *United States v. Olano,* 507 U.S. 725 (1993), the United States Supreme Court set forth the proper analysis for handling errors which were not properly brought to the attention of the trial court. The first question is whether there has been an error at all. *Id*. at 732-733. Assuming there has been error, the second question is whether the error is "plain." *Id*. at 734. Finally, the third question is whether the error affected substantial rights. *Id*.

In this case, all of these requirements are met. First, there is an error. Absent waiver, which is "'an intentional relinquishment or abandonment of a known right,'" "[d]eviation from a legal rule is 'error.'" *Id*. (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Given trial counsel's fight to have the evidence admitted, it is clear that Stern did not intend to relinquish or abandon his right to present the excluded evidence. Moreover, as is demonstrated in pages 3 -9 of this brief, the failure to admit Stern's

testimony was error as the testimony was not properly excluded as hearsay under Rule 801, and could not reasonably have been excluded as not relevant under Rule 402 or as unfairly prejudicial under Rule 403, even if the government had objected on those grounds.

Second, the error was plain. As the United States Supreme Court explained, "'Plain' is synonymous with 'clear' or, equivalently, 'obvious.'" *Olano*, 507 U.S. at 734. As is demonstrated above at pages 3 -9, the law here is clear: Leonard-Allen's lie was not hearsay because it had no truth to it and was not, and could not, be proffered for its truth, the evidence was relevant for purposes of the key issue of Stern's lack of knowledge, and there was no danger of unfair prejudice here which outweighed its probative value.

Third, as required, *see id*. at 734, Stern can meet the burden of demonstrating that the evidence affects substantial rights. The exclusion of the testimony gutted Stern's defense by preventing him from explaining that his suspicious actions resulted from Leonard-Allen duping him, thereby making him a victim and not a criminal. For the reasons set forth at pages 27-33 of his brief-in-chief and pages 9 -13 of this brief, Stern has demonstrated that the exclusion of the testimony concerning the lie that induced him to put Leonard-Allen's money in his own name affected the outcome

of the proceedings below.

Because Stern has demonstrated plain error, this Court should exercise its discretion and correct the plain error because it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings," *see Olano*, 507 U.S. at 736 (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936), especially given the prosecutor's emphasis in closing argument on the absence of the very evidence the government itself had caused to be improperly excluded, *cf. Green v. Georgia*, 442 U.S. 95 (1975) (violation of due process to exclude exculpatory evidence as unreliable "hearsay" at capital sentencing hearing where state previously had used the same evidence as reliable enough to justify a death sentence for the declarant). When an error not only could have affected the jury, "but probably did so," the exercise of such discretion is appropriate. *United States v. Caputo*, 978 F.2d 972, 974 (7th Cir. 1992).

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

If, as the government argued, Leonard-Allen's close relationship with Stern made it more likely that he knew of her bankruptcy (R89:383), then the fact that she did not tell close family members such as her own

daughters of that bankruptcy makes it less probable that a close relationship would motivate her to talk. As the government concedes, "[t]he question under Fed. R. Evid. 401 is not whether the evidence has great probative weight, but whether it has any, and whether it in some degree advances the inquiry." United States Br. 37. Because the government fails to argue before this Court that, as the district court incorrectly believed (*see* R37:10; App. 114), there is a special standard for something called "negative evidence," the government also appears to concede that there is no such thing and that there is a single, unified standard for the admissibility of relevant evidence.

Moreover, although the government baldly asserts that the district court's decision "did not involve weighing evidence," *see* United States Br. 38, it does not explain how the critique of the difference in the personal relationships between Leonard-Allen and her daughters and Leonard-Allen and her boyfriend goes to anything more than the perceived weight of the evidence and its persuasive power. Instead, without further explanation, the government simply asserts that Stern's status as an attorney somehow changes the calculus. *Id*. Contrary to the government's assertion, Stern's status as an attorney rationally would make it *less* likely that she would tell him of her wrongdoing, given the ethical obligations of attor-

neys. *See* WI SCR Chap. 20. The government therefore fails to establish that the district court correctly applied the law in excluding the evidence. Because a district court that applies the law incorrectly abuses its discretion, *see Koon v. United States*, 518 U.S. 81, 100 (1996), this Court should hold that the district court abused its discretion.

In addition, as Stern explained before on page 37 of his brief-in-chief, the error is not harmless. Once again, as it did with the excluded testimony concerning Leonard-Allen's lie to Stern, the government attempts to demonstrate harmlessness by inflating the value of the intake data form. *See* pages 11-13 of this brief, *supra*. But the weaknesses in the government's case cannot be overcome simply by assuming that the ambiguous statement of a liar on the intake form definitively proves what the government wishes it proved.

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

A. The Issue is Properly Preserved.

Contrary to the government's suggestion, Stern did object to the admission of the intake data form and properly preserved the issue. The government, not Stern, sought to admit the intake data form into evidence

in this case. (R18). Thus, the government, as the proponent of the statement, had the burden of establishing, by a preponderance of the evidence, that a conspiracy embracing both Leonard-Allen and Stern existed, and that Leonard-Allen uttered the statement on that form during and in furtherance of the conspiracy. *See, e.g., United States v. Mitchell*, 596 F.3d 18, 23 (1st Cir. 2010); *United States v. Elashysi*, 554 F.3d 480, 503 (5th Cir. 2008). At the hearing on the motion, although stated inelegantly, trial counsel objected to the admission of this form, saying:

> When we became aware of the fact that the Government was going to put into that–into evidence a document that was kept supposedly in the ordinary and necessary course of business whereby Miss [Leonard-]Allen wrote down ostensibly a name, Walter Stern, as evidence against Mr. Stern, that he was in fact at that time, when that was put down, involved in a conspiracy with Miss Allen. And then only to know that Miss Allen has completely exonerated Mr. Stern in that regard, in a hearing or meeting with the United States Attorney whereby she said that Mr. Stern did not know of her bankruptcy. And that Mr. Stern – and then the Government having given her a grant of immunity after she had been sentenced went on to appear before a Grand Jury. Was asked the question. Said exactly the same thing, that Mr. Stern did not know of her going bankrupt, and did not, did not, refer Mr. Stern (sic) to Attorney Losey. That the Government is trying to suggest that is not testimonial. We definitely feel it's testimonial, number one. Number two, it's clearly hearsay.

(R22:3-4; App. 120-121). By indicating that the form was hearsay, trial counsel was stating that the government had not met its burden and put both prongs of the admissibility standard into issue. Fed. R. Evid. 103(a)(1)

(party need only object and state specific ground to preserve objection to the improper admission of evidence).

B. The Statement on the Intake Data Form is Not Admissible Under the Residual Exception to the Hearsay Rule.

The parties agree that admission under Federal Rule of Evidence 807 requires, among other things, "substantial guarantees of trustworthiness." *See* United States Br. 43. The parties also agree that whether a statement is sufficiently reliable turns on: "(1) the probable motivation of the declarant in making the statement; (2) the circumstances under which it was made; and (3) the knowledge and qualifications of the declarant." *See id.*; *Cook v. Hoppin*, 783 F.2d 684, 690-691 (7th Cir. 1986). Where the parties differ is on whether these probable motivations, circumstances, knowledge and qualifications make the cryptic scribbling of "Walter Stern" on the intake data form sufficiently reliable. Stern contends that they do not and that the intake data form therefore is inadmissible under Rule 807, regardless whether it meets the other criteria for admission under the rule.

First, the knowledge and qualifications of Leonard-Allen do not lend themselves to reliability and saying so is a matter of her character, not hindsight. Leonard-Allen is a known, repeated liar who, at the time of the scribbling, was setting up a lie to the bankruptcy court. Her character at the time therefore was such that she was willing to lie–even under oath to the

bankruptcy court. Leonard-Allen was a known, repeated liar who eventually was willing to lie to Stern (according to Stern) or to the government and the grand jury (according to the government) and to say so is not hindsight but a comment on her character. In addition, it is not clear whether Leonard-Allen is willing to tell the truth even when it was in her own interests. Assuming, for purpose of argument only that the government is correct that Leonard-Allen committed perjury in the grand jury, telling the truth in her own interest should have lead her to plead guilty and cooperate with the government against Stern but she did not do so.

Second, contrary to the government's assertion, United States Br. 43, the circumstances under which she wrote on the intake data form were *not* unremarkable. They were remarkable both for her underlying intent and for the ambiguity of her statement. Her underlying intent was the commission of a fraud on the bankruptcy court. Surely if she were willing to lie to the court, lying to Attorney Losey would have been no big deal.

As for the statement itself, the way the question was asked prevented the statement from being reliable evidence that Stern referred Leonard-Allen to Losey. Even though, as the government suggests, Leonard-Allen was in a position to know whether Stern referred her to Losey, she was not necessarily in a position to know whether Losey

actually was asking who referred her. Leonard-Allen was asked "[h]ow did you select this office?" and not "who referred you?" (R38:Ex.10; R19:Ex.A; App. 177). If, at some time, Stern had merely mentioned Losey in passing and not in the context of Leonard-Allen's bankruptcy, the phrasing of the question made it possible to answer the question "Walter Stern" even though Stern had not made a referral and, in fact, knew nothing of Leonard-Allen's bankruptcy.

Third, Leonard-Allen's lack of motive to lie is not so clear. To suggest, as the government does, *see* United States Br. 44, that Leonard-Allen, a co-defendant is somehow "a seemingly disinterested witness" in this case strains credulity. Leonard-Allen was very much at the center of the events in this case and her intent to commit fraud was clear. Moreover, Leonard-Allen knew that Stern was a prominent attorney in the area and she was not above lying to Losey if she hoped to get special treatment. Even the government itself suggested that Leonard-Allen might believe that Losey would be more likely to take her case if she used Stern's name. United States Br. 42.

The hearsay assertions Leonard-Allen placed on the intake data form accordingly were far from reliable and the form therefore was not admissible under Rule 807 against Stern.

C. The Statement on the Intake Data Form was Not a Statement in Furtherance of the Conspiracy under Rule 801(d)(2)(E).

Regardless whether Leonard-Allen intended her statement to further any alleged conspiracy, the government still has failed to explain how her statement on the data intake form either tended to or actually did advance the objectives of the conspiracy. *See United States v. Shoffner*, 826 F.2d 619, 628 (7th Cir. 1987); *United States v. Powers*, 75 F.2d 335, 340 (7th Cir. 1996). The government simply ignores the lack of evidence of any such advance. The government fails to address the lack of evidence that *any* answer to that question would or did affect Attorney Losey's treatment of her clients. Her testimony suggested that she was willing to take walk-in clients based upon her listing in the Yellow Pages and the telephone book (R87: 108-113). The wealth of possible answer to the question "how did you select this office" itself suggested that she was willing to take walk-in clients (*id*.)

Given this lack of evidence, the government could not establish, by a preponderance of evidence, that the statement on the intake data form was made in furtherance of a conspiracy as required for admission under Rule 801(d)(2)(E).

D. The Admission of the Statement on the Intake Data Form was Not Harmless Error.

The government does not argue that, if error, the admission of the

statement on the intake data form was harmless. The government therefore concedes that, if admission were error, the error harmed Stern. *See United States v. Giovanetti*, 928 F.2d 225, 226 (7th Cir. 1991) (government may waive argument that error is harmless by failing to raise it unless the error's harmlessness is obvious).

CONCLUSION

For these reasons, as well as for those in his opening brief, Walter Stern III respectfully asks that the Court vacate the judgment below and order a new trial.

Dated at Milwaukee, Wisconsin, April 4, 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 reply 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 6,290 words as determined using the word count of the WordPerfect word-processing program used to prepare the brief.

s/ Ellen Henak
Ellen Henak

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of April, 2013, I caused 15 hard copies of the Reply Brief of Defendant-Appellant Walter Stern III to be mailed, properly addressed and postage prepaid, to the United States Court of Appeals for the Seventh Circuit, 219 South Dearborn Street, Chicago, Illinois 60604. I further certify that on the same date, I caused two hard copies of the reply brief to be mailed, properly addressed and postage prepaid, to counsel for the Respondent, AUSA Gordon Giampietro, Federal Courthouse, #530, 517 E. Wisconsin Ave., Milwaukee, WI 53202 and counsel for Defendant Norma Leonard-Allen, Daniel Stiller, Federal Defender Services, Federal Courthouse, #182, 517 E. Wisconsin Ave., Milwaukee, WI 53202.

s/ Ellen Henak
Ellen Henak
State Bar No. 1012490

Stern Reply.wpd