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1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3 -----X

4 UNITED STATES OF AMERICA,

5 v. 16-898-cr
16-939-cr

6 ANTHONY ALLEN,
et al.,

7 Defendants,

8 -----x

9 New York, N.Y.

10 January 26, 2017
11 10:30 a.m.

12
13 Before:

14 HON. JOSE A. CABRANES
15 HON. GERARD E. LYNCH
HON. ROSEMARY S. POOLER

16 Circuit Judges

17 APPEARANCES

18 UNITED STATES DEPARTMENT OF JUSTICE, Criminal Division
Attorneys for Government

19 BY: JOHN PELLETTIERI

20 WILLKIE & GALLAGHER LLP
Attorneys for Defendant Allen

21 BY: MICHAEL S. SCHACHTER

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1 JUDGE CABRANES: We will hear counsel now in United
2 States v. Anthony Allen and Anthony Conti.

3 Mr. Schachter, while you're getting ready, permit me
4 to make a preliminary statement which is actually relevant to
5 both sides, and the government will be able to comment on this
6 when they address the Court.

7 Both sides will have the time necessary for their
8 argument. We've given you more than usual, and you are lucky
9 that there is nothing else this morning; and I assure you, you
10 will have time necessary for your arguments.

11 That said, I have some threshold, possibly non-record
12 inquiries, by which I mean that I, speaking for myself only,
13 would welcome your description of the human and prosecutorial
14 context here. The general public, as well as the court, are
15 entitled to understand how and why this prosecution was
16 undertaken, or any prosecution was undertaken. And this is an
17 unusual and complicated case where the two defendants are U.K.
18 nationals, they are young and relatively low-level employees,
19 and they worked in London for a Dutch bank which may be a
20 household name in The Hague but not in my parochial American
21 world. The case is also brought by so-called Main Justice, not
22 by a prosecutorial office, that certainly regards itself as
23 second to none in securities and financial prosecutions.

24 Now, all of this is a puzzlement to me, and
25 interesting, at least, so maybe you can give us a description

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1 of what was going on here in a way that's comprehensible to
2 non-specialists. I know you're geared up with large questions
3 of statutory construction and constitutional issues, all of
4 which we'll hear, but we want to get a little context here.

5 MR. SCHACHTER: May it please the Courts, this is a
6 topic which I am very pleased to begin with, and the answer to
7 your Honor's question is I have not the slightest idea.

8 When I was informed that the Justice Department
9 intended to indict my client, I went to them and said, why in
10 God's name would the Justice Department need to prosecute these
11 British citizens for conduct which occurred exclusively in
12 London where the cooperating witnesses are not U.S. citizens,
13 where it is all about the alleged involvement of or it's
14 responding to questions that are posed by a British banking
15 trade organization about a rate which is set at 11:00 London
16 time, why is it necessary to drag this British citizen to stand
17 trial here thousands of miles from home and from his family?
18 He has young children. It was a burden for his parents, who
19 are elderly and came to stay in New York for the length of this
20 trial, and to what end? So that we can incarcerate this
21 British citizen thousands of miles from home where it would be
22 a great burden for their family to visit them? I said why?
23 Now, there may be a circumstance --

24 JUDGE POOLER: I don't want you to lose track of Judge
25 Cabranes' question, but were there prosecutions in Britain?

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1 MR. SCHACHTER: Absolutely. And what I said to the
2 justice department was there may be circumstances where no
3 other government is addressing this harm, and it is a global
4 harm, where the United States Justice Department feels that
5 they need to step in, but I noted that there were extremely
6 active British prosecutions, there were investigations being
7 undertaken of exactly the same conduct in London. In fact,
8 there were active investigations of our clients.

9 The financial conduct authority, their version of the
10 Securities and Exchange Commission, is an issue which is
11 created by what the government did in this circumstance. They
12 had an investigation that was active. They knew they had an
13 active investigation. They were working very closely with the
14 serious fraud office in the U.K. What is the possible reason
15 why it was necessary for the United States to spend taxpayer
16 resources to prosecute this British citizen and incarcerate him
17 here in the United States?

18 JUDGE LYNCH: Are you aware of other LIBOR-related
19 prosecutions brought in the United States?

20 MR. SCHACHTER: Subsequent to ours. Ours was the
21 first. Then subsequent to that, there have been other charges
22 and there are cases pending. There are other cases in the U.K.
23 which have been prosecuted: Some successfully, some
24 unsuccessfully.

25 JUDGE LYNCH: I meant here.

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1 JUDGE CABRANES: Where are they pending in the United
2 States, do you know?

3 MR. SCHACHTER: They are brought by the fraud section.
4 I am not positive, but I believe they were all filed in the
5 Southern District of New York, but all being prosecuted by Main
6 Justice with no involvement from the Southern District of New
7 York.

8 JUDGE LYNCH: There were days when U.S. Attorneys for
9 the Southern District of New York threatened to resign over
10 things like that.

11 MR. SCHACHTER: I understand that.

12 JUDGE LYNCH: But it isn't, after all, the sovereign
13 district. It is a branch of the Justice Department in its own
14 little way.

15 MR. SCHACHTER: As a very technical matter, I know
16 some former U.S. Attorneys that would maybe disagree with that
17 statement. But, no, it was very troubling.

18 In fact, one of the central issues in our case is that
19 there is a critical witness, the LIBOR secretary from the
20 British Bankers Association, John Ewan, he absolutely would
21 have been available to us to have him testify if Mr. Allen and
22 Mr. Conti were prosecuted in the United Kingdom. And, in fact,
23 when he testified, in some circumstances there have been
24 acquittals, according to the news reports. This is all outside
25 the record. But according to the news reports, it is largely

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1 based on his testimony, because his testimony, which we quote
2 from his testimony in the U.K., is that in the British Bankers
3 Association's view, you commit no falsehood if you submit a
4 LIBOR rate which is anywhere within the range of reasonable
5 estimates of a bank's borrowing costs, whether it's the highest
6 or the lowest.

7 We think that if the jury here had the opportunity to
8 hear Mr. Ewan's testimony, that that would have been a basis
9 for them to acquit. We certainly think they would have
10 acquitted. You would have had the entity which set up this
11 construct which says this is OK with us; we don't consider it
12 to be a falsehood as long as it is a reasonable estimate of a
13 bank's borrowing costs.

14 JUDGE POOLER: Have there been any convictions in
15 Britain?

16 MR. SCHACHTER: Yes.

17 JUDGE POOLER: So, in spite of this testimony, there
18 have been convictions?

19 MR. SCHACHTER: Well, the evidence with respect to
20 certain people was mixed. So, for example, the first
21 conviction, and the most well-known in the U.K. is that of a
22 man named Thomas Hayes. Mr. Hayes was bribing brokers through
23 wash sales in order to get them to spread false information, in
24 order to recommend that a trader submit false information to
25 the British Bankers Association. That's a horse of a different

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1 color.

2 JUDGE POOLER: It wasn't within the reasonable rates
3 is what you're saying.

4 MR. SCHACHTER: Correct.

5 JUDGE POOLER: And that's when it becomes false and
6 fraudulent.

7 JUDGE LYNCH: On the record that we have, as opposed
8 to the one that we might have had if Mr. Ewan had been allowed
9 to testify, is there not plentiful evidence, including from one
10 of your experts, that what the purpose of LIBOR was, was to set
11 a benchmark for what is the best borrowing rate for the best
12 customers?

13 MR. SCHACHTER: Well, I think it is -- aside from the
14 word "best," the purpose is to get banks to submit their
15 reasonable estimates of where they can borrow.

16 JUDGE LYNCH: So, if I'm asked what's the best rate at
17 which -- someone says to me, you have a good credit rating.
18 I'd like to know for my purposes what a person with a good
19 credit rating could borrow at, and I know from my experience
20 that my bank would give me a loan at 5 percent. I also know
21 that the loan shark operating out of the bar on the corner
22 would be happy to lend me money at 25 percent for two weeks. I
23 also know that there are other lending agencies that might
24 charge 6 or 7. I'm entitled to say 12 because that's somewhere
25 in the range? I mean, that would be a truthful answer to that

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1 question?

2 MR. SCHACHTER: I don't know that it would be. That's
3 not our facts.

4 JUDGE LYNCH: I don't know that it isn't your facts.
5 Your facts are that an agency that is trying to set a
6 benchmark -- and I have a problem with the exclusion of Ewan's
7 testimony because that could problematize this, but on the
8 record that we've got, they're asked for an honest estimate.
9 They're not asked pick a number in a range. They're not
10 asked -- the literal question that's asked is certainly not:
11 Give us a number that falls somewhere in the ballpark of what
12 you might be able to borrow at. They're asked, what's your
13 estimate? What's the number at which you could borrow? And
14 there's evidence that your clients calculated such a number,
15 and then were responsive to somebody who said, you know, it
16 would be good for us to submit a different number than that.

17 Now, I don't understand why -- again, we're not
18 talking now at the moment about the evidentiary issues, but as
19 a matter of what is false and fraudulent, is there not
20 plentiful evidence from which a reasonable jury could conclude
21 that they were asked what is their estimate, and they did not
22 give their estimate; they gave something else that was not
23 their honest answer to that question. Tell me what's wrong
24 with that as a theoretical matter of what's a crime under the
25 wire fraud statute.

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1 MR. SCHACHTER: I'll answer it two ways. First, there
2 was not evidence that that occurred. Rather, I think it's
3 important to discuss a little bit the construct here.

4 The question, at what rate could you borrow -- this is
5 the question posed by the BBA: At what rate could you borrow
6 funds if ordered to do so by asking for and then accepting
7 interbank offers in reasonable market size just prior to 11:00?
8 The question was posed for 15 different time periods, from
9 overnight to 12 months.

10 It is undisputed that banks did not borrow for a vast
11 majority of those purposes. There was no interbank borrowing.
12 It was undisputed that this is a subjective estimate and not
13 more than that. It is not transaction based. Nobody is
14 required to look to --

15 JUDGE LYNCH: But they're asked for their subjective
16 estimate. It's not a case where they're asked what is the
17 scientific fact, and, alas, there is no such thing, so there
18 can't be a falsehood. They're asked for their estimate. And
19 the question is, did they give their honest estimate or did
20 they give a falsehood that was convenient to them rather than
21 their best guess.

22 If you asked me what's your estimate of how many
23 points the Patriots are going to score in the Superbowl --

24 JUDGE CABRANES: Judge, why don't we let him answer
25 the question as opposed to going into compound and paragraph?

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1 MR. SCHACHTER: There is no evidence that the
2 estimates were not honest in that they were accurate. There is
3 no evidence that either appellant believed that they were
4 submitting a rate which they did not believe to be an accurate
5 answer, a fair and reasonable estimate. There is no evidence
6 that supports that. In fact, the evidence was that there was
7 -- in fact, part of the government's submission is that there
8 was a range of accurate estimates.

9 JUDGE LYNCH: But are they asked for a fair estimate
10 or are they asked for their opinion?

11 MR. SCHACHTER: The question that your Honor poses
12 suggests that there is only one answer to the question, and the
13 evidence was to the contrary. In fact, the government's
14 cooperating witness, Mr. Yagami, whose testimony is at page 265
15 of the joint appendix, he testifies there is no one correct
16 number.

17 Mr. Robson at the beginning of his direct testimony is
18 asked by the prosecutor to basically describe the scheme, and
19 he says -- I'm quoting. This is page 225 of the appendix.
20 "So, there would be kind of a range of two or three numbers
21 where LIBOR could possibly be."

22 The question, by the way, is:

23 "Q. First explain again what you did." That's the question
24 posed by the prosecutor.

25 Here is Mr. Robson, the principal cooperating witness'

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1 opportunity to explain the scheme. And he says, "So, what I
2 would do is I would ask the interbank broker where he felt the
3 LIBORs would be. There would be kind of a range of two or
4 three numbers where LIBOR could possibly be." This is quoted
5 at page 19 of our brief. "So, for example" --

6 JUDGE CABRANES: This is the government witness?

7 MR. SCHACHTER: The government witness, direct
8 examination at the outset of Mr. Robson's testimony.

9 He says, "There would be kind of a range of two or
10 three numbers where LIBOR could possibly be. So, for example,
11 if the broker came on and said three months, I think I'm
12 hearing might be 80, might be 85, might be 90, but probably
13 75." He says, "I would go down the middle."

14 And then the government asks:

15 "Q. Now, let's say you in fact had a trader request where a
16 trader wanted you to submit a LIBOR to favor their position.
17 So what would you do?

18 "A. So, given those circumstances, if one of the traders had
19 contacted me and said three months, if I needed a higher three
20 months, I would have moved it higher at his request, I would
21 have moved it towards the 90 level or set 90." In other
22 words --

23 JUDGE LYNCH: What's he moving?

24 MR. SCHACHTER: He's moving his estimate.

25 JUDGE LYNCH: He selected an estimate and then he

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1 moved that estimate. He had got a range -- no question, he got
2 a range of information. He took that information into account.
3 He said, well, the best I can do is average it. And then
4 somebody says, don't average it, give the high end of the range
5 because that's what we want. And then he, in his words, bumps,
6 right, he moves the estimate?

7 MR. SCHACHTER: He selects in the range of accurate
8 estimates that he could provide --

9 JUDGE LYNCH: I understand -- maybe we're just talking
10 at cross purposes as to what is an estimate. I mean, there are
11 lots of things that one could be asked to estimate and it
12 wouldn't be wrong.

13 You can't say -- if I say, oh, the Patriots are going
14 to score 40 points in the Superbowl. You can't say that's
15 wrong. Who knows?

16 But if I'm asked what's your estimate, and I pick one,
17 and then somebody else says, wait a minute. Tell him something
18 else because that's better for you because you got a number in
19 a pool or something. That's a lie, if I say my estimate is 40
20 points when my estimate is really 28.

21 MR. SCHACHTER: Respectfully, I disagree, and here is
22 why: If you're asked for an estimate, and there may -- an
23 estimate is inherent generally in estimates, and it certainly
24 is the evidence in this case that there certainly was no one
25 right answer. You could choose three. Assume you could choose

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1 three answers. You could choose 75, 80, 85. They're all the
2 same. They're all equally accurate. And you select one
3 accurate answer as opposed to another accurate answer because
4 it will help your employer, which is as an employee what you
5 have a fiduciary obligation to do. If you simply are selecting
6 one accurate answer as opposed to another accurate answer, that
7 is not wire fraud.

8 JUDGE LYNCH: No, an answer that is accurate in the
9 sense you're saying is, if I honestly thought this, no one
10 could quarrel with me. But I'm asked for what I honestly
11 think, and if I don't give the answer that I honestly think, I
12 mean that is standard that that's a fraud.

13 MR. SCHACHTER: A hundred percent I agree. There was
14 no evidence of that.

15 Had the government presented any evidence that the
16 appellants disbelieved the opinion that they were providing --
17 and the statement of opinion in answering the BBA's query is, I
18 believe that Rabobank can borrow at 3.10 percent for six
19 months. That's my estimate. That's what I believe. Had the
20 government presented any evidence that the appellants in fact
21 didn't believe -- they thought no way 3.0. In fact, three or
22 four, if there had been evidence of that, then I would agree
23 with your Honor. However, there was no evidence. That's our
24 argument. That's our point. There was no evidence that they
25 disbelieved. And in fact in the way the offense was described

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1 to the jury by both the prosecutors and Judge Rakoff, the jury
2 wasn't asked to determine that. They weren't asked to
3 determine falsehood.

4 I would just like, if I may, to quote from the
5 prosecutor's summation. "If you find that the defendants took
6 part in the scheme to base Rabobank's LIBOR submissions, at
7 least in part, on trading positions, you should convict.
8 Regardless of whether the submission was inside or outside of
9 some so-called range, you should convict." It's quoted at page
10 339 of our appendix.

11 So the government is telling the jury, look, all you
12 need to find is that one of the considerations in their mind
13 when they selected a perhaps accurate estimate was what would
14 benefit their employer. If they did it, that's wire fraud.
15 And that's not the law.

16 JUDGE POOLER: Counsel, my question is, if they
17 submitted a bid that was outside the range of numbers that they
18 had accumulated from talking to their brokers on the basis of
19 the request of a trader, would that be fraud?

20 MR. SCHACHTER: That very well may be because then the
21 circumstance would be that there would be evidence that the
22 defendant disbelieved the opinion that he was providing.

23 JUDGE POOLER: And there was no such evidence in this
24 trial?

25 MR. SCHACHTER: There was no such evidence, and even

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1 more importantly, the jury wasn't asked to consider that,
2 because they were told that the wire fraud offense here was
3 submitting a rate which may be within the range. It may be
4 believed by the defendant to be an honest answer, an accurate
5 estimate; but if they took into account what would benefit
6 their employer, then they were told that's the crime that they
7 are charged with.

8 Over our vigorous objection, that's how Judge Rakoff
9 described the offense to the jury, which we believe was a
10 constructive amendment because that's not in the indictment.
11 That is not the theory that's articulated in the indictment.
12 The indictment articulates a fraud theory. They say that they
13 chose a rate that was not what they perceived to be what
14 Rabobank could borrow money at. That would be fraud.

15 JUDGE LYNCH: Could you elaborate on what Mr. Ewan
16 would have testified? Could you give me two or three of the
17 best quotes for what he would have said about what the question
18 meant?

19 MR. SCHACHTER: Quoted at page 691 --

20 JUDGE CABRANES: If you permit me, Judge, maybe he can
21 as a threshold to your question -- which he should, of course,
22 answer -- tell us what exactly happened as to his testimony.
23 Who wanted what and why was he not permitted?

24 MR. SCHACHTER: He was not permitted because the Court
25 ruled that his testimony was not relevant. Here is what

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1 happened --

2 JUDGE CABRANES: Answer the Judge's question.

3 MR. SCHACHTER: I can lay out the timeline.

4 At Mr. Allen's arraignment on March 20 of 2015, we
5 alerted the district court that we anticipated to move for Rule
6 15 depositions. We thought that was going to be a real
7 possibility, given the fact that all of the witnesses and all
8 of the conduct occurred outside of the United States.

9 On April 21, 2015, so just one month after the
10 defendant's arraignment, we reminded Judge Rakoff that we
11 believed that we would need to move for Rule 15 depositions,
12 but it's a difficult position to necessarily identify -- what
13 we were effectively doing was identifying trial witnesses one
14 month into the case, and we needed to time to review the
15 hundreds of thousands of documents which were going to be
16 provided to us in discovery.

17 In June of 2015, Mr. Ewan testified in the United
18 Kingdom. And then two weeks later the Justice Department filed
19 a superseding indictment. That's June 25. We received
20 documents from the government relating to the British Bankers
21 Association and Mr. Ewan on June 26. And within a matter of
22 weeks after that -- so that's June 26. On July 14, we told the
23 Court that we intended to request Mr. Ewan's deposition, and
24 the district court ordered us to file our motions by July 24.
25 We filed our motions on July 24 and Judge Rakoff denied the

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1 motion on August 18.

2 We thought this was a critical witness, and one of the
3 reasons was his testimony -- I'm quoting, and this is at page
4 691 appendix. This was his sworn testimony in the United
5 Kingdom: "A panelist who can borrow in reasonable market size
6 at any one of a wide range of offered rates commits no
7 falsehood if she bases her response to the daily LIBOR survey
8 upon the lowest of these or the highest or any arbitrary
9 selection from among them."

10 If Mr. Allen and Mr. Conti were prosecuted in the
11 United Kingdom, the jury would have heard that testimony, but
12 because Main Justice decided to prosecute them here in the
13 United States, the jury never heard that testimony. We think
14 that that would have made a significant difference.

15 JUDGE POOLER: The government decided to prosecute
16 because even though they could pick a number within the
17 reasonable range, they were influenced by the request from
18 traders to pick a certain number. I'd like it high on the
19 three-month rate, and that is the intent part of the fraud,
20 correct?

21 MR. SCHACHTER: Correct.

22 JUDGE POOLER: So why isn't it a complete fraudulent
23 act?

24 MR. SCHACHTER: Well, several issues. This Court in
25 the Countrywide decision made very clear that bad faith or

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1 impure thoughts does not give rise to fraud. You need a false
2 representation or a misleading half truth or an omission, and
3 it was conceded below that this case was not based on
4 omissions. You need the actus reus, not simply the state of
5 mind.

6 JUDGE POOLER: Your argument is they had impure
7 thoughts, but there was no fraudulent act. Is that your
8 argument?

9 MR. SCHACHTER: Well, I guess I would put it somewhat
10 differently. Certainly, there was no impure act, but I would
11 even quarrel to some extent with the impure thoughts. The
12 thought that they had was that this will benefit their
13 employer. These prosecutions we detailed, and this is at
14 sentencing, but there are more than 125 people that were
15 engaged in identical conduct. In fact, the Bank of England
16 called Barclays and told them that they should put their LIBOR
17 submission low because they were worried about the general
18 economy. So, what the thoughts of these people were, they're
19 an employee and they're helping their employer.

20 I think that the thought process was something along
21 the lines of: As long as I'm answering the question
22 accurately, in other words, I'm providing -- there is no one
23 answer. During the financial crisis, there is no interbank.
24 That's when most of our relevant time period is, the financial
25 crisis. There is no interbank borrowing at all. Banks do not

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1 borrow from one another, and yet they are called upon to submit
2 a LIBOR rate, which is what rate can you borrow. It is a very
3 wide range --

4 JUDGE LYNCH: In fact, Mr. Ewan's testimony, it seems
5 to me, goes directly to the question, what is it that they are
6 being asked, right? I mean, the testimony in the record on
7 that, from the government's expert witness at least, is
8 somewhat to the contrary in terms of what he thinks they were
9 supposed to do, which is, as I was trying to suggest, to give
10 their best estimate; not to pick a number in a range. But
11 Mr. Ewan seems to say the opposite, and he was unwilling to
12 come to the United States to give that testimony.

13 MR. SCHACHTER: That is certainly correct.

14 JUDGE LYNCH: And you asked to do what you do when a
15 witness is unavailable, which is to do a Rule 15 deposition,
16 and the government opposed, and the judge didn't let you do it.

17 MR. SCHACHTER: That is absolutely correct. And with
18 all due respect to this business school professor from
19 California that the Justice Department flew in to testify, his
20 knowledge of how to interpret the BBA's question is no greater
21 than any of ours. There is no book of rules from the British
22 Bankers Association --

23 JUDGE LYNCH: I mean, there doesn't need to be a book
24 of rules necessarily. There's a reasonable way of interpreting
25 this question based on what the purpose of this is, and the

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1 jury had certain information from an expert that goes to that.
2 Whether or not you are right about the argument that there is
3 no possibility of a crime here, you've also got the argument
4 that the jury was not permitted to hear all of the evidence
5 that bears on the question of how the question should be
6 interpreted.

7 MR. SCHACHTER: That is absolutely correct. And even
8 Mr. Harris, the government's expert, testified that this is an
9 estimate, it's subjective; and during most of these time
10 periods there is no interbank borrowing whatsoever from which
11 these traders are to draw on to come up with a number to submit
12 each day.

13 JUDGE CABRANES: Do we know from the record or do we
14 care why Mr. Ewan couldn't come to testify? Does it matter?
15 Maybe he just didn't want to get on a plane, which is fine.
16 I'm just wondering whether there was something in the record we
17 should know.

18 MR. SCHACHTER: I don't think so.

19 JUDGE CABRANES: What was your argument on behalf of
20 the Rule 15 deposition, which was denied?

21 MR. SCHACHTER: Well, it wasn't --

22 JUDGE CABRANES: He doesn't want to come? He's
23 available in London?

24 MR. SCHACHTER: We were informed by his counsel that
25 he would not come. So, the only way to have this testimony

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1 presented before the jury is to take his Rule 15 deposition.

2 JUDGE LYNCH: You might want to stay out of the United
3 States if you're anywhere near LIBOR with --

4 MR. SCHACHTER: I think that's true.

5 JUDGE LYNCH: He just might not want to get in an
6 airplane.

7 JUDGE CABRANES: What's the theory of denial, if you
8 can refresh our recollection? I know that in fast-moving
9 prosecutions or hearings -- and all hearings before Judge
10 Rakoff are fast moving, but what's the reason for denying? Do
11 we know what the reason is for denying the Rule 15? It seems
12 like a simple enough motion.

13 MR. SCHACHTER: I think I have trouble articulating
14 the basis for why his testimony would not meet the relevance
15 standard. I think for Rule 15 standard, it has to be highly
16 relevant, not just 401, but nonetheless I have trouble
17 articulating the Court's decision. He said it wasn't relevant
18 to whether a fraud had occurred --

19 JUDGE POOLER: Did the government object?

20 MR. SCHACHTER: The government certainly did object.
21 I was surprised that the government objected to a request to
22 take testimony and have it presented to the jury of what seems
23 to be a central witness, particularly when one of the
24 government's theories is that the defendants were acting
25 dishonestly in not following the British Bankers Association's

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1 expectations. In fact, that's much of the government's
2 summation. The government talks about that. How could then
3 the witness from the British Bankers Association that runs
4 LIBOR, how could that testimony be denied to this jury? Yes,
5 the government objected.

6 JUDGE CABRANES: We'll hear from them on that for
7 sure, and they will want to be thinking about it; but before
8 you sit down, would you briefly address the Kastigar issue?

9 MR. SCHACHTER: Yes. So what we had, again, by virtue
10 of the fact that these men were prosecuted in the United
11 States, in an extremely unusual circumstance. We are aware of
12 one case where it has ever happened that a witness, a
13 government witness, has been exposed to a defendant's compelled
14 testimony. Really, this never happens; never should happen.

15 JUDGE LYNCH: Unless somebody testifies on national
16 television under an immunity granted by Congress.

17 MR. SCHACHTER: Exactly. It's an extremely rare
18 circumstance.

19 JUDGE LYNCH: Which has happened, and that's the case
20 you're referring to, I take it?

21 MR. SCHACHTER: Of course. Yes, your Honor. Yes.

22 JUDGE CABRANES: Poindexter and North, right?

23 MR. SCHACHTER: Yes.

24 JUDGE CABRANES: Unusual.

25 MR. SCHACHTER: It's very unusual. Here, you have a

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1 circumstance where -- I was present, by the way, at Mr. Allen's
2 U.K. testimony, and I said, I just want to make perfectly clear
3 that this man has Fifth Amendment rights in the United States,
4 and so if, God forbid, he's ever prosecuted in the United
5 States, that no use or derivative use could be made of this
6 testimony. There can be no exposure -- any exposure by anyone
7 associated with this prosecution, any witness, would
8 effectively make him non-prosecutable here in the United
9 States. I just want to make that clear.

10 And here you had a circumstance where the government's
11 main cooperating witness, Paul Robson, he testifies one way
12 before the financial conduct authority. He testifies
13 effectively that he didn't think he was doing anything wrong.

14 JUDGE CABRANES: During that proceeding in Britain,
15 was there anybody from the United States Government present?

16 MR. SCHACHTER: No, although they were well aware of
17 the testimony, I believe, because I believe that I had notified
18 the Justice Department of the testimony, and I believe that
19 they speak in their papers of their efforts to wall themselves
20 off from the testimony so that the prosecutors themselves did
21 not hear of the testimony, even though they were speaking to
22 the FSO, I understand, on a pretty regular basis because they
23 were coordinating the investigation who was going to prosecute
24 who. There's interactions between the Justice Department and
25 the FSO, but they walled themselves off from that.

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1 JUDGE CABRANES: I interrupted you. Go ahead.

2 MR. SCHACHTER: Mr. Robson testifies one way before
3 the FSA. Then it was called the FSA; now the FCA. Then he
4 receives Mr. Allen's compelled testimony, which he's forced to
5 testify under penalty of imprisonment in the U.K. He reads
6 that testimony, and he has obviously read it carefully. We
7 attach his markups of the testimony in the appendix. He
8 circles, he stars throughout the testimony. And it's not
9 surprising that he would pay attention because Mr. Allen was
10 Mr. Robson's supervisor, so this is pretty important testimony.

11 In fact, Mr. Robson had testified that he thought he
12 was supposed to be speaking to traders in other countries so
13 that he could estimate borrowing costs. And Mr. Allen says
14 no -- his testimony before the FCA is, no, he shouldn't be
15 looking to other traders in order to set LIBOR. And he stars
16 and he circles and he asterisks, and then he writes five pages
17 of notes to his attorney about what he read in Mr. Allen's
18 testimony and also Mr. Conti who he sits next to. And
19 remember, the subject of this testimony is about things that
20 happened years ago and these are close coworkers of Mr. Robson,
21 so, of course, he pays close attention to the compelled
22 testimony, and then he tells a completely different story. We
23 detail certain portions of that in our brief. He tells a
24 completely different story.

25 Now, the government has what the courts have referred

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1 to as an extremely heavy burden, and the reason why it's a
2 heavy burden is they have to prove a negative. They have to
3 prove that there was no use made; that he made no use
4 whatsoever. He was not affected. His recollection was not
5 refreshed. According to the D.C. Circuit, it doesn't even
6 matter if that witness had personal knowledge of these events
7 because you still don't know what can affect somebody's --

8 JUDGE LYNCH: To the D.C Circuit, it didn't even
9 matter that the witness had given on substantive terms the same
10 testimony to a grand jury before being exposed to Mr. North's
11 testimony. The normal way that this would be done, that the
12 government tries to meet this burden in these cases, is to look
13 back at, if they are fortunate enough to have such a thing or
14 they took the trouble to make it, at exactly what you're doing:
15 Look at Robson's testimony before he was exposed to the
16 immunized testimony, compare it after, and demonstrate that
17 it's the same thing. But here you're telling us it is in
18 significant ways not the same thing.

19 MR. SCHACHTER: The canned testimony is completely --
20 what the D.C. Circuit referred to as the canned testimony which
21 you could look to, to show theoretically that the witness was
22 not in any way affected by his review of this testimony, and
23 the D.C. Circuit's -- memory is a very difficult thing. When
24 you're asking witnesses to talk about their memory, what could
25 affect a memory of things that happened years ago, it's hard.

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1 But if you had, the D.C. Circuit theorizes, if you had canned
2 testimony, and you're able to show the testimony is identical
3 to the testimony they provided from before exposure to after,
4 then, then perhaps you could show that this witness was not
5 affected in any way.

6 Judge Rakoff in addressing the Kastigar issue that we
7 raised explicitly stated he is not following the D.C. Circuit's
8 standard and makes no analysis of what the D.C. Circuit said
9 was the test, that Mr. Robson was not in any way -- and these
10 are their words -- shaped, altered or affected; that the
11 government must prove, they must negate the possibility that
12 his testimony was refreshed or influenced, and that is a heavy
13 burden. And it is a burden that Judge Rakoff released the
14 government from in this circumstance; said that's not the test
15 he's going to apply, and we believe that was error.

16 JUDGE LYNCH: This is a rare circumstance, as you say,
17 and the D.C. Circuit is not us, and we've never confronted this
18 situation before. Isn't it right that what Judge Rakoff did
19 was essentially apply a test, almost like what happens to
20 eyewitnesses in a suggestive identification test situation,
21 which is to say, since Mr. Robson says he had a good
22 opportunity to learn this information on his own, since he was
23 there, presumably, for I think most of the things anyway he's
24 testifying about, and I credit that he says this is his real
25 recollection now and it's not really influenced, that's enough?

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1 Isn't that basically what he did?

2 MR. SCHACHTER: I will add one caveat. There is one
3 additional thing we suggest is relevant that he also looked at;
4 that is, effectively he credited Mr. Robson's denials. And I
5 will note this is an issue that this Court has confronted
6 because in many circumstances the question is whether
7 prosecutors have been exposed, and this Court has said on
8 numerous occasions that we're not going to rely on a
9 prosecutor, an officer of the Court's denials as to exposure.
10 The government needs to prove more than that. And we suggest,
11 we argued that certainly if the prosecutor --

12 JUDGE LYNCH: Before you get away from it, what is the
13 extra thing mentioned to Judge Rakoff?

14 MR. SCHACHTER: The government also assembled a chart
15 which compared Mr. Robson's testimony to other evidence that
16 was presented to the jury. So, in other words, Mr. Robson says
17 this, but so does Mr. Yagami. Mr. Robson says this, but so
18 does Mr. Stewart.

19 JUDGE POOLER: But they didn't print a chart of his
20 before and after testimony, did they?

21 MR. SCHACHTER: Absolutely not, because that would
22 actually address the issue, which is, was Mr. Robson's
23 testimony in any way shaped, altered or affected. The fact
24 that Mr. Yagami testified at trial something that's consistent
25 with Mr. Robson, well, that's not the basis for Mr. Robson's

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1 testimony. He certainly didn't review Mr. Yagami's trial
2 testimony before testifying at trial.

3 JUDGE LYNCH: There is one other issue you've got to
4 get over, right, on the Kastigar issue, which is, say
5 hypothetically that we agreed with you that if the SEC or the
6 U.S. Justice Department had given Mr. Robson this transcript
7 and then Mr. Robson testified. Assume that we agree that that
8 would be a flagrant violation of Kastigar. How is it changed
9 or is it changed by the fact that the testimony was compelled
10 by a foreign government, and under the foreign government's
11 rules, if they had done this prosecution, they could have done
12 essentially what the government did here -- I take it that's
13 the belief -- without consequence.

14 MR. SCHACHTER: Yes. That is, I believe, simply
15 wrong. The reason for that -- first of all, I will note that
16 taken to its logical end, the government would say, well, sure,
17 Mr. Allen was compelled under penalty of imprisonment in the
18 U.K. to testify, but we didn't do it, so the Fifth Amendment
19 doesn't apply. Nothing would prevent them from using it any
20 way they see fit. In fact, according to the government's
21 theory, they could introduce it to the jury.

22 JUDGE LYNCH: They could introduce it to the jury.

23 MR. SCHACHTER: Sure, let's have Mr. Allen's compelled
24 testimony presented before the jury under their argument.

25 JUDGE LYNCH: There might be some due process limits

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1 to this, right? For example, if it was compelled by torture,
2 the case might be different. Or if it was a more flagrant use
3 of the testimony, that might be different. But does every jot
4 and tittle of Fifth Amendment law apply in the circumstance
5 where a foreign government has done something that could
6 compromise American prosecutions? Because they're just doing
7 what they do under their law; they give this witness the
8 testimony to look at because there's no problem for them to do
9 that. Now it's happened, and now an important witness is just
10 unavailable to the United States?

11 MR. SCHACHTER: Well, it's difficult to address
12 circumstances beyond this one, but here we have the Fifth
13 Amendment, and the reason why the Fifth Amendment applies here
14 is the act which violates the Fifth Amendment is the use of the
15 compelled testimony. It's not the compulsion. The Supreme
16 Court has made that clear. It is the use of the compelled
17 testimony. That is when the violation has occurred. It
18 doesn't matter --

19 JUDGE LYNCH: Which is the Fourth Amendment cases.

20 MR. SCHACHTER: That's correct. But under the Fifth
21 Amendment, it is the use of the compelled testimony in any way,
22 a direct derivative that is the Fifth Amendment violation. It
23 doesn't matter who did the compelling because that is not the
24 threshold issue. No court has suggested that the Fifth
25 Amendment does not apply to taking compelled testimony of a

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1 witness who is subsequently prosecuted in the United States.

2 And in fact, the Supreme Court in United States v.
3 Bram. They dealt with this exact circumstance. This was
4 testimony that was taken in Canada of someone who then is
5 prosecuted in the United States, and the Supreme Courts -- it's
6 a long time ago. It's late 1800's; 1898, I believe.

7 JUDGE LYNCH: They were remarkably liberal, the
8 Supreme Court, in the late 19th century.

9 MR. SCHACHTER: But just as authoritative.

10 JUDGE LYNCH: They made the Warren Court look tough.

11 JUDGE CABRANES: The case has not fallen into
12 desuetude.

13 MR. SCHACHTER: That's correct. Many courts,
14 including this Court, some directly, have said that it's
15 well-settled -- in In Re: Terrorist Bombings, this Court said
16 "foreign nationals interrogated overseas but tried in the
17 civilian courts of the United States are protected by the Fifth
18 Amendment."

19 In Yousef, this Court said, "The law is settled that
20 statements taken by foreign police in the absence of Miranda
21 warnings are admissible if voluntary."

22 The Ninth Circuit in Brulé addressed this case this
23 circumstance head on because it was statements that had been
24 compelled by Mexican law enforcement, and the Ninth Circuit
25 says the Fifth Amendment applies.

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1 There is no case which has ever held that the Fifth
2 Amendment does not apply to the Justice Department's use of
3 compelled testimony because the compelling was outside of the
4 United States. And unlike the Fourth Amendment, this is not a
5 restriction on government action. It's not like Miranda. It's
6 not a prophylactic rule.

7 The rule is against the use of the testimony
8 regardless. It doesn't ask anyone to find fault in the
9 compulsion. It's not a question of whether or not the Justice
10 Department is to blame for this testimony. The issue is are
11 they using it.

12 JUDGE CABRANES: Thank you, Mr. Schachter.

13 MR. SCHACHTER: Thank you.

14 JUDGE CABRANES: Mr. Pellettieri, looking forward to
15 hearing from you. You might give some thought to the original
16 inquiry by me at the threshold regarding the history and
17 timeline of the prosecution itself.

18 MR. PELLETTIERI: May it please the Court, John
19 Pellettieri from the Department of Justice on behalf of the
20 United States.

21 Turning to that first, Judge Cabranes, LIBOR was
22 devised by the British Bankers Association to be an impartial
23 market tool for use in financial transactions throughout the
24 world; and it was used, and it is used, in financial
25 transactions throughout the world, including many in the United

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1 States and in New York.

2 Now, the defendants here also manipulated the U.S.
3 dollar LIBOR. In fact, they did it with individuals located in
4 New York in a bank branch located in New York, and Main Justice
5 as a general matter has been investigating and prosecuting
6 LIBOR cases and has been handling those and taking the lead on
7 them. So that is generally the background here.

8 JUDGE POOLER: Are other cases pending on LIBOR?

9 MR. PELLETTIERI: There are other prosecutions
10 pending, yes, your Honor.

11 JUDGE POOLER: In the Southern District?

12 MR. PELLETTIERI: I believe in Southern District. I'm
13 not positive off the top of my head, your Honor.

14 JUDGE POOLER: But this was the first to go to trial?

15 MR. PELLETTIERI: This was the first to go to a jury
16 and lead to a conviction, but there have been deferred
17 prosecution agreements with the banks, a number of them, and so
18 those prosecutions have been resolved with Main Justice with
19 the banks themselves. This was the only one to go to trial so
20 far and to lead to a jury verdict against individuals.

21 JUDGE POOLER: But the banks who submitted bids, are
22 those the banks you're talking about? So you've had deferred
23 prosecutions with other banks?

24 MR. PELLETTIERI: Other banks, your Honor. Rabobank
25 for one entered into a deferred prosecution agreement and other

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1 banks as well.

2 JUDGE POOLER: So you have a deferred prosecution with
3 Rabobank, and yet you're pursuing these two employees of
4 Rabobank.

5 MR. PELLETTIERI: Well, they -- they admitted
6 liability. They admitted guilt, and there's a deferred
7 prosecution agreement, yes. And we also prosecuted individuals
8 as well.

9 Now, turning back to the purpose of LIBOR and its
10 function. As I mentioned, the British Bankers Association
11 intended it to be an impartial market tool, and for that reason
12 they selected a panel of banks based on the reputation, the
13 scale of activity and the perceived expertise of those things.
14 And then they required that those banks provide an estimate of
15 the bank's borrowing costs on the interbank market every day
16 around 11:00 a.m. London time.

17 Now, Rabobank required the defendants here, who are
18 cash traders, to provide that estimate because they had the
19 expertise. So they were able to evaluate -- and Mr. Allen's
20 testimony at trial went into this. He described at pages 1165
21 to 1169 in the trial transcript how he was able to evaluate
22 market information every day. He had the expertise as a cash
23 trader, evaluate market information, and get a picture of the
24 market, get a picture of where cash was trading, and as time
25 went on, that picture narrowed down to a single number that he

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1 could provide --

2 JUDGE POOLER: A single number or a range of numbers?

3 MR. PELLETTIERI: He said it was a straightforward
4 process, and I could provide an estimate every day of what the
5 bank's borrowing costs were. He didn't mention a range or say
6 I couldn't figure out between one of a number. His testimony
7 was that I had the expertise, and I could do it, and I did do
8 it, and he said, yes, I received requests from traders. They
9 asked me. It was, number one, improper for them to even ask
10 me, but I just didn't act on those. I kind of pushed them off,
11 and I gave my honest estimate every day. That was his
12 testimony.

13 The jury was entitled to reject that testimony, and in
14 fact, the jury on that testimony alone could have convicted
15 Mr. Allen, but there was ample evidence supporting that there
16 was a single number, an estimate that the defendants were able
17 to come to every day, and that instead of providing that
18 estimate, they provided something different.
19 They bumped the number, they biased the number, and provided
20 that biased number with the purpose of benefiting Rabobank
21 traders, the positions they held in interest rate swaps. Now
22 these interest rate swaps --

23 JUDGE LYNCH: I may tend to agree with you about that,
24 what a jury could have found on the evidence in the record, but
25 it seems to me there is some possibility that the question is

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1 ambiguous; that it could be read the way Mr. Schachter wants it
2 to be read, and he had a witness from the BBA who would have
3 testified that that's not what the question meant, that the BBA
4 would have been satisfied with any estimate -- high, low or in
5 the middle -- plucked from a range of reasonable guesses.

6 MR. PELLETTIERI: Well, that wasn't Mr. Ewan's
7 testimony. I think you have to look at the actual transcript,
8 which is at Docket 1063 page 8, and if you look at the --

9 JUDGE LYNCH: Is that in the appendix? I have the
10 appendix.

11 MR. PELLETTIERI: I believe it was in the --

12 JUDGE LYNCH: The transcript?

13 MR. PELLETTIERI: I will double check for you. Maybe
14 my colleague will recall it.

15 JUDGE LYNCH: Just read it then.

16 MR. PELLETTIERI: What happened was, this was on
17 cross-examination, Mr. Ewan was presented with a document that
18 was authored by someone, I believe it was Fred Stern, and in
19 it, it contained the statement that was quoted in the briefs
20 and has been quoted to the Court today where it said -- this is
21 Fred Stern saying, "A contributor panelist who can borrow in
22 reasonable market size at any one of a wide range of offered
23 rates commits no falsehood if she bases her response to the
24 daily LIBOR survey upon the lowest of these or the highest or
25 any other arbitrary selection." That's what Fred Stern said in

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1 a document.

2 Then Mr. Ewan was asked, "is that" -- you know, do you
3 agree? And he said, well, that's fine as far as what Fred
4 Stern is saying. It's consistent with the definition. Then he
5 says, "but" and he goes into a whole other explanation. He
6 says, "But there's a final component of the definition which is
7 a bank can't submit a range. It has to submit one number. And
8 so that's why the LIBOR question isn't where did you last
9 borrow money. In order to arrive at that one, that one number,
10 the question is where do you think you would be lent money?
11 And there can be only be one answer to that, and it should be
12 where do you think an unnamed counterparty would offer you
13 money?" And he said, "You should be using all information
14 available to you to get to that one figure."

15 He said, "Well, was that a funneling process?" He's
16 asked.

17 He said, "I don't know if there's a funneling process,
18 but yes, there should be a process at the bank that lays out
19 how you arrive at your number and whether it's a funneling down
20 or an iteration of evidence, or however you want to describe
21 it, but there should be a process for doing it."

22 So he says, yes -- and it's consistent with Allen's
23 testimony. Allen said, "Yes, there was a process. Every
24 morning I got down to one number."

25 JUDGE LYNCH: It's a somewhat contradictory answer at

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1 least if he starts by saying yes, Mr. Stern is correct, because
2 what Mr. Stern apparently says is that any estimate would do.

3 MR. PELLETTIERI: And then he qualifies it.

4 Initially, I agree, it's somewhat --

5 JUDGE LYNCH: But then he comes back and says
6 something else. But does he ever say it would be -- flatly say
7 it would be wrong, it would be a falsehood to give an estimate
8 that is influenced by a trader?

9 MR. PELLETTIERI: Yes, he absolutely said that. He
10 said that it was against the letter and the spirit of the
11 definition to take into account a trader's interest in
12 providing a LIBOR submission. He absolutely said that. He
13 said, I didn't know about it until 2012. I think he says maybe
14 there's some inklings in 2012, but I didn't know about it in
15 2010. I didn't know about it until 2012.

16 In fact, Mr. Ewan was called as a Crown witness
17 against an individual who was charged and convicted of
18 manipulation. He was called to testify that it was not proper,
19 it was not part of the definition to take trader interest into
20 account. I didn't know about it, and if I'd known about it, I
21 wouldn't have approved of it. There was a conviction in that
22 case.

23 So Judge Rakoff did not abuse his discretion at all in
24 concluding that Mr. Ewan's testimony when viewed in its
25 totality was not material. And, again, there's a different

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1 standard. It's not relevance. It's materiality. In addition
2 to materiality, there also has to be a showing that it would be
3 a deprivation of justice if the deposition were not taken. So
4 depositions are the exception; not the rule.

5 And materiality is different than relevance. There
6 has to be something that would show a reasonable likelihood
7 that would actually change the outcome of the trial or affect
8 the outcome of the trial.

9 In light of everything Mr. Ewan testified to, the fact
10 that it absolutely was not proper to take into account trader
11 interest in setting a LIBOR, he didn't know about it, and that
12 there has to be one number. Mr. Ewan's testimony which
13 supported our case --

14 JUDGE POOLER: In order to get to the one number,
15 doesn't he get information from various sources, and isn't that
16 what we've been calling the range of the one number, the range
17 of the right number? Isn't that correct?

18 MR. PELLETTIERI: The cash brokers, who were the LIBOR
19 submitters, had their own expertise just by trading cash, and
20 then they also collected market information; and among the
21 market information they collected was information from brokers,
22 and different brokers may have given different information. So
23 there was perhaps on any given day different numbers, and the
24 responsibility of the LIBOR submitter was to take all that
25 information and provide an estimate. And the evidence

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1 established that they were able to do it, they were able to get
2 to that number. They were able to get to an estimate, but they
3 gave a different number. And by giving that different number,
4 that's deceit. That's deceptive. Because every estimate
5 provided by the defendants carries with it an assertion that
6 this is actually my estimate; this is not something else.

7 JUDGE POOLER: The nature of the fraud is what?
8 Describe the fraud to me. What is the fraud that was
9 perpetrated?

10 MR. PELLETTIERI: Well, a scheme to defraud is a
11 scheme to deprive another of property or money through deceit.
12 And here, the defendants deceptively provided estimates that
13 were not actually their estimates, so those were misleading and
14 false, in order to deprive their counterparties in these
15 interest rate swaps of their money, because, remember, these
16 interest rate swaps are directly tied to the LIBOR. If in this
17 interest rate swap a counterparty agreed I'm going to pay the
18 floating rate LIBOR on this notional amount of 10 million, if
19 LIBOR goes up, the counterparty automatically has to pay more
20 money to Rabobank. And so by scheming and deceptively changing
21 that number, that --

22 JUDGE POOLER: Even marginally.

23 MR. PELLETTIERI: Even marginally, because many of
24 these were billions of dollars, many hundreds of millions of
25 dollars. Even marginally affects and deprives the counterparty

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1 of money or property. So that was the scheme. The whole
2 purpose of the scheme was to profit, to maximize Rabobank's
3 profits in these interest rate swaps.

4 JUDGE POOLER: Can I turn a moment to the ten-year
5 statute of limitations that you need to show a harm, as we were
6 just talking, to an FDIC bank, correct? The charge that Judge
7 Rakoff gave added that the "investment decisions of that bank
8 would have been different if the bank had known of the fraud."

9 Now, that's not anywhere in this statute. As far as I
10 can tell, that was made up. It may be correct, but it was made
11 up. I believe the defendants objected strenuously to that
12 language, and yet it was delivered to the jury. Can you speak
13 to that?

14 MR. PELLETTIERI: A few points. So, the statute uses
15 the word affect. And everyone agrees, the defendants agree
16 that an affect on a bank includes exposing that bank to loss or
17 a risk of loss. Now, loss and risk of loss --

18 JUDGE POOLER: He said risk of loss, but then he added
19 "or" so he gave an alternative ground, and there was no special
20 verdict, so we don't know on which ground the jury decided.
21 "Or that the investment decisions of that bank would have been
22 different if the bank had known of the fraud." And that's not
23 in the statute, is it?

24 MR. PELLETTIERI: No, and neither is loss or risk of
25 loss. It gives explanation for the word affect. And in our

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1 view, an influence on a bank's investment decision is an effect
2 on that bank. It does affect that bank. In fact, there's very
3 little difference between affecting a bank's investment
4 decision and exposing the bank to a risk of loss because
5 investment decisions are intended to maximize profit and reduce
6 risk of loss.

7 JUDGE POOLER: You didn't submit this language either.

8 MR. PELLETTIERI: No, we did not submit it. We didn't
9 rely on it in our argument at all. But a few points. Number
10 one is, this is not a jury question under this Court's
11 precedent. It was submitted to the jury, but it didn't have to
12 be.

13 JUDGE POOLER: Under the statute, the judge could have
14 decided by himself?

15 MR. PELLETTIERI: Well, this Court has held that in
16 the statute that tolls the limitations period for a period
17 where the defendant is a fugitive from justice, it is the
18 district court that finds by a preponderance of the evidence
19 whether the defendant was a fugitive and tolls that period. We
20 don't see any way of distinguishing that determination from the
21 determination of whether a fraud affects a bank.

22 JUDGE POOLER: You needed the fraud to affect the bank
23 to get the ten-year statute to make all these cases within the
24 statute of limitations. Isn't that correct?

25 MR. PELLETTIERI: For the substantive wire fraud, not

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1 for the conspiracy counts. Because an objective of the
2 conspiracy counts was bank fraud, that carried a ten-year
3 statute of limitations of already.

4 JUDGE POOLER: If the convictions were based on all
5 the overt acts of the wire fraud, it would have been harder to
6 prove conspiracy without the overt acts. Isn't that correct?

7 MR. PELLETTIERI: Well, a statute of limitations is an
8 affirmative defense. It needs to be pressed by the defendants
9 at the trial. There was never any assertion of a statute of
10 limitations to the conspiracy counts here. So it's waived.
11 That's the Musacchio case in the Supreme Court just recently
12 decided. The reason for that is because perhaps we would have
13 presented different evidence to show whatever had to be
14 demonstrated.

15 JUDGE POOLER: They argue it now, I suppose we would
16 look at it as a harmless error standard, but I think they argue
17 now that the ten-year statute shouldn't have applied.

18 MR. PELLETTIERI: For the conspiracy, it wouldn't be
19 plain error, harmless error. It's waived. But for the
20 substantive wire fraud counts, the first question is whether
21 the instructions were erroneous. We don't think they are, but
22 if they were, the Court would then determine whether it is
23 harmless error. In our view it is harmless error because of
24 the overwhelming evidence of a risk of loss to these banks, to
25 these FDIC-insured banks. These banks were the object of the

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1 fraud. They were the counterparties in these swaps, and the
2 purpose of the fraud was to deprive those counterparties of
3 money.

4 JUDGE POOLER: So you have no problem with risk of
5 loss.

6 MR. PELLETTIERI: Absolutely no problem with risk of
7 loss. It's clear that, as this Court has said, if a bank was
8 the object of the fraud, it clearly was affected; and we proved
9 that these banks were the object of the fraud, and by being an
10 object were supposed to a risk of loss.

11 JUDGE POOLER: You didn't really need the second
12 phrase in that charge which says "or that the investment
13 decisions of that bank would have been different if the bank
14 had known of the fraud." You really don't need that. All you
15 needed is the risk of loss.

16 MR. PELLETTIERI: Right, your Honor. We don't need
17 it.

18 JUDGE POOLER: So it was surplusage, and yet there was
19 no special verdict, the jury could have found on that basis.

20 MR. PELLETTIERI: It wasn't surplusage. It was
21 explicating the word affect. So, as this Court has said,
22 affect encompasses a broad range of influences. It's not
23 limited to a particular loss or risk of loss in the language of
24 the statute. It talks about effect.

25 JUDGE POOLER: He was just elaborating on what risk of

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1 loss is.

2 MR. PELLETTIERI: Well, no, he's elaborating on
3 effect. Risk of loss elaborates on effect, and changing the
4 bank's investment decision elaborates on effect.

5 JUDGE POOLER: I was only troubled that neither party
6 asked for that language and the defendants objected, and yet it
7 was given to the jury. That was my concern.

8 MR. PELLETTIERI: Well, in our view it was consistent
9 with the language of the statute. The jury didn't even have to
10 make that determination because it was a determination of the
11 judge, and any error in the instructions was harmless because
12 there was ample evidence of risk of loss to these banks.

13 JUDGE LYNCH: Can we go back to the jury instructions
14 on the theory of mail fraud for a moment? It is clear from
15 some of my questions that I tend to agree with you that if
16 there was not an honest answer given, that's clearly a mail
17 fraud; but the defense actually requested an instruction that
18 seems to me to be entirely consistent with your theory, and at
19 least what I'm inclined to think, they asked for an instruction
20 that "a statement of opinion or estimate may constitute a false
21 statement or misrepresentation only if the government can prove
22 beyond a reasonable doubt it was not honestly held by the
23 person making it at the time that it was made."

24 Isn't that an exact accurate statement of law and
25 indeed a statement of what your theory was; that they didn't

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1 give an honest estimate at the time that it was made?

2 MR. PELLETTIERI: I think the only word we would
3 quibble with is "only," but yes, it was generally an accurate
4 statement, but the Court correctly concluded that that concept
5 was already incorporated into --

6 JUDGE LYNCH: Where? Can you just point me to what
7 the judge said that conveys that piece of law?

8 MR. PELLETTIERI: Yes. To begin with, the broader
9 instruction where the Court said that "the government had to
10 prove a plan or design to obtain money or property by means of
11 false or fraudulent pretenses, representations or promises
12 which can take the form of outright lies but can also consist
13 of misleading half-truths." So that encompasses the general
14 framework; and as we discussed, when someone gives an estimate
15 that is not an actual estimate, that is a lie. So as a broad
16 matter, that is in there.

17 JUDGE LYNCH: To be very specific though, in a case
18 where the whole point according to the government is that the
19 defendants did not -- maybe I'm misunderstanding your theory.
20 I thought your theory was precisely that this was a fraud
21 because the defendants did not give their honest estimate.

22 MR. PELLETTIERI: So that provides the background, but
23 there's more specific --

24 JUDGE CABRANES: In reference to Judge Rakoff's
25 instruction, do you have a page citation for it? You seem to

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1 be reading from it.

2 MR. PELLETTIERI: Yes. It's in the trial transcript
3 at 1631 to 1633, I believe, or 1634 are the elements of wire
4 fraud. So that's where that is. Also, again, the general
5 instruction about falsehood, lies, things of that sort.

6 Then that has to be understood together with the
7 good-faith instruction which says, "A statement made with a
8 good-faith belief in its accuracy does not amount to an
9 intentional false or misleading statement and is not a crime
10 even if the statement itself is accurate or misleading."

11 So that encompasses the idea that if they felt their
12 estimate was somehow accurate, if they believed that, they
13 wouldn't be convicted.

14 Now, to go further, the Court also explained the
15 government's allegations, and when he explained the
16 government's allegations, he said, "The government alleges that
17 the defendants submitted LIBOR or rate estimates that were not
18 at the levels the defendants would have honestly submitted
19 otherwise, but were instead at levels reflecting, at least in
20 part, an intent to benefit Rabobank's trading positions."

21 So, under that theory if the defendants gave an honest
22 estimate that's different than their -- so that that
23 encompasses the idea if they thought all three were perfectly
24 appropriate, then they wouldn't have been guilty.

25 Now, fourth, there's another component of the

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1 good-faith instruction where the Judge says, "If a defendant
2 believed in good faith that he was acting properly in making
3 such a statement or causing it to be made, even if he was
4 mistaken in that belief and even if others were injured by his
5 conduct, there would be no crime." So this was a very defense
6 friendly good-faith instruction.

7 And Mr. Conti made a pitch about a range -- Mr. Allen
8 didn't, but Mr. Conti made this pitch in closing arguments. He
9 said, look, my client thought every day there may be a few
10 numbers that he thought accurately described Rabobank's
11 borrowing costs, and he didn't think there was anything wrong
12 with providing a number based on trader interest. Now, if the
13 jury accepted that, the jury would have acquitted under these
14 instructions.

15 JUDGE POOLER: Counsel, in an exchange with
16 Mr. Yagami, Mr. Robson said, "Don't worry, mate. There's
17 bigger crooks in the market than us."

18 Do you have more cases that you're going to bring
19 based on the fact that, I guess, everyone was a crook in doing
20 this?

21 MR. PELLETTIERI: These investigations and
22 prosecutions continue, yes, your Honor.

23 Now, just turning to some of the strength of the
24 evidence of this range and the fact that they didn't believe
25 it. There's two issues here. One is sufficiency of the

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1 evidence and one is the jury instructions.

2 I just described how the jury instructions allowed or
3 required acquittal if the jury found the facts as described in
4 Mr. Conti's closing statement. But the facts didn't establish
5 that; far from it. The facts established the opposite. We
6 provided really very substantial evidence that showed that the
7 defendants did, in fact, collect market information, come to a
8 figure that represented their estimate, and then change that
9 figure and provided that figure instead of their actual
10 estimate in order to bump up or bump down the LIBOR and benefit
11 the traders.

12 I think that some of the best evidence are the
13 collection of emails between the government supplemental
14 appendix 14 through 17. And in that exchange Christian Schlep
15 from New York asks Conti, "Where do you see the six-month LIBOR
16 tomorrow?"

17 And Conti says, "Where do you like to see it is more
18 the question."

19 Later in the exchange, he says, "Well, at the moment,
20 5.40."

21 Then later in the day, Schluep texts Conti and says,
22 "Gonna need a fricking high six-month fix tomorrow if OK with
23 you. 5.42?"

24 Conti says, "Remind me tomorrow. I have too much on
25 my plate right now."

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1 So tomorrow Schluep obliges and says, "Don't want you
2 to price yourself out of the market. A 41, 42 level would be
3 great though."

4 Then there's another exchange between Sliney, who is
5 another New York trader, and Mr. Allen. And Sliney asks Allen,
6 "Any feel for the LIBORs today?" This is the date when the
7 other trader had asked Conti can you bump it to 42?

8 And Allen says, "Well, one, two, three months are 59,
9 56, 53.5," and he says, "six month, 42 -- six month, 42. I
10 think that's what Christian needs," Schluep.

11 So Christian Schluep made the request at 5.42 to
12 Conti. Allen was aware of it. They provided 5.42 because
13 that's what Christian needs, not because it was some reasonable
14 number we thought it was. It was the actual number, and we
15 changed what we actually would have given.

16 There's another exchange with Mr. Conti in which he
17 similarly describes a number 5.20. This is at GSA 100. He
18 says that it was not specifically correct. He says, "Today's
19 LIBOR was 5.20." That was not specifically correct. It was
20 too high. And he says, "Well, even though I gave 5.20 as well,
21 just because Lee had a fixing." That's Lee Stewart, the trader
22 who sits across the desk from Conti. So all of this evidence
23 firmly established that there was one number that represented
24 their estimate, and they gave a different number.

25 Regarding the Kastigar issue, there's a factual and a

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1 legal question there, both of which support the district
2 court's determination. Legally, a Fifth Amendment claim
3 requires both compulsion and use of the compiled statement.
4 The compulsion and the use have to be accomplished by a
5 sovereign bound by the Fifth Amendment.

6 JUDGE POOLER: Why wasn't the use showing the tomorrow
7 to Mr. Robson? Isn't that use?

8 MR. PELLETTIERI: Well, factually, that was not use,
9 and that's what the district court concluded. I can go into
10 that.

11 JUDGE POOLER: Well, is the district court correct?
12 That's my question.

13 MR. PELLETTIERI: Yes, I'll turn to that.

14 JUDGE POOLER: It seems to me it was use if someone
15 gets to look at it and change their testimony; that's use.

16 MR. PELLETTIERI: Well, if the exposure to the
17 compelled testimony is the reason for the change in the
18 testimony, that is the use. But here, we established that the
19 changes in Robson's testimony to the FCA in the UK and his
20 trial testimony in the United States had nothing to do with his
21 exposure to these transcripts.

22 He plainly described, he said, yeah, I was fabricating
23 things in the U.K. I was just trying to prevent market color
24 because I was just trying to exculpate myself, and I was lying.
25 Right? Then he comes and he decides, now I'm going to come

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1 clean, and I'm going to testify in the United States
2 truthfully.

3 JUDGE POOLER: He says the first time he was lying.
4 Then he looked at the transcripts. And now, lo and behold,
5 he's telling the truth.

6 MR. PELLETTIERI: Well, looking at the transcripts did
7 not in any way result in his actual truthful testimony.

8 JUDGE LYNCH: But he says --

9 MR. PELLETTIERI: Yes, your Honor.

10 JUDGE LYNCH: And it's enough for the judge in your
11 view to credit what he said, and then that solves your Kastigar
12 problem?

13 MR. PELLETTIERI: We do believe that it's enough, but
14 that's not the only component here. We do believe that if
15 there's credible testimony, and that's what the Court in the
16 D.C. Circuit in Poindexter says was missing there. If you have
17 credible testimony from a witness that his actual testimony was
18 not influenced by exposure to tainted testimony, that can
19 satisfy the government's Kastigar burden.

20 But we didn't only have that here. We had more.
21 Number one, we looked at the overlap between the subject
22 matter, and the D.C. Circuit recently in the Slough case said
23 applying its own standards in the North/Poindexter cases, it
24 said, if a person who is exposed to tainted testimony, if their
25 current testimony has no antecedent in that compelled

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1 testimony, generally that's not enough to show use. There's
2 not going to be use there. And that was the Slough case. So
3 if you compare --

4 JUDGE LYNCH: Wait a minute. So if you have a witness
5 who gives an account before he's exposed to tainted immunized
6 testimony that leaves out some significant details, he's
7 exposed to the testimony immunized testimony that contains
8 those details and then he testifies at a trial including those
9 details, it's just a question of his credibility for the
10 district court? I'm sorry, I must have missed it.

11 MR. PELLETTIERI: That's not what we're saying. What
12 we're saying is Mr. Allen's and Mr. Conti's testimony said X,
13 Y, Z, and Robson's testimony may have been A, B, X. So for the
14 A and B, there's no use.

15 JUDGE LYNCH: The A and B is fine.

16 MR. PELLETTIERI: So that was one additional --

17 JUDGE LYNCH: But the question is the X.

18 MR. PELLETTIERI: Yes.

19 JUDGE LYNCH: The question is, this is not a case
20 where there's canned testimony that you can go back to and say,
21 Robson essentially told the same story on every material point
22 in the pre-exposure testimony to the post exposure testimony.

23 Instead, am I wrong about this, there are at least
24 some significant issues on which either Robson testifies to
25 something that he had never talked about before but that is in

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1 the immunized testimony, or in which he actually said something
2 different for whatever reason before seeing the immunized
3 testimony, and then changes his tune after to accord with the
4 immunized testimony? Is that not a factual statement about at
5 least some of Robson's testimony?

6 MR. PELLETTIERI: Where there's overlap, the Court has
7 to determine whether the testimony from Robson was in any way
8 affected, and that's what the Court made --

9 JUDGE LYNCH: But that's a rather extraordinary thing
10 to say it's just a question of -- a judge can just say, hey, I
11 believe him; he has an honest face, it's fine. How is that
12 meeting a heavy burden to establish that there is no influence
13 of the testimony? I mean, I have a passing familiarity with
14 the North case. In North, the D.C. Circuit said, you know,
15 even if they said the same factual thing before that they said
16 after, the possibility that they testified more forcefully
17 because they now knew that North wasn't going to contradict
18 them or, more emphatically, because they thought that North was
19 going to call them a liar, that is enough to change to be a use
20 of the testimony.

21 MR. PELLETTIERI: I think in North factually there
22 wasn't a dispute whether it had refreshed their recollection,
23 and the issue was a legal issue whether refreshing recollection
24 was actually use, and the Court determined that it was actual
25 use. And here, they didn't try and they didn't show; and we

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1 proved to the contrary, there was no refreshing of
2 recollection. There was nothing, and for a few different
3 reasons --

4 JUDGE LYNCH: This seems to me this opens an enormous
5 door for the government to make use of immunized testimony. It
6 might be a risk, but it seems to me you're saying there's
7 nothing that really prevents a prosecutor from giving a witness
8 the transcript because afterwards if he says, oh, well, my
9 recollection was independently refreshed by something else --

10 MR. PELLETTIERI: Every case is going to turn on the
11 facts. I mean, the Slough case in the D.C. Circuit, those
12 witnesses were exposed to testimony, and the Court concluded
13 based on the unique facts there that that didn't kick in
14 Kastigar.

15 And here, it's not just Robson's word. They had
16 ample, ample opportunity to cross-examine Robson with any kind
17 of inconsistencies, and the Court observed him. The Court
18 listened to all of those arguments. The district court was in
19 the best position to evaluate.

20 But we're not only relying on Robson's say-so. As I
21 mentioned, what the Court took into account as well are the
22 testimony of other witnesses and other documentary testimony
23 that showed --

24 JUDGE LYNCH: You've got one cooperator who is
25 vulnerable to all kinds of impeachment because he's cooperating

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1 with the government in exchange for a benefit. You bring in
2 another cooperator who's been exposed to immunized testimony,
3 and you say, oh, there's no problem because he matches up with
4 the first cooperator.

5 MR. PELLETTIERI: The reason the district court took
6 that into account is to corroborate Robson's testimony that he
7 actually saw, and that was the basis for his testimony, because
8 there were other witnesses.

9 JUDGE LYNCH: But he may have actually seen it, but
10 we've got a record in which he didn't testify to it until after
11 he had been exposed to the immunized testimony.

12 MR. PELLETTIERI: We have Robson's testimony. We have
13 the corroboration. We also have the fact that much of the
14 testimony from Allen and Conti consisted of kind of vague
15 denials, a lack of recollection and really nothing to use,
16 nothing to prompt the memory, to change or in any way affect
17 Robson's testimony. Cumulatively, all of that amply met our
18 burden under Kastigar, but we don't think we had to meet our
19 burden under Kastigar. We only did it out of an abundance of
20 caution because there was no compulsion. There was no
21 compulsion by a sovereign bound by the Fifth Amendment.

22 JUDGE LYNCH: Well, if that's true, then it would have
23 been OK, would it not, for you to introduce the transcript of
24 Conti's testimony at this trial. You didn't do that.

25 MR. PELLETTIERI: Under the Fifth Amendment. But we

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1 were being cautious, your Honor.

2 JUDGE LYNCH: I understand you were being cautious,
3 but you may not be cautious the next time because you're asking
4 us to hold that it would be permissible for you to do that
5 because since you weren't the ones who compelled the testimony
6 in the first place, there's no bar to your use of that
7 immunized foreign testimony at a trial, any kind of use. The
8 whole Kastigar hearing was a waste of time on that theory
9 because even if Robson had been refreshed by the testimony,
10 that wouldn't be a problem. Even if you had given him the
11 transcript in order to refresh his recollection, that wouldn't
12 be a problem. And even if you introduced the testimony at the
13 trial itself, that wouldn't have been a problem either.

14 MR. PELLETTIERI: Under the Fifth Amendment -- if the
15 government as an employer tells a witness, tells an employee,
16 look, we want information, you've got to testify or we're going
17 to fire you, if the government does that, that's compulsion
18 under the Fifth Amendment. We can't use that at a trial.

19 Now, if a private employer does the same and it says,
20 well, we're going to fire you unless you provide information,
21 that doesn't kick in the Fifth Amendment protection. That can
22 be introduced at a later trial. And the British government is
23 on the same footing as a private employer. The Fifth Amendment
24 has to be --

25 JUDGE CABRANES: Who said that? What court has

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1 supported the proposition that a British government is on the
2 same footing as a private employer?

3 MR. PELLETTIERI: Well, Judge Friendly ruled that a
4 private employer like the New York Stock Exchange, if they
5 compel testimony, that doesn't trigger the Fifth Amendment.

6 JUDGE CABRANES: What's that got to do with a foreign
7 sovereign?

8 MR. PELLETTIERI: Because if the United States compels
9 testimony as an employer, that triggers it. And if you make
10 that distinction between private employer and a public
11 employer, there's no reason -- the reason is because the
12 private employer is not bound by the Fifth Amendment, just as
13 the U.K. government --

14 JUDGE CABRANES: Yes, and you earlier, in response to
15 Judge Lynch, suggested that compulsion and use had to be by the
16 same sovereign. That seems to be in direct conflict with our
17 decisions in Yousef and In Re: Terrorist Bombings. And I was
18 just scanning your brief in response to defense counsel with
19 respect to those cases, and I think it's the case that you are
20 suggesting that those passages of Yousef and In Re: Terrorist
21 Bombings were dicta. Is that right?

22 MR. PELLETTIERI: Well, they weren't necessary to the
23 result the way we read those cases.

24 JUDGE CABRANES: It's called dicta.

25 MR. PELLETTIERI: Yes. And the reason is also because

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1 Salameh is really more on all fours here. In that case, you
2 had an individual who was in foreign custody, was allegedly
3 compelled -- there's coercive activity by that foreign entity,
4 and then he was put into United States custody and provided
5 statements, and this Court held that because of the coercive
6 activity was allegedly perpetrated by a foreign sovereign, that
7 didn't kick in the due process protections for a coercion. And
8 now there's a distinction between this notion of due process --

9 JUDGE CABRANES: Salameh, with which we're all kind of
10 familiar, it's an important case in this circuit, but it does
11 antedate the two decisions that we were just talking about.
12 I'm not suggesting that there was some modification of the law
13 of the Circuit, but I would think that the more recent
14 decisions are more compelling on some of these principles, but
15 I guess you don't agree with that.

16 MR. PELLETTIERI: Well, I don't think that in the -- I
17 don't think that in the Yousef and the Terrorist Bombings case
18 that the issue that turned on the Court's decision was whether
19 there was coercion by a foreign government that resulted in
20 testimony used in the United States. That just wasn't an issue
21 there as far, as I read those cases. And the Court did hold
22 that the Miranda rights --

23 JUDGE CABRANES: I wonder why the Court would have
24 carried on about that subject if it wasn't an issue.

25 MR. PELLETTIERI: The Court did hold that Miranda

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1 rights and the requirement that someone be read warnings before
2 their testimony can be used, that that's a prophylactic rule
3 intended to protect Fifth Amendment rights, the privilege
4 against self-incrimination, and it doesn't kick in when foreign
5 authorities question an individual. If a foreign authority
6 questions --

7 JUDGE CABRANES: Your theory, of course, is taking us
8 to the proposition suggested earlier by Judge Lynch, that if a
9 foreign sovereign beats the hell out of somebody and compels
10 the testimony, since it's a different sovereign, you're able to
11 use that compelled testimony in a federal court.

12 MR. PELLETTIERI: Well, there might be other
13 constitutional doctrines that kick in there. We acknowledge
14 that --

15 JUDGE CABRANES: It's not a Fifth Amendment issue.

16 MR. PELLETTIERI: It's not a Fifth Amendment issue,
17 no.

18 JUDGE LYNCH: If they don't beat somebody, but they
19 simply compel him by force of legal compulsion that's legal in
20 that country to do, in that event, I assume that wouldn't shock
21 anybody's conscience to follow that, since it's not necessarily
22 a due process question. You're saying as a matter of Fifth
23 Amendment law anyway, that's perfectly OK for you -- you are
24 overly cautious here because you absolutely could have
25 introduced Allen's and Conti's testimony on your theory.

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1 MR. PELLETTIERI: Correct, your Honor. And out of an
2 abundance of caution we didn't, and we also showed factually we
3 did not use it, and the district court's determinations are not
4 clearer in light of the record, their really meticulous
5 evaluation --

6 JUDGE CABRANES: Let me ask you, our standard of
7 review of that decision is clearer.

8 MR. PELLETTIERI: Yes, your Honor, clearer.

9 JUDGE CABRANES: Anything else you'd like to add?

10 MR. PELLETTIERI: Unless the Court has any questions,
11 we would ask that the Court affirm. Thank you, your Honor.

12 MR. SCHACHTER: I would like to begin with something
13 that the government says here and said in the indictment but
14 did not say to the jury. The government here said that the
15 evidence showed that their estimates were not their estimates.
16 They also said that they came up with one number and gave a
17 different number. That would fall within what is established
18 law with respect to fraud based on statements of opinions or
19 estimates. They have to prove beyond a reasonable doubt that
20 it was not honestly held by the person making it at the time.
21 It was disbelieved by the speaker. That is the theory that the
22 government articulated in the indictment.

23 JUDGE LYNCH: Isn't it a reasonable inference from the
24 kinds of conversation that Mr. Pellettieri read to us that if
25 Schleup says to Conti, you know, what do you think the number

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1 is going to be? And Conti says, the real question is what do
2 you want it to be? Why couldn't a reasonable jury draw the
3 inference beyond a reasonable doubt that Conti wasn't
4 interested in making an honest estimate. He was interested in
5 doing whatever Schleup wanted, or at least whatever Schleup
6 wanted that wasn't so ridiculous that they'd be laughed at and
7 people would start to suspect something was wrong. Why is that
8 not a plausible inference?

9 MR. SCHACHTER: There is no question that swap traders
10 made requests. They would say, hey, can you put it higher or
11 lower? And there is no question that the cash traders would
12 say sure. That does not prove a violation of the wire fraud
13 statute because the government has an obligation to prove that
14 the ultimate statement that the speaker made was disbelieved by
15 him at the time.

16 JUDGE LYNCH: But that can be a matter of inference.
17 We're always trying to draw inferences about what's in
18 somebody's head. It seems to me if somebody says to another
19 person: What I'm interested in is just what do you want.
20 That's all I want to know. That's what I care about. Then he
21 gives the estimate that Schleup asked for, and there's no other
22 evidence suggesting that there was some calculation that
23 reached that number, why can't it -- it's a matter of inference
24 whether Mr. Conti in this case didn't believe what he said.

25 MR. SCHACHTER: Here, it would be based entirely on

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1 speculation because that's not what the government told the
2 jury they needed to determine. Again, that was the theory
3 articulated in the indictment. It said that they submitted
4 rates that were inconsistent with what they perceived to be the
5 rate.

6 Comes time for the charge conference, and Judge Rakoff
7 says that the Court is going to describe the charges in this
8 other way that doesn't speak to it being inconsistent with the
9 opinion that the speaker actually had, and instead comes up
10 with the formulation that they submitted a LIBOR rate that was
11 different than they otherwise would have to help their
12 employer. Different, however, does not equal false.

13 And we said, your Honor, if you're going to describe
14 the indictment, why not use the language of the indictment?
15 And we asked the Court to include just that language.

16 JUDGE LYNCH: That might have been better for the
17 judge to do, but still, he does give the good faith
18 instruction, right? That if the person believed in good faith
19 that what he was doing was submitting the right estimate, he's
20 fine.

21 MR. SCHACHTER: The problem with the good faith
22 instruction -- there's a number of problems with the good faith
23 instruction. Principally, the good faith instruction tells a
24 jury: Here's the circumstances where a statement may not
25 amount to a false or misleading statement. The problem was, it

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1 was academic to the determination that the jury was told by the
2 Court and by the prosecutors in summation that they needed to
3 make because they didn't need to consider whether a statement
4 was false. Then the good faith instruction would have been a
5 useful tool for them.

6 But that's not what they were asked to determine.
7 Judge Rakoff said that the crime, the issue that you need to
8 determine, jury, is, was it different? Was it influenced in
9 part by what would help their employer? And these words are
10 really important. The prosecutors in summation said, if you
11 find that the defendants took part in the scheme to base
12 Rabobank's LIBOR submissions, at least in part, on trading
13 positions, you convict. Regardless of whether they're inside
14 or outside of the range, you should convict. So, in other
15 words, the jury --

16 JUDGE LYNCH: Stay away from the range, right?
17 Whether or not it's what they honestly believed.

18 MR. SCHACHTER: Yes. Yes. Whether or not it's what
19 they -- exactly. That's the problem.

20 JUDGE LYNCH: The words "whether or not they honestly
21 believed" are not there. It seems to me that what Mr. Ewan's
22 testimony, at least as the part that Mr. Pellettieri quotes,
23 says he would have thought that that was not what they're
24 supposed to do. They're supposed to give their honest
25 estimate; not what they wish it would be for their own trading

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1 positions.

2 MR. SCHACHTER: I'm going to answer that question in
3 two ways. First, perhaps one could say that's unethical. That
4 is a sharp practice. Wire fraud does not embrace everything
5 that one wishes to consider to be a sharp practice. But I said
6 two ways, there's two ways; and that is, that it was not clear
7 even to the government's own cooperating witnesses that there
8 was anything inappropriate with "as long as you are submitting
9 a rate that is within the range, that it's a fair and
10 reasonable estimate," it was not clear to them that that was
11 unlawful. And it's really important, I found it somewhat
12 shocking. I'm not sure how his plea was taken, but Mr. Stewart
13 testified -- and this is the appendix at page 214 -- that in
14 his view it was, and I'm quoting, "not considered inappropriate
15 for swap traders to ask the people submitting LIBOR for a
16 higher or lower rate." This is the government's cooperating
17 witness' testimony. At trial he testifies that when he left
18 the bank a year later, he had "no inkling that LIBOR
19 submissions at Rabobank were an issue or a problem." That's
20 the government's own cooperating witness who ultimately pled
21 guilty pursuant to a cooperation agreement.

22 The other cooperating witness says the same thing.
23 Mr. Yagami testified, page 265 of the joint appendix -- this is
24 the government cooperating witnesses' testimony.

25 JUDGE CABRANES: What page was that?

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1 MR. SCHACHTER: 265 of the appendix. I apologize
2 because we submitted appendices with four pages, which I
3 realized after submitting was not particularly helpful to the
4 Court, but it can be found on page 265 of the appendix.
5 Mr. Yagami testified, "The practice of adjusting submissions by
6 a few basis points based on a trader's request was a gray area
7 but 'agreeable' and 'OK to do.'"

8 He even testified about a conversation that he had
9 with Mr. Robson -- a contemporaneous conversation before he was
10 threatened with indictment and ultimately pleads guilty.
11 Mr. Yagami testified the same page of the appendix that
12 Mr. Robson said, "That it was OK because LIBOR moves in a range
13 and there were multiple correct LIBOR rates he could submit."

14 JUDGE POOLER: Excuse me, because opposing counsel
15 said there was only one rate, not a range. There was only one
16 rate that was correct. That's what he just said on the podium.

17 MR. SCHACHTER: Well, there is nothing that supports
18 that. I think what -- I think what counsel from the government
19 said is he was quoting language from Mr. Ewan that said there's
20 only one rate that can be submitted. Yeah, of course,
21 ultimately, you may have a range of equally accurate estimates,
22 but ultimately you have to submit one.

23 JUDGE POOLER: He said there was one rate that was the
24 right rate.

25 MR. SCHACHTER: That is completely contradicted by the

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1 evidence at trial. There is nothing in the record which
2 suggests that there was one rate.

3 JUDGE CABRANES: I suppose, in part, because there are
4 15 plus banks which are making their own estimates of what the
5 correct rates are.

6 MR. SCHACHTER: And there is no interbank borrowing
7 during most of this time period and certainly for most of the
8 time periods they have to submit LIBOR for, what would they
9 have to pay to borrow for eight months? There can't be one
10 number. It never happens. It's, at best, a rough estimate.
11 The contemporaneous testimony from the communications is, I
12 don't know, it's between, you know, 3.1 and 3.2, I could -- I
13 could put it in anywhere.

14 In fact, just to address that, when the government
15 points to the evidence of he mentioned a number 5.20, which
16 Mr. Conti puts in LIBOR that day at 5.20, that's final LIBOR
17 that day. Final LIBOR is 5.20. Rabobank put in 5.20, which
18 means that the final LIBOR is you have 16 panel banks that each
19 submit their estimates. And the BBA lops off the top four,
20 lops off the bottom four, averages the middle eight, and
21 Mr. Conti's submission that day, 5.20, was exactly the same as
22 the average of the middle eight banks. That can't be fraud.

23 JUDGE LYNCH: Unless Mr. Conti thought it was 5.18,
24 and if he put that in, it might have come out at 5.19 as the
25 total average.

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1 MR. SCHACHTER: I agree with your Honor one hundred
2 percent. And had the jury been instructed that that's what
3 they need to find -- had they been instructed, as we asked, on
4 how they should assess an opinion or estimate, and they have to
5 find that the opinion or estimate provided was disbelieved by
6 the speaker, had Judge Rakoff and the government told them
7 that's the test, maybe it wouldn't be an issue.

8 And the reason why the Court and the government
9 instructed the jury in this fashion was because it was the end
10 of the trial, and the government had not presented any
11 evidence -- they didn't have any evidence that any of the
12 opinions were, in fact, disbelieved by the speaker, and that's
13 why they opted for this different formulation which is not
14 consistent with wire fraud.

15 JUDGE CABRANES: They say on TV. I have a final
16 question of context before we recess. There was a reference
17 earlier, and Mr. Pellettieri may wish to comment on this too,
18 about a deferred prosecution of Rabobank?

19 MR. SCHACHTER: Yes.

20 JUDGE CABRANES: Can you give us the timeline and also
21 just indicate what relevance, if any, it has to this.

22 MR. SCHACHTER: The timeline was that Rabobank entered
23 into a resolution with the government --

24 JUDGE CABRANES: Did you represent them?

25 MR. SCHACHTER: No. It's of no relevance. Look, the

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1 reality is --

2 JUDGE CABRANES: It antedated the indictments here.

3 MR. SCHACHTER: Absolutely correct, and financial
4 institutions settle cases with the government for all sorts of
5 reasons.

6 JUDGE CABRANES: I understand that. What was the
7 role, if any, of Rabobank in cooperating with the government?
8 Do we know that? Do we care about that?

9 MR. SCHACHTER: I don't think it is of any moment. I
10 think they responded to the government's requests.

11 JUDGE CABRANES: Yes. OK.

12 Mr. Pellettieri, would you like to comment on that?

13 MR. PELLETTIERI: The deferred prosecution was in that
14 time period, and it reserved the ability of the Department of
15 Justice to go after individuals.

16 JUDGE CABRANES: Right. I think it would be helpful
17 to the Court if counsel on both sides were to make arrangements
18 with the clerk's office have a transcript of this splendid oral
19 argument prepared for your use as well as ours.

20 We thank you very much. We will take this case under
21 submission. You expected a summary order, I know, but absent a
22 summary order, we will recess. We will adjourn for the day.

23 (Adjourned)

24

25

