

11-5445

To Be Argued By:
JOHN H. DURHAM

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 11-5445

—
UNITED STATES OF AMERICA,
Appellee,

-vs-

ARNOLD BELL,
Defendant-Appellant.

—
ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

The district court (Alan H. Nevas, J.) had subject matter jurisdiction under 18 U.S.C. § 3231. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b), and this Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

Statement of Issues Presented for Review

1. Did the district court abuse its discretion in denying the defendant's motion for a mistrial based on the government's cross-examination asking the defendant to comment on testimony by other witnesses, where almost all of the questions simply asked whether the other witnesses were mistaken, wrong or accurate, the court gave a cautionary instruction and the questions did not substantially prejudice the defense?

2. Did the district court abuse its discretion in denying the defendant's motion for a mistrial where the government cross-examined the defendant about his post-arrest, *Mirandized* statement?

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Preliminary Statement

On June 13, 2002, the defendant, Arnold Bell, an armed career criminal, shot New Haven Police Officer Robert Fumiatti in the face with a .38 caliber Colt revolver that had traveled in interstate commerce. He had obtained the firearm from his cousin four months earlier, immediately after he had been released from prison and had returned to selling narcotics. The evidence was overwhelming and included testimony by seven

different eyewitnesses to the shooting, the defendant's flight from the scene and attempt to hide from the police and matching DNA and fingerprint evidence taken from clothing the defendant wore that night.

At trial, the defendant testified and offered a version of events that directly conflicted with all of the eyewitnesses. Though he did not object during cross examination, he subsequently moved for a mistrial claiming that the government improperly asked him to comment on the veracity of its witnesses and to explain his failure to provide certain exculpatory information to the police during his post-arrest, *Mirandized* statement. On appeal, he claims that the district erred in not granting a mistrial and that these two avenues of cross-examination violated his due process rights.

For the reasons set forth below, these claims have no merit.

Statement of the Case

On January 20, 2004, a federal grand jury returned a second superseding indictment charging the defendant in four counts. Government's Appendix ("GA")¹. Count One charged that, in February 2002, the defendant possessed a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c).GA1-GA2. Count Two charged that, on June 13, 2002, the defendant possessed with intent to distribute cocaine

base, in violation of 21 U.S.C. § 841(a)(1). GA2. Count Three charged that, on June 13, 2002, the defendant carried, used and possessed a firearm in furtherance of a drug trafficking offense crime, in violation of 18 U.S.C. § 924(c)(1)(a). GA2-GA3. Count Four charged that, from in or about February 2002 through June 13, 2002, the defendant, having been previously convicted of a felony offense, unlawfully possessed a firearm by a previously convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). GA3.

On January 28, 2004, the district court severed Count Four from the remaining counts, and trial commenced on February 17, 2004. A6a-A7a. On February 24, 2004, the defendant made oral motions for a mistrial, which the court denied. A1667, A1669-A1670. The government filed a response that same day. GA13. On February 25, 2004, the defendant filed a written motion to reconsider the court's denial of his mistrial motion, arguing that the government had infringed upon his right to remain silent. GA19. Also, on February 25, 2004, the defendant filed a written motion for a mistrial based on the government's alleged improper cross-examination as to the veracity of witnesses. GA24. On that same date, the court denied both mistrial motions, A1711, A1724, and, on February 26, 2004, the jury found the defendant guilty of Count Four. A1877.

On June 23, 2004, the district court sentenced the defendant to a 45-year (540-month) incarceration term on Count Four and a consecutive 24-month incarceration term on a supervised release violation. Special Appendix (“SPA”)1. “The sentence reflect[ed] an upward departure under U.S.S.G. §§ 5K2.2 & 5K2.6. . . . [because] the defendant caused the victim, Officer Fumiatti ‘significant physical injury’ and used a firearm in the commission of the offense.” A1883. The court ordered the sentence to be served concurrently to the 45-year state sentence imposed based on the related state assault and firearms convictions. SPA1.¹ The court also granted the government’s motion to dismiss all of the remaining counts against the defendant. SPA1.

The defendant is presently state custody serving his state sentence.

¹ After the federal trial, but prior to sentencing, the defendant was tried in Connecticut state court on charges arising from the shooting of Officer Fumiatti. A state jury convicted him of, *inter alia*, first degree assault. The defendant appealed. The Connecticut Supreme Court upheld his convictions, but remanded the case for resentencing. *State v. Bell*, 931 A.2d 198 (Conn. 2007). After remand and re-sentencing, the Court ultimately upheld his 45-year sentence. *State v. Bell*, 33 A.3d 167 (Conn. 2011).

Statement of Facts and Proceedings Relevant to this Appeal

1. The government's case

In or about September 1974, a Colt Cobra revolver bearing serial number F99443 (“the revolver”) was manufactured in Hartford and shipped to a company in New York. A168-A172. That company sold the revolver to an individual in New York later that year. A173. Sportsman’s Rendezvous, a business located in Milford, Connecticut, acquired the revolver in 1996 and sold it to Michael Rice in 1997. A174-A175. In December 2001, Rice owned three firearms, including the revolver. A64-A65, A164-A165.

By late 2001 and early 2002, Rice was heavily addicted to crack cocaine; he purchased crack from dealers on Truman Street in the Hill Section of New Haven, sometimes traveling there four to five times a day. A57-A61. His primary source for crack was “G-Knocker,” a street name for Gary Mills. A27-A28, A62, A197. Given Rice’s addiction, money became a problem for him, and Mills began to sell him crack on credit, doubling the price. A63-A64. Mills demanded that Rice leave him collateral to receive the crack on credit, with the understanding that Rice would return and pay him double the next day. A66-A67.

Desperate to fuel his crack addiction, Rice provided Mills with a box containing his firearms, including the revolver, in return for approximately \$70-\$80 in crack. A67-A68, A127. The next day, Rice returned to retrieve the firearms, but Mills refused to give them back to him. A69, A128-A129. Rice became fearful and left. A69. He stopped using Mills as a source of crack and never reported the guns as stolen. A69.

On February 12, 2002, Ramek Gordon, the defendant's cousin, picked up the defendant when the defendant was released from prison. A179, A187. Shortly after his release, the defendant told Gordon he wanted to make money selling drugs. A190-A191. The defendant began selling crack and marijuana on Hurlbert Street between Washington Avenue and Spring Street. A193-A194. He hid his drugs in the trees and in other locations on Hurlbert Street. A214. He wore latex gloves on his hands when he was selling drugs. A195-A196. His partner in his drug operation was Gregory Hughes, with whom he also worked at a legitimate job during the day. A278, A280-A281.

The defendant, a previously convicted felon, A25-A26, asked Gordon for help getting a gun. A191. He thought people were following him. A191. Gordon knew that Mills had been bragging about a .38 caliber revolver he had obtained from "Mike [Rice]," one of Mills's regular cus-

tomers. A203. Gordon understood that Mills had originally obtained the firearm from Rice as collateral for crack, which is something that Gordon himself had done in the past with Rice. A197-A203.

Sometime between when the defendant was released from jail and February 23, 2002, when Mills was incarcerated, Gordon arranged for Mills to sell a firearm to the defendant. A204-A205. On that occasion, Gordon went to Truman Street to pick up Mills, and the two then drove to 209 Spring Street where they met with the defendant. Mills and Gordon went into the hallway of the house at that location to show the defendant the revolver. The defendant agreed to purchase it, and Gordon gave Mills seven grams of crack in return for the firearm. A206-A207.

Gordon saw the defendant with the revolver (and wearing latex gloves) on one later occasion. A214-A215. On another occasion, the defendant told Gordon that rival drug dealers were selling drugs on his turf. According to the defendant, the rival dealers were cutting into his profits and they "had to go." A214-A215.

In the early evening hours of June 13, 2002, one of the defendant's regular drug customers, Anthony Banks, saw him at Hurlbert Street and Washington Avenue, across from where the defendant regularly sold crack. A322-A326. The defendant was dressed in a camouflage suit. A327.

Around 9:00 p.m. that same evening, Melanie Buckenjohn, the owner of 614 Washington Avenue, saw the defendant walking back and forth on Washington Avenue and then ducking on his “haunches” in her driveway area near her car. A29-A30, A567, A569, A573, A577-A578, A587-A589, A618, A663. He was dressed in fatigues. A578. Concerned about her car, she went out to the porch and asked the defendant to leave. A574-A575. At first, the defendant ignored Buckenjohn, but then he agreed to leave. A574-A575.

Buckenjohn remained concerned about the defendant and alerted Eden Bass, one of her tenants, to his presence, pointing out the defendant to him. A578-A579. Bass approached the defendant, A687, A688-A690, and saw that he was with another man. A682-A683. Bass politely asked them to leave, and the defendant agreed to do so, stating that he was “just trying to make some money, but I’m leaving.” A683-A684. The defendant and Bass shook hands, and Bass saw that he was wearing a white latex glove on his right hand. A684-A685. Bass also noted that the defendant was wearing camouflage. A683, A686. Bass had seen the defendant on other occasions in the early evening hours in the vicinity of Hurlbert Street and Washington Avenue going up to cars. A695-A699.

After Bass left, Buckenjohn’s other tenant, Namien N’Guessan, returned home from church,

and Buckenjohn alerted him to the defendant's presence and told him to keep an eye on the defendant. A580, A653-A654, A1236-A1238. N'Guessan, who had ordered take-out food for dinner, decided he would wait until the defendant left before picking up his food and then kept an eye on him. A1238, A1286-A1287. He watched the defendant, dressed in a camouflage jacket and pants, walk back and forth, occasionally appearing to touch the leaves on trees. A1240-A1242, A1247. At one point, N'Guessan saw a white car arrive and was relieved, thinking that the defendant might be getting picked up. A1242.

Instead, he then saw a van pull up and a man get out. He observed the defendant pull his right hand from his pocket and then saw a flash and heard a loud noise. A1243-A1244. He ran upstairs and told Buckenjohn that he had seen the man in the driveway shoot a policeman. A617, A1244. He positively identified the defendant in a photo-array and at trial as the man in camouflage who had shot the policeman. A31-A32, A1239, A1255-A1257.

The man in the white car was Hughes. A521. Hughes had known the defendant for about 15 years and had helped him get a job at Fleet Pride following his release from prison. A521, A525. When he arrived on Hurlbert Street in his white Honda Civic, A526-A527, he saw the defendant standing alone behind the sidewalk

on Hurlbert Street dressed in a camouflage jacket and pants. A516. He also saw that the defendant was wearing latex gloves on his hands, A534, and he recognized them as the kind of gloves that were available at Fleet Pride. A543-A544. The defendant appeared to be angry. A564.

Hughes got out of his car and called across the street to talk with a female. A531. At that point, he observed a van pull up and police officers get out of it. A531-A532. He heard a single gun shot, A532-A533, that came from behind him, where the defendant had been standing alone just before the shot was fired. A536. The defendant immediately fled the area, and Hughes remained on the scene, telling the officers that "it wasn't me." A423-A424, A442, A453.

The van N'Guessan and Hughes had seen pull up was, in fact, an unmarked New Haven police van. A331-A333. That night, the van contained 12-15 officers and was being driven by Detective Martin Dadio. A331-A333, A1296. The officer in charge was then-Lieutenant Brian Norwood, who was in the front passenger seat of the vehicle. A1295, A1297. Officer Robert Fumatti was seated in the rear cargo area directly behind Norwood. A1325.

As Detective Dadio drove the van down Washington Avenue and made a right onto Hurlbert Street, an area known for drug activity, A340, he observed a man dressed in full camou-

flage standing by another man who was next to a white car. A339. The man dressed from head to toe in camouflage looked at the van, and then turned away, walking toward a grassy area. A1299-A1300. He placed a hand in his waist area. A1302. Lieutenant Norwood told the officers in the van that they were going to identify the subjects and conduct a field interview. A340, A1303. The officers were not in uniform, but wore badges around their necks and had shirts or raid vests with police logos. A426, A463.

As the van pulled up and the doors opened, Lieutenant Norwood got out from the front passenger seat simultaneously with Officer Fumiatti, who was behind him. A1305-A1306. Lieutenant Norwood took two steps toward the man dressed in camouflage while focusing his attention on him. A1305. The man in camouflage raised a revolver with his right arm, and fired a shot. A1307-A1308.² Lieutenant Norwood realized almost immediately that Officer Fumiatti had been shot. A1310. He saw the man in camouflage run across the grassy area, cross Washington Avenue and then go through a lot, where he lost sight of him. A1310-A1311.

Detective Dadio also saw the man wearing the camouflage pull his arm up from his waist,

² At trial, the defendant stipulated that he is right-handed. A1321-A1322.

and then heard a shot and saw a muzzle flash.³ A343-A345. After checking himself for wounds, Dadio got out of the van and observed the man in camouflage fleeing across Washington Avenue and Officer Fumiatti lying on the ground bleeding from the head. A345, A351-A352.⁴ Detective Edward Reynolds, who had followed Officer Fumiatti out of the van, also saw the silhouette of a black man dressed in camouflage running away down Washington Avenue toward King and Clover Place. A474-A477.

The police secured the entire area immediately and established a large perimeter. A356, A432, A1119. Thereafter, they began a systematic search of the area. A476-A477, A1081-A1082, A1117-A1118.

Shortly after the shooting and the assailant's flight, a resident in the area, Dorothy Hall, heard a voice saying, "Mrs. Hall. Let me in." A916-A917. Hall, who knew the defendant, tes-

³ Other officers also heard the single shot fired. A424, A471.

⁴ Officer Fumiatti was critically wounded by a gunshot to the head. A396-A399. Doctors determined it would be too dangerous to attempt to remove the bullet, so it was left in place. A405-A408, A411. While the caliber of the bullet could not be determined, x-rays showed that it was not a bb projectile or a .22 caliber round. A409.

tified that she believed the person she heard asking to be let in was Arnold Bell. A917-A918.⁵

Several hours after the shooting and while an intensive search for the shooter was still underway, A942, a police officer noticed a pair of legs attired in camouflage pants sticking out from under some bushes located in the rear yard of 138 Frank Street. A1131-A1132. The officer instructed the person to show his hands and, after seeing no movement, pulled the person out from under the bushes. A1133-A1134. The man in the camouflage pants, who was wearing a black t-shirt at the time of his apprehension, was the defendant. A1135. Police placed him in custody and waited for Lieutenant Norwood to arrive to see if he could identify the defendant as the shooter. A1120-A1121.

Lieutenant Norwood had a very good look at the shooter, A1300, whose face was illuminated by the muzzle flash from the revolver. A1309, A1332.⁶ Shortly after the defendant's apprehen-

⁵ In a call recorded on June 24, 2002 by the Connecticut Department of Corrections, the defendant complained to his girlfriend, Dorothy Hall's daughter, that he had tried to get into Hall's house "to change [his] clothes," but that she had rebuffed him. A980-A984.

⁶ Lieutenant Norwood testified that he was only about the distance from the witness stand to the at-

sion, Norwood identified him as the man he saw shoot Officer Fumiatti; Norwood was 100 percent certain of his identification and had no doubt that the defendant was the shooter. A1320, A1322, A1323.

The Identification Unit arrived soon after, secured the crime scene, A710-A712, and recovered a number of items. First, during a grid search conducted in the primary crime scene at Washington Avenue and Hurlbert Street, they found the revolver (bearing serial number F99443) in the dirt area adjoining 614 Washington Avenue. A732, A991, A1019. A latex glove was found stuck in the trigger of the revolver. A998. The revolver, which was found to be operable, A1051, was loaded with three live .38 caliber rounds, two empty chambers, and a single expended cartridge, showing that the gun had been fired once. A729-A730, A1001-A1004. No other spent cartridges were recovered at the crime scene. A995.

Later that evening, police officers recovered a camouflage jacket and mask in the back of Hall's residence. A913, A933. Forensic evidence proved that the defendant was a contributor to the DNA sample taken from the collar and sleeve of that jacket, and from the mask. A792-A800. In addition, lead, which is the most common component

torney's podium when the defendant fired the shot. A1344.

of gunshot residue, was recovered from the samples taken from the right sleeve, left sleeve, and cuff of the jacket, as well as the t-shirt the defendant was wearing when he was apprehended. A824-A825.

Found next to the camouflage jacket were pens and markers used at the defendant's place of employment, Fleet Pride. A744-A745. Similar Fleet Pride pens were recovered pursuant to a state search warrant from the defendant's residence, as were latex gloves. A755-A763. In addition, a set of keys belonging to the defendant's mother was recovered from the side of Hall's residence. A751, A968, A1095-A1096

The DNA profile from the firearm was determined to be a mixture, and the defendant, Rice, Mills and Gordon were all eliminated as contributors to that profile. A788. DNA swabs were also taken from the latex glove which had been stuck in the revolver. The defendant was eliminated from the mixture of DNA recovered from the fingertip and wrist areas of the latex glove, but could not be excluded from the mixture taken from the general swab of the glove. A790, A800-A801.

If a person wore two gloves, one would not expect the interior of the outer glove to contain the person's DNA. A806, A821-A822. In this regard, on the morning after the shooting, during a daylight search, a pair of discarded latex gloves were recovered in the area of Hall's residence.

A753-A754, A970. While no gunshot residue was found on those gloves, A820-A821, the defendant's right and left palm prints were identified on the gloves. A1197-A1198. No latent fingerprints were obtained from the glove that was stuck on the revolver, A1192, A1226, but gunshot residue was recovered from that glove indicating that it had been worn by or in close proximity to a person discharging a firearm. A817-A819.

2. The defendant's case

The defendant testified in his own defense.⁷ He admitted to having several prior felony drug sale convictions and for "other misdemeanor type offenses," but said he had not sold drugs after his release from prison in February 2002. A1447-A1450. Upon his release from prison, he was picked up by his grandmother and Gordon. A1450-A1451. Thereafter, he worked at Fleet

⁷ The defendant also called several witnesses, including his supervisor at work, A1418, who testified that Gordon sold drugs and carried a firearm, A1421, and that the defendant had access to, and wore latex gloves at work, A1427, and his girlfriend, who testified that the defendant came home from work at about 5:30 p.m. on June 13, 2002, A1433, and left at about 7:00 p.m. saying he was going to the store. A1535-A1537. His girlfriend did not actually see him leave and did not know what he was wearing when he left. A1441-A1442.

Pride where he had access to pens inscribed with the Fleet Pride name and where he wore latex gloves and a mask to combat the dust. A1454-A1456.

He testified that on June 13, 2002, he had worn a camouflage jacket and pants to work, A1460. He stated that he had completed a full day of work, and after going home and having dinner, he decided to go to the store. A1464-A1465. At the time he left, he stated he was wearing a camouflage jacket and camouflage pants. A1467.

He testified that he saw Gordon in the vicinity of Hurlburt Street and Washington Avenue, and, even though he knew he was not supposed to smoke marijuana, he told Gordon he was looking for some "smoke." A1468, A1469. Gordon said he had some and, after moving into Buckenjohn's driveway to avoid detection, Gordon, who was wearing gloves, removed bags of marijuana from his buttocks area and provided them to the defendant. The defendant said that, when he saw Gordon wearing gloves, he also put on a pair of latex gloves. A1470-A1471.

About that same time, he acknowledged having conversations with Buckenjohn and Bass. He admitted both shaking hands with Bass and having gloves on at the time, but denied telling him that "a man's got to make money." A1473-A1474. He also denied walking back and forth near Buckenjohn's house. A1475.

He claimed that, after speaking with Buckenjohn and Bass, as he was walking on Washington Avenue toward Spring Street, he saw a van driving very slowly down Hurlburt Street. A1476-A1477. At approximately the same time, he saw his friend Hughes, who had pulled up and gotten out of his car; he asked Hughes what was going on with the slow moving van, and, when the van pulled up, he backed away from Hughes. A1476-A1477. As he started to turn to run, he said he saw Gordon attired all in black, walking along the fence towards him on Washington Avenue. A1481-A1483, A1485. The defendant testified that, when the van doors opened, he started running to King Place and, as he ran, he heard three shots which, he admitted on direct examination, was inconsistent with everyone else's testimony. A1484-A1485. He did not see who fired the shots, A1485, but, in context, suggested that it was Gordon. A1485.

He testified that, as he ran, somebody was running right behind him. A1485-86. He went to 61-63 Truman Street and rang the bell, but Hall would not let him in. A1490-A1491. He continued running and took off his camouflage jacket, removing the contents of its pockets including the Fleet Pride pens, house keys and latex gloves with marijuana. A1491-A1493. He eventually hid in the bushes as he saw police cars arrive. A1495-A1496. He claimed that he did not surrender to the police at that time be-

cause he heard an officer say that, when they caught “that Arnold Boy, we gonna kill him.” A1497. He admitted that when he was eventually found by a police officer, he did not initially comply with his instructions to come out. A1498-A1499. After he was removed from the bushes, he claimed he was beaten by the officer, A1499, though he admitted that the photographs taken shortly after his arrest did not depict any injuries. A1596-A1597.

Finally, the defendant said on direct examination that he gave a statement to the police after being arrested and, in the statement, denied shooting Officer Fumiatti. A1503-A1504.⁸ He also told the jury that he was telling the truth, although he admitted that his testimony was not consistent with the testimony of other witnesses. A1504-A1505.

On cross-examination, the government asked the defendant on a number of occasions whether other witnesses were “mistaken,” “wrong,” “accurate,” “correct,” or whether their testimony was “true.” *E.g.*, A1542-A1543 (whether Bass and Gordon were mistaken); A1546-A1547 (whether officers, Hughes, and N’Guessen were wrong); A1548-A1549 (whether Hall was wrong or mistaken); A1550-1551 (whether Hall,

⁸ The government did not offer the statement or any of its contents in its case-in-chief.

Hunter and Carbone were mistaken); 1567-1570 (whether Bass was correct, right, and accurate; whether N'Guessen was mistaken); A1573 (whether Hughes was mistaken); A1574-A1577 (whether witnesses including N'Guessen and Dadio were mistaken, wrong on certain points and accurate as to others); A1585 (whether police and N'Guessen were accurate as to certain points, but wrong as to where defendant was standing); A1598 (whether witnesses were accurate about what defendant was wearing, but mistaken about other things); A1598-A1599 (whether descriptions of where defendant was standing were accurate); A1599 (whether testimony that defendant wearing latex gloves was accurate). On several occasions, the defendant was asked about the accuracy of portions of the testimony of other witnesses because, on his direct examination, he already had given testimony that overlapped with their testimony and conceded that his testimony was inconsistent with that of the eyewitnesses.

On one occasion, the government asked the defendant whether a government witness had been "lying," though the word "lying" was first injected by the defendant, and the government merely repeated his characterization, as follows:

Q: . . . you said - -

A: No, no.

Q: -- yesterday that you never sold drugs after you got out of jail in February of 2002?

A: Right.

Q: Now, you heard the testimony of Ramek Gordon concerning that subject matter. You're saying that Ramek Gordon is mistaken?

A: I'm telling you that Ramek Gordon is lying.

Q: Okay, and Anthony Banks. You heard the testimony of Anthony Banks?

A: Yes, I have.

Q: And is Mr. Banks lying?^[9]

A: For sure.

Q: Okay, and you heard the testimony of Eden Bass, that he had seen you in that same area on Hurlburt Street across from the Shop Smart on numerous occasions,

⁹ Banks had testified in the government's case-in-chief that the defendant regularly sold him crack cocaine at the same location where the shooting took place. A323-A324. In addition, Banks placed the defendant alone at the location, dressed in a full camouflage, earlier on the night of the shooting. A326-A328.

going up to cars, and so forth. Is he mistaken about that?

A: Yes, he is.

A1542.

On another occasion, the government asked the defendant whether he was aware of any reason why Bass would intentionally provide false testimony. On direct examination, defense counsel had asked:

Q: . . . You heard Mr. Bass testify?

A: Yes , I did.

Q: And I believe he said something to the effect of, you know, he asked you what you were doing there?

A: Yes.

Q: And you – did you say to him, a man's got to make some money?

A: No, I didn't.

. . .

Q. But you didn't say what he said you said?

A. I know I didn't say nothing about no money.

A1474.

In response, the government inquired:

Q: Okay, and you heard the testimony of Edeen Bass, that he had seen you in that same area on Hurlburt Street across from the Shop Smart on numerous occasions, going up to cars, and. Is he mistaken about that?

A: Yes, he is.

Q: Okay. To your knowledge, you don't have any beef with Edeen Bass, right?

A: None whatsoever.

Q: You don't know of any reason that he would intentionally provide false information under oath to the jury, correct?

A: Based on the government, that's what it is.

Q: Okay, but you don't have any knowledge that, for example, Mr. Bass has some reason to come in and to lie about you?

A: From my understanding, is to help you.

A1542-A1543.¹⁰

On cross examination, the government also asked the defendant about his post-arrest

¹⁰ The government, after asking the defendant if N'Guessan had been mistaken, also asked him if he had "any beef" or "trouble" with him in the past. A1570.

statement. For example, the government confirmed that the defendant had refused to even tell the police Hughes's last name and had lied to the police by telling them he did not know the last name. A1505-A1506. He also confirmed that he had taken twenty steps before hearing shots fired. A1580-A1581. And the government asked the defendant if he recalled telling the police that he had not remembered how many shots were fired that night. A1585.

The government also asked him a few questions about exculpatory information he had completely failed to provide to the police.

Q: Now you told the jury yesterday that you did talk to the police when you were back at the New Haven Police Department, correct?

A: Correct

Q: And they had fully advised you of your rights, correct?

A: Correct.

Q: Did you ever, ever say a single word to the New Haven Police Department, either to the officers that were interviewing you or to any officer or thereafter that you had seen Ramek Gordon out there?

A: No, I did not.

A1554.

The government asked about the defendant's failure to tell the police that he had been wearing a camouflage jacket and latex gloves at the scene of the shooting:

Q: Did you tell the police that were were wearing a camouflage jacket?

A. No, I didn't

Q. You withheld that information.

A. Well, yeah.

Q. Yeah?

A. Okay

Q. Did you tell the police that you were wearing latex gloves that night?

A: That was never asked.

Q: Did you tell them, sir, that you were wearing latex gloves?

A: That was never asked.

Q: You withheld that information from them, didn't you?

A: They never asked about the gloves.

A1508. The government returned to this subject later, and the defendant insisted that the police had never asked him about latex gloves and acknowledged that his palm prints were on the gloves recovered behind 59 Truman Street. A1564.

And regarding the defendant's whereabouts that night, the government asked:

Q: The police didn't know that you had been in the driveway that night, ducking down between the cars and so forth, correct?

A: I can't answer that question, I don't know.

A1566.

Finally, the government confirmed with the defendant that he told the police that his statements were truthful and that he had nothing else to add to the statement he gave. A1614.

3. The motions for a mistrial

The defendant did not raise any objection to the questions he was asked on cross-examination and about which he now complains while he was testifying. It was not until after the defendant had completed his testimony, after another defense witness had completed her testimony, after arguments had concluded regarding other act evidence the defendant sought to offer, and after a recess, that the defendant moved for a mistrial in the case. A1662. In doing so, he raised objections to two aspects of the government's cross examination.

First, he argued that a mistrial was warranted because the government asked him "a number of questions concerning what he did and did

not say to the police.” A1663. The defendant argued that this questioning violated his right to remain silent because “he didn’t have to tell the police anything” A1663. The defendant expressed concern that the jury would interpret the government’s questioning “to mean that [the defendant] had an opportunity, had a duty to discuss what he knew about the incident that evening, and he didn’t have that obligation under the constitution.” A1664. In response, the government maintained that the defendant had waived his *Miranda* rights, marking the waiver form as exhibit 71, and “chose to answer questions” so that it was permissible to ask him questions about what he did and did not tell the police. A1665 (“So it would be a Fifth Amendment violation if the defendant had elected to remain silent and did not waive his rights, but in view of the fact that he did waive his rights, inquiry in that area . . . is proper.”). The court denied the motion, as well the defendant’s motion to strike the questions and answers. A1667.

Next, citing *State v. Singh*, 793 A.2d 226 (Conn. 2002), the defendant moved for a mistrial because the government had asked him whether certain of the government’s witnesses were lying. A1668. In response, the government maintained that it had asked the defendant if certain witnesses “were mistaken,” and it had been the defendant who first “said in one or more instances that they’re lying.” A1669. The court denied

the motion without prejudice to renew after counsel had the opportunity to review *Singh*. A1669-A1670.

The following day, the defendant filed a motion to reconsider his mistrial motion based upon the alleged infringement of his right to remain silent, citing *Doyle v. Ohio*, 426 U.S. 610 (1976), GA19, and a motion for mistrial based upon the alleged improper questioning of the defendant about the veracity of the government's witnesses, citing *Singh* and *United States v. Richter*, 826 F.2d 206 (2d Cir. 1987). GA24.

As to the *Doyle* claim, he maintained that a "defendant cannot be impeached by the government based on something he did not say." A1694. He argued that, under *Doyle*, a defendant cannot be asked about "instances of silence during his interrogation . . ." A1694. Though he did not show the court the post-arrest statement itself, he suggested that, during the statement, the police had failed to ask him some of the questions that were asked during direct examination. The defendant never asked the court to review the post-arrest statement and never made the argument he now advances on appeal, *i.e.*, that the government's questions were impermissible because they did not relate to an inconsistency between the direct testimony and the statement to the police. In response, the government again maintained that, because the defendant had waived his *Miranda* rights and

provided a statement to the police, it was permissible to ask him about information he disclosed during direct examination, but had failed to disclose to the police. A1695.

After reviewing the *Doyle* decision and concluding that the inquiry here hinged on whether the defendant had exercised his right to remain silent, the court granted the motion to reconsider, but denied the motion for a mistrial. A1708-A1711. In the court's view, this case was not similar to *Doyle* because "in *Doyle* the witness invoked his right to remain silent, and never made any statement at all." A1708. Quoting from *Kibbe v. Dubois*, 269 F.3d 26, 34 (1st Cir. 2001), the court pointed out, "[T]he *Doyle* restriction on a defendant's post-arrest silence does not apply when a defendant has created the impression, though his testimony and defense presentation, that he fully cooperated with the authorities when, in fact, he had not. . . . The defendant will not be permitted to use *Doyle* as a tool to fashion an uncontradicted and distorted version of his post-arrest behavior." A1713.

As to the *Singh* claim, the defendant maintained, "[T]here were references to other witnesses maybe lying, being mistaken, being wrong, those types of buzz words, and the case law in the second circuit, as in Connecticut, is very clear that that's an area that the government cannot get into . . . particularly . . . when the witness is a defendant in a criminal case,

and the suggestion is that the only way the defendant is innocent is if all the witnesses are lying.” A1711. In response, the government asserted that almost all of its questions asked the defendant whether other witnesses were mistaken, which is permissible under this Court’s precedent, and that the only reference to “lying” came at the suggestion of the defendant, not the government. A1716-A1718; GA13-GA14.

The court denied the motion for a mistrial, but decided to give a curative instruction to avoid the possibility of any prejudice to the defendant as a result of the cross examination regarding the testimony of other witnesses. A1724. The defendant maintained that a curative instruction was insufficient and asked that no instruction be given. A1723. The court responded that it “wouldn’t want the court of appeals, if I hadn’t given the instruction, to say, ‘well, if the Court had given . . . an instruction then there’d be no problem. So I don’t want you to use this – or my failure to give the instruction, Mr. Kestenband, as a tactical – in a tactical fashion so that you got – you have one leg up on clearly – if there’s an appeal in this matter.” A1724.

Prior to final instructions, the court supplemented its conclusions regarding the *Singh/Richter* motion for a mistrial. First, the court noted that this Court, unlike the Connecticut Supreme Court, has distinguished between permissibly asking a defendant whether a prior

witness was mistaken and impermissibly asking whether a prior witness was lying. A1817. The court noted that the government had asked in two instances whether witnesses were lying, but found that any potential error was “harmless because the government was merely revisiting a contention that Mr. Bell had already articulated in various ways, that those witnesses, Gordon and Banks, had ulterior motives for testifying as they did” A1817-A1818. The court also noted that neither Banks nor Gordon were government agents, there was no contemporaneous objection, the government did not call additional witnesses to bolster a contention that the defendant was lying, and the government had not argued in closing argument, that, in order for the jury to believe the defendant, they must conclude that the other witnesses were lying rather than merely mistaken. A1818. The court found that the challenged questions “did not deprive or interfere in the jury’s role of determining witness credibility and thus its questions did not improperly alter the outcome of the trial.” A1818.

Further, in addition to the general charge on credibility, the court included the following specific instruction as part of its charge:

Yesterday, the government asked Mr. Bell several questions regarding whether he, Mr. Bell, believed that certain witnesses were not telling the truth. I in-

struct you that the determinations of the credibility of witnesses are for you, the jury, and you alone. I emphasize that you and you alone are to assess the credibility of those who have testified at trial.

A1834.

Summary of Argument

1. The questions asked of the defendant as to whether the other witnesses whose testimony conflicted with his account of events were mistaken, incorrect or wrong, were not improper under this Court's precedent. And when the defendant was asked in a single instance if another witness had lied or not been truthful, it was the defendant who had just injected the notion of witnesses lying into the case when he called his cousin Gordon a liar. Moreover, given that the defendant himself recognized during his own direct testimony that his version of events conflicted in many respects with the versions provided by the government's witnesses, cross-examination along this same theme could not have substantially prejudiced him or deprived him of his due process rights to a fair trial. The government's questions simply pointed out the obvious: the defendant's version of events stood in stark contrast to the version of events described by the various eyewitnesses to the crime.

In the end, the case against the defendant was overwhelming and his conviction certain

with or without the challenged cross examination. The evidence included the testimony of no fewer than seven eyewitnesses who put him at the crime scene at the time of the shooting; the testimony of two of the eyewitnesses positively identifying the defendant as the man who was wearing the camouflage and fired the shot that struck Officer Fumiatti; the testimony of the defendant's own cousin regarding the defendant's acquisition of the revolver used to shoot the officer and which was found at the scene of the shooting; testimony from multiple witnesses concerning the defendant's immediate flight from the crime scene; testimony concerning the defendant's attempt to get into his girlfriend's mother's house to change his clothes; testimony about how the defendant discarded the camouflage jacket he was wearing, a jacket with his DNA profile on it, as well as lead deposits consistent with a weapon having been discharged near it; testimony that the defendant discarded latex gloves with his palm prints along his escape route; and testimony that he secreted himself under some bushes for three hours before he was arrested.

2. It was also proper to cross-examine the defendant about the fact that, in his voluntary, post-arrest statement to the police, he had failed to mention the exculpatory information that he had testified about on direct examination. The defendant did not remain silent when he was ar-

rested. He waived his *Miranda* rights and spoke with the officers. It was, therefore, entirely permissible for the government to cross-examine him regarding material inconsistencies and omissions in this post-arrest statement. These questions did not seek to hold any post-arrest silence against the defendant because he did not remain silent. Moreover, to the extent that the defendant now claims, for the first time on appeal, that the cross-examination as to various omissions did not relate to an inconsistency between the statement and the direct testimony, the defendant himself opened the door to questions about the statement. And, as discussed above, any error by the district court in refusing to grant a mistrial was harmless in light of the strength of the government's evidence establishing the defendant's guilt on the firearms offense.

Argument

I. The district court did not abuse its discretion when it denied the defendant's motion for a mistrial based on questions posed to the defendant on cross-examination about the testimony of other witnesses

A. Relevant facts

The facts relevant to this issue are set forth above in the Statement of Facts and Proceedings Relevant to this Appeal.

B. Governing law and standard of review

This Court reviews the district court's denial of a motion for mistrial for abuse of discretion. *See United States v. Deandrade*, 600 F.3d 115, 118 (2d Cir. 2010); *United States v. Smith*, 426 F.3d 567, 571 (2d Cir. 2005).

As a general matter, “[i]nappropriate prosecutorial comments standing alone, would not justify a reviewing court to reverse a criminal conviction obtained in an otherwise fair proceeding.” *United States v. Young*, 470 U.S. 1, 11-12 (1985). To warrant reversal, prosecutorial misconduct must cause the defendant such substantial prejudice as to deny the defendant due process. *See United States v. Carr*, 424 F.3d 213, 227 (2d Cir. 2005); *United States v. Thomas*, 377 F.3d 232, 244 (2d Cir. 2004).

This Court has adopted a three-part test to determine “substantial prejudice”: (1) the severity of the misconduct, (2) the measures adopted to cure it, and (3) the certainty of conviction in the absence of the misconduct. *See United States v. Shareef*, 190 F.3d 71, 78 (2d Cir. 1999) (stating that “[e]ven where a prosecutor's argument was clearly impermissible, we have been reluctant to reverse where the transgression was isolated, the trial court took swift and clear steps to correct the implication of the argument, and the evidence against the defendant was strong.”); *see also, e.g., United States v. Truman*, 688 F.3d 129, 144 (2d Cir. 2012) (finding that the prosecutor improperly asked the defendant on several occasions whether other witnesses were “mistaken or lying,” but finding improper questions did not cause the defendant substantial prejudice by so infecting the trial with unfairness as to make the resulting conviction a denial of due process”)(internal quotations omitted); *United States v. Modica*, 613 F.2d 1173, 1184 (2d Cir. 1981) (“reversal is an ill-suited remedy for prosecutorial misconduct.”)

C. Discussion

The defendant first claims that he is entitled to a new trial because the government’s cross-examination asked the defendant to comment on the veracity of certain of the government’s witnesses. The defendant chiefly relies on this Court’s decision in *United States v. Richter*, 826

F.2d 206 (2d Cir. 1987). His argument should be rejected.

In *Richter*, the prosecutor asked the defendant whether an FBI agent was mistaken or had lied during his previous testimony. When the defendant testified that the agent's testimony was false, the prosecutor called a second FBI agent to corroborate the first agent's testimony. The prosecutor focused on these alleged discrepancies during summation, and misquoted the defendant's testimony.

This Court held that the totality of prosecutorial misconduct warranted a new trial. The Court noted, however, that it might have overlooked the improper questions if they were the sole claim of error, because the prosecutor gave the witness the option of branding the testimony as a lie or a mistake, and the defense did not object to this line of questioning. *See Richter*, 826 F.2d at 208.

Richter has since been largely limited to its facts and, as one court has noted, it "has become readily apparent that the Second Circuit has been very reluctant to expand the scope of the *Richter* decision beyond its narrow and specific facts." *United States v. Williamson*, 53 F.3d 1500, 1523 (10th Cir. 1995)

For example, in *United States v. Durrani*, 835 F.2d 410, 424 (2d Cir. 1987), this Court emphasized that reversal in *Richter* was warranted be-

cause of a combination of facts, including the questions asked on cross-examination and the statements made during closing argument. Similarly, in *United States v. Kiszewski*, 877 F.2d 210, 217 (2d Cir. 1989), this Court distinguished *Richter* by noting that reversal there was required because of the cumulative effect of the misconduct. This Court also noted that the issue in *Richter* did not turn on the truthfulness of the FBI agents on whose veracity the defendant was being called to comment.

In *United States v. Scanio*, 900 F.2d 485, 491-93 (2d Cir. 1990), this Court again distinguished *Richter* on its facts. While acknowledging the rule in *Richter* was “not limited to situations where the defendant is asked to comment on the testimony of government agents,” *id.* at 493, the Court held that this fact raised “special concern[s]” because of the “heightened credibility of government agents,” *id.*, concerns not present when the defendant is asked to comment on the veracity of non-governmental witnesses. Furthermore, the court in *Scanio* distinguished *Richter* because the prosecutor had not highlighted the improper cross-examination during closing argument. *Id.*

In *United States v. Weiss*, 930 F.2d 185, 195 (2d Cir. 1991), this Court continued to distinguish *Richter* on the grounds that the witnesses as to whose credibility the defendant was asked to comment on were not law enforcement offi-

cial, coupled with the fact that no rebuttal witness was called to emphasize the cross-examination, and “the prosecutor did not, in his summation, state that a verdict for Weiss was essentially a finding that all of the government's witnesses were lying.” As a result, this Court held that, although the prosecutor’s cross-examination was “confrontational and abrasive, [it] fell short of depriving Weiss of a fair trial.” *Id.*

In *United States v. Gaind*, 31 F.3d 73, 77 (2d Cir. 1994), this Court further clarified *Richter*, holding that “[a]sking a witness whether a previous witness who gave conflicting testimony is ‘mistaken’ highlights the objective conflict without requiring the witness to condemn the prior witness as a purveyor of deliberate falsehood, i.e., a ‘liar.’” *Id.*, 31 F.3d at 77 (internal quotations omitted). In *Gaind*, the prosecutor repeatedly asked the witness whether other government witnesses were “mistaken” in their testimony. Further, the prosecutor asked the defendant twice if these government witnesses were “lying,” after the witness had first used the term “lying” to answer previous questions about the statements of the government witnesses. Finally, the prosecutor “incorporated Gaind’s characterization of the other witnesses’ testimony as ‘mistaken’ into her summation, reminding the jury that Gaind had testified that essentially all of the other witness were ‘mistaken,’ and

added: “Isn't it funny how everyone is so mistaken but Arun Gaind?” *Id.* at 76.

Gaind found *Richter* not to be controlling. *Id.* at 77. It first distinguished between asking a witness whether a different witness is a “liar” -- which generally would not be an appropriate question -- and asking whether a different witness is “mistaken” or a variant thereof, which is an appropriate cross-examination question. *Id.* *Gaind* also noted that its witnesses were not government agents, whereas the *Richter* witnesses were. *Id.* Finally, *Gaind* summarized the limitations on *Richter* by noting that “defendants invoking *Richter* have not succeeded in obtaining reversal of their convictions when the starkly offensive prosecutorial delinquencies in *Richter* were not replicated.” *Id.* at 77; *see also*, e.g., *United States v. Williams*, 343 F.3d 423, 438 (5th Cir. 2009) (noting that no conviction has been reversed based on prosecutor improperly questioning defendant about other witnesses veracity and noting that reversal in *Richter* was occasioned by other more serious errors).

More recently, this Court has focused on whether the question posed to the defendant inquired whether other witnesses were lying. *See Truman*, 688 F.3d at 143. In *Truman*, this Court held that it was improper to ask a defendant whether lay witnesses for the government were “mistaken or lying” and twice asking the defendant if his son was lying, as well referring

to defendant's deposition testimony in summation, in which defendant testified that all of the police officers were "liars." While it found the questions objectionable, the Court declined to reverse the conviction, holding that the misconduct did not cause the defendant substantial prejudice so as to deprive him of a fair trial. *Id.* at 144.

Under this Court's precedent, the government's cross-examination of the defendant here was not improper and did not deprive him of a fair trial. The government asked the defendant on a number of occasions whether other witnesses were "mistaken," "wrong," "accurate," "correct," or whether their testimony was "true," which are not prohibited by *Richter* and its progeny. Moreover, these questions related to the defendant's own statement on direct examination that his testimony conflicted with that of several eyewitnesses.

For example, both Gordon and the defendant testified that Gordon picked up the defendant from prison when he was released and gave him money, *compare* A187-A188 *with* A1450-A1451, and both Bass and the defendant testified that Bass encountered the defendant in the street, near Buckenjohn's home wearing a camouflage jacket and a latex glove. *Compare* A683-A685 *with* A1473-A1475. Under these circumstances, it was appropriate to ask questions to delineate the congruity between the defendant's testimony

and the testimony of these other witnesses. This cross-examination merely identified the factual inconsistencies and did not, at bottom, ask the defendant to make a credibility determination that would have infringed upon a unique jury prerogative, much less require the defendant to say that government witnesses were intentionally lying. See *United States v. Harris*, 471 F.3d 507, 511 (3d Cir. 2006) (“[I]t is often necessary on cross-examination to focus a witness on the differences and similarities between his testimony and that of other witnesses . . . provided he is not asked to testify about the veracity of the other witness.”)

Although the government did, on one occasion, ask the defendant whether a witness had been “lying,” as in *Gaind*, the word “lying” was first injected into the exchange by the defendant himself. A1542 (“Q: You’re saying that Ramek Gordon is mistaken? A: I’m telling you that Ramek Gordon is lying. . . . Q: And is Mr. Banks lying? A: For sure.”). As in *Gaind*, the government only asked whether a particular witness had lied after “[the defendant’s] testimony introduced the proposition that [other witnesses] were liars.” *Gaind*, 31 F.3d at 77.

The same can be said regarding Bass’s testimony. On direct examination, the defendant was asked to comment on Bass’s allegation that, when he confronted the defendant on the night of the shooting, the defendant stated, “[A] man’s

got to make some money.” A1474. He denied making that statement and said that he “didn’t say what [Bass] said [he] said.” A1474. On cross-examination, in response to that denial, it was appropriate for the government to ask the defendant if he was aware of any reason why Bass would intentionally provide false testimony. A1542-A1543.¹¹

It was not the government, but the defendant, through his direct testimony, who first highlighted the inconsistencies between his version of events and that of the various eyewitnesses. He concluded his direct examination by saying that his testimony was not consistent with what other witnesses stated and insisting that he was telling the truth. A1504-A1505. As such, it was defendant who opened the door to the government’s cross-examination. *See, e.g., Harris*, 471 F.3d at 412 (were-they-lying questions might be proper “if a defendant opened the door by testifying on direct that another witness was lying.”).

The defendant contends, for the first time on appeal, that the government compounded the alleged improper cross examination by asking the jury in its rebuttal closing argument to compare the defendant’s testimony against the evidence

¹¹ The same can be said regarding the defendant’s direct testimony referencing N’Guessan’s claim “about you walking back and forth between trees,” which the defendant denied doing. A1475.

in the case and find that the defendant's testimony simply was not credible. *See* Def.'s Br. at 39-40. He also challenges the rebuttal argument's suggestion that a contrast of the credibility of all of the witnesses would lead to the conclusion that defendant's testimony simply was not credible.

However, it is "generally acceptable to argue to the jury that to believe one witness means to disbelieve other witnesses . . . provided that in doing so a party does not mischaracterize trial evidence or rely on a witness's evaluation of the credibility of another . . ." *Truman*, 688 F.3d at 143 (citation omitted). Moreover, this Court has consistently held that "[p]rosecutors have greater leeway in commenting on the credibility of their witnesses when the defense has attacked that credibility." *United States v. Perez*, 144 F.3d 204, 210 (2d Cir. 1998). Defense counsel repeatedly attacked the credibility and testimony of government witnesses in his closing argument. A1753 ("Now, we have Ramek Gordon. Ramek Gordon is a street-smart drug dealer. We all heard about that. He's a person who tries to beat the system any chance he gets. He's a self-admitted liar."); A1757 ("Ramek Gordon says they were partners. Ramek Gordon says Greg Hughes possessed a gun. Greg Hughes said, 'That's not true.' Again, who's being truthful?"); A1767 ("Lieutenant -- Chief Norwood says Mr. Bell was still facing him when this was all

happening. So is he walking backwards? If he's thinking that something strange -- a strange van is coming by, why wouldn't he be running away from the van? And again, that's not consistent with the other testimony."); A1773 ("I never sold drugs with Arnold Bell.' Bell contradicts what Ramek Gordon says. 'I never owned a gun.' Contradicts what Ramek Gordon said."); A1775 (" . . . you must question accuracy of each and every eyewitness because they all conflict with each other. Therefore, their testimony has to be suspect. [...] Think about all the inconsistencies.").

Finally, unlike in *Richter*, the government here did not argue in its summation that in order to find the defendant credible, the jury necessarily would have to find that other witnesses lied. Rather, the government asked the jury to consider the different testimony presented, and suggested that, in light of that evidence, the defendant's testimony was not credible.

As he did below, the defendant also argues that the questioning on cross-examination was improper under *Singh*, 793 A.2d 226. However, *Singh* is not controlling here, does not state the law of this Circuit and, in any event, is readily distinguishable from the case at hand since it involved several categories of misconduct.¹² In

¹² In his appeal of his state conviction, the defendant made the same argument to the Connecticut Su-

Singh, the court reversed a state conviction finding four categories of prosecutorial misconduct that in totality warranted a new trial: “(1) questions and comments on the veracity of other witnesses’ testimony; (2) personal expressions of opinion on evidence; (3) references to matters not in evidence; and (4) appeals to the emotions, passions and prejudices of the jurors.” *Id.* at 233.

Moreover, the government’s questions about which the defendant complains did not cause the defendant “substantial prejudice” under the three part test set forth in *Shareef* that involves the analysis of: (1) the severity of the misconduct, (2) the measures adopted to cure it, and (3) the certainty of conviction in the absence of the misconduct. *Shareef*, 190 F.3d at 78; *United States v. Elias*, 285 F.3d 183, 190 (2d Cir. 2002).

First, the claimed misconduct was not severe. As noted above, the government’s use of the term lying was limited to a single question isolated in the cross-examination of the defendant

preme Court because a transcript of the defendant’s testimony during his federal trial was admitted as evidence in the state trial. That Court found the questions to be improper under Connecticut state law, but concluded that any error was harmless “there was a low risk that the jury might have believed erroneously that if the state’s witnesses were being truthful, then the defendant must have been lying.” *Bell*, 931 A.2d at 220.

and was asked in response to the defendant having characterized another government witness as a liar. The remainder of the government's questions to the defendant were proper under *Gaind*, 31 F.3d at 77.

Further, the government did not exploit this allegedly improper question during summation. While the government did ask the jury to consider the credibility of the defendant as compared to other witnesses, it did not insinuate to the jury that the defendant thought witnesses were lying. This Court has held that prosecutors are permitted to contrast a defendant's version of the story with other witnesses, and even to argue that one witness must be lying. *See, e.g., Shareef*, 190 F.3d at 79 (holding that it was not misconduct for the government to contrast testimony of two different witnesses and state to the jury, "If you believe Shareef," the witness "had to lie"). The government never suggested that, for the defendant to be telling the truth, the jury would have to believe all of the eyewitnesses were lying.

In addition, the district court instructed the jurors that it was their "job to decide how believable each witness was in his or her testimony" and that they were "the sole judges of the credibility of each witness, and of the importance of his or her testimony." A1831. Moreover, the court gave a specific instruction which referenced the cross examination of the defendant

and cautioned the jury that it was the exclusive determiner of credibility. A1834. Accordingly, even assuming, *arguendo*, that there was some impropriety in the questions posed by the government in the cross-examination of the defendant, these instructions would have cured any such error. *See, e.g., Thomas*, 377 F.3d at 244-45 (prosecutor's statements not misconduct causing substantial prejudice given, *inter alia*, district court's immediate curative instruction); *United States v. Tutino*, 883 F.2d 1125, 1137 (2d Cir. 1989) (finding that "the curative instructions that were given both immediately and moments later were sufficient to eliminate any possible prejudice from the prosecutor's remarks.").

Finally, the government's evidence regarding the defendant's possession of the revolver was overwhelming, and his conviction was certain even in the absence of the claimed impermissible questions.

First, Rice, the registered owner of the revolver, testified that he purchased crack on Truman Street from Mills and that he had given Mills the revolver as collateral in return for crack. A66-A68. Gordon then testified that, in February 2002, at the defendant's request, he had arranged for Mills to transfer the revolver the defendant in exchange for seven grams of crack. A204-A207.

Second, on June 13, 2002, the police recovered the revolver a short distance away from

where Officer Fumiatti had been shot, with a latex glove caught in its trigger guard. A991-A992, A997-A999. Bass and Hughes saw the defendant wearing latex gloves that evening, A534, A685, and Gordon had seen the defendant with latex gloves and the revolver on an earlier occasion in the same area. A195-A196, A215.

Third, Hughes was a short distance from the defendant moments before the shooting occurred and did not see anyone other than the defendant in the area from which he heard a single shot ring out. A527-A537. According to Hughes, prior to the shooting, the defendant appeared angry. A564.

Fourth, shortly after the shooting and again in court, Lieutenant Norwood and N'Guessen positively identified the defendant as the person they saw shoot Officer Fumiatti. A1239, A1255-A1258, A1320, A1323.

Fifth, Buckenjohn, Bass, N'Guessen, Hughes, and Banks each said the defendant was wearing camouflage clothing that evening in the vicinity of the shooting. A327, A526, A578, A683-A684, A1240. Detectives Dadio and Reynolds saw just one person standing where the shot came from, and that person was described by both officers as being attired in camouflage. A339, A474.

Sixth, a camouflage jacket and mask, which the defendant had discarded during his flight from the crime scene and which contained the

defendant's DNA, as well as pens marked with the name of his employer, were recovered a short distance from the shooting and close to where he was apprehended. A738, A792-A794, A799-A800, A933. Additional latex gloves were seized from the defendant's residence, A760, A971-A972, and two discarded latex gloves with the defendant's palm prints were recovered a short distance from where the shooting had occurred. A753-A755, A1197-A1198.

And, of course, the police arrested the defendant after finding him hiding in bushes wearing camouflage pants and a black t-shirt. A1131-A1135.

Indeed, the defendant's own testimony on direct examination corroborated virtually all of the government's case except that he denied possessing the revolver and shooting Officer Fumiatti. For example, he confirmed that his first cousin Gordon picked him up from prison and gave him \$250. A1450-A1451. He also confirmed living at 209 Spring Street. A1451-A1452. He admitted that the camouflage jacket found near the scene of the shooting was his, A1458-A1459, that he was wearing the camouflage jacket and pants the evening of the shooting, A1471-A1472, and that he had worn latex gloves as well. A1470. In addition, he confirmed being confronted by Buckenjohn and Bass, as well as shaking hands with Bass using one of his gloved hands. A1472-A1474. He also testified

that he saw Hughes standing outside of his white Honda Civic. A1476-A1477. He admitted that he ran away once the police van arrived, A1484, that he went to his father's house where Hall refused to let him inside, A1490-A1491, that he discarded his camouflage jacket as well as the contents of the jacket's pockets, including the two latex gloves, A1491-1492, and that he hid in the bushes until he was apprehended by the police. A1495-A1499. Though the defendant claimed he saw Gordon in the area from which he heard a shot fired, A1482, every other witness testified that the defendant was alone, and they made no mention of seeing a person matching Gordon's description in the area at the time of the shooting.

Given the strength of the direct and circumstantial evidence as to the defendant's possession of the revolver at issue in the case, as well as the court's limiting instructions on credibility and the fact that the government never suggested to the jury that it had to disbelieve all of its witnesses to credit the defendant's testimony, any impropriety in the government's cross-examination of the defendant did not substantially prejudice him. Even had none of these questions been asked, the jury certainly understood that there were factual discrepancies between the defendant's and the eyewitnesses' versions of events and its role as fact finder in resolving those discrepancies.

II. The district court did not abuse its discretion in denying the defendant's motion for mistrial based on the government's use of prior inconsistent statements to impeach his testimony at trial

A. Relevant facts

The facts relevant to this issue are set forth above in the Statement of Facts and Proceedings Relevant to this Appeal.

B. Governing law

In *Doyle v. Ohio*, 426 U.S. 610, 611 (1976), the United States Supreme Court held that prosecutors may not use a defendant's decision to remain silent after having been advised of his rights under *Miranda v. Arizona*, 384 U.S. 436, 467-73 (1966), as evidence of guilt at trial. Since "[s]ilence in the wake of these warnings may be nothing more than the arrestee's exercise of these Miranda rights," 426 U.S. at 617, the Court reasoned that "every post-arrest silence is insolubly ambiguous because of what the state is required to advise the person arrested (citing *United States v. Hale*, 422 U.S. 171, 177 (1975))." *Id.*

However, the Supreme Court also has held that "a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all." *Anderson v. Charles*, 447

U.S. 404, 408 (1980). Accordingly, the Supreme Court has stated that it is proper for the prosecution to cross-examine a testifying defendant on why, if his exculpatory trial testimony were true, he did not include the information in his earlier, post-*Miranda* statement to the police. *Id.* at 408-09. On the other hand, it would not be proper to cross-examine a defendant on prior inconsistent statements if the questioning is being done to elicit meaning from, or to comment on, the defendant's exercise of his or her right to remain silent. *Id.* But, even though a defendant's prior inconsistent description of events could be said to involve "silence," as the prior statement and the defendant's trial testimony omit facts included in the other, *Doyle* is not to be applied with such a "formulative" understanding of silence. *Id.* at 409.

When a *Doyle* violation is found to have occurred, the standard of review for determining the consequence of such a violation is that of harmless error. *United States v. Matthews*, 20 F.3d 538, 552-53 (2d Cir. 1999).

C. Discussion

The defendant claims that his Fifth Amendment right to remain silent was violated when the government cross-examined him about what he appears to characterize as his post-arrest silence. In particular, the defendant argues that the government violated the principles set forth in *Doyle* that bar the government from eliciting

evidence at trial of the accused's silence following his receipt of *Miranda* warnings. Def.'s Br. at 49.

As an initial matter, it was the defendant who chose to open the door to inquiry about his post-arrest, post-*Miranda* statements to the police. The government made no reference to the statement in its case-in-chief. At the very conclusion of the defendant's direct testimony, he indicated that he had spoken to the police and had denied shooting Officer Fumiatti, A1503-A1504, creating the false impression that what he had said during his direct testimony matched what he had told the police immediately after the shooting incident.¹³

The defendant's argument below and here is based on a flawed interpretation of *Doyle* and its progeny. In *Doyle*, the Supreme Court held that the due process clause of the Fourteenth Amendment bars the use of an accused's silence

¹³ While defense counsel showed his client his post-arrest statement during his re-direct examination A1612, it was not marked as an exhibit at trial or received into evidence. In light of the defendant's new claim on appeal that the government has failed to show its questions on cross-examination related to an inconsistency with the post-arrest statement, the government has sought, over the defendant's objection, to supplement the appellate record with the statement itself. *See United States v. Aulet*, 618 F.2d 182, 187 (2d Cir. 1986).

after receiving *Miranda* warnings for the purposes of proving the accused's guilt. 426 U.S. at 619. Although *Doyle* bars the use of silence to prove guilt, it does not bar questions on cross-examination that merely inquire into prior inconsistent statements made to the police by a defendant who takes the stand at trial, *Anderson*, 447 U.S. at 408-09, as the defendant did in this case.

There is no dispute that the defendant gave a statement to the police on the night he was arrested. A1503. Further, there is no question that *Miranda* warnings were given to the defendant prior to his post-arrest statement, and the defendant waived those rights. A1554; Gov't Ex. 71. Finally, there was never any suggestion or claim that the statement was anything other than voluntary. Thus, his voluntary statements, after being fully *Mirandized*, effectively waived his Fifth Amendment right to remain silent.

The challenged questions that were asked on cross-examination were intended to impeach the defendant on material inconsistencies between his direct testimony and his post-arrest statement and were not intended to infringe upon his Fifth Amendment right to remain silent. Indeed, the defendant never exercised his Fifth Amendment right to remain silent, selectively or otherwise. In short, then, the questioning made "no unfair use of silence because a defendant who voluntarily speaks after receiving *Miranda*

warnings has not been induced to remain silent” . . . “[and] [a]s to the subject matter of the statements, defendant [did] not remain silent at all.” *Anderson*, 447 U.S. at 408.

Specifically, during the defendant’s *direct* examination, he claimed to have seen and spoken with Gordon, who was dressed in a black jacket, black pants and black boots, at the scene of the shooting. A1485. This testimony was contrary to his post-arrest statement to the police in which he omitted any mention whatsoever of encountering Gordon on the night of his arrest, despite the fact that Gordon was supposedly standing in the area from which the defendant claimed he heard shots fired. Cross examination on this inconsistency did not violate *Doyle* and its progeny.

Similarly, during *direct* examination, the defendant testified that he was wearing latex gloves at or around the time of the shooting. In describing his alleged interaction with Gordon, the defendant testified that he had put on latex gloves after Gordon – who was also wearing latex gloves – had retrieved marijuana from his buttocks area. A1470. On cross examination, it was certainly appropriate for the government to ask the defendant about his failure to inform the police that he had been wearing latex gloves at the scene of the shooting.

Finally, during *direct* examination, the defendant testified that, on the night of his arrest,

he had been in Buckenjohn's driveway, which is where Gordon had allegedly given him marijuana. A1472-A1473. It was certainly fair cross examination for the government to point out that "[t]he police didn't know that you had been in the driveway that night, ducking down between the cars and so forth, correct?" A1566.¹⁴

The defendant claims a *Doyle* violation, notwithstanding that he first raised the subject of his post-arrest statement to the police and that his direct testimony injected material inconsistent statements into the case. It is respectfully submitted that these inconsistencies were fair game for prosecutorial inquiry under *Anderson*. As the Supreme Court noted in connection with government inquiries about statements obtained in violation of *Miranda*, "[t]he shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." *Harris v. New York*, 401 U.S. 222, 226 (1971); *see also United States v. Douglas*, 525 F.3d 225, 248 (2d Cir. 2008).

In support of his claim, the defendant now relies almost exclusively on this Court's decision in *United States v. Casamento*, 887 F.2d 1141, 1179 (2d Cir. 1989) (holding that cross-examination of

¹⁴ It bears note that this question does not implicate *Doyle* because it does not really ask the defendant to comment on his post-arrest statement.

a defendant based on prior inconsistent, post-*Miranda* statements to the police violates *Doyle* if the post-arrest statements are not, in fact, inconsistent). In *Casamento*, the defendant told FBI Agents in a post-*Miranda* statement that he knew co-defendant Alfano because they had thought about buying a pizza shop together. *Id.* at 1179. At trial, the defendant testified that he had engaged in the business of buying precious stones with Alfano. The government subsequently cross-examined the defendant about whether he had told police about the stone-related dealings with Alfano, and he responded that he had not. *Id.* The Court concluded that the defendant had chosen to remain selectively silent on the issue of whether he dealt stones with Alfano and that the *Anderson* exception to *Doyle*, which allows questioning as to any prior inconsistent statements, did not apply because it was logically consistent that the defendant could have known Alfano due to the fact that he had considered buying a pizzeria with him and still could have been in the business of importing precious stones with him. Since both statements could have been true, the defendant's choice to provide one over the other was protected under *Doyle*. The Court went on to specifically find, however, that the error was harmless. *Id.* at 1179-80.

The defendant's argument fails for two reasons. First, he did not make this argument below, did not rely at all on *Casamento* and never

asserted that the government's questions did not relate to inconsistencies. As a result, the defendant never asked the district court to examine the post-arrest statement and never made the statement part of the record for appeal. Without the statement, it is impossible for him to assert that the cross examination did not relate to inconsistencies between the statement and his direct testimony. The government has moved to supplement the record on appeal with the post-arrest statement, and a plain reading of it establishes that the challenged cross examination absolutely related to inconsistencies between the trial testimony and the statement.

Second, unlike in *Casamento*, there is no suggestion here that the defendant remained selectively silent or exercised his Fifth Amendment rights at all. To the contrary, the defendant provided a statement to the police in which he denied any involvement in the shooting. When he testified during direct and described, in detail, his actions that night, he bolstered this testimony by informing the jury, for the first time, that he had talked to the police, provided them with a statement, and denied shooting Officer Fumiatti. The questions that the government asked related to whether the defendant had told the police he had been wearing latex gloves or had seen Gordon that night went to the very heart of the subject matter of his statement to the police. If it was permissible for the defendant, in a blatant

attempt to corroborate his story, to inform the jury that he had provided a statement to the police in which he had denied any role in the shooting, it was certainly permissible for the government to ask whether he had advised the police about some of the exculpatory details from the direct testimony.

Although it appears that this Court has not had occasion to address factual circumstances similar to those in the instant appeal, several other Circuits have. In *Grieco v. Hall*, 641 F.2d 1029 (1st Cir. 1981), the court reviewed a fact pattern involving a defendant who took the stand in his own defense and testified to an exculpatory version of the events giving rise to his burglary and robbery charges. In essence, the defendant testified he and a friend, Richard Callei, had been driving around while drinking. At some point Callei stopped the car and went into a building while the defendant relieved himself behind a building. When he headed back to Callei's car, the van used in the burglary/robbery pulled up, two men jumped out, and they ran into a wooded area. Shortly thereafter, the police pulled up and arrested the defendant as he was walking near the abandoned van. *Id.*, 641 F.2d at 1031.

On cross-examination, the defendant was asked the following:

Q: Did you tell [the police] that you were just urinating behind the building?

A: He didn't ask me.

Q: But your answer was you didn't tell him ... that you were urinating behind the parking lot, is that right; yes or no?

...

Q: Did you tell Sergeant Laracy that you were just urinating in the parking lot?

A: No.

Q: Did you direct the attention of the police to Mr. Callei and his car at that time (at the police station)?

A: They didn't ask any questions.

Q: Did you tell them?

A: No, they didn't ask.

Q: And during the entire time you were in the police station, did you at any time tell the police about Mr. Callei or that there was a car there?

A: (after objection) No, I didn't tell them anything.

Id., 641 F.2d at 1032.

In holding that no *Doyle* violation had occurred as the result of the government's cross-examination, the court cited with approval, as had the Supreme Court in *Anderson*, the decision in *United States v. Mireles*, 570 F.2d 1287, 1291-93 (5th Cir. 1978). As the *Mireles* court

reasoned, “There is no insoluble ambiguity of silence as noted in *Doyle*, since the defendant *Mireles* waived his right to remain silent, and denied knowledge” of the incident and, at one point, even proffered a partial alibi. *Doyle*’s protection of the right to remain silent does not apply to cross-examination and argument concerning a defendant’s exculpatory explanation given after the *Miranda* warnings.” 641 F.2d at 1035 (quoting *Mireles*, 570 F.2d at 1293) (internal brackets and quotation marks omitted).

In *United States v. Donnat*, 311 F.3d 99 (1st Cir. 2002), the First Circuit again considered a claimed *Doyle* violation. The defendant was charged with bank fraud and forgery in connection with a U.S. Treasury check. Following his indictment, arrest, and advice of rights, the defendant told a Secret Service Agent that he had received the check at issue from someone named “Patrick” who he had met at a nightclub where the defendant worked. At trial, the defendant testified that it was not someone named Patrick who had given him the check, but rather a business associate of his brothers whose name was “Carlos.” 311 F.3d at 102. Cross-examination included the following exchange:

Q: And there’s no such person as Patrick.
He never existed.

A: No, sir.

Q: And at no time did you ever contact the Secret Service after you first gave them a statement and say, you know, I want to tell you about Carlos?

Id., 311 F.3d at 104. The defendant asserted that the last question was intended to impeach his testimony based on his decision to exercise his right to remain silent and, therefore, was a violation of *Doyle*.

The court rejected the claim, as follows:

In [*Anderson*] the Court held that when a defendant has given a post-arrest statement to the police, *Doyle* does not bar a prosecutor from inquiring about the defendant's failure to tell the police the exculpatory story he presented at trial, if that story is inconsistent with the post-arrest statement. . . . Where the defendant elects to speak to the police and gives statements that he later contradicts at trial, a prosecutor's inquiry into the defendant's failure to give the exculpatory account before trial does not draw a negative inference from the defendant's decision to remain silent but rather from his prior inconsistent statement. . . . 447 U.S. at 409.

Donnat, 311 F.3d at 104-05. The court went on to observe that the question complained of was proper under *Anderson* because it did not draw

meaning from the defendant's reliance on his right to remain silent, but instead sought an explanation for his prior inconsistent statement to the Secret Service agent. *See id.* at 105.

The decision in *Pitts v. Anderson*, 122 F.3d 275, 277 (5th Cir. 1997) is also instructive. In *Pitts*, the defendant was convicted of murder in a state trial in Mississippi. He sought habeas corpus relief from the Mississippi murder conviction claiming that the prosecution had engaged in misconduct when it improperly impeached him on the stand using his post-arrest silence. The Fifth Circuit rejected the claim, noting that most courts have held that “where post-arrest and trial statements involve the same subject matter and where the post-arrest statement is sufficiently incomplete as to be ‘arguably inconsistent,’ i.e. where the implications of the statements, if not their language, suggests they may be inconsistent, [*Anderson*] applies and comment upon the omissions is permitted.” 122 F.2d at 281.

In *United States v. Makhlouta*, 790 F.2d 1400 (9th Cir. 1986), the court reached the same result as in *Pitts*. In *Makhlouta*, the defendant argued that the government emphasized the defendant's inconsistent statements made at trial during closing arguments. He claimed that the mention of his inconsistent statements was prosecutorial misconduct. The court found, how-

ever, that “[a]s our court has interpreted *Anderson*, once a defendant makes post-arrest statements that ‘may *arguably* be inconsistent with the trial story,’ he has raised a question of credibility . . .” *Id.* at 1404. Furthermore, the court found that the prosecution, to provide all relevant evidence bearing on credibility, “may probe all post-arrest statements and the surrounding circumstances under which they were made, including defendant’s failure to provide critical details.” *Id.*

It is clear that, although the defendant cites *Casamento* as the primary legal authority supporting his appeal, the facts in his case are dissimilar to those in *Casamento*. The defendant’s inconsistent statements, and the government’s subsequent questioning of those inconsistencies, are more analogous to the facts in *Grieco*, *Donnat*, *Pitts* and *Maklouta*. These decisions, read along with the *Anderson* exception to *Doyle*, illustrate that the government’s questioning of the defendant regarding his testimonial omissions and inconsistencies was proper.

Assuming, *arguendo*, however, that the three challenged questions should not have been permitted, the error clearly was harmless. Given the strength of the evidence against the defendant, his conviction was certain even in the absence of the claimed impermissible questions. As this Court conclude in *Casamento*:

[B]ased on the nature of the violation and the trial record as a whole, the error in allowing the prosecutor's questions was harmless. [T]he properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the [error] so insignificant by comparison, that it is clear beyond a reasonable doubt that [the error] was harmless error.

Id., 887 F.2d at 1180 (internal quotation marks and footnote omitted).

The same holds true in the instant matter. Multiple witnesses identified the defendant as the person with the revolver who shot Officer Fumiatti; the defendant fled the scene and, in the course of doing, so discarded incriminating evidence including the revolver, his camouflage jacket and latex gloves; the defendant hid from the police under a growth of bushes for more than three hours prior to his capture; and he testified to a version of events that was inconsistent with that of every other witness in the case, civilian and law enforcement alike. Thus, to the extent that the government's cross-examination of the defendant violated the principles set forth in *Doyle* principles, that error was harmless.

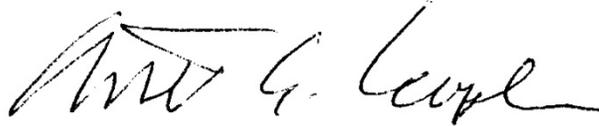
Conclusion

For the foregoing reasons, the judgment of conviction should be affirmed.

Dated: May 3, 2013

Respectfully submitted,

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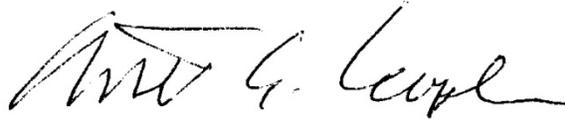
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