IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-30296

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

WALTER P. REED; STEVEN P. REED,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Louisiana

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(Filed Nov. 5, 2018)

Before HIGGINBOTHAM, SMITH, and CLEMENT, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Walter Reed served as District Attorney for Louisiana's 22nd Judicial District from 1985 to 2015. Federal prosecutors charged him and his son, Steven Reed,[1] with conspiracy to commit wire fraud and

[1] When our discussion involves both appellants, we will refer to them by their full names. When it involves only one appellant, as in the case of the counts only charged against Walter Reed, we will refer to him as "Reed" where context makes the referent clear.

money laundering and substantive counts of both wire fraud and money laundering. Walter Reed also drew additional counts of wire fraud, false statements on income tax returns, and mail fraud. The jury convicted on all but one count, and both defendants appeal. We vacate and remand the district court's imposition of joint and several liability for monetary forfeiture, but otherwise affirm.

I

The Reeds were indicted on nineteen counts.[2] While overlapping in certain ways, the counts fall into three categories.

The first set of counts were drawn from both defendants' use of Walter Reed's District Attorney campaign funds. The prosecution argued that Walter Reed solicited funds from donors on the premise that those funds would be used to facilitate his reelection, but instead used them for personal expenses unrelated to his campaign or the holding of public office—on multiple occasions, hiring Steven Reed to perform work at prices that did not correspond to the services provided. The defendants responded that each allegation had an innocent explanation.

Count 1 alleged that the Reeds conspired to engage in wire fraud and money laundering by funneling campaign funds to Steven Reed. The indictment

[2] The prosecution filed an eighteen-count indictment, amending to add a count.

described 21 overt acts on behalf of the conspiracy, linked to three distinct events. First, Walter Reed paid Steven Reed about $14,000 in campaign funds for producing an anti-drug service announcement worth only $2,000. Second, Walter Reed paid Steven Reed's company, Globop, about $550 for bar services at a "housewarming party" unrelated to the campaign.[3] And third, Walter Reed paid Steven Reed's other company, Liquid Bread, to provide "Bar Services: Beverages and Liquor" at a campaign event featuring the band America, the "America Event." The prosecution presented evidence that Liquid Bread only provided bar services and did not provide alcohol at the event, but that Walter Reed nonetheless paid Steven Reed $12 per person for 2,450 people. The prosecution also alleged that Walter Reed suggested to two other companies providing services at the America Event that they each pay Steven Reed $5,000 out of the amount Walter Reed's campaign had paid them, but that he did not disclose either $5,000 payment on his campaign finance reports. After receiving payment from the America Event, Steven Reed paid down a loan for which Walter Reed was the guarantor and on which Steven Reed had begun to incur late charges. Counts 7, 9, and 10 alleged that both defendants committed wire fraud and money laundering related to the America Event.

Counts 2-6 and 8 dealt with Walter Reed's additional use of campaign funds for personal expenditures. The prosecution alleged that Reed spent

[3] As we discuss, the district court ultimately declined to impose forfeiture on this payment.

campaign funds to purchase dinners, restaurant gift cards, and flowers—all for non-campaign purposes. It further alleged that he used campaign funds to pay for dinners with Pentecostal pastors and their families, then used those dinners to recruit referrals for the private legal practice he operated concurrently with his District Attorney service. As the prosecution explained, on one occasion, Walter Reed used campaign funds to host one of these dinners, requested that his firm reimburse him because he obtained a referral during the dinner, and then kept the reimbursement for himself until the investigation was underway.[4] It presented evidence at trial that the same pastor who gave Walter Reed the referral sought a "referral fee" in the form of a contribution to a church gymnasium, and after his firm declined to provide that fee, Walter Reed "donated" $25,000 of campaign funds for a church gymnasium.

The jury convicted both defendants of all counts related to use of Walter Reed's campaign funds, except for one money laundering count involving a $5,000 payment to Steven Reed at the America Event.

The second broad category of counts, counts 11-14, alleged that Walter Reed underreported income on his tax returns, including for failing to report campaign funds he had converted to personal use. The prosecution contended that Reed owed the Internal Revenue

[4] Walter Reed contends that this was an inadvertent mistake.

Service about $40,000 in unpaid taxes. The jury convicted Walter Reed of all tax counts.

The final category of counts, counts 15-19, alleged mail fraud related to Walter Reed's representation of St. Tammany Parish Hospital. The prosecution presented evidence that the Hospital entered into a representation agreement with the District Attorney's office, but that from 1994 to 2014, Reed began depositing checks meant for the D.A.'s office into a personal bank account for a business entity he owned with his ex-wife, "Walter Reed Old English Antiques." It argued that the Hospital intended to enter into a relationship with the D.A.'s office, not with Reed in his personal capacity. The prosecution presented evidence that Reed was aware that the Hospital Board had repeatedly reaffirmed the *D.A.'s office*'s designation as special counsel, and that Reed sent another attorney from the D.A.'s office when he was unable to attend Board meetings. It also presented testimony that in response to press inquiries, Reed asked one assistant district attorney who often attended meetings in his place to sign a false affidavit that Reed offered to pay him to attend. Reed's defense was that there was a misunderstanding, and that he had been under the impression that the Hospital began retaining him in his personal capacity in 1994. The jury also convicted Reed of all mail fraud counts.

The district court sentenced Walter Reed to a below-guidelines term of imprisonment of 48 months, and Steven Reed to a below-guidelines term of probation. It ordered Walter Reed to pay a $15,000 fine and

$605,244.75 in restitution. It also imposed forfeiture of $46,200 jointly and severally against both defendants, and of $609,217.08 solely against Walter Reed. In determining how much forfeiture to impose, the district court declined to impose forfeiture for the "housewarming party" that the prosecution had identified as one of the 21 overt acts supporting the conspiracy count.[5] Because the court concluded that there was sufficient evidence of other overt acts to support the conspiracy charges, however, this affected the forfeiture amount but not the defendants' conspiracy convictions.

The Reeds raise several distinct issues on appeal. We reject all but one: the imposition of joint and several forfeiture liability.

II

One of the principal arguments of the Reeds is that in prosecuting offenses drawn from misuse of Walter Reed's D.A. campaign funds,[6] the jury was asked to convict the Reeds of violation of campaign

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[5] The district court concluded that the event appeared to have been "squarely political," since it was attended by Walter Reed's political supporters and he gave a speech or toast.

[6] This argument relates to counts 1-10 (alleging conspiracy and substantive offenses related to misuse of the campaign funds) and counts 11-14 (alleging false tax statements, in part through failure to report income diverted from the campaign funds).

finance law, a denial of due process and "federalism."[7] We review here *de novo,*[8] and reject the contention.

The Reeds chiefly rely on the Supreme Court's decision in *McDonnell v. United States,*[9] which was issued after trial but before the district court denied the Reeds' post-trial motions for judgment of acquittal.[10] It called on the Supreme Court to interpret "official act" in the federal bribery statute 18 U.S.C. § 201—"any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit."[11] The Court declined to read the definition broadly, determining that

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[7] The district court limited references to state campaign finance law, concluding that they effectively alleged a scheme not charged in the indictment to defraud the public, not just donors, and the Louisiana Board of Ethics.

[8] *See, e.g.*, *United States v. Petras*, 879 F.3d 155, 166 (5th Cir. 2018) (explaining that we review *de novo* whether a federal statute permissibly covers certain conduct). Walter Reed frames this issue as raising due process and federalism concerns, and Steven Reed echoes the same points, though Steven Reed also appears to argue that this presents an issue for the sufficiency of the evidence. Through any of these lenses, our standard of review on the point is still *de novo.*

[9] 136 S. Ct. 2355 (2016).

[10] The district court allowed Walter Reed to file a supplemental memorandum to address *McDonnell.*

[11] While the relevant portion of the *McDonnell* charges involved honest services fraud under 18 U.S.C. §§ 1343 and 1349 and Hobbs Act extortion under 18 U.S.C. § 1951(a), the parties had agreed to interpret those statutes with reference to the bribery statute. *McDonnell*, 136 S. Ct. at 2365.

the phrase "official act" implicated only a limited set of decisions or actions "involv[ing] a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee."[12]

Focusing on statutory text and precedent, the Court also noted "significant constitutional concerns" with a broader reading bringing a risk of "a pall of potential prosecution" over relationships between public officials and their constituents, reminding that it could not "construe a criminal statute on the assumption that the Government will use it responsibly."[13] Relatedly, the Court observed that "the term 'official act' is not defined 'with sufficient definiteness that ordinary people can understand what conduct is prohibited,' or 'in a manner that does not encourage arbitrary and discriminatory enforcement' "—implicating due process concerns.[14] And, finally, it identified "significant federalism concerns" attending a reading of "official act" that "involves the Federal Government in setting standards of good government for local and state officials."[15]

While honest services fraud and the definition of "official act" in the bribery statute are not at issue

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[12] *Id.* at 2371-72.

[13] *Id.* at 2372-73 (internal quotation marks omitted).

[14] *Id.* at 2373 (quoting *Skilling v. United States*, 561 U.S. 358, 402-03 (2010)).

[15] *Id.* (quoting *McNally v. United States*, 483 U.S. 350, 360 (1987)) (internal quotation marks omitted).

here,[16] the Reeds argue that *McDonnell* does control; that as with the *McDonnell* prosecution's reliance on the term "official act," this case hinged on the interpretation of Louisiana campaign finance law's prohibition on the use of campaign funds for purposes unrelated to the campaign or the holding of public office.[17] The prosecution offered testimony from the CPA who prepared Walter Reed's campaign disclosure reports and from Kathleen Allen, Ethics Administrator and General Counsel to Louisiana's Board of Ethics.[18] It also offered testimony from Walter Reed's campaign contributors—alleged victims of the wire fraud—stating that they had expected their contributions to be spent on reelection activities.[19] The Reeds aver that these witnesses and the rest of the prosecution's strategy evidenced a prosecutorial reliance on what Louisiana campaign finance law did or did not prohibit, which was both unconstitutionally vague and inserted the federal

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[16] Walter Reed suggests that the prosecution impermissibly reinfused honest services fraud into the case. As we will explain, the prosecution's evidence spoke to mens rea and donor expectations—not to the further question of whether Walter Reed violated campaign finance law or committed honest services fraud.

[17] *See* La. R.S. § 18:1505.2(I)(1).

[18] We discuss later in this opinion whether the district court improperly limited the testimony of a witness the Reeds offered to respond to Allen's testimony.

[19] One witness testified that he donated to Walter Reed's campaign fund "[t]o help him—support him to get reelected," and that he expected the funds to be used "[f]or reelection, signs, TV ads, rallies." Another witness testified she expected the funds to be used for "what campaigns usually do." A third testified that he expected the funds to be used "[j]ust for his campaign, advertisements."

government into enforcement of state law—in contravention of *McDonnell*.

The argument fails: to the extent that the prosecution pointed to Louisiana campaign finance law, it did so only to prove non-honest-services wire fraud and related offenses, a different context from *McDonnell*. The jury was tasked with determining whether the defendants committed simple wire fraud by defrauding Reed's donors.[20] The government was not required to prove that the defendants ran afoul of Louisiana campaign finance law, in contrast to *McDonnell*, where the troublesome concept of an "official act" was agreed to be an element of the honest services fraud and Hobbs Act charges.[21]

As a result, the Reeds' due process arguments are without merit. We agree with the district court that the conspiracy and wire fraud statutes at issue do not

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[20] The fact that the donors were alleged victims differentiates the Reeds' case from our decision in *United States v. Ratcliff*, 488 F.3d 639 (5th Cir. 2007), which involved a mail fraud conviction based on the defendant's procurement of loans to support his parish presidency campaign in violation of state campaign finance law. We held that the prosecution had not shown a scheme to defraud the parish just by showing that if the defendant had been reelected, he would have been eligible for financial benefits like a salary. *Id.* at 645. Since those financial benefits would have gone to the winning candidate regardless of who that candidate was, the defendant's activities could not be said to be part of a scheme to defraud the parish of money or property. *Id.* As the district court observed in this case, federalism was not the basis for *Ratcliff*'s holding or for the Supreme Court's holding in *Cleveland v. United States*, 531 U.S. 12 (2000), which the Reeds also cite.

[21] *See McDonnell*, 136 S. Ct. at 2365-66.

suffer the difficulties of "technical interpretation" of "official act," as in *McDonnell*; and so are unattended by its vagueness concerns.[22] Our recent decision in *United States v. Hoffman* is instructive. There, we reviewed convictions for wire and mail fraud related to filings and reports made in attempting to obtain state tax credits for film production.[23] We concluded that prosecution for those offenses did not raise vagueness concerns—"lying to cheat another party of money has been a crime since long before Congress passed the first mail fraud statute making it a federal offense in 1872."[24] In *Hoffman*, "[t]he government did not have to prove violations of state law," but instead, "[t]he elements the jury had to find included terms like misrepresentations and property that have deep roots in both criminal and civil law."[25] Here too, the jury was not called upon to interpret technical federal statutes or even elements of Louisiana's campaign finance law—it was asked to determine whether the Reeds had committed fraud.

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[22] *See United States v. Curry*, 681 F.2d 406, 410 (5th Cir. 1982) ("As a learned judge of this Circuit once remarked in regard to the mail fraud statute, '[t]he law does not define fraud; it needs no definition; it is as old as falsehood and as versatile as human ingenuity.' ") (quoting *Weiss v. United States*, 122 F.2d 675, 681 (5th Cir. 1941)); *accord United States v. Hoffman*, 901 F.3d 523, 541 (5th Cir. 2018).

[23] *Hoffman*, 901 F.3d at 531-36.

[24] *Id.* at 540. We observed that in contrast, the "honest services aspect of mail fraud" may permissibly give rise to vagueness challenges. *Id.*

[25] *Id.* at 540-41.

We also conclude that the Reeds' prosecution did not impermissibly step on principles of federalism. *McDonnell* concerned a statute that, read broadly, might chill permissible official-constituent interactions.[26] While the Supreme Court's narrow reading was informed by a broader reading's challenge to principles of federalism,[27] it did not suggest that federal criminal law may never overlap with state regulation of governmental activity. We agree with the district court that "the federal government, in this case, enforced federal law—namely the federal fraud statute—and used state law only to prove *mens rea* and donor expectations."[28] While state governments certainly have "the

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[26] *McDonnell*, 136 S. Ct. at 2372 ("In the Government's view, nearly anything a public official accepts—from a campaign contribution to lunch—counts as a *quid*[;] and nearly anything a public official does—from arranging a meeting to inviting a guest to an event—counts as a *quo*. . . . [Under the Government's position, officials] might wonder if they could respond to even the most commonplace requests for assistance, and citizens with legitimate concerns might shrink from participating in democratic discourse."). Walter Reed urges similar concerns about a chilling effect on Louisiana politicians' use of campaign funds. As we explain, a candidate may present evidence of his or her understanding of state campaign finance law to support an argument that he or she lacked mens rea to commit fraud. Here, the jury evidently rejected Walter Reed's avowals that he lacked the requisite mens rea.

[27] *Id.* at 2372-73.

[28] As the district court observed, "[i]n this case, the jury heard a plethora of evidence, including evidence about Louisiana state campaign finance law, W. Reed's CFDA submissions, and testimony from donors and others who knew W. Reed. Ultimately, despite W. Reed's testimony and evidence suggesting his expenditures

prerogative to regulate the permissible scope of interactions between state officials and their constituents,"[29] those state officials simultaneously must comply with federal fraud statutes.[30] In other words, if Reed's expenditures were legal under state law, the funding for the expenditures could nonetheless have been obtained fraudulently under federal law—and if Reed's expenditures were illegal under state law, the federal fraud prosecution did not substitute for any discipline under state campaign finance law.[31]

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were, or he believed they were, legal and appropriate, the jury disagreed and found him guilty."

[29] *McDonnell*, 136 S. Ct. at 2373.

[30] We considered a similar issue in *United States v. Curry*, which in relevant part involved a defendant's mailing of false campaign finance reports. We recognized there that "[t]he same conduct could also give rise to charges of state law violations," but "the fact that a scheme may violate state laws does not exclude it from the proscriptions of the federal mail fraud statute." *Curry*, 681 F.2d at 411 n.11 (alteration omitted); *cf. United States v. Walker*, 490 F.3d 1282, 1299 (11th Cir. 2007) (rejecting federalism concerns where "[t]he claims against [the defendant] were not predicated on any violation of state law" and "the jury instructions specifically cautioned jurors *not* to decide whether [the defendant] violated any state law, but to consider those laws only to the extent that the evidence indicated an intent to commit fraud on [the defendant's] part"). We do not read *McDonnell* or other cases to require otherwise.

[31] This point is born out in this case. Prosecution witnesses who had donated to Walter Reed's campaign testified that they had expected their donations to be used for *campaign* activities. The defendants argue that some of the expenditures, while not used for campaigning purposes per se, were nonetheless permissible under Louisiana law because they were related to the "holding of public office." While the defense elicited testimony from the prosecution donor witnesses that they solely expected their

We pause to observe that our holding here is consistent with our fellow circuits' reluctance to extend *McDonnell* beyond the context of honest services fraud and the bribery statute, even where prosecutions involved local or state government officials.[32] This is not to say that the federalism or vagueness concerns raised in *McDonnell* could never have teeth beyond the specific statutes *McDonnell* interpreted, but rather that *McDonnell* should not be taken to prohibit prosecution for any federal crime that overlaps or intersects with state law or local governance.

III

The Reeds further raise a host of claimed errors in the district court's conducting of the trial. We will

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donations to be spent in accordance with Louisiana campaign laws, those same donors had previously testified that they expected their donations to be used toward typical political campaign expenditures. One donor denied that she solely expected her donation to be spent in accordance with state law, instead stating that "if you ask for money for a campaign, it should be used that way," regardless of state law. The wire fraud counts did not hinge on state law; instead, they hinged on whether the jury could determine fraud had occurred.

[32] *See United States v. Maggio*, 862 F.3d 642, 646 n.8 (8th Cir. 2017) (declining to apply *McDonnell* to prosecution under 18 U.S.C. § 666, which criminalizes theft or bribery concerning programs receiving federal funds); *United States v. Ferriero*, 866 F.3d 107, 128 (3d Cir. 2017) (declining to apply *McDonnell* to a state bribery statute that served as a predicate offense for a defendant's Travel Act and RICO convictions); *cf. United States v. Jackson*, 688 F. App'x 685, 695-96 nn.8, 9 (11th Cir. 2017) (observing that the issue was waived, but concluding that *McDonnell* did not apply to the same statute at issue in *Maggio*).

address the points of error, ultimately rejecting each of them.[33]

A

Steven Reed contends that the district court should have severed his case from Walter Reed's, and Walter Reed contends that the district court should have severed the Hospital counts from the other counts. Federal Rule of Criminal Procedure 8 provides for joinder of defendants and offenses. Federal Rule of Criminal Procedure 14(a) allows a court to sever a trial if joinder appears to prejudice a defendant. "We review the denial of a motion to sever a trial under the

[33] Walter Reed frames these issues as relevant to his constitutional right to present a complete defense. This requires him to show that "the excluded evidence is indispensable to the theory of defense; and the district court fails to provide a rational justification for its exclusion." *United States v. Kuhrt*, 788 F.3d 403, 421 (5th Cir. 2015). The Supreme Court has suggested that the right to present a complete defense is rarely violated when a court excludes defense evidence under a rule of evidence. *See Nevada v. Jackson*, 569 U.S. 505, 509 (2013) (per curiam) (discussing state rules of evidence and distinguishing cases where a rule "did not rationally serve any discernable purpose" or "could not be rationally defended," or where the state "did not even attempt to explain the reason for its rule"). Because we conclude that the district court had rational justifications for excluding the relevant pieces of evidence, we also conclude that Reed's right to present a complete defense was not violated. *Cf. United States v. McGinnis*, 201 F. App'x 246, 252 (5th Cir. 2006) (per curiam) (holding that the right to present a complete defense was not violated where the district court concluded that proffered testimony would not assist the jury).

'exceedingly deferential' abuse of discretion standard."[34] Giving the district court the deference due, we find no abuse of discretion in its denial of both defendants' motions to sever.

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"[T]he federal judicial system has a preference for joint trials of defendants who are indicted together,"[35] and "[a] defendant is not entitled to severance just because it would increase his chance of acquittal or because evidence is introduced that is admissible against certain defendants."[36] We have held that "[m]erely alleging a spillover effect—whereby the jury imputes the defendant's guilt based on evidence presented against his co-defendants—is an insufficient predicate for a motion to sever."[37] Instead, a defendant "must prove that: (1) the joint trial prejudiced him to such an extent that the district court could not provide adequate protection; and (2) the prejudice outweighed the government's

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[34] *United States v. Chapman*, 851 F.3d 363, 379 (5th Cir. 2017) (quoting *United States v. Whitfield*, 590 F.3d 325, 355 (5th Cir. 2009)) (discussing a motion to sever defendants); *see United States v. Mays*, 466 F.3d 335, 340 (5th Cir. 2006) (applying the abuse-of-discretion standard to a motion to sever counts).

[35] *Chapman*, 851 F.3d at 379 (internal quotation marks omitted). Steven Reed does not allege on appeal that he was improperly charged in the same indictment as Walter Reed.

[36] *Burton v. United States*, 237 F.3d 490, 495 (5th Cir. 2000) (citing *Zafiro v. United States*, 506 U.S. 534, 540 (1993)).

[37] *Chapman*, 851 F.3d at 379 (internal quotation marks omitted).

interest in economy of judicial administration."[38] Severance is proper "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence."[39]

Turning to Steven Reed's trial with his father, he has not made the required showings. He argues that the joint trial prejudiced him because he was only charged in 4 of the 19 counts presented at trial and was prejudicially associated with Walter Reed's convictions on the other counts. But he has failed to establish that the district court's limiting instructions were inadequate protection against the harms he identifies.[40] The

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[38] *United States v. Rodriguez*, 831 F.3d 663, 669 (5th Cir. 2016) (internal quotation marks omitted).

[39] *United States v. Mitchell*, 484 F.3d 762, 775 (5th Cir. 2007) (quoting *Zafiro*, 506 U.S. at 539).

[40] *See Rodriguez*, 831 F.3d at 669 ("[The defendant] must show that the instructions to the jury did not adequately protect him from any prejudice resulting from the joint trial." (alterations omitted)); *see also United States v. Matthews*, 178 F.3d 295, 299 (5th Cir. 1999) (considering limiting instructions similar to the ones offered here and holding that, "[a]ssuming without deciding that the Defendants' defenses were mutually antagonistic, the court's limiting instructions were sufficient to cure any prejudice").

Steven Reed points to our decision in *United States v. McRae*, 702 F.3d 806 (5th Cir. 2012), where we reversed a district court's refusal to sever one police officer's officer-involved shooting trial from the trial of a set of other police officers who separately attempted to cover up the shooting. Unlike in *McRae*, the evidence presented against Walter Reed on the counts only pertaining to him (the tax return, mail fraud, and certain wire fraud counts) was not so inflammatory that the jury would find it highly difficult to dissociate it from Steven Reed's conduct. *See id.* at 828.

court directed the jury to consider each defendant's case separately and to give separate consideration to the evidence as to each defendant.[41] Steven Reed only offers a conclusory assertion that despite this instruction, the jury could not separately consider the evidence as to each defendant. This is not a showing that the district court abused its discretion.[42]

Steven Reed's other arguments for severance speak more to his ability to present a defense, and arguably could not be cured by a limiting instruction. He claims that he was prejudiced because his separate counsel was not conflict free and declined to raise certain defenses that would have aided Steven Reed but

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Further, the charge and evidence against Steven Reed was significantly related to the charge and evidence against Walter Reed on the campaign funds counts, whereas in *McRae*, two sets of defendants were effectively being tried for two completely different offenses and the only link was that one offense was the "catalyst" for the other. *See id.* at 821-23.

[41] In relevant part, the district court provided the following instructions:

> A separate crime is charged against one or both of the defendants in each of the counts of the indictment. Each count and the evidence pertaining to it should be considered separately. The case of each defendant should be considered separately and individually. The fact that you may find one of the accused guilty or not guilty of any of the crimes charged should not control your verdict as to any other crime or any other defendant. You must give separate consideration to the evidence as to each defendant.

[42] We generally presume that juries follow trial court instructions. *See, e.g.*, *United States v. Posada-Rios*, 158 F.3d 832, 864 (5th Cir. 1998).

put his father in a negative light.[43] As Steven Reed did not adequately develop this argument before the trial court, we will not hold here that the district court abused its discretion in denying his motion to sever.[44] He also claims that his father's testimony was a core portion of his defense, but that once evidence emerged in the trial of the Hospital counts that Walter Reed had asked an assistant District Attorney to lie on his behalf, Walter Reed's credibility as a witness was effectively impeached.[45] Here too, Steven Reed has not

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[43] Specifically, Steven Reed claims that he would have testified that his father told him what to put on the public service announcement invoice and instructed him how to respond to the reporter asking about whether he provided alcohol at the America Event, and that he believed the $5,000 payment he received from a caterer at the America Event was a tip for hard work, but that his attorney—who was hired by Walter Reed on Steven Reed's behalf—refused to voice these defenses.

[44] "The general rule in the Fifth Circuit is that Sixth Amendment ineffective assistance of counsel claims are not reviewed on direct appeal unless they were 'adequately raised in the trial court.' In order to provide competent review of such claims, the appellant must develop the record at the trial court." *United States v. Cervantes*, 706 F.3d 603, 621 (5th Cir. 2013) (quoting *United States v. Stevens*, 487 F.3d 232, 245 (5th Cir. 2007)) (internal citation omitted). Steven Reed filed a four-page affidavit with his motion for judgment of acquittal, stating that he had told his attorney information that would have exculpated him but negatively impacted his father's case, and that he urged the attorney to ask his father about these instances on cross-examination, but the attorney declined to do so. His sentencing counsel further raised this issue, but no further evidence was developed, such as through an evidentiary hearing.

[45] The crux of Steven Reed's argument here is effectively that the jury was exposed to extrinsic evidence of specific dishonest acts taken by Walter Reed, which otherwise would have been barred by Federal Rule of Evidence 608(b) if Walter Reed had

presented specific reason to believe that if the jury had not been aware of Walter Reed's alleged dishonesty related to the Hospital counts, it would have credited his testimony differently or reached a different outcome—he simply asserts without further explanation that Walter Reed's testimony was central to his defense, and that evidence emerging from the Hospital counts impeached that testimony. In sum, we cannot conclude that the district court abused its discretion in not severing Steven Reed's trial from all or part of Walter Reed's, especially given the strong preference for joint trials and the fact that joint trials have significant benefits that go beyond efficiency.[46]

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Walter Reed, in turn, urges us to hold that the district court should have severed the Hospital counts

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simply been a testifying witness at Steven Reed's separate trial. This was not directly addressed by the limiting instruction; Steven Reed's argument on this point is not that the jury held his father's offenses against him, but rather that the most convincing evidence he had in his favor was his father's testimony, and the jury may separately have been compelled to conclude that his father was not credible.

[46] "Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability—advantages which sometimes operate to the defendant's benefit. Even apart from these tactical considerations, joint trials generally serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts." *Richardson v. Marsh*, 481 U.S. 200, 210 (1987).

from the other counts.[47] Joinder of counts is justified when there is "a series of acts unified by some substantial identity of facts or participants."[48] Because "[j]oinder of charges is the rule rather than the exception," in order to justify severance of counts a defendant must show "clear, specific and compelling prejudice that resulted in an unfair trial."[49] As with joinder of defendants, "the mere presence of a spillover effect does not ordinarily warrant severance."[50] The district court found that all of the counts in the indictment were properly joined because they were "part of a common series of transactions with a singular purpose—to exploit Walter Reed's influence as district attorney for personal financial betterment." It also found that "[t]o enrich himself, Defendant Walter Reed employed a singular means—fraud." Walter Reed alleges a general spillover effect whereby the prosecution conflated his alleged violation of the public trust in the Hospital counts with his misuse of *non*public campaign funds in the campaign funding counts. But he has not adequately explained why, especially in light of the district court's limiting instructions to the jury to consider each count and the corresponding evidence on each

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[47] In contrast, Steven Reed suggests that the court should have severed the campaign fund counts—the only counts under which he was charged—from the tax and Hospital counts. Because this is effectively an extension of his argument to sever defendants, we do not address it further.

[48] *McRae*, 702 F.3d at 820.

[49] *United States v. Bullock*, 71 F.3d 171, 174 (5th Cir. 1995).

[50] *United States v. Simmons*, 374 F.3d 313, 318 (5th Cir. 2004) (per curiam).

count separately, he suffered "clear, specific, and compelling" prejudice resulting in an unfair trial. We conclude that the district court did not abuse its discretion in denying the motion to sever counts.

B

The defendants contend that at trial, the district court made a series of erroneous evidentiary rulings. The district court did not abuse its broad discretion on these rulings.[51]

1

Both appellants contend that the district court improperly limited the expert testimony of Gray Sexton, a former Louisiana Board of Ethics general counsel.[52] The district court initially excluded Sexton's proffered testimony in its entirety, but later allowed Sexton to offer limited testimony in response to Kathleen Allen, a prosecution witness who testified to certain aspects of campaign finance law. The court observed that it had thought Allen would primarily explain aspects of Walter Reed's campaign finance reports, but because

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[51] *See, e.g.*, *Williams v. Manitowoc Cranes, L.L.C.*, 898 F.3d 607, 615 (5th Cir. 2018) ("This court applies a 'deferential abuse of discretion standard' when reviewing a district court's evidentiary rulings.' " (quoting *Heinsohn v. Carabin & Shaw, P.C.*, 832 F.3d 224, 233 (5th Cir. 2016)).

[52] Only Walter Reed raised this issue before the district court, but Steven Reed adopts it in his briefing as part of his argument that if Walter Reed's conviction should be reversed, so too should his.

she ultimately testified to her opinions on what the campaign finance laws required, Sexton should be allowed to respond. The Reeds argue that further "custom and practice" testimony from Sexton was critical to demonstrate that Walter Reed had a good faith belief that he was in compliance with Louisiana law involving "dual purpose" campaign expenditures, so limiting Sexton's testimony also impermissibly limited their ability to present a defense.

A district court has "wide latitude" and "broad discretion" to exclude expert testimony.[53] We will not disturb the court's exercise of its discretion to exclude such testimony unless the exclusion was "manifestly erroneous"—that is, unless it "amounts to a complete disregard of the controlling law."[54] The district court found that Sexton's proffered "custom and practice" evidence about the Ethics Board's treatment of campaign fund expenditures was not relevant to Walter Reed's state of mind or other issues in the case, since there was no suggestion that Walter Reed had been aware of the facts on which Sexton would testify, and that Sexton's testimony would not help the jury understand the core issue of fraud.[55] We see no manifest error in

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[53] *See, e.g.*, *Williams*, 898 F.3d at 615 (alteration omitted).

[54] *Id.*; *see Kuhrt*, 788 F.3d at 418.

[55] *See* Fed. R. Evid. 702(a) (permitting expert testimony only if it will "help the trier of fact to understand the evidence or to determine a fact in issue"). For similar reasons, we conclude that Sexton's testimony was not "indispensable to the theory of defense," as Walter Reed would have to show in order to prove that the district court restricted his right to present a complete defense. *See Kuhrt*, 788 F.3d at 421.

the exclusion, especially because, as we have explained, this was not a trial of campaign finance violations.[56]

2

Walter Reed further argues that the district court erred in admitting certain statements by Steven Reed discussing the America Event. In 2014, Steven Reed was approached over a social networking site by a news reporter, who asked him whether he had the proper license to provide catering services to Louisiana political campaigns between 2009 and 2012. They conversed online, and Steven Reed told the reporter that he did not require a catering license because he did not provide food or purchase or transport alcohol, but rather only provided bar setup services—including at the America Event. These statements were admitted in trial, apparently against both defendants. Walter Reed contends that under the Sixth Amendment's Confrontation Clause and *Bruton v. United States*, these statements could only be admitted against him if Steven Reed testified at the trial. While he raised other challenges to the admission of Steven Reed's statements before the district court, including that they were inadmissible hearsay as offered against him and that they violated other elements of the Confrontation Clause, he does not present those arguments here, and

[56] *Cf. United States v. Herzog*, 632 F.2d 469, 473 (5th Cir. 1980) (affirming the district court's decision to exclude a tax expert's testimony where it was not relevant to whether the defendant's tax crimes were willful).

has therefore waived them on appeal.[57] We review alleged Confrontation Clause violations *de novo*, but subject to a harmless error analysis.[58]

The *Bruton* doctrine "addresses the thorny Sixth Amendment problem where one defendant confesses out of court and incriminates a co-defendant without testifying at their joint trial."[59] The Supreme Court held that in such a case, the declarant's confession presents such a "powerfully incriminating extrajudicial statement[]" that a limiting instruction alone cannot safeguard the co-defendant's Sixth Amendment rights.[60] But the Court has since clarified that *Bruton*

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[57] Arguably, Steven Reed's statements *were* inadmissible hearsay as offered against Walter Reed; while they appeared to come in under Rule 801(d)(2)(A)'s exception for party-opponent statements, that exception allows the admission of statements made or adopted *by the defendant* or made on his behalf, for example by a co-conspirator speaking in furtherance of the conspiracy. *See* Fed. R. Evid. 801(d)(2)(E). Steven Reed's statements, made years after the America Event, could not be said to have been made on Walter Reed's behalf or in furtherance of their conspiracy, as would have been required under Rule 801(d)(2)'s exceptions to hearsay. But because Walter Reed does not present this issue in his briefing, we take him to have waived it. *See, e.g.*, *Willis v. Cleco Corp.*, 749 F.3d 314, 319 (5th Cir. 2014).

To the extent that Walter Reed argues a separate Confrontation Clause issue in his reply brief, we agree with the district court that Steven Reed's statements were not testimonial under the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004).

[58] *See, e.g.*, *United States v. Ramos-Cardenas*, 524 F.3d 600, 606 (5th Cir. 2008) (per curiam).

[59] *United States v. Gibson*, 875 F.3d 179, 194 (5th Cir. 2017).

[60] *Bruton v. United States*, 391 U.S. 123, 135-36 (1968).

applies only to facially inculpatory statements—and not to statements that only become inculpatory "when linked with evidence later introduced at trial."[61] It has explained that non-facially-inculpatory statements are less likely to inexorably steer a jury into disregarding limiting instructions, not to mention the practical impossibility of predicting in advance what statements might *become* inculpatory when coupled with other evidence presented at trial.[62]

We have some doubt about whether *Bruton* presents the appropriate lens for Walter Reed's objection,[63] but at a minimum, *Bruton* does not apply here because Steven Reed's statements did not facially inculpate Walter Reed. Steven Reed told the reporter that he had not provided alcohol at the America Event. For Steven Reed's statements to inculpate Walter Reed, the prosecution needed to link the statements to

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[61] *See Richardson*, 481 U.S. at 208; *accord Gibson*, 875 F.3d 179, 194-95 (5th Cir. 2017).

[62] *See Richardson*, 481 U.S. at 208-09.

[63] *Bruton* dealt with a statement that was only admitted against the declarant-defendant, but not against his co-defendant, as will often be the case when a statement is admitted as a party-opponent statement in a trial involving multiple defendants. *See Bruton*, 391 U.S. at 124-25. It does not prevent statements from being admitted against the non-declarant co-defendant when they are otherwise admissible. Here, the more central question appears to be whether the statement was directly admissible against Walter Reed in the first instance—that is, whether the statement was inadmissible hearsay as offered against him, or whether even if it was not inadmissible hearsay, admitting it against him violated his Confrontation Clause rights where Steven Reed did not take the stand. But Walter Reed raises neither of these issues on appeal, as we have discussed, focusing solely on the *Bruton* issue.

other evidence presented at trial: it had to prove that Walter Reed knew that his son did not provide the alcohol, and that a payment of $12 per person was not commensurate with the services that Steven Reed provided. Where there was this degree of attenuation between the statement and its inculpatory value, introducing the statement did not violate *Bruton*.

Walter Reed raises other concerns about the introduction of the conversation, which we will not address in detail. We agree with the district court that, especially since the parties had previously stipulated to the authenticity of the documents, the district court did not err in allowing a Federal Bureau of Investigation financial analyst to read the record of the conversation out loud at trial.[64] As for the introduction of the reporter's statements in conversation with Steven Reed, the district court instructed the jury not to consider her statements for their truth, and Walter Reed offers no argument for why this limiting instruction was insufficient to cure any prejudice.[65]

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[64] *See United States v. Isiwele*, 635 F.3d 196, 200 (5th Cir. 2011) ("Once the proponent has made the requisite showing, the trial court should admit the exhibit in spite of any issues the opponent has raised about flaws in the authentication. Such flaws go to the weight of the evidence instead of its admissibility." (alteration omitted)).

[65] *See United States v. Jones*, 873 F.3d 482, 496 (5th Cir. 2017) (holding that when a defendant's statements on a phone call were admitted as party-opponent statements under Rule 801(d)(2)(A), "the other call participants' statements were admissible to provide context" (citing *United States v. Dixon*, 132 F.3d 192, 199 (5th Cir. 1997)).

3

Finally, Walter Reed argues that the district court prevented him from presenting a complete defense to the Hospital counts because it barred his proffered testimony about statements by deceased St. Tammany Parish Hospital Chairman, Paul Cordes. Reed had sought to testify and offer evidence about a conversation he had with Cordes in 1994, in which allegedly Cordes arranged for Walter Reed to represent the Hospital in his personal capacity rather than his capacity as District Attorney. The district court excluded this testimony as presenting inadmissible hearsay.

The first question is whether Cordes's statements were hearsay, that is, an out-of-court statement offered to prove the truth of the matter asserted.[66] We review *de novo* the district court's legal conclusion about whether a statement is hearsay.[67] Ordinarily, a statement is not hearsay if it is offered to prove the statement's effect on the listener.[68] Reed contends that he did not offer Cordes's statements to prove that Cordes actually arranged for him to represent the Hospital personally, but rather as evidence supporting his belief that he had begun representing the Hospital personally. The line was fuzzy, however, as to whether Reed truly sought to admit Cordes's statements solely to

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[66] *See* Fed. R. Evid. 801(c).

[67] *See French v. Allstate Indem. Co.*, 637 F.3d 571, 578 (5th Cir. 2011).

[68] *See, e.g.*, *White v. Fox*, 470 F. App'x 214, 222 (5th Cir. 2012) (per curiam); *Mota v. Univ. of Tex. Hous. Health Sci. Ctr.*, 261 F.3d 512, 526 n.46 (5th Cir. 2001).

prove their impact on him, the listener, or whether he in fact sought to admit them for their truth. For example, after the district court excluded testimony about Cordes's statements, Reed attempted to offer the following statement, which the court directed the jury to strike: "It was my state of mind [that I was representing the Hospital in my personal capacity], and it was Paul Cordes'[s] state of mind too, I can tell you, from discussions with him." In light of the dual purposes for which Cordes's statements could have been wielded, we do not believe that the district court erred in concluding that Cordes's out-of-court statements were hearsay.

The issue was therefore whether the statements fell under an exception to hearsay, which Reed had the burden to establish.[69] He urges us to conclude that Cordes's statements should have been admitted under the residual exception to hearsay. We have been clear that the residual hearsay exception "is to be used only

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[69] *See* 30B *Federal Practice & Procedure Evidence* § 6803 (2018 ed.) ("The proponent of the [hearsay] statement, however, bears the burden of proving each element of a given exception or exclusion." (internal quotation marks omitted)). It is possible that Reed could have argued that Federal Rule of Evidence 803(3)'s exception for "[a] statement of the declarant's then-existing state of mind (such as motive, intent, or plan)" applied to Cordes's statements, if those statements described Cordes's intention to secure or confirm Reed's individual representation for the Hospital. Because Reed did not argue this issue and the parties have not briefed it, we do not consider it further, as Reed did not carry his burden of proving this hearsay exception.

rarely, in truly exceptional cases,"[70] and that the "lodestar" of the exception is whether a hearsay statement has "equivalent circumstantial guarantees of trustworthiness" relative to other hearsay exceptions.[71] Reed contends that Cordes's statements had equivalent circumstantial guarantees of trustworthiness because his wife was prepared to testify that she participated in the conversation and other evidence corroborated that Reed had begun representing the Hospital in his personal capacity. This misunderstands the nature of the residual exception. As we have explained, "[t]he determination of trustworthiness is drawn from the totality of the circumstances surrounding the making of the statement, but it cannot stem from other corroborating evidence."[72] Reed has not

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[70] *United States v. Walker*, 410 F.3d 754, 757 (5th Cir. 2005) (internal quotation marks omitted). "We will not disturb the district court's application of the exception absent a definite and firm conviction that the court made a clear error of judgment in the conclusion it reached. . . ." *Id.* (internal quotation marks omitted).

[71] *United States v. El-Mezain*, 664 F.3d 467, 498 (5th Cir. 2011) (quoting *Walker*, 410 F.3d at 758).

[72] *El-Mezain*, 664 F.3d at 498 (internal quotation marks omitted). The operative question is not whether the jury would have reason to believe that the conversation occurred, or even whether the jury would have reason to believe that Cordes's statement was independently likely to be true. The residual exception requires a showing that because of the context in which the statement was made, the usual rationales for the hearsay exception—that there is no opportunity for contemporary cross-examination of the *declarant*, so there is no way to illuminate whether the *declarant*'s statement was mistaken or deliberately false—apply with less force than usual. In other words, the issue was whether the jury could trust the truth of *Cordes's* hearsay statements, not

carried his burden to demonstrate that the circumstances *surrounding Cordes's statements* generated circumstantial guarantees of trustworthiness adequate to support their admission.

In any event, any error would have been harmless because the district court allowed Reed and his wife to testify extensively regarding Reed's reactions to the conversation. For example, Reed testified that "[a]fter a discussion with Mr. Cordes, [he] began attending the meetings in a personal capacity, and [he] began getting a check to Walter Reed." He further testified that he alerted the D.A. office manager that the D.A.'s office would no longer receive payment from the Hospital, and gave his office a memorandum to that effect. The district court also allowed Reed to introduce a letter, dated October 15, 1996, where he wrote to Cordes saying that while he had begun representing the Hospital two years prior, he had recently become aware that the board had never ratified his appointment as counsel. The letter attached a draft resolution for the Hospital Board to adopt; the defense also introduced a fax to Cordes's office dated October 21, 1996, also attaching a draft resolution. To the extent that Reed truly sought to introduce Cordes's statements to prove their impact on Reed as the listener, "the district court permitted [Reed] to elicit essentially the same (if not better) facts as those he originally proffered."[73] The jury's decision

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whether it could trust Walter Reed's recounting of those statements.

[73] *Gibson*, 875 F.3d at 193 (explaining that in such a case, there was no constitutional error in excluding evidence).

to nonetheless convict Reed on the Hospital counts is supported by the prosecution's contrary evidence that Reed was aware that the Hospital had never approved his appointment in a personal capacity, and that he sent members of the D.A.'s office to take his place at meetings without arranging for any additional compensation.

The district court did not commit reversible error in its conduct of the trial.

IV

Walter Reed separately argues that prosecutorial misconduct presents grounds for reversing his conviction. Much of his argument centers on a claim that the prosecution effectively amended the indictment during trial. We conclude that Reed has not alleged any material variance, constructive amendment, or other prosecutorial misconduct that would justify reversal.

In discussing the Hospital counts, the indictment stated that

> [i]t was further part of the scheme to defraud that in order to conceal the fact that he was taking money and property from the Office of the District Attorney for the 22nd Judicial District for the State of Louisiana, Walter P. Reed reported the funds that he diverted as income on his 'Tier 2' personal financial disclosure to the Louisiana Board of Ethics, and, in all but one year, as gross receipts on his personal income tax returns.

Based on an adding tape produced a month before trial, the prosecution ultimately determined that Reed had paid taxes on his Hospital legal fees every year, but that there had been a different $30,000 discrepancy on his tax reporting in 2009. The government contends that regardless of where the $30,000 discrepancy came from, it had not been properly reported on Reed's tax returns.[74] At trial, the prosecution amended its exhibits to reflect that the missing $30,000 came from a different source, rather than from the hospital.

Reed now argues that the government's case impermissibly diverged from the indictment. He appears to frame this as a constructive amendment issue, but it is more appropriately addressed under the framework of material variance, which occurs "when the proof at trial depicts a scenario that differs materially from the scenario challenged in the indictment but does not modify an essential element of the charged offense."[75] The parties differ on what standard of review is appropriate, since Reed did not raise this argument

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[74] While Walter Reed argues that this was a "CPA error mistaking a '4' for a '1,' " that argument was presented to the jury, but the jury evidently rejected it and convicted him on the relevant count.

[75] *United States v. Girod*, 646 F.3d 304, 316 (5th Cir. 2011). In contrast, a "constructive amendment occurs when the government changes its theory during trial so as to urge the jury to convict on a basis broader than that charged in the indictment, or when the government is allowed to prove an essential element of the crime on an alternative basis permitted by the statute but not charged in the indictment." *Id.* (internal quotation marks omitted).

until sentencing. We conclude that under any standard, Reed's claim fails.

We have held that "a variance between allegations and proof is fatal only when it affects the substantial rights of the defendant by failing to sufficiently notify him so that he can prepare his defense and will not be surprised at trial."[76] As the government explains, Reed's ability to prepare his defense was not hindered, because he was on notice of the prosecution's argument prior to trial and was aware of where the $30,000 discrepancy originated. The district court instructed the jury that any statements by the prosecution—including in the summary exhibits at issue here—were not themselves evidence that could support a conviction.[77] Any variance did not affect Reed's substantial rights.

Relatedly, Reed argues that the pattern of prosecutorial misconduct was so prejudicial as to warrant a new trial, and that the aggregation of non-reversible errors amounts to a constitutional violation and warrants reversal. He cites no legal authority for his arguments that the prosecution engaged in misconduct warranting reversal,[78] and we are not convinced that

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[76] *Id.* at 317 (internal quotation marks omitted).

[77] We presume "that a jury can and will follow an instruction that attorneys' statements are not evidence, unless there is an overwhelming probability that the jury will be unable to follow the instruction and there is a strong probability that the effect is devastating." *United States v. Bennett*, 874 F.3d 236, 247 (5th Cir. 2017) (internal quotation marks omitted).

[78] *See United States v. Olguin*, 643 F.3d 384, 399 (5th Cir. 2011) ("[The appellant] fails to cite any authority for his argument; therefore, we conclude that he has waived this issue.").

any prejudicial prosecutorial misconduct occurred—especially not of the sort that satisfies Reed's "substantial burden" to prove reversible misconduct.[79] Even if we had concluded that Reed was correct on the legal and evidentiary issues we have discussed, he has not shown that the prosecution acted *improperly* in advocating for those rulings. As for his argument about cumulative error, having found no error with respect to Reed's claims, we also do not find cumulative error that would justify reversal.[80]

V

Only Steven Reed directly challenges the sufficiency of the evidence for his conviction.[81] His argument

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While Reed cites authority for his argument that prosecutorial misconduct would warrant reversal, he does not provide us with legal grounds to reach the predicate determination that the prosecution in his case engaged in misconduct.

[79] *See Bennett*, 874 F.3d at 247.

[80] To prove cumulative error, a defendant must show that those errors "so fatally infect[ed] the trial that they violated the trial's fundamental fairness." *United States v. Oti*, 872 F.3d 678, 690 n.10 (5th Cir. 2017) (internal quotation marks omitted).

[81] Walter Reed did not raise sufficiency of the evidence as a ground for reversal in his opening brief, either in his statement of issues on appeal or in the full text of the brief. He argues in his reply brief that by stating that the district court should have granted his post-trial motions, he incorporated his sufficiency-of-the-evidence claims from before the district court. This was insufficient to preserve the issue. *See, e.g.*, *Procter & Gamble Co. v. Amway Corp.*, 376 F.3d 496, 499 n.1 (5th Cir. 2004) (holding that failure to adequately brief an argument in the opening brief waives the issue on appeal). Reed also argues that because he spent several pages in the "Statement of the Case" section of his

partially hinges on claims Walter Reed advances, which we have already rejected. He also disputes, however, that the prosecution proved some of the 21 overt acts included in the indictment to establish the conspiracy count, and avers that the evidence did not sufficiently support that he committed wire fraud or money laundering connected to the America Event.

We review the denial of a motion for acquittal based on the sufficiency of the evidence *de novo*, but will affirm "if a reasonable trier of fact could conclude from the evidence that the elements of the offense were established beyond a reasonable doubt, viewing the evidence in the light most favorable to the verdict and drawing all reasonable inferences from the evidence to support the verdict."[82] The jury, not we, evaluates the

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opening brief refuting the overt acts that supported his conspiracy conviction, he preserved a challenge to the sufficiency of the evidence. This is similarly insufficient to indicate that he intended to preserve the challenge.

In any event, Reed solely presents *alternative* ways to interpret the evidence that convicted him, rather than showing that there was insufficient evidence to support the prosecution's interpretation. As we discuss in the context of Steven Reed's arguments, this is not enough to overturn a jury verdict.

[82] *United States v. Ragsdale*, 426 F.3d 765, 770-71 (5th Cir. 2005); *see United States v. Martinez*, 900 F.3d 721, 727-28 (5th Cir. 2018); *see also United States v. Isgar*, 739 F.3d 829, 835 (5th Cir. 2014) ("The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (emphasis in original)).

weight of the evidence and the credibility of witnesses.[83]

To prevail on the conspiracy count against Steven Reed, the prosecution needed to establish an agreement between the appellants to commit wire fraud or money laundering, an overt act committed by one of the conspirators in furtherance of the agreement, and the requisite criminal intent.[84] Contrary to Steven Reed's assertion on appeal, the prosecution was not required to prove that he actually committed the substantive offenses of wire fraud or money laundering.[85] While Steven Reed contests the sufficiency of the evidence on some of the 21 overt acts the prosecution presented,[86] all the prosecution needed to do was prove one of the overt acts in furtherance of the conspiracy. There was ample evidence for a rational juror to find beyond a reasonable doubt that Steven Reed agreed with his father to commit wire fraud and money laundering, that he intended to further the illegal purpose of that conspiracy, and that one of the defendants committed at least one of the overt acts.

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[83] *Ragsdale*, 426 F.3d at 771.

[84] *See United States v. Cessa*, 785 F.3d 165, 173 (5th Cir. 2015) (discussing conspiracy to commit money laundering); *United States v. Ingles*, 445 F.3d 830, 838 (5th Cir. 2006) (discussing conspiracy to commit wire fraud).

[85] *See United States v. Adair*, 436 F.3d 520, 525 (5th Cir. 2006).

[86] Specifically, he challenges the sufficiency of the evidence that he was overpaid for producing the public service announcement, which underpinned several of the overt acts.

The evidence was likewise sufficient for the jury to find beyond a reasonable doubt that Steven Reed committed the underlying offenses of wire fraud and money laundering. To prove wire fraud, the prosecution needed to show "(1) a scheme to defraud that employed false material representations, (2) the use of . . . interstate wires in furtherance of the scheme, and (3) the specific intent to defraud."[87] It produced evidence that Steven Reed knowingly accepted money from the campaign that was disproportionate to services he provided at the America Event, and that these funds were transferred using interstate wires. To prove money laundering, the prosecution needed to prove that Steven Reed knew that certain property represented the proceeds of unlawful activity and conducted a financial transaction involving those proceeds, knowing that the transaction was designed in whole or in part "to conceal or disguise" the nature, source, ownership, or control of the proceeds.[88] It produced evidence that Steven Reed was aware that the $5,000 he received from the caterer at the America Event was fraudulently derived from Walter Reed's campaign funds and that Walter Reed arranged for that transfer with the intent to obscure its origin.[89] We conclude that

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[87] *See Hoffman*, 901 F.3d at 545 (explaining the elements of wire and mail fraud).

[88] *See* 18 U.S.C. § 1956(a)(1)(B)(i).

[89] While Steven Reed contests that the evidence showed that he personally intended to conceal the origin of the check, the prosecution did not need to prove that. *See Adair*, 436 F.3d at 524 ("To be guilty under [18 U.S.C. § 1956(a)(1)(B)(i)], a defendant need not have specifically intended to conceal or disguise the proceeds

viewing the evidence in the light most favorable to the verdict, a reasonable juror could have credited the evidence presented as establishing beyond a reasonable doubt that Steven Reed was part of the charged conspiracy and that he committed wire fraud and money laundering.

* * *

This concludes our review of the defendants' convictions. On appeal, the Reeds have extensively listed strengths in their cases and weaknesses in the prosecution's case. They have also pointed to discretionary determinations the district court made, ones that a different court may have perhaps resolved differently. None of this, however, convinces us that this able district court impermissibly erred in how it conducted the defendants' trial—or that the jury's ultimate decision to convict the defendants on almost all counts should be overturned. Finding no reversible error, we affirm the convictions.

VI

We must separately consider the defendants' challenges to the district court's imposition of forfeiture. As we have described, the district court ordered forfeiture of $46,200 jointly and severally against both defendants for the conspiracy conviction under Count 1, and ordered forfeiture of $609,217.08 against Walter

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of the unlawful activity. It is sufficient for the defendant merely to be aware of the perpetrator's intent to conceal or disguise the nature or source of the funds.").

Reed for the wire and mail fraud counts.[90] We "review[ ] the district court's findings of fact under the clearly erroneous standard of review, and the question of whether those facts constitute legally proper forfeiture de novo."[91] The defendants raise three primary challenges to the fact and amount of forfeiture.[92]

A

First, Walter Reed argues that the district court should have only imposed forfeiture on the Hospital mail fraud counts related to offenses occurring within the five-year statute of limitations for mail fraud. We

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[90] The government did not seek forfeiture for the tax offenses or money laundering counts.

[91] *Olguin*, 643 F.3d at 395.

[92] Walter Reed cites no authority for his argument that the government attorney bindingly limited the amount of forfeiture to a ten-year period by identifying a forfeitable sum reflecting ten years of legal fees in a pre-trial letter. We reject the suggestion that the prosecution may not seek changes to a forfeiture amount based on information that arises in trial. Other courts have permitted forfeiture of amounts not identified in an indictment "when the defendant has otherwise received sufficient notice of the forfeiture proceedings, the property sought to be forfeited, and the opportunity to defend against it." *See, e.g.*, *United States v. Diaz*, 190 F.3d 1247, 1257 (11th Cir. 1999) (collecting cases); *United States v. DeFries*, 129 F.3d 1293, 1315 n.17 (D.C. Cir. 1997) ("The government is not required to list all forfeitable interests in the indictment, provided the indictment notifies defendants that the government will seek to forfeit all property acquired [in the violation]."). Here, the indictment expressed intent to obtain forfeiture of proceeds traceable to violations of the applicable laws, and Reed was on notice of the intended forfeiture prior to the hearing, allowing him to argue against the forfeiture of twenty years of legal fees prior to the forfeiture hearing.

see no clear factual error in the district court's finding that Reed had engaged in a continuing scheme over 20 years, and no legal error in its conclusion that he could therefore be required to forfeit all of the proceeds from that scheme under 18 U.S.C. § 981 and 28 U.S.C. § 2461(c).[93]

Reed's reliance on the Supreme Court's decision in *Kokesh v. SEC*[94] is mistaken. *Kokesh* concerned the civil forfeiture statute 28 U.S.C. § 2462, and interpreted the language of that statute—which explicitly provides for a five-year limitations period on "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture."[95] By its terms, § 2462

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[93] We have upheld forfeiture based on "a comprehensive criminal conspiracy" taking place over more than six years, even where the statute of limitations for the offense was five years. *See United States v. Wyly*, 193 F.3d 289, 303 (5th Cir. 1999). Other circuits have been more explicit in holding that forfeiture may be imposed on an amount that goes beyond the counts of conviction, as long as the property was obtained through the same criminal scheme. *See United States v. Venturella*, 585 F.3d 1013, 1015-17 (7th Cir. 2009) ("Furthermore, . . . forfeiture is not limited solely to the amounts alleged in the count(s) of conviction. . . . We have also interpreted other statutes authorizing forfeiture to include the total amount gained by the crime or criminal scheme, even for counts on which the defendant was acquitted."); *United States v. Capoccia*, 503 F.3d 103, 116 (2d Cir. 2007) (distinguishing cases where forfeiture for uncharged and acquitted conduct was permissible because "the bases for the forfeiture orders [in those cases] were convictions for schemes, conspiracies, or enterprises" from a case where the funds were not traceable to such a scheme).

[94] 137 S. Ct. 1635 (2017).

[95] *Id.* at 1642 (quoting 28 U.S.C. § 2462).

governs *civil* forfeitures.[96] In contrast, here, forfeiture was imposed under 18 U.S.C. § 981 and 28 U.S.C. § 2461(c). Section 2461(c) allows for criminal forfeiture when civil or criminal forfeiture is authorized for an offense and the defendant is convicted.[97] Because no specific statutory provision authorized criminal forfeiture on the fraud counts, the government therefore sought criminal forfeiture under § 2461(c) based on the civil forfeiture authorized under § 981. Reed identifies no case where a court has applied § 2462 or *Kokesh* to forfeiture under the provisions at issue in this case, neither of which incorporates the limitations provision in 28 U.S.C. § 2462 or imposes its own limitations

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[96] *See United States ex rel. Vaughn v. United Biologics, L.L.C.*, ___ F.3d ___ (5th Cir. Oct. 16, 2018) (explaining that the "series-qualifier" principle may allow "a single adjective . . . to modify a series of subsequent nouns or verbs" when context indicates that such a reading is intended, as when "the nouns and verbs are listed without any intervening modifiers").

[97] *See* 28 U.S.C. § 2461(c). Here, the relevant civil forfeiture provision was 18 U.S.C. § 981, which allowed for civil forfeiture for mail fraud. "[A]lthough neither 18 U.S.C. § 981(a)(1)(C) nor 28 U.S.C. § 2461(c) expressly refers to personal money judgments, our sister circuits have uniformly agreed that personal money judgments are a proper form of *criminal forfeiture* under these statutes." *United States v. Nagin*, 810 F.3d 348, 353-54 (5th Cir. 2016) (emphasis added); *see also United States v. Vampire Nation*, 451 F.3d 189, 199-200 (3d Cir. 2006) (explaining that an earlier wording of § 2461(c) served as a "bridge" or "gap-filler" between civil and criminal forfeiture, "in that it permit[ed] criminal forfeiture when no criminal forfeiture provision applies to the crime charged against a particular defendant but civil forfeiture for that charged crime is nonetheless authorized").

period.[98] We conclude that the five-year limitations period at issue in *Kokesh* did not apply, and the district court was entitled to impose forfeiture on all proceeds from Reed's continuous criminal scheme—including those that fell outside the five-year limitations period for mail fraud.

B

Second, Walter Reed also argues that the forfeiture amount violated the Eighth Amendment prohibition against excessive fines. The Supreme Court has explained that "[t]he touchstone of the constitutional inquiry under the Excessive Fines Clause [of the Eighth Amendment] is the principle of proportionality."[99] "If the amount of [a punitive] forfeiture is *grossly* disproportional to the gravity of the defendant's offense, it is unconstitutional."[100] Here, the district court found that Walter Reed engaged in a twenty-year scheme to defraud by diverting payments meant for the D.A.'s office into his personal bank account. His offenses had identifiable victims—the Hospital, his constituents, and the D.A.'s office—and the money that he would forfeit came from those victims. The required forfeiture of $574,063.25 for the mail

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[98] Indeed, no case appears to have applied *Kokesh* in the context of 18 U.S.C. § 2461(c) or 18 U.S.C. § 981.

[99] *United States v. Bajakajian*, 524 U.S. 321, 334 (1998).

[100] *Id.* at 337 (emphasis added).

fraud offenses was not grossly disproportionate to the gravity of his offenses.[101]

C

Finally, all parties propose that the district court's imposition of joint and several liability between the defendants for a forfeiture amount of $46,200—representing proceeds related to both defendants' convictions on the conspiracy count—should be vacated and remanded in light of the Supreme Court's decision in *Honeycutt v. United States*. *Honeycutt* held that joint and several forfeiture liability was not permitted for forfeiture under 21 U.S.C. § 853(a)(1), which mandates forfeiture for certain drug crimes.[102] The district court was aware that the *Honeycutt* decision was pending, but declined to postpone its ruling to wait for a decision, observing that we had previously held that joint and several liability was acceptable and that it was not clear that the Supreme Court's holding regarding 21 U.S.C. § 853(a)(1) would be binding on this case. Because the government has conceded that the imposition of joint and several forfeiture liability should be vacated and remanded in light of *Honeycutt*, we need not pick a side in the burgeoning circuit split over whether *Honeycutt* generally prohibits the imposition of joint and several liability for forfeiture imposed

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[101] The facts of this differ from those of *United States v. Bajakajian*, where the only crime at issue was the failure to comply with a reporting requirement. *Id.* at 339.

[102] 137 S. Ct. 1626 (2017).

under 18 U.S.C. § 981(a)(1)(C).[103] We leave it to the district court to allocate the $46,200 in forfeiture between the two defendants.

VII

We vacate and remand the portion of the district court's forfeiture order imposing forfeiture of $46,200 jointly and severally between both defendants, and otherwise affirm.

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[103] *See United States v. Sexton*, 894 F.3d 787, 798-99 (6th Cir. 2018) (holding that *Honeycutt* does not apply to forfeiture under 18 U.S.C. § 981(a)(1)(C)); *United States v. Gjeli*, 867 F.3d 418, 427 (3d Cir. 2017) (holding that 18 U.S.C. § 981(a)(1)(C) is "substantially the same as the [statute] under consideration in *Honeycutt*"); *see also United States v. Carlyle*, 712 F. App'x 862, 864-65 (11th Cir. 2017) (per curiam) (remanding for the district court to determine whether *Honeycutt* governed wire fraud forfeiture under § 981(a)(1)(C), though observing that it appeared likely to apply).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	CRIMINAL ACTION
VERSUS	NO. 15-100
WALTER REED AND STEVEN REED	SECTION "L"

ORDER AND REASONS

(Filed Mar. 3, 2017)

Pending before the Court is the Government's Motion for Preliminary Order of Forfeiture. (R. Doc. 361). Defendants Walter and Steven Reed both oppose the motion. (R. Docs. 364, 365). Upon leave of the Court, the Government timely filed a reply. (R. Doc. 371). Oral Argument was also heard on this Motion on January 5, 2017. (R. Doc. 374). Having read the parties' briefs, reviewed the applicable law, and heard the parties on oral argument, the Court now issues this Order & Reasons.

I. BACKGROUND

On April 23, 2015, Defendants Walter Reed ("W. Reed") and Steven Reed ("S. Reed") were charged in an eighteen-count indictment. Specifically, the indictment alleged that, *inter alia*, W. Reed used campaign donations (i) to recruit potential clients for his private legal practice, (ii) pay off various expenses incurred by

Steven Reed, (iii) pay for private and personal dinners, (iv) grossly overpay his son for work allegedly performed on behalf of the Campaign, and (v) host a housewarming party for friends and family unrelated to the Campaign or the holding of public office. Further, according to the indictment, W. Reed actively misled his donors by (i) holding fundraisers, claiming they were the purpose of furthering his reelection efforts; (ii) misrepresenting the actual purpose of expenditures on filings with the Louisiana Board of Ethics; and (iii) using recipients of legitimate campaign-related expenses to mask some illegitimate payments to S. Reed. The indictment also alleges that W. Reed engaged in mail fraud when he deposited payments made by the St. Tammany Parish Hospital in exchange for legal representation by the District Attorney's office into his own personal bank accounts for private use. On October 22, 2015, the Government filed a superseding indictment, adding an additional wire fraud count against W. Reed. The superseding indictment also contained a Notice of Fraud Forfeiture, which notified both Defendants of the Government's intent to seek forfeiture for Counts 1-10 and 15-19 in accordance with F. R. Crim. P. 32.2(a).

Count 1 alleges that W. Reed and S. Reed conspired under 18 U.S.C. § 371 to commit the above-mentioned offenses.

Counts 2 – 6 and Count 8 allege that W. Reed committed wire fraud by willingly and knowingly transmitting and causing to be transmitted funds in

interstate commerce in violation of 18 U.S.C. §§ 1342, 1343.

Count 7 alleges that W. Reed and S. Reed committed wire fraud by willingly and knowingly transmitting and causing to be transmitted funds in interstate commerce in violation of 18 U.S.C. §§ 1342, 1343.

Counts 9 and 10 allege that W. Reed and S. Reed committed money laundering in violation of 18 U.S.C. § 1956.

Counts 11 – 14 allege that W. Reed willfully made false statements on income tax returns in violation of 26 U.S.C. § 7206(1).

Counts 15 – 19 allege that W. Reed committed mail fraud by knowingly cause to be delivered funds by mail in violation of 18 U.S.C. § 1341.

On May 22, 2016, following an 11-day trial, a jury found W. Reed guilty of Count 1, conspiracy to commit wire fraud and money laundering; Counts 2 through 8, wire fraud; Count 9, money laundering; Counts 11 through 14, making false statements on income tax returns; and Counts 15 through 19, mail fraud. The jury also found S. Reed guilty of Count 1, conspiracy to commit wire fraud and money laundering; Count 7, wire fraud; and Count 9, money laundering. The jury acquitted both Defendants of Count 10. After trial, all parties consented to leave the forfeiture determination to the Court. (R. Doc. 314 at 159-61).

The Government now seeks forfeiture of certain funds pertaining to Counts 1, 2-6, 8, and 15-19. The

Government seeks a preliminary order of forfeiture pursuant to the Notice of Fraud Forfeiture. Specifically, they seek judgments against W. Reed for $609,489.57 and against W. Reed and S. Reed jointly and severally for $78,539.11. $78,539.11 represents the proceeds of Count 1, conspiracy to commit wire fraud and money laundering, of which both Defendants were convicted at trial. (R. Doc. 361-1 at 3). $609,489.57 represents the proceeds of the wire and mail fraud counts, Counts 2-6, 8, and 15-19, of which W. Reed alone was convicted.

II. LAW AND ARGUMENT

A. Legal Standard

The federal civil forfeiture statute, 18 U.S.C. § 981, applies to criminal cases pursuant to 28 U.S.C. § 2461(c). Section 981(a)(1)(C) requires the forfeiture of property or proceeds that are traceable to a violation of certain enumerated criminal statutes. Directly or by reference to other statutes, that list includes Wire Fraud (18 U.S.C. § 1343) and Mail Fraud (18 U.S.C. § 1341).

Section 981(a)(1)(C) also mandates forfeiture for any conspiracy to commit any of those enumerated crimes. A forfeiture motion may seek a money judgment.

A money judgment is appropriate where, as here, the government seeks forfeiture under 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c). *See United States. v. Nagin*, 2016 WL 98478, at *4 (5th Cir. Jan. 7,

2016) ("[T]he combined operation of 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c) authorizes personal money judgments as a form of criminal forfeiture."); *see also United States v. Thomas*, 2015 WL 4730718, at *3 (E.D. La. Aug. 10, 2015) (Duval, J.). The amount of the money judgment must be specified in a preliminary order of forfeiture, which is then made part of the defendant's sentence. Fed. R. Crim. P. 32(b)(2)(A).

Criminal forfeiture of property related to certain crimes is mandated by statute and has a punitive purpose, unlike restitution. *See United States v. Taylor*, 582 F.3d 558, 565-66 (5th Cir. 2009) (citing *United States v. Webber*, 536 F.3d 584, 602-03 (7th Cir. 2008)). Multiple overlapping statutes govern forfeiture. The Court must look to each count for which the defendants were convicted and identify the specific statutory basis for forfeiture setting forth the requisite nexus between the crime and any money or property connected to that crime that each defendant will be ordered to forfeit. *See* F. R. Crim. P. 32.2(b)(1)(A).

The Government has the burden to prove that nexus by a preponderance of the evidence. *See United States v. Juluke*, 426 F.3d 323, 326 (5th Cir. 2005); *United States v Hasson* 333 F3d 1264 (11th Cir. 2003); *United States v. Myers*, 21 F. 3d 826 (8th Cir. 1994); *United States v. Voigt*, 89 F.3d 1050 (3rd Cir. 1996); *United States v. Smith*, 966 F.2d 1045, 1050-53 (6th Cir. 1992). The Court may rely on "evidence already in the record, including any written plea agreement, and on any additional evidence or information submitted by

the parties and accepted by the court as relevant and reliable." Fed. R. Crim. P. 32.2(b)(1)(B). However, the Court need only make "a reasonable estimate" of the forfeitable sum, given the available information. *United States v. Jiau*, 624 F. App'x 771, 773 (2d Cir. 2015). In a conspiracy case, "co-conspirators subject to criminal forfeiture are held jointly and severally liable for the full amount of the proceeds of the conspiracy." *Nagin*, 2016 WL 98478, at *4; *see also United States v. St. Pierre*, 809 F. Supp. 2d 538, 544; *United States v. Edwards*, 303 F.3d 606, 643 (5th Cir. 2002). As such, the government need only demonstrate that the money or property at issue was connected to or benefitted the conspiracy as a whole and not necessarily each individual defendant.

B. Count 1

The Government argues that, because both Defendants were convicted of Count 1 (Conspiracy), they are jointly and severally liable for the entire proceeds of every overt act charged under that Count, namely $78,539.11. *Id.* The Government reaches its $78,539.11 total for Count 1 in the following way. (1) Payments from the campaign to Globop, S. Reed's company, totaling $22,658.76, including $14,300 for a public service video and $8,358.76 for the Open House party. *Id.* at 5. (2) A $29,400 payment from the campaign to Liquid Bread, S. Reed's company, for bar services at the "America Event." (3) Payments funneled from the campaign through third party vendors for the "America Event," including $5,000 to Liquid Bread through the

catering company and $5,000 to Globop through an entertainment vendor. (4) Payments from the campaign for products and services for the Open House, including $221.95 to Kentzel's Printing, $1,351.24 to Martin Wine Cellar, $3,207.16 to Coles Rental World, $4,700.00 to Charles Gambino, and $7,000 to Vince Vance & Valiants. *Id.* at 5-6.

W. Reed and S. Reed both oppose the Government's legal conclusions and the total forfeitable amount. (R. Docs. 364, 365).

Open House

S. Reed and W. Reed make various arguments supporting their contention that they should not have to forfeit the funds sought in connection with the Open House Event, namely $24,839.11.

First, both Defendants argue the Open House was a political event, making the expenditures proper and not forfeitable. S. Reed further argues that even if the Open House were not a campaign event, he had no way of knowing that and should not be held liable. (R. Doc. 364 at 2). To convict the Defendants of Count 1, the jury only had to find that the Government had proven at least one of the twenty-one overt acts beyond a reasonable doubt. *Id.* Both Defendants argue that they were not clearly found guilty of the "Open House" overt act under Count 1. Further, because it was not charged in a separate count, the Court must now determine whether or not the event was related to the campaign

or the holding of public office. (R. Docs. 364 at 2, 365 at 8).

S. Reed argues the evidence is insufficient to prove the Open House was a personal event, pointing to the evidence that W. Reed's breakfast club members, major supporters, and other elected and political figures attended the event. (R. Doc. 364 at 1-3). W. Reed points to trial exhibits showing that judges, councilmen, mayors, political supporters, employees of the district attorney's office, and St. Tammany Parish Hospital board members attended the event. (R. Doc. 365 at 8 (citing R. Docs. 707 at 53-54, 312 at 49-52)). During oral argument, W. Reed introduced photographs showing prominent guests in attendance, a photo of W. Reed making a speech for his guests, and evidence that the event included security guards and an outdoor tent. In its reply, the Government acknowledges the Court must decide, by a preponderance of the evidence, whether the Open House is a campaign event, but argues the event was not campaign-related because it bore no markings of a political event. (R. Doc. 367-1 at 1).

Considering the evidence presented at trial and at the forfeiture hearing, this Court finds that the Government did not prove, by a preponderance of the evidence, that the Open House was a personal event unrelated to the campaign. In fact, it appears to be squarely political – the party was attended by W. Reed's breakfast club members, major supporters, judges, councilmen, mayors, employees of the District Attorney's office, and other elected and political

figures. Further, W. Reed hired security guards and rented an outdoor tent for the Open House – expenses not typically incurred for a personal house party. In addition, W. Reed's speech or toast using a microphone is an act expected at a political function, not a personal event.

Campaign or political events are not, as the Government appears to contend, always fundraisers or overtly campaign-oriented. To curry favor and support, political figures sometimes throw parties that do not contain the markings of a 'typical' political or fundraising event; they may not include party wares with campaign insignia or the 'passing of the hat' to collect campaign contributions but such events are nevertheless clearly for political purposes. It is also worth noting that, given the event's attendees and appearance, S. Reed would have no indication that the event was anything but a political one. Because this Court finds that the Open House is a political event, however, this argument is moot.

Because the jury did not indicate upon which overt act it based its finding of guilty for Count 1, this Court has the responsibility to determine whether the forfeitable sum should include the amount associated with the Open House. Because this Court finds the Government failed to prove the event was not related to the campaign or the holding of public office, neither W. Reed or S. Reed are responsible to forfeit the $24,839.11 sought for the Open House.

The Drug Abuse Video and Golf Tournament

Even if the jury found the Defendants guilty of the overt act in Count 1 concerning the $14,300 invoice to Globop for the public service video, S. Reed argues that it is not clear how much of that total was found to be related to the fraud. (R. Doc. 364 at 7). He points out that, at trial, the Government admitted that $2,500 was a fair price for the drug abuse video, $2,500 was for the production of W. Reed's golf tournament, and $2,000 was for S. Reed's work on a subsequently-cancelled safe driving initiative. *Id.* Therefore, S. Reed argues the amount should be reduced to, at most, $7,300. W. Reed argues the same. (R. Doc. 365 at 7-8). S. Reed also argues, however, that $2,500 does not fairly reflect the amount of work he put in to the drug abuse video – the $9,800 invoice more fairly represented the work he performed. (R. Doc. 364 at 7). Accordingly, S. Reed contends that none of the $14,300 charged on the November 2009 invoice should be forfeitable given the preponderance of the evidence.

The Government disagrees, contending that the purported value of the drug abuse video has no bearing on the forfeiture analysis. (R. Doc. 371 at 3-4). While the Government concedes that direct costs are deductible, the estimated value of a good or service is not a direct cost. *Id.* (citing 18 U.S.C. § 981(a)(2)(B)). The Government also asserts that the evidence does not support the Defendants' contention that a portion of the funds was payable to Globop for the golf tournament ($2,500) and for the safe driving initiative ($2,000). (R. Doc. 371 at 4). The Government notes that

the campaign invoice only mentioned the drug abuse video. *Id.* The checks presented at trial included three checks totaling $11,800 with various references to the drug abuse video, and one $2,500 check with "golf tournament production" in the memo line. (Gov. Tr. Ex. 137.)

This Court finds the forfeitable amount is $11,800: $14,300 minus the $2,500 payment to Globop for production of the golf tournament because the Government did not prove, by a preponderance of the evidence, that the latter amount was forfeitable. S. Reed put on evidence at the forfeiture hearing, including testimony by his cousin who attended the tournament, that demonstrated his legitimate role in producing W. Reed's golf tournament. Accordingly, given the preponderance of the evidence, this Court finds the $2,500 he was paid for producing that event is not forfeitable under Count 1.

On the other hand, S. Reed failed to prove that one of the $2,000 checks was related to a safe driving initiative. Neither the campaign finance report nor the checks mention the initiative, and S. Reed failed to demonstrate that the $2,000 payment was related to any such initiative for which he did work. While at trial the Government gave an estimated value for S. Reed's work on the drug abuse video, an estimated value of goods or services, whether made by the Defendant or Government, is not a direct cost and therefore is not deductible as such. 18 U.S.C. § 981(a)(2)(B) states:

> . . . the term "proceeds" means the amount of money acquired through the illegal transactions resulting in the forfeiture, less the direct costs incurred in providing the goods or services. The claimant shall have the burden of proof with respect to the issue of direct costs. The direct costs shall not include any part of the overhead expenses of the entity providing the goods or services, or any part of the income taxes paid by the entity.

S. Reed failed to put on evidence of any expenses or direct costs sustained in the making of this drug abuse video – no receipts, employee salaries, etc. He cannot rely on the Government's estimated value to deduct direct costs for a video he produced and for which he over charged the campaign fund.

Accordingly, the total forfeitable amount for the Drug Abuse Video is $11,800.

America Event

S. Reed argues the $29,400 the Government seeks for his provision of liquor and bar services for the America Event is excessive. (R. Doc. 364 at 8). Further, he argues that the Government does not show by a preponderance of the evidence that he did not earn that money. *Id.* at 9. In his opposition, S. Reed lists the amount of money he believes he spent on the liquor for the event, "around $7,548.00," and avers that amount should be deducted from the forfeiture amount as a

direct cost pursuant to § 981(a)(2)(B).[1] *Id.* at 10. However, apart from the deductions for direct costs, S. Reed concedes that his conviction as to the related Count 7 suggests the jury also found him guilty of the same acts charged in Count 1, totaling $29,400. *Id.* at 10. W. Reed adopts these arguments. (R. Doc. 365 at 9). The Government disagrees that S. Reed's estimated expenditures should be deductible as a direct cost, arguing that he does not meet his burden to prove he incurred those costs. (R. Doc. 371 at 5).

Under 18 U.S.C. § 981(a)(2)(B) the Defendant bears the burden to prove direct costs. In this case, S. Reed has failed to prove how much direct cost he incurred for this event. While it may be true that he spent a significant amount of money on liquor for bar services, his estimations are insufficient to meet his burden. Had he provided receipts or invoices detailing the amount spent, this Court may have been able to deduct that cost from the forfeitable amount. Because he provides nothing more than an estimate, however, that amount is not deductible as a direct cost and the entire amount sought, $29,400, is therefore forfeitable.

Lakehouse Funds

S. Reed argues that forfeiture of the $5,000 payment from The Lakehouse is excessive, but acknowledges that the Defendants' conviction as to Count 7

[1] W. Reed echoes this argument. (R. Doc. 365 at 9).

suggests they found the Lakehouse payment to be an overt act under Count 1. (R. Doc. 364 at 8, 10).

W. Reed argues that, because he reimbursed his campaign for the $5,000 Lake House charge, it should not be subject to forfeiture. (R. Doc. 365 at 10). The Government, however, contends his reimbursement is irrelevant to forfeiture. (R. Doc. 371 at 6). While W. Reed makes a cognizable argument for reimbursement and, at first blush, fairness seems to be in his corner, forfeiture has a punitive rather than rehabilitative goal, making his repayment of the funds irrelevant for the purpose of forfeiture. *Id.* (citing *United States v. Taylor*, 582 F.3d 558, 566 (5th Cir. 2009)).

This Court, with some pause, finds the entire $5,000 forfeitable, as conceded by S. Reed. W. Reed fails to legally support his contention that a subsequent reimbursement of the funds renders them not forfeitable. As explained in *Taylor*, forfeiture has a punitive purpose unrelated to the repayment of the victims of a fraudulent scheme. *Taylor*, 582 F.3d at 566. In fact, both forfeiture and restitution may be ordered for the same illegal activity, disgorging the Defendant of twice the amount gained from the criminal scheme. *Id.* Accordingly, whether or not W. Reed repaid the victims of his illegal behavior is of no consequence. The $5,000 is forfeitable despite that alleged repayment.

White Oak Funds

Both Defendants also argue that the $5,000 the Government seeks for the payment from White Oak

Productions to Globop is excessive. (R. Docs. 364 at 8, 365 at 9). Although the Government seeks the funds pursuant to an overt act charged in Count 1, Defendants aver that the Government fails to meet its burden under the preponderance of the evidence given that the jury acquitted both Defendants of Count 10, which charged the same conduct. The Defendants argue that, given the acquittal, the jury presumably would not then find the Defendants liable for the exact same conduct under Count 1. Further, both Defendants maintain their innocence as to that overt act, explaining that W. Reed had hired Ed White to produce the America Event but, at the last minute, Mr. White was unable to attend. Mr. White testified that S. Reed produced the event in his stead because he was familiar with the event and with production, and Mr. White saw it as an opportunity to strengthen his relationship with W. Reed. (R. Docs. 364 at 9; 306 at 244; 313 at 57-58; 396 at 221-38). Defendants argue the $5,000 accurately reflected S. Reed's work and value at the America Event. Accordingly, the Defendants argue they should not be liable to forfeit the $5,000 White Oak payment.

The Government disagrees with the Defendants' analysis, arguing that the $5,000 charged through White Oak Productions was an inflated amount not commensurate with the work S. Reed performed. (R. Doc. 371 at 5). They point to another section of Mr. White's testimony wherein he admits that $5,000 is a large payment for one night of production work. *Id.*; (R. Doc. 396 at 220-223). Further, the Government points out that, while the Defendants were acquitted of

money laundering in Count 10, Count 1 charges conspiracy to commit fraud, which is a different offense with a different theory of liability. (R. Doc. 371 at 5).

This Court finds the Government did not prove by a preponderance of the evidence that the $5,000 payment to White Oak was related to the conspiracy charged in Count 1. It is reasonable to assume that when the jury acquitted both Defendants of money laundering through White Oak in Count 10, they did not then find them guilty of that same conduct under Count 1. While it is true that the charge in Count 1, conspiracy to commit fraud, is different than that charged in Count 10, money laundering, the Government did not provide sufficient proof that the Defendants were guilty of conspiracy to commit fraud by nature of their White Oak payment. Because the jury's acquittal indicates they did not find S. Reed and W. Reed had done anything improper in making the payment through White Oak for the America Event, a conceded campaign event, this Court finds the $5,000 payment not forfeitable.

Joint and Several Liability

Though the Government seeks to hold W. Reed and S. Reed jointly and severally liable for the entire amount forfeitable under Count 1, S. Reed argues he should not be held liable for the proceeds he did not acquire. (R. Doc. 364 at 1); *United States v. Cano-Flores*, 796 F.3d 83 (D.C. Cir. 2015). While he admits joint and several liability is recognized in this circuit,

S. Reed asks the Court to recommend the Fifth Circuit reconsider its precedent on joint and several liability in the context of forfeiture. In *U.S. v. Cano-Flores*, the D.C. Circuit found joint and several liability inapplicable under 21 U.S.C. § 853. 796 F.3d 83, 91 (2015). §853 permits forfeiture "only of amounts *obtained* by the defendant on whom the forfeiture is imposed." The Court found joint and several liability to be at odds with the language of statute, specifically the requirement that the amounts be *obtained. Cano-Flores* 796 F.3d. Relevant to the instant case, § 981(a)(2)(B) provides for forfeiture only of "the amount of money *acquired* through the illegal transactions. . . ." (emphasis added). S. Reed avers that allowing joint and several liability in this case is similarly at odds with requiring the statutory requirement that the amounts be 'acquired.' (R. Doc. 364 at 6).

While this Court recognizes that circuits have reached different conclusions when addressing joint and several liability, the Fifth Circuit indisputably recognizes joint and several liability for money judgments imposed pursuant to a forfeiture order. *United States v. Nagin*, 810 F.3d 348, 353 (5th Cir. 2016). Although the D.C. Circuit in *Cano-Flores* may provide persuasive authority and the circuit may wish to reconsider its position in the future, the law is presently clear in this circuit that co-conspirators are jointly and severally liable for the entire forfeiture amount and this Court is bound by present jurisprudence. Further, the statute at issue in *Cano-Flores*, while similar, is not the statute at issue in the instant case. Accordingly, this

Court finds W. Reed and S. Reed jointly and severally liable for the forfeitable amount in Count 1.

For similar reasons, this Court denies the request made at oral argument to delay S. Reed's forfeiture determination until after the Supreme Court rules on *United States v. Honeycutt*. 816 F.3d 362 (6th Cir. 2016). *Honeycutt* is inapposite to the present case given that it, like *Cano-Flores*, contemplates different criminal behavior, namely a drug conspiracy, and a different forfeiture statute, namely 21 U.S.C. § 853(a)(1). Because it is not altogether clear that the Supreme Court's holding in that case will be binding on the instant case, this Court declines to postpone its ruling.

C. Counts 2-6, and 8, and 15-19

The Government also seeks the forfeiture of $609,489.57 from W. Reed, representing the proceeds of the wire and mail fraud counts: Counts 2-6, 8, and 15-19. Though W. Reed was also convicted of Count 7, the amount therein was sought under Count 1 and is accordingly not re-alleged. *Id.* at 7.

W. Reed argues that the Government confuses forfeiture with restitution. (R. Doc. 365 at 6). He argues the campaign fund was legitimate but that the expenses were improper and should be reimbursed. Accordingly, the amounts paid to innocent third party vendors should be reimbursed to the fund as the victim of a crime, not forfeited, which is proper when there are proceeds of a crime. *Id.* As explained above, forfeiture

is mandatory and W. Reed's arguments to the contrary are unavailing.

1. Counts 2-6 and 8

The total amount the Government seeks from Counts 2-6 and 8 is $35,426.32, including (1) $2,635 for an annual steak dinner for ministers and their wives; (2) a $25,000 referral fee; (3) $4,701.79 for a prime rib dinner for a group of pastors and their wives; and (4) noncampaign-related gifts for friends and family, including $614.49 spent at Flowers N Fancies, $589.68 spent at Annadelle's Plantation, and $1,885.36 spent at Dakota Restaurant. *Id.* at 8.

Because he reimbursed the campaign for the amount paid to Gerald's Steakhouse for the annual steak dinner, W. Reed argues that amount is not forfeitable. *Id.* at 12. In its reply, the Government avers that any reimbursed funds are irrelevant. (R. Doc. 367-1 at 6). The Government argues that repayment is only relevant to restitution, not to forfeiture, whose purpose is punitive. *Id.* As explained above, a Defendant's reimbursement of the victim of his or her crime does not release him from forfeiture payments. Accordingly, W. Reed is responsible for the $2,635 payment to Gerald's Steakhouse.

W. Reed next avers that the majority of expenditures in these counts went to third parties not involved in the conspiracy: the recipient of the $25,000 check to build a new church gym (which the Government calls the referral fee) and the recipients of flowers, gifts, and

food. (R. Doc. 365 at 5, 12). Accordingly, W. Reed contends this amount should not be forfeitable. Though W. Reed avers none of the charges in this category are appropriate for forfeiture, he acknowledges that the Court may find the amount spent for flowers unrelated to the Open House to be forfeitable. (R. Doc. 365 at 13). If the Court so finds, the remaining amount would be $342.00.[2]

The Government avers that the steak dinner, referral fee, and prime rib dinner were all efforts by W. Reed to recruit clients for his private legal practice and are therefore forfeitable. (R. Doc. 361-1 at 8). The other expenses, they argue, were personal expenditures such as flowers, gifts, gift cards, and holiday meals. *Id.* Further, the Government contends that W. Reed misunderstands or misstates the deductibility of "proceeds" and innocent third-party vendors. *Id.* at 2. The Government argues that the payments out of the fund to third party vendors are not collateral costs, but the essence of the fraud. *Id.* Further, Defendants benefitted from the payments even though he didn't directly possess the money because he did not have to pay for the items or services from his personal account. *Id.* at 2-3. The

[2] In total, W. Reed argues that the Court should not order any forfeiture [sic] Counts 1, 2-6, and 8, but instead should order restitution for $29,152, totaling the amount to Liquid Bread and the remaining charges for the video made by S. Reed. As was discussed above and more fully elucidated in *Taylor*, both restitution and forfeiture can be ordered for the same criminal activity. Under 18 U.S.C. §981, forfeiture is mandatory in this *case. See*, *e.g.*, *Taylor*, 582 F.3d at 565; *see also United States v. Harms*, 442 F.3d 367, 380 (5th Cir. 2006).

Government avers that W. Reed's control of the campaign funds is sufficient to subject the funds to forfeiture. *See United States v. Contorinis*, 692 F.3d 136, 147 (2d Cir. 2012); *St. Pierre*, 809 F. Supp. 2d at 545.

In addition to the $2,635 related to Gerald's Steakhouse, this Court finds forfeitable the $25,000 referral fee, the $4,701.79 for a prime rib dinner, $589.68 spent at Annadelle's Plantation, $1,885.36 spent at Dakota Restaurant, and $342.00 spent at Flowers N Fancies, which excludes the flowers purchased for the Open House event. Because this Court found the Open House to be a campaign event, the money spent on flowers for that event is not forfeitable. As this Court explained in *St. Pierre*, funds that were "directly or indirectly acquired or *otherwise benefitted*" defendants are forfeitable. 809 F. Supp. 2d at 545. W. Reed had control of and access to the campaign fund and, in writing these checks, he acquired funds meant to benefit his campaign and used them to pay for his personal expenses. Further, by using the campaign funds to pay personal expenses and to recruit clients for his law firm, W. Reed benefitted financially in that he did not have to use his own money to pay for those expenses. The money taken from the campaign did not merely go to innocent third party vendors – it profited W. Reed as well.

The Court finds the forfeitable amount under Counts 2-6 and 8 to be **$35,153.83**.

2. Counts 15-19

The total amount the Government seeks for Counts 15-19 (Mail Fraud) is $574,063.25, which is the proceeds of twenty years of payments from St. Tammany Parish Hospital. (R. Doc. 361-1 at 9). The Government provided the following chart:

Year	Months	Amount	Yearly Total	Trial Exhibit
1994	8	$2,247.75	$17,982.00	47.03, 50, 76
1995	12	$2,247.75	$26,973.00	
1996	12	$2,247.75	$26,973.00	
1997	12	$2,247.75	$26,973.00	
1998	12	$2,247.75	$26,973.00	
1999	12	$2,247.75	$26,973.00	
2000	12	$2,247.75	$26,973.00	
2001	3	$2,247.75	$ 6,743.25	
2001	9	$2,500.00	$22,500.00	47.18, 53, 56
2002	12	$2,500.00	$30,000.00	
2003	12	$2,500.00	$30,000.00	
2004	12	$2,500.00	$30,000.00	
2005	12	$2,500.00	$30,000.00	
2006	12	$2,500.00	$30,000.00	
2007	12	$2,500.00	$30,000.00	
2008	12	$2,500.00	$30,000.00	
2009	12	$2,500.00	$30,000.00	
2010	12	$2,500.00	$30,000.00	
2011	12	$2,500.00	$30,000.00	
2012	12	$2,500.00	$30,000.00	
2013	12	$2,500.00	$30,000.00	
2014	2	$2,500.00	$ 5,000.00	68.17
			$574,063.25	

This total exceeds the $12,500 specified in the five counts of conviction, which were each for discreet $2,500 payments. *Id.* at 10. However, the Government argues that because W. Reed was convicted of a continuing scheme, he is liable for the entire proceeds of that scheme, not just the proceeds of the counts of conviction. *Id. See*, *e.g.*, *United States v. Venturella*, 585 F.3d 1013, 1015, 1015-17 (7th Cir. 2009) (defendant's plea to one count of mail fraud involving $477 rendered her liable for a money judgment for the entire scheme: $114,000). The Government argues the forfeitable amount should include all proceeds, even those not obtained through use of the mails or that were realized outside of the statute of limitations for the substantive offense of conviction. *See United States v. Budden*, 2012 WL 1315366, *4 (D. S.C. April 17, 2012) (requiring defendant convicted of mail fraud to forfeit proceeds of the entire scheme, even if defendant used the mails only with respect to one of the many victims); *United States v. Sagillito*, 899 F. Supp. 2d 850, 861-62 (E.D. Mo. 2012) (requiring defendant to forfeit proceeds of the entire fraud scheme, even where some of the proceeds were realized outside of the five-year statute of limitations). W. Reed opposes the Government's motion, arguing that the Government should not be permitted to retrieve twenty years of payments, but should be limited. (R. Doc. 365 at 4).

Five Specific Charges

First, W. Reed argues that forfeiture should be limited to the five discrete violations alleged in the

indictment. (R. Doc. 365 at 3-4). W. Reed cites to *United States v. Capoccia*, which limited the defendant's forfeiture amount, finding that the Government sought funds derived from uncharged conduct and did not bear the requisite nexus to the charge of conviction. 503 F.3d 103. As stated above, the Government avers the entire amount is forfeitable because W. Reed was charged with and convicted of a continuing scheme. (R. Doc. 361-1 at 10-11). *Capoccia* is inapposite to the present case. The Government does not seek funds for uncharged conduct, but seeks funds W. Reed obtained in the course of his fraudulent scheme. Conversely, as in *Venturella*, "forfeiture is not limited to the amount of the particular mailing but extends to the entire scheme." 585 F.3d at 1015-17. W. Reed's argument is without merit.

Excessive Fines

Secondly, W. Reed argues that the Government's efforts to seek forfeiture of this entire amount violates the Eighth Amendment's prohibition against excessive fines. *Id.* at 4; *United States v. Bajakajian*, 524 U.S. 321 (1998). He argues the amount charged is grossly disproportionate to the gravity of the offense considering that the legal services were not *per se* improper and that the harm was not proportionate to the amount sought. (R. Doc. 365 at 4). Further, the amount is excessive because the statute of limitations for mail fraud is five years and the forfeiture should be similarly limited. *Id.* at 5, 17-18. The Government avers this claim is meritless, as they only seek the amount

W. Reed illegally received and kept as income over the 20 years he represented the Hospital as the District Attorney, and no more. (R. Doc. 367-1 at 10). Accordingly, the Government argues the constitution is not implicated. Further, the Government avers that because it charged a continuing scheme, the statute of limitations is not relevant for forfeiture analysis. (R. Docs. 361-2 at 11, 371 at 9 (citing *United States v. Sagillito*, 899 F. Supp. 2d 850, 861-62 (E.D. Mo. 2012))).

As was discussed above, forfeiture for an entire scheme is proper. Accordingly, this Court finds that W. Reed has failed to prove that requiring him to forfeit the exact amount he obtained through his fraudulent scheme is either disproportionate or excessive. *See*, *e.g.*, 18 U.S.C. § 983(g)(3) ("The claimant shall have the burden of establishing that the forfeiture is grossly disproportional by a preponderance of the evidence. . . ."); *United States v. Bajakajian*, 524 U.S. 321, 322 (1998) ("a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense.");[3] *United States v. Loe*, 248 F.3d 449, 464 (5th Cir. 2001) ("The court ordered Babo Loe to forfeit only so much of the property as was purchased with illegally obtained funds – money that she had no right to in the first place. We therefore find

[3] It is also worth noting that the Supreme Court in *Bajakajian* found it salient that the defendant in that case had committed no fraud on the Government, nor had their crime resulted in any loss to the public. Not so in this case. W. Reed's crime resulted in a loss to the Office of the District Attorney to the tune of $30,000 a year.

no disproportionality, let alone the "gross disproportionality" required by *United States v. Bajakajian*."). This [sic] facts of this case are not analogous to *Bajakajian*; the amount sought in the present case is the total amount W. Reed actually received during the fraudulent scheme and bears a relationship to the gravity of the offense committed. W. Reed's argument fails.

Meetings Attended by Assistant District Attorneys

Third, W. Reed argues the forfeiture amount should be limited to the times in which an assistant district attorney attended the Hospital board meetings in his stead. (R. Doc. 365 at 18). This limitation, however, merely represents a failed trial theory that was presented to and rejected by the jury. W. Reed was found guilty of keeping for himself the payments intended for the District Attorney's office. Even when he attended the board meetings himself, he was not representing the Hospital in his personal capacity and therefore should not have kept the funds. Accordingly, this argument has no merit.

10-year limitation

W. Reed alternatively urges the Court to enforce the amount alleged in a letter from former First Assistant United States Attorney Richard Westling, which was sent in response to W. Reed filing a Motion Bill of Particulars. *Id.* at 16. In that letter, the Government explained that the amount alleged in the Notice of Fraud Forfeiture is comprised of the money W. Reed

received from the Hospital in the ten years leading up to the indictment. (R. Doc. 361-2 at 2). W. Reed argues the Government should be bound by that time frame because the letter was not mere discovery but was a response to motion practice and allegations that he lacked notice of forfeiture. (R. Doc. 365 at 16).[4] The Government disagrees with W. Reed's interpretation of the letter, arguing that the letter expressly stated the forfeiture amount was preliminary and would likely change. (R. Doc. 361-1 at 13). At the time of the letter (14 months before trial) the Government argues it did not have sufficient information to give a final forfeiture amount. *Id.* Further, it argues W. Reed cannot allege surprise or lack of notice given the letter was received long before this proceeding and because he was given sufficient time to prepare his defense in this forfeiture proceeding. *Id.* at 13-14; *see United States v. Diaz*, 190 F.3d 1247, 1257-58 (11th Cir. 1999).

Rule 32.2(a) requires the indictment to notify the defendant of the government's plan to seek forfeiture as a remedy. However, the indictment "need not identify the property subject to forfeiture or specify the amount of any forfeiture money judgment that the government seeks." Fed. R. Crim. P. 32.2(a). The purpose of the Notice of Forfeiture, which the Government included in the Indictment, is merely to provide notice that the government plans to seek forfeiture from the

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[4] W. Reed also draws the Court's attention to his previously-filed Motion in Limine to limit the forfeiture to five years from the date of indictment, to which the Court deferred ruling. The Court has already addressed this argument and will not do so again.

defendant. *See United States v. Loe*, 248 F.3d 449, 464 (5th Cir. 2001); *United States v. Simpson*, No. 3:09-CR-249-D(06), 2011 U.S. Dist. LEXIS 76881, at *60-61 (N.D. Tex. July 15, 2011).

If the indictment lacks sufficient detail to inform the defendant of the charges against him, the court may order a bill of particulars. Fed. R. Crim. P. 7(f); *see also United States v. Perez*, 489 F.2d 93, 95 (5th Cir. 1974); *United States v. Chen*, 378 F.3d 151, 163 (2d Cir. 2004). The bill of particulars, however, is not a discovery tool, it is not meant to provide the defendant with "evidentiary detail," and it is not intended to freeze the Government's evidence. *See*, *e.g.*, *United States v. Kilrain*, 566 F.2d 979, 985 (5th Cir. 1978); *Downing v. U.S.*, 348 F.2d 594 (5th Cir. 1965); *United States v. Bonventre*, 646 F. App'x 73, 79 (2d Cir. 2016); *United States v. Persico*, 621 F. Supp. 842, 868 (S.D.N.Y. 1985). Though W. Reed filed for a bill of particulars in this case, the Court denied the Motion as premature. (R. Doc. 30 at 5). However, the Government's letter response to W. Reed's motion is an official correspondence upon which the Defendant can reasonably rely, and may stand in the place of a bill of particulars.

In response to W. Reed's request to explain how the Government reached the amount in the Notice of Fraud Forfeiture, the Government explained that the amount was "comprised of the amount your client received from St. Tammany Parish Hospital in violation of federal law in the ten years prior to the date of the Indictment. . . ." (R. Doc. 361-2 at 2). However, the letter goes on to notify W. Reed that "the government

expressly states that the forfeiture amount set forth in the indictment is a preliminary number and that it can, and likely will, change prior to the trial of this case. . . ." *Id.* In the Notice of Fraud Forfeiture in the Indictment, the Government notifies the Defendants of their intent to seek forfeiture of "any and all property, real or personal, which constitutes or is derived from proceeds traceable to violations of [applicable codes], including but not limited to: *at least* $390,932.00. . . ." (R. Doc. 64 at 28) (emphasis added). Further, "[t]he Government specifically provides notice of its intent to seek a personal money judgment against the defendant in the amount of the fraudulently-obtained proceeds." *Id.* at 29.

As stated above, the purpose of the notice of forfeiture is to put the defendant on notice that the Government plans to seek forfeiture in this case. Fed. R. Crim. P. 32.2(a); 28 U.S.C. § 2461(c); *United States v. Loe*, 248 F.3d 449, 464 (5th Cir. 2001) ("An indictment is sufficiently specific if it 'puts the defendant on notice that the government seeks forfeiture and identifies the assets with sufficient specificity to permit the defendant to marshal evidence in their defense.') (internal citations omitted). In this case, the Government notified the Defendants of its intent to seek forfeiture and, though the Government provided a specific forfeiture amount, they are not required to do so under Rule 32.2(a). This Court finds the Government adequately notified Defendants of its intent to seek forfeiture. Further, because the Government informed both Defendants of its intent to seek *all* funds associated with the fraud including *at least* $390,932.00, this Court is

bound by present case law to find that the Defendants were fairly on notice that the amount was subject to change as the Government more fully developed its evidence. Accordingly, this Court finds W. Reed's argument that the forfeiture amount should be limited to the 10-year time frame is unavailing.

Direct Costs

W. Reed again avers the costs of goods and services should be deducted from the total forfeitable amount. (R. Doc. 365 at 5). Further, because he provided the Hospital with legal services, and because the District Attorney is under no obligation to represent the Hospital, W. Reed argues the proper venue for reimbursement is restitution, not forfeiture. *Id.* at 6, 14-15; La. R.S. 1051(a). This Court has already discussed the appropriateness and necessity of forfeiture in this case. *Taylor* 582 F.3d at 565. Accordingly, as discussed above, any argument that the value of W. Reed's services should be deducted from his forfeiture amount is fruitless. *See also United States v. Poulin*, 461 F. App'x 272, 288 (4th Cir. 2012). It is also worth noting that the charges in this section demonstrate that the 'victim' is, at least in part, the Office of the District Attorney, from whom W. Reed fraudulently kept the Hospital's payments. Accordingly, W. Reed's argument that the Hospital received a benefit from his services is inapposite. Finally, W. Reed's assertion that his forfeitable about [sic] should be reduced by the amount of income taxes paid also fails. Under 18 U.S.C. §981(a)(2)(B), direct costs do not include income tax paid.

This Court finds W. Reed responsible for the entire forfeitable amount alleged by the Government: $574,063.25.

D. Counts 9-14

The Government does not seek forfeiture for Counts 11-14 because forfeiture is unavailable for tax offenses. *Id.* at 4 n. 1. Nor does the Government seek forfeiture for Counts 9-10 because the money laundering alleged in those counts were also alleged as overt acts in Count 1 (Conspiracy). *Id.*

III. CONCLUSION

For the foregoing reasons, **IT IS ORDERED** that W. Reed and S. Reed are jointly and severally liable for **$46,200.00** forfeitable under Count 1.

IT IS FURTHER ORDERED that W. Reed is liable for **$609,217.08**, which includes $35,153.83 forfeitable under Counts 2-6 and 8, and $574,063.25 forfeitable under Counts 15-19.

New Orleans, Louisiana, this 3rd day of March, 2017.

/s/ Eldon E. Fallon
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-30296

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

WALTER P. REED; STEVEN P. REED,

Defendants - Appellants

Appeals from the United States District Court
for the Eastern District of Louisiana

ON PETITIONS FOR REHEARING EN BANC

(Filed Jan. 23, 2019)

(Opinion 11/05/2018, 5 Cir., _____, _____ F.3d _____)

Before HIGGINBOTHAM, SMITH, and CLEMENT, Circuit Judges.

PER CURIAM:

(✓) Treating the Petitions for Rehearing En Banc as Petitions for Panel Rehearing, the Petitions for Panel Rehearing are DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR.

R. 35), the Petitions for Rehearing En Banc are DENIED.

( ) Treating the Petitions for Rehearing En Banc as Petitions for Panel Rehearing, the Petitions for Panel Rehearing are DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petitions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Patti C. Higginbotham
UNITED STATES CIRCUIT JUDGE

*Judge Engelhardt did not participate in the consideration of the rehearing en banc.

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January 29, 2016

Mr. Richard Simmons
Halley, McNamara, Hall, Larmann, & Papale, LLP
One Galleria Boulevard; Suite 1400
Metairie, Louisiana 70001

Re: United States of America v. Walter Reed and Steven Reed; Criminal Action No. 15-100, Section "L" on the docket of the United States District Court, Eastern District of Louisiana

Report Concerning the Contemporaneous Construction and the Custom and Usage of the Louisiana Campaign Finance Disclosure Act
Your File No.: 6010-68326-RTS

Dear Richard:

This will confirm, and supplement, in part, your recent communication regarding my engagement to

provide you with an Opinion concerning the contemporaneous construction, the custom and usage and the historical application of the provisions of Louisiana's Campaign Finance Disclosure Act ("CFDA") with particular respect to the Superseding Indictment for Conspiracy initially filed by the United States Attorney for the Eastern District of Louisiana and as lately addressed and modified by the January 5, 2016 Order & Reasons of the United States District Judge for the Eastern District.

This is an interim report and may be modified by the occurrence of additional developments or by the review of additional information that may be drawn to my attention.

The District Court, during the course of its January 5, 2016 Order & Reasons, framed the issues germane to the CFDA noting, at the outset, that:

> "The gravamen of the conspiracy and wire fraud counts (counts 1-8) is Defendants' alleged improper personal use of campaign funds. Walter Reed is alleged to have solicited campaign funds from donors on the premise that the funds would be used to facilitate his reelection then used those funds to pay for personal expenses unrelated to his campaign or the holding of public office."

The court catalogs, in general, the details of those referenced counts before delineating his reasoning for addressing and resolving the pending Motions to

Strike Surplusage (and other motions unrelated to these considerations).

This opinion will address the general issues as framed by the District Court.

Background

Louisiana's CFDA was originally enacted by Acts 1980, No. 786 and was modeled, in large measure, against the Federal Election Code.

It was initially administered by a panel of *exofficio* officeholders; but, as the result of separation of powers concerns expressed by the Attorney General, the Legislature, after the initial creation of the CFDA, altered the manner for its administration and enforcement by creating the "Supervisory Committee on Campaign Finance Disclosure." LSA-R.S.18:1511.1.

The "members of the Board of Ethics . . . " were designated as the members of the "Supervisory Committee" and generally charged with the responsibility of the statute's administration.

The "Board of Ethics" replacing the prior Commission on Ethics for Public Employees and the Louisiana Board of Ethics for Elected Officials, was established "in the Department of State Civil Service" by LSA-R.S. 42:1132 and statutorily charged with the administration of Louisiana's Conflicts of Interest statute as well as other regulatory laws, in addition to the CFDA and including "lobbying" (LSA-R.S. 24:61), Executive Branch Lobbying (LSA-R.S. 49:71), etc.

The Board of Ethics is composed of eleven members selected in an unusual manner: seven members of the Ethics Board are appointed by the Governor but first must be nominated by representatives of Louisiana's private colleges and universities, two are "elected" by the House of Representatives but, again, must be first nominated by the Presidents or designees of Louisiana's private colleges and universities and two are "elected" by the State Senate likewise from lists of eligible designees provided by designated privates colleges and universities.

The Board of Ethics has a staff of attorneys, investigators, compliance personnel and administrative employees. It presently has approximately 40 employees.

Although the Board of Ethics, in its capacity as a "Supervisory Committee" on CFDA, initially had the statutory authority and capacity to "adjudicate" alleged violations of the Act, that capacity was statutorily modified and, presently, the Ethics Board no longer has the power and authority to adjudicate significant aspects of the CFDA which are, in turn, addressed and adjudicated by the "Ethics Adjudicatory Board (EAB)." The "EAB" was created by LSA-R.S. 42:1141.2 to hear charges brought by the Board of Ethics (and by the Supervisory Committee) as the result of due process and equal protection concerns that were developed prior to Acts 2012, No. 608.

The CFDA is a complicated statute. As published and formatted by the House of Representatives' Database, it is 60 pages in length. The CFDA has been

amended by the Legislature on dozens of occasions. It has been the subject of numerous administrative advisory opinions rendered by the Supervisory Committee, of enforcement actions and corresponding decisions by the EAB and has been the subject of subsequent interpretive case law primarily by Courts of Appeal and by the Supreme Court of Louisiana.

Because of the nature and extent of the proscriptions and penalties contained in the statutes administered by the Board of Ethics and by the "Supervisory Committee," the reviewing appellate courts have established judicially a "Rule of Lenity." The courts have prescribed that any reasonable doubt as to the interpretation of a proscribing or administrative provision of the Code of Governmental Ethics and the Louisiana Campaign Finance Disclosure Act must be resolved in favor of the respondent and against the Board of Ethics and the Supervisory Committee. Additionally, the Legislature amended the Ethics Code to require the Board of Ethics to establish violations through "clear and convincing" evidence.

The Purpose of the CFDA

The Legislature has provided a statement of purpose reflecting the importance of a "knowledgeable electorate . . . " and instructing that the CFDA is enacted to provide "public disclosure of the financing of election campaigns . . . "

Although there are restrictions on certain campaign practices, limitations on funding, the overall

framework of the CFDA is to require candidates seeking election to public office to periodically disclose the sources of their campaign funding. "Candidates" are divided into different categories with different filing requirements, primary and general elections are treated differently and annual reports are required of candidates and elected officials under prescribing circumstances.

There are also provisions that regulate expenditures. Prior to January 1, 1991, candidates having unexpended contributions could convert those contributions to their personal use and subject to applicable taxing could expend those funds in any manner they chose to.

The law was changed, effective January 1, 1991, so that campaign contributions received subsequent to that date were subject to a restriction that the funds must be (1) expended for a lawful purpose (2) must not be expended or "used" for any "personal use" unrelated to a political campaign or (3) expended for any use that is unrelated to the "holding" of a public office or party position.

Administration of the Restrictions on Expenditures

There was general uncertainty by the "Supervisory Committee" and its staff over the administration of the expenditure restrictions that were amended into the Ethics Code subsequent to January 1, 1981.

Because the operative provisions of the CFDA did not contain definitions of the salient terms regarding these restrictions on expenditures, the Ethics Board, on occasion, appealed to the Legislature to enact clarifying legislation. More particularly, there was widespread confusion, debate and dissention over what was meant by the operative terms prohibiting the use of surplus contributions for "personal use," and what was meant by the pronouncement that such funds could be used for the "holding of a public office . . . " Amendments to the CFDA were proposed, addressed to the House and Governmental Affairs Committee and to the Senate and Governmental Affairs Committees but, in large measure, no clarifying legislation was enacted. Although the Board had rendered a number of advisory opinions addressing these particular words, clarity was demonstrably lacking. In an effort to summarize its position regarding the interpretation and application of these ambiguous restrictions on campaign expenditures, the Board, through its staff, attempted to publish Statements of Policy, purporting to detail the respected position of the Board. Members of the Legislature complained, charging that the Ethics Board had no authority to provide general policy statements, without comporting with the requirements of the Administrative Code by enacting rules which required public notice, review by two legislative committees and by the Office of the Governor. As a result of opinions rendered by the Attorney General, the Ethics Board discontinued its effort at providing clarifying instructions regarding the application of the terms contained in the CFDA.

The October 22, 2015 Superseding Indictment

I have been requested to review and comment on those specific articles of the superseding indictment that are "based on" or that are otherwise entwined with the provisions of Louisiana's CFDA. Each of these will be addressed below:

- **Campaign contributions expended for the purchase and delivery of floral arrangements.**

The superseding indictment and the government's responses to the Bill of Particulars list a series of expenditures by check to florists, and primarily to "Flowers N Fancies by Carol," a retail florist located in Mandeville, Louisiana.

Some of these floral arrangements were delivered to members of the immediate family of Mr. Reed and others to members of his staff. Most of the expenditures were for floral arrangements that were delivered on birthdays and other occasions, at funeral services and to hospitals, and generally for the benefit of constituents and supporters. It is my understanding that all of the recipients, including members of the immediate family and staff employees of Mr. Reed, supported his most recent election to public office.

The issue of whether the provision of floral arrangements for the funerals, the hospitalizations, the birthdays and other occasions for constituents and supporters, as well as in recognition of prior political support, was the subject of conflicting actions by the Ethics Board. Literally hundreds of Campaign Finance

Disclosure Reports were filed by candidates that disclosed expenditures for these purposes. Little, if any, detail was given in these Disclosure Reports of the relationship that the recipients had to the candidate or the specific purpose for which the flowers were given. In large measure, the reporting of these expenditures for flowers was universally ignored by the audit and compliance staff of the Ethics Board, although on occasion "objections" were issued resulting in amended returns being filed.

This culminated in litigation when the Ethics Board sued Kip Holden, Mayor of the City of Baton Rouge, arguing generally that Mayor Holden may have violated provisions of the CFDA by expending funds for the purchase of floral arrangements to constituents and staffers.

A trial was conducted during the course of which the staff – apparently speaking for the Board – contended that such expenditures were impermissible. The gist of the Board's position was that the operative provision of law, LSA-R.S. 18:1505:2 I. (1) restricted the expenditure of excess campaign funds only for three proposes: (1) returned to contributors on a *pro rata* basis (2) charitable contributions as provided in 26 USC 170(c) and 26 USC 501(C)(3) or (3) expended as campaign contributions to other candidates and committees.

During the course of the trial conducted in the 19th Judicial District Court, this position by the Ethics Board was rejected. The District Court concluded that

the statute clearly allows candidates to purchase flowers for their constituents and staffers as this is a quintessential activity of elected officials to maintain their relevancy for future elections, to award their supporters, and to maintain a harmonious and supportive relationship with their constituency and potential voters. Expert testimony was introduced recognizing that elected officials have always used their campaign contribution surpluses to honor and recognize the achievements and accolades of their constituents – and particularly the children of their constituents – to express sympathy for those electors who are ill or hospitalized or deceased and to generally memorialize their "representative" responsibilities to the public in general and to the electorate in particular.

This decision by the District Court was continued by Louisiana's First Circuit Court of Appeal.[1]

The controlling provision of the CFDA, Section 1505.2 I. (1) is manifestly ambiguous. It is and has been the subject of a host of conflicting interpretations. The Legislature has consistently declined to enact clarifying legislation. An effort by the Board to provide general pronouncements was undermined when, at the request of a Chairman of the House and Governmental Affairs Committee, the Attorney General rendered an advisory opinion concluding that such publications by the Board of Ethics were invalid without compliance with the operative provisions of the Administrative Procedures Act. Judicial interpretation warrants

[1] 121 So.3d 113 (La.App. 1 Cir. 2013)

the conclusion – and it is generally my opinion – that Louisiana's Campaign Finance Disclosure Act does not prohibit elected officials from expending campaign contribution surpluses for the purchase of floral arrangements for constituents, staffers, and supporters, including immediate family members, who have notably contributed their energy and resources to the candidate's successful election. Public office is not maintained in a vacuum. Reelection – or subsequent election to another office – is seldom achieved where elected officials fail to actively participate and thereby recognize those who have contributed by their efforts, energy, resources and vote to the official's election.

Donations to Pentecostal Churches and Ministers

Counts II, III, IV, VI and elsewhere describe a series of expenditures for donations made to Pentecostal churches through their ministers and for luncheons and dinners attended by Pentecostal ministers and others. By way of illustration, Count VIII references a $25,000 donation to the First Pentecostal Church/and to a Reverend Cox in 2013, while other Counts describe payments to restaurants – such as "Gerald's Steakhouse" for meetings attended by Pentecostal ministers and personnel. Some of these meetings at restaurants were apparently also attended by individuals who were colleagues of District Attorney Reed with respect to his private practice of law with the "McCranie Sistrunk" law firm.

The gist of the Charge by the United States Attorney is that the purpose – or at least a purpose – of these contributions and expenditures was to "recruit" these Pentecostal ministers to refer private civil legal work to the law firm with which Reed was affiliated.

At the outset, it is reasonable to assume the "First Pentecostal Church" as well as the "Little Rock Pentecostal Church" are charitable, nonprofit organizations and that donations directly or through their agent ministers are clearly permitted at subparagraph "I. (1) of §1505.2." There is no need and in deed no authority for any further inquiry to be made into the "purpose" of a donation that is clearly permitted under the controlling statutory law.

Yet, and setting aside this specific statutory authorization for such expenditures from political campaign surpluses, it is difficult to envision a more divisive and emotional controversy over public policy than what has been described as the "pandering" of support by candidates from conservative religious organizations and leaders. Experience demonstrates that – particularly in the South and in what might be referred to as the "Bible Belt" – support from conservative "faith based organizations", "faith based spokespersons" and religious organizations is of paramount importance to successful campaigning for election to public office. In my 45 years or so of experience, it is fair to say that this is nowhere more prevalent and axiomatic than in Louisiana where officeholders seeking reelection and those initially seeking election to public office are frequently aligned with "social wedge issues" that are

either supported by or opposed by faith based organizations. It is my understanding that District Attorney Reed has historically appealed to and has engendered the political support of Christian organizations, in general, and the Pentecostal ministry, in particular.

It is not unusual for candidates and elected officials who seek or have received the support of faith based organizations to correspondingly express their support for those ministries through charitable donations to the organizations or to their ministers and to the honoring of those relationships by hosting and paying for lunches, dinners and other "receptions" for the exchange of political, social, and religious views.

Conversely, and in my experience, it would be naive to assume that the development of these personal relationships between candidates and elected officials on the one hand, and supporting religious leaders on the other hand, does not also entail mutual, yet secular accommodations. A former member of the Louisiana Senate who owned an automobile dealership in North Louisiana routinely supported and donated to conservative religious organizations likewise sold automobiles to these institutions, to their ministers and to their support staff under arm's length commercial transactions. "Mixed" purposes often attend relationships between elected officials and organizations they support and whom conversely support those elected officials.

It is my opinion that given the "Rule of Lenity" and coupled with the "clear and convincing" standard that

attends the enforcement of provisions of the CFDA, that it is unlikely that a violation of Section 1505.2 I. (1) occurs when such events unfold as the result of such "mixed reasons." The consideration that these religious leaders might have recommended to members of its congregation the [sic] use Mr. Reed's law firm to represent them in casualty claims does not, in my opinion and experience, undermine the provisions of law that specifically allows campaign funds to be used for purposes that are either "related to a public political campaign" or otherwise related to the "holding of a public office." A former member of the Board of Ethics used to express, yet perhaps with sarcasm, that "holding on to public office" is a guiding aspiration applicable to all elected officials and that "getting support and giving support is a two-way street."

Although a review of pertinent advisory opinions of the Ethics Board on this – or any other – subject is problematical because of the indexing and retrieval mechanisms, I am not aware of any opinion of the Ethics Board that suggests that an expenditure that is made for purposes reasonably related to the holding of a public office – particularly to an organization – qualifying as a charitable institution under Title 26 of the USC – is nevertheless undermined by the consideration that it may have produced a reciprocal consequence or in fact, that it was made for a "dual purpose." Purchasing automobiles from a dealership owned by a candidate who might have made donations to the organization that has likewise provided political and

elective support is indicative of the world in which elected officials and their supporters exist.

Thanksgiving Dinners at the Dakota Restaurant

One of the several area restaurants that was frequented by the District Attorney and at which he entertained supporters, contributors and political allies is a restaurant known as the Dakota's. There were several luncheons at the Dakota and there were dinners on Thanksgiving Day in 2009 through 2012. The gist of the position of the government is that these were family dinners and not dinners for supporters. Although this is a fact specific consideration, to the extent that these dinners – and the Thanksgiving celebrations in particular – were attended by political allies of the District Attorney, by his past and potential future supporters and contributors, these dinners manifestly relate to both the District Attorney's "holding of office" as well as his reelection strategy. The ancient bromide of "wining and dining" is the quintessential way in which elected officials have garnered the confidence and the support of political allies, potential voters and contributors. And, it is often a way of showing appreciation for and "honoring" their previous support. The consideration that family members likewise attended these events at a public restaurant does not alter the framework of the specific statutory authorization for this type of expenditure.

The April 14, 2012 Open House

Count 1 of the indictment relates to an event described as an "Open House" and a written invitation that was issued by the District Attorney for a Saturday evening in April of 2012.

Expenditures totaling $25,289.00 were made and reported from Mr. Reed's campaign. Of this amount, approximately $8,300.00 was paid to a business owned by Mr. Reed's son, for various support services provided during the course of the event.

As I understand the government's Charge, this "Open House" was not for any purpose related to either the holding of public office by Mr. Reed or his effort to maintain or develop support for reelection but, rather, was only for the purpose of "funneling" money to or for the benefit of his son.

It is my understanding that a commercial band was hired to perform at the Open House, that a tent had been set up outside for the entertainment of participants and guests, that approximately 150 invitations were printed and issued and that this or a larger number of people attended. I have seen photographs that appear to identify a number of area political officials, elected officials and supporters of Mr. Reed, including particularly a Judge, the Mayor of Covington, a member of the City Council, a former Mayor, representatives of a support organization (the River Boat Pilot's Association) and at least one notable contributor.

I have not been requested to nor do I purport to express any opinion as to the "reasonableness" or the necessity of the services provided by Steven Reed through his company on the occasion of this reception.

There is nothing unusual about an elected official holding a reception for mixed purposes. In my experience, and to the contrary, it is customary for elected officials to host events, often in conjunction with other civic, charitable, religious or personal activities, yet that include as a significant component the inviting of "patrons": that is, individuals who have been previously identified as potential supporters of the elected official and whose presence at such events signals general support for the hosting elected official. These events also provide a venue for informal discussions regarding future support. I am unaware of any opinion of the Ethics Board, the Ethics Adjudicatory Board or the courts that have suggested that such "mixed purposes" events precluded funding from campaign surpluses. This is particularly the situation with respect to holiday, Mardi Gras, birthday and other receptions in which governors legislatures and other elected officials, at every level of office in Louisiana, have sponsored and hosted, at their expense, events at which supporters, contributors, political allies, representatives of religious and commercial businesses are invited to attend in order to evidence their general political and perhaps financial support of the particular candidate.

In my opinion, these principles are not undermined by reason of the consideration that a portion of

expenses associated with this activity may have enured to the benefit of the District Attorney's son by reason of the payments made in exchange for the services provided by the son's commercial business.

It is noteworthy that expenditures that ultimately inure to the benefit of immediate family members of the candidate have not always been proscribed. To the contrary, this restriction was added to the Campaign Finance Disclosure Act as (5)(a) of Subsection I. of Section 1505.2. The definition of "immediate family member" would include the son of the District Attorney.

It is my opinion that the "mixed purpose" for which this event was manifestly held, that is both a "house warming" party as well as a "patron support" function, does not violate the principle that the expenditure for the reception was reasonably related to Mr. Reed's "holding of public office" as well as to the development and planned support for his reelection.

As the totality of these expenditures was timely reported to the Board of Ethics and Campaign Finance Disclosure Reports filed by District Attorney Reed, based on its custom and practice, the Board would have instructed Mr. Reed to refund his campaign account with a portion of expenditures that were made to his son's business.

St. Paul School

I am uncertain of the position of the Justice Department concerning this matter as I do not see any

particular allegations regarding expenditures made to the Roman Catholic St. Paul's school. I am told this matter may be developed by the government. A review of the Campaign Finance Disclosure Act reveals that about $6,000.00 was donated by Mr. Reed from his campaign surplus to this 100 year old private school, that a wrestling team appreciation dinner was hosted and that approximately $1,600.00 was expended for that purpose as well. Mr. Reed's son was a student at St. Paul's in 2009/2010 when these charitable donations were made and when these expenditures were incurred. St. Paul's is a charitable organization and, it is my understanding, has been recognized as such under Section 501(c)(3) of the Internal Revenue Code. It is my understand that Mr. Reed paid 100% of the tuition costs incurred on behalf of his son as both a student and a member of the wrestling team. I've seen documents from St. Paul "thanking [as a] supporter" District Attorney Reed for his actions.

With respect, I am at a loss to understand any untoward aspect of consequence of these charitable contributions and of Mr. Reed's support for a private school attended by his son.

America Concert

One of the core contentions of the government relates to a substantial occurrence generally referred to as the "America Concert." The position of the government generally stated at Article 12 is that a service

company owned by Steven Reed was paid approximately $29,400.00 to provide bar services at the event.

It is my understanding that several hundred people – perhaps as many as 1,500 people – attended this celebratory/political/patriotic event. A review of the appropriate Campaign Finance Disclosure Report illustrates that Mr. Reed reported expenditures in excess of $29,000.00 to "Liquid Bread," yet that is a business owned by Steven. Although I express no opinion over the "valuation" of the services and products provided by Steven, it is nevertheless my understanding that he was intimately involved in the support aspects of this significant event. There does not appear to be any question that this occurrence was attended by a litany of political supporters of the District Attorney, colleagues, other elected officials, representatives of support organizations and citizens who had and would reasonably be expected in the future to support both the District Attorney's reelection and the development of his office's law enforcement agenda. My experience over the past five decades with respect to the administration of the Ethics Board and its predecessors, warrants the conclusion that if any action had been taken by the Supervisory Committee, it would have been to invite the District Attorney to replenish his campaign account with the portions of the "America Concert" that may have been paid – in excess of amounts commensurate with services rendered – to businesses owned by his son.

The Anti-Drug Video

Count I of the government's Charge pertains to an overpayment by the District Attorney to his son for the production of a campaign video that was reported at a cost of $14,300.00. I express no opinion as to the reasonableness of this Charge.

It appears axiomatic to me that it is entirely reasonable and appropriate for a law enforcement officer, in general – and a District Attorney in a conservative community – to pay the reasonable cost associated with the development and planned distribution of an anti-drug video. There are reports that more than half of all of the crimes in Louisiana are related to the illegal use and distribution of controlled dangerous substances. The provision of information concerning the prevention of the use and distribution of these deleterious substances is completely consistent with the responsibility of a District Attorney and most of the political reelection aspirations and to the responsibilities of his "holding office."

In my opinion, the expenditure of Mr. Reed's campaign funds for the development, purchase and distribution of this video is entirely permissible under the controlling provision of the CFDA at Section 1505.2 I. (1). Again, the contemporaneous construction of the application of this provision and the custom and practice of the Board as the Supervisory Committee for the past two decades warrants the conclusion that the matter would have been quickly resolved when called to the

attention of the candidate by the repayment of the expenditure to the campaign fund.

Two $5,000 Payments

Articles 13 and 14, generally at the bottom of page 9 and at the top of page 10 of the indictment refer to apparent expenditures from the Walter Reed Campaign Fund. One of these expenditures is described as the hiring of "Company A" to produce entertainment coupled with an allegation that the District Attorney "required" the owner of Company A to pay a portion of the fee to Steven Reed. The reference at Article 14 is similar but involves "Company B" and catering services for the America event.

Given the consideration that the provisions of the CFDA are to be "strictly construed" against the Ethics Board, and review of the Rule of Lenity announced by the First Circuit Court of Appeal, it is highly unlikely, in my experience, that the Ethics Board would attempt to argue that Subsection (5)(a) would prohibit either "Company A" or "Company B" from subcontracting with a member of the immediate family of the District Attorney to provide services commensurate with payments made. Again, this is a fact specific issue that has been clouded by the inflammatory allegation that the expenditures by Company A and B were "required" by the District Attorney and by the perception that the presumption that no services were provided. It is my understanding that the two $5,000 sums were repaid

to the District Attorney's Campaign Account prior to the original indictment.

Conclusion

The Campaign Finance Disclosure Act is a civil statute. It is administered by the Supervisory Committee as the plaintiff and adjudications occur in civil proceedings conducted by the Ethics Adjudicatory Board. It has always been the position of the Ethics Board and of the Supervisory Committee that the "exclusive remedy" for enforcing alleged violations of the CFDA was through this civil enforcement mechanism. I am not aware of any authority for the proposition that violations of the CFDA can he pursued by anyone other than the Supervisory Committee.

In a broader sense, the "holding of a public office" and the political campaign agenda of an existing officeholder create complex dynamics. The use of campaign funds to achieve election, to attain office, and to promote reelection are at the forefront of the thoughts and actions of every successful elected officeholder. Much has been written about the deleterious effect of the unfettered direct and indirect use and effect of money on the selection of our elected governmental officials.

The subsequent use of surplus campaign contributions by officeholders is of no less controversy and fair debate. The manifest reticence – indeed unwillingness – by the legislature to provide statutory guidance to what is and what is not a permissible expenditure, coupled with the legislatively inspired opinions of the

Attorney General that the Ethics Board cannot provide general guidance as to what is meant by the "use unrelated to a political campaign" or the "holding of public office," underscores the consideration that Louisiana lawmakers prefer for the Ethics Board to make fact specific decisions in particular cases with a specific set of circumstances, rather than to paint with a broader brush. This may be regrettable as such protocol does not provide guidance to even the most prudent officeholder as to what he can or cannot do with his campaign surplus.

In all events, the most significant aspect of the expenditure requirements of the CFDA is that of disclosure and reporting: Has the candidate reported the amount spent? Reported expenditures, if inaccurate, warrant amended reports. Reported expenditures for impermissible purposes typically results in the candidate being directed to repay his campaign fund by the amount improperly expended.

Please contact me to discuss further as needed.

Yours truly,

/s/ R. Gray Sexton
R. Gray Sexton

RGS:agd