APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16-20181

United States Court of Appeals
Fifth Circuit
FILED
January 2, 2018
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

PATRICK LANIER,

Defendant - Appellant

Appeal from the United States District Court
for the Southern District of Texas

Before REAVLEY, ELROD, and SOUTHWICK, Circuit Judges.

REAVLEY, Circuit Judge:

Patrick Lanier was indicted and charged with conspiracy to commit wire fraud, in violation of 18 U.S.C. §§ 1343 and 1349 (Count 1); wire fraud, in violation of 18 U.S.C. § 1343 (Counts 2–15); harboring and concealing a person from arrest, in violation of 18 U.S.C. § 1071 (Count 16); and assisting a federal offender, in violation of 18 U.S.C. § 3 (Count 17). A jury convicted him on each count save Count 14. Lanier received a sentence of 204 months in prison based on the fraud-related convictions and a concurrent 22-month sentence based on the Counts 16 and 17 convictions. The district court also sentenced him to three years of supervised release and ordered a $1,600 special assessment and

restitution in the amount of $37,544,944.16. Challenging his conviction and sentence, Lanier appeals.

I. BACKGROUND

This case features complex facts spanning several years. We supply only those necessary to make sense of the following discussion. Patrick Lanier was once a successful securities lawyer practicing in Austin, Texas. Somewhere along the way, Harris Dempsey Ballow became a client. Lanier provided Ballow with legal services relating to criminal cases and SEC investigations. In 2000, Ballow was involved with a company called EpicEdge and paid Lanier in EpicEdge stock. EpicEdge turned out to be part of a fraud scheme, and Lanier sold all of his shares just before their value cratered. In 2003, Ballow was permanently enjoined from "engaging in the promotion of securities," and Lanier (who was representing Ballow's co-defendant) knew of this.

Lanier's initial involvement with Ballow did not lead him into legal trouble. Their union ended, for a time, in late 2004 when Ballow pleaded guilty to an 18 U.S.C. § 1957 violation then fled the country while released on bond, becoming a fugitive. The men renewed their relationship in 2006. Ballow was hiding in Mexico, and he needed a lawyer.

In mid-2006, Lanier visited Ballow in Mexico for the first time. From that point on, he was Ballow's attorney once more. He assisted on numerous projects, providing legal assistance as problems arose. Ballow used false names during this period, and Lanier incorporated these false names into his work product. While Lanier and Ballow often communicated directly, sometimes long-time Ballow associate Ruben Garza Perez ("Garza") acted as an intermediary. Garza even set up a special email account for Lanier (the "patlawbest account"), and Lanier used this account rather than his professional account when working with Ballow.

Ballow had not reformed. He was still engineering and implementing fraudulent schemes to bilk unsuspecting "investors." In Mexico, he primarily used E-SOL International Corporation ("E-SOL"), Medra Corporation ("Medra"), and Aztec Technology Partners, Inc. ("Aztec"). Lanier provided legal services for each of these fraud-facilitating corporations.

Law enforcement never stopped looking for Ballow. Lanier monitored the manhunt and repeatedly supplied Ballow with updates on its progress. For example, in 2008 he provided Ballow with a link to a news article describing the ongoing search and indicating the FBI's belief that Ballow was in Mexico.

The investigation eventually bore fruit. Ballow was arrested, and so was Lanier. With four other defendants, Lanier was charged in a thirty-five-count indictment. He faced 17 counts including wire fraud, conspiracy to commit wire fraud, harboring and concealing a fugitive, and assisting a federal offender. Unlike his co-defendants, Lanier went to trial. The jury convicted him on 16 of the charged counts, securing an acquittal only with respect to one count of fraud. In addition to a period of supervised release and a special assessment, the district court sentenced him to 204 months imprisonment. Lanier timely appealed.

II. DISCUSSION

Lanier advances numerous arguments. They can be classified as follows: sufficiency of the evidence challenges, *Brady* challenges, evidentiary challenges, attorney-disqualification challenges, and sentencing challenges. We address them in that order.

A. Sufficiency of the Evidence Challenges

1. Standard of Review

Ordinarily, sufficiency-of-the-evidence challenges are reviewed *de novo*, with all evidence viewed in the light most favorable to the government and all reasonable inferences made in support of the verdict. *United States v. Grant*,

850 F.3d 209, 219 (5th Cir. 2017). If, under this standard, "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," the conviction must stand. *Id.* (quoting *United States v. Vargas–Ocampo*, 747 F.3d 299, 301 (5th Cir. 2014) (en banc)). Our review is circumscribed still further when error is unpreserved. In such cases, "review is only for a manifest miscarriage of justice." *United States v. McDowell*, 498 F.3d 308, 312 (5th Cir. 2007). When this standard applies, the conviction will stand "unless the record is *devoid of evidence* pointing to guilt or if the evidence is so tenuous that a conviction is shocking." *United States v. Delgado*, 672 F.3d 320, 330–31 (5th Cir. 2012) (en banc) (quoting *United States v. Phillips*, 477 F.3d 215, 219 (5th Cir. 2007)).

A motion for acquittal generally preserves sufficiency arguments for the purposes of appeal. *See, e.g.*, *United States v. Beacham*, 774 F.3d 267, 272 (5th Cir. 2014). Here, Lanier moved for acquittal, but only with respect to Counts 16 and 17. Accordingly, his sufficiency challenge to those counts will be reviewed *de novo*, but his fraud-related sufficiency challenge will be reviewed only for a manifest miscarriage of justice.

2. The Fraud-Related Counts

Lanier attacks the sufficiency of the evidence supporting his convictions for wire fraud and conspiracy to commit wire fraud. The challenge is limited to one element common to each conviction—intent to commit fraud. *See United States v. Kuhrt*, 788 F.3d 403, 413–14 (5th Cir. 2015). Under the circumstances, the question of intent reduces to a factual question of attorney knowledge. *See United States v. Beckner*, 134 F.3d 714, 718–19 (5th Cir. 1998). Ultimately, we must determine whether the record is devoid of evidence that Lanier "was aware [Ballow] was engaged in a fraudulent activity and knowingly worked to further it." *Id.* at 720.

In *Beckner*, we determined that the lawyer–defendant inadvertently contributed to his client's fraudulent scheme in the course of providing routine and proper legal services. Lanier contends that his case is the same. But *Beckner* does no more for Lanier than sharpen our focus on the key factual question—knowledge *vel non*. Lanier's claimed lack of knowledge rests on his assertion that his involvement with Ballow was very limited—he "acted only as an attorney to unwind" one Medra transaction.

The record does not support this claim of limited representation. Lanier was involved with Medra from its earliest stages, giving advice on reinstatement of the forfeited corporate charter, providing his own address as an address at which Medra could receive mail within the United States, and assisting with tax matters. And his work for Ballow was not limited to Medra. To provide but one example each for E-SOL and Aztec: He prepared a "Letter of Non-Distributive Intent" that paved the way for the sale of 1 million shares of restricted E-SOL stock. He either prepared or had a significant role in preparing Aztec's business plan. These examples merely scrape the surface of Lanier's work for Ballow.

Given that Lanier's sufficiency argument proceeds on a false factual premise, it is unsurprising that there is plenty of evidence from which a jury could infer attorney knowledge. Even Lanier's role in the one transaction he is willing to acknowledge suggests knowledge of the fraud. After being issued 40 million Medra shares and appointed as corporate officials, two men sought to disassociate themselves from the entity, contending they had never agreed to any involvement with Medra. The men were represented by Aaron Ghais, a Maryland attorney who worked with Lanier to undo the stock issuance and appointment. Lanier told Ghais that he represented a Medra shareholder name "John Gel," but Gel is a Ballow alias. He also held "Lorraine Barrowcliff"

out as the president of Medra, but Barrowcliff was one of multiple aliases belonging to Ballow's wife.[1]

False names were a repeated ingredient of Lanier's work product. Further, with knowledge that Ballow was enjoined from promoting securities, Lanier assisted with stock-related schemes, even drafting an "E-SOL International 2007 Stock Option Agreement." On a separate occasion, he did counsel Ballow to stay away from the word *investment* on E-SOL brochures relating to a real estate scam. But his motivation was not compliance with the injunction, *à la Beckner*, 134 F.3d at 716, but rather a concern that "the word investment . . . will bring focus on the managers almost immediately." Scrutiny of the managers was something to be feared because E-SOL's purported managers included Gel and an entirely fictitious person, Robert Remington.

The record contains more evidence, plenty to support the jury's finding that Lanier knowingly acted to further Ballow's scheme. The government has set forth evidence that Lanier was "not only aware of the fraud, but actually helped perpetrate the fraud." *Kuhrt*, 788 F.3d at 416. And Lanier has certainly not shown a manifest miscarriage of justice. *See United States v. Oti*, 872 F.3d 678, 689 (5th Cir. 2017). Lanier's sufficiency arguments fail as to the fraud-related counts.

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[1] There is evidence that Lanier knew Barrowcliff did not exist. Even as he was working with Ghais, Lanier continued to work with Garza and Ballow on reviving Medra. Because of Barrowcliff's purported status with Medra, the corporation could not obtain a federal tax identification number without providing her social security number. Lanier promised to find a "solution" to the problem. Of course, if she were a legitimate person, the obvious answer would have been simply to ask her for the social security number. Lanier's ultimate proposal was to use *someone's* social security number and hope to not get caught. In his words: the "only way to get fed tax id is to go ahead and use someone's ss# on the officer line . . . [they] didn't use to require such but no way around having some # in that slot--not sure if its cross matched later for tax purposes should corp not pay its taxes etc."

3. Venue, Counts 16 & 17 (Harboring and Assisting a Federal Offender)

Because Lanier preserved his sufficiency of the evidence challenge as it relates to venue and Counts 16 (harboring) and 17 (assisting a federal offender), our review is *de novo*. Venue need be proven only by a preponderance of the evidence. *United States v. Strain*, 396 F.3d 689, 692 (5th Cir. 2005). Thus, the question before us is whether any rational finder of fact could have found venue proper by a preponderance of the evidence. *See id.* The parties agree that the analysis germane to Count 16 controls the outcome of Count 17, and so our focus is on the harboring offense.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . ." U.S. Const. amend. VI. When the relevant criminal statute lacks a venue provision, the Sixth Amendment controls and requires that trial occur in the "the district or districts within which the offense is committed." *United States v. Anderson*, 328 U.S. 699, 705, 66 S.Ct. 1213, 1217 (1946) (footnote omitted). Where, as here, "the Government alleges a single continuing offense committed in multiple districts, it must show that the trial is taking place 'in any district in which [the] offense was begun, continued, or completed.'" *Strain*, 396 F.3d at 693 (alteration in original) (quoting 18 U.S.C. § 3237(a)).

To determine if the harboring offense was begun, continued, or completed in the Southern District, we must first determine which acts constitute harboring acts. Criminal harboring of a fugitive occurs when a defendant (1) knows a federal arrest warrant has been issued, (2) engages in physical acts that help the fugitive avoid detection and apprehension, and (3)

intends "to prevent the fugitive's discovery." *United States v. Green*, 180 F.3d 216, 220 (5th Cir. 1999); *see also* 18 U.S.C. § 1071.

The government contends that each of Lanier's criminal acts qualify for one reason or another. We place Lanier's acts in two categories. First, there are traditional acts of harboring, as when Lanier repeatedly emailed Ballow information about the government's investigation, which a jury could infer had the purpose and effect of keeping Ballow one step ahead of law enforcement. Second, there are general conspiracy-furthering acts. The government acknowledges that these acts are "not typical, straightforward acts of harboring" but contends they qualify nonetheless because acts aiding the conspiracy inevitably "helped Ballow avoid detection and arrest and to obtain money and stock."

We do not agree that Lanier's conspiracy-furthering acts qualify as harboring acts simply because they provided Ballow with a revenue stream that funded his life on the lam. This court has already observed that direct financial assistance to a fugitive does not necessarily amount to harboring. *United States v. Stacey*, 896 F.2d 75, 77 (5th Cir. 1990). The same is necessarily true of any indirect financial assistance Lanier provided by dint of his participation in the conspiracy. The key is intent. Further, by declining the government's invitation to conflate the conspiracy and harboring offenses for purpose of the venue analysis, we dutifully uphold the Sixth Amendment's offense-specific approach to venue. *See United States v. Davis*, 666 F.2d 195, 198 (5th Cir. 1982) ("Venue may properly be laid in one district with respect to one count of an indictment, but still be improper with respect to the other counts."); *United States v. Schlei*, 122 F.3d 944, 979 (11th Cir. 1997) ("Venue must exist for each offense charged.").

As already noted, Lanier sent several emails that a jury could find rendered him criminally liable for harboring a fugitive. The evidence, however,

is that these emails were sent from Austin, which is not in the Southern District of Texas. Accordingly, the government rightly cites these emails to show harboring generally, but not for the purpose of showing that venue was proper. Instead, the government draws our attention to five acts and seeks to persuade us that the acts both bore the requisite connection with the Southern District of Texas and continued the harboring offense.

The government has not shown that any of these acts continued the harboring offense, however. Rather, in each case, the government tries to bootstrap venue from an act that, at most, furthered the fraud conspiracy. Three of the acts speak for themselves in this regard. While in Houston, Lanier tried unsuccessfully to check his patlawbest account. On another occasion, Lanier drafted a release for the signature of one Chaz Robertson, a Ballow employee located in Houston. And, finally, Lanier received an email containing a forged document that had been notarized by a Harris County, Texas notary.

The final alleged acts fail for the same reason but require a bit of explanation. In November 2006, Lanier traveled through Houston to meet Ballow. This episode, if it would otherwise create venue, cannot represent a continuation of the harboring offense because it occurred prior to the beginning of that offense. Our review of the record shows the first act of harboring did not occur until mid-2007, when Lanier first provided Ballow with an update on the FBI's investigation and information that he was being sought in Panama. Accordingly, Lanier's travel through Houston can only be associated with the already-ongoing conspiracy. Finally, Lanier and Ballow routinely communicated at what the government labels a "Houston telephone number" due to its Houston area code. Again, even assuming the phone calls might somehow establish venue, without evidence regarding the calls' contents, they cannot be said to represent harboring. *See Strain*, 396 F.3d at 696. The government appears to recognize this, urging not that an inference of direct

harboring was warranted but instead that "the purpose of Lanier's communications," including the phone calls, "was to assist Ballow in operating" the fraud scheme. We could accept this argument only if we were willing to conflate the conspiracy and harboring offense, but we have already held such intermixing to be inappropriate.

The government has attempted to draw several links between Lanier, the Southern District, and the harboring offense.[2] On inspection, however, the government has not shown that Lanier continued the harboring offense in that district. Accordingly, the convictions as to Counts 16 and 17 must be vacated.

B. *Brady* Challenges

We review *de novo* "the *Brady* question" of whether the prosecution withheld material evidence favorable to the defendant, but any underlying factual findings are entitled to deference. *United States v. Severns*, 559 F.3d 274, 278 (5th Cir. 2009). Lanier alleges two *Brady* violations. First, he complains that prosecutors "failed to disclose that Assistant U.S. Attorney Belinda Beek had previously represented Harris Dempsey Ballow in matters in which Lanier was involved (but unaware of her representation)."[3] This allegedly undisclosed fact was discovered by Lanier in his own files, so there was no *Brady* violation. *See United States v. Dvorin*, 817 F.3d 438, 450 (5th Cir. 2016). Second, Lanier complains that the prosecution "failed to disclose its methodology in calculating the damages suffered by the victims." But Lanier fails to develop any non-disclosure theory and instead quibbles with the calculation itself, thus failing to establish a *Brady* violation. *See United States*

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[2] Each asserted act fails for multiple reasons. For purposes of efficiency, we have discussed only the common reason shared by all of them. This opinion should not be read to suggest that the government's theories found traction with this court in any respect.

[3] We present the allegation as made by Lanier. The actual evidence in the record belies the substance of the accusation.

v. Brown, 650 F.3d 581, 588 (5th Cir. 2011) ("suppressed evidence" is an integral element of any *Brady* violation).

C. Evidentiary Challenges

Lanier chose to take the stand. The cross-examining prosecutor elicited Lanier's testimony that he had once been paid by Ballow in EpicEdge stock, then zeroed in on the timing of its subsequent sale: "And you weren't worried at all that there would be a connection between the fact that you sold the last EpicEdge stock when the stock collapsed?" According to Lanier, "[b]y stating or implying Lanier had engaged previously in an illegal scheme to defraud with the same actor, Harris Ballow, the Government successfully destroyed Lanier's entire defense"—*i.e.*, the lack of specific intent to commit fraud. Of course, the government may attempt to destroy a defendant's entire defense and counts it as a pretty good day when successful. And so, for his gripe to have traction, Lanier must demonstrate why the question was improper. He perceives two errors.

First, Lanier contends that the question violated Rule 404(b) of the Federal Rules of Evidence, which governs the admissibility of "[e]vidence of a crime, wrong, or other act." FED. R. EVID. 404. The Rule 404 argument found in Lanier's brief was largely copied and pasted from his original motion for a new trial. This is problematic because the district court explained in a written order that its decision to admit the evidence was not based on Rule 404 at all but instead on Rule 608, which "applies when other-acts evidence is offered to impeach a witness, 'to show the character of the witness for untruthfulness,' or to show bias." *United States v. Tomblin*, 46 F.3d 1369, 1388 (5th Cir. 1995) (quoting *United States v. Schwab*, 886 F.2d 509, 511 (2d Cir. 1989)). Because Lanier's appellate brief ignores the very ruling that is being appealed from, he has abandoned the issue, which was not "briefed properly to address the basis of the district court's ruling." *United States v. Tavera–Jaimes*, 609 F. App'x

254, 255 (5th Cir. 2015) (per curiam); *see also Friend v. Valley View Cmty. Unit Sch. Dist. 365U*, 789 F.3d 707, 712 (7th Cir. 2015) (striking argument sections from an appellate brief that did "not inform [the court] why the district court erred" and, indeed, could not "respond to the district court's decision, since each section [was] directly copied and pasted, essentially word for word from" the underlying filings).

Lanier also asserts that the question violated the Confrontation Clause because it assumed facts not in evidence thus transforming the prosecutor into an unconfronted fact witness. When combined with a witness's testimony, the questions of a prosecutor designed to introduce testimony about out-of-court testimony that would otherwise be inadmissible hearsay, can violate the Confrontation Clause. *United States v. Kizzee*, No. 16-20397, 2017 WL 6398243, at *3 (5th Cir. Dec. 15, 2017). *But see United States v. Solis*, 299 F.3d 420, 442 (5th Cir. 2002) (holding that because closing arguments do not constitute evidence, a prosecutor's statement did not implicate the Confrontation Clause). Here, the prosecutor's questioning was not designed to introduce inadmissible hearsay evidence but to impeach the witness. Moreover, the district court found that "documents in evidence provided support for the decline in the stock price," meaning the prosecutor's reference to the decline was not objectionable at all. Lanier has shown no error relating to the EpicEdge question.

D. Attorney Disqualification Challenges

Generally, the existence of a conflict of interest is a legal question subject to *de novo* review.[4] *See, e.g., United States v. Garza*, 429 F.3d 165, 171 (5th

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[4] Lanier states that questions regarding attorney disqualification are reviewed for plain error, citing *U.S. ex rel. S.E.C. v. Carter*, 907 F.2d 484, 488 (5th Cir. 1990). He fails to note, however, that in *Carter*, the appellant did not seek disqualification before the trial court or even raise the issue on appeal. *See* 907 F.2d at 485, 488. The plain-error standard applied in that case because the court raised the issue *sua sponte*. *See id.*

Cir. 2005) (conflict between defendant and own counsel). With respect to criminal matters, the Supreme Court "establish[ed] a categorical rule against the appointment of an interested prosecutor, adherence to which requires no subtle calculations of judgment." *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 814, 107 S.Ct. 2124, 2141 (1987). Accordingly, our standard of review is *de novo* with respect to the legal question of conflict, and reversal is automatic if conflict is found. *See id.* (holding "that harmless-error analysis is inappropriate in reviewing the appointment of an interested prosecutor").

Prior to trial, the district court rejected Lanier's efforts to disqualify prosecutor John Lewis. Lanier assigns error, alleging Lewis was conflicted out of the prosecution. Lanier advances two theories.

First, Lanier alleges that Lewis disclosed "materials obtained through a criminal investigation for the benefit of a party in a civil action" and then teamed up with that party to pursue an indictment of Lanier. We have reviewed the record as it relates to this accusation and find that Lewis acted at all times with a proper investigative purpose, in the clear interest of his office, and in an open and forthright manner. What information he shared was for the documented purpose of "advanc[ing] the government's investigation of Mr. Ballow," and the decision was made only after giving Ballow's counsel an opportunity to object. Indeed, the episode of which Lanier complains was fully documented across five letters between the parties, and we can find nothing resembling objectionable conduct on Lewis's part.

Lanier's second attorney-disqualification theory is nearly as risible. Years ago, when acting as an attorney for Ballow, Lanier accused Lewis of prosecutorial misconduct. The accusation was frivolous and incomprehensible; it went nowhere. Lanier's unilateral act—an unfounded, unpursued, difficult-

to-parse accusation—did not create a conflict of interest forever disqualifying Lewis from prosecuting Lanier.[5]

E. Sentencing Challenges

Lanier contends the district court erred by failing to classify him as a "minimal" or "minor" participant in the conspiracy for purposes of sentencing. Such a designation would have rendered him eligible for a lighter sentence recommendation under the Guidelines. The standard of review is clear error. *United States v. Torres–Hernandez*, 843 F.3d 203, 207 (5th Cir. 2016). We have already rejected Lanier's attempts to minimize his role in the conspiracy. While he doubtless played a lesser role than did Ballow, the conspiracy's ringleader, Lanier has not shown that he was "substantially less culpable" than the conspiracy's "average participant.'" *Id.* at 205, 207 (quoting § 3B1.2 cmt. n.3(A)). His related, but broader, argument that the sentence was substantively unreasonable is also unavailing. The 204-month sentence was within the properly calculated Guidelines range and enjoys a presumption of reasonableness that Lanier has failed to rebut. *See United States v. Cooks*, 589 F.3d 173, 186 (5th Cir. 2009).

The district court found that victims of Ballow's fraudulent scheme lost more than $37 million and ordered restitution in the amount of $37,544,944.16. Alleging that E-SOL shares retain value, Lanier contends that this loss calculation is flawed to the extent that it treats the victims' E-SOL investments as a total loss. Assuming the soundness of the argument's premise, Lanier has failed to show that the district court clearly erred. *United States v. Brown*, 727

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[5] Regrettably, this very appeal shows how loose counsel can be with accusation of prosecutorial misconduct. While attorneys must zealously represent their clients, we lament the willingness of Lanier's counsel to distort the record and challenge opposing counsel's integrity with accusations that (in our view) could not have been made in good faith.

F.3d 329, 341 (5th Cir. 2013). To the contrary, the evidence in the record indicates that E-SOL investments are entirely worthless.[6]

III. CONCLUSION

The convictions as to Counts 16 and 17 are VACATED. In all other respects, the judgment is AFFIRMED. As the sentence imposed on Counts 16 and 17 was to run concurrently with the sentence imposed on the remaining counts, resentencing is not necessary. Nonetheless, we REMAND so that the district court can issue a judgment reducing the special assessment and otherwise reflecting our decision.

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[6] Lanier also argues that the loss calculation included losses beyond what Lanier could have foreseen. But this argument rests on the already-rejected contention that Lanier's role in the conspiracy was limited to "unwinding a transaction involving Medra."

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
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January 2, 2018
Lyle W. Cayce
Clerk

No. 16-20181

D.C. Docket No. 4:10-CR-258-4

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

PATRICK LANIER,

Defendant - Appellant

Appeal from the United States District Court for the
Southern District of Texas

Before REAVLEY, ELROD, and SOUTHWICK, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed in part and vacated in part, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

Certified as a true copy and issued as the mandate on Jan 29, 2018

Attest: Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-20181

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

PATRICK LANIER,

Defendant - Appellant

Appeal from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING

Before REAVLEY, ELROD, and SOUTHWICK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that Appellant's motion for leave to file petition for rehearing out of time is GRANTED. IT IS FURTHER ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

Thomas M Reavley

UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT

Southern District of Texas

Holding Session in Houston

UNITED STATES OF AMERICA
V.
PATRICK LANIER

JUDGMENT IN A CRIMINAL CASE

CASE NUMBER: **4:10CR00258-004**
USM NUMBER: 68126-280

☐ See Additional Aliases.

Mervyn Milton Mosbacher, Jr.
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on count(s) 1S-13S and 15S-17S on January 27, 2014. after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S. C. § 1343 and 1349	Conspiracy to commit wire fraud	07/13/2010	1S
18 U.S.C. § 1343	Wire fraud	07/25/2008	2S
18 U.S.C. § 1343	Wire fraud	08/12/2008	3S
18 U.S.C. § 1343	Wire fraud	10/31/2008	4S

☒ See Additional Counts of Conviction.

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on count(s) 14S

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the .

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

March 7, 2016
Date of Imposition of Judgment

Signature of Judge

LEE H. ROSENTHAL
UNITED STATES DISTRICT JUDGE
Name and Title of Judge

March 25, 2016
Date

16-20181.1280 MRO | MRO

DEFENDANT: **PATRICK LANIER**
CASE NUMBER: **4:10CR00258-004**

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1343	Wire fraud	11/28/2008	5S
18 U.S.C. § 1343	Wire fraud	12/29/2008	6S
18 U.S.C. § 1343	Wire fraud	01/29/2009	7S
18 U.S.C. § 1343	Wire fraud	03/09/2009	8S
18 U.S.C. § 1343	Wire fraud	04/01/2009	9S
18 U.S.C. § 1343	Wire fraud	04/28/2009	10S
18 U.S.C. § 1343	Wire fraud	07/01/2009	11S
18 U.S.C. § 1343	Wire fraud	07/17/2009	12S
18 U.S.C. § 1343	Wire fraud	10/19/2009	13S
18 U.S.C. § 1343	Wire fraud	03/02/2010	15S
18 U.S.C. § 1071	Harboring and concealing a person from arrest	07/13/2010	16S
18 U.S.C. § 3	Assisting a federal offender	07/13/2010	17S

☐ See Additional Counts of Conviction.

DEFENDANT: **PATRICK LANIER**
CASE NUMBER: **4:10CR00258-004**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 204 months.
This term consists of TWO HUNDRED FOUR (204) MONTHS as to each of Counts 1S-13S and 15S, and TWENTY-TWO (22) MONTHS as to Counts 16S and 17S, to run concurrently for a total of TWO HUNDRED FOUR (204) MONTHS.

☐ See Additional Imprisonment Terms.

☒ The court makes the following recommendations to the Bureau of Prisons:
That the defendant be designated to a facility as close to Bastrop, Texas, as possible.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:
☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **PATRICK LANIER**
CASE NUMBER: **4:10CR00258-004**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 3 years.
This term consists of THREE (3) YEARS as to each of Counts 1S-13S, and 15S, and ONE (1) YEAR as to Counts 16S and 17S, to run concurrently, for a total of THREE (3) YEARS.

☐ See Additional Supervised Release Terms.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court. *(for offenses committed on or after September 13, 1994)*

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state registration in which he or she resides, works, is a student, or was convicted of a qualifying offense. (Check, if applicable)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

☒ See Special Conditions of Supervision.

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: **PATRICK LANIER**
CASE NUMBER: **4:10CR00258-004**

SPECIAL CONDITIONS OF SUPERVISION

The defendant is prohibited from employment or acting in a fiduciary role during the term of supervision.

The defendant shall provide the probation officer access to any requested financial information. If a fine or restitution amount has been imposed, the defendant is prohibited from incurring new credit charges or opening additional lines of credit without approval of the probation officer.

The defendant is prohibited from possessing a credit access device, such as a credit card, unless first authorized by the probation officer.

☐ See Additional Special Conditions of Supervision.

DEFENDANT: **PATRICK LANIER**
CASE NUMBER: **4:10CR00258-004**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$1,600.00		$37,544,944.16

A $100 special assessment is ordered as to each of Counts 1S-13S, 15S, 16S, and 17S, for a total of $1,600.

☐ See Additional Terms for Criminal Monetary Penalties.

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☒ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal payees must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
See attachment		$37,544,944.16	

☐ See Additional Restitution Payees.

TOTALS	$0.00	$37,544,944.16

☐ Restitution amount ordered pursuant to plea agreement $ _____

☒ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

☐ Based on the Government's motion, the Court finds that reasonable efforts to collect the special assessment are not likely to be effective. Therefore, the assessment is hereby remitted.

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: **PATRICK LANIER**
CASE NUMBER: **4:10CR00258-004**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☒ Lump sum payment of $1,600.00 due immediately, balance due
- ☐ not later than _____, or
- ☒ in accordance with ☐ C, ☐ D, ☐ E, or ☒ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ installments of _____ over a period of _____, to commence _____ days after the date of this judgment; or

D ☐ Payment in equal _____ installments of _____ over a period of _____, to commence _____ days after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ days after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

Payable to: Clerk, U.S. District Court, Attn: Finance, P.O. Box 61010, Houston, TX 77208

Balance due in installments of 50% of any wages earned while in prison in accordance with the Bureau of Prisons' Inmate Financial Responsibility Program. Any balance remaining after release from imprisonment shall be due in equal monthly installments of $2,000 to commence 30 days after release from imprisonment to a term of supervision.

* In reference to the amount below, the Court-ordered restitution shall be joint and several with any co-defendant who has been or will be ordered to pay restitution under this docket number.

The defendant's restitution obligation shall not be affected by any payments that may be made by other defendants in this case, except that no further payment shall be required after the sum of the amounts paid by all defendants has fully covered all the compensable losses.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☒ Joint and Several

Case Number **Defendant and Co-Defendant Names** **(including defendant number)**	**Total Amount**	**Joint and Several Amount**	**Corresponding Payee, if appropriate**
Patrick Lanier 4:10CR00258-004	$37,544,944.16	$37,544,944.16	
Christopher Harless 4:10CR00258-003	$32,544,944.16	$32,544,944.16	

☐ See Additional Defendants and Co-Defendants Held Joint and Several.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	)	
	)	CRIMINAL ACTION NO.
VS.	)	4:10-CR-258-4
	)	
PATRICK LANIER	)	4:07 P.M.

SENTENCING
BEFORE THE HONORABLE LEE H. ROSENTHAL
MARCH 7, 2016

APPEARANCES:

FOR PLAINTIFF:
MR. JOHN RAYMOND LEWIS
MS. BELINDA A. BEEK
Assistant United States Attorneys
1000 Louisiana, Suite 2300
Houston, Texas 77002

FOR DEFENDANT:
MR. MERVYN M. MOSBACKER, JR.
Attorney at Law
2777 Allen Parkway, Suite 1000
Houston, Texas 77019

COURT REPORTER:
Heather Alcaraz, CSR, FCRR, RMR
Official Court Reporter
515 Rusk, Suite 8004
Houston, Texas 77002
(713)250-5584

Proceedings recorded by mechanical stenography, transcript produced by computer.

(Defendant present.)

THE COURT: Good afternoon. Go ahead and state your appearances, please, and then you may be seated.

MR. LEWIS: John Lewis and Belinda Beek for the United States, Your Honor.

MR. MOSBACKER: Mervyn Mosbacker for Mr. Lanier, Your Honor.

THE COURT: All right. Thank you.

All right. The Court has received a motion for continuance by Mr. Mosbacker filed over the weekend as well as supplemental objection --

MR. MOSBACKER: Yes, Your Honor.

THE COURT: -- to the PSR. Is there anything you want to add to this?

MR. MOSBACKER: Your Honor, I believe --

THE COURT: Pretty exhaustive.

MR. MOSBACKER: Yes, Your Honor. The issues were fleshed out in there. I believe they're significant issues that we do need some time to look into -- some additional time, Your Honor.

THE COURT: What's the government's response, please?

MR. LEWIS: We just don't think that's the case. I mean, I can respond here to the points raised in the objections filed last night, which I think will -- will show that there's no need for time.

I mean, number one, Mr. Mosbacker or Mr. Lanier spends a great deal of that last night's objection implying that the government has somehow withheld records that are favorable to him. It's just not true. The government has disclosed vast quantities of evidence to Mr. Lanier through Mr. Mosbacker.

Mr. Mosbacker has not asked the government to see any additional specific evidence. If he want --

THE COURT: Has this been an open-file case?

MR. LEWIS: No, we have not disclosed all of the witness statements.

THE COURT: All right.

MR. LEWIS: But --

THE COURT: Are there any witness statements that contain mitigation evidence?

MR. LEWIS: No. And, again, he hasn't asked for anything specific.

THE COURT: Well, you have an obligation to provide it independent of his asking.

MR. LEWIS: Right. All --

THE COURT: So that's, I think, not the test, Mr. Lewis.

MR. LEWIS: Right. I understand. I'm just saying that we would have been happy to go and would still go the extra mile to disclose something if -- you know, if he can point out what it is that he wants. I understand that's not the test,

but --

THE COURT: But have you independently satisfied yourself that there is no mitigating evidence particularly as to -- no favorable evidence by the -- in terms of mitigation specifically, which appears to be the thrust of Mr. Mosbacker's current argument?

MR. LEWIS: I'm satisfied that there is none that could possibly be described that way that hasn't already been disclosed.

THE COURT: And with respect to the allegation of conflict on the part of your cocounsel?

MR. LEWIS: On that one in particular, the -- several points. One is that although I -- Ms. Beek may want to answer or make some additional factual points. It is absolutely clear, as indicated in her sworn declaration, that she did not work on any case while in civil practice that involved Mr. Ballow or Mr. Garcia.

She did not represent them. She did not receive any confidential information belonging to them. But the point I'd like to make about that is it would not have made any difference in this case even if it had been true.

In other words, it has not been pointed out to us how that would have been an ethical violation or would have disqualified her from being a prosecutor on this case if she had represented Mr. Ballow.

THE COURT: She points to the Ogden memo.

MR. LEWIS: Well --

THE COURT: Why does that not apply?

MR. LEWIS: Well --

THE COURT: Had she -- again, you're assuming facts that you tell me are not the case.

MR. LEWIS: Right.

THE COURT: And, in fact, the argument seems to largely be imputed disqualification through her association through Mills Shirley; is that correct?

MR. MOSBACKER: Yes, Your Honor.

THE COURT: All right. So why don't you address the imputed disqualification argument, which is the thrust of his argument. He does not claim that Ms. -- that Beek herself was involved in the case or the representation.

MR. LEWIS: Well, if I'm understanding the claim right, there's some suggestion that there's the appearance of -- of --

THE COURT: No -- well, yes, in part, but there is a line of cases that addresses when the fact that a firm was involved results in the disqualification of anyone who was with the firm during that period.

MR. LEWIS: Well --

THE COURT: There's certain kinds of subsequent representation, and the question is how that plays out here.

What is your understanding of the law on implied disqualification as it pertains to prosecutors?

MR. LEWIS: Um --

THE COURT: Mr. Ogden's memo does not suggest that that's the standard, I would note. It is what the prosecutor himself or herself was personally involved in prior to involvement in the U.S. Attorney's Office.

MR. LEWIS: And --

THE COURT: And information --

MR. LEWIS: -- maybe I need to back up and emphasize the point that Mr. Lanier was not a defendant in any of these cases that are the subject of this discussion. There's no suggestion --

THE COURT: So the case is not substantially related, which is, I think, a key element of all this substantial -- of all the imputed disqualification cases.

MS. BEEK: I think that's correct, Your Honor. And I would also say that I -- as near as I can tell, they are making this imputed argument aside from the fact that I did not work on these cases, and I was leaving the firm when this arbitration case was pending for eight weeks or whatever it was --

THE COURT: And you received no confidential information --

MS. BEEK: No.

THE COURT: -- or any information about the cases?

MS. BEEK: None whatsoever.

THE COURT: Were you aware of their presence in the office?

MS. BEEK: No. I had never heard of Butch Ballow or any of these people until years later when I read about it in the paper when he absconded from Judge Hittner's sentencing.

I would also say that to the extent they're making the argument that I should have disclosed that I worked at the firm, I didn't know about any of this, but I will say that, not for the reasons that I thought I had a disclosure obligation, but I actually did disclose that I worked at this firm, which is why we're here.

I'll tell the Court that --

THE COURT: And when was that disclosure? It was some time ago because this has been briefed and vetted for a long time.

MS. BEEK: Actually, it was before and during the trial, and I'll tell the Court how it came up.

THE COURT: Right.

MS. BEEK: On several occasions I told Mr. Mosbacker that Mr. Lanier and I had mutual friends through my former law partner, Jack Brock and his wife. I told Mr. Mosbacker, before the trial started, that I had had dinner with Mr. Brock and his wife, who told me that they wanted me to know that Mr. Lanier and his wife, they had known them for many years, dating back to

the day when Mr. Lanier worked with Mr. Brock's wife at the State Securities Board and how saddened they were by what had happened in his life and that they just wanted me to know that.

Me relaying that information to Mr. Mosbacker before and on several occasions during the trial is the only reason Mr. Lanier knows that I worked at that firm. But if it's a disclosure issue, he knew that I worked at the firm.

THE COURT: During the trial itself?

MS. BEEK: Yes, and before.

THE COURT: All right.

MR. MOSBACKER: Well, Your Honor, could I respond just briefly on that?

THE COURT: Yes, sir.

MR. MOSBACKER: Ms. Beek is correct in stating that she met -- made those disclosures to me. I was not aware of the relationship of Mills Shirley, that Jack Brock had anything to do with that. She mentioned some friends. She may have mentioned the names --

THE COURT: But when did you -- I mean, again, this is not a late-breaking development, Mr. Mosbacker. You've raised this. There's been a lot of information exchanged on it in advance of yesterday when you filed your request for more time to delve into this yet more.

MR. MOSBACKER: Yes, Your Honor.

THE COURT: And I'm confused -- concerned about