No. 14-12373

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

PETER E. CLAY, TODD S. FARHA, PAUL L. BEHRENS AND WILLIAM L. KALE,
Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Florida, No. 8:11-cr-00115-JSM-MAP
Before the Honorable James S. Moody, Jr.

BRIEF OF EVIDENCE LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER PAUL L. BEHRENS' PETITION FOR REHEARING AND REHEARING *EN BANC*

SARA E. KROPF, COUNSEL OF RECORD
LAW OFFICE OF SARA KROPF PLLC
1001 G STREET, NW, SUITE 800
WASHINGTON, DC 20001
(202) 627-6900
SARA@KROPF-LAW.COM

COUNSEL FOR AMICI CURIAE

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1-1, the *amici* identify themselves and their counsel as persons interested in the outcome of this case:

Paul Rothstein, Professor of Evidence, Georgetown University Law Center (*amicus curiae*)

Jules Epstein is Director of Advocacy Programs and Professor of Evidence, Temple Beasley School of Law (*amicus curiae*)

Sara E. Kropf (counsel for *amici curiae*)

The briefs already filed in this matter have identified all of the remaining persons so interested.

/s/ Sara E. Kropf
Sara E. Kropf
Law Office of Sara Kropf PLLC
1001 G Street, NW, Suite 800
Washington, DC 20001
(202) 627-6900
sara@kropf-law.com

Counsel for Amici Curiae

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STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following precedents of this circuit and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court:

United States v. Garnett, 122 F.3d 1016 (11th Cir. 1997)
United States v. Davis, 571 F.2d 1354 (5th Cir. 1978)

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves the following question of exceptional importance:

> The panel decision creates a hybrid rule concerning the admission of hearsay under Federal Rule of Evidence 703 and other hearsay exceptions—in this case, the "business records" exception under Rule 803(6)—that dispenses with the elements of those Rules that safeguard a criminal defendant's Confrontation Clause rights. This case presents whether the Federal Rules of Evidence permit the government's expert, in a criminal trial, to present an alleged co-conspirator's hearsay confession of financial misreporting to the jury for its truth without meeting the requirements for presenting such hearsay under Rule 703 and without presenting any witness with personal knowledge of—and who can be cross-examined about—the coercive circumstances under which the statement was created, as required by Rule 803(6).

/s/ Sara E. Kropf
Sara E. Kropf
Law Office of Sara Kropf PLLC
1001 G Street, NW, Suite 800
Washington, DC 20001
(202) 627-6900
sara@kropf-law.com

Attorney of Record for Amici Curiae

INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are law professors who have long studied, taught, and written about the Federal Rules of Evidence. Paul F. Rothstein is a professor at Georgetown University Law Center; Jules Epstein is a professor at Temple Beasley School of Law. *Amici* have a professional interest in the development and application of evidence law. The panel here held that the government's expert in a criminal trial can present hearsay for its truth without satisfying the requirements of Rule 703 or the prerequisites to admissibility under any hearsay exception. *Amici* believe that misreads the Federal Rules of Evidence, undermines the general prohibition on hearsay, and circumvents defendants' cross-examination rights.

ISSUE FOR REVIEW

Whether the Federal Rules of Evidence permit the government's expert, in a criminal trial, to present an alleged co-conspirator's hearsay confession of financial misreporting to the jury for its truth without meeting the requirements for presenting such hearsay under Rule 703 and without presenting any witness with personal knowledge of—and who can be cross-examined about—the coercive circumstances under which the statement was created, as required by Rule 803(6).

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[1] Pursuant to FRAP 29 and this Court's Rule 35-9, counsel for *amici curiae* states that no party or counsel for a party authored this brief in whole or in part or made a monetary contribution to the preparation and submission of this brief. Pursuant to this Court's Rule 35-6, *amici* have filed a motion requesting leave of court to file this *amicus* brief.

ARGUMENT[2]

I. Rules 703 and 803(6) Are Designed to Preserve a Defendant's Cross-Examination Rights and Provide Critical Protections Against Hearsay

A. The Hearsay Rules Protect Cross-Examination Rights

The Federal Rules of Evidence prohibit the introduction of hearsay—an out-of-court statement offered for the truth of the matter asserted—unless the statement falls within certain well-defined exceptions. Fed. R. Evid. 801(c), 802. The "main justification for the exclusion of hearsay" is the "lack of any opportunity for the adversary to cross-examine the absent declarant whose out-of-court statement is reported." 2 Broun, *McCormick on Evidence* §245 (7th ed.). The "hearsay rules and the Confrontation Clause" thus are "designed to protect similar values." *California v. Green*, 399 U.S. 149, 154 (1970).

Cross-examination serves a crucial role—it is "the greatest legal engine ever invented for the discovery of truth." *Id.* at 158 (quoting 5 J. Wigmore, *Evidence* §1367 (3d ed. 1940)). Among other things, cross-examination ensures "[t]he defendant will have a chance to inquire into the circumstances under which [a declarant's] statements were made and the motives that might have led the declarant to color their truth at the time." *United States v. Inadi*, 475 U.S. 387, 407 (1986).[3]

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[2] This brief does not contain as separate fact section as all relevant facts are summarized in Petition for Rehearing and Rehearing En Banc on Behalf of Defendant-Appellant Paul L. Behrens.

[3] This brief cites several cases decided before *Crawford v. Washington*, 541 U.S. 36

Thus, when hearsay is "introduced against a criminal defendant without the benefit of cross-examination," a trial's truth-finding function is "uniquely threatened." *Lee v. Illinois*, 476 U.S. 530, 541 (1986).

There are, of course, exceptions to the hearsay prohibition. Those exceptions may diverge in substantive requirements, but each reflects well-established principles that ensure the statement's reliability. The panel's decision here implicates two Federal Rules of Evidence that allow for disclosure of hearsay to the jury where certain safeguards of reliability are met: Rule 703, which governs an expert witness's disclosure of otherwise inadmissible evidence, and Rule 803(6), the "business records" exception. The panel's decision eradicated the safeguards in both rules, denying Defendants the ability to "inquire into the circumstances under which" the restatement was made and "the motives" WellCare had that may have "color[ed]" its decisions and render the restatement unreliable. *Inadi*, 475 U.S. at 407.

B. Rule 703 Allows an Expert To Disclose Hearsay Only Where Specific Safeguards Are Met

Rule 703 allows an expert who has "base[d]" his opinion on facts or data that "would otherwise be inadmissible" to "disclose them to the jury," but only under certain circumstances. First, the expert must have relied on the information in forming his opinion; second, the evidence's proponent must establish that its

(2004). *Crawford* did not overrule these cases as to the importance of cross examination to determine a hearsay statement's reliability.

"probative value in helping the jury evaluate the opinion substantially outweighs its prejudicial effect." Fed. R. Evid. 703. Even if both requirements are met, the statements are not admissible for their truth, but rather "only for the purpose of assisting the jury in evaluating an expert's opinion." Fed. R. Evid. 703 advisory committee note; *see also* 2 Broun, *McCormick on Evidence* §324.3 (7th ed.). Rule 703 is thus a limited exception. It retains "a presumption against disclosure to the jury of information used as the basis of an expert's opinion." Fed. R. Evid. 703 advisory committee note. It does not permit "misuse" of experts to present otherwise inadmissible evidence "for substantive purposes." *Id*.

As academic treatises explain, Rule 703 does not permit an expert "to testify that other experts have the same opinion as he does." 6 Fishman et al., *Jones on Evidence* §42:11 (7th ed. 2013). Such corroborative testimony would be "relevant only as inadmissible hearsay to bolster the expert witness's testimony." *Id.*; *see also* Rothstein et al., *Evidence: Cases, Materials, and Problems* 262 (4th ed.) (collecting cases); Weissenberger, *Federal Evidence* §7.03(5) (2d ed.).

C. Rule 703's Limitations Are Critical Because Expert Witness Are Particularly Problematic as Hearsay Conduits

Rule 703 "is not an open door to all inadmissible evidence disguised as expert opinion." *United States v. Scrima*, 819 F.2d 996, 1002 (11th Cir. 1987). The safeguards it contains exist, among other reasons, to protect against "Rule 703 improperly becoming a 'backdoor' hearsay exception." 2 *McCormick On Evidence*

§324.3 (Brown 6th ed. 2006). It is clear that parties may not "bring inadmissible hearsay and documents before the jury in the guise of expert testimony to prove subsidiary facts" in the case. *Pelster v. Ray*, 987 F.2d 514, 527 (8th Cir. 1993).

"When an expert witness relies on inadmissible facts and data in the formulation of an opinion, the ability of a criminal defendant to cross-examine the expert witness effectively is crucial to the preservation of confrontation rights." Weinstein et al., *Weinstein's Evidence Manual* §13.04[1] (7th ed. 2015). Where an expert cannot testify to the circumstances of the hearsay statement, it creates "a screen against cross-examination." *In re James Wilson Assocs.*, 965 F.2d 160, 173 (7th Cir. 1992). The defendant is effectively "subjected to the testimony of a witness whom he may not cross-examine." *United States v. Tran Trong Cuong*, 18 F.3d 1132, 1143 (4th Cir. 1994). Rule 703 does not "permit an expert witness to circumvent the rules of hearsay by testifying that other experts, not present in the courtroom, corroborate his views." *United States v. Grey Bear*, 883 F.2d 1382, 1392-93 (8th Cir. 1989).

As discussed below, the panel's ruling contradicts these settled principles. It instead allows courts to dispense with Rule 703's requirements and permits an expert to disclose uncross-examinable hearsay to the jury, all while allowing the government to use those statements as substantive evidence of the defendant's guilt.

D. The Business Records Exception to the Hearsay Prohibition in Rule 803(6) Likewise Includes Careful Restrictions

Rule 803(6) is the "business records" exception to the hearsay prohibition. For

the record to be admissible, it must have been created "at or near the time" of the event, kept in the course of a "regularly conducted" business activity and that making the record was a "regular practice" for that activity. Fed. R. Evid. 803(6). But "even a record that satisfies the basic requirements is excludable if it is untrustworthy"—for example, if it "was prepared with an eye toward litigation." 4 Mueller et al., *Federal Evidence* §8:78 (4th ed.).

The Rule, moreover, is "unusual in expressly including" a requirement for "foundation testimony." 4 Mueller, *supra*, §8:78. It "*requires* the testimony of a custodian or other qualified witness who can explain the record-keeping procedure utilized" and show that the requirements of the business record exception are met. *United States v. Garnett*, 122 F.3d 1016, 1018-19 (11th Cir. 1997) (per curiam) (emphasis added). "The reason for doing so is that the elements of the exception are elaborate and require what amounts to an 'insider' to describe the record-making process" and verify that the conditions that would render the record reliable are in fact satisfied. 4 Mueller, *supra*, § 8:78; *see also* 30C Graham et al., *Federal Practice & Procedure*, Evidence §7047 (2014 ed.).

As discussed below, the panel dispensed with the business records foundation requirement altogether. It ruled that an expert witness could disclose hearsay statements in purported business records where the expert himself has no personal knowledge of the document's preparation, and no other witness with knowledge has

laid the foundation required by the Rule.

II. The Panel's Misapplication of the Rules of Evidence Sets a Dangerous Precedent for Other Criminal Cases

A. The Panel Disregarded the Rules' Plain Requirements

The government expert's presentation of the contents of WellCare's restatement to the jury cannot be upheld under Rule 703. The district court never found that the restatement's probative value substantially outweighs its prejudicial effect. *See* Behrens Br. 93-95; Behrens Reply 33-37. Nor did the government and its expert present the restatement for the purpose Rule 703 allows—informing the jury of the basis of the expert's opinion. Instead, they used it for the truth of its contents—as evidence WellCare agreed its prior numbers were false. The panel admitted that the expert used it "*primarily* [to] corroborate[] his own . . . analyses," Op. 118 (emphasis added), and not simply to explain the basis of his opinion.

The panel held that Rule 703's limits did not apply "because the financial restatement was admissible as a business record under Rule 803(6)." Op. 118. But the government did not offer the testimony necessary to lay the foundation for the business records exception, either. Behrens Pet. 11. No insider testified that the restatement was made at the time by someone with knowledge, that it was kept in the course of "regularly conducted activity," or that making the record was a "regular practice of that activity." Fed. R. Evid. 803(6). The trial record is silent as to the elements of Rule 803(6); the panel cannot manufacture them out of thin air to

absolve the government's misuse of the expert's testimony.

The panel's circular reasoning does not comply with the Rules. It held that the government need not comply with Rule 703's requirements for expert testimony because the restatement is admissible as a business record; but the government need not prove the restatement admissible as a business record under Rule 803(6) because its contents were presented by an expert. Behrens Pet. 12. The panel thus allowed testimony on the restatement's contents under the auspices of both Rules, without requiring any of the indicia of reliability under either one.

B. The Panel's Holding Allowing Experts To End-Run Around The Rules' Requirements Undermines the Default Prohibition Against Hearsay and Criminal Defendants' Cross-Examination Rights

The panel's holding has far-reaching—and extremely harmful—implications for criminal defendants in future cases. It allows the government, through use of expert witnesses, to fatally undermine the hearsay rules and circumvent defendants' cross-examination rights.

1. It is critical to note that the panel's reasoning in allowing an expert to present otherwise-inadmissible hearsay evidence to the jury extends beyond purported business records. It would permit a government expert to present all types of hearsay evidence against a criminal defendant without providing the foundation that the Rules require to ensure the reliability of that evidence. For example, suppose a government expert on organized crime in a RICO case is to testify about how to

interpret a handwritten note written by a co-conspirator appearing to summarize the structure of a street gang. Under Rule 801(d)(2)(E), that statement would not come into evidence without a showing that there was a conspiracy, that the person who wrote the note was a co-conspirator and so forth. The panel's decision would allow the expert to present the note's contents to the jury without establishing the foundational requirements of the co-conspirator exception. A government expert could likewise testify about street lingo in a wiretap recording without having to testify under Rule 901(b)(9) about how the recording was made or identify the speaker under Rule 901(b)(5).

As those examples show, cross-examination is critical on foundational issues to ensure that evidence presented to a jury is sufficiently reliable. *Inadi*, 475 U.S. at 407. The panel's decision eviscerates a defendant's ability to use cross-examination to challenge the reliability of the government's evidence, simply because it is presented through an expert witness. Nowhere do the Rules—or precedent of this Court—contemplate such an outcome.

2. In *People v. Sanchez*, 374 P.3d 320 (Cal. 2016), the California Supreme Court cogently addressed the problems raised when the government uses an expert to circumvent hearsay rules and defendants' cross-examination rights. In *Sanchez*, the government offered an expert who testified about gangs, including gang culture and the gang of which the defendant was allegedly a member. But the government

then elicited testimony from the expert about the defendant's prior contacts with police, including statements by the defendant to the police, even though the expert had not been present when those statements were made.

The court explained the problems with allowing experts to testify to hearsay, and particularly where it concerns facts the government has the burden of proving:

> Generally, parties try to establish the facts on which their theory of the case depends by calling witnesses with personal knowledge of those case-specific facts. An expert may then testify about more generalized information to help jurors understand the significance of those case-specific facts. An expert is also allowed to give an opinion about what those facts may mean. *The expert is generally not permitted, however, to supply case-specific facts about which he has no personal knowledge*.

Sanchez, 374 P.3d at 327-28 (emphasis added). When an expert is testifying about case-specific facts and "no other evidence" of those facts has been admitted, then "there is no denying that such facts are being considered by the expert, and offered to the jury, as true." *Id*. at 333. "[A]n expert cannot . . . relate as true case-specific facts asserted in hearsay statements, unless they . . . are covered by a hearsay exception." *Id*. at 334.

3. The same conclusion is required here. As an initial matter, the re-statement was unquestionably "case-specific," as it related to the correctness of the very WellCare expenditure reports at issue in the criminal trial. The expert used the restatement to buttress his expert opinion that WellCare's initial accounting for the 80/20 payments was false, opening the door for the government to argue in closing

that the company's well-regarded auditor (Deloitte) had given the restatement its stamp of approval as well as to demonstrate its supposed trustworthiness. No other witness had testified to the contents or reliability of the restatement. As a result, under *Sanchez*'s reasoning and the plain language of the Rules, these statements had to be "covered by a hearsay exception." 374 P.3d at 334. Yet the panel did not require that the government lay the foundation necessary to do so.

C. The Panel's Decision Sets a Dangerous Precedent Given the Reality of White-Collar Criminal Prosecution and the Use of Restatements in Those Prosecutions

The panel's decision not only eviscerates a defendant's ability to challenge the reliability of hearsay statements, but also sets a dangerous precedent given how white-collar criminal investigations are handled in today's climate.

In recent years, the Department of Justice has simultaneously encouraged co-operation by corporations under investigation and prosecuted more of those corporations' executives. The DOJ insists on full corporate cooperation in criminal investigations to earn cooperation credit. *See* U.S. Attorney's Manual §§9-28.300(A)(4), 9-28.700, 9-28.720. Just this April, the Foreign Corrupt Practices Act unit of DOJ's Fraud Section promulgated a pilot program that "is designed to motivate companies to voluntarily self-disclose FCPA-related misconduct [and] fully cooperate with the Fraud Section." Available at https://www. justice.gov/opa /blog/criminal-division-launches-new-fcpa-pilot-program. The program authorizes

DOJ to offer a company up to a 50% reduction in recommended sentence if it cooperates fully with the Department's demands.

In September 2015, DOJ promulgated guidance on Individual Accountability for Corporate Wrongdoing. Available at https://www.justice.gov/dag/file /769036/download. Known colloquially as the "Yates Memo," it makes clear that DOJ seeks to prosecute more corporate executives, reasoning that "[o]ne of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing." *Id*. at 1.

When the government threatens criminal action, the pressure to succumb and admit fault is extreme. "Faced with threatened criminal charges, most companies agree to settle because the collateral consequences of a conviction . . . are so harsh—in many cases, they amount to a corporate death sentence." Copland & Mangual, *Justice Out of the Shadows: Federal Deferred Prosecution Agreements and the Political Order*, at 4 (June 2016). Health care providers "are particularly susceptible to collateral consequences that can destroy the company if convicted of a crime." Podgor, *White Collar Innocence: Irrelevant in the High Stakes Risk Game*, 85 Chi.-Kent L. Rev. 77, 88 n. 4 (2010). WellCare, for example, faced possible exclusion from the Medicare system in Florida—a consequence that would have threatened its very existence.

The government often extracts a restatement of a company's earnings as part

of its cooperation efforts—a fact often noted in deferred prosecution agreements. *See, e.g.*, Deferred Prosecution Agreement ¶4, in *United States v. Arthrocare Corp.* (W.D. Tex. Dec. 30, 2013) (company "engaged in extensive remediation, including restating its financial statements"), available at http://lib.law.virginia.edu/Garrett/prosecution_agreements/sites/default/files/pdf/Arthrocare.pdf. Likewise, the SEC considers a company's willingness to restate financials in deciding whether to initiate an enforcement action. *See* Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934, Exchange Act Release No. 44969, 76 SEC Docket 220 (Oct. 23, 2001). And a prompt restatement can dramatically affect the penalties levied. One study found that, "for each week earlier that a restatement is announced to the public," the SEC's corporate penalties "are reduced by $434,000." Files, *SEC Enforcement: Does Forthright Disclosure and Cooperation Really Matter?*, 53 J. Accounting & Econ. 353, 355 (2012).

As companies restate to show their cooperation, their executives often pay the price for what is said in those restatements. Those executives—like Defendants here—do not have a hand in drafting the restatement. The company's strategy is not to craft a restatement so as to mitigate its executives' criminal liability down the road. It is to capitulate so as to avoid punishment altogether.

D. This Case Demonstrates the Danger of Allowing Financial Restatements to be Used Against Defendants Where the Rules' Limited Exceptions to Use of Hearsay Are Not Satisfied

This case illustrates the dangers of allowing uncross-examinable hearsay to be put before the jury. WellCare's financial restatement was hearsay. Yet the government presented WellCare's restatement to the jury, through the government's expert, as an admission by the company and its auditors that its prior reporting was wrong. As Judge Hull commented during oral argument, that use of the restatement was "big time prejudicial." Oral Argument at 1:26:26, *United States v. Clay et al.*, No. 14-12373 (11th Cir. held Oct. 2, 2015).

WellCare restated its financials only under extreme pressure from the government. Because none of the Rules' safeguards for presenting hearsay were satisfied, however, Defendants had no opportunity to examine any government witness about the circumstances of the restatement's creation or to test its reliability. The panel ignored the purpose of the Rules to prevent precisely this circumstance—the admission of unreliable and uncross-examined hearsay.

Specifically, Defendants could elicit no testimony from the government's expert regarding the circumstances of the restatement's creation, including that it followed a 200-agent raid of WellCare's headquarters. The raid prompted WellCare to announce "extensive" cooperation with the government in an effort to avoid prosecution. *See* Behrens Pet. 6-7. WellCare faced pressure from the Florida agency

that oversees the Medicaid program, AHCA, which threatened to stop allowing WellCare do business in Florida. *Id.* And there was evidence that AHCA and prosecutors chose the methodology WellCare and its auditors used in the restatement. *Id.* But the government's expert had no personal knowledge of the restatement's preparation, and so could not be cross-examined about any of that. *Id.*

Despite the expert's lack of personal knowledge, the trial judge permitted the government to elicit hearsay statements from him and to argue during closing that these hearsay statements were substantive evidence that WellCare's initial accounting was false—an element of the charges against Defendants. The circumstances surrounding the drafting of WellCare's restatement demonstrate its inherent unreliability. Although it may not be a coerced confession in a literal sense, it was far from a freely-made admission. It was extracted from a company facing its possible demise if it did not cooperate with the government's demands. The panel's decision nowhere takes into account how the restatement came to pass or its inherent unreliability under those circumstances. Worse yet, it eliminated the very safeguards imposed by the Rules of Evidence to protect Defendants from the dangers of conviction based on unreliable hearsay evidence.

CONCLUSION

The Court should grant *en banc* review in this case.

September 12, 2016

Respectfully submitted,

/s/ Sara E. Kropf

Sara E. Kropf
Law Office of Sara Kropf PLLC
1001 G Street, NW, Suite 800
Washington, DC 20001
(202) 627-6900
Fax (202) 347-0316
sara@kropf-law.com

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of 11th Cir. R. 35-6 because this brief does not exceed 15 pages, exclusive of the items required by 11th Cir. R. 35-5(a)-(d) and (j).

This brief complies with the typeface requirements of Federal Rules of Appellate Procedure 29(c) and 32(a)(5)(A) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

September 12, 2016 Respectfully submitted,

/s/ Sara E. Kropf

Sara E. Kropf
Law Office of Sara Kropf PLLC
1001 G Street, NW, Suite 800
Washington, DC 20001
(202) 627-6900
Fax (202) 347-0316
sara@kropf-law.com

CERTIFICATE OF SERVICE

I certify that today, September 12, 2016, I electronically filed the foregoing Brief of Evidence Scholars as *Amici Curiae* in Support of Petitioner Paul L. Behrens' Petition for Rehearing and Rehearing En Banc with the Clerk of the Court using the appellate CM/ECF system. Counsel of record for all parties will be served by the appellate CM/ECF system.

I further certify that today, September 12, 2016, I caused fifteen paper copies of the foregoing to be dispatched to the clerk by Federal Express for delivery within three days.

/s/ Sara E. Kropf