**The Government Relied on False Evidence**

**Standard of Review**

Defendants repeatedly objected to 101i based on its cumulative prejudicial effect based on the defendants’ understanding from the Government that it displayed “the profits and losses of every participant in I2G.” (R.455,#3545; R.681,#8311; R.498,#4164.) After trial, Hosseinipour received new evidence showing information in Reynolds’ database that was omitted from 101i. Hosseinipour also received new evidence that Reynolds filtered out gains and did not include all the gains in 101i. This was the first time Hosseinipour had the information to raise a false evidence argument, and Hosseinipour’s appeal was pending. Instead of filing another motion for a new trial based on newly discovered evidence, Hosseinipour raised the false evidence claims with the other issues identified on appeal. This was in the interest of judicial economy, so it should not be relegated to plain-error review. *Libertarian Party of Ohio v. Husted*, 831 F.3d 382, 406 (6th Cir. 2016)(issue properly raised on appeal where it first became available while appeal was pending). Regardless, the error was plain.

**Merits**

A defendant can show the presentation of false evidence when the Government fails to correct testimony that gives the jury a “false impression.” *Alcorta v. Texas*, 355 U.S. 28, 31 (1957). The use of false testimony extends to “‘half-truths and vague statements that could be true in a limited, literal sense but give a false impression to the jury.” *U.S. v. Freeman*, 650 F.3d 673, 680 (7th Cir. 2011). “Due process protects defendants against the knowing use of any false evidence by the State, whether it be by document, testimony, or any other form of admissible evidence.” *Hayes v. Brown*, 399 F.3d 972, 981 (9th Cir. 2005).

The Government cherrypicked certain false evidence claims to respond to in its brief, thereby conceding the falsity of certain evidence and testimony. 101i included losses from more than 4,000 participants in a separate company, XTG1, after the indictment period. (Br.43-45.) This had nothing to do with I2G; instead, it just increased the losses and percentage of those who lost.  The Government did not argue that the evidence and testimony claiming that there were losses of I2G participants was not false. (Br.56-57.)

101i included purchases of packages where individuals could not make any money. For example, it consists of 2,665 purchases of $19.95, indicating the purchase of a customer package. (Hosseinipour Br.45.) These individuals were not eligible to participate in the compensation plan and received exactly what they purchased. There was no loss, and testifying that those individuals lost money was false. The Government did not respond to this argument. (Br.56-57.)

An additional 219 entries were reported as fraud, and no payment was made. (Hosseinipour Br.46.) Thus, no loss was suffered, and the testimony that they suffered a loss was also false. The Government did not respond to this argument. (Br.56-57.)

The loss figure also included monthly subscription fees, which were waived. (R.505,#4550.) Thus, it had an additional $832,000 in losses never incurred. (Hosseinipour Br.48.) The Government did not respond to this argument. (Br.56-57.)

Given the Government’s failure to respond, 101i and the related testimony were false. However, the government’s arguments in response worsened the prosecutorial misconduct.

 The Government claims to this Court that “Exhibit 101i” merely presents the data as recorded in Reynolds's system. (BR.56). However, this representation worsens prosecutorial misconduct. It is objectively untrue that 101i presents only the gains and losses of I2G participants as tracked by Reynolds's system. 101i explicitly includes voided and XTG1 transactions, customer purchases, and "gifted" and refunded packages marked as losses. Also, significant earned commissions were filtered out.  In other words, 101i does not present the gains and losses indicated by Reynolds's system; rather, it reports inflated loss rates and deflated gains with no factual basis.

Based on a spreadsheet Reynolds produced after the trial, I2G had 12,791 voided transactions. (R.721-2, Refunds.) This spreadsheet includes refunds that I2G gave to participants. 101i included losses for certain purchasers who never paid because the transaction was voided or where the purchasers were refunded. For example, Moyer received a full refund, but he still is shown as a loss on 101i. Critically, the refunds and voided transactions came from Reynolds’ system. (R.721-2.) Yet 101i does not reflect them.

Post-trial, Reynolds admitted under oath that 101i did not include all the data recorded in his system. (R.721-2.) Reynolds filtered out significant commissions that participants earned. (*Id.*) Thus, 101i, by Reynolds’ admission, does not report all the commission that participants earned.

101i gave a false impression of the loss rate of I2G, and the testimony related to it was false for several other reasons. For example, 101i does not include all commissions earned by Emperors but only payment of checks ordered through Jerry Reynolds’ back office computer system. 101i does not include commissions earned that were used to purchase i2g products or positions. 101i does not include commissions earned that were transferred to other participants. Emperor positions paid for with “a gift certificate” created from “filtered commissions” were listed as if a participant paid $5,000.00 for each position.

Keep’s testimony furthers the false evidence that was relied on by the Government and never corrected. Keep testified that 101i shows “for every participant in the system how much they gained or lost.” (R.487,#3876.) Keep testified that it showed the returns that individuals received. (*Id.*) Keep testified that he sorted the 101i by “gains and losses” and determined that 96% of the “20-plus thousand accounts” lost money. (R.487,#3877.) Keep testified that this was the total percentage of people that either gained or lost money through participation with I2G. The total number of distributors derived from 101G was also objectively untrue, including over 4000 XTG1 enrollments. (*Id.*) Keep used a simple formula to calculate from looking at “every account.” (R.487,#3877.)

The Government elicited factual testimony from its expert witness that was false. This was not an erroneous opinion. Instead, the Government had its witness falsely represent the information produced in discovery by the Government. This has nothing to do with inaccurate testimony. Instead, it was factual testimony regarding what 101i was, which was false. The Government then had a government agent further the false testimony: “[O]ne of them showed all of the commissions earned by all the different members within I2G” (R.699,#10322.)

As has been shown, this is not a case of mere inconsistency. Through the testimony of multiple witnesses (Keep, Reynolds, and Sauber), the Government reinforced the deception that 101-i showed all gains and losses and that 96% of purchasers lost money. Thus, as Lochmondy (a case relied on by the Government) illustrates, a contrary statement reinforced by multiple witnesses rises to a due process violation. *U.S. v. Lochmondy*, 890 F.2d 817, 823 (6th Cir. 1989).

The Government’s arguments to the jury doubled down on the false testimony. In its opening statement, the Government misrepresented that the “evidence will show that about 96 percent of the participants in the pyramid scheme lost money.” (R.485,#3735.) However, the government did not have evidence to show the percentage of participants who lost money.

In closing, the Government told the jury how great the data was and how it showed exactly how things played out at I2G:  “And importantly, in the end, Dr. Keep said that he had never had data like this. He had never had access to data like this of exactly how everything played out.” (R.671,#7692.) That simply was not true.

The Government hammered home the false testimony:

Then [Keep] said let’s look at the actual situation, and he looked at the data. And in the actual data, he testified to you that 96 percent of the people, 96 percent of the participants lost money. And look at that spreadsheet, 101I, the participant gain/loss, 96 percent. That’s what he testified lost.

(R.671,#7691.)

The Government’s reliance on *Ward* is misplaced. *Ward* addressed perjury on a collateral issue where the perjured testimony was brought to the jury's attention. Here, the testimony was on the central issue in the case, and its falsity was not made known to the jury. Furthermore, Hosseinipour did not have access to this data and had no way of knowing that the Government would elicit false testimony. Reynolds would not talk to the defendants, so they could not learn more about the documents produced before the trial. (R.681,#8326.) Her ineffective counsel would have had to ask questions to which he did not know the answer to uncover that the evidence was false. *De Freitas v. Hertz Corp.*, 2024 U.S. Dist. LEXIS 45167, at \*22 (D. Nev. Mar. 13, 2024)(noting “cardinal rule of cross-examination” is “asking questions at trial that he didn’t know the answer to”). The Government again makes one argument to the court and another to this Court. Below, the Government argued that the defense counsel could not understand the data without Reynolds. (R.718,#11354.) Now, the Government argues that defense counsel had all it needed. However, the Government never told defense counsel what it purported 101i to be, what its witnesses testified 101i to be, and the central opinion of Keep were all false. This was not a situation of the parties having the same information, and the cases relied on by the Government are inapposite. The Government obtained 101i from a specific request from Reynolds and did not share that request with defense counsel, and the Government did not even produce a 302 to show what the request was. The false evidence that the Government put on could not be corrected merely by cross-examination, and its arguments that such improprieties should be left unchecked should be rejected in full.

The Government knew or should have known 101i and the testimony related to it was false. The Government subpoenaed 101i. (R.498,#4217.) The Government claims it sent “specific” subpoenas for “specific documents.” (R.681,#8324-25.) The Government met with Reynolds on June 22, 2022. (*Id.*) The next day, Reynolds created 101i. (10/27/2023CD, 101i properties showing creation date of June 23, 2022.) According to an article on the FTC’s website, the expected loss rate would be around 99.6%. JON M. TAYLOR, THE CASE (FOR AND) AGAINST MULTI-LEVEL MARKETING, CONSUMER AWARENESS INST. 7-2 (2012). The Government wanted to show a high loss rate. By sending a “specific” subpoena for a “specific document,” the Government was able to have Reynolds filter out commissions, ignore refunds, including fraudulent transactions, and otherwise provide a spreadsheet that grossly inflated the loss rate at I2G. This data further omitted any commission payments outside his system, which were millions. The Government then had its witnesses falsely testify that 101i showed all gains and losses in Reynolds’ system, that it had all gains and losses for I2G participants, and that the loss rate at I2G was 96%. All this evidence was false and related to a document the government requested, which was created one day after the government met with Reynolds. 101i was contrary to data that Reynolds had already given the Government. The Government knew or should have known the evidence and testimony was false.

“In order to demonstrate a reasonable probability, the petitioner must ‘sufficiently undermine[] confidence in the outcome of the trial.’” *McNeill v. Bagley*, 10 F.4th 588, 598 (6th Cir. 2021). The convictions should be set aside where “the knowingly misleading testimony is offered by a ‘key prosecution witness.’” *In re Jackson*, 12 F.4th 604, 610-11 (6th Cir. 2021)(quoting *Carter v. Mitchell*, 443 F.3d 517, 535 (6th Cir. 2006)). Both Keep and Reynolds and McClelland were key prosecution witnesses. The false data was “gold.” It was a central issue in the government’s case, and the convictions resulted from false data and related testimony that falsely characterized the data. Against the backdrop that the spreadsheet was created two weeks before trial and Keep rendered new opinions on that data based on false testimony as to what the data purported to be, it is clear that the repeated false testimony by multiple witnesses that was relied on by the Government in opening and closing undermined confidence in the outcome of the trial and seriously affected the fairness and integrity of the judicial proceedings. (*See* R.485,#3735;R.487,#3747, 52, 3805, 08, 26, 27,  44-45, 47, 70, 73, 84, 85, 3925-26; 3995-96, 98; R.498 at #4131, 69-73; R.681,#8324-25; R.671,#7691-92; R.699,#10322.)  The government continues to falsely characterize the evidence in this court after the involvement of seven prosecutors; such a practice should not be tolerated.