No. 09-375 SEP 24 2009

BALDASSARE AMATO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether it violates a criminal defendant's Fifth and Sixth Amendment fair trial rights to exclude, pursuant to Rule 613(b) of the Federal Rules of Evidence, extrinsic evidence of the main prosecution witness's material prior inconsistent statements after the witness/declarant has been given the opportunity on cross-examination to explain or deny the statements and denies them?

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PETITION FOR WRIT OF CERTIORARI

Baldassare Amato respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The denial of panel rehearing and rehearing *en* banc, dated April 27, 2009 (App., *infra.*, 27A-28A) is unreported. The opinion of the court of appeals (App., *infra.*, 1A-10A) is reported at 306 Fed. Appx. 630 (2d Cir., January 12, 2009). The Memorandum and Order of the district court (App., *infra.*, 11A-26A) is reported at 2006 U.S. Dist. LEXIS 43366 (E.D.N.Y., June 27, 2006).

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2009. The court of appeals denied panel rehearing and rehearing *en banc* on Mr. Amato's co-defendant's petition for rehearing and for rehearing *en banc* on April 27, 2009. On July 21, 2009, Justice Ginsburg granted an extension of time within which Mr. Amato could file a petition for certiorari to and including September 24, 2009. The jurisdiction of this Court rests on 28 U.S.C. Section 1254(1).

STATUTORY PROVISION INVOLVED

Rule 613 of the Federal Rules of Evidence provides as follows:

> 613. Prior Statements of Witnesses
>
> (a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness,

> whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.
>
> (b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

STATEMENT OF THE CASE

The Petition presents this Court with the opportunity for the first time to address the foundational requirements for the admission of extrinsic evidence of a trial witness's prior inconsistent statements under Rule 613(b) of the Federal Rules of Evidence, where such prior inconsistent statements are critically material to the defense theory of the case, would undermine the prosecution's theory of the case and the credibility of its primary witness, and directly implicate the defendant's constitutionally protected rights to compulsory process, to confront witnesses against him, to due process of law, and to a fair trial.

The Court should grant the Petition to resolve conflicts among the various federal circuit and district courts around the country and internal conflicts within the various circuits. This Court's

guidance on this frequently recurring issue is badly needed. The Court also should grant the Petition to correct the miscarriage of justice that occurred in this case as a result of the trial court's exclusion, pursuant to a misapplication of Rule 613(b), of the fundamentally important extrinsic evidence of the primary witness's prior inconsistent statements which inculpated himself, rather than the defendant.

A. Relevant Underlying Facts Which Frame the Issue

1. Mr. Amato and the Charges Against Him at Trial

Petitioner, Baldassare Amato was tried before a jury in the Eastern District of New York on a superseding indictment charging him with RICO conspiracy, 18 U.S.C. § 1962(d), predicated on five racketeering acts. The two most serious racketeering acts each charged a murder and a related murder conspiracy. The crimes charged were alleged to have been committed in furtherance of the interests of the Bonnano organized crime family.

The indictment alleged, *inter alia,* that on May 5, 1992, Amato murdered Robert Perrino, a New York Post delivery superintendent who was associated with the Bonnano family and involved in illegal activity at the Post.

The prosecution theorized that the Bonnano family feared Perrino would cooperate in an investigation of that activity, and the "consigliere" and "underboss" of the family ordered his murder. According to the Government, Amato, a Bonnano family "soldier," was recruited to shoot Perrino.

The defense contended that the underboss, Salvatore Vitale ("Vitale"), who later would become a cooperating witness, feared Perrino would implicate him and his son in the illegal activity and that Vitale had Perrino murdered by persons close to Vitale, not by Amato.

The defense theory, for which the prior inconsistent statements were an integral part, was that Vitale earlier had admitted his true involvement in the murder to others; but later pinned it on Amato to protect his (Vitale's) close associates who helped him (Vitale) with the murder. Vitale's prior statements to the other witnesses, before he falsely implicated Mr. Amato, were inconsistent with his trial testimony and were critically material to the defense theory and presentation of the case.

It was further alleged that on February 27, 1992, Sebastiano DiFalco, an accountant and restaurateur said to be associated with the Bonnano family, was murdered by persons unknown at the direction of Amato, who was close to DiFalco and reputedly partners with him in a restaurant. The prosecution theorized that Amato believed DiFalco was stealing from him. The defense contended that Amato was not DiFalco's partner, but his friend, and had no motive to kill him, and that Vitale implicated Amato gratuitously in the long-unsolved murder, through hearsay to bolster his (Vitale's) fabricated implication of Amato as to the Perrino murder.

Mr. Amato has at all times maintained his innocence with respect to the charges against him.

B. Background Relevant to Vitale's Trial Testimony and His Prior Inconsistent Statements

Vitale was charged in 2003 with the murder of Perrino. In 2002 Cantarella had also been charged with that crime. Both testified for the Government in 2004 at the trial of Massino, the former boss of the Bonanno family. Their testimony at the Massino trial, disclosed as "3500 material" to Amato well before his trial in 2006, diverged in a material respect regarding the Perrino murder: Cantarella at the 2004 Massino trial testified that Vitale said he was concerned that Perrino would cooperate about criminal activity at the Post and Vitale wanted him killed; Vitale testified, as he would at Amato's trial, that it was Cantarella who was concerned and wanted Perrino killed.

From Cantarella's contradiction of Vitale developed Amato's theory of defense: Vitale had a strong personal motive for killing Perrino: he feared Perrino would implicate him and his son in the illegal activity at the Post and he had Perrino murdered by associates whom he was protecting, not Amato. After implicating Amato in the Perrino murder, Vitale shored up that claim by gratuitously implicating Amato--albeit through hearsay--in the DiFalco murder, after learning that Amato was considered a suspect. Amato believed and pursued a defense at trial based on the belief that again it was Vitale behind the DiFalco murder.

At trial, despite having furnished Amato with the 3500 material for both Vitale and Cantarella, the Government called only Vitale. He adhered to his position that he had no personal interest in killing

Perrino and he denied telling Cantarella otherwise. Amato confronted Vitale with his prior inconsistent statements and Vitale denied making them.

Amato's defense was scuttled by the court, however, when at the end of the prosecution's case the court granted the Government's motion to preclude Amato from calling Cantarella to contradict Vitale's testimony that he had never told Cantarella he was concerned Perrino would cooperate and wanted him killed.[1] The trial court's decision was based on a misunderstanding and misapplication of Rule 613(b) of the Federal Rules of Evidence and its foundational requirements.

The trial court acknowledged that the prior statements at issue were inconsistent and acknowledged that Vitale was given an opportunity to explain or deny them on cross-examination; but the court then grafted on two additional requirements for admission not required either by Rule 613(b) or by any other court in the country. It went well beyond Rule 613(b) and required further (1) that the prior inconsistent statements somehow have to be highlighted during the cross-examination and (App. *infra.*, 21A-22A) (2) that the party seeking to offer the prior inconsistent statement extrinsically through another witness, announce his intention and identify the witness(es) well in advance. (App. *infra.*, 24A) This ruling, which finds no support in the law, denied Mr. Amato his constitutional right to

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[1] The court's ruling under Fed R. Evid. 613(b) also precluded Amato from calling James Tartaglione-a former Bonnano family "acting boss" cooperating with the Government--to elicit a prior inconsistent statement of Vitale, as discussed further below.

a fair trial and to exercise his fair trial rights, including his rights to due process, to present a complete defense, compulsory process and to confrontation and has led to his sentence of life in prison for crimes he could have shown he did not commit; rather the government's witness did and told others about.

C. Some Examples of the Relevant Testimony Providing the Foundation Under Rule 613(b)

Cantarella's testimony at the Massino trial, furnished by the Government to Amato as 3500 material on May 19, 2006, included the following:

Q. Did Sal Vitale's son have a job at the Post?

A. He had a no-show job.

Q. A no-show job, does that mean he also had a sell off the tail situation?

A. I don't know what his job description was. He was on the payroll and got paid.

Q. He was on the payroll and got paid but he didn't do any work.

A. Correct.

Q. Now, there came a time I believe you said that Sal Vitale approached you to talk about Perrino, right?

A. That's right.

Q. When was that, sir?

A. It had to be right after the -- shortly after we were all arrested in '92.

Q. After you were arrested you had this visit from Sal?

A. I had a visit, no, I met with Sal.

Q. Where?

A. I believe it was in a hotel on Long Island.

Q. Do you remember what hotel it was?

A. I think the Hilton.

Q. At that time, do you remember what year it was?

A. It had to be '92.

Q. Shortly after your arrest?

A. Shortly before he was killed.

Q. And what was the conversation--when was he killed?

A. I believe May of '92.

Q. What did he say to you and what did you say to him?

A. He brought me downstairs to the swimming pool area, he wanted to make sure there was a lot of noise, there was the running of water and he asked if Bobby Perrino was, in my opinion, was showing any signs of weakness and possibly cooperating.

Q. And what was your opinion?

A. I don't see him that often, very seldom do I see him and he didn't show no weakness to me when I did see him?

Q. When Sal had this conversation with you did he tell you he wanted to kill Perrino?

A. Yes.

Q. How long after the conversation began did he tell you he wanted to whack this guy?

A. I don't remember the exact time, it wasn't long.

Q. Did he tell you why he wanted you involved?

A. I guess because I was--I worked at the Post and I could be approachable to Perrino.

Q. When Sal said [D'Amico] should be honored to do something for the family, did you understand this request was being made for the family or it was being made for Sal?

A. I believe it was being made for Sal.

Q. In other words, he was concerned that if Perrino could in some way implicate someone, it would be Sal who might be implicated, that he was concerned about?

A. I believe that's correct.

Q. So, you believed at the time that Sal was lying to both you and D'Amico in order to get this guy killed?

A. Yes. (A-126-28; emphasis added.)

At Amato's trial, Vitale--called as the prosecution's first fact witness--testified on direct examination that it was Cantarella who "felt Bobby was weak, and he felt that Bobby might spill the

beans on what was going on down there, as far as the Bonnano Organized Crime Family." Consequently, according to Vitale, he and Spero decided to kill Perrino.

On cross-examination by Amato's counsel, Vitale was given an opportunity to explain or deny the prior inconsistent statements and he testified as follows:

Q. After he, Mr. Perrino, was arrested and Richie Cantarella and others were arrested, did you speak to Richard Cantarella about this circumstance, the fact that there was an investigation and arrest?

A. Richie spoke to me. He come to find me on Grant Avenue.

Q. On Grant Avenue he came to speak to you?

A. Yes.

Q. And what did he say?

A. He didn't think that Bobby was going to be able to take the weight. He thought that Bobby would flip.

Q. And did he ask you to do something about it?

A. In that context of that conversation he was asking to kill Bobby.

Q. Did you ever meet him in a hotel in Long Island to discuss the situation, Mr. Cantarella, Richard Cantarella?

A. I would meet Richie in a hotel in Long Island also.

Q. Did you meet him with respect to Robert Perrino?

A. I don't recall if we discussed that. It wasn't one conversation--more than one conversation.

Q. Do you recall a meeting at a Hilton hotel in Long Island just shortly before Perrino was killed?

A. I used to meet Richie there.

Q. And did you ask him at that meeting whether Bobby Perrino was showing any signs of weakness?

A. No, I didn't have to. He volunteered that.

Q. Did he tell you in his opinion that Robert Perrino wasn't showing any signs of weakness?

A. He never said that.

Q. Did you tell Richie Cantarella that you wanted to kill Robert Perrino?

A. No. I says to Richie if he has a location in the city, and he knew what I meant by that. After he described the situation--after I discussed it with Spero.

Q. In [sic] he had a location.

A. If he had a location in the city where we could kill Bobby. But you're going into the like third, fourth, fifth conversation. It wasn't all done in one conversation.

Q. You were not the one who suggested to him that Perrino be killed?

A. No. He suggested it to me. And Al Walker was suggesting it to Spero.

Q. Did you have any personal interest in Robert Perrino being killed?

A. Not at all. (emphasis added.)

Amato asked several other questions based on the 3500 material which contained additional material prior inconsistent statements by Vitale to Cantarella and Tartaglione.

During the trial, the government advised that it would finish its direct case sooner than expected. Concerned that the government might not call Cantarella and Tartaglione to the stand, Amato advised the government that he wanted them produced so that he could call them during the defense case to examine them concerning Vitale's prior inconsistent statements.

Claiming to rely on Rule 613(b), the government moved to preclude Amato from calling Cantarella or other cooperating witnesses to impeach Vitale's credibility, complaining that the notice was insufficient. Amato identified the statements at issue, the witnesses he wanted to call to offer the extrinsic evidence of Vitale's prior inconsistent statements, the direct relevance to the whole defense theory.

The court heard argument, during which Amato's counsel provided further details of the prior inconsistent statements about which Cantarella would testify. The Government acknowledged that the issue was only one of timing, not whether the statements were inconsistent, and the court subsequently agreed that they were inconsistent.

On the day the prosecution rested, the court granted the Government's motion under Rule 613(b), ruling that "Amato never confronted Vitale with the purported evidence of the inconsistent statement(s)" or "provided Vitale with sufficient opportunity to explain or deny the prior inconsistent statement" and that Amato at the time of his cross-examination of Vitale did not put the Government on notice and "should have made his intentions known during his examination of Vitale that he would be seeking to introduce these prior inconsistent statements through Cantarella, Coppa, and/or Tartaglione." Amato expanded his protest to include the denial of his right to compulsory process and to present a complete defense, and the court noted that objection.

D. Proceedings Below

Petitioner Baldassare Amato was tried before a jury in the United States District Court for the Eastern District of New York from May 30, 2006 to July 12, 2006.

On June 27, 2006, following a motion *in limine* by the government to preclude Mr. Amato from calling witnesses to adduce extrinsic evidence of prior inconsistent statements by the government's primary trial witness against Mr. Amato, the district court entered an Order, precluding any and all such extrinsic evidence based on the Court's misunderstanding and misapplication of Rule 613(b) of the Federal Rules of Evidence. (App. *infra.*, 11A-26A) The Court granted the government's motion over Mr. Amato's objections based on his constitutionally protected fair trial rights, including his rights to compulsory process, to due process of

law, to confront witnesses against him and generally to a fair trial.

On July 12, 2006, the jury returned a verdict of guilty as charged. On October 27, 2006, Mr. Amato was sentenced to life imprisonment, lifetime supervised release, a fine of $250,000, and a special assessment of $400.

On January 12, 2009, the United States Court of Appeals for the Second Circuit denied Mr. Amato's appeal, affirming the judgment of conviction and sentence, without ever substantively addressing Mr. Amato's fully briefed claim concerning the Rule 613(b) exclusion of the prior inconsistent statements and the impact of the same on his constitutionally protected fair trial rights. (App. *infra., 1A-10A)*

On April 27, 2009, the Court of Appeals denied a motion for rehearing and rehearing *en banc* filed by Mr. Amato's co-defendant (App. *infra.*, 26A-27A) and this Petition for a Writ of Certiorari to the Second Circuit follows, after an extension for filing the same was granted by Justice Ginsburg.

REASONS FOR GRANTING THE PETITION

1. The Trial Court's Application of Fed. R. Evid. 613(b) Conflicts with Decisions on its Application in all Circuits Around the Country, There is a Split of Authority Among and Within the Circuits and This Court Has Not Yet Written on This Issue and Must Resolve the Various Conflicts on Issues Arising with Respect to the Rule's Application and the Exclusion of Extrinsic Evidence of Prior Inconsistent Statements Under Rule 613(b)

There is a sharp split of authority among the Circuit courts of appeals on several issues surrounding the application of Rule 613(b) which requires this Court's guidance in order to achieve some measure of uniformity in important decisions on the admissibility of prior inconsistent statements which often implicate fundamentally important constitutional rights to due process of law, to confrontation, and to other fair trial rights and which often impact on important commercial dealings as well.

A recent decision from the Supreme Court of Vermont, for example, in analyzing how to apply that State's analog to Fed. R. Evid. 613(b), expressly noted the development of what it characterized as a lenient "minority rule," on the foundation which must be laid and the timing for laying it before a prior inconsistent statement can be admitted under Rule 613(b) and a more stringent rule purportedly adopted by at least six other federal circuits. Under the latter, there purportedly is a firm requirement that for admissibility under Rule 613(b), a

foundation for the prior inconsistent statement must be laid in full while the declarant whose prior inconsistent statements are to be put at issue is on the witness stand. *See*, *State of Vermont v. Danforth*, 184 VT 122, 129; 956 A.2d 554, 559 (2008)(Joining the "majority" rule in excluding the prior inconsistent statement because notice of the intention to offer extrinsic evidence of the witness's prior inconsistent statement not given until second day of trial, after witness/declarant had testified).[2]

A more comprehensive review of the relevant case law, however, reveals that even on this one issue – whether Rule 613(b) requires that the foundation for the admission of extrinsic evidence of the prior inconstant statement must be laid by cross-examination which confronts the witness/declarant with the prior inconsistent statements while the witness/declarant is on the stand and before the extrinsic evidence of the prior inconsistent statement is adduced through another witness – the split of authority among the Circuits is even more complicated than the Court in Danforth recognized and, indeed, there is a conflict on this very issue even within some of the Circuits the *Danforth* Court put in the "majority" camp. *See e.g.*, *United States v. Wilson*, 490 F. Supp. 713, 719-20 (E.D. Mich.

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[2] The Court in Danforth, cites the decision in *United States v. Barrett*, 539 F.2d 244 (1st Cir. 1976) as reflecting the "minority" rule, with the "majority" rule being reflected by decisions in *United States v. Sutton*, 41 F.3d 1257, 1260 (8th Cir. 1994); *United States v. Bonnett*, 877 F.2d 1450, 1462 (10th Cir. 1989); *United States v. Greer*, 806 F.2d 556, 559 (5th Cir. 1986); *United States v. Elliott*, 771 F.2d 1046, 1051 (7th Cir. 1985); *United States v. Cutler*, 676 F.2d 1245, 1249 (9th Cir. 1982). *Danforth*, 184 VT at 129; 956 A.2d at 559.

1980)(holding under 6th Circuit precedent that Rule 613(b) that it is perfectly permissible to call a witness to adduce extrinsic evidence of a prior inconsistent statement, even before the witness/declarant whose statements are at issue testifies or is cross-examined about the prior inconsistent statements and that Rule 613(b) purposely relaxed this foundational requirement, relying on and adopting *Barrett*); The Eleventh Circuit appears to be fully in accord with this position. *See e.g., Wimington Trust Company v. The Manufacturer's Life Insurance Company*, 749 F.2d 694, 699 (11th Cir. 1985).

Moreover, contrary to the *Danforth* Court's understanding of the split of authority and notwithstanding the cases its cites in support of its conclusion concerning the breakdown of the split of authority, other decisions from the very Circuits it posits as being in the "majority" camp of requiring the presentation of the prior inconsistent statements to the witness/declarant on cross-examination while he/she is on the stand and before the extrinsic evidence is adduced, other decisions from these very same Circuits actually hold exactly to the contrary, placing those Circuits fully in line with the First Circuit's "relaxed foundation" view of Rule 613(b) reflected in *Barrett* and characterized in *Danforth* as the "minority rule." *See e.g., United States v. Young* , 86 F.3d 944, 949 (9th Cir. 1996)(reversing lower court and finding only that the witness be permitted "at some point" to explain or deny the prior inconsistent statement); *United States v. Rose*, 403 F.3d 891, 903-904 (7th Cir. 2005)(failure to cross-examine witness/declarant on prior inconsistent statement while on stand and prior to adducing extrinsic

evidence of prior inconsistent statement does not preclude admission under Rule 613(b); procedure is simply to allow witness/declarant to be recalled to stand later and citing 6th, 7th, 8th, and 9th Circuits as being fully in accord with this position).

The Fifth Circuit also appears to have an internal conflict on this subject. *Compare United States v. Greer*, 806 F.2d 556, 559 (5th Cir. 1986)(cited in *Danforth* as being in the "majority" camp requiring strict compliance with advance foundation "rule") *with United States v. Bibbs*, 564 F.2d 1165, 1169-70 (5th Cir. 1977)(allowing admission of extrinsic evidence of prior inconsistent statement even before witness/declarant whose statements are at issue is given an opportunity to explain or deny the prior inconsistent statements) and *United States v. Hames*, 185 Fed. Appx. 318, 322-323 & n.4 (5th Cir., June 12, 2006)(*citing Bibbs* as binding authority and noting conflict among the Circuits).

The Second Circuit has no definitive published decision on the issue, as the Court below in the instant case noted; however, it would appear to be closer to the restrictive rule adopted in *Danforth*. See e.g., *United States v. Surdow*, 121 Fed Appx. 898, 900 (2d Cir., February 9, 2005) (unpublished)(appearing to require either cross-examination of the witness/declarant or advance announcing the intention to use extrinsic evidence of prior inconsistent statements while the witness/declarant is on the stand for admission under Rule 613(b); *United States v. Harvey*, 547 F.2d 720, 723 (2d Cir. 1976)(reversing conviction for exclusion of extrinsic evidence of prior inconsistent statements where witness/declarant was given opportunity on cross-examination in to explain or

deny prior inconsistent statements in advance of proffered extrinsic evidence of prior inconsistent statements and noting in *dicta* that Rule 613(b)'s foundational requirement in that regard is mandatory).

Commentators point to many additional areas of conflict among the various courts regarding additional Rule 613(b) issues. *See* 4-613 *Weinstein's Federal Evidence* Sec. 613.05; 613 *Federal Rules of Evidence Manual* 613.02, n.6.

This Court must act now to provide guidance to the lower courts in light of so much conflict concerning the proper application of Rule 613(b).

2. The Trial Court's Decision in Misapplying Fed. R. Evid. 613(b) to Exclude Critically Material Extrinsic Evidence Was Erroneous, Violated Fundamental Constitutionally Protected Fair Trial Rights, and the Question Presented is Important

Rule 613 was designed to relax the foundational requirements for introduction of a witness's prior inconsistent statement, not to stiffen them. *See* Advisory Committee Note to Fed. R. Evid. 613, Subdivision (b) ("The traditional insistence that the attention of the witness be directed to the statement on cross-examination is relaxed in favor of simply providing the witness with an opportunity to explain and the opposite party with an opportunity to examine on the statement, with no specification of any particular time or sequence"). The more flexible procedure under Rule 613(b) has been succinctly described as follows:

This means that the modest requirements of Rule 613(b) may be satisfied in two ways. First, these requirements are satisfied if the impeaching party follows the traditional approach, even if the rule does not compel him to do so. Following this approach insures that the witness has an opportunity to explain or deny during the impeaching party's cross-examination and before any extrinsic evidence is offered. This approach further provides the opponent with the required opportunity to examine the witness about the statement since the cross-examination will alert the opponent as to the need to conduct that examination on redirect. Second, the requirements of Rule 613(b) also can be met if the impeaching party ignores the traditional approach. Thus, impeaching counsel can examine the witness without mentioning the statement or providing any of the required opportunities, and then offer extrinsic evidence after opposing counsel has completed his examination and the witness has been excused. So long as the witness then is available to be recalled by opposing counsel, the required opportunities to explain or deny and examine the witness can be provided.

Wright & Gold, Federal Practice and Procedure: Evidence § 6205, p. 527 (2006)(emphasis added)(footnote omitted); *accord* Goode & Wellborn, Courtroom Handbook on Federal Evidence, Rule 613, p. 352 (2005); *see also* Weinstein's Federal Evidence § 613.05[2] (2006) ("Most courts hold that the requirements of Rule 613(b) are met

> if the witness has an opportunity to explain after the contents of the statement are made known to the jury" while "other courts continue to state that the opportunity to explain or deny should precede the admission of extrinsic evidence").

The relaxed rule "permit[s] the impeaching party to maintain surprise and, thus, the effectiveness of impeachment," Wright & Gold, Federal Practice and Procedure: Evidence § 6205, p. 527, but at the same time prevents sharp practice, bad faith, or unfairness, e.g., introducing extrinsic evidence of a prior inconsistent statement after the witness to be impeached is no longer available to deny or explain it. See Weinstein's Federal Evidence § 613.05[4][b].

The Second Circuit has simply stated that a witness's statement may be offered to impeach the witness's credibility if "(1) the statement is inconsistent with the witness's trial testimony, (2) the witness is afforded an opportunity to deny or explain the same, and (3) the opposing party is afforded the opportunity to cross-examine the witness thereon." *United States v. Strother*, 49 F.3d 869, 874 (2d Cir. 1995).

Here, the court applied Rule 613(b) too rigidly and, in so doing, denied Amato the right to present witnesses in his own defense and a fair trial. *See Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)("Few rights are more fundamental than that of an accused to present witnesses in his own defense" and a rule of evidence "may not be applied mechanistically to defeat the ends of justice"). Amato did more than he was required to do under the Rule, because he did confront Vitale with the

statements to Cantarella and Tartaglione before seeking to introduce those statements, thereby alerting the Government to address these questions on re-direct, if it so chose.

The court's ruling that Amato at the time of his cross-examination of Vitale did not put the Government on notice and "should have made his intentions known during his examination of Vitale that he would be seeking to introduce these prior inconsistent statements through Cantarella, Coppa, and/or Tartaglione" (App. *infra.*, 24A) is not supported by the Rule or any case law. Amato's cross-examination of Vitale about the statements was sufficient notice, because "the cross-examination will alert the opponent as to the need to conduct that examination on redirect." Wright & Gold, supra.

This is particularly so here, and a contrary conclusion is particularly irksome, because, unlike cases where the opposing party is ignorant of extrinsic proof of a prior inconsistent statement in the adversary's possession, here the Government furnished the extrinsic proof of Vitale's prior inconsistent statements through the 3500 material of its own cooperating witnesses. The Government was certainly well aware of Cantarella's testimony at the Massino trial concerning the Perrino murder and undoubtedly well aware that it clashed with Vitale's. Indeed, that was very likely a strong factor in the Government's decision not to call Cantarella at Amato's trial. Under such circumstances, to embrace the Government's argument, as the court did (App. *infra.*, 24A), that during Vitale's testimony Amato did not put the Government on notice of his intention to introduce Vitale's prior inconsistent statements through the testimony of Cantarella and

other cooperating witnesses is to defeat the purpose of Rule 613(b) and to allow it to be exploited in unwarranted circumstances.

In ruling that Amato "should have made his intentions known during his examination of Vitale that he would be seeking to introduce these prior inconsistent statements through Cantarella, Coppa, and/or Tartaglione," (App. *infra.*, 24A), the court appears to have been led astray by the Government's motion, which--selectively quoting and lifting from its context a statement in Weinstein's Federal Evidence--indicated that a party was obliged to "'inform[] the court and opposing counsel, at the time the witness testifies, of the intention to introduce' impeaching extrinsic evidence so that appropriate steps may be taken to comply with Rule 613(b)." (*citing* Weinstein's Federal Evidence § 613.05[5]; emphasis the Government's.) The Government pushed this position at argument of the motion, stating that this is "required by 613(b)," that "Rule 613(b) precisely addresses that," and that according to Judge Weinstein "opposing counsel has to 'inform the court and opposing counsel at the time the witness testifies of the intention to introduce' impeaching extrinsic evidence." (emphasis added.) The court noted this argument and characterized it as the "prevailing practice," to which the court would adhere. (App. *infra.*, 23A)

But this is not at all the thrust of the commentary in the Weinstein treatise, nor is it the law. Rather, the commentary, in full context, is simply saying that this would be an acceptable way of complying with the rule where the witness has not been confronted with the statement: "The impeaching party would seem to comply sufficiently

with the rule by informing the court and opposing counsel, at the time the witness testifies, of the intention to introduce an impeaching statement and that the opponent may therefore prefer to keep the witness available to be called to explain the statement." *Id.*

The commentary assumes that the impeaching party has not confronted the witness with the statement; if the impeaching party has done so, of course, the opponent has already been already put on notice by the cross-examination and may have the witness explain the asserted inconsistency on redirect.

Even more troublesome is the court's ruling that "Amato never confronted Vitale with the purported evidence of the inconsistent statement(s)" or "provided Vitale with sufficient opportunity to explain or deny the prior inconsistent statement." (App. *infra.*, 22A) Not only did Amato provide Vitale with sufficient opportunity to explain or deny the prior inconsistent statements, Vitale did deny them.

It is difficult to imagine what more could have been done to give Vitale an opportunity to deny or explain the statements, other than to ask him whether Cantarella would be lying if he had so testified--an improper question. *United States v. Richter*, 826 F.2d 206, 208 (2d Cir. 1987). Thus, Amato laid an adequate foundation for Cantarella's prospective testimony that at the Long Island hotel shortly before Perrino's murder it was Vitale, not Cantarella, who had asked if Perrino was showing any signs of weakness and possibly cooperating, and, when Cantarella replied he was not, Vitale said he wanted to kill Perrino, which Cantarella understood

to mean that Vitale was concerned that Perrino would implicate Vitale.

Similarly, when Amato's counsel asked Vitale whether he had ever told Cantarella that it was Urso who was going to pick up Perrino at the pizzeria and walk him to the murder site, to which Vitale responded "I wouldn't have said that;" whether, on the day after Perrino was killed, Vitale had told Tartaglione that he should have been with Vitale the previous night and Vitale had to take Urso instead, to which Vitale responded: "I don't recall that. I don't believe that's true;" and whether he had told Tartaglione he was concerned Perrino would cooperate--because he was "becoming religious, going to church"--to which Vitale responded "I don't remember what I said to Mr. Tartaglione,"[3] it is difficult to imagine what more counsel could have asked.

The court did not find that Amato flat out failed to afford Vitale "an opportunity to deny or explain" the statements, *e.g. United States v. Schnapp,* 322 F.3d 564, 570 (8th Cir. 2003); but rather that it was "unclear" and presented a "closer question." (App *infra., 21A-22A*) The court's reasoning seems to be that Amato's counsel also asked Vitale about conversations he had with <u>other</u> Bonnano family

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[3] "[S]tatements need not be diametrically opposed to be inconsistent." *United States v. Agajanian,* 852 F.2d 56, 58 (2d Cir. 1988). If the witness "answers that he or she does not remember making the statement, counsel may resort to extrinsic proof as the next step." Weinstein's Federal Evidence § 613.05[3][a]. In any event, here the district court acknowledged that the prior statements at issue were inconsistent for purposes of Rule 613(b). (App. *infra.,* 19A)

members about the facts of the Perrino murder. Apparently it was the court's view that this somehow neutralized or diluted the questions asked Vitale about his statements to Cantarella and Tartaglione, because, according to the court, it was "unclear" whether Amato was impeaching Vitale based on extrinsic prior inconsistent statements or is "simply probing Vitale's recollection" to elicit contradictions in his testimony. (App. *infra.*, 21A-22A)

But the Rule only requires that the witness be given an "opportunity to explain or deny" the statement, not that it be labeled a "prior inconsistent statement" for him. Under the court's reasoning, a defendant who questions a witness closely about all the facts he testified to on direct examination risks losing the ability to introduce extrinsic evidence of prior inconsistent statements, even if the witness has denied them, because the denials do not stand out in sharp enough relief.

Moreover, most of the references to things said to or by the other seven Bonnano family members identified by the court were of a different nature than the confrontational questions that are the hallmark of the foundational type for introduction of prior inconsistent statements. The questions confronting Vitale with his prior statements to Cantarella or Tartaglione referred Vitale to very particular circumstances and began "Did you tell ...," "Did you ask ...," "Did you ever tell ...," or a variation of these. Nothing about the mention of things said to others during cross-examination of Vitale by Amato's counsel should excuse opposing counsel from recognizing foundational questions regarding prior inconsistent statements, especially when opposing counsel is already in possession of

those statements. Certainly the Government was, to use the language of Rule 613(b), "afforded an opportunity to interrogate the witness thereon."

Finally, even if the Government were asleep at the switch during Vitale's cross-examination, the Government, consistent with Rule 613(b), could have recalled him on its rebuttal case to further deny or explain Cantarella's and Tartaglione's testimony. *See United States v. Hudson,* 970 F.2d 948, 955 (1st Cir. 1992)(requirements of Rule 613(b) satisfied where federal prisoner witness was available for recall).

The court opined that calling cooperating witnesses like Cantarella and Tartaglione "would present a much greater logistical burden on the Government" than calling FBI agents (which co-defendant Basile proposed to do). (App *infra.,* 25A) The judge's concern might have some currency if it had been pressed by the Government--which never indicated it could not produce Cantarella and Tartaglione, quite the contrary--but seems beyond the interests that a disinterested judicial officer should be advancing. And the court never found that Vitale was not readily available to be recalled.

The court also cited to Rule 611(a) as supporting its ruling, stating that the rule gives the court "broad latitude" in deciding whether prior inconsistent statements should be admitted.[4] (App. *infra.,* 24A) The court counted against Amato that "the statements with which Amato seeks to impeach

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[4] Rule 611(a) provides that the court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence.

Vitale primarily implicate the collateral matters of Vitale's role, motive and interest in ordering Perrino's death." (App. *infra.*, 25A; emphasis added.) This was a complete mistake. A witness's motive and interest are not collateral matters. Weinstein's Federal Evidence § 613.05[1], *citing* Slough, *Impeachment of Witnesses: Common Law Principles and Modern Trends*, 34 Ind. L.J. 1, 18 (1958)("two classes of facts would be admissible independently of self contradiction: (1) facts relevant to matters at issue; (2) facts admissible to discredit the witness by showing motive, bias, interest, and any other similar matter likely to affect his testimony")(emphasis added). In any event, these were statements by Vitale indicating that he and not Amato wanted Perrino murdered for reasons having nothing to do with Amato. Nothing could be more material and less collateral.

It is true, as the court observed, that the court has discretion to admit or exclude extrinsic evidence of a prior inconsistent statement. (App. *infra., 18A, citing United States v. Schnapp,* 322 F.3d at 571, and *United States v. Young*, 248 F.3d 260, 268 (4th Cir. 2001).) But in *Schnapp*, the court exercised its discretion to exclude a statement because, unlike here, the witness had not been afforded an opportunity to deny or explain it. 322 F.2d at 572. And in *Young*, the court exercised its discretion to exclude the statement under Rule 403, because it was not "probative." 248 F.3d at 258. Here, the court necessarily abused its discretion because it erred in finding that Amato had not afforded Vitale an opportunity to deny or explain the statements; it erred in ruling that Amato was required, at the time Vitale was cross-examined, to notify the Government

of his intention to impeach Vitale by introducing his prior inconsistent statements through the testimony of Cantarella and Tartaglione; and it erred in concluding that evidence of Vitale's interest in the murder of Perrino was "collateral."

The exclusion of evidence violates the right to present a complete defense and denies the defendant a fair trial when the excluded evidence "creates a reasonable doubt that did not otherwise exist." *Jiminez v. Walker*, 458 F.3d 130, 146 (2d Cir. 2006), *citing United States v. Agurs*, 427 U.S. 97, 112-13 (1976).

If the jury disbelieved Vitale, it is doubtful that Amato would have been convicted of the Perrino and DiFalco murders, and the jury may have questioned the Government's theory about Amato's role in the gambling operation.

If the jury concluded that Vitale had a personal interest in murdering Perrino, but lied about this interest in his testimony, the jury may well have accepted the theory of defense that Vitale had a strong personal motive for killing Perrino, namely, he feared Perrino would implicate him and his son Joel in the illegal activity at the Post and he had Perrino murdered by persons close to Vitale, whom he was protecting, not Amato.

Similarly, the jury would have doubted Vitale's testimony that he had heard that Amato killed DiFalco. This statement was critical to Amato's conviction. Vitale was the central trial witness against Amato and the verdict turned on whether he was to be credited or impeached.

The error in precluding Amato from calling Cantarella and Tartaglione to introduce Vitale's prior inconsistent statements was constitutional error, not only error in applying a rule of evidence. *See Crane v. Kentucky*, 476 U.S. 683, 687 (1986)("Constitution guarantees defendant 'a meaningful opportunity to present a complete defense'")(citation omitted); *Washington v. Texas,* 388 U.S. 14, 19 (1967)(fundamental element of due process is "the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies"); *Chambers v. Mississippi*, 410 U.S. 284.

Thus, "the more rigorous harmlessness test for constitutional errors" is applicable, *United States v. Tropeano*, 252 F.3d 653, 659 (2d Cir. 2001), namely, whether the Government can show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California,* 386 U.S. 18, 24 (1967). Given the primacy and centrality of Vitale's testimony, the Government cannot possibly satisfy that burden.

The decision in *United States v. Wilson*, 490 F. Supp. 713 (E.D. Mich. 1980) is particularly instructive. As the Court in *Wilson* wrote, the concept of requiring that before extrinsic evidence to impeach by means of a prior inconsistent statement can be introduced, a foundation which requires that the witness be asked in advance (i.e. on cross-examination) whether he had made the allegedly inconsistent statement, originated with *Queen Caroline's Case*, 2 Brod. & Bing., 284, 319, 129 Eng. Rep. 976 (1820) (also referred to as the *Queen's Case*). *Wilson*, 490 F. Supp. at 719. Under the rule in *Queen Caroline's Case*, the witness had to be

confronted with specific foundational questions regarding when, where, and to whom the statement was made. *Id.* Similar to the view taken by the district court in Mr. Amato's case, in short, the cross-examination on the prior inconsistent statement had to be, in a sense, highlighted and very specifically detailed in order to constitute the requisite foundation which would later allow the introduction of extrinsic evidence of the prior inconsistent statement.

As the *Wilson* Court found, such a foundation no longer is required for several reasons. "Congress unequivocally abolished the stringent requirements of the *Queen's Case* from the Federal law of evidence when it promulgated Fed. R. Evid. 613(b)." *Wilson*, 490 F. Supp. at 719-20; 5-613 *Weinstein's Federal Evidence* Sec. 613 App.100.

The *Wilson* decision is instructive for an additional reason which highlights an error below: Rule 613(b)'s restrictions on the use of extrinsic evidence of prior inconsistent statements, does not even apply to admissions of a party-opponent as defined in Fed. R. Evid. 801(d)(2). Vitale testified as a co-conspirator under Rule 801(d)(2) and therefore Rule 613(b) had no application at all to the offering of extrinsic evidence of his prior inconsistent statements for, by definition, his prior inconsistent statements would come in as substantive evidence, not merely impeachment evidence, under Rule 801(d)(2) and for such prior inconsistent statements, Rule 613(b) does not apply, nor is there any need to establish the foundation under that rule. *Wilson*, 490 F. Supp. at 720.

As the Court found in *Wilson*, under such circumstances, the appropriate remedy would be to allow the Government to put on the extrinsic evidence of the prior inconsistent statement through its witness Ratliff, and then to permit Urbanski to be called on sur-rebuttal.

Ultimately, allowing the extrinsic evidence of prior inconsistent statements helps the jury reach "a better ascertainment of the truth." *Wilson*, 490 F. Supp. at 725.

The district court's exclusion of the critically important witnesses in Mr. Amato's case who would have testified that Vitale previously had expressed his personal motive for wanting to kill Mr. Perrino, prior statements which clearly were inconsistent with Vitale's testimony and, specifically with Vitale's denial on cross-examination of making any such statements, is especially confounding in light of a decision from the Second Circuit in *United States v. Harvey*, 547 F.2d 720 (2d Cir. 1976).

In *Harvey*, the defendant was charged with armed robbery and larceny. A Government witness, Mrs. Martin, testified at trial that she saw Harvey entering the bank he was accused at trial of robbing, at the time of the robbery. Martin testified that she had known Harvey for a number of years, had never had any arguments or disagreements with him, had never accused Harvey of fathering her child and, otherwise had no bias or prejudice against Harvey that would have led her to falsely inculpate him in the crime charged. *Harvey,* 547 F.2d at 722.

Following Martin's testimony, during which she specifically denied each of these facts, in response to questions on cross-examination, the defendant

Harvey sought to put on extrinsic evidence of prior inconsistent statements by Martin which would have shown her bias or prejudice against Harvey and which would have provided a motivation for giving false testimony against Harvey at trial. Specifically, Harvey sought to offer testimony from his wife who had encountered Martin while she (Mrs. Harvey) was on duty as a nurse in a hospital where Martin went for treatment of a broken leg. Mrs. Harvey would have testified that during that encounter, Martin had accused the defendant Harvey of fathering her child and refusing to support it and that when her husband (Mr. Martin) had learned about this he beat her and broke her leg, leading her to go to the hospital. *Harvey*, *Id.* The district court barred the admission of such extrinsic evidence of Martin's prior inconsistent statements under Rule 613(b) finding the same to be "collateral."

In reversing Harvey's conviction, the Second Circuit noted that extrinsic evidence that a witness has a motive to testify falsely is not a collateral issue and clearly is admissible. *Id.* Indeed, it found that the "law of evidence has long recognized" that a defendant must be permitted to adduce extrinsic evidence, "including the testimony of other witnesses," to prove facts which show bias in favor of or against a party. *Id.*, *citing* McCormick, *Evidence*, § 41 (2d Ed. 1972). As the Court noted, "special treatment is accorded evidence which is probative of a special motive to lie 'for if believed it colors every bit of testimony given by the witness whose motives are bared.'" *Id.* (quotation omitted)

The Court in *Harvey*, went on to note that, like many other Circuits, the Second Circuit requires that a "proper foundation must be laid before

extrinsic evidence of bias may be introduced," and that such foundation requires that a witness be "afforded an opportunity to explain or deny the prior inconsistent statement;" however, it held that Rule 613(b) "relaxes the traditional foundation requirement that a witness's attention on cross-examination be directed specifically to the time and place of the statement and the person to whom made." *Id.*, *citing inter alia* Advisory Comm. Notes, Fed. R. Evid. 613(b); McCormick, *Evidence*, § 37 n.45. In Mr. Amato's case, in contrast, while the district court conceded, as it had to, that Vitale's was specifically confronted with his prior inconsistent statements, and denied ever making the same, that foundation, nevertheless, was insufficient under Rule 613(b), nevertheless, because that area of cross-examination was not, somehow highlighted, or emphasized, and, instead, was simply a part of a longer cross-examination.

By so holding, the district court grafted an additional requirement onto Rule 613(b) which, not only is not required by the Rule, but is directly contrary to the Rule, the Advisory Committee Notes explaining the Rule's effect in actually relaxing the foundational requirements and is contrary to all cases construing the Rule.

The Court in *Harvey* expressly noted that Martin was asked about each of the prior inconsistent statements and, in each case, denied ever making them. This opportunity, alone, certainly was enough to obviate any surprise to the Government concerning the proffered extrinsic evidence of the prior inconsistent statements, notwithstanding the fact that defense counsel arguably could have been

"more expansive in establishing his foundation." *Harvey*, 547 F.2d at 723.

The Court in *Harvey* recognized that the right to introduce extrinsic evidence showing a witness's motive for lying about a defendant is not limitless and is subject to some level of discretion by the district court. *Id.* Mr. Amato does not take issue with that general principle; rather, he agrees with the *Harvey* Court and with its further statement that "it is rarely proper to cut off completely a probative inquiry that bears on a feasible defense." *Id.* It is especially important, as the Court in *Harvey* held, that a criminal defendant be given every opportunity to present facts which, if believed, could lead to the conclusion that a witness who testified for the government either favored the prosecution or was hostile to the defendant and to show the reasons establishing the same. *Id.* In the *Harvey* case, the proffered extrinsic evidence of prior inconsistent statements was offered to show Mrs. Martin's possible motivation for lying about Harvey – her anger toward him for refusing to support the child he had fathered with her, which led to a beating from her own husband.

In Mr. Amato's case, the proffered extrinsic evidence of Vitale's prior inconsistent statements was offered to show Vitale's direct personal interest in inculpating Mr. Amato in order to conceal his own (Vitale's) role in the Perrino murder and the role of his (Vitale's) close personal associates in the same. By pointing the finger at Mr. Amato, the defense theory argued, Mr. Vitale was protecting himself and his close associates from prosecution for the murder which he earlier had expressed a direct personal interest in carrying out, while denying the same at

trial. Surely, that was a most compelling circumstance which, especially after a foundation which included confronting Vitale with such prior inconsistent statements on cross-examination and his denial of the same, must have been permitted through the extrinsic evidence proffered by Mr. Amato, including the testimony of witnesses to those prior inconsistent statements by Vitale. The conviction in *Harvey* was reversed under much less compelling circumstances and the district court's decision in Mr. Amato's case cannot be reconciled with authority from the Second Circuit and all other authority from around the country on this principle or with the language of Rule 613(b) itself.

Virtually every other Circuit which has considered this question in one form or another is consistent with the decisions in *Harvey* and *Wilson* and sets forth its own formulation of the principle that Rule 613(b) was intended to relax the foundational requirements (all of which were fully met in Mr. Amato's case) and that Rule 613(b) actually favors the admission of extrinsic evidence of prior inconsistent statements under circumstances even less compelling than those present in Mr. Amato's case without any requirement that the foundation include a highlighting of the opportunity to explain or deny the statements or that it be dependent on specific advance notice to the witness or to the government of the identity of specific witnesses the defendant intended to call in its case-in-chief to present such extrinsic evidence of the witness's prior inconsistent statements. *See* e.g. *Wilmington Trust Company v. The Manufacturer's Life Insurance Company*, 749 F.2d 694, 699 (11th Cir. 1985) (Rule 613(b) does not specify any particular

time or sequence for giving the witness an opportunity to explain or deny or examine the prior inconsistent statements at issue; allowing extrinsic evidence testimony of the prior inconsistent statement before the witness was given an opportunity to explain or deny the prior inconsistent statement), *citing, United States v. Barrett,* 539 F.2d 244, 254-56 (1st Cir. 1976); S. Saltzburg & K. Redden, *Federal Rules of Evidence Manual at 430*, (3d ed. 1982); *United States v. Bibbs*, 564 F.2d 1165, 1169-70 (5th Cir. 1977); No. 3 J. Weinstein & M. Berger, *Weinstein's Evidence* § 613.(04) at 613-16 n. 6 (1981) (extrinsic evidence witness could testify about prior inconsistent statements even before declarant was given an opportunity to explain or deny the conversation at issue).

See also United States v. Young, 86 F.3d 944, 949 (9th Cir. 1996) (reversing conviction and finding that "the foundational prerequisites of Rule 613(b) require only that the witness be permitted - at some point - to explain or deny the prior inconsistent statement."; holding that even absent the declarant's denial of the statement on cross-examination extrinsic witness's later testimony about declarant's prior inconsistent statement would not have been barred. Declarant simply would have been given an opportunity to explain or deny on rebuttal); *United States v. Rose*, 403 F.3d 891, 903-904 (7th Cir. 2005) (failure to cross-examine declarant/witness on prior inconsistent statements did not preclude defense from eliciting extrinsic evidence testimony from another witness about the prior inconsistent statement; procedure simply was for government to bring declarant back to the stand on rebuttal to give him an opportunity to explain or deny the prior

inconsistent statements; finding error harmless because not direct or compelling evidence), *citing* 6th, 7th, 8th, 9th Circuits as being in accord with its understanding of Rule 613(b) application in not requiring cross-examination of the declarant/witness prior to the admission of extrinsic defense testimony concerning the prior inconsistent statements.

The lower court's misapplication of Rule 613(b) leaves Mr. Amato serving a life sentence for murders likely committed by a government witness who previously admitted the same. By denying Mr. Amato the ability to put evidence of such admissions before the jury, the court caused a great miscarriage of justice which this Court can and must correct.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

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