No. 07-1029

In the Supreme Court of the United States

WALTER A. FORBES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in excluding statements made by prosecutors during two prior trials that a government witness had received immunity from prosecution, when the government established before petitioner's third trial, and the court found it undisputed, that the earlier statements were mistaken and that the witness had not received immunity.

2. Whether the district court's exclusion of the prior statements at petitioner's third trial violated petitioner's rights under the Fifth and Sixth Amendments.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 1, 2007, and was reissued on October 3, 2007. A petition for rehearing was denied on December 4, 2007 (Pet. App. 8a-10a). The petition for a writ of certiorari was filed on February 5, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Connecticut, petitioner was convicted on one count of conspiring to make false statements in reports required to be filed with the Securities

and Exchange Commission (SEC), in violation of 18 U.S.C. 371; and on two counts of making false statements in reports required to be filed with the SEC, in violation of 15 U.S.C. 78ffa. He was sentenced to 151 months of imprisonment, to be followed by three years of supervised release, and was ordered to pay $3.275 billion in restitution. The court of appeals affirmed. Pet. App. 1a-7a.

1. Petitioner is the former chief executive officer (CEO) and chairman of the board of directors of CUC International, Inc. (CUC), and the former chairman of CUC's successor, Cendant Corp. (Cendant). CUC/Cendant sold memberships to consumers that provided discounts for, inter alia, travel, shopping, dining, and insurance services. During the 1990s, petitioner directed a massive accounting fraud that involved CUC/Cendant's public dissemination, in press releases and in annual and quarterly filings with the SEC, of materially and fraudulently inflated earnings figures. Gov't C.A. Br. 2, 8-9.

A principal goal of the scheme was to overstate CUC's earnings in order to meet or exceed earnings "targets" published by Wall Street securities analysts. Because CUC/Cendant publicly reported that it consistently hit those targets, investors paid more for shares of CUC/Cendant stock than they would have paid if the company had accurately disclosed its earnings. Petitioner benefitted directly from the fraud because he was compensated in large part by options to purchase CUC/Cendant stock. On April 15, 1998, when the fraud was exposed, the value of Cendant's stock plummeted by 47% in a single day. Cendant's stock price continued to fall during the following weeks, resulting in an overall

loss of more than $20 billion in shareholder value. Gov't C.A. Br. 2-3, 8-9.

2. In July 2001, a grand jury sitting in the District of New Jersey returned a superseding indictment against petitioner and co-defendant E. Kirk Shelton, the former president and chief operating officer of CUC. The United States District Court for the District of New Jersey transferred the case to the District of Connecticut. The government subsequently obtained a second superseding indictment from a grand jury sitting in the District of Connecticut. Gov't C.A. Br. 3-4.

In 2004, petitioner and co-defendant Shelton were tried before a jury in a trial lasting more than seven months. See C.A. App. 99-164. The jury found Shelton guilty on all 12 counts against him. The jury was unable to reach a verdict on any count against petitioner, and the district court declared a mistrial. Gov't C.A. Br. 4.

The government elected to retry petitioner on a redacted four-count indictment that included one conspiracy count, two counts of making false statements to the SEC, and one count of securities fraud. Between October 2005 and February 2006, petitioner was tried a second time before a jury. The jury was unable to reach a verdict on any count, and the district court again declared a mistrial. Gov't C.A. Br. 5.

In October 2006, petitioner was tried a third time before a jury in a three-week trial. The jury found petitioner not guilty on the securities-fraud count, but it found him guilty on the conspiracy count and the two false statements counts. Gov't C.A. Br. 5-7.

3. The principal government witnesses at petitioner's third trial were Cosmo Corigliano, CUC's chief financial officer (CFO); Henry Silverman, Cendant's CEO; Michael Monaco, Cendant's CFO; and Anne

Pember, CUC's controller. See C.A. App. 7783-7797, 7836-7919, 7924-8073, 8097-8153, 8158-8201, 8224-8239 (Monaco—more than 360 pages); *id.* at 8706-8867, 8895-8945 (Silverman—more than 210 pages); *id.* at 8394-8488, 8496-8676 (Pember—more than 270 pages); *id.* at 9075-9309, 9338-9578, 9635-9750, 9772-9815, 9822-9862, 9883-9984 (Corigliano—more than 760 pages). Silverman was a new witness who had not testified at the prior two trials and whose testimony contradicted petitioner's testimony when petitioner took the stand in his own defense. Gov't C.A. Br. 6-7. Silverman corroborated petitioner's role in the conspiracy, including petitioner's persistent lobbying to keep Pember in a position that would enable her to continue to conceal the fraud and to keep Ernst & Young as the auditor for at least CUC's side of Cendant. C.A. App. 8710-8792.

Corigliano testified as a cooperating government witness and explained the fraud. He was the controller at CUC and later replaced Stuart Bell as the CFO when Bell left the company. C.A. App. 9080-9082, 9107-9109. Corigliano pleaded guilty to conspiracy and wire fraud. *Id.* at 9254-9257.

According to Corigliano's testimony, petitioner told Corigliano, when Corigliano took over as CFO, that petitioner wanted to make sure that CUC "hit the numbers Wall Street was expecting." C.A. App. 9117. Petitioner also told Corigliano that CUC needed to realize operating growth of at least 25% per year to maintain its status as a growth company. *Id.* at 9117, 9143. Corigliano prepared "cheat sheets" for petitioner that showed the use of merger reserves to overstate CUC/Cendant's income and to match the numbers reported to Wall Street analysts. *Id.* at 9118-9119, 9124, 9128-9129, 9132, 9142, 9164-9165. Corigliano met with petitioner at least quar-

terly, before each press release, to decide what numbers should be reported and to discuss the use of merger reserves to inflate CUC/Cendant's income. *Id.* at 9122, 9135-9136. Corigliano instructed his subordinates to make "topside adjustments" to the consolidated financial statements from the merger reserves that had the effect of overstating CUC's earnings.[1] *Id.* at 9139-9140.

Kevin Kearney, the manager of financial reporting at CUC, testified as a government witness at all three trials. According to Kearney's testimony, he was instructed by Corigliano and Bell to make unsupported topside adjustments to the consolidated financial statements that had the effect of overstating CUC's earnings. C.A. App. 8253-8255, 8260, 8271-8274, 8277, 8291-8292. At the end of each quarter, Corigliano or Bell told Kearney to make topside adjustments to achieve a specified earnings per share number because that was the number that petitioner wanted. *Id.* at 8274-8283.

Most of Kearney's comparatively brief direct testimony at petitioner's third trial (C.A. App. 8240-8296) described the undisputed mechanics of the accounting fraud—subjects that other witnesses, including Corigliano and Pember, covered in greater detail. Kearney did add that he was told by Corigliano and Bell that petitioner had ordered some of the fraudulent accounting entries and that certain information could not be released to Ernst & Young until petitioner had "blessed" the release. *Id.* at 8274-8281, 8285-8290. Kearney admitted, however, that he did not have personal knowledge of petitioner's involvement. *Id.* at 8302-8310.

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[1] Corigliano explained that a topside adjustment "wasn't reported on any individual division books" but "was recorded at the top of the organization and, thus, the name topside adjustment." C.A. App. 9139.

The investigation and prosecution of this case was sufficiently long and involved that it was conducted by numerous prosecutors, in three successive teams. The initial prosecutorial team was led by Assistant United States Attorney (AUSA) Paul Weissman, who performed many investigatory interviews of Kearney, but who left before the case was transferred to the District of Connecticut. *Id.* at 10165-10166, 10185, 10278-10293; Crim. No. 01-cr-140 Docket pp. 4-5 (D.N.J.). By the time of the first trial, the case was being handled by a new team led by AUSA John Carney. C.A. App. 39-41, 44.

When petitioner submitted his proposed jury instructions, the new prosecutorial team "join[ed] in" numerous instructions, including one stating that two government witnesses, including Kearney, "ha[d] been promised by the government that, in exchange for their testimony, they [would] not be prosecuted for any crimes they may have admitted either here in court or in interviews with the government." C.A. App. 2128, 2131. The district court so instructed the jury, cautioning the jury to "scrutinize [Kearney's testimony] closely" because Kearney had "a motive to falsify his testimony." *Id.* at 4926-4927. Before the second trial, a new, third team of prosecutors took over, *id.* at 178, and the new team proposed that the same jury instructions be used again, *id.* at 395-396, 2135. The government subsequently agreed to a modified instruction that added that the promise not to prosecute "was not a formal order of immunity by the Court, but was arranged directly between the witness and the government." *Id.* at 2137, 2139. The district court so instructed the jury, again cautioning the jury to "scrutinize [Kearney's testimony] closely" because

Kearney had "a motive to falsify his testimony." *Id.* at 5879-5880.[2]

Before the third trial, the third team of prosecutors investigated and determined that Kearney had not in fact been granted immunity from prosecution. C.A. App. 1673-1676, 7015-7016, 7019-7021, 7029-7030, 7038; C.A. Gov't Supp. App. 11-17. Months before the third trial, the government informed the district court that the jury instruction given in the prior trials was "factually erroneous" because Kearney had not been granted informal immunity. C.A. App. 1673-1676. The government explained that Kearney had instead provided information pursuant to proffer agreements, which limited the extent to which the government could use in a subsequent criminal proceeding any statement made by Kearney, but which did not preclude the government from prosecuting Kearney based on information it acquired through other means. *Id.* at 1674-1675. The government proposed a supplemental jury instruction concerning a witness testifying pursuant to a proffer agreement. *Id.* at 1677-1678. Petitioner objected to the supplemental jury instruction, arguing that the instruction given in

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[2] At the second trial, petitioner moved to strike part of the government's closing rebuttal argument. C.A. App. 727-728. In the portion of the argument to which petitioner objected, government counsel observed that Kearney had not testified pursuant to a cooperating plea agreement, and then asked the rhetorical question, "does [Kearney] have a motivation beyond that of an ordinary witness?" *Id.* at 760-761. In its response to the motion to strike, the government explained that "[t]he purpose of the question was to contrast the motivation of a witness who has already received the benefit of an informal immunity agreement at the time of his testimony, and the very different motivation of a witness who has yet to receive the full benefit of a cooperation agreement at the time of his testimony because that witness has not yet been sentenced." *Id.* at 761.

the two prior trials should be given at the third trial as well. *Id.* at 1710-1713.

At the pretrial charge conference on September 20, 2006, the government reiterated that there was "simply no basis," C.A. App. 7016, for the jury instruction given in the two prior trials because "there [was] no immunity agreement with respect to Mr. Kearney, either oral or written," *id.* at 7015. The government stated that it was "embarrassed to admit" that its agreement to the instruction at the prior trials was a "matter of inadvertence." *Id.* at 7014. The government represented that Kearney would testify that he did not have immunity, that the former prosecutors said he did not have immunity, and that Kearney's counsel said that he did not have immunity. *Id.* at 1786, 2148-2149, 7015-7016, 7021. Petitioner continued to urge that the instruction should be given. *Id.* at 7023-7026, 7067-7068. After hearing arguments from both parties, the district court deferred ruling on the instruction until after Kearney testified. *Id.* at 7022-7023, 7026-7027, 7033, 7038-7039, 7069.

Shortly thereafter, petitioner asked the district court to rule on the matter before trial, arguing that an informal immunity instruction should be given because Kearney had received informal immunity. C.A. App. 1725-1730. Petitioner also asserted that the government's prior filings and representations provided an evidentiary basis for the instruction because they were "admissible as statements of a party-opponent." *Id.* at 1729; see Fed. R. Evid. 801(d)(2). The government opposed the request on the ground that the evidence would likely show that Kearney was not promised immunity in exchange for his testimony. C.A. App. 1786, 1787; C.A. Gov't Supp. App. 11-17. The government explained its change in position as the result of an "inadvertent fail-

ure, during the first two trials, to notice that the Kearney instruction was erroneous as a matter of fact." C.A. App. 1787.

After the jury was selected, the trial began on October 10, 2006, and Kearney testified on the third day of trial. C.A. App. 8083, 8239. On direct examination, *id.* at 8296-8297, on cross-examination, *id.* at 8348-8350, and on redirect examination, *id.* at 8355-8356, Kearney unequivocally denied that he had been promised anything by the government in exchange for his testimony. Kearney was recalled as a witness on the eighth day of trial, and he again testified that he had not been promised anything before providing information to the government. *Id.* at 9616-9617. Kearney's testimony on that point was corroborated by Michael Kozik, the former general counsel of the Connecticut State Board of Accountancy, who testified about a 2002 conversation with AUSA Carney reviewing Kearney's cooperation with the government, during which AUSA Carney never represented that Kearney had any agreement with or promises from the government concerning his cooperation. *Id.* at 9627-9628; see *id.* at 9629-9632.

4. On the tenth day of trial, October 23, 2006, petitioner moved for the first time to admit the government's prior statements to the effect that Kearney had been promised immunity from prosecution in exchange for his testimony. C.A. App. 2120-2120f. Petitioner relied on Federal Rule of Evidence 801(d)(2), which provides that admissions by a party-opponent are not hearsay, and on Second Circuit cases holding that in-court statements by attorneys (including government counsel) are encompassed by that rule. See C.A. App. 2120-2120a, 2120c-2120d. The government opposed the motion. *Id.* at 2144-2152. In its brief, the government cor-

roborated Kearney's testimony by reiterating that it had contacted Kearney's counsel, Robert Fettweis, and each of the former prosecutors who would have been in a position to immunize Kearney, and that all of them had confirmed that the government had never offered Kearney immunity in exchange for his testimony, either orally or in writing. *Id.* at 2148-2149; see *id.* at 1673-1676, 7014-7016, 7019-7021, 7029-7030, 7038; C.A. Gov't Supp. App. 14-15.

The same day, the district court held a hearing pursuant to Federal Rule of Evidence 104 at petitioner's request, but petitioner did not seek to present evidence on the issue of Kearney's purported immunity, choosing instead to address other issues. See C.A. App. 10105-10229. AUSA Carney was the lead prosecutor for the first trial, had helped prepare Kearney to testify in that trial, and had first agreed to the instruction stating that Kearney had been given immunity. *Id.* at 9321-9323, 9622, 10429. Petitioner elected not to call AUSA Carney as a witness (*id.* at 10428-10429), despite having Carney under defense subpoena (*id.* at 9002-9004, 9023, 9311-9323, 9484-9485, 10428-10429), and despite representing earlier in the trial that petitioner would call him and question him on this subject and others (*id.* at 9318; see *id.* at 9322-9323, 9596, 9690, 9752, 9820-9821, 10089-10091, 10097, 10390-10394). And when petitioner called AUSA Weissman to testify at the Rule 104 hearing and later before the jury, *id.* at 10164-10166, 10178-10180, 10185-10186, 10278-10293, petitioner did not question him concerning Kearney's purported immunity.

Apart from the government's own statements in its filings during the two prior trials, the only evidence submitted by petitioner to support his claim that an immunity agreement existed was a letter dated May 5, 2000,

from Fettweis to the SEC about a proposed settlement of a civil enforcement action against Kearney. C.A. App. 1743-1751. That letter stated that "at no time did the U.S. Attorney's Office condition its own agreement with Kearney upon his simultaneous willingness to cooperate with the [SEC]." *Id.* at 1749. As the government explained to the district court, however, Fettweis confirmed that he had never entered into any kind of immunity agreement with the government on behalf of Kearney. *Id.* at 2148, 7016. Rather, Fettweis explained that his use of the word "agreement" in the letter was an "unfortunate" word choice because the government had never agreed not to prosecute Kearney. C.A. Gov't Supp. App. 16-17. (As set forth above, see p. 7, *supra*, the government had entered only into proffer agreements with Kearney.) Although petitioner had subpoenaed Fettweis to testify at the October 23, 2006, Rule 104 hearing, see C.A. App. 9485, petitioner ultimately did not call Fettweis as a witness, see *id.* at 10410-10411.

On October 24, 2006, the day after the Rule 104 hearing, the district court denied petitioner's request to admit the prior statements into evidence. Pet. App. 11a-13a.[3] Relying on *United States* v. *McKeon*, 738 F.2d 26,

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[3] In stating (Pet. 14) that the district court excluded the government's prior statements "at the beginning of the third trial," and that the court "saw no need even for an evidentiary hearing," petitioner suggests that the district court ruled peremptorily without compiling an adequate record. In fact, the district court made clear at the pretrial charge conference on September 20, 2006, that the court would not decide whether to instruct the jury that Kearney had received immunity until Kearney had testified and had been questioned on that point. See C.A. App. 7022-7039. Petitioner did not seek to have the government's prior statements admitted into evidence until October 23, 2006—the tenth day of trial—and the district court denied the request the following day. By that time Kearney and former AUSA Weissman

33 (2d Cir. 1984), the court explained that "[s]tatements and briefs filed by the government during the previous two trials which make reference to the fact that Kevin Kearney was testifying pursuant to an immunity agreement are not admissible as government admissions as the Court has determined that an innocent explanation exists for the statements." Pet. App. 11a. The court noted that Kearney had "testified unequivocally to the fact that he received no offers of immunity from the government[,] either formal or informal, oral or written[,] in exchange for his testimony." *Id.* at 12a. The court also noted that the government had "corroborated Mr. Kearney's testimony and acknowledge[d] that its references to Mr. Kearney's immunity agreement in briefs filed in the previous two trials were made in error." *Id.* at 13a. The court concluded that petitioner would "not be allowed to draw any inferences regarding the existence of * * * an immunity agreement when the undisputed facts establish that no such agreement exists." *Ibid.*

5. After the jury returned its guilty verdicts, petitioner moved for a new trial. Petitioner argued, inter alia, that the district court had abused its discretion in declining to admit the government's prior statements to the effect that Kearney had received informal immunity from prosecution. The district court denied the motion.

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had testified, and petitioner had elected not to call as witnesses at the October 23, 2006, hearing either Fettweis or former AUSA Carney. See pp. 9-10, *supra*. Other than the letter from Fettweis to the SEC, petitioner never proffered any evidence to rebut any part of the government's explanation that the prior statements were mistaken. There is consequently no basis for concluding that the district court denied petitioner an adequate opportunity to establish that Kearney had actually received immunity.

Pet. App. 14a-15a. The court reiterated its prior conclusion that "Kearney did not, as a matter of undisputed fact, receive any form of immunity." *Id.* at 14a. The district court concluded that, "because there was an innocent explanation for the supposed inconsistency that [petitioner] sought to take advantage of, the court did not abuse its discretion in ruling that the government submissions were not admissible." *Ibid.*

6. The court of appeals affirmed. Pet. App. 1a-7a. Petitioner contended, as one of eight separate challenges to his convictions set forth in his 100-page opening brief, that the district court had erred by excluding the government's prior statements about Kearney's supposed immunity agreement and by refusing to give the same jury instruction that it had given at the first two trials. See *id.* at 5a-6a. The court of appeals rejected those claims, explaining that, "[b]ecause the Government offered a sufficient explanation for the mistaken jury instruction with regard to [Kearney's] informal immunity * * * , the District Court did not abuse its discretion." *Id.* at 6a.

ARGUMENT

Petitioner contends (Pet. 12-29) that the district court erroneously excluded statements made by the government in prior trials of petitioner and that this Court's review is necessary to resolve a conflict in the circuits on whether Federal Rule of Evidence 801(d)(2), which defines "[a]dmission[s] by [a] party-opponent" as nonhearsay, applies to statements by the government in criminal prosecutions. His contentions lack merit. The district court had an ample basis for excluding the prosecutors' prior representations that a witness had an immunity agreement after the government established

that no such agreement existed and that the statements were made inadvertently. The court of appeals' unpublished decision finding no abuse of discretion in that evidentiary ruling does not merit this Court's attention. No court of appeals has addressed a comparable situation, where a district court, after a full inquiry, concluded that the prior prosecutorial statements resulted from an inadvertent mistake. Further, although courts have articulated different views about Rule 801(d)(2) in different contexts, the Second Circuit has treated prosecutors' in-court statements as encompassed within Rule 801(d)(2), and no circuit's decision would have compelled admission of the statements offered in this case, which were readily excludable under Federal Rule of Evidence 403. Given the absence of a square conflict and the harmlessness of the alleged error, further review of the court of appeals' unpublished decision is not warranted.

1. Under Federal Rule of Evidence 801(d)(2), the term "[a]dmission by party-opponent" encompasses, inter alia, a "statement [that] is offered against a party and is (A) the party's own statement, * * * (B) a statement of which the party has manifested an adoption or belief in its truth, * * * or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." Rule 801(d)(2) does not render all such statements *admissible*. Rather, Rule 801(d) simply provides that a statement within the enumerated categories "is not hearsay," Fed. R. Evid. 801(d), and therefore is not subject to exclusion under Federal Rule of Evidence 802. Questions concerning the ultimate admissibility of statements encompassed by

Rule 801(d)(2) are decided by reference to other provisions of the Federal Rules of Evidence.

Petitioner argues that certain statements made by federal prosecutors during petitioner's first and second trials should have been admitted at his third trial. The government had represented in the first two trials that it had an informal immunity agreement with one of the witnesses who testified against petitioner. After concluding that the government had established as a matter of fact that no immunity agreement existed and that the earlier government acknowledgments to the contrary had an innocent explanation, *i.e.*, they were made inadvertently, the district court excluded the statements. Pet. App. 11a-13a. Contrary to petitioner's contention (Pet. 15-21), no circuit conflict exists as to whether Rule 801(d)(2) requires admission of such statements.

a. The First and District of Columbia Circuits have held that statements submitted by government attorneys to courts in criminal cases are encompassed by Rule 801(d)(2). See, *e.g.*, *United States* v. *Kattar*, 840 F.2d 118, 130-131 (1st Cir. 1988) (holding that Rule 801(d)(2) encompassed prosecutors' statements in a sentencing memorandum and a brief in prior cases); *United States* v. *Morgan*, 581 F.2d 933, 937-938 & n.10 (D.C. Cir. 1978) (holding that Rule 801(d)(2) encompassed police officer's statements in sworn affidavit that was approved by a prosecutor and submitted to a magistrate). The court in *Morgan* concluded that "the Federal Rules [of Evidence] clearly contemplate that the federal government is a party-opponent of the defendant in criminal cases," *id.* at 937 n.10, and it found "nothing in the history of the Rules generally or in Rule 801(d)(2)(B) particularly to suggest that it does not apply to the prosecution in criminal cases," *id.* at 938. The court in *Kattar*

held that, "[w]hether or not the entire federal government in all its capacities should be deemed a party-opponent in criminal cases, * * * the Justice Department certainly should be considered such." 840 F.2d at 130.

The District of Columbia and First Circuits have recognized, however, that the prior statement of a government agent may still be inadmissible on other grounds even when it is found to be non-hearsay under Rule 801(d)(2). The court in *Morgan* considered (while ultimately rejecting on the merits) the government's relevancy objection to admission of the pertinent statements. See 581 F.2d at 936-937. The court in *United States* v. *Warren*, 42 F.3d 647, 655-656 (D.C. Cir. 1994), similarly considered (and rejected on the facts) the district court's exclusion of government-agent statements under Rule 403. And the court in *Kattar* explained that, "[o]f course, this sort of party-opponent admission is still subject to the trial court's balancing of its probative value against its prejudicial effect under Rule 403." 840 F.2d at 131 n.10. Thus, neither of those courts has rejected the basis for the exclusion here, *i.e.*, the district court's finding that the factual basis of the government's prior representation was incorrect because of an inadvertent error.

b. Petitioner contends (Pet. 18-19) that the Seventh and Fifth Circuits have categorically refused to admit statements by government agents in criminal cases under Rule 801(d)(2). Petitioner, however, errs because those courts have reserved judgment on the application of Rule 801(d)(2) to statements of the type made in this case, *i.e.*, statements made by prosecutors in court proceedings.

The Seventh Circuit has held, as a *general* matter, that statements by government employees fall outside

Rule 801(d)(2)(D), based on the principle that individual government agents "are traditionally unable to bind the sovereign." *United States* v. *Kampiles*, 609 F.2d 1233, 1246 (7th Cir. 1979), cert. denied, 446 U.S. 954 (1980). See, *e.g.*, *United States* v. *Arroyo*, 406 F.3d 881, 888 (7th Cir. 2005) (holding that statements in an Internal Revenue Service memorandum were properly excluded because "government agents are not party-opponents for purposes of Rule 801(d)(2)"); *United States* v. *Prevatte*, 16 F.3d 767, 779 n.9 (7th Cir. 1994) (statements of an undercover cooperator made to his mother were properly treated as hearsay, notwithstanding Rule 801(d)(2)). The court in *Kampiles* explained that, "[p]rior to adoption of the Federal Rules of Evidence, admissions by government employees in criminal cases were viewed as outside the admissions exception to the hearsay rule," and the court found "[n]othing in the Federal Rules of Evidence [that] suggests an intention to alter the traditional rule." 609 F.2d at 1246.

But petitioner identifies only one Seventh Circuit case—*United States* v. *Zizzo*, 120 F.3d 1338, 1351 n.4, cert. denied, 522 U.S. 998 (1997)—that involved statements made *to a court* by a government *attorney*. The court in *Zizzo* observed that, "[b]ased on the common law principle that no individual should be able to bind the sovereign, we generally decline to apply Rule 801(d)(2) to statements made by government employees in criminal cases." 120 F.3d at 1351 n.4. The court "note[d], however, that a number of courts have rejected that approach when dealing with statements made by government attorneys." *Ibid.* (citing *Kattar* and *Morgan*). The Seventh Circuit in *Zizzo* ultimately did not decide whether Rule 801(d)(2) encompasses in-court statements made by government counsel on behalf of the

United States. Rather, the court explained that, "even if [the defendant] could convince us that the statements qualified as nonhearsay under Rule 801(d)(2)(D), the [district] judge cited a number of reasons why he felt the statements should be excluded, any one of which supports his exercise of discretion." 120 F.3d at 1351-1352; see *id.* at 1352 (discussing various bases for exclusion and citing, inter alia, Federal Rule of Evidence 403). The Seventh Circuit thus refrained from deciding whether prosecutorial submissions of the type at issue here are encompassed by Rule 801(d)(2).

Petitioner is also wrong in asserting (see Pet. 18, 19) that the Fifth Circuit has treated statements by government officials as categorically outside the coverage of Rule 801(d)(2). Petitioner cites *United States* v. *Garza*, 448 F.3d 294 (5th Cir. 2006) (Pet. 19), in which the court of appeals upheld the exclusion of an extra-judicial report that was prepared by Michael Grimes, a government investigator. See *Garza*, 448 F.3d at 296, 298-299. In holding that the report fell outside the coverage of Rule 801(d)(2)(D), the Fifth Circuit explained that "[t]he results of [Grimes's] investigation were never adopted by the Department of Justice," and it concluded that "the district court did not abuse its discretion in ruling that Grimes' report could not be attributed to the Government." *Id.* at 299. The court of appeals, however, specifically noted that other circuits have held that "statements made by a *prosecutor*, rather than some other government employee, are admissible against the Government as a party admission under 801(d)(2)(D)." *Id.* at 298 n.14 (emphasis added). That statement underscores that the Fifth Circuit has not categorically resolved whether Rule 801(d)(2) is inapplicable to statements by *prosecutors*. Thus, with respect to the issue

presented in this case, both the Fifth and the Seventh Circuit have left open the applicability of Rule 801(d)(2) to statements made by federal prosecutors in criminal proceedings.

c. In *United States* v. *Yildiz*, 355 F.3d 80, 82 (2004) (per curiam), the Second Circuit itself stated that, for purposes of Rule 801(d)(2), "[t]here is good reason * * * to distinguish sworn statements submitted to a judicial officer, which the government might be said to have adopted, and those that are not submitted to a court and, consequently, not adopted" by the government. Thus, the Second Circuit has treated the government's prior "in-court statements * * * and filings" as admissible in appropriate circumstances. *Id.* at 82 (citation omitted). In *United States* v. *GAF Corp.*, 928 F.2d 1253, 1258-1262 (2d Cir. 1991), the court held that the government's prior inconsistent bill of particulars should have been admitted at the defendant's criminal trial. The court explained that, under Rule 801(d)(2)(B), "a prior inconsistent bill of particulars [may] be considered an admission by the government in an appropriate situation." *Id.* at 1260. In *United States* v. *Salerno*, 937 F.2d 797, 810-812 (2d Cir. 1991), rev'd on other grounds, 505 U.S. 317 (1992), the court held that the district court should have admitted the government's jury arguments from a prior criminal proceeding. And in *Yildiz*, the court reaffirmed its rulings in *GAF* and *Salerno*, stating that "[t]hese cases are consistent with Rule 801(d)(2)(B), which provides that a statement of which a party 'has manifested an adoption or belief in its truth' is not hearsay, and with authority that has applied that provision against the government in criminal cases." 355 F.3d at 82 (citing *Kattar* and *Morgan*). Thus, the Second Cir-

cuit *does* apply Rule 801(d)(2) to statements by prosecutors in appropriate cases.

Indeed, neither of the courts below suggested that statements by federal attorneys are categorically outside the coverage of Rule 801(d)(2). The district court held that, in light of the "innocent explanation" for the inconsistency between the government's prior filings and Kearney's testimony that he did not receive immunity, petitioner should "not be allowed to draw any inferences regarding the existence of * * * an immunity agreement when the undisputed facts establish that no such agreement exists." Pet. App. 13a; see *id.* at 14a-15a (explaining that "Kearney did not, as a matter of undisputed fact, receive any form of immunity," and that "there was an innocent explanation for the supposed inconsistency that [petitioner] sought to take advantage of"). The court of appeals similarly explained that the prior statements were properly excluded "[b]ecause the Government offered a sufficient explanation for the mistaken jury instruction with regard to [Kearney's] informal immunity." *Id.* at 6a. The clear premise of the decisions below was that the prior statements *would* have been treated as admissions if the government had failed to provide a convincing explanation for the discrepancy between its earlier statements and Kearney's testimony that he had not been immunized.

Against that background, petitioner's theory that this case implicates a circuit split on whether prosecutors' statements are covered by Rule 801(d)(2) in a criminal case is mistaken. The Second Circuit has made clear that such statements *can* be admitted under Rule 801(d)(2), and no court of appeals has categorically refused to treat such statements as admissions. There is, therefore, no justification for this Court's review on

whether Rule 801(d)(2) can encompass statements made to a court by federal prosecutors.[4]

3. Petitioner principally attacks the Second Circuit's standard (Pet. 20-24) on the theory that it establishes restrictions on admitting prior in-court submissions of counsel that other courts of appeals do not apply under Rule 801(d)(2). He observes (Pet. 20-21) that, under *United States* v. *McKeon*, 738 F.2d 26 (2d Cir. 1984), a party seeking to admit a statement made by counsel in a prior trial must establish that the inference the party "seeks to draw from the inconsistency [with the party-opponent's present position] is a fair one and that an innocent explanation for the inconsistency does not exist." *Id.* at 33. Petitioner's claim of a circuit conflict based on the application of that requirement is unfounded. The purported disagreement turns more on a formal matter of *which* rule of evidence permits courts to exclude prior statements by counsel when the admission would serve little probative purpose (but would engender considerable confusion and delay), rather than

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[4] Nor does this case present a broader issue concerning government agents that petitioner claims has divided the courts of appeals. Petitioner contends (Pet. 13) that there is a conflict among the circuits on "the more comprehensive issue of whether Rule 801(d)(2) can be invoked in criminal cases for statements by government agents generally, not just government attorneys." This case presents no occasion for considering that "more comprehensive issue," however, because the statements at issue here were contained in court submissions by government attorneys, and because the Second Circuit has expressly distinguished between in-court and out-of-court statements for purposes of Rule 801(d)(2). See *Yildiz*, 355 F.3d at 82 (noting recognition that "the government's attorneys can bind the government with their in-court statements," while "the out-of-court statements of a government informant are not admissible in a criminal trial pursuant to Rule 802(d)(2)(D) as admissions by the agent of a party opponent").

whether such evidence may be excluded. No review of that semantic disagreement is warranted, particularly where no other other court of appeals has considered the exclusion of a prosecutor's prior statement when it was shown to be an inadvertent error, and where the exclusion of the prior statements had no bearing on the outcome of the case.

a. Petitioner asserts (Pet. 13) that, in contrast to the Second Circuit's prerequisites to admitting prior "statements to the court by government attorneys," a prosecutor's statements are "admissible always" under the decisions of the District of Columbia and First Circuits. That is incorrect. While the District of Columbia and First Circuits treat such statements as non-hearsay under Rule 801(d)(2), those circuits have recognized that such statements may be excluded on other grounds, including on the ground that their potential for unfair prejudice or jury confusion substantially outweighs their probative value under Rule 403. See pp. 15-16, *supra*.

The Second Circuit's position is substantively similar. In *McKeon*, after the court reviewed the origins and general contours of Rule 801(d)(2), it expressed the view that "the evidentiary use of prior jury argument must be circumscribed in order to avoid trenching upon other important policies." 738 F.2d at 32. Petitioner describes the *McKeon* court's limitations on the admission of such evidence as a "gloss on Rule 801(d)(2)." Pet. 21. But while the court in *McKeon* held that prior statements of counsel should be excluded if they do not satisfy the announced standards for admission, the court did not identify the specific rule of evidence on which exclusion should be based. In particular, the court did not make clear whether such statements should be excluded on hearsay grounds (*i.e.*, as falling outside Rule 801(d)(2)'s

coverage) or on the basis of other evidentiary principles. And, although the Second Circuit in *McKeon* did not expressly rely on Federal Rule of Evidence 403, the concerns it described are directly relevant to a determination of admissibility under that rule.

Rule 403 vests district courts with significant discretion to take into account the sorts of considerations that the Second Circuit identified in *McKeon*. The rule states that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The court in *McKeon* explained that admission of counsel's jury argument in a prior case "might consume substantial time to pursue marginal matters," 738 F.2d at 32; that "the evidentiary use of earlier arguments before the jury may lead to seemingly plausible but quite prejudicial inferences," causing the jury in the second trial to "be misled," *ibid.*; and that admission of such evidence "may lead to the disqualification of counsel," *id.* at 33. These considerations are all subsumed under Rule 403. There is no reason to assume that other circuits, considering the same factors within the context of an explicit Rule 403 balancing of interests, would apply significantly different substantive standards in determining whether particular attorney statements from prior judicial proceedings should be admitted into evidence at a subsequent trial.[5]

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[5] Petitioner contends (Pet. 25) that some courts of appeals under Rule 801(d)(2) have erroneously applied more restrictive standards for admitting prior government statements than for admitting analogous statements by private party-opponents. The Second Circuit's decisions, however, adopt no such double standard for statements by federal

b. The district court's assessment of the record in this case makes clear that Rule 403 provides ample justification for exclusion of the prior statements by prosecutors that witness Kevin Kearney had received immunity from prosecution.[6] Both in its denial of petitioner's re-

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prosecutors. *McKeon*, *supra*, the source of the Second Circuit's jurisprudence on this issue, involved (as petitioner recognizes, see Pet. 20) the admission of statements made by defense counsel in a prior criminal proceeding. See *Salerno*, 937 F.2d at 811-812 (applying *McKeon* standards to determine the admissibility of the government's jury argument in a prior case); *GAF*, 928 F.2d at 1259-1260 (relying substantially on *McKeon* in holding that a prior bill of particulars prepared and submitted by the government was admissible in a subsequent trial). And the court in *Yildiz* recognized that Rule 801(d)(2) makes "[n]o distinction between * * * the civil and criminal context, the government and other parties, or the government's attorneys and its other law enforcement agents." 355 F.3d at 81. Because the Second Circuit has applied the same standards to determine the admissibility of prior in-court statements by government and private counsel, the evidentiary ruling challenged here does not (as petitioner incorrectly suggests, see, *e.g.*, Pet. 24-25) reflect any disparate treatment of the parties in a criminal case.

[6] An appellate court "may affirm an evidentiary ruling on any ground supported by the record, regardless of whether the district court relied on the same grounds or reasoning." *United States* v. *Pang*, 362 F.3d 1187, 1192 (9th Cir.), cert. denied, 543 U.S. 943 (2004); accord *United States* v. *Ledford*, 443 F.3d 702, 707 (10th Cir. 2005), cert. denied, 127 S. Ct. 165 (2006); *United States* v. *Mussare*, 405 F.3d 161, 168 (3d Cir. 2005), cert. denied, 546 U.S. 1225 (2006). That principle applies to Rule 403. See *United States* v. *Counce*, 445 F.3d 1016, 1018-1019 (8th Cir. 2006) (per curiam) (upholding exclusion of evidence under Rule 403 after ruling that the district court had erroneously excluded the evidence on other grounds); cf. *United States* v. *Yousef*, 327 F.3d 56, 156-157 (2d Cir.) (prior jury argument that might have been admissible as admission of party-opponent under Rule 801(d)(2)(A) properly excludable as irrelevant under Rule 402), cert. denied, 540 U.S. 993 (2003). In this case, the district court's own reasoning supports exclusion under Rule 403, even if the court did not cite that rule. Notably, the court of

quest that the government's prior statements be placed before the jury, and in denying petitioner's post-verdict request for a new trial, the court referred to the "undisputed" fact that no such immunity agreement had ever existed. See Pet. App. 13a, 14a. The prosecutors' former mistaken statements that were contrary to the "undisputed" facts, concerning a matter relating to impeachment of a witness, are clearly excludable under Rule 403 to prevent "confusion of the issues," "misleading the jury," or "waste of time." Fed. R. Evid. 403.

In view of a district court's broad discretion under Rule 403, a court would indisputably have authority to exclude a party-opponent's prior statement after the party-opponent established to a virtual certainty that its earlier statement was a mistake. Suppose, for example, that a prosecutor stated that a particular witness had previously been given a reduced sentence in return for his agreement to testify, but subsequently realized that the witness had not yet been sentenced and that the prosecutor had confused him with another individual. If the error in the prior statement were made clear by relevant judicial records, and the defense nevertheless sought to introduce the prosecutor's earlier statement at a second trial, the court should clearly exclude it under Rule 403 on the ground that it would "mislead[] the jury" to suggest that any serious dispute about the matter existed. The district court's factual determination here—that the government had clearly established the non-existence of any immunity agreement—stands on a similar analytical footing. The court accepted the government's proof on that point only after affording peti-

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appeals in this case did not cite *McKeon* or any rule of evidence, but simply stated that "the District Court did not abuse its discretion." Pet. App. 6a.

tioner an ample opportunity to provide contrary evidence from any source, which petitioner was unable to do.[7] The court's exclusion of evidence that would only fuel factually unsupported implications that petitioner would have drawn from mistaken prior government statements was well within its discretion, and its decision to exclude that evidence creates no conflict with any other decision.[8]

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[7] Petitioner contends (Pet. 10 n.8) that the factual issue of whether Kearney had an informal immunity agreement was "hotly disputed," but that claim lacks any factual basis. At the third trial, Kearney testified unequivocally that he had not been promised anything by the government in exchange for his testimony. C.A. App. 8296-8297, 8348-8350, 8355-8356, 9616-9617. The government also informed the district court that each of the former prosecutors had "confirmed that, not only did they not offer Kearney immunity against prosecution in this case at any time, but they never offered and would not * * * have offered any witness 'informal immunity' by way of an oral representation." *Id.* at 1786, 2149. The government further explained that Kearney's counsel had confirmed that he had never entered into any kind of immunity agreement with the government on behalf of Kearney. *Id.* at 2148, 7016, 7021; see pp. 8, 10, 11, *supra*. And petitioner declined to avail himself of ample opportunities to offer evidence substantiating his claim that an immunity agreement existed. See pp. 10-11, *supra*.

[8] The circumstances of this case are far removed from the facts of *United States* v. *Powers*, 467 F.2d 1089 (7th Cir. 1972), cert. denied, 410 U.S. 983 (1973), in which then-Judge Stevens dissented from the court of appeals' decision to uphold the exclusion of evidence of a prior position taken by the government. *Id.* at 1097-1098 (Stevens, J., dissenting). In that case, the government prosecuted Powers, an attorney, for fraud. It introduced evidence that Powers had received certain checks that linked him to a fraudulent scheme with his client, Fidanzi. The defense contended that, in a prior prosecution of Fidanzi, the government had made the contradictory factual claim, supported by the same witness, that the checks at issue were personally and exclusively received by Fidanzi. On those facts, then-Judge Stevens believed that Powers was entitled to prove that the government had previously taken

c. In any event, petitioner is mistaken in suggesting (Pet. 14-15) that his inability to introduce the government's prior statements about an informal immunity agreement with Kearney tipped the balance towards conviction after two prior mistrials. To the contrary, any error in excluding the prosecutors' misstatements at issue was harmless. See *United States* v. *Warren*, 42 F.3d at 656 (finding that error in excluding officer's statement under Rules 801(d)(2) and 403 did not require reversal because the court concluded "with fair assurance . . . that the judgment was not substantially swayed by the error") (quoting *Kotteakos* v. *United States*, 328 U.S. 750, 765 (1946)). Kearney's testimony spanned roughly 130 pages of the several-thousand-page-long trial transcript. C.A. App. 8240-8362, 9614-9623. During that testimony, Kearney admitted that he had participated in the fraud yet had not been charged with any crime; Kearney also admitted that he did not know whether petitioner had participated in the fraud. *Id.* at 8254-8255, 8293-8297, 8302-8322, 8338-8339, 8348-8350, 8355-8356, 8361-8362. In addition, Kearney admitted that he was told that he "was not a target of the investigation," which was "very good news" to him. *Id.* at 8348-8350.

Thus, the fact that Kearney had not been prosecuted and might therefore be biased was plain to the jury. Petitioner employed other means to discredit Kearney as well: he called a former prosecutor and an SEC lawyer

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"mutually exclusive" positions on an issue central to factual guilt. *Ibid.* That situation bears scant resemblance to the circumstances here, where the government's factual theory of petitioner's guilt was consistent through all three trials, and the only change in its position was a realization that the prosecutors' concession of an immunity agreement with a witness was factually unfounded.

to describe for the jury interviews with Kearney before the first trial, during which interviews Kearney purportedly did not mention certain events or contradicted his testimony at the third trial. C.A. App. 10278-10286, 10293-10298. Given the thorough impeachment of Kearney, the excluded misstatements concerning the purported immunity agreement would not have had any significant incremental impact on the jury, particularly when they would have been refuted by the uniformly contrary testimony of Kearney, Kearney's counsel, and the prosecutors involved.

Nor was Kearney's testimony the critical evidence against petitioner. Cosmo Corigliano—CUC's CFO and petitioner's co-conspirator—described in detail how the fraud worked and directly implicated petitioner with respect to both the perpetration and the concealment of the fraud. C.A. App. 9114-9119, 9122-9133, 9135-9182, 9188-9199, 9202-9209, 9213-9214, 9219-9223, 9226-9229, 9231-9236, 9961, 9972-9976. Anne Pember—CUC's controller and petitioner's co-conspirator—similarly detailed the fraud. *Id.* at 8396, 8401-8416, 8428, 8431-8449, 8453-8469, 8516-8517, 8519-8520, 8523-8525, 8528-8529, 8532-8535, 8540. Henry Silverman—Cendant's CEO—described petitioner's extraordinary efforts both to keep Pember in a position that would allow her to continue concealing the fraud, and to continue using CUC's outside auditor, Ernst & Young, which had missed red flags signaling the fraud. *Id.* at 8742-8775. Importantly, Silverman was a *new* witness at petitioner's third trial, and his testimony was far more likely to explain the different outcome at that trial than the omission of a prior statement by a prosecutor that Kearney had immunity (which statement Kearney denied without impeachment from any witness with factual knowledge). Michael Mo-

naco—the Cendant CFO whom defense counsel called honest (*id.* at 7569)—corroborated Silverman's testimony concerning petitioner's lobbying on behalf of Pember and Ernst & Young. *Id.* at 7787-7788, 7847-7884, 7888-7889, 8175-8176, 8187-8188. Jan Davidson—a former CUC director—described petitioner's stern reaction when questioned at a board meeting about CUC's merger reserves—a key part of the fraud. *Id.* at 7653-7662. Casper Sabatino, a CUC vice president and defense witness, testified that he had exposed the fraud to Cendant officials, rather than to petitioner, because he feared that otherwise his concerns would be "squashed." *Id.* at 10454-10455. Another defense witness, Greg Danilow—petitioner's lawyer and friend—helped to establish that petitioner had transferred $17 million in assets when he learned that a criminal investigation was underway, and that petitioner had perjured himself in both prior trials. *Id.* at 9066-9072; see *id.* at 1695-1696, 9031-9052, 12042-12045.

In light of the thorough impeachment of Kearney, including by evidence from which the jury could conclude that he had a reason to be biased in favor of the government because he had not been prosecuted, and in light of the strength of the evidence from other witnesses of petitioner's fraud, any error in excluding the prosecutors' prior (mistaken) statements about an immunity agreement did not have "substantial and injurious effect or influence in determining the jury's verdict the verdict," *Kotteakos*, 328 U.S. at 776, and the court of appeals' unpublished decision does not warrant review.

5. Finally, petitioner contends (Pet. 30-33) that the exclusion of the government's prior statements in this case violated his rights under the Fifth and Sixth Amendments. That claim, which essentially recasts his

evidentiary objection, lacks merit. The Constitution "guarantees criminal defendants 'a meaningful opportunity to present a complete defense,'" *Crane* v. *Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California* v. *Trombetta*, 467 U.S. 479, 485 (1984)), including the right to present evidence that a witness has been promised immunity so that the jury may assess the witness's credibility, see *Giglio* v. *United States*, 405 U.S. 150, 154-155 (1972). Here, Kearney testified at the third trial and denied that he had been promised anything by the government in exchange for his testimony. C.A. App. 8296-8297, 8355-8356, 9616-9617. Petitioner had the opportunity to cross-examine him fully, as well as the opportunity to elicit testimony from the pertinent AUSAs and Kearney's counsel, all of whom either testified or were under defense subpoena, *id.* at 9002-9004, 9311-9313, 9316-9323, 9484-9485, 10164-10186, 10428-10429.

Petitioner sought to introduce the government's mistaken statements from the two prior trials to create the appearance of a genuine factual issue on a matter that, in the district court's view, was not the subject of any legitimate dispute. The Constitution did not require the court to admit evidence of a purported immunity agreement "when the undisputed facts establish[ed] that no such agreement exist[ed]." Pet. App. 13a. See *Holmes* v. *South Carolina*, 547 U.S. 319, 326 (2006) ("[W]ell-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury."); *United States* v. *Nobles*, 422 U.S. 225, 241 (1975) ("[O]ne cannot invoke the Sixth Amendment as a justification for presenting

what might have been a half-truth.").[9] Because the district court properly concluded that the government's prior statements lacked probative force, and because the exclusion of those statements for impeachment purposes responded to wholly legitimate evidentiary interests—*e.g.*, the concern about jury confusion, minitrials on a collateral matter, and the potential to mislead the jury—the district court's evidentiary ruling infringed no constitutional right of petitioner to present his defense.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2008

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[9] In *Holmes*, the Court found constitutional error because the trial court excluded defense evidence suggesting a third party's guilt based on the conclusion that the prosecution's evidence was strong, "without considering challenges to the reliability of the prosecution's evidence." 547 U.S. at 330. The error was that "by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." *Id.* at 331. Here, in contrast, the district court considered all the relevant evidence and concluded that petitioner had failed to call into question the government's innocent explanation of its former error, despite a full opportunity to adduce evidence of an immunity agreement with Kearney, if such evidence existed.