APPENDIX A

913 F.3d 332

United States Court of Appeals, Third Circuit.

UNITED STATES of America

v.

William HIRD, Appellant at No. 14-4754

United States of America

v.

Thomasine Tynes, Appellant at No. 14-4804

United States of America

v.

Robert Mulgrew, Appellant at No. 14-4812

United States of America

v.

Michael Lowry, Appellant at No. 15-1344

United States of America

v.

Willie Singletary, Appellant at No. 15-1739

United States of America

v.

Henry P. Alfano, aka Ed, aka Eddie,
Henry P. Alfano, Appellant at No. 15-3765

Nos. 14-4754, 14-4804, 14-4812,
15-1344, 15-1739, 15-3765

| Argued October 23, 2017

| Opinion Filed: January 18, 2019

Affirmed in part, vacated in part, and remanded.

Opinion, 901 F.3d 196, superseded.

***336** On Appeal from the United States District Court for the Eastern District of Pennsylvania (District Court Criminal Nos. 2-13-cr-00039-007, 2-13-cr-00039-005, 2-13-cr-00039-003, 2-13-cr-00039-002,

2-13-cr-00039-004, 2-13-cr-00039-008), District Judge: Honorable Robert F. Kelly, District Judge: Honorable Lawrence F. Stengel

BEFORE: GREENAWAY, JR., NYGAARD, and FISHER, Circuit Judges

OPINION OF THE COURT

NYGAARD, Circuit Judge.

***337** I.

In the run-up to a joint trial on a 77-count indictment that charged Appellants with operating a ticket-fixing scheme in the Philadelphia Traffic Court, the District Court denied a motion, under Federal Rule of Criminal Procedure 12(b)(3)(B)(v), to dismiss charges of conspiracy (18 U.S.C. § 1349), mail fraud (18 U.S.C. § 1341), and wire fraud (18 U.S.C. § 1343). Appellants Henry Alfano (private citizen) and William Hird (Traffic Court administrator) subsequently pleaded guilty to all counts against them. But now they appeal the District Court's decision on this motion, questioning whether the indictment properly alleged offenses of mail fraud and wire fraud.[1]

Appellants Michael Lowry, Robert Mulgrew, and Thomasine Tynes (Traffic Court judges) proceeded to a joint trial and were acquitted on the fraud and conspiracy counts, but they were convicted of perjury for statements they made before the Grand Jury. Lowry, Mulgrew, and Tynes dispute the sufficiency of the evidence on which they were convicted by arguing that the prosecutor's questions were vague, and that their answers were literally true. Lowry and Mulgrew

[1] Alfano and Hird preserved their right to appeal. *See infra* subsection I.C.

contend alternatively that the jury was prejudiced by evidence presented at trial on the fraud and conspiracy counts. Mulgrew also complains that the District Court erred by ruling that certain evidence was inadmissible.

At the same trial, the jury convicted Willie Singletary (Traffic Court judge) of making false statements during the investigation. He claims the District Court made errors when it sentenced him.[2] The Government concurs with Singletary's challenge to his sentence.

We have consolidated these appeals for efficiency and have grouped the arguments—to the extent that it is possible—by common issues. We agree with Singletary and the Government that he should be resentenced. We will reverse the judgment and remand his cause to the District Court for this purpose. We are not persuaded by the rest of Appellants' arguments and will affirm their judgments of conviction.[3]

II.

Appellants Alfano[4] and Hird[5]

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[2] Singletary also attempted to join additional arguments raised by other appellants, but for reasons we explain later, *see infra* note 33, we focus only on his challenge to his sentence.

[3] The District Court had jurisdiction pursuant to 18 U.S.C. § 3231. We have jurisdiction to review these claims under 28 U.S.C.§ 1291 and 18 U.S.C. § 3742(a).

[4] Appellant Alfano pleaded guilty to Conspiracy (Count 1), Wire Fraud (Counts 2, 3, 4, 5, 6, 7) and Mail Fraud (Counts 51, 52, 53, 54, 55, 56).

[5] Appellant Hird pleaded guilty to Conspiracy (Count 1), Wire

A.

We begin with a brief look at the indictment's description of the Traffic Court and ***338** its operations to contextualize the arguments made by Alfano and Hird. The Philadelphia Traffic Court was part of the First Judicial District of Pennsylvania. App. 186 (Indictment ¶ 2).[6] It adjudicated violations of the Pennsylvania Motor Vehicle Code occurring in the City of Philadelphia, no matter whether the Philadelphia Police or the Pennsylvania State Police issued the tickets. App. 187 (Indictment ¶ 5). When a person was cited for a violation he or she was required—within ten days—to enter a plea of guilty or not guilty. If the person failed to plead, the Traffic Court issued a notice that his or her license was being suspended. App. 189 (Indictment ¶ 12). A person who pleaded not guilty proceeded to a hearing with a Traffic Court judge presiding. App. 187 (Indictment ¶ 6).

A guilty plea, or a determination of guilt by a Traffic Court judge after a hearing, resulted in a judgment ordering payment of statutory fines and court costs. App. 188 (Indictment ¶ 8).[7] The Traffic Court was responsible for collecting these fines

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Fraud (Counts 3, 4, 5, 6, 16, 17, 18, 19, 20, 22, 23) and Mail Fraud (Counts 58, 59, 60).

[6] Philadelphia Traffic Court was abolished and its jurisdiction was transferred to the Municipal Court in 2013 by an Act of the Pennsylvania General Assembly. 42 Pa.Cons.Stat. § 1121(a)(2) (2013). The court is now known as the Traffic Division of the Municipal Court.

[7] Although other penalties are prescribed by the Pennsylvania Motor Vehicle Code (App. 188), this appeal is limited to the monetary fines and costs. App. 355.

(sending them to the City and Commonwealth) and costs (which it distributed to several pre-designated funds). App. 188-89 (Indictment ¶ 9). Finally, it reported the disposition of each adjudication to the Pennsylvania Department of Transportation (Penn-DOT). App. 189 (Indictment ¶ 11).

B.

The indictment charged that, at the behest of Alfano (App. 193 (Indictment ¶ 25)) and others, the Traffic Court administrator and judges operated an "extra-judicial system, not sanctioned by the Pennsylvania court system" that ignored court procedure and gave preferential treatment ("consideration") to select individuals with connections to the court who had been cited for motor vehicle violations. App. 196 (Indictment ¶ 31). The special treatment included:

> (1) dismissing tickets outright; (2) finding the ticketholder not guilty after a "show" hearing; (3) adjudicating the ticket in a manner to reduce fines and avoid assignment of points to a driver's record; and (4) obtaining continuances of trial dates to "judge-shop," that is find a Traffic Court judge who would accede to a request for preferential treatment.

App. 195-196 (Indictment ¶ 30). All of this was "not available to the rest of the citizenry." App. 196 (Indictment ¶ 32). It also alleged that Appellants cooperated with each other to fulfill requests they and their staffs received. App. 194-95 (Indictment ¶ 27). Finally, it charged that "[i]n acceding to requests for 'consideration,' defendants were depriving the City of Philadelphia and the Commonwealth of Pennsylvania of money which would have been properly due as fines

and costs." App. 197 (Indictment ¶ 38).[8]

***339** After extending consideration to favored individuals, Traffic Court judges would report the final adjudication to "various authorities, including PennDOT, as if there had been a fair and open review of the circumstances." App. 197 (Indictment ¶ 34). Appellant Hird provided a printout to Appellant Alfano showing citations that had been "dismissed or otherwise disposed of." App. 198-99 (Indictment ¶ 42). Such "receipts" were not routinely issued in cases.

C.

Hird and Alfano pleaded guilty to all the charges against them in the indictment. But, in their plea agreement they reserved the right to appeal "whether the Indictment sufficiently alleged that the defendants engaged in a scheme to defraud the Commonwealth of Pennsylvania and the City of Philadelphia of money in costs and fees." App. 355 (Plea Agreement ¶ 9(b)(4)). So they now appeal the District Court's order denying the motion to dismiss, asserting that the indictment failed to allege violations of mail fraud and wire fraud.

"To be sufficient, an indictment must allege that

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[8] An example of the many allegations involving Alfano and Hird is: A.S. requested assistance from Appellant Alfano and Appellant Hird on Citation Number P1J0PK568L4 on or around February 17, 2010. The citation charged A.S. with driving a tractor-trailer from which snow and ice fell, striking vehicles on Interstate 95. The violation carried a $300 fine and costs of $142. Appellant Hird promised that he would "stop all action" on the citation and instructed A.S. to ignore the ticket. Although A.S. did not appear at the hearing, the Traffic Court judge (who is not an appellant here) ruled A.S. not guilty. App. 210-12 (Indictment ¶¶ 25-34).

the defendant performed acts which, if proven, constitute a violation of the law that he is charged with violating." *United States v. Small*, 793 F.3d 350, 352 (3d Cir. 2015). We assume in our review that the allegations in the indictment are true. *United States v. Hedaithy*, 392 F.3d 580, 583 (3d Cir. 2004). "The question of whether the ... indictments alleged facts that are within the ambit of the mail fraud statute is a question of statutory interpretation subject to plenary review." *Id.* at 590 n.10.

To indict on mail or wire fraud, the Government must allege that defendants "devised or intend[ed] to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" and used mail or wire to effect the scheme. 18 U.S.C. §§ 1341, 1343. Alfano and Hird claim the Government failed to allege that the scheme to commit wire and mail fraud had an objective of "obtaining money or property."[9]

The District Court ruled that the indictment sufficiently alleged that the scheme "involved defrauding the Commonwealth and the City of money." App. 20. It noted, among others, allegations that:

> The conspirators used the Philadelphia Traffic Court ("Traffic Court") to give preferential treatment to certain ticketholders, most commonly by "fixing" tickets for those with whom

[9] In the context of mail fraud (§ 1341) and wire fraud (§ 1343) the term "money" has the same meaning. The same is true for the term "property." *Carpenter v. United States*, 484 U.S. 19, 25 n. 6, 108 S.Ct. 316, 98 L.Ed.2d 275 (1987).

> they were politically and socially connected. By doing so, the conspirators defrauded the Commonwealth of Pennsylvania and the City of Philadelphia of funds to which the Commonwealth and the City were entitled.

Id. at 18; *see also id.* at 185 (Indictment ¶ 1). Similarly, it referred to the following.

> In acceding to requests for "consideration," defendants were depriving the City of Philadelphia and the Commonwealth of Pennsylvania of money which would have been properly due as fines and costs.

***340** *Id.* at 9; *see also id.* at 197 (quoting Indictment ¶ 38). Highlighting the references to "funds" and "money," and that the monetary amounts of the fines are specifically pleaded, the District Court cited to a case from the Court of Appeals for the Eighth Circuit which concluded succinctly that "[m]oney is money." *United States v. Sullivan*, No. 2:13-cr-00039, 2013 WL 3305217, at *7 (E.D. Pa. July 1, 2013) (quoting *United States v. Granberry*, 908 F.2d 278, 280 (8th Cir. 1990)). The District Court was satisfied that the indictment alleged enough.

"Money, of course, is a form of property." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979). But Alfano and Hird argue that the mere mention of money in an indictment is not enough. They point to a string of Supreme Court and Court of Appeals decisions analyzing Section 1341 and Section 1343 which reinforce the point that crimes of mail fraud and wire fraud are "limited in scope to the protection of property rights." *McNally v. United States*, 483 U.S. 350, 360, 107 S.Ct. 2875, 97

L.Ed.2d 292 (1987).[10] The Supreme Court said that "[a]ny benefit which the government derives from the [mail fraud] statute must be limited to the Government's interests *as a property holder*." *Id.* at 359 n.8, 107 S.Ct. 2875 (emphasis added). Appellants are convinced that money in the form of traffic fines and costs cannot be regarded as the Government's "property" for purposes of mail or wire fraud, and they identify two decisions as particularly supportive of their position: *Cleveland v. United States*, 531 U.S. 12, 121 S.Ct. 365, 148 L.Ed.2d 221 (2000); and *United States v. Henry*, 29 F.3d 112 (3d Cir. 1994).

The Court in *Cleveland* examined the mail fraud convictions of individuals who received a state video poker license by submitting a license application that withheld important information. *Cleveland*, 531 U.S. 12, 121 S.Ct. 365.[1111] The Court noted that the video poker licenses were part of a state program that was "purely regulatory." *Id.* at 22, 121 S.Ct. 365 (citation omitted).[12] It ruled that licenses are a "paradigmatic

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[10] The District Court cited to a number of cases that came after *McNally*: *Carpenter v. United States*, 484 U.S. 19, 108 S.Ct. 316, 98 L.Ed.2d 275 (1987); *Cleveland v. United States*, 531 U.S. 12, 121 S.Ct. 365, 148 L.Ed.2d 221 (2000); *Pasquantino v. United States*, 544 U.S. 349, 125 S.Ct. 1766, 161 L.Ed.2d 619 (2005).

[11] The licenses were part of a regulatory scheme that had as its purpose to increase public confidence in the honesty of gaming activities that are free of criminal involvement. *Cleveland*, 531 U.S. at 20–21, 121 S.Ct. 365 (quoting La. Rev. Stat. Ann. § 27:306(A)(1) (2000) (repealed 2012)).

[12] The Court rebuffed the Government's attempts to analogize licenses to other forms of property like patents and franchise rights. As for likening licenses to franchise rights, the Court observed that the Government did not enter the video poker

exercise[ ] of the States' traditional police powers." *Id.* at 23, 121 S.Ct. 365. The Court went on to say that the state's regulatory powers involving "intangible rights of allocation, exclusion, and control" (which are embodied in a license) are not interests that traditionally have been recognized as property. *Id.* Therefore, even though appellants may have obtained the license through deception, this was not mail fraud because the license—at least while still in the hands of the state—was not property. *Id.* at 26-27, 121 S.Ct. 365. It was a purely administrative tool used to achieve regulatory objectives. *Id.* at 21, 121 S.Ct. 365.

***341** The state responded to the Court's concerns by agreeing that the licenses served a regulatory purpose, but it directed attention to the revenue it received from fees collected for license applications and renewals, as well as device fees. *Id.* at 21-22, 121 S.Ct. 365. It argued that this revenue is a property interest. *Id*. The Court was not convinced:

> Tellingly, as to the character of Louisiana's stake in its video poker licenses, the Government nowhere alleges that Cleveland defrauded the State of any money to which the State was entitled by law. Indeed, there is no dispute that TSG paid the State of Louisiana its proper share of revenue, which totaled more than $1.2 million, between 1993 and 1995. If Cleveland defrauded the State of "property," *the nature of that property cannot be economic*.

Id. at 22, 121 S.Ct. 365 (emphasis added). It concluded that "[e]ven when tied to an expected

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business, but rather decided to "permit, regulate, and tax private operators of the games." *Id*. at 24, 121 S.Ct. 365.

stream of revenue, the State's right of control does not create a property interest any more than a law licensing liquor sales in a State that levies a sales tax on liquor." *Id.* at 23, 121 S.Ct. 365.[1313] The money collected from application and processing fees was an integral part of the state regulatory program and it did not create any property interest. *See id.*

The purpose of the Pennsylvania Motor Vehicle Code is to "promote the safety of persons and property within the state." *Maurer v. Boardman*, 336 Pa. 17, 7 A.2d 466, 472 (1939). Moreover, issuing traffic tickets is a crucial element in the enforcement of the Motor Vehicle Code: it is a quintessential exercise of state police power. Alfano and Hird conclude, much like *Cleveland,* that no property interest could arise from revenue generated from the state's exercise of its police power in the form of a traffic-ticket fine. They see nothing but a regulatory program here. But this ignores crucial aspects of the case before us that make it different.

Simply stated, fees charged to obtain a license cannot be equated with fines and costs that result from a traffic ticket. The license fee was imposed, adjusted, and collected solely by the state's exercise of its regulatory authority. In contrast, here the state's police power is exercised when a citation is issued, but this ticket merely establishes the summary violation with which the person is charged. Once a person has been charged, it is judicial power (not the state's police power) that is exercised to determine whether the person is guilty and, if guilty, to impose the fine

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[13] *Cleveland* also held that Government-issued licenses have no intrinsic economic worth before they are given to applicants. *Id.* at 23, 121 S.Ct. 365.

and costs.[14] These fines and costs, although specified by the Motor Vehicle Code, cannot be cabined as a product of the state's regulatory authority. They are part and parcel of the judgment of the court. With this in mind, it is significant that the indictment does not focus on how the citations were issued (which would implicate police power), but rather alleges that the judicial process was rigged to produce only judgments that imposed lower fines—or most often—no fines and costs at all.[15]

***342** But this raises a further question: can a criminal judgment held by the government ever be "property?" The Court in *Cleveland* offered a critique in its analysis of a different issue (whether licenses were analogous to patents) that is apropos to answering this question.

> [W]hile a patent holder may sell her patent, see

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[14] The Traffic Court was not an administrative tribunal. Rather, it was part of the First Judicial District of Pennsylvania. App. 186 (Indictment ¶ 2). *See also supra* note 6 and accompanying text.

[15] On this point, it is noteworthy that the Supreme Court also said the following: "We resist ... [any invitation] to approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress. ... '[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance' in the prosecution of crimes." *Cleveland*, 531 U.S. at 24-25, 121 S.Ct. 365 (quoting *Jones v. United States,* 529 U.S. 848, 858, 120 S.Ct. 1904, 146 L.Ed.2d 902 (2000)). As we discuss later, the legal tradition of understanding judgments as property is long-established. Consequently, the concern about expanding the reach of federal fraud statutes to new classes of property that was present in the deliberation of state licenses in *Cleveland* is not at issue here.

> 35 U.S.C. § 261 ... "patents shall have the attributes of personal property" ... the State may not sell its licensing authority. Instead of a patent holder's interest in an unlicensed patent, the better analogy is to the Federal Government's interest in an unissued patent. That interest, like the State's interest in licensing video poker operations, surely implicates the Government's role as sovereign, not as property holder.

Cleveland, 531 U.S. at 23–24, 121 S.Ct. 365. Fines imposed by judges are criminal penalties that "implicate[ ] the Government's role as sovereign." *Id. at* 24, 121 S.Ct. 365. Judgments ordering traffic fines and costs cannot be sold and, in the logic of *Cleveland*, would seem then to have no intrinsic *economic* value. Indeed, the penal (non-economic) nature of the fine is undeniable because the failure to pay a fine can result in the imposition of sentences of greater consequence, including imprisonment. *See* Pa. R. Crim. P. 706 cmt. But *Cleveland* is not the last word. As we will discuss below, a Supreme Court opinion issued five years later, *Pasquantino v. United States*, 544 U.S. 349, 125 S.Ct. 1766, 161 L.Ed.2d 619 (2005), forecloses the defendants' argument.

Finally, we note a dissimilarity between this case and *Cleveland*, highlighted by the District Court, on the significance of the monetary interest that the Government associates with the fraud. The *Cleveland* Court regarded the licensing fees as integral to the regulatory effort and collateral to the matter at hand. The indictment there centered on the scheme to obtain licenses, and did not even raise the licensing fees. *See Cleveland*, 531 U.S. at 22, 121 S.Ct. 365.

Indeed, those charged with the fraud paid all the appropriate fees; there was no evidence that the government suffered any economic detriment. *Id.*

In contrast, the indictment here explicitly states that the scheme deprived the City and the Commonwealth of money, and it describes the object of the scheme as obviating judgments of guilt that imposed the fines and costs. Unlike *Cleveland*, the fines and costs play a central role in the scheme as alleged.

Alfano and Hird next focus on our decision in *Henry* to argue that the Government cannot claim to have a property right because the Government never had a legal claim to the fines and costs at any point in the scheme. In *Henry*, we examined convictions for wire fraud arising from a competitive bidding process among banks to receive deposits of a public agency's bridge tolls. *Henry v. United States*, 29 F.3d 112 (3d Cir. 1994). Appellants—public employees—were convicted of mail fraud for giving one bank confidential information about bids from other banks. *Id.* at 113. We identified several problems,[16] ***343** but Alfano and Hird highlight our observation in *Henry* that the object of the mail and wire fraud must be something to which the victim could claim a right of entitlement. *Id.* at 115 ("a grant of a right of exclusion") (citing *Carpenter*, 484 U.S. at 26-27, 108 S.Ct. 316).[17] Indeed, we noted that a bank's property

[16] The Supreme Court had already made clear that "a government official's breach of his or her obligations to the public or an employee's breach of his or her obligations to an employer" did not fall within the scope of Section 1343. *Henry*, 29 F.3d at 114 (citing *Carpenter,* 484 U.S. at 25, 108 S.Ct. 316).

[17] To assess whether a particular claim is a legal entitlement,

right to the tolls would attach only after the funds were deposited. *Id.* at 114. So the banks that lost the bidding process never had a basis to claim any legally recognized entitlement to the toll deposits.[18] *Id.* at 115. A fraud claim cannot rest on the bidders being cheated out of an *opportunity* to receive the deposits. For these reasons, we concluded that the indictment did not allege a scheme to obtain fraudulently someone's "property." *Id.* at 116.

Here, the Government alleged that the defendants "were depriving .. Philadelphia and ... Pennsylvania of money which would have been properly due as fines and costs" by making it possible for certain well-connected individuals to avoid a judgment of guilt that imposed an obligation to pay appropriate statutory fines. App. 197 (Indictment ¶ 38). But Appellants stress that, like the deposits in *Henry*, the indictment here alleged an entitlement that does not yet exist because a person must be adjudicated (or plead) guilty before they must pay any fines or costs. None of the cases directly associated with Alfano and Hird resulted in a guilty judgment. As a result, they argue, the Government cannot claim here that it was cheated of an entitlement, because they were only fines and costs that the people *might* have owed *if* they had been found guilty.

The District Court said it well. Accepting this argument "would permit the alleged conspirators" to

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"we look to whether the law traditionally has recognized and enforced [the entitlement] as a property right." *Henry*, 29 F.3d at 115.

[18] They were, no doubt, robbed of a fair process, but we could not identify any legal tradition that recognized this deprivation as a property right. *Id.* at 115.

take advantage of their "unique position" in this case "to enter into a scheme to commit fraud and then hide behind the argument that the success of their fraud precludes prosecution under the 'money or property interest' requirement of the mail and wire fraud statutes." *Sullivan*, 2013 WL 3305217, at *7. Appellants cannot rest on the very object of their scheme (to work on behalf of favored individuals to obviate judgments of guilt and the imposition of fines and costs) as the basis to claim that there is no fraud. Indeed, the not-guilty judgments that Alfano and Hird worked to obtain through the extrajudicial system were alleged in the indictment as evidence of the scheme itself.

Even if some of the cases in the extra-judicial system would have been judged not guilty in a real adjudication it is (as the District Court correctly noted) the intent of the scheme, not the successful execution of it, that is the basis for criminal liability. *See Neder v. United States*, 527 U.S. 1, 25, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (In the criminal context, the court focuses on the objective of the scheme rather than its actual outcome; what operatives intended to do, not whether they were successful in doing it.); *United States v. Rowe*, 56 F.2d 747, 749 (2d Cir.) ("Civilly of course the [mail fraud statute]would fail without proof of damage, but that has no application to criminal liability."), *cert. denied* ***344** 286 U.S. 554, 52 S.Ct. 579, 76 L.Ed. 1289 (1932). The indictment generally alleges not just that Appellants operated a system that operated outside the bounds of Traffic Court procedures, but that it did so for the purpose of obviating judgments of guilt imposing fines and costs in those selected cases. *See, e.g.*, *supra* note 8. Moreover, we note that in one case not directly

involving either Alfano or Hird, the indictment alleged that fines and costs were not just obviated, but were actually erased by an alleged co-conspirator traffic court judge who ignored the conviction, backdated a continuance, and "adjudicated" the person not-guilty. App. 228-29 (Indictment ¶¶ 108-113). This episode serves to highlight that the entire scheme was centered on keeping (or taking) judgments out of the hands of the Government to prevent the imposition of fines and costs. As a result, Appellants' reliance on our justice system's presumption of innocence as a basis to argue against the existence of a governmental property interest is a red herring that is properly disregarded here.

Accordingly, we conclude that the indictment's allegation that the scheme had an objective of depriving "Philadelphia and ... Pennsylvania of money which *would have been properly due* as fines and costs" is not undermined by the lack of guilty verdicts. App. 197 (Indictment ¶38 (emphasis added)).

Alfano and Hird next highlight that, in *Henry*, our property interest analysis centered on "whether the law traditionally has recognized and enforced [the entitlement in question] as a property right." 29 F.3d at 115. Appellants assert that traffic fines and costs typically have not been considered economic property and are unsupported by any legal tradition sufficient to ground charges of wire and mail fraud. As we have already noted we disagree with any conclusion that the fines and costs at issue have no intrinsic economic value. But we turn to another decision of the Supreme Court that came after *Cleveland* to address squarely whether jurisprudence supports our conclusion.

In 2005 the Supreme Court reviewed convictions

arising from a scheme to smuggle large quantities of liquor from the United States into Canada, evading Canadian taxes. *See Pasquantino v. United States*, 544 U.S. 349, 353, 125 S.Ct. 1766, 161 L.Ed.2d 619 (2005). The Court noted that the right to be paid has been routinely recognized as property, *id.* at 355–56, 125 S.Ct. 1766,[19][19] observing that there is an equivalence between "money in hand and money legally due," *id.* at 356, 125 S.Ct. 1766. Affirming the conviction, the Court said: "Had petitioners complied with this legal obligation, they would have paid money to Canada. Petitioners' tax evasion deprived Canada of that money, inflicting an economic injury no less than had they embezzled funds from the Canadian treasury." *Id.* It concluded that: "[t]he object of petitioners' scheme was to deprive Canada of money legally due, and their scheme thereby had as its object the deprivation of Canada's 'property.' " *Id.* Under *Pasquantino*, then, traffic tickets (or more precisely, judgments arising from them) are considered an "entitlement to collect money from individuals, the possession of which is 'something of value.'" 544 U.S. at 355, 125 S.Ct. 1766 (quoting *McNally,* 483 U.S. at 358, 107 S.Ct. 2875).[20] We

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[19] The Court cited 3 W. Blackstone, Commentaries on the Laws of England 153–155 (1768), which classified the right to sue on a debt as personal property.

[20] We also note that Pennsylvania law permits the government to remedy the nonpayment of fines and costs as an unpaid debt through civil process, enabling the government to become a judgment creditor. Pa. R. Crim. P. 706 cmt. ("Nothing in this rule [concerning criminal fines] is intended to abridge any rights the Commonwealth may have in a civil proceeding to collect a fine or costs."). Because of this, a separate legal tradition is implicated that recognizes the

conclude that a ***345** scheme to obviate judgments imposing fines, effectively preventing the government from holding and collecting on such judgments imposes an economic injury that is the equivalent of unlawfully taking money from fines paid out of the Government's accounts. *See id.* at 358, 125 S.Ct. 1766.

Alfano and Hird focus, finally, on the role that a judge's discretion plays in the adjudication of a case, asserting that the uncertainty this creates about outcomes in any given case undermines any argument that a judgment in a Traffic Court case can be claimed as an entitlement to property. To the extent that this merely rephrases the issue of guilt or innocence on particular charges, we have already addressed it above. To the degree that it refers to a judge's discretion in sentencing, as the District Court noted, there is no such discretion here.[21] The Motor Vehicle Code imposes fines and costs for each violation, eliminating any judicial discretion in this

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judgment itself as property. *See*, *e.g.*, *Armada (Singapore) PTE Ltd. v. Amcol International Corp.*, 885 F.3d 1090, 1094 (7th Cir. 2018). This long, stable legal tradition of recognizing civil judgments for money as property supports the conclusion that the fines arising from judgments in traffic court cannot be regarded merely as implicating the act of a sovereign imposing a criminal penalty. They can be collected by civil process as a debt and are, thus, a property interest.

[21] We question, in general, the relevance of an entity's authority to relinquish a just entitlement or to forbear an obligation that an entitlement imposes upon another, as a basis to call into doubt the legitimacy of, or the very existence of the entitlement. *But see United States v. Mariani*, 90 F.Supp.2d 574, 583 (M.D. Pa. 2000) (Discretionary civil fines and penalties "may be too speculative to constitute a valid property interest.") (internal citation omitted).

regard.

D.

All of this leads us to conclude that the District Court did not err by denying the motion to dismiss. We conclude that, as alleged, this scheme had the objective of preventing the City of Philadelphia and the Commonwealth of Pennsylvania from possessing a lawful entitlement to collect money in the form of fines and costs—a property interest—from individuals who Alfano and Hird assisted. We will thus affirm the convictions of Appellants Alfano and Hird.

III.

Appellants Tynes, Lowry, and Mulgrew

A.

In 2011, the United States Attorney presented to the Grand Jury evidence arising from the Federal Bureau of Investigation's inquiry into the Traffic Court. Appellants Lowry, Mulgrew, and Tynes testified and the Government brought perjury charges against them for statements they made to the Grand Jury. After Hird and Alfano pleaded guilty, the rest of the Appellants went to trial. The jury acquitted Lowry, Mulgrew, and Tynes of all counts against them on wire fraud, mail fraud, and conspiracy. But it found them guilty of perjury. Tynes, Lowry, and Mulgrew challenge their convictions by raising similar legal arguments about the sufficiency of the evidence.

As with all challenges to the sufficiency of the evidence, we use a highly deferential standard of review. *See United States v. Caraballo-Rodriguez*, 726 F.3d 418, 430 (3d Cir. 2013) (en banc). We examine ***346** the record in a light most favorable to the

prosecution, and will not disturb the verdict if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. McGee*, 763 F.3d 304, 316 (3d Cir. 2014) (emphasis in original) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). Tynes, Lowry, and Mulgrew argue that the questions asked of them at trial were fatally vague and/or that their answers were truthful. As a result, they contend that these questions and answers are an inadequate basis for a perjury conviction.

A conviction for perjury before a grand jury requires the Government to prove that the defendant took an oath before the grand jury and then knowingly made a "false material declaration." 18 U.S.C. § 1623. But we recognized (in the context of a sentencing enhancement for perjury) that sometimes "confusion, mistake, or faulty memory" results in inaccuracies that cannot be categorized as a "willful attempt to obstruct justice" under perjury statutes. *United States v. Miller*, 527 F.3d 54, 75 (3d Cir. 2008) (quoting U.S. Sentencing Guidelines Manual § 3C1.1 cmt. n.2 (U.S. Sentencing Comm'n 2003)). So we do understand that "[p]recise questioning is imperative as a predicate for the offense of perjury." *Bronston v. United States*, 409 U.S. 352, 362, 93 S.Ct. 595, 34 L.Ed.2d 568 (1973).

Precision, however, is assessed in context. An examiner's line of questioning should, at a minimum, establish the factual basis grounding an accusation that an answer to a particular question is false. *Miller*, 527 F.3d at 78. So a perjury conviction is supported by the record "when the defendant's testimony 'can reasonably be inferred to be knowingly

untruthful and intentionally misleading, even though the specific question to which the response is given may itself be imprecise.' " *United States v. Serafini*, 167 F.3d 812, 823 (3d Cir. 1999) (quoting *United States v. DeZarn*, 157 F.3d 1042, 1043 (6th Cir. 1998)).

Challenges to the clarity of a question are typically left to the jury, which has the responsibility of determining whether the defendant understood the question to be confusing or subject to many interpretations. *United States v. Slawik*, 548 F.2d 75, 86 (3d Cir. 1977). Moreover, consistent with our standard of review, we will not disturb a jury's determination that a response under oath constitutes perjury unless "it is 'entirely unreasonable to expect that the defendant understood the question posed to him.' " *Serafini*, 167 F.3d at 820 (quoting *United States v. Ryan*, 828 F.2d 1010, 1015 (3d Cir. 1987), *abrogated on other grounds by United States v. Wells*, 519 U.S. 482, 117 S.Ct. 921, 137 L.Ed.2d 107 (1997)).[22] On appeal, we review every aspect of the record pertinent to both the question and answer to reach a conclusion about whether, in context, the witness understood the question well enough to give an answer that he or she knew to be false. *See Miller*,

[22] The Court of Appeals for the Second Circuit underscored the high bar this establishes for appellants by noting that a fundamentally ambiguous question is "not a phrase with a meaning about which men of ordinary intellect could agree, nor one which could be used with mutual understanding by a questioner and answerer unless it were defined at the time it were sought and offered as testimony." *United States v. Lighte*, 782 F.2d 367, 375 (2d Cir. 1986) (quoting *United States v. Lattimore*, 127 F.Supp. 405, 410 (D. D.C.), *aff'd*, 232 F.2d 334 (D.C. Cir. 1955)).

527 F.3d at 78. Our review, however, is focused on glaring instances of vagueness or double-speak by the examiner at the time of questioning (rather than artful post-hoc interpretations of the questions) ***347** that—by the lights of any reasonable fact-finder—would mislead or confuse a witness into making a response that later becomes the basis of a perjury conviction. Questions that breach this threshold are "fundamentally ambiguous" and cannot legitimately ground a perjury conviction. *Id.* at 77.[23]

That is the law applicable to the claims raised by Tynes, Lowry and Mulgrew. But, because our review is fact-dependent, and because each raises some unique issues, we will address each of their claims individually.[24]

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[23] The rule of fundamental ambiguity is intended to "preclude convictions that are grounded on little more than surmise or conjecture, and ... prevent witnesses ... from unfairly bearing the risks associated with the inadequacies of their examiners." *Ryan*, 828 F.2d at 1015.

[24] Adopting the arguments made by Alfano and Hird, Appellants Lowry, Mulgrew and Tynes assert that the Government improperly charged them with conspiracy, wire fraud, and mail fraud. Therefore, they assert, their joint trial on these counts of the indictment prejudiced the jury's deliberation on the charges of perjury. They claim such evidence would have been excluded under Federal Rule of Evidence. 403. They also contend that, without a charge of conspiracy, the joinder of their cases would have been impermissible under Federal Rule of Criminal Evidence 8(b) or, at the very least, severance of their cases would have been warranted under Federal Rule of Criminal Procedure 14(a). Certainly, where there is evidence of prejudice resulting from "spillover" evidence from counts that should have been dismissed, reversal is warranted. *See United States v. Wright*, 665 F.3d 560, 575-577 (3d Cir. 2012). But we have concluded that the District

B.

Appellant Tynes[25]

Appellant Tynes claims her convictions for perjury at Count 71 and Count 72 lack sufficient evidence because she was responding to questions that were fundamentally ambiguous. The perjury charged at Count 71 arises from the following exchange.

> Q. In all the years you've been [at Traffic Court] have you ever been asked to give favorable treatment on a case to anybody?
>
> A. No, not favorable treatment. People basically know me. The lawyers know me. The court

_____(cont'd)

Court did not err by denying the motion, under Federal Rule of Civil Procedure 12(b)(3), to dismiss the conspiracy, wire fraud and mail fraud counts of the indictment. Thus, Appellants' spillover argument has been nullified. Likewise, Appellants have no basis to claim that the Court unfairly prejudiced them by not granting separate trials.

[25] Tynes filed a separate motion to dismiss. App. 291-99. The record also contains Tynes' proposed order to join Sullivan's motion to dismiss. App. 290. However, Tynes' motion contains no such request. Moreover, the Government's response to the motions notes that Lowry and Mulgrew moved to join (without argument), and makes no mention of Tynes. The District Court's ruling on Tynes' motion to dismiss relates only to the arguments she made separately in her brief. As a result, we cannot consider Tynes' arguments on appeal that relate to those raised in Sullivan's motion. Moreover, since she failed to raise any of the arguments she made in her separate motion to dismiss, these arguments are waived. With that said, we will affirm the District Court's ruling on the Motion raised by Sullivan and joined by the five Appellants. Therefore, we need not address Tynes' assertion that the District Court's mishandled her joinder motion because it does not prejudice the outcome of her appeal.

> officers know me. I have been called a no-nonsense person because I'm just not that way. I take my position seriously, and the cards fall where they may.

App. 255, 5720.[26] Tynes contends that the Government pursued a novel theory here ***348** (applying federal fraud statutes to allegations of ticket fixing) and used the vague term "favorable treatment" to gloss over its uncertainty about what, ultimately, would constitute an illegal act. She points out that the term had not been used before in reference to this case and that the Government offered no explanation or definition of the term to alert Tynes to the intent of the question.

Also, from Tynes's perspective, every litigant appearing before a court seeks an outcome that is favorable, thus making "favorable treatment" a term that essentially referred to "how litigation works." She claims that its use amounted to a fishing expedition designed to capture unfairly the entirety of her conduct in the courtroom. She warns that this is precisely the type of "open-ended construction" in questioning that we found unacceptable in *Serafini*. 167 F.3d at 822.

Tynes makes a related argument against her perjury conviction for Count 72. That conviction is based on this exchange.

> Q. You've never taken action on a request?

---

[26] We cite to the testimony quoted in the indictment and the Grand Jury that was used at trial. We note that there are some typographical inconsistencies between these sources and in those instances we have quoted the Grand Jury testimony.

A. No.

App. 257, 5722. She maintains that the word "request" was presented to the jury as a follow-on to the question grounding Count 71, requiring a person to link the term "favorable treatment" and the word "request" to make sense of it. She argues that the Government took advantage of the ambiguity of "favorable treatment," forcing the jury to speculate that Tynes interpreted "request" as "favorable treatment." This reliance on "sequential referents" is, from her perspective, exactly what we criticized in *Serafini*. 167 F.3d at 821. But she misconstrues our holding.

In *Serafini*, the surrounding questions focused on a different topic. This bolstered appellant's argument in that case that the question on which the perjury conviction rested was fundamentally ambiguous. *Id.* The appellant said the multiplicity of topics in surrounding questions caused the jury to speculate improperly on how he understood the question at issue. We said: "The meaning of individual questions and answers is not determined by 'lifting a statement ... out of its immediate context,' when it is that very context which fixes the meaning of the question." *Serafini*, 167 F.3d at 821 (quoting *United States v. Tonelli*, 577 F.2d 194, 198 (3d Cir. 1978)). In the case of *Serafini*, the context made the confusing nature of the question apparent. The various topics in surrounding questions created sufficient ambiguity to undermine the conviction. *Id.*

Here, however, even though the terms used by the examiner changed, we conclude that the line of questioning—including both questions that ground Count 71 and 72—have an obvious, consistent focus.

Q. In all the years you've been [at Traffic Court] have you ever been asked to give favorable treatment on a case to anybody?

A. No, not favorable treatment. People basically know me. The lawyers know me. The court officers know me. I have been called a no-nonsense person because I'm just not that way. I take my position seriously and the cards fall where they may. Most of the time ... the people in my Court plea bargain. They know that most of the time, ninety percent of the time, say 90 percent, I go with the police officer's recommendation. ...

Q. So, in all those years no one has ever asked you to find somebody not guilty–

A. No.

***349** Q. –or to find a lesser violation; find a lesser fine; anything along those lines?

A. No. I will say to people go to court, go to trial and see what happens. ..

Q. Ward leaders, politicians has anyone called you and said I have Johnny Jones coming up next week and I would appreciate it if -- if you would look favorably on him when he comes through? Has anything like that ever happened?

A. Throughout the years ward leaders and people have called all the time and asked me questions. The only thing I will say to them is they need to go to court. If you think it's a problem, they need to hire a lawyer, or make sure you bring all your evidence to court. If it's something like inspection, make sure you bring your -- papers and things like that. That's what I

would tell them to do. I give advice that way. I don't know if that's wrong or not, but I do.

Q. You've never taken action on a request?

A. No.

App. 528-29, 530; 5720-22. This broader context would give any reasonable fact-finder more than enough basis to conclude that the witness knew the point of reference for both the term "favorable treatment" and "request" was ticket fixing. In fact, Tynes is asking us to do precisely the thing we criticized in *Serafini*, to lift a phrase or statement out of its context. *Serafini*, 167 F.3d at 821. Tynes has not persuaded us that the question harbors any fatal ambiguity.

Tynes next contends that her responses to questions grounding Count 71 and Count 72 cannot support convictions for perjury because they were literally true. Of course, perjury arises only from making knowingly false material declarations. 18 U.S.C. § 1623. Therefore, a witness who answers an ambiguous question with a non-responsive answer that the witness believes is true—even if the answer is misleading—does not commit perjury. *See Bronston*, 409 U.S. at 361-62, 93 S.Ct. 595; *see also United States v. Reilly*, 33 F.3d 1396, 1416 (3d Cir. 1994).

Tynes argues that, because she regarded the question about favorable treatment as vague, she interpreted it as asking whether she accepted any bribes in exchange for a judgment of not guilty or a reduced punishment. Her response of "no" (grounding Count 71) is literally true—she says—because there is no evidence that she accepted any bribes in return for giving preferential outcomes in the adjudication of

some individuals who were cited for breaking the law. Under this theory, the same argument can also negate the charges at Count 72 since she says she did not accept any "requests" (bribes) in exchange for preferential treatment.

Although the jury is permitted reasonable inferences drawn from the record about the witness' understanding of the truth or falsity of the answer, it is not (as we noted above) permitted to reach conclusions based merely on speculation or conjecture. *See Bronston*, 409 U.S. at 359, 93 S.Ct. 595. Tynes' assertion of literal truth is undermined because the trial record supports no reasonable inference that the Government was asking her about matters outside of the alleged bribes, nor does it provide any reason why Tynes would interpret the question in this way.

Finally, Tynes contends that the evidence was not sufficient to support her conviction. However, the jury heard Tynes' personal assistant, Medaglia "Dolly" Warren, testify that she received from personal assistants of other judges three to four cards per week requesting consideration. Each card had the name of a person who was appearing before Tynes on that day. She passed these to Tynes' court officer, ***350** who was present during the proceedings. App. 4593-95. Tynes also instructed Warren to give similar cards to the staff of other judges. App. 4598. Warren knew to act discreetly when she was transferring the cards. App. 4599. The jury also heard testimony from those who actually received consideration from Tynes. For example, Timothy Blong was cited for reckless driving and driving without a license. He admitted in testimony that he did not have a license when he was cited. App. 3150. He also testified that he requested

consideration through a Traffic Court employee (Danielle Czerniakowski, who worked as a personal assistant to a Traffic Court judge) with whom he was acquainted. When he appeared in court, he was simply told that his case was dismissed. He did not have to say anything, App. 3159-60. Blong testified he was told his case was dismissed because the police officer did not appear (App. 3160-61), but the government produced evidence that an officer was present. App. 3193-96. The Government also showed that Tynes was the presiding judge in Blong's case. App. 3193. Richard Carrigan—who admitted in testimony that he drove through a red light—described a similar experience in which, after requesting favorable treatment through Judge Lowry's personal assistant, Kevin O'Donnell, his case was dismissed by Judge Tynes without ever having to say a word. App. 3178-82.

Tynes does not challenge any of this in her appeal. Instead she focuses on the weight of other evidence and perceived gaps in testimony. We conclude that all of this provides more than a sufficient basis to support a reasonable jury's conclusion that Tynes did "give favorable treatment on a case," and did "take[ ] action on a request." App. 528-30.

For all of these reasons, we will affirm the judgment of conviction on perjury as to Appellant Tynes.

C.

Appellant Lowry[27]

Like Tynes, Appellant Lowry advances arguments of

[27] Lowry was charged with perjury in Count 69 of the indictment.

fundamental ambiguity and literal truth. His perjury conviction centered on one question and answer.

> Q. So if I understand your testimony, you're saying you don't give out special favors; is that right?
>
> A. No, I treat everybody in that courtroom the same.

App. 489. Lowry attacks the Government's use of the term "special favors" as one with many potential meanings. However, as we noted above in our reference to *Serafini*, we reject arguments that lift individual questions or answers—or individual phrases embedded in either—from the context of surrounding questions that help fix their meaning. *Serafini*, 167 F.3d at 821. The larger context for the question asked of Lowry is as follows.

> Q. So if I understand your testimony, you're saying you don't give out special favors; is that right?
>
> A. Well, I know it appears that way; and it's hard for me to prove to you ...
>
> Q. I'm just asking, your testimony is you don't give out special favors, is that right?
>
> A. No, I treat everybody in that courtroom the same.
>
> Q. You treat everybody fairly?
>
> A. I'm a lenient judge. I will admit to that.
>
> Q. You treat everybody fairly?
>
> A. Yes, I do.
>
> ***351** Q. And these notices that you get from your personal or from other people, they don't affect you in any way; is that right?

A. Virtually no effect at all.

App. 489-90.

Lowry's assertion that the phrase "special favors" is subject to many interpretations is unconvincing. We note two things. First, the line of questioning reasonably supports a conclusion that this inquiry referenced conduct associated with allegations of ticket fixing. Second, Lowry answered as if his understanding of the question was consistent with this interpretation. He said that he was aware it may "appear" that he gave special favors. He also defended himself by saying that such requests did not affect his conduct in the courtroom at all. If—as he says—he understood "special favors" to mean fair treatment, his answer makes no sense.

Lowry next claims that, since the question was structured to elicit a negative response, his answer cannot be used as the basis of a perjury charge. Relatedly, he contends that the question was merely a summation of an answer that he gave just before this question. In essence he argues that this was a leading question. We have concluded, in the context of a trial, that the propriety of leading questions in direct examinations is a matter left to the sound discretion of the trial judge. *See United States v. Montgomery*, 126 F.2d 151, 153 (3d Cir. 1942). We extend the same deference here to the District Court's decision to admit this portion of the Grand Jury transcript. We do not regard the question as fundamentally unfair or unclear, or something outside the norm of questions typically employed on direct examination. For these reasons, we conclude that the District Court did not abuse its discretion here.

Alternatively, Lowry argues that—if the term is

understood to reference fixing tickets—there is no evidence to contradict his response that requests for special favors did not impact any of his adjudications. We do not agree. The record contains the following testimony.

Kevin O'Donnell, who was Lowry's personal assistant, testified about Lowry's involvement with requesting and giving consideration. He said that Lowry made four to five requests each month for consideration and that O'Donnell transmitted them to the personal assistants of other Traffic Court judges. App. 1854. Likewise, he said other judges transmitted requests for consideration to Lowry through their personal assistants. App. 1812-13. Appellant Hird and various politicians also made requests of Lowry for consideration. App. 1827-28, 1832-33. O'Donnell said he would give the requests to Lowry on the day scheduled for hearing on the citation. App. 1818-19. The requests were for preferential treatment in the adjudication of particular citations: typically the requests were for "removing points" and obtaining a "not guilty" judgment. App. 1819. O'Donnell said he sometimes had to signal Lowry in the courtroom to remind him that a particular case was supposed to receive consideration. App. 1822-23. He testified from his own observation that Lowry typically honored requests for consideration. App. 1829. He also declared if Lowry claimed he never gave consideration or asked it of others, this would not be truthful. App. 1813. The same assistant testified that if Lowry testified that he ignored requests for consideration, or that he never honored requests for consideration, that testimony would not be true. App. 1855. The Government also asked: "If [Lowry] claimed that ... consideration requests had no impact when he

disposed of cases, would that be true?" The assistant responded, "probably not." *Id.*

***352** Another witness, Walt Smaczylo, employed as a court officer in the Traffic Court, provided an example of how "consideration" worked in the courtroom.

> When someone comes in, for example, for a reckless driving ticket and that judge normally comes down pretty hard and finds that defendant guilty and then the same type cases come in and you see a defendant walk out either not guilty or a significantly reduced charge.

App. 1912. The Government asked Smaczylo if he saw Lowry preside over such instances, and he answered: "That's correct, yes." *Id.* Smaczylo testified that requests for consideration were written on small note cards or "sticky" notes and that he saw Lowry in possession of these cards and notes. App. 1914. He also provided a generalized example of consideration, based on his observation and understanding, in which a reckless driving citation would be reduced to careless driving. In such instances, he indicated that a $300 to $400 fine would be cut in half. He said: "So, that money was not collected, obviously, by the state. If that ticket was fixed then I saw it as stealing." App. 1919. Smaczylo was asked: "[I]f Judge Lowry testified at the [G]rand [J]ury he didn't give consideration would that be a truth or would that be a lie?" He responded: "That would not be the truth." App. 1921.

All of this testimony provides more than a sufficient basis to support a reasonable jury's conclusion that Lowry was not truthful when he responded to the Government's question about special

favors.[28]

Finally, Lowry argues that the Government's question sought a dispositive response from him on the charges of conspiracy and fraud. He says an affirmative answer to whether he gave "special favors" to certain individuals would have been enough to convict him of conspiracy and fraud. Thus, he maintains that his acquittal on charges of mail fraud, wire fraud, and conspiracy is res judicata as to the perjury charges that are based on his answer. He said he did not commit fraud and the jury agreed with him. Therefore, he says, he did not perjure himself. However, even if we accepted Lowry's characterization of the question, we reject this argument.

First, a jury's determination that Lowry's ticket-fixing conduct did not constitute wire fraud, mail fraud, and conspiracy does not preclude its determination that he lied about this conduct before the Grand Jury. Moreover, as the Supreme Court has articulated, a verdict on one count that seems to be at odds with another "shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were

[28] Lowry points to the cross-examination of both witnesses in which they seem to equivocate on some of their observations and responses to the Government. For instance O'Donnell stated his view that giving consideration was no different from the leniency that Lowry extended to every other person who pleaded not guilty and appeared at the hearing. However, we do not weigh the credibility of evidence in the record. We only judge whether there is sufficient evidence in the record to support a reasonable fact-finder's determination that the record supported conviction of Lowry on a charge of perjury. *See United States v. Richardson,* 658 F.3d 333, 337 (3d Cir. 2011).

not convinced of the defendant's guilt." *United States v. Powell*, 469 U.S. 57, 63, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984) (quoting *Dunn v. United States*, 284 U.S. 390, 393, 52 S.Ct. 189, 76 L.Ed. 356 (1932)). It is impossible to know in such cases whether the verdicts were an exercise of lenity by the jury or outright error.

Nonetheless, as the *Powell* Court noted, any assessment of the jury's rationale for its verdicts "would be based either on pure speculation or would require inquiries into ***353** the jury's deliberations that courts generally will not undertake." *Id.* at 58, 105 S.Ct. 471. So, even if Lowry was correct that the acquittal is relevant to his response to the question grounding his perjury conviction, we are not convinced that his perjury conviction is unfounded. Given the substantial body of evidence presented to the jury, nothing here demands that we abandon the deference we traditionally give to the collective judgment of the jury. For all these reasons, we will affirm the jury's verdict as to Lowry.

D.

Appellant Mulgrew[29]

Mulgrew does not argue that the question asked at the Grand Jury was ambiguous, he simply maintains that his statement was truthful.[30] The questions and answers grounding his perjury conviction are as follows.

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[29] Mulgrew was charged with perjury in Count 70 of the indictment.

[30] Mulgrew's claims are reviewed for plain error because he did not make the same argument before the District Court. *United States v. Syme*, 276 F.3d 131, 148 (3d Cir. 2002).

> Q. How about your personal, has your personal received any calls like that from other judges, other ward leaders that she's conveyed to you, saying so-and-so has called about this case?
>
> A. If she did, she didn't convey them to me.

App. 432-33 (emphasis added). Shortly after this, the following exchange occurred:

> Q. Let me make sure as well that if I got your testimony correct [sic]. You're saying that if other people, whether they be political leaders, friends and family, anybody is approaching your personal and asking her specifically to look out for a case, see what she can do in a case, give preferential treatment, however you want to phrase it, that she is not relaying any of that information on to you; is that correct?
>
> A. No, she isn't.

App. 438. As to the first exchange, Mulgrew claims that the Government's use of the word "call" referred exclusively to telephone calls. This mattered to him, he says, because others had testified that personal assistants of other Traffic Court judges would give index cards to his personal assistant in his chambers or robing room containing names of some individuals whose tickets were listed for hearing. Mulgrew claims that there is no evidence that he ever received any phone calls asking that he act extrajudicially to give well-connected individuals preferential treatment. The implication is that, had the Government asked him about receiving index cards with such requests, his answer would have been completely different.

As with Tynes and Lowry, our review of claims of literal truth drives us to examine the context of the

question.

> Q. How about other judges, have other judges ever approached you or called to you or get a message to you either themselves or through their personals saying that someone is going to be on your list next week or next Monday and can you could some special way towards the case?
>
> A. No, they haven't.
>
> Q. Never?
>
> A. No.
>
> Q. How about your personal, has your personal received any *calls* like that from other judges, other ward leaders that she's conveyed to you saying so and so has called about this case?
>
> ***354** A. If she did, she didn't convey them to me.
>
> Q. And your personal is who?
>
> A. Gloria McNasby.
>
> Q. Have you ever seen on traffic court files --You actually get a file when someone's case is called?
>
> A. Right.
>
> Q. So the case is called and you get a file presented to you; is that right?
>
> A. uh-huh.
>
> Q. Have you ever seen any index cards or notations on the file indicating that a person *has called* or taken some special interest in this case?
>
> A. Nope.

App. 432-33 (emphasis added). The transcript makes it obvious that Mulgrew's singular reliance on the

reference to a "call" ignores the thrust of the Government's line of questions. The questions focus on the substance of the communications between Mulgrew's personal assistant and himself, rather than the mode of those communications.

Mulgrew also claims that he responded truthfully to the second question.

> Q. Let me make sure as well that if I got your testimony correct [sic]. You're saying that if other people whether they be political leaders, friends and family, anybody is approaching your personal and asking her specifically to look out for a case*, see what she can do* in a case, give preferential treatment, however you want to phrase it, that she is not relaying any of that information on to you; is that correct?
>
> A. No, she isn't.
>
> Q. Wouldn't you want to know it?
>
> A. No, I don't want to know. Then I never have to worry about what I do in the courtroom.

App. 437-38 (emphasis added). Apparently focusing on the words "see what she can do," he says that he answered truthfully by responding that his personal assistant did not tell him that people were approaching her and asking *her* to give them preferential treatment. But, as with the first question, Mulgrew cherry-picks a small part of the question out of context, distorting it. The full text and follow up question show that the thrust of the inquiry was whether Mulgrew's personal assistant was informing him of the names of those requesting preferential treatment from him. And Mulgrew's response to the follow-up question—saying that he did

not want to know so that he did not have to worry about what he did in the courtroom—is consistent with one who understood this. App. 438.

We conclude that, ultimately, the evidence is sufficient for a reasonable jury to conclude Mulgrew understood that both of these questions were focused on whether his personal assistant informed him of requests for him to give preferential treatment, and that he answered in the negative to both.

Mulgrew alternatively asserts that the District Court erred by refusing to admit additional testimony from the Grand Jury that he claims is relevant to his perjury conviction.[31] After the Government introduced Mulgrew's Grand Jury testimony, Mulgrew sought the admission of other portions of his testimony. But the District Court sustained the Government's hearsay objection. The portion of the transcript supporting the perjury conviction is as follows:

> ***355** Q. [W]hether you have ever been asked to provide, what I'll call, favorable treatment for people in traffic court or however you define that, whether it would be special handling, keep an eye out for a ticket, do me a favor. Have you ever been asked to provide any type of treatment like that for people in traffic court?
>
> A. People have asked me for consideration, but I give consideration to everybody that comes in my courtroom[,] so it doesn't make a difference to me.

App. 422-23. The basis for the Government's hearsay

[31] We review the District Court's ruling on the admissibility of evidence for abuse of discretion. *United States v. Green*, 617 F.3d 233, 239 (3d Cir. 2010).

objection to this portion of the testimony was that it raised an out-of-court statement not offered by a party opponent.

Mulgrew first contends that the District Court erred by ruling that this was hearsay because it was not offered for the truth of the matter asserted. He says that the testimony was instead offered to show his state of mind later in his testimony. *See United States v. Hoffecker*, 530 F.3d 137, 191-92 (3d Cir. 2008). However, we conclude that it was not an abuse of discretion for the District Court to sustain the Government's hearsay objection. It was reasonable for the District Court to conclude here that his response relied on out-of-court statements offered to assert his innocence since his response conveys a declaration that he treated no person different from another.

Mulgrew also argues that this portion of the transcript is admissible under Federal Rule of Evidence 106: "[i]f a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time." Mulgrew maintains that this question and answer provides context showing that he did not commit perjury. He also maintains that the "doctrine of completeness" applies here: fairness demanded the admission of the statements. *See United States v. Soures*, 736 F.2d 87, 91 (3d Cir. 1984).[32] We are not

[32] "Under this doctrine of completeness, a second writing may be required to be read if it is necessary to (1) explain the admitted portion, (2) place the admitted portion in context, (3) avoid misleading the trier of fact, or (4) insure a fair and impartial understanding." *Soures*, 736 F.2d at 91.

convinced.

The excerpt at issue occurs many pages before the testimony regarded as perjurious. It is unrelated in the overall sequence of questions and to the answers grounding his conviction. Moreover, as the intervening pages suggest, it was separated by the passage of time during questioning. We also fail to see how Mulgrew's equivocation over the term "consideration" gives helpful context to his later denial of receiving requests for consideration. For these reasons, we conclude the District Court did not abuse its discretion by sustaining the Government's hearsay objection.

IV.

Appellant Singletary[33]

During the investigation of the Traffic Court by the Federal Bureau of Investigation, ***356** Appellant Singletary was among those interviewed. The jury acquitted Singletary of all counts of wire fraud, mail

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[33] Appellant Singletary was charged with making false statements in Counts 73 and 74 of the indictment. He states in his brief that he "joins all arguments on behalf of co-appellants pursuant to Federal Rules of Appellate Procedure 28(i)." Singletary Br. 19. To the extent that he joins the argument of prejudice resulting from the trial on the fraud and conspiracy charges, we already have determined that the indictment was proper and no prejudice resulted from bringing these charges to trial. As for the challenges to perjury in Counts 72 and 74, we note that Singletary was charged with a different crime: false statements in a federal investigation pursuant to 18 U.S.C. § 1001. In addition, the challenges to all of such charges are inherently fact-intensive. As he did not provide a factual basis for such a challenge, we regard the issue to be waived.

fraud, and conspiracy. It found him guilty of false statements made to the Federal Bureau of Investigation. At sentencing, over Singletary's objection, the District Court sentenced Singletary using the Guideline on obstruction.

The Government agrees that the single count on which he was convicted does not contain all of the elements of obstruction. U.S.S.G. § 2J1.2. For this reason, the Government agrees with Singletary that he is entitled to a remand for resentencing. Accordingly, we will vacate the judgment of sentence as to Singletary and remand to the District Court for resentencing.

V.

For all of these reasons, we will vacate the judgment of sentence of the District Court with regard to Appellant Singletary and remand for resentencing. We will affirm the judgments of the District Court as to Appellants Alfano, Hird, Lowry, Mulgrew and Tynes.

APPENDIX B

2013 WL 3305217
United States District Court,
E.D. Pennsylvania.

UNITED STATES of America, Plaintiff,
v.
Michael J. SULLIVAN, Michael Lowry, Robert Mulgrew, Willie Singletary, Thomasine Tynes, Mark A. Bruno, William Hird, Henry P. Alfano and Robert Moy, Defendants.

No. 2:13–cr–00039.
| July 1, 2013.

MEMORANDUM

ROBERT F. KELLY, Senior District Judge.

***1** Presently before the Court is Defendant, Michael J. Sullivan's ("Sullivan") Motion to Dismiss, which has been joined in by several of the Defendants, the Response in Opposition filed by the United States of America ("Government"), the Replies filed thereto, and the oral arguments presented during a hearing conducted on June 24, 2013. For the reasons set forth below, we deny the Motion to Dismiss.

I. *INTRODUCTION*

This case involves criminal charges resulting from the federal investigation into an alleged widespread ticket-fixing scheme by nine current or former Philadelphia Traffic Court ("Traffic Court") judges. *See* Indictment. According to the Indictment, the

Traffic Court was used by the alleged conspirators to give preferential treatment to certain ticketholders, most commonly by "fixing" tickets for those with whom they were politically and socially connected. *Id.* ¶ 1. The Indictment charges that Defendants:

> achiev[ed] favorable outcomes on traffic citations for politically connected individuals, friends, family members, associates, and others with influential positions. This manipulation, or "ticket-fixing," consisted of: (1) dismissing tickets outright; (2) finding the ticketholder not guilty after a 'show' hearing; (3) adjudicating the ticket in a manner to reduce fines and avoid the assignment of points to a driver's record; and (4) obtaining continuances of trial dates to 'judge-shop,' this is to find a Traffic Court judge who would accede to a request for preferential treatment.

Id. ¶ 30. According to the Indictment, "[i]n acceding to requests for 'consideration,' Defendants were depriving the City of Philadelphia and the Commonwealth of Pennsylvania of money which would have been properly due as fines and costs." *Id.* ¶ 38.

The Indictment charges each of the defendants with one count of conspiracy to commit wire and mail fraud in violation of 18 U.S.C. § 1349.[1] *See id.* Additionally,

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[1] 18 U.S.C. § 1349 states:

> Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or

all of the Defendants are charged with multiple counts of wire fraud, in violation of 18 U.S.C. § 1343,[2] and mail fraud in violation of 18 U.S.C. § 1341.[3] In

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conspiracy.

18 U.S.C. § 1349.

[2] The wire fraud statute, 18 U.S.C. § 1343, provides in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1343.

[3] The mail fraud statute, 18 U.S.C. § 1341, provides in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is

addition, Defendants Michael Lowry ("Lowry"), Robert Mulgrew ("Mulgrew"), and Thomasine Tynes ("Tynes") have been charged with perjury under 18 U.S.C. § 1623. *Id.* at p. 67–73. Defendants, Willie Singletary ("Singletary") and William Hird have also been charged with making a False Statement to the FBI under 18 U.S.C. § 1001. *Id.* at p. 74–79. Former Traffic Court Judges Fortunato Perri, Sr. ("Perri"), H. Warren Hogeland ("Hogeland"), and Kenneth N. Miller ("Miller") have pled guilty.

II. *BACKGROUND*

Sullivan's Motion to Dismiss has been joined in by Defendants Mulgrew, Lowry, Alfano, Moy, Singletary, Bruno, and Hird. (*See* Doc. Nos. 73, 76, 77, 78, 85, 88, 91.) Defendant Mark A. Bruno ("Bruno") has filed his own Motion to Dismiss, which includes, in part, the same argument set forth by Sullivan.[4] (*See* Doc. No. 85.) Tynes has filed a First Motion to Dismiss Counts which is based upon a separate and distinct issue. (*See* Doc. No. 87.) We will consider other arguments for dismissal at a later time.

***2** As previously stated, the Indictment charges each of the Defendants with conspiracy to commit wire and mail fraud under 18 U.S.C. § 1349, wire fraud under 18 U.S.C. § 1343, and mail fraud under 18 U.S.C.

_____(cont'd)

addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C.A. § 1341.

[4] The Court notes that Bruno's Motion to Dismiss will be addressed in accordance with the Scheduling Order dated March 28, 2013.

§ 1341.[5] Defendants move to dismiss the Indictment based upon the argument that the money the Government alleges was lost in fees and costs is not "a property interest because the conduct charged is too inchoate; until a traffic violator has been adjudicated guilty, no fine or cost can be imposed and neither the City of Philadelphia nor the Commonwealth can claim any legal entitlement to any fines or costs arising from the violations." (Sullivan's Mot. to Dismiss at 1–22.) According to Defendant, "[s]imply put, through the Indictment the Government seeks to criminalize alleged violations of state judicial conduct rules; such an improper expansion of federal power should not be allowed." (*Id.* at 2.)

III. *LEGAL STANDARD*

"Federal Rule of Criminal Procedure 7(c)(1) requires only that an indictment be a plain, concise, and definite written statement of the essential facts constituting the offense charged." *United States v. Huet,* 665 F.3d 588, 594 (3d Cir.2012). " 'It is well-established that '[a]n indictment returned by a legally constituted and unbiased grand jury, ... if valid on its face, is enough to call for trial of the charge on the merits.' " *Id.* at 594–95 (quoting *United States v. Vitillo,* 490 F.3d 314, 320 (3d Cir.2007)). The Court of Appeals for the Third Circuit ("Third Circuit") has previously held that "an indictment is facially

[5] The same legal analysis applies to both the mail and wire fraud statutes because they share the same relevant language. *See Carpenter v. United States,* 484 U.S. 19, 25 n. 6, 108 S.Ct. 316, 98 L.Ed.2d 275 (1987) (noting that "[t]he mail and wire fraud statutes share the same language in relevant part, and accordingly we apply the same analysis to both sets of offenses here").

sufficient if it '(1) contains the elements of the offense intended to be charged, (2) sufficiently apprises the defendant of what he must be prepared to meet, and (3) allows the defendant to show with accuracy to what extent he may plead a former acquittal or conviction in the event of a subsequent prosecution.' " *Id.* at 595 (quoting *Vitillo,* 490 F.3d at 321). " '[N]o greater specificity than the statutory language is required so long as there is sufficient factual orientation to permit a defendant to prepare his defense and invoke double jeopardy.' " *Id.* (citing *United States v. Kemp,* 500 F.3d 257, 280 (3d Cir.2007)). "In contrast, if an indictment fails to charge an essential element of the crime, it fails to state an offense." *Id.* (citing *United States v. Wander,* 601 F.2d 1251, 1259 (3d Cir.1979)).

"'Federal Rule of Criminal Procedure 12(b)(3)(B) allows a district court to review the sufficiency of the government's pleadings to ... ensur[e] that legally deficient charges do not go to a jury.' " *Id.* (quoting *United States v. Bergrin,* 650 F.3d 257, 268 (3d Cir.2011)). "[T]he scope of a district court's review at the Rule 12 stage is limited." *Id.* " '[A] pretrial motion to dismiss an indictment is not a permissible vehicle for addressing the sufficiency of the government's evidence.' " *Id.* (quoting *United States v. DeLaurentis,* 230 F.3d 659, 660 (3d Cir.2000)). In evaluating a Rule 12 motion to dismiss, the factual allegations set forth in the indictment must be accepted as true by the district court. *Id.* (citing *United States v. Sampson,* 371 U.S. 75, 78–79, 83 S.Ct. 173, 9 L.Ed.2d 136 (1962); *United States v. Besmajian,* 910 F.2d 1153, 1154 (3d Cir.1990)). " 'Evidentiary questions-such as credibility determinations and the weighing of proof-

should not be determined at this stage.' " *Id.* (quoting *Bergrin,* 650 F.3d at 265 (internal marks and citation omitted)). "Thus, a district court's review of the facts set forth in the indictment is limited to determining whether, assuming all of those facts as true, a jury could find that the defendant committed the offense for which he was charged." *Id.* at 595–96 (citations omitted).

IV. *DISCUSSION*

***3** The mail and wire fraud statutes both require the existence of a "scheme or artifice to defraud, or for obtaining money or a property by means of false or fraudulent pretenses." *See* 18 U.S.C. §§ 1341, 1343. In this case, the question presented is whether the Indictment adequately alleges that Defendants engaged in a scheme to defraud the Commonwealth and the City of money in costs and fees.[6] Upon consideration of all of the arguments, and the extensive caselaw concerning this issue, we conclude that it does.

A. Supreme Court Cases

In order to come to this conclusion, a summary of the following four main Supreme Court cases interpreting the phrase "money or property interest" in the mail

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[6] Originally, the Government argued that the ticket-pricing scheme deprived the Commonwealth of property in the form of its ability to regulate safe drivers on the roadways through licensing suspensions and revocations. *See* Indictment. The Government abandoned this theory in its Response to Sullivan's Motion to Dismiss. (Govt.'s Response to Defs.' Mot. to Dismiss at 18 n. 12.)

and wire fraud statutes is instructive: *McNally v. United States,* 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), *superseded by statute,* 18 U.S.C. § 1346; *Carpenter v. United States,* 484 U.S. 19, 108 S.Ct. 316, 98 L.Ed.2d 275 (1987); *Cleveland v. United States,* 531 U.S. 12, 121 S.Ct. 365, 148 L.Ed.2d 221 (2000); and *Pasquantino v. United States,* 544 U.S. 349, 125 S.Ct. 1766, 161 L.Ed.2d 619 (2005).

1. McNally v. United States

McNally involved a former public official of the Commonwealth of Kentucky, and a private individual, who were involved in a self-dealing patronage scheme involving commissions and premiums paid on awarding insurance coverage for the State. 483 U.S. at 353–355. The defendants were charged with, and convicted of, violating Section 1341 by devising a scheme to defraud the citizens and government of Kentucky of their "intangible right" to have the Commonwealth's affairs conducted honestly. *Id.* at 352.

Notably, the *McNally* Court pointed out that "as the action comes to us, there was no charge and the jury was not required to find that the Commonwealth itself was defrauded of any money or property." *McNally,* 483 U.S. at 360. Thus, the Supreme Court was asked to determine whether the deprivation of "honest services" fell within the scope of the mail fraud statute. The Supreme Court decided that Section 1341 must be read "as limited in scope to the protection of property rights."[7] *Id.* at 360. Impor-

[7] In response to the *McNally* decision, Congress enacted 18 U.S.C. § 1346, which defines "a scheme or artifice to defraud"

tantly, the *McNally* Court held that the mail fraud statute did not reach "the intangible right of the citizenry to good government." *Id.* at 356. As such, the Court held that a scheme to deprive the Commonwealth of Kentucky of "honest services" was not within the scope of Section 1341 and, therefore, reversed the defendants' convictions. *Id.* at 361.

2. Carpenter v. United States

In the same year as its *McNally* decision, the Supreme Court decided *Carpenter v. United States.* 484 U.S. 19, 108 S.Ct. 316, 98 L.Ed.2d 275. The *Carpenter* Court applied Section 1341 to intangible property rights. *Id.* at 25. In *Carpenter,* the defendant was alleged to have violated Section 1341 by defrauding the Wall Street Journal (the "Journal") of "confidential business information." *Id.* at 24. One Defendant was a reporter for the Journal and wrote a regular column discussing selected stocks and giving positive and negative information about those stocks. The Journal had a policy setting forth that before the publication of each column, the contents of the column were the Journal's confidential information. *Id.* at 23. Against this policy, the defendant entered into a scheme by which he gave employees of a brokerage firm advance information as to the timing and

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to include not only a scheme that deprives the victim of money or property, but also "a scheme or artifice to deprive another of the intangible right to honest services." *See* 18 U.S.C. 1346. In *Skilling v. United States,* ——U.S. ——, ——, 130 S.Ct. 2896, 2931, 177 L.Ed.2d 619 (2010), the Court held that such "honest services" fraud encompasses only bribery and kickback schemes. A violation of Section 1346 is not alleged in the Indictment.

contents of the column. Then, those brokers traded on the prepublication information.

***4** The reporter and the brokers were charged with violations of securities laws and the mail and wire fraud statutes. The specific issue addressed by the Supreme Court was whether the contents of the Journal column, which were fraudulently misappropriated by the reporter, constituted "money or property" under the mail and wire fraud statutes in light of *McNally*. Distinguishing the case from *McNally,* the Court held that as defendant's employer, the Journal, "was defrauded of much more than its contractual right to [defendant's] honest and faithful service, an interest too ethereal in itself to fall within the protection of the mail fraud statute, which 'had its origin in the desire to protect individual property rights." " *Id.* at 25 (citing *McNally,* 483 U.S. at 359 n. 8). The Court focused on the fact that the object of the scheme was to take the Journal's confidential business information, and determined that its intangible nature does not make it any less "property" protected by the mail and wire fraud statutes. *Id.* The Court stated that "*McNally* did not limit the scope of § 1341 to tangible as distinguished from intangible property rights." *Id.* at 25. Reasoning that "confidential business information has long been recognized as property," the Court concluded that the Journal "had a property right in keeping confidential and making exclusive use, prior to publication, of the schedule and contents of [its] column." *Id.* at 26 (citations omitted).

In coming to its conclusion, the Court rejected the argument that a scheme to defraud required a

monetary loss; instead, holding that "it is sufficient that the Journal has been deprived of its right to exclusive use of the information, for exclusivity is an important aspect of confidential business information and most private property for that matter." *Id.* at 26–27. The Court also rejected the argument that defendant's conduct amounted to no more than a violation of workplace rules and did not constitute fraudulent activity. Relying upon its prior opinion in *McNally,* the Court concluded that "the words 'to defraud' in the mail fraud statute have the 'common understanding' of 'wronging one in his property rights by dishonest methods or schemes.' " *Id.* at 27.

3. Cleveland v. United States

In 2000, the Supreme Court decided *Cleveland,* which involved a defendant who was charged and convicted of violating the mail fraud statute by making false statements in applying to the Louisiana State Police for a license to operate video poker machines. 531 U.S. at 15. The Supreme Court specifically addressed the issue of whether the pre-issued Louisiana video poker license qualified as "property" within the scope of § 1341. *Id.* In deciding this issue, the Court held that "[i]t does not suffice ... that the object of the fraud may become property in the recipient's hands; for purposes of the mail fraud statute, the thing obtained must be property in the hands of the victim." *Id.* at 15. Accordingly, the Supreme Court went on to consider "whether a government regulator parts with 'property' when it issues a license." *Id.* at 20.

***5** In analyzing this issue, the Court first noted that the "core concern" for Louisiana in issuing licenses was regulatory, and, as such, Louisiana law

established a typical regulatory program for issuing video poker licenses. *Id.* at 20–21. Also, the Court noted that the pre-issued licenses sought "do not generate an ongoing stream of revenue" and "the Government nowhere alleges that Cleveland defrauded the State of any money to which the State was entitled by law." *Id.* at 22. Regarding the government's argument that the state had a right to choose to whom it would award a license, the Court responded that this was not a property right, but an intangible right; namely, the power to regulate. *Id.* at 23. Concluding that the video poker license at issue was not property in the hands of the State of Louisiana, the Court reversed defendant's conviction because the conduct did not fall within the scope of the mail fraud statute.

4. Pasquantino v. United States

In *Pasquantino,* defendants were convicted of wire fraud in connection with a scheme to evade Canadian liquor importation taxes by smuggling liquor from the United States into Canada. 544 U.S. at 355. The Supreme Court held that "an entitlement to collect money from [a party]" is money or property under the mail and wire fraud statutes. *Id.* The Court found that the defendants were attempting to "deprive Canada of money legally due," and that "Canada's right to uncollected excise taxes ... is 'property' in its hands." *Id.* at 355–56.

B. Analysis of Case

Against this background, accepting as true the Government's factual allegations in the Indictment, we find that the Indictment tracks the express

language of the statutes and unambiguously states the elements that constitute the offenses charged. Specifically, we find that the Indictment charges Defendants with committing acts which caused a monetary or property loss to the Commonwealth and the City. Therefore, Defendants' Motion to Dismiss is denied.

Although Defendants argue that the alleged fraud by Defendants did not deprive the Commonwealth or the City of "money or property," the Indictment specifically alleges that the ticket-fixing scheme defrauded the Commonwealth and the City of funds to which they were entitled. Regarding the "money or property" requirement of the mail and wire fraud statues, the Indictment alleges, in relevant part, as follows:

> 1. The conspirators used the Philadelphia Traffic Court ("Traffic Court") to give preferential treatment to certain ticketholders, most commonly by "fixing" tickets for those with whom they were politically and socially connected. By doing so, the conspirators defrauded the Commonwealth of Pennsylvania and the City of Philadelphia of funds to which the Commonwealth and the City were entitled.
>
> * * * * *
>
> 5. The Traffic Court judges presided over and adjudicated moving violations, commonly referred to as traffic tickets or citations, occurring within Philadelphia, issued by the Philadelphia Police Department and the Pennsylvania State Police, and other police entities. Traffic Court was responsible for the collection of fines and court costs resulting

from guilty pleas and findings of guilt for violations of the Pennsylvania Motor Vehicle Code.

***6** 6. On a daily basis, ticketholders appeared before the Traffic Court judges for their trials. It was not uncommon for a Traffic Court judge to preside over dozens of trials in one session. The trials involved an appearance by the ticketholder contesting his or her guilt and either an officer from the Philadelphia Police Department, a State Trooper, or another law enforcement officer, who prosecuted the ticket.

7. Traffic Court judges had several options when disposing of citations, including finding the ticketholder guilty of a different offense, guilty, not guilty, not guilty in absentia, guilty in absentia, guilty with a reduction in speed, and dismissal. In addition, the ticketholder could engage in a plea bargain with the police officer or state trooper or other law enforcement officer.

8. Guilty adjudications subjected a violator to statutorily determined fines and costs of court.[8]

9. The moneys received from the fine portion of a guilty adjudication were equally divided between the City and the Commonwealth of Pennsylvania.

10. Upon an adjudication of not guilty or dismissal, the ticketholder did not pay any fines or costs.

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[8] According to the Government, "the amount of the fine and the costs are statutorily mandated, and not within the discretion of the court." (Govt.'s Response Defs.' Mot. to Dismiss at 14.) The Government states "[i]n the instant case, there is no discretion as to the imposition of fines and costs once a finding of guilt is made." (*Id.*)

* * * *

27. From in or about July 2008 to in or about September 2011 ... Defendants ... conspired and agreed ... to commit offenses against the Unites State, that is

> (a) to devise and intend to devise a scheme to defraud, and to obtain money and property by means of false and fraudulent pretenses, representations, and promises, and, for the purpose of executing the scheme and artifice and attempting to do so, place in a post office or authorized depository for mail matter, matter to be sent or delivered by the Postal Service.
>
> (b) to devise and intend to devise a scheme to defraud, and to obtain money and property by means of false and fraudulent pretenses, representations, and promises, and, for the purpose of executing the scheme and artifice, transmit or cause to be transmitted by means of wire communication in interstate commerce, writings, signs, signals, and sounds.

* * * * *

30. In order to provide the requested preferential treatment, Defendants ... used their positions at Traffic Court to manipulate Traffic Court cases outside of the judicial process, thereby achieving favorable outcomes for politically connected individuals, friends, family members, associates, and others with influential positions. This manipulation, or "ticket-fixing," consisted of (1) dismissing tickets outright; (2) finding the ticketholder not guilty after a 'show' hearing; (3) adjudicating the ticket in a

manner to reduce fines and avoid the assignment of points to a driver's record; and (4) obtaining continuances of trial dates to 'judge-shop,' this is to find a Traffic Court judge who would accede to a request for preferential treatment.

* * * * *

34. When Traffic Court engaged in "ticket-fixing," they nevertheless reported the final adjudication to the various authorities ... as if there had been a fair and open review of the circumstances.

* * * * *

***7** 38. In acceding to requests for "consideration," defendants were depriving the City of Philadelphia and the Commonwealth of Pennsylvania of money which would have been properly due as fines and costs.

See Indictment.

Additionally, the Overt Acts section of the Indictment specifically names particular citations that were issued and adjudicated, according to the Government, extra-judicially in furtherance of the traffic-fixing conspiracy. *Id.* at p. 20–57. The Government includes the specific monetary amounts of the statutory fees and costs associated with the moving violations cited in the tickets, and the adjudications resulting in no fees or costs being assessed. *Id.* Taking the Government's factual allegations as true, we find that the Defendants' alleged conspiracy involved defrauding the Commonwealth and the City of money. *See United States v. Granberry,* 908 F.2d 278, 280 (8th Cir.1990) ("Money is money, and 'money' is specifically mentioned in the statutory words [of

Section 1341.]")

In his Reply Brief, Sullivan agrees that the right to statutorily required fees and costs is a property interest, but argues that this is not so in this case because the right to fines here is triggered only by a guilty adjudication. (Sullivan's Reply at 4.) Sullivan further asserts that "anything short of guilt results in no right to collect any fine or cost from the traffic defendant." (*Id.*) Sullivan argues that "until an assessment has been imposed any property interest is too attenuated to be the basis of a mail or wire fraud violation." (*Id.* at 5.) Sullivan's argument, however, fails under the specific facts of this case because the Indictment charges Defendants with the object of the alleged fraud as being the prevention of guilty adjudications; thereby, resulting in statutorily required fees and costs not being assessed or paid to the Commonwealth and the City. It is the fact that the specific tickets at issue did not result in guilty adjudications with fees and costs which is at the heart of the entire "ticket-fixing" scheme alleged in the Indictment. The crux of the Government's conspiracy claim is Defendants' unique ability to prevent guilty adjudications that allows them to give preferential treatment to certain ticketholders for those with whom they were politically and socially connected. In this case, Defendants are in the unique position of being Traffic Court judges who have the power and, according to the Indictment, used such power to not permit the adjudication of specific traffic citations as guilty with fees and costs. Finding in favor of Defendants' argument that the Commonwealth and the City have not suffered economic harm because the right to fees and costs here is only triggered by a

guilty adjudication, an assessment or deficiency being imposed, is circular in the context of this case. To accept Defendants' argument would permit the alleged conspirators in this case to enter into a scheme to commit fraud and then hide behind the argument that the success of their fraud precludes prosecution under the "money or property interest" requirement of the mail and wire fraud statutes.

***8** Additionally, we point out that the Indictment alleges that Defendants conspired and schemed to prevent the payment of actual fines, not merely potential fines. (Govt.'s Response Mot. to Dismiss at 8.) Defendants argue that, "[a]t most, the City and Commonwealth have a potential entitlement to collect a fine that might be assessed at a future point, but such a speculative property interest by definition is not 'property in the [government's] hands.' " (Sullivan's Mot. to Dismiss at 2.) Regarding the Indictment before us, Defendants' argument misses the mark because the Indictment does not address traffic citations awaiting adjudication, but addresses traffic citations that have been adjudicated. Adjudicated, argues the Government, pursuant to a conspiratorial scheme designed to prevent guilty rulings resulting in the payment of fines.

Defendants' argument implies that the Government has to prove that the Commonwealth and the City were actually deprived of money or property. This is not required. The relevant inquiry concerns what Defendants intended-not whether the Commonwealth and the City were *actually* deprived of money or property. *See United States v. Tulio,* 263 F. App'x. 258, 261 (3d Cir.2008).

The Government asserts that "in this case, the Government has alleged and will prove ... a scheme to prevent the entry of guilty verdicts which the Defendants believed would otherwise occur, and therefore an intent and scheme to deprive the City and Commonwealth of actual funds." (Govt.'s Response Defs.' Mot. to Dismiss at 18.) The Government submits that the overwhelming evidence of ticket-fixing referenced in the Indictment, and which will be presented at trial, will prove that Defendants took part in a scheme to deprive the City and the Commonwealth of money which would have been properly due as fines and costs. *Id.* at 11. In light of the allegations in the Indictment, it is conceivable that the Government will be able to produce evidence that Defendants violated the mail and wire fraud statutes by devising a scheme to obtain money. Whether the Government will successfully prove its case is not at issue here. However, at this time, a review of the Indictment shows that the Government sufficiently alleged that Defendants intended to deprive the Commonwealth and the City of money or property.

There is some discussion by Defendants that the statutory fees and costs owed pursuant to a guilty adjudication are regulatory, as opposed to revenue-enhancing. In *Cleveland,* the Supreme Court balanced the regulatory against the revenue-collecting aspects of the video poker licensing scheme describing the State's "core concern" in pre-issued video poker licenses is "regulatory" despite the fact that the State argued that it "receives a substantial sum of money in exchange for each license and continues to receive

payments from the licensee as long as the license remains in effect." 531 U.S. at 20–22. The *Cleveland* Court focused on the fact that licenses pre-issuance do not generate an on-going stream of revenue for Louisiana. *Id.* at 22. In so finding, the Court stated that:

> ***9** Tellingly, as to the character of Louisiana's stake in its video poker licenses, the Government nowhere alleges that Cleveland defrauded the State of any money to which the State was entitled by law. Indeed, there is no dispute that [defendant's family limited liability partnership] paid the State of Louisiana its proper share of revenue, which totaled more than $1.2 million, between 1993 and 1995. If Cleveland defrauded the State of 'property,' the nature of that property cannot be economic.

Id. The Court found that Louisiana's interests in licensing video poker operations implicates the Government's role as sovereign, not as property holder. *Id.* at 24.

The Court concluded that "§ 1341 requires the object of the fraud to be 'property' in the victim's hands and that a Louisiana video poker license in the State's hands is not 'property' under § 1341." *Id.* at 26–27. The Government's argument that Louisiana had a property interest in its licenses simply due to the significant amounts of money it receives in exchange for each license, as well as from the licensee as long as the license remains in effect, was rejected by the Court. *Id.* Acknowledging that Louisiana had a substantial economic stake in the video poker industry, and that Louisiana does not run any video

poker machinery, the Court noted that "[t]he State receives the lion's share of its expected revenue not while the licenses remain in its own hands, but only *after* they have been issued to licensees." *Id.* at 22. The Court pointed out that "[l]icenses pre-issuance do not generate an ongoing stream of revenue." *Id.* "At most, they entitle the State to collect a processing fee from applicants for new licenses." *Id.* The Court stated that "[w]ere an entitlement of this order sufficient to establish a state property right, one could scarcely avoid the conclusion that States have property rights in any license or permit requiring an upfront fee, including drivers' licenses, medical licenses, and fishing and hunting licenses." *Id.*

We note that monetary loss was not involved at all in the offense underlying the conviction in *Cleveland.* Significantly, monetary loss is alleged, and involved, in this case. The interest of the Commonwealth and the City in statutorily required fees and costs concerning traffic citations in this case implicates their role as property holders, not sovereigns. The fact that the Commonwealth and the City were prevented from receiving those fees and costs due to the alleged conspiracy does not result in a finding that they, therefore, were not property in the hands of the Commonwealth and the City.

Our finding that the Indictment advances theories of mail and wire fraud liability comport with the Supreme Court's decisions in *McNally, Carpenter, Cleveland* and *Pasquantino.* The Indictment alleges that the object of Defendants' fraud was money or a property right, not simply an intangible right unrelated to money or property. *See McNally,* 483

U.S. at 2879 ("The mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government."); *Carpenter,* 484 U.S. at 26 ("Sections 1341 and 1343 reach any scheme to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises."); *Cleveland,* 531 U.S. at 26 (" § 1341 requires the object of the fraud to be 'property' in the victim's hands."); *Pasquantino,* 544 U.S. at 355 ("The object of petitioner's scheme was to deprive Canada of money legally due, and their scheme thereby had as its object the deprivation of Canada's 'property.' ")

***10** Other than the *Carpenter* decision, which is distinguishable from our case because it addresses intangible property rights, *McNally, Cleveland* and *Pasquantino* all addressed whether or not the indictments at issue charged that the Government was defrauded of any money or property. *See McNally,* 483 U.S. at 360 ("We note that as the actions comes to us, there was no charge and the jury was not required to find that the Commonwealth itself was defrauded of any money or property."); *Cleveland,* 531 U.S. at 2 ("[T]he Government nowhere alleges that Cleveland defrauded the State of any money."); *Pasquantino,* 544 U.S. at 357 (differentiating *Cleveland* stating "[h]ere, by contrast, the Government alleged and proved that petitioners' scheme aimed at depriving Canada of money to which it was entitled by law"). We make note of this because the Indictment at hand specifically charges that the alleged scheme under the mail and wire fraud statutes was designed to defraud the Commonwealth and the City of money. Given the unique

circumstances of the kind involved here, which include allegations of corrupt Traffic Court judges preventing the adjudication of guilty verdicts resulting in fees and costs being owed and paid to the Commonwealth and the City, we conclude that the Government has sufficiently alleged that the object of Defendants' scheme was to deprive the Commonwealth and the City of money or property.

V. *CONCLUSION*

Although the Third Circuit has not yet had an opportunity to consider the "money or property" theory in the Indictment, this Court is confident that if the issue was before it, it would reject the narrow and circular approach taken by Defendants in favor of an approach examining the Indictment as a whole, and affirm the validity of the indictment due to the legitimate property interests clearly at stake. As the Third Circuit explained in *United States v. Asher,* 854 F.2d 1483, 1494 (3d Cir.1988), "[w]hile we recognize that cases may fall on either side of the McNally/Carpenter line, those cases that have sustained mail fraud convictions have done so where the 'bottom line' of the scheme or artifice had the inevitable result of effectuating monetary or property losses to the employer of or the state." Accepting the factual allegations in the Indictment as true, we find that the Government has alleged the "bottom line" of the charged scheme as having the result of effectuating a monetary or property loss to the Commonwealth and the City. Accordingly, dismissal of the Indictment is not warranted.

An appropriate Order follows.

ORDER

AND NOW, this 1st day of July, 2013, upon consideration of Defendant, Michael J. Sullivan's ("Sullivan") Motion to Dismiss (Doc. No. 69), which has been joined in by Defendants Mulgrew, Lowry, Alfano, Moy, Singletary, Bruno[9], Hird (*See* Doc. Nos. 73, 76, 77, 78, 85, 88, 91), the Response in Opposition filed by the United States of America, the Replies filed thereto, and the oral arguments presented during a hearing conducted on June 24, 2013, it is hereby **ORDERED** that Sullivan's Motion is **DENIED.**

[9] The Court notes that Bruno's Motion to Dismiss will be addressed in accordance with the Scheduling Order dated March 28, 2013.

APPENDIX C

2014 WL 5795575
United States District Court,
E.D. Pennsylvania.

UNITED STATES of America
v.
Michael LOWRY, Robert Mulgrew, Willie Singletary and Thomasine Tynes.
Criminal Action Nos. 13–39–02, 03, 04, 05.
| Signed Nov. 6, 2014.

OPINION

STENGEL, District Judge.
***1** Four former Philadelphia Traffic Court Judges filed motions for judgment of acquittal or for a new trial. On July 23, 2014, a jury convicted Michael Lowry, Robert Mulgrew and Thomasine Tynes of making false declarations before the grand jury in violation of 18 U .S.C. § 1623. The same jury convicted Willie Singletary of making false statements to the FBI in violation of 18 U.S.C. § 1001. I will deny the motions.

I. Background

The defendants are former Judges of the Philadelphia Traffic Court, elected to these positions by the citizens of Philadelphia. They adjudicated traffic citations issued by police for moving violations within the City of Philadelphia. Their court was very busy, with each judge adjudicating approximately 20,000 citations in a given year. The violations handled by Traffic Court yielded several million dollars each year in fines and costs which was significant revenue to the City and Commonwealth of Pennsylvania. Mr. Lowry served on the Traffic Court for five years from 2008 to 2013; Mr.

Mulgrew four years, from 2008 to 2012; Ms. Tynes 23 years, from 1989 to 2012; and Mr. Singletary four years, from 2008 to 2012.

During the eight week trial the government presented in excess of 60 witnesses and many exhibits. Witnesses included Traffic Court employees, judicial assistants (known as "personals") for each of the defendant judges, persons who were issued traffic tickets and persons who requested special treatment or "consideration" from the judges or their assistants. The evidence at trial demonstrated very clearly that defendants were influenced by "extrajudicial communications" when reaching their decisions on select tickets. In short, they and their colleagues were "fixing tickets."

The extrajudicial communications were ferried about the courthouse by the defendants' personal assistants and other court house staff. These employees testified that there was no specific term used to identify the requests. The employees would speak in code, asking for "consideration," requesting another judge to "take a look at a ticket," or simply telling a colleague or staffer, "I have a name for you." Regardless of the terms, the evidence was clear: the defendants were routinely granting favorable dispositions to well-connected ticket-holders who knew a Traffic Court judge or an employee.

The government's theory at trial was that defendants committed mail fraud or wire fraud, depriving the City and Commonwealth of fines and fees that would have been due had defendants adjudicated the tickets guilty on the merits of each case, instead of not guilty

because of some personal contact, personal relationship or on a request for consideration.[1] To prove mail and wire fraud, the government had to prove the defendants intended to deprive Philadelphia and Pennsylvania of money or property, i.e. fines that would have been due but for the "fixed" result in a given case. The jury acquitted all seven defendants of the fraud charges.[2] The jury found that Mr. Lowry, Mr. Mulgrew, Ms. Tynes and Mr. Singletary lied to the grand jury or to FBI investigators and returned a guilty verdict on the perjury counts. These motions for judgment of acquittal and new trial followed.

II. Standard of Review

***2** My ability to review a jury verdict is very limited. When a convicted defendant moves for acquittal pursuant to Rule 29, the defendant carries a very heavy burden and the trial court must give great deference to a jury's verdict. *United States v. Coyle,* 63 F.3d 1239, 1243 (3d Cir.1995); *see also United States v. Rosario,* 118 F.3d 160, 162–63 (3d Cir.1997). In evaluating a motion challenging the sufficiency of the evidence at trial, I "must determine whether a reasonable jury believing the government's evidence

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[1] The indictment also charged defendants with conspiracy to commit mail fraud and wire fraud

[2] In addition to the moving defendants, the government also charged former Traffic Court Judge Michael Sullivan, Magisterial District Judge Mark Bruno and Chinatown businessman Robert Moy with mail fraud, wire fraud and conspiracy. The government did not charge these defendants with making false statements to the grand jury or FBI agents.

could find beyond a reasonable doubt that the government proved all the elements of the offenses." *United States v. Salmon,* 944 F.2d 1106, 1113 (3d Cir.1991); *see also United States v. Brodie,* 403 F.3d 123, 133 (3d Cir.2005). Accordingly, I must "sustain the verdict if there is substantial evidence, viewed in the light most favorable to the government, to uphold the jury's decision." *United States v. Gambone,* 314 F.3d 163, 169–70 (3d Cir.2003). A court may find that the government introduced insufficient evidence to support a conviction only where "the prosecution's failure is clear." *United States v. Leon,* 739 F.2d 885, 891 (3d Cir.1984) (quoting *Burks v. United States,* 437 U.S. 1, 17, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978)).

Under Rule 33(a), "[a] district court can order a new trial on the ground that the jury's verdict is contrary to the weight of the evidence only if it believes that there is a serious danger that a miscarriage of justice has occurred—that is, that an innocent person has been convicted." *United States v. Johnson,* 302 F.3d 139, 150 (3d Cir.2002). Unlike a motion for insufficiency of the evidence under Rule 29, in which I view the evidence in the light most favorable to the government, a Rule 33 motion permits me to exercise my own judgment in assessing the government's case. *United States v. Brennan,* 326 F.3d 176, 189 (3d Cir. 2003). Our Court of Appeals has emphasized that motions for a new trial based upon weight of the evidence contentions are not favored and should only be granted sparingly in exceptional cases. *Government of the Virgin Islands v. Derricks,* 810 F.2d 50, 55 (3d Cir.1987).

III. Discussion

A. The Elements of the Offenses and the Government's Burden of Proof

To obtain a conviction for false statements to a grand jury, i.e. perjury, the government must prove: 1) the defendant testified before a grand jury under oath, 2) the defendant made a false statement, 3) the defendant knew the statement was false and 4) the false statement was material to the grand jury's investigation. 18 U.S.C. § 1623; *United States v. Dobson,* 380 F. App'x 170, 178 (3d Cir.2010). The proof required for Mr. Singletary's conviction for false statements to the FBI is similar. The government must prove: 1) the defendant made a false statement to the FBI, 2) the defendant knew the statement was false, 3) the statement was made in a matter within the jurisdiction of the FBI and 4) the statement was material to the FBI's investigation. 18 U.S.C. § 1001; *United States v. Castro,* 704 F.3d 125, 139 (3d Cir.2013). Each of the four defendants dispute that a reasonable jury could find their statements to be knowingly false and material.

B. Michael Lowry's Motion for Judgment of Acquittal and for a New Trial

***3** Mr. Lowry testified under oath to the grand jury. The Assistant U.S. Attorney asked him, "Your testimony is you don't give out special favors is that right?" Mr. Lowry responded, "No, I treat everybody in that courtroom the same." The trial jury found that this testimony was in fact a false statement to the grand jury and returned a guilty verdict on count 69 of the indictment. Mr. Lowry contends the question was vague and argues there was insufficient evidence that he treated ticket-holders differently.

According to Mr. Lowry, the question put to him in the grand jury was too vague and ambiguous. He could not possibly have knowingly given false testimony to the grand jury because, legally speaking, a vague and ambiguous question cannot be the basis for a perjury conviction. He is right on the law and wrong on the facts. The Third Circuit has held that an excessively vague or fundamentally ambiguous question may not form the basis of a perjury conviction. *United States v. Ryan,* 828 F.2d 1010, 1015 (3d Cir.1987) (citing *United States v. Lighte,* 782 F.2d 367, 375 (2d Cir.1986); *United States v. Slawik,* 548 F.2d 75, 86 (3d Cir.1977)), *abrogated on other grounds by, United States v. Wells,* 519 U.S. 482, 117 S.Ct. 921, 137 L.Ed.2d 107 (1997). A question is fundamentally ambiguous "when it [is] entirely unreasonable to expect that the defendant understood the question posed to him." *United States v. Reilly,* 33 F.3d 1396, 1416 (3d Cir.1994) (citing *Ryan,* 828 F.2d at 1015). Otherwise, it is for the trial jury to resolve, "which construction the defendant placed on the question." *United States v. Serafini,* 167 F.3d 812, 820 (3d Cir.1999) (citing *Ryan,* 828 F.2d at 1015). According to Mr. Lowry's brief, the term "special favors" is confusing because the prosecutors used the terms "consideration," "preferential treatment," "special treatment," "favorable disposition" and "special favors" interchangeably throughout the course of the grand jury examination. The question is not whether these terms were confusing, although they most certainly were not. The question is whether it is entirely unreasonable to expect that the defendant understood the question posed to him.

The language that Mr. Lowry now chooses to parse

was used in a certain context. *See United States v. Fernandez,* 389 F. App'x 194, 198 (3d Cir.2010) ("It is clear from the context of the questions and the record as a whole that [defendant] understood what the prosecutor was asking him."). Mr. Lowry's entire grand jury examination focused on alleged ticket fixing at the Traffic Court. The prosecutors used all of these terms to ask Mr. Lowry how he disposed of cases at Traffic Court. Clearly, the prosecutors were asking Mr. Lowry whether he adjudicated tickets based on extrajudicial communications or on other factors unrelated to the merits of the case. The terms they used were simple, direct and capable of being understood by anyone with a basic working knowledge of the English language. The plain meaning of these terms would have been evident to anyone with a high school education. Mr. Lowry was an elected judge. These terms were not presented as part of a vocabulary test or used in a manner that would be confusing to the average person possessed of some common sense. But, we need not belabor the plain meaning of these terms. In truth, these terms were used in a specific context and Mr. Lowry well understood that context. These words were used in the context of an inquiry about the practice of fixing tickets in Philadelphia's Traffic Court. To anyone with even a basic understanding of the long-standing and pervasive corruption in that court, such as, for example, Mr. Lowry, these terms would have made perfect sense. Mr. Lowry well understood the import of the question which formed the basis of his conviction.

***4** Mr. Lowry's response, i.e. that he treated everyone fairly, demonstrates that he knew exactly what the

prosecutor was asking. *See United States v. Neff,* 212 F.2d 297, 311 (3d Cir.1954) ("[T]he record of the defendant's testimony before the grand jury on which Counts 2 and 3 were premised clearly demonstrates that the questions put to her and her answers thereto dealt with but one subject matter."). Why, in this context, would he claim to treat "everyone fairly" unless there was some question about his sense of fairness or about the inconsistent sense of fairness throughout the court on which he served? By answering a question about "special treatment" or "consideration" with a claim that he treated "everyone fairly" he acknowledged that there was a concern about whether he was fair or whether he was, from time to time, responsive more to influence than to fairness. In answering the question in this way, he did not tell the truth to the grand jury.

These were arguments best made to the jury, not to the Court after the jury has spoken. All this evidence was considered by the jury. The clarity of the terms, the context for the questions and the veracity of the answer—these were all questions presented to the jury. There is no basis to second guess or overturn the legitimate and evidence-based finding of the jury.

Second, Mr. Lowry maintains the government did not prove his statement was actually false. While Mr. Lowry seems to agree that testimony at trial proved he participated in the consideration process, he denies that he treated those ticket-holders any differently. Def. Lowry's Reply 3. The government, he insists, did not produce any evidence that ticket-holders who requested consideration received more favorable dispositions.

Yet, there is ample evidence that "connected" ticket-holders frequently did very well in former Judge Lowry's courtroom. Kevin O'Donnell, Mr. Lowry's personal assistant, and Walter Smaczylo, Mr. Lowry's court officer, testified that ticket-holders who appeared before Mr. Lowry received better outcomes if someone had requested "consideration" for them. These witnesses were in Traffic Court nearly every day when Mr. Lowry was on the bench. They were in a very good position to observe the effect requests for consideration had on the judicial process.

In an effort to explain away the damaging evidence, Mr. Lowry contends that Mr. O'Donnell's and Mr. Smaczylo's testimony was "too general" to prove beyond a reasonable doubt that he treated certain ticket-holders more favorably. There are a number of problems with this desperate argument. First, no one sitting in the courtroom and listening to Mr. O'Donnell and Mr. Smaczylo testify could describe their testimony as "too general." They were clear and they were credible when they each told the jury that Mr. Lowry responded regularly to requests for consideration and special treatment by adjudicating certain cases in favor of those requests. Second, I am required to view the trial evidence in the light most favorable to the government as the verdict winner for purposes of this post trial motion. By that standard, Mr. Lowry's argument borders on frivolous. Third, this was an issue for the jury. The jury heard the questions put to Mr. Lowry before the grand jury, they heard his answer, they heard Mr. O'Donnell and Mr. Smaczylo testify and they were in the best possible position to place Mr. Lowry's statement to

the grand jury in the correct context.

***5** Fourth, Mr. O'Donnell's and Mr. Smaczylo's testimony was corroborated many times over. Court employees testified that Mr. Lowry both accepted requests for consideration and made such requests to the other judges. Perhaps the strongest evidence was Mr. O'Donnell's testimony that Mr. Lowry requested consideration for his nephew, Francis Lowry. Francis Lowry testified that he did not go to court to defend his traffic citation. Nonetheless, the government established that Former Traffic Court Judge Michael Sullivan found Francis Lowry not guilty. The jury could reasonably infer from this evidence that Mr. Lowry was expecting a favorable disposition for his nephew and that he took steps to get that disposition. Furthermore, the jury heard from four ticket-holders who requested consideration and who received a favorable disposition from Mr. Lowry. This was strong and clear evidence from which the jury could reasonably infer that Mr. Lowry favorably disposed of these tickets in response to requests for consideration.

Mr. Lowry insists that the statistical evidence he and his co-defendants introduced proves he did not treat certain ticket-holders more favorably. In effect, Mr. Lowry wants me to find that this statistical evidence outweighs the testimony of Mr. O'Donnell, Mr. Smaczylo and Francis Lowry and the rest of the government's case. All this was presented to the jury and the trial judge has no business weighing the relative strength or quality of the evidence in the context of a motion for judgment of acquittal. *See United States v. Flores,* 454 F.3d 149, 154 (3d Cir. 2006) ("[A] court "must be ever vigilant in the context

of Fed.R.Crim.P. 29 not to usurp the role of the jury by weighing credibility and assigning weight to the evidence, or by substituting its judgment for that of the jury."). The statistics may well demonstrate that Mr. Lowry was a lenient judge. But the government, through cross examination, very effectively pointed out how the data could have been manipulated in Mr. Lowry's favor. The statistical evidence was presented in a methodical and careful way to the jury. Mr. Lowry's defense attorney, and all the defense attorneys, argued the persuasive value of the statistical evidence in great detail and with great enthusiasm in their eloquent closing arguments. In the end, it was for the jury to weigh the credibility of the government's evidence, Mr. Lowry's statistics and all the other evidence in this case. I will not disturb the jury's findings.

In the alternative, Mr. Lowry moves for a new trial. He advances no specific theory as to how the jury's verdict is contrary to the weight of the evidence. Again, there was ample, if not overwhelming, evidence that Mr. Lowry received requests for consideration. His disposition of the tickets in evidence at trial supports the jury's finding that he treated ticket-holders with requests for consideration more favorably. At the grand jury, Mr. Lowry stated under oath that "[he] treat[ed] everybody in that courtroom the same." The jury found that to be a false statement. The jury's verdict is sound and based on strong and clear evidence.

C. Robert Mulgrew's Motion for Judgment of Acquittal

***6** On February 4, 2011, Robert Mulgrew also testified under oath in front of the grand jury. Count

70 charged that Mr. Mulgrew gave false testimony when he stated:

> Q: How about your personal, has your personal received any calls like that from other judges, other ward leaders that she's conveyed to you saying that so and so has called about this case?
>
> A. If she did, she didn't convey them to me.
>
> ....
>
> Q. Let me make sure as well that if I got your testimony correct. You're saying that if other people whether they be political leaders, friends and family, anybody is approaching your personal and asking her specifically to look out for a case, see what she can do in a case, give preferential treatment, however you want to phrase it, that she is not relaying any of that information to you; is that correct?
>
> A. No, she isn't.

The jury found that Mr. Mulgrew's testimony before the grand jury was false and convicted Mr. Mulgrew of perjury. Mr. Mulgrew believes his statement was neither material nor false and seeks a judgment of acquittal here.

Mr. Mulgrew claims that his statements regarding the consideration process were immaterial to the grand jury's investigation into mail and wire fraud at Traffic Court. Mr. Mulgrew provides no further explanation, no doubt because it would be difficult to explain, or defend, this argument. The grand jury was considering fraudulent activity in Traffic Court related to fixing tickets through extrajudicial

communications. Far from "immaterial," Mr. Mulgrew's receipt of requests for consideration was highly material and relevant to the grand jury's inquiry. *Reilly,* 33 F.3d 1396, 1419 (3d Cir.1994) ("It is well established that a perjurious statement is material .. if it has a tendency to influence, impede, or hamper the grand jury from pursuing its investigation.").

Mr. Mulgrew also attacks the consistency of the verdict. Since the jury acquitted Mr. Mulgrew of the underlying fraud and conspiracy charges, he asserts that there was no evidence that his statements were false. This argument assumes that the jury acquitted Mr. Mulgrew of fraud because the jury did not believe that he engaged in the consideration process. To the contrary, the jury might have decided that the government's proof that Mr. Mulgrew made and honored requests for consideration was credible, but that he lacked the requisite intent to deprive the City and Commonwealth of money or property. *See United States v. Gugliaro,* 501 F.2d 68, 71 (2d Cir.1974) ("While the meetings with another conspirator were clearly sufficiently material by any test to sustain a perjury indictment and conviction if Gugliaro had falsely denied them, a rational jury could find that they were, standing alone, insufficient to demonstrate participation with knowledge and the requisite intent in a single conspiracy.").

We do not know exactly what evidence the jury considered important. Nor do we know why the jury found Mr. Mulgrew not guilty of mail fraud and wire fraud. We do, however, know with great certainty that the jury had ample evidence to find Mr. Mulgrew lied

to the grand jury. Gloria McNasby, Mr. Mulgrew's personal assistant, testified at trial that Mr. Mulgrew told Ms. McNasby that she would be getting names from other Judge's personal assistants. According to Ms. McNasby, Mr. Mulgrew instructed her to give the names to him. Contrasting Ms. McNasby's testimony with Mr. Mulgrew's sworn statement to the grand jury, the jury had substantial evidence to find Mr. Mulgrew guilty of making false statements to the grand jury.

***7** Finally, Mr. Mulgrew asserts that his testimony was not false because the terms "consideration" and "preferential treatment" have different meanings. Mr. Mulgrew notes that earlier in his grand jury testimony he admitted that he received requests for consideration, but he drew a distinction when the prosecutor asked if he received requests for preferential treatment. At trial, Mr. Mulgrew's counsel repeatedly argued that the terms "consideration" and "preferential treatment" could not be conflated, despite numerous witnesses testifying that the consideration process went by many different names. The jury heard all of this testimony and argument and apparently did not believe a distinction could or should be made between the two terms. *See Serafini,* 167 F.3d at 820 (citing *Ryan,* 828 F.2d at 1015) ("[I]n instances of some ambiguity as to the meaning of a question, 'it is for the petit jury to decide which construction the defendant placed on the question.'"). Mr. Mulgrew cannot now escape his conviction by twisting the prosecutor's clear questioning and drawing a distinction which does not exist. *See Serafini,* 7 F.Supp.2d 529, 539 (M.D.Pa. 1998) (quoting *United States v. Crippen,* 570 F.2d 535,

537 (5th Cir.1978)) ("The words used were to be understood in their common sense, not as they might be warped by sophistry or twisted in pilpul ."), *aff'd,* 167 F.3d 812 (3d Cir.1999).

D. Thomasine Tynes's Motion for Judgment of Acquittal

On February 4, 2011, Ms. Tynes testified to the grand jury as follows:

> Q: In all the years you've been [at Traffic Court] have you ever been asked to give favorable treatment on a case to anybody?
>
> A: No, not favorable treatment. People basically know me. The lawyers know me. The court officers know me. I have been called a no nonsense person because I'm just not that way. I take my position serious and the cards fall where they may.
>
> ....
>
> Q: You've never taken action on a request?
>
> A: No.

These statements formed the basis of the perjury charges against Ms. Tynes in counts 71 and 72. The jury found Ms. Tynes guilty on both counts.

Ms. Tynes maintains that she did not know the grand jury was examining ticket fixing at Traffic Court and was, therefore, incapable of lying about a material element of the investigation. The test for materiality is whether the statement had "a tendency to influence, impede, or hamper the grand jury from pursuing its investigation." *Reilly,* 33 F.3d 1396, 1419 (3d Cir.1994) (quoting *United States v. Lardieri,* 497

F.2d 317, 319 (3d Cir.1974)). In other words, the issue is whether the grand jury thought the testimony was material, not whether Ms. Tynes knew it was material. The government must prove Ms. Tynes knew her statement was false, but it is not required to prove that she knew the statement was material. *See United States v. Dunnigan,* 507 U.S. 87, 94, 113 S.Ct. 1111, 122 L.Ed.2d 445 (1993) ("A witness testifying under oath or affirmation violates this statute if she gives false testimony concerning a material matter with the willful intent to provide false testimony...."). Ms. Tynes's recollection of the scope of the grand jury's inquiry is not persuasive.

***8** It is hard to imagine that Ms. Tynes was unaware of the grand jury's purpose. Ms. Tynes might have been alerted by the prosecutors' repeated questioning about how she handled requests for consideration. It would not have been too much of a stretch for Ms. Tynes to conclude, or at least suspect, that the grand jury was looking into ticket fixing when five of her fellow judges, her former Administrative Judge, her court's Director of Records and a dozen or so former and current court employees were all questioned in front of the grand jury about ticket fixing. She might have known they were concerned about ticket fixing when the FBI raided the Traffic Court, served subpoenas and carted off computers and boxes of documents all prior to the grand jury session. Ms. Tynes probably had at least an inkling there was an investigation into ticket fixing when the FBI searched the office and home of a Chinatown businessman, Robert Moy, who regularly sent her requests for special Traffic Court treatment for his clients in memos where he addressed her as "Mom."

To be clear, Ms. Tynes well knew the purpose of the grand jury in this case. Her curious assertions that she did not know the grand jury was considering evidence of ticket fixing is untethered to the basic facts of this case. Ms. Tynes should have known that denying she gave certain ticket-holders favorable treatment was material. And even if she did not know the issue was an important or a "material" one, she well knew her statements were false. There is no question that her statements were material to the grand jury.

Ms. Tynes's bald and unsupported claim that the evidence is "insufficient" does not satisfy her very heavy burden for this Rule 29 motion. *Coyle,* 63 F.3d at 1243. There is no dispute that Ms. Tynes gave the testimony as alleged in the indictment. The jury heard from Ms. Tynes's personal assistant Migdalia Warren, who stated that she gave Ms. Tynes requests for consideration which Ms. Warren received from other Traffic Court staff. Ms. Warren also described Ms. Tynes's close relationship with Robert Moy, whose many clients received numerous favorable adjudications in front of Ms. Tynes. Mr. Moy was so confident in his connection with Ms. Tynes that he ran newspaper advertisements guaranteeing no points on traffic citations.

The jury also heard from several ticket-holders who Ms. Tynes found not guilty. Gordon Li testified that he received a ticket for careless driving which he took to Mr. Moy. The government introduced into evidence a note from Mr. Moy to Ms. Tynes which requested "help" on Mr. Li's ticket. Osama Siam also went to

Mr. Moy when he received a ticket for traveling 70 mph in a 30 mph zone. As with Mr. Li, Mr. Moy sent a letter to Ms. Tynes notifying Ms. Tynes of Mr. Moy's interest in Mr. Siam's ticket. Finally, Timothy Blong testified that he was cited for careless driving and driving without a license. Mr. Blong complained about the tickets to his friend Danielle Czerniakowski, who was employed at Traffic Court. Ms. Czerniakowski testified that Ms. Tynes was scheduled to hear Mr. Blong's case, so Ms. Czerniakowski submitted a request for consideration to Ms. Warren. Since Ms. Tynes found all three of these ticket-holders not guilty of the cited offenses, it was fair for the jury to infer that Ms. Tynes found the men not guilty as a result of the intercessions of Mr. Moy and Ms. Czerniakowski. This evidence, when contrasted with Ms. Tynes's grand jury testimony, is more than sufficient to support the perjury conviction.

E. Willie Singletary's Motion for Judgment of Acquittal

***9** Mr. Singletary was convicted of making two false statements to the FBI, both federal felonies. The indictment, at count 73, alleged that Mr. Singletary told FBI Task Force Officer Stephen Snyder, "he never arranged or facilitated preferential treatment with a matter in Traffic Court." Mr. Singletary also represented to the FBI that, "he never waived any fines, reduced fines, reduced any points, or eliminated any tickets at the request of another judge or employee of the City of Philadelphia, nor through a previous arrangement prior to a court hearing." This statement was the subject of count 74. The jury found Mr. Singletary guilty on counts 73 and 74, clearly finding the statements were false.

At Mr. Singletary's trial, the government was required to prove that his statements to Officer Snyder were material. A statement is material when it has a " 'natural tendency to influence' or [was] 'capable of influencing' the FBI." *United States v. Moyer,* 674 F.3d 192, 214 (3d Cir.2012) (citing *United States v. Gaudin,* 515 U.S. 506, 509, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995)), *cert. denied,* 133 S.Ct. 165 (2012) and *cert. denied,* 133 S.Ct. 979 (2013). The conduct is criminal because a false statement to the FBI can derail or obstruct a legitimate investigation. Had the FBI believed Mr. Singletary's statements, the agency may well have refocused their investigation. *Id.* ("[T]he government was not required to show actual reliance on [defendant's] statements...."). This kind of obstruction would tend to hamper an investigation into corrupt conduct by Mr. Singletary and other public officials. An investigation of this nature serves a high public interest. Mr. Singletary's denial of participating in extrajudicial requests for favorable treatment was clearly material to the FBI's investigation. *Id.* (citing *United States v. Lupton,* 620 F.3d 790, 806 (7th Cir.2010) ("When statements are aimed at misdirecting agents and their investigation, even if they miss spectacularly or stand absolutely no chance of succeeding, they satisfy the materiality requirement of 18 U.S.C. § 1001."). Mr. Singletary's statements undoubtedly were aimed at misdirecting agents and their investigation.

Mr. Singletary appears to deny there was evidence that he knew his statement was false. Mr. Singletary's motion states, "The government has failed to make out the element that the statements of the alleged conduct in counts 73 and 74 were made

with the intent to deceive." Intent to deceive is not an element of the charged crime, but the government must prove that the statement was knowingly false. *See Castro,* 704 F.3d at 139.[3] In truth, there was very strong evidence that Mr. Singletary well knew his statements to the FBI were false. From promising his campaign contributors a "hook up" if elected to Traffic Court to throwing out tickets issued to his family members, the record is replete with evidence that Mr. Singletary arranged for and accorded preferential treatment to well-connected ticket-holders.

***10** With respect to count 73, evidence regarding Natisha Mathis's ticket established that Mr. Singletary arranged or facilitated preferential treatment with a matter in Traffic Court. Ms. Mathis received three moving violations over two traffic stops. Ms. Mathis knew Mr. Singletary through a mutual friend, Malcom Lewis. Ms. Mathis called Mr. Singletary for help on her tickets. After the second traffic stop, she met with Mr. Singletary in his chambers at Traffic Court and gave him the tickets. Michael Sullivan

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[3] *Castro* explains: "To establish a violation of § 1001, the government [is] required to prove each of the following five elements: (1) that [the accused] made a statement or representation; (2) that the statement or representation was false; (3) that the false statement was made knowingly and willfully; (4) that the statement or representation was material; and (5) that the statement or representation was made in a matter within the jurisdiction of the federal government." 704 F.3d at 139. The government must prove that the statement was knowingly false. *Id.* Since no other element requires proof of intent, I will assume that Mr. Singletary means that there is insufficient evidence of falsity.

adjudicated the first ticket not guilty, and Mr. Lowry dismissed the two tickets issued during the second traffic stop. The jury could very reasonably infer from this evidence that Mr. Singletary sent requests for consideration to Mr. Sullivan and Mr. Lowry for Ms. Mathis' tickets.

Evidence supporting Mr. Singletary's conviction on count 74 came in through testimony regarding the Herbert Wilcox ticket. Philadelphia police cited Mr. Wilcox for backing down a one-way street in the wrong direction. Mr. Wilcox is connected with Philadelphia City Councilwoman Jannie Blackwell. John Fenton, a member of Ms. Blackwell's staff, testified that he spoke to Tonya Hilton, Mr. Singletary's personal assistant, and requested assistance on Mr. Wilcox's ticket. Ms. Hilton testified that Mr. Wilcox's ticket was marked for consideration. As with other requests she received, Ms. Hilton noted Mr. Wilcox's hearing date on her calendar which was introduced into evidence. Mr. Singletary found Mr. Wilcox not guilty. This is substantial evidence that Mr. Singletary waived fines at the request of an employee of the City of Philadelphia.

The jury heard testimony about the FBI investigation and specifically about questions the agents posed to Mr. Singletary. They heard testimony from the agent about Mr. Singletary's answers to the FBI questions. In a trial that stretched over eight (8) weeks, the jury heard abundant evidence about the Traffic Court and the "culture of consideration." In the context of so much information about the pervasive and long standing ticket fixing scheme in Traffic Court—in which Mr. Singletary and the other defendants were

deeply involved—the jury was asked to consider the truthfulness of Mr. Singletary's answer to the FBI agent's questions. The jury found he was not honest and truthful in his responses to FBI questioning. They made this finding on substantial and credible evidence. I will not disturb the jury's decision.

IV. Conclusion

For the foregoing reasons, I will deny defendants' motions for judgment of acquittal, and, in Mr. Lowry's case, I will deny his motion for a new trial.

An appropriate order follows.

ORDER

AND NOW, this 6th day of November 2014, upon consideration of defendants' Motions for Judgment of Acquittal (doc nos. 424, 425, 426 and 427), the government's response (doc. no. 435), and Mr. Lowry's reply thereto (doc. no. 436) **IT IS HEREBY ORDERED** that the defendants' motions (doc. nos. 424, 425, 426 and 427) are **DENIED.**