APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 16-4397, 16-4410, 16-4411,
16-4427, 17-1346

UNITED STATES OF AMERICA
Appellant in 17-1346

v.

CHAKA FATTAH, SR.,
Appellant in 16-4397

KAREN NICHOLAS,
Appellant in 16-4410

ROBERT BRAND,
Appellant in 16-4411

HERBERT VEDERMAN,
Appellant in 16-4427

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
District Court Nos. 2-15-cr-00346-001,

2-15-cr-00346-002, 2-15-cr-00346-003,
2-15-cr-00346-004
District Judge: The Honorable Harvey Bartle III

Argued January 18, 2018

Before: SMITH, *Chief Judge*, GREENAWAY, JR.,
and KRAUSE, *Circuit Judges*

(Filed: August 9, 2018)

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OPINION

SMITH, *Chief Judge*.

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I. Introduction

Chaka Fattah, Sr., a powerful and prominent fixture in Philadelphia politics, financially overextended himself in both his personal life and his professional career during an ultimately unsuccessful run for mayor. Fattah received a substantial illicit loan to his mayoral campaign and used his political influence and personal connections to engage friends, employees, and others in an elaborate series of schemes aimed at preserving his political status by hiding the source of the illicit loan and its repayment. In so doing, Fattah and his allies engaged in shady and, at times, illegal behavior, including the misuse of federal grant money and federal appropriations, the siphoning of money from nonprofit organizations to pay campaign debts, and the misappropriation of campaign funds to pay personal obligations.

Based upon their actions, Fattah and four of his associates—Herbert Vederman, Robert Brand, Bonnie Bowser, and Karen Nicholas—were charged with numerous criminal acts in a twenty-nine count indictment. After a jury trial, each was convicted on multiple counts. All but Bowser appealed. As we explain below, the District Court's judgment will be affirmed in part and reversed in part.

II. Background[1]

During the 1980s and '90s, Fattah served in both houses of the Pennsylvania General Assembly,

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[1] The facts are drawn from the trial record unless otherwise noted.

first as a member of the House of Representatives and later as a Senator. In 1995, Fattah was elected to the United States House of Representatives for Pennsylvania's Second Congressional District. In 2006, Fattah launched an unsuccessful run for Mayor of Philadelphia, setting in motion the events that would lead to his criminal conviction and resignation from Congress ten years later.

A. The Fattah for Mayor Scheme

Fattah declared his candidacy for mayor in November of 2006. Thomas Lindenfeld, a political consultant on Fattah's exploratory committee, believed that "[a]t the beginning of the campaign, [Fattah] was a considerable . . . candidate and somebody who had a very likely chance of success." JA1618. But Fattah's campaign soon began to experience difficulties, particularly with fundraising. Philadelphia had adopted its first-ever campaign contribution limits, which limited contributions to $2,500 from individuals and $10,000 from political action committees and certain types of business organizations. Fattah's fundraising difficulties led him to seek a substantial loan, far in excess of the new contribution limits.

1. The Lord Loan and Its Repayment

While serving in Congress, Fattah became acquainted with Albert Lord, II. The two first met around 1998, when Lord was a member of the Board of Directors of Sallie Mae.

As the May 15, 2007 primary date for the Philadelphia mayoral race approached, Fattah met Lord to ask for assistance, telling Lord that the Fattah for Mayor (FFM) campaign was running low

on funds. Fattah asked Lord to meet with Thomas Lindenfeld, a political consultant in Washington, D.C., and part-owner of LSG Strategies, Inc. (Strategies), a company that was working with the FFM campaign and that specialized in direct voter contact initiatives. Lindenfeld had been part of the exploratory group that initially considered Fattah's viability as a candidate for mayor. Lindenfeld had known Fattah since 1999, when Fattah endorsed Philadelphia Mayor John Street. Through Fattah, Lindenfeld had also gotten to know several of Fattah's associates, including Herbert Vederman, Robert Brand, and Bonnie Bowser. Herbert Vederman, a businessman and former state official, was the finance director for the FFM campaign. Robert Brand owned Solutions for Progress (Solutions), a "Philadelphia-based public policy technology company, whose mission [was] to deliver technology that directly assists low and middle income families [in obtaining] public benefits." JA6551. Bowser was Fattah's Chief of Staff and campaign treasurer, and served in his district office in Philadelphia.

Lord's assistant contacted Lindenfeld to arrange a meeting, and Lindenfeld informed Fattah that he would be meeting with Lord. Lindenfeld, along with his partner, Michael Matthews, met with Lord and discussed Fattah's need for funds to mount an intensive media campaign. After that meeting, Lindenfeld reported to Fattah that Lord wanted to help, but that they had not discussed a specific dollar amount. Approximately a week later, Fattah instructed Lindenfeld to meet with Lord a second time. Lord "wanted to know if he could give a substantial amount of money, a million dollars" to

Fattah's campaign. JA1630. That prompted Lindenfeld to reply that the amount "would be beyond the campaign finance limits." *Id.*

Lord proposed a solution: he offered to instead give a million dollars to Strategies in the form of a loan. To that end, Lindenfeld had a promissory note drafted which specified that Lord was lending Strategies $1 million, and that Strategies promised to repay the $1 million at 9.25% interest, with repayment to commence January 31, 2008. Lindenfeld later acknowledged that the promissory note would make it appear as though Lord's $1 million was not a contribution directly to the Congressman, although he knew that it was actually a loan to the FFM campaign. Indeed, Lindenfeld confirmed with Fattah that neither Lindenfeld nor Strategies would be responsible for repayment. With that understanding, Lindenfeld executed both the note and a security agreement purporting to encumber Strategies' accounts receivable and all its assets.

On May 1, shortly before the primary election, Lord wired $1 million to Lindenfeld. Lindenfeld held the money in Strategies' operating account until Fattah told him how it was to be spent. Some of the money was eventually used for print materials mailed directly to voters. And, at Fattah's direction, Lindenfeld wired a substantial sum to Sydney Lei and Associates (SLA), a company owned by Gregory Naylor which specialized in "get out the vote" efforts.

Naylor had known Fattah for more than 30 years.[2] During the campaign, Naylor worked as the field director and was in charge of getting out the vote on election day. On the final day of the campaign, Naylor worked with Vederman, who allowed Naylor to use his credit card to rent vans that would transport Fattah voters to the polls.

As the primary date neared, Fattah and Naylor knew the campaign was running out of money. The campaign was unable to finance "media buys," and Naylor needed money for field operations to cover Philadelphia's more than one thousand polling places. In early May, Lindenfeld called Naylor to say that Lindenfeld "would be sending some money [Naylor's] way." JA3057. Within days, SLA received a six-figure sum for Naylor to use in the campaign and on election day. Naylor used the money to pay some outstanding bills, including salaries for FFM employees, and allocated $200,000 to field operations for election day.

Fattah lost the mayoral primary on May 15, 2007. Afterward, Lindenfeld spoke with Fattah, Naylor and Bowser about accounting for the FFM campaign money from Lord that had been spent.

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[2] Naylor first worked with Fattah when he was in the state legislature. When Fattah was elected to Congress, Naylor worked in his Philadelphia office. Naylor met Nicholas when she joined Fattah's staff at some point in the 1990s. After concluding her employment with Fattah's office, Nicholas worked with the Educational Advancement Alliance (EAA), an education nonprofit entity founded by Fattah. This entity helped to recruit underrepresented students for scholarship and college opportunities. Around 2009, Naylor left Fattah's office to work exclusively with SLA. Naylor also knew Brand.

They decided that the amounts should not appear in the FFM campaign finance reports, and Fattah instructed Naylor to have his firm, SLA, create an invoice. Naylor did so, creating an invoice dated June 1, 2007 from SLA to FFM, seeking payment of $193,580.19. Naylor later acknowledged that the FFM campaign did not actually owe money to SLA, and that the false invoice was created to "hide the transaction that took place earlier" and "make it look like [SLA] was owed money." JA3075–76. Although FFM did not owe SLA anything for the election day expenses, the FFM campaign finance reports from 2009 through 2013 listed a $20,000 in-kind contribution from SLA for each year, thereby lowering FFM's alleged outstanding debt to SLA.

Of the total $1 million Lord loan, $400,000 had not been spent. Lindenfeld returned that sum to Lord on June 3, 2007. He included a cover letter which stated: "As it turns out the business opportunities we had contemplated do not seem to be as fruitful as previously expected." JA1254. Lindenfeld later admitted that there were no such "business opportunities" and that the letter was simply an effort to conceal the loan.

In late 2007, faced with financial pressures, Lord asked his son, Albert Lord, III, to collect the outstanding $600,000 balance on the loan to Strategies. Lord III contacted Lindenfeld about repayment and expressed a willingness to forgive the interest owed if the principal was paid. Lindenfeld immediately called Fattah and informed him that repayment could not be put off any longer. Fattah told Lindenfeld more than once that "[h]e would take care of it," JA1652, but Fattah did not act. Needing

someone who might have Fattah's ear, Lindenfeld reached out to Naylor and Bowser. Naylor talked to Fattah on several occasions and told him that Lindenfeld was under considerable pressure to repay the loan. Fattah told Naylor more than once that he was "working on it." JA3082–83.

During his political career, Fattah had focused on education, especially for the underprivileged. Indeed, Fattah founded two nonprofit organizations: College Opportunity Resources for Education (CORE), and the Educational Advancement Alliance (EAA).

EAA held the annual Fattah Conference on Higher Education (the "annual conference") to acquaint high school students with higher education options. JA3079. Sallie Mae regularly sponsored the conference. According to Raymond Jones, EAA's chairman of the board from 2004 through 2007, EAA offered a variety of programs to provide "marginalized students with educational opportunities so they could continue and go to college." JA1360. EAA was funded with federal grant money which could only be spent for the purposes described in the particular grant. Karen Nicholas served as EAA's executive director, handling the organization's day-to-day administrative responsibilities. Nicholas had previously been a staffer for Fattah when he was a member of Pennsylvania's House of Representatives.

CORE was an organization that awarded scholarships to graduating high school students in Philadelphia who had gained admission to a state university or the Community College of Philadelphia. CORE received funding from a variety of sources,

including Sallie Mae. Because CORE also received federal funds, and because EAA had experience working with federal grants, EAA received and handled the federal funds awarded to CORE. In short, EAA functioned as a fiduciary for CORE. When money became a problem for the FFM campaign, Fattah's involvement with EAA and CORE soon became less about helping underprivileged students, and more about providing an avenue for disguising efforts to repay the illicit campaign funds from Lord.

On January 7, 2008, Robert Brand contacted Fattah by telephone. Shortly thereafter, Lindenfeld received an unexpected call from Brand proposing an arrangement for Brand's company, Solutions, to work with Strategies. Solutions had developed a software tool called "The Benefit Bank," which was designed to "assist low and moderate income families to have enhanced access to benefits and taxes." JA1993. During the telephone call, Brand referred to The Benefit Bank and suggested a contract under which Strategies would be paid $600,000 upfront. JA1666. Shortly thereafter, on January 9, 2008, Brand followed up on his call to Lindenfeld with an email about "develop[ing] a working relationship where you could help us to grow The Benefit Bank and our process of civic engagement. While I know this is not your core business I would like to try to convince you to take us on as a client." JA6427. Lindenfeld responded that he was interested. To Lindenfeld, "this was the way that Congressman Fattah was going to repay the debt to Al Lord." JA1654. When Lindenfeld called Fattah and told him of the contact from Brand, Fattah simply replied that Lindenfeld "should just proceed." JA1666–67.

A few days later, Brand emailed Nicholas at EAA a proposal from Solutions concerning The Benefit Bank, which sought EAA's support in developing an education edition of The Benefit Bank and a $900,000 upfront payment.

As the January 31 date for repayment of the balance of the $1 million Lord loan approached, a flurry of activity took place. On January 24, both Raymond Jones, chair of the EAA Board, and Nicholas signed a check from EAA made out to Solutions in the amount of $500,000. Although no contract existed between EAA and Solutions, the memo line of the check indicated that it was for a contract, and Nicholas entered it into EAA's ledger.[3]

That same day, Ivy Butts, an employee of Strategies, emailed Lindenfeld the instructions Brand would need to wire the $600,000 balance on the Lord loan. Within minutes, Lindenfeld forwarded that email to Brand at Solutions. Brand then made two telephone calls to Fattah. By late afternoon, Brand emailed Nicholas, informing her that he had "met with all the people I need to meet with and have a pretty clear schedule of what works best for us. I am also seeing what line of credit we have to

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[3] Raymond Jones, who was EAA's Chairman of the Board from 2004 through 2007, recalled at trial that the Board had a limit on the amount that Nicholas could spend without board approval. JA1358, 1369. Nicholas was authorized to sign contracts on behalf of EAA for no more than $100,000. JA1369–71. Jones did not recall the contract between EAA and Solutions, nor did the EAA board minutes for December 2007, February 2008, or May 2008 refer to the EAA–Solutions contract or to the substantial upfront payment of half a million dollars upon execution of the agreement. JA6358–63; 6567.

stretch out the payments until you get your line of credit in place." JA6558. Brand asked if they could talk and "finalize this effort." JA6558. On January 25 and 26, there were a number of calls between Fattah, Brand, and Nicholas.

On Sunday January 27, at 5:46 pm, Brand telephoned Fattah. At 10:59 pm, Brand emailed Nicholas a revised contract between EAA and Solutions for the engagement of services. Brand indicated he would send someone to pick up the check at about 1:00 pm the following day. The revised contract called for the same $900,000 payment from EAA to Solutions, yet specified that $500,000 was to be paid on signing, with $100,000 due three weeks later, and another $100,000 to be paid six weeks out. No due date for the $200,000 balance was specified. The terms of the contract called for EAA to assist Solutions with further developing The Benefit Bank. In addition, under the contract, EAA would receive certain funds from the Commonwealth of Pennsylvania for a program relating to FAFSA applications.[4]

The same evening, Brand sent Lindenfeld a contract entitled "Cooperative Development Agreement to Provide Services to Solutions for Progress, Inc. for Growth of The Benefit Bank." JA6569. The agreement proposed a working partnership in which Strategies would work with Solutions to identify and secure a Benefit Bank affiliate in the District of Columbia and two other

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[4] FAFSA is an acronym for Free Application for Federal Student Aid.

states, and to facilitate introductions to key officials in other states where The Benefit Bank might expand. The terms of the agreement provided that Solutions would pay $600,000 to Strategies by January 31, 2008, which would "enable [Strategies'] team to assess opportunities and develop detailed work plans for each area." JA6572. Brand copied Solutions' Chief Financial Officer, Michael Golden. Lindenfeld responded to Brand's email within a minute, asking if Brand had received the wiring instructions. Brand immediately confirmed that he had.

Concerned that Solutions did not have $600,000 to pay Strategies, Golden talked to Brand, who informed him that Solutions would be receiving a check for $500,000 from EAA. Early the next morning, Nicholas responded to Brand's email from the night before. She advised Brand that he could pick up the check, "but as I stated I am not in a position to sign a contract committing funds that I am not sure that I will have." Gov't Supp. App. (GSA) 1. That same day, a $540,000 transfer was made from the conference account, which EAA handled, into EAA's checking account. The conference account was maintained to handle expenses for Fattah's annual higher education conference. Prior to this transfer, EAA had only $23,170.95 in its account. EAA then tendered a $500,000 check to Solutions, which promptly deposited the check before the close of that day's business. EAA never replenished the $540,000 withdrawal from the conference account.

Brand received the executed contract between Solutions and Strategies on January 28. Even though the contract called for Strategies to perform

services in exchange for the $600,000 payment, Lindenfeld neither expected to do any work for the $600,000, nor did he in fact do any work.

In sum, by January 28, Solutions had received $500,000 from EAA, but it still had to come up with $100,000 to provide Strategies with the entire amount needed to repay the Lord loan. Golden obtained the needed funds the following day by drawing $150,000 on a line of credit held by Brand's wife. Brand and Fattah spoke four more times on the telephone on January 29. Trial evidence later showed that, during the month of January 2008, neither the FFM campaign bank account nor Fattah's personal account had a sufficient balance to fund a $600,000 payment.

On the morning of January 30, frustrated by the delay, Lindenfeld sent Brand an email with a subject line "You are killing me." JA6430. Lindenfeld stated that he had "made a commitment based on yours to me. Please don't drag this out. I have a lot on the line." *Id.* Brand responded late in the afternoon, stating: "just met with Michael. He does the transfer at 8 AM tomorrow. It should be in your account ($600K) early tomorrow morning." *Id.* Lindenfeld replied: "The earlier the better." *Id.* The following morning, Golden wired $600,000 from Solutions' Pennsylvania bank account into Strategies' Washington D.C. bank account. JA2745, 2874. Strategies in turn, wired the same amount from its Washington D.C. bank account to Lord's bank account in Virginia. JA2874, 6549. Around noon, Brand telephoned Lindenfeld.

In the days following the exhaustive efforts to meet the January 31 loan repayment deadline, four

more telephone calls took place between Brand and Fattah.[5] Naylor learned at some point that the loan had been paid off. When Naylor asked Fattah about details of the repayment, Fattah simply replied "[t]hat it went through EAA to Solutions and it was done." JA3088.

Meanwhile, at some point in January, EAA received notice that the Department of Justice Office of the Inspector General (DOJ) intended to audit its books.[6] DOJ auditors told EAA to provide, at the "entrance conference," documentation containing budgetary and accounting information. EAA failed to produce any accounting information.

Although Lindenfeld was no longer making demands of Brand, Brand was still owed the remaining $100,000 that Solutions had paid to satisfy the Lord loan. On March 23, 2008, Brand sent Nicholas an email outlining his efforts to contact her over the previous two weeks about documentation on the CORE work, how to proceed with the paperwork for the Commonwealth of Pennsylvania, and "how we can get our proposed contract signed and the outstanding payments made." JA2749. Nicholas responded that evening, writing:

> I can appreciate your urgency however I do have EAA work that I continue to do, including the [usual] facilitation of programs, our financial

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[5] By contrast, between October to December 2007, Brand and Fattah spoke by telephone only "once or twice [a] month." JA2734.

[6] One of the terms and conditions of a federal grant is that the recipient "be readily prepared for an audit." JA2314.

> audit, the start-up of two new programs[,] and of course the DOJ audit. I am still trying to obtain a line of credit without a completed 2007 audit and things are getting a little uncomfortable now as I try to keep us afloat.

JA6576. Nicholas told Brand that the DOJ auditors were making demands and would soon be on site. She noted that "[t]hey are still very uncomfortable with your contract amongst other things and depending on their findings some of the funding received may have to be returned." *Id.* Nicholas said that she had submitted the paperwork to the state, and she told Brand that "in the future . . . as a result of the DOJ audit I will not be in a position to do another contract such as this." *Id.*

Shortly after Nicholas's reply to Brand, Nicholas forwarded the Brand–Nicholas email chain to Fattah. The body of the email stated, in its entirety: "I really don't appreciate the tone of Bob's email. I can appreciate that he has some things going on however I am doing my best to assist him. Some other things are a priority. He needs to back off." GSA2. Later that night, Bowser sent Fattah an email with a subject line that read "Karen N" and a telephone number. JA2752.

As the audit continued, the auditors found other deficiencies. During April of 2008, DOJ issued a notice of irregularity to EAA, which resulted in the audit being referred to DOJ's Investigations Division for a more comprehensive review.

On April 24, 2008, Brand emailed Nicholas asking for a time to update her on The Benefit Bank. In early May, Brand sent another email to Nicholas

attaching a revised EAA–Solutions contract proposal, which decreased the initial upfront cost from $900,000 to $700,000.

Although Solutions and EAA had still not signed a contract, EAA paid Solutions another $100,000 in May. That money was obtained via a loan to EAA from CORE. Thomas Butler, who had worked for Fattah both when Fattah was in Congress and when he was in the General Assembly, was CORE's executive director. Butler had been contacted in mid-May by Jackie Barnett, a member of CORE's Board who had also worked with Congressman Fattah. Barnett informed Butler that Nicholas had requested a loan from CORE to EAA, and that Fattah, as Chairman of CORE's Board, had approved it. Butler and Barnett withdrew funds from two CORE bank accounts and obtained a cashier's check, dated May 19, in the amount of $225,000 and made payable to EAA. The withdrawals were from accounts used for Sallie Mae funds and other scholarship money.

After EAA received the $225,000 check, EAA tendered a $100,000 check to Solutions. The check bore the notation "Commonwealth of Pennsylvania." EAA repaid CORE the following month. Because EAA lacked sufficient funds of its own to cover this payment, EAA drew on grant money that it had received from NASA.

Brand and Lindenfeld continued to communicate concerning The Benefit Bank. In July of 2008, a meeting was held at Solutions with Brand, Lindenfeld, Golden, and other Solutions employees to discuss "an enormous amount of work" that Brand wanted Strategies to do. JA1670. Lindenfeld said in response "we'd be glad to do that, but . . . we would

have to be paid." *Id.* At that point, someone in the meeting stated that Strategies "had already been paid" $600,000. *Id.* Lindenfeld replied: "well, that was for Congressman Fattah, . . . that's not for us. So if you want us to do work, we have to get paid for it separately." *Id.* Brand became upset with Lindenfeld over his comment about being paid because his colleagues at Solutions were not aware of the reason for the $600,000 payment.

Meanwhile, EAA was attempting to meet the demands of the DOJ auditors, who were focused on the relationship between EAA and CORE. DOJ served a subpoena upon Solutions to produce "[a]ny and all documents including, but not limited to, contract documents, invoices, correspondence, timesheets, deliverables and proof of payment related to any services provided to or payments received" from CORE or EAA. JA2350.

Special Agent Dieffenbach, from the DOJ, interviewed Nicholas on July 14, 2008. During that interview, Nicholas discussed the relationship between EAA and CORE, how invoices were paid, and how consultants were handled. Nicholas also answered questions about EAA's relationship with Solutions, including the payment of invoices. She did not inform Agent Dieffenbach of the $500,000 payment in January or the subsequent $100,000 payment in May. Nor did the interview address the EAA–Solutions contract that purportedly required those payments, because the contract had yet to be produced.

Solutions failed to comply with the subpoena, prompting an email from Agent Dieffenbach on August 26 asking for an update concerning Solutions'

reply to the DOJ subpoena. Solutions then produced an undated version of the EAA–Solutions contract that required the $600,000 upfront payment. Neither Brand nor Nicholas provided the auditors with the January and May checks from EAA to Solutions.

Efforts to conceal the repayment of the Lord loan and to promote the political and financial interests of Fattah continued. The FFM campaign reports indicated in-kind contributions of debt forgiveness by SLA even though there had been no actual debt. In September of 2009, with EAA's ledgers still under scrutiny, Nicholas altered the description of the entry for the $100,000 check to Solutions from "professional fees consulting" to "CORE Philly." JA2546. Other FFM campaign debt was reduced further after Vederman negotiated with creditors.

EAA never fully recovered from its payment of the $600,000 balance on the Lord loan and the audits that took place in 2008. It began laying off employees in 2011, and by June of 2012, only four employees remained. JA3659. EAA ceased operations at some point in 2012. JA1530.

2. The College Tuition Component of the FFM Scheme

Although the FFM campaign was close to insolvent, it nevertheless made tuition payments for Fattah's son, Chaka Fattah Jr., also known as Chip. Chip attended Drexel University, but had yet to complete his coursework because he had failed to pay an outstanding tuition balance. As the FFM campaign got underway in 2007, Fattah wanted Chip to re-enroll in classes at Drexel and get a degree.

Fattah asked Naylor to help financially, and he did so by writing checks from SLA to Drexel toward Chip's outstanding tuition. By October of 2007, Chip was permitted to re-enroll in classes.

Although Naylor never directly addressed the issue with Fattah, he agreed to assist with Chip's outstanding tuition with the expectation that SLA would be repaid. The first check to Drexel in the amount of $5,000 was sent in August of 2007, with $400 payments in the months that followed until August of 2008. At some point, Chip informed Naylor that the payee was no longer Drexel, but Sallie Mae. Naylor then began sending monthly checks from SLA to Sallie Mae. Those payments, in the amount of $525.52, began in March of 2009 and continued until April of 2011, after which Fattah told Naylor he no longer needed to make them. SLA's payments to Drexel and Sallie Mae totaled $23,063.52.

Naylor's expectation of repayment was eventually realized. Beginning in January of 2008 and continuing until November 2010, Bowser sporadically sent SLA reimbursement checks from the FFM campaign with a notation that payment was for "election day operation expenses." JA3136. The FFM funds had been transferred from the Fattah for Congress campaign. These reimbursement checks totaled $25,400. In an effort to conceal the source of the payments to Drexel and Sallie Mae, and to make it appear that the younger Fattah had performed services for SLA, Naylor created false tax forms for Chip. Chip, however, had never performed services for SLA.

3. The NOAA Grant and the Phantom Conference

In mid-December 2011, when EAA was experiencing serious financial difficulties, Nicholas submitted an email request to the educational partnership program of the National Oceanic & Atmospheric Administration (NOAA) for a grant "designed to provide training opportunities and funding to students at minority serving institutions" interested in science, technology, engineering, and math fields related to NOAA's mission. JA3354–55. The request sought $409,000 to fund EAA's annual conference scheduled for February 17–19, 2012. Jacqueline Rousseau, a supervisory program manager at NOAA, participated in a conference call with Nicholas shortly thereafter and advised Nicholas that the agency could not afford the $409,000 request but would consider a smaller grant. Rousseau advised Nicholas that EAA would need to submit an application if it wished to be considered for a grant.

Before submitting a grant application, Nicholas emailed Rousseau about sponsoring the conference. On January 11, 2012, Rousseau informed Nicholas that the "NOAA Office of Education, Scholarship Programs has agreed to participate and provide sponsorship funds of $50K to support the referenced conference." JA6453. Rousseau also informed Nicholas that Chantell Haskins, who also worked with the student scholarship program, would be the point of contact for NOAA.

In February 2012, EAA held its annual conference at the Sheraton Hotel in downtown

Philadelphia. The conference had been held at the same location each year since 2008.

Nicholas contacted Haskins at some point in early 2012, inquiring about the $50,000 grant. On May 8, 2012, Haskins sent Nicholas an e-mail which included information about submitting proposals to fund a conference for students. EAA then submitted a grant application, which Haskins reviewed. She advised Nicholas on June 28, 2012 that the grant could not be used to provide meals, and that the date of the conference would have to be pushed back, with the new date included in a modified application. When Nicholas asked if expenses from a previous conference could be paid from the new grant, Haskins informed her that this was not allowed.

In early July 2012, Nicholas sent a modified grant proposal to Haskins. It eliminated the budget item for food and changed the date of the 2012 conference to October 19–21, 2012 at the same Sheraton Hotel in Philadelphia where EAA's annual conference had taken place earlier in the year. NOAA approved a $50,000 grant for the October 2012 conference—a conference that would never be held.

Unaware that no October 2012 conference had taken place, NOAA allowed Nicholas access to the $50,000 grant in March of 2013. She then transferred the entire amount from NOAA to EAA's bank account a few days later. Naylor had performed services for EAA for which he was still owed $116,590. JA3119. In discussions with Naylor, Nicholas had informed him that the likelihood of EAA's being able to pay him was "[n]ot very good." JA3120. Yet several days after EAA had received the

$50,000 from NOAA, Nicholas sent Naylor a check for $20,000. JA3120, 4283.

On April 3, 2013, Nicholas submitted a final report to NOAA concerning EAA's use of the grant. Notably, page 4 of the report stated the conference had been held in February 2012, while page 17 stated that the conference had been held from October 19 to 21, 2012. NOAA issued a notice asking for clarification and for a list of students who had been supported at the conference. Nicholas failed to file either a clarifying report regarding the date of the conference or a timely report regarding the disbursement of the grant. Finally, in November of 2013, Nicholas submitted the final Federal Financial Report in which she certified, falsely, that the $50,000 had been used for a project during the period from August 1, 2012 to December 30, 2012.

B. The Blue Guardians Scheme

In addition to functioning as the conduit for Lord's $1 million loan to Fattah's campaign, Lindenfeld's company, Strategies, also performed services for the campaign. The work resulted in indebtedness from FFM to Strategies of approximately $95,000. Fattah made several small payments, but failed to pay the full amount due. Although Lindenfeld spoke to Fattah, Naylor and Bowser about the debt, no payments were forthcoming. During a meeting in Fattah's D.C. office, Fattah told Lindenfeld "that [repayment] really wasn't going to be possible because the campaign had been over for a long time" and the funds were not available. JA1693. Fattah then asked Lindenfeld if he could write off the debt on his FFM campaign finance reports. *Id.* Lindenfeld told Fattah

that as long as he was paid, it was not his business how Fattah disclosed it on the campaign finance reports. JA1694.

In lieu of repayment, Fattah suggested that Strategies could claim to be interested in setting up an entity to address environmental issues and ocean pollution along the coastline and in the Caribbean. Fattah explained that creating such an entity would make it possible to obtain an appropriation from the government. Hearing this, Lindenfeld knew he was not going to be paid by the FFM campaign, and was amenable to receiving money from an appropriation instead. At a later meeting, Lindenfeld told Fattah that the name of the entity would be "Blue Guardians." Lindenfeld consulted with an attorney about creating Blue Guardians as an entity to receive the federal grant. He emailed Fattah, asking questions about how to complete an application to the House Appropriations Committee. Fattah provided suggestions, and an application was eventually completed. It indicated that Blue Guardians would be "in operation for a minimum of ten years," and, in accordance with Fattah's guidance, requested $15 million in federal funds. JA1711–13.

Lindenfeld submitted the application to Fattah's office in April of 2009. Afterward, a Fattah staffer contacted Lindenfeld to suggest that he change his Washington, D.C., address to Philadelphia because that was the location of Fattah's district. Fattah later suggested to Lindenfeld that Brand might allow the use of his Philadelphia office address, a plan to which Brand agreed.

In February 2010, Lindenfeld submitted a second application to the Appropriations Committee. In March, Fattah submitted a project request using his congressional letterhead and seeking $3,000,000 for the "Blue Guardians, Coastal Environmental Education Outreach Program." JA6432. Within a month, Blue Guardians had both articles of incorporation and a bank account. Around that time, a news reporter contacted Lindenfeld to discuss the new Blue Guardians entity. The inquiry made Lindenfeld uncomfortable, and he ultimately decided to abandon the Blue Guardians project. He continued to seek payment from Fattah, to no avail.

Nonetheless, having obtained Lindenfeld's acquiescence to writing off the campaign's debt to Strategies, Fattah started falsifying FFM's campaign reports. Beginning in 2009 and extending through 2013, the FFM campaign reports executed by Fattah and Bowser stated that Strategies made in-kind contributions of $20,000, until the debt appeared to have been paid in full.

C. The Fattah–Vederman Bribery Scheme

Vederman and Fattah were personal friends. Vederman was a successful businessman who had also served in prominent roles in the administrations of Ed Rendell when he was Mayor of Philadelphia and Governor of Pennsylvania. In November of 2008, Vederman was a senior consultant in the government and public affairs practice group of a Philadelphia law firm. His assistance to the FFM campaign included paying for rented vans used in the get-out-the-vote effort.

After Fattah's electoral defeat, the campaign still owed more than $84,000 to a different law firm for services performed for the campaign. Vederman approached that firm in the summer of 2008 asking if it would forgive FFM's debt. Negotiations resulted in a commitment from FFM to pay the firm $30,000 by the end of 2008 in exchange for forgiveness of $20,000, all of which would appear on the FFM campaign finance report. Vederman's efforts also led to payment by Fattah of an additional $10,000 in 2009 to the law firm, in exchange for additional forgiveness of $20,000 of debt. It was not long after Vederman's successful efforts to lower Fattah's campaign debt, that Fattah wrote a letter to U.S. Senator Robert P. Casey recommending Vederman for an ambassadorship.

At some point in 2010, Vederman again intervened on behalf of the FFM campaign. FFM remained in debt to an advertising and public relations firm owned by Robert Dilella. By late 2011, Vederman and Dilella had worked out a settlement to resolve the outstanding debt. Pursuant to that settlement, Dilella received partial payment from the FFM campaign: $25,000 in satisfaction of a $55,000 debt. Dilella testified at trial that he would not have agreed to retire a portion of the debt had he known the FFM campaign was paying college tuition for Fattah's son.

Vederman helped Fattah financially in other ways. Before the 2006 FFM campaign, Fattah and his wife, Renee Chenault-Fattah, sponsored a young woman named Simone Muller to live with them as an au pair exchange visitor. Muller was from South Africa, and her J-1 visa allowed her to serve as a

nanny and to study in the United States. Muller later applied for and received a second visa, an F-1 student visa that indicated she had been accepted as an international student at the Community College of Philadelphia. The application indicated that Muller would again be residing with the Fattahs. Notwithstanding this living arrangement, Fattah identified Vederman as the person who would be paying for Muller's trip to the United States.

By the beginning of 2010, Muller wished to transfer to Philadelphia University. This required her to submit verification that funds were available to pay for her study. Although the Fattahs were Muller's sponsors, Fattah explained to the University's Dean of Enrollment Services that he was submitting a letter of secondary support from Vederman. JA3754, 3763–65, 6504. Without Vederman's January 2010 letter of support, the University would not have admitted Muller. In addition to this pledge of support, Vederman paid $3,000 of Muller's tuition. Shortly thereafter, Fattah resumed his efforts to secure an ambassadorship for Vederman.

In February of 2010, Fattah staffer Maisha Leek contacted Katherine Kochman, a scheduler for White House Chief of Staff Rahm Emanuel. Leek requested a telephone conference with Emanuel, Rendell, and Fattah to discuss Vederman's "serving his country in an international capacity." JA2893. In a follow-up email on March 26, Leek sent documents to Kristin Sheehy, a secretary to White House Deputy Chief of Staff James Messina. The documents included Fattah's 2008 letter to Senator Casey and Vederman's biography. After participating in a

telephone conference about Vederman with Fattah and Rendell, Messina sent Vederman's biography to the White House personnel office for consideration.

As the April 2010 tax deadline approached, Fattah still owed the City of Philadelphia earned income tax in the amount of $2,381. Just days before the filing deadline, Vederman gave a check to Chip Fattah for $3,500. The younger Fattah quickly deposited $2,310 into his father's bank account. Fattah paid his tax bill on April 15. Without Chip's deposit into his father's bank account, the older Fattah would not have had sufficient funds to pay his tax bill.

On October 30, 2010, Vederman gave Chip another check, this one for $2,800. That same day, Fattah hand-delivered a letter to President Obama recommending Vederman for an ambassadorship. A few weeks later, Fattah's staffer, Leek, sent the letter that Fattah had given to President Obama to Messina's office. That letter pointed out that both Rendell and Fattah had sent letters on behalf of Vederman, and that he was an "unquestionably exceptional candidate for an ambassadorship." JA6291–92.

Fattah's efforts to secure Vederman an ambassadorship were unsuccessful. Fattah then shifted gears and sought to secure Vederman a position on a federal trade committee. Fattah approached Ron Kirk, who served as U.S. Trade Representative, and asked him to speak with a constituent. In May of 2011, Leek followed up on that discussion by emailing Kirk and asking him to meet with Vederman. Kirk met with Vederman on June 5, 2011 and explained to him the role of the trade

advisory committees. Although the two men "had a very nice conversation," JA 3566, it soon became "pretty apparent to [Kirk and his staff] that [serving on a trade advisory committee was] not what Mr. Vederman was interested in." JA3567. As Kirk put it, "it was obvious that [Vederman] was looking for something perhaps more robust in his mind or . . . higher profile than one of our advisory committees." *Id.* Given Vederman's lukewarm interest, no appointment to an advisory committee was forthcoming.

In late December 2011, the Fattahs applied for a mortgage so they could purchase a second home in the Poconos. Shortly after applying for the mortgage, Fattah emailed Vederman, offering to sell him his wife's 1989 Porsche for $18,000. Vederman accepted the offer. The next day, Vederman wired $18,000 to Fattah's Wright Patman Federal Credit Union account.

The Credit Union Mortgage Association (CUMA) acted as the loan processing organization for the home mortgage. Because CUMA is required to verify the source of any large deposits, CUMA's mortgage loan processor, Victoria Souza, contacted Fattah on January 17, 2012, to confirm the source of the $18,000. Fattah informed Souza that the $18,000 represented the proceeds of the Porsche sale. Souza requested documentation, including a signed bill of sale and title.

That same day, Bowser emailed Vederman a blank bill of sale for the Porsche. After Vederman signed the bill of sale, Fattah forwarded it to Souza. The bill of sale was dated January 16, 2012, which was the day *before* Souza had requested the

documentation. It bore the signatures of Renee Chenault-Fattah and Herbert Vederman, with Bonnie Bowser as a witness.

Fattah also provided Souza with a copy of the Porsche's title. It was dated the same day it was sent to Souza, and bore signatures of Chenault-Fattah as the seller and Vederman as buyer, along with a notary's stamp. Neither Vederman nor Chenault-Fattah actually appeared before the notary.

Vederman never took possession of the Porsche. Renee Chenault-Fattah continued to have the Porsche serviced and insured long after the purported sale had taken place. Moreover, the Porsche remained registered in Chenault-Fattah's name, and was never registered to Herbert Vederman. When FBI agents searched the Fattahs' home in 2014, the Porsche was discovered in the Fattahs' garage.

On January 24, 2012, the Fattahs wired $25,000 to the attorney handling the escrow account for the purchase of the vacation home. Without the $18,000 transfer from Vederman, the Fattahs would not have had sufficient funds in their bank accounts to close on the home.

Around the same time that the Fattahs were purchasing the house in the Poconos, Fattah's Philadelphia office hired Vederman's longtime girlfriend, Alexandra Zionts. Zionts had long worked for a federal magistrate judge in Florida. Near the end of 2011, the magistrate judge retired, leaving Zionts ten months shy of obtaining the necessary service required to receive retirement benefits. If Zionts could find another job in the federal

government, her benefits and pension would not be adversely affected. Vederman assisted Zionts in her job search, which included calling Fattah. Fattah hired her, a move that put his congressional office overbudget. Zionts worked in Fattah's office for only about two months, leaving to work for a congressman from Florida.

Tia Watson, who performed constituent services for Fattah and worked on the same floor as Zionts in Fattah's district office, testified she had no idea what work Zionts performed. Although Zionts contacted Temple University about archiving Fattah's papers from his career in both the state and federal government, an employee from Temple University observed that Zionts' work contributed nothing of value to the papers project.

D. The Indictment and Trial

Fattah's schemes eventually unraveled. On July 29, 2015, a federal grand jury in the Eastern District of Pennsylvania returned a twenty-nine count indictment alleging that Fattah and his associates had engaged in a variety of criminal acts. Fattah, Vederman, Nicholas, Brand, and Bowser were charged with unlawfully conspiring to violate the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(d). In addition to the RICO charge, the indictment alleged that Fattah and certain co-defendants had unlawfully conspired to commit wire fraud, 18 U.S.C. §§ 1343, 1349; honest services fraud, 18 U.S.C. §§ 1343, 1346, 1349; mail fraud, 18 U.S.C. §§ 1341, 1349; money laundering, 18 U.S.C. § 1956; and to defraud the United States, 18 U.S.C. § 371. Several defendants were also charged with making false statements to banks, 18 U.S.C. §

1014; falsifying records, 18 U.S.C. § 1519; laundering money, 18 U.S.C. § 1957; and engaging in mail, wire, and bank fraud, 18 U.S.C. §§ 1341, 1343, and 1344.

The RICO charge alleged that the defendants and other co-conspirators constituted an enterprise aimed at supporting and promoting Fattah's political and financial interests. The efforts to conceal the $1 million Lord loan and its repayment are at the heart of the RICO conspiracy and the Fattah for Mayor scheme. The indictment further alleged that the RICO enterprise involved: (1) the scheme to satisfy an outstanding campaign debt by creating the fake "Blue Guardians" nonprofit; and (2) the bribery scheme to obtain payments and things of value from Vederman in exchange for Fattah's efforts to secure Vederman an appointment as a United States Ambassador.

A jury trial, before the Honorable Harvey Bartle III of the Eastern District of Pennsylvania, began on May 16, 2016, and lasted about a month.[7] Judge Bartle charged the jury on Wednesday, June 15, 2016, and deliberations began late that afternoon. The following day, after deliberating for only four hours, the jury sent a note to the judge. Written by the foreperson, the note read:

> Juror Number 12 refuses to vote by the letter of the law. He will not, after proof, still change his vote. His answer will not change. He has the 11 of us a total wreck knowing that we are not getting anywhere in the hour of deliberation

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[7] The District Court dismissed one charge prior to trial: an individual money laundering count against Nicholas.

> yesterday and the three hours today. We have zero verdicts at this time all due to Juror Number 12. He will not listen or reason with anybody. He is killing every other juror's experience. We showed him all the proof. He doesn't care. Juror Number 12 has an agenda or ax to grind w/govt.

JA5916.

Shortly after receiving the foreperson's note, the Court received a second communication—a note signed by nine jurors, including the foreperson. The second note read:

> We feel that [Juror 12] is argumentative, incapable of making decision. He constantly scream [*sic*] at all of us.

Id.

Judge Bartle met with counsel in his chambers and advised them of his intention to *voir dire* both the foreperson and Juror 12 in an effort to determine whether the juror was deliberating as required by his oath. The Judge also indicated that he would "stay away from the merits of the case," and that whether he would *voir dire* more jurors "remain[ed] to be seen." JA5917.

Counsel for the defendants objected to the Court's proposed inquiry. As a group, they indicated that while the note *could* be read as suggesting "a flat refusal to deliberate," they were of the opinion that it sounded "more in the manner of a disagreement over the evidence." JA5918. Nicholas's counsel specifically argued that questioning the jurors so quickly after the start of deliberations would send a message that differences of opinion

among a block of jurors could be resolved by complaining to the Court. Defense counsel acknowledged that the case law gave Judge Bartle wide discretion on how to proceed, but suggested that a "less intrusive" course of action was preferred. JA5918–19. They collectively urged the Court to do nothing more than remind the jurors of their duty to deliberate.

The Government agreed with Judge Bartle's proposed *voir dire*. In the prosecution's view, the Court had already given proper instructions to the jury on their duty to deliberate. The Government further argued that if Juror 12 had exhibited bias, as suggested in the notes, he would have lied during the *voir dire* process and his refusal to deliberate would be "further evidence of that and his unsuitability as a juror." JA5921.

With all counsel present, and over defense counsel's objections, Judge Bartle ultimately questioned five jurors in chambers. He questioned Juror 2 (the foreperson), Juror 12 (the subject of the complaints), Juror 3, Juror 6, and Juror 1.

Judge Bartle began each *voir dire* by informing the juror that he would ask a series of questions, but would not inquire into the merits of the case or how any juror was voting. Each juror was placed under oath, and Judge Bartle asked, among other questions, whether screaming was occurring; whether the jurors were discussing the evidence; whether Juror 12 was placing his hands on other jurors; and whether Juror 12 was unwilling to follow his instructions.

The foreperson acknowledged that he had written the initial note during lunch earlier that day. He stated that Juror 12 was not willing to follow the law, but instead "want[ed] to add his own piece of the law . . . which has nothing to do with it." JA5927–28. The foreperson further testified that Juror 12 "was standing up screaming" and that "[i]t was everybody pretty much against [Juror 12]." JA5929. He testified that Juror 12 "has his own agenda," and that Juror 12 put his hand on another juror. JA5930. The foreperson also stated that the jury had discussed only a single count since the day before, and that they were still discussing it. When the District Court responded that the jurors should understand that they could take as much time as they needed, the foreperson responded: "I understand that. . . . [W]e all understand it. But we feel that he's just—he's got another agenda." JA5934.

Judge Bartle advised counsel that he considered this "a very serious situation" and that he would proceed to *voir dire* Juror 12. JA5937. Fattah's counsel renewed his objection to questioning Juror 12, which the Court overruled. Brand's counsel argued that because the Court had decided to *voir dire* Juror 12, it should also *voir dire* an additional juror. The Court agreed to do so.

When the Court questioned Juror 12, he admitted to having "yelled back" at others, but only when they raised their voices to him. JA5939. Juror 12 contended that he, in fact, was "the only one" deliberating. *Id.* When an initial vote was taken the previous afternoon, his vote "was different than everybody else's." *Id.* Juror 12 explained to the other jurors why his vote was different, bringing up

specific evidence. In response, the other jurors said "that doesn't mean anything" and "pointed to the indictment." JA5940. Juror 12 told the other jurors that the indictment is not evidence. *Id.* In response, the others "threatened to have [him] thrown off." *Id.*

Juror 12 testified that a similar sequence of events had taken place that morning. After a brief period of deliberations, another vote was taken, and with the same result as the previous afternoon. A discussion ensued, and the other jurors again "point[ed] to the indictment." *Id.* Juror 12 told them to "read the charge," "[t]he indictment is not evidence." *Id.* They read the charge, and Juror 12 again attempted to explain his view, but the other jurors paid little attention. Accordingly, Juror 12 told the others that if they did not want him there, he "[didn't] want to be [there]"—he would be "[o]kay with it" if they wanted him taken off the jury. JA5941.

Upon hearing this testimony, Judge Bartle again asked about the tone of deliberations. Juror 12 repeated that he raised his voice only in response to others who did so—he did "not want to yell at anybody." JA5942. Judge Bartle then asked whether he had touched other jurors. Juror 12 replied that he had not *hurt* anyone. When asked if he had put his hand on anybody's shoulder, Juror 12 answered: "I couldn't remember to be honest with you." JA5946.

Following Juror 12's *voir dire*, the Court summoned Juror 3 to chambers. Juror 3 testified that, after discussion of a particular count, there was one juror at odds with the others. According to Juror 3, "the rest of the jurors pounced on the gentleman with the . . . dissenting opinion." JA5948. Juror 3

testified that Juror 12 "got very defensive and just a little bit [] impatient" and that "the other jurors were very impatient with him." *Id.* Juror 3 did not recall witnessing Juror 12 putting his hand on any other jurors.

The Government requested that the Court *voir dire* another juror. Defense counsel objected, claiming that the questioning "threaten[ed] . . . the entire deliberative process." JA5949–50. Judge Bartle reminded counsel that he had the authority to question each juror, and called for *voir dire* of Juror 6.

Juror 6 testified that the jury had been discussing the case and reviewing the evidence, but that Juror 12 "wants to be seen" and was "being obstinate." JA5951–52. According to Juror 6, Juror 12 "may not agree" with the conclusion of other jurors but "doesn't give valid reasons as to why he may disagree with the charge." JA5952. Juror 6 also revealed that Juror 12 was the first to raise his voice, and that he may have touched her and another juror. When asked to clarify what she meant by Juror 12 disagreeing with "the charge," Juror 6 testified that Juror 12 was "reading maybe too deeply into it and putting his own emotions into it instead of just looking at what it says [and] what the facts are." JA5952, 5955. According to Juror 6, Juror 12 "just continues to read past that into his own mind of what he feels it should be." JA5955. Juror 6 testified that Juror 12's "justification for some of his responses [did not] seem to relate to what the matter [was] before [them]." JA5957.

Judge Bartle chose to hear from yet another juror. Juror 1 was called and informed the Court and

counsel that the jury "really [hadn't] been able to even start the deliberation process" in light of the disruptive behavior of "one particular individual." JA5958–59. The particular individual, according to Juror 1, was "very opinionated" and "[came] into the process with his view already established, refusing to even listen to any of the evidence . . . [being] very forceful . . . standing up, yelling, pointing his finger." JA5959. When asked if this individual was willing to follow the Court's instructions, Juror 1 testified that he "pours [sic] over the documents very well" but that he was adding other factors to answer the question on the verdict form, such as "what did this person feel." JA5961. When Judge Bartle advised that intent was an appropriate consideration, Juror 1 agreed but said that Juror 12 was "trying to investigate . . . going way beyond the scope" of the evidence before them. JA5961–62. Juror 12, he said, "has an opinion and that opinion is established." JA5962. He stated that Juror 12 was "not willing to listen to any sort of reason or any sort of what everyone else is saying" but instead, was "trying to force everyone else to get to his point of view." *Id.* "[I]f he feels like he's not getting there, he gets louder and louder and points and puts his hand on your shoulder . . . ." *Id.*

After questioning the five jurors (Jurors 1, 2, 3, 6, and 12), Judge Bartle heard argument from counsel. The attorney for the Government pointed out that the Court would have to make a credibility determination because Juror 12 stated that he did not recall touching anyone. In the Government's view, Juror 12 was disrupting the process and should be removed. Defense counsel disagreed. They argued that Juror 12 was conscientious and was engaging

with the evidence. They pointed out that despite the testimony that Juror 12 was reading too deeply into the instructions or introducing new factors for the jury to consider, Juror 6 had testified that the jurors "talked it through" and resolved the concern. JA5965. Defense counsel argued that the jury was discussing intent, an issue that was at the heart of the case. Defense counsel perceived no breakdown in deliberations and argued that dismissal would be premature. They suggested, instead, that the Court provide a supplemental instruction.

Judge Bartle decided to adjourn for the afternoon. But before he left the courtroom, defense counsel brought two matters to his attention. First, in light of testimony during the *voir dire*, they asked that the jury be reinstructed that the verdict form and indictment were not evidence. Second, they apprised the Judge of the standard for juror dismissal set forth in *United States v. Kemp*, 500 F.3d 257 (3d Cir. 2007). Defense counsel stated that under *Kemp*, a request to discharge a juror must be denied if there is a possibility that the request stems from the juror's view of the evidence. Judge Bartle expressed hesitation on reinstructing the jury, but agreed that *Kemp* would control his determination as to whether dismissal was appropriate.

With the following morning came a new revelation. With counsel in chambers, the Judge informed them that "additional significant evidence" had come to light since the previous day's recess. JA5980. He placed his courtroom deputy under oath, and she proceeded to testify to an exchange that had occurred the previous day as she was escorting Juror 12 back to the jury room after he had been voir dired.

According to the deputy, Juror 12 stopped her in the hallway, placed his hand on her shoulder, and looked her "straight in the eye." JA5981. He then said: "I'm going to hang this jury." *Id.* The deputy then related that before any further conversation could take place between Juror 12 and the deputy, Judge Bartle summoned Juror 12 back to his chambers. Later that day, however, Juror 12 and the courtroom deputy had another exchange. She testified that after all five jurors had been questioned, Juror 12 emerged from the jury room and told her "I really need to talk to you." JA5982. She informed Judge Bartle and counsel that Juror 12 "said more about how they're treating him and what he's saying to them." *Id.* He flatly stated that "it's going to be 11 to 1 no matter what." *Id.*

There were no follow-up questions for the deputy. Instead, defense counsel suggested that what Juror 12 may have meant was that he was willing to hang the jury because of a lack of evidence. They requested that Juror 12 be asked about his comments to the deputy.

After once again summoning Juror 12 to his chambers, the Judge advised him that "[s]ome questions have arisen" about what he may have done after being *voir dired* the previous day. JA5985. Juror 12 acknowledged having conversations with the courtroom deputy. When asked "what happened" and "[w]hat occurred," Juror 12 responded: "Basically, I said that there was a lot of name calling going on." JA5985. He said comments had been made by other jurors about his service in the military. He specifically referred to other jurors' suggesting that he had possibly "hit [his] head . . . hard a few times"

while serving in a parachute regiment. JA5986. He testified he had conveyed these comments to the deputy and that he found them offensive. When asked if he said anything else to the deputy, Juror 12 responded: "I may have. I really can't recall." JA5987. And when Judge Bartle followed up by asking if he could recall anything else that he said to the deputy, Juror 12 simply replied: "No. To me, that was the most important thing." *Id.* Juror 12 was then excused from chambers.

Defense counsel next requested that the juror be asked directly whether he told the courtroom deputy that he was going to "hang this jury." JA5988. Juror 12 was recalled to chambers, and the following back and forth took place:

> The Court: You may be seated. And, of course, [Juror 12], you know you're under oath here from yesterday?
> Juror 12: Yes, sir.
> The Court: . . . Did you say to [the courtroom deputy] that you're going to hang this jury?
> Juror 12: I said I would.
> The Court: You did?
> Juror 12: I did. I said—I told her—I said, we don't agree; I'm not just going to say guilty because everybody wants me to, and if that hangs this jury, so be it.
> ….
> Juror 12: I did say that, sir.
> The Court: You didn't remember that before?
> Juror 12: I'm more concerned about people spitting on my military record.
> The Court: Did you say that you'd hang the jury no matter what?

> Juror 12: If they do—if we cannot come to—
> The Court: No. The question is what you said to her. Did you say to her you would hang the jury no matter what?
> Juror 12: I can't really remember that. I did say that if we didn't—a person—no matter what, I can't recall that exactly.
> The Court: All right. Thank you very much. You can wait just out there in the anteroom.

JA5989–90.

Defense counsel continued to oppose Juror 12's dismissal. They argued that the juror's concern was about the evidence, and that his comments to the courtroom deputy reflected a conviction that "he's not going to agree just because others want him to agree." JA5991. They also argued that nothing should be made of Juror 12's failure to mention the comments when initially questioned by the Court, and that a supplemental instruction was all that was warranted given the early stage of the deliberations.

The Government strongly disagreed. The Assistant United States Attorney argued that Juror 12 "should absolutely be removed" because "his demeanor ha[d] demonstrated a hostility . . . both to the other jurors and to the court." JA5993. The Government also suggested that Juror 12's comments that he would hang the jury meant that he was not participating in the deliberations and was ignoring the evidence and the law.

Ruling from the bench, Judge Bartle announced:

> I find [the deputy clerk] to be credible. I find [Juror 12], not to be credible. I find that [Juror

> 12] did tell [the deputy clerk] that he was going to hang this jury no matter what.
>
> There have been only approximately four hours of deliberation. There's no way in the world he could have reviewed and considered all of the evidence in the case and my instructions on the law.
>
> I instructed the jury to deliberate, meaning to discuss the evidence; obviously, to hold onto your honestly held beliefs, but at least you have to be willing to discuss the evidence and participate in the discussion with other jurors.
>
> Juror number 12 has delayed, disrupted, impeded, and obstructed the deliberative process and had the intent to do so. I base that having observed him, based on his words and his demeanor before me.
>
> He wants only to have his own voice heard. He has preconceived notions about the case. He has violated his oath as a juror.
>
> And I do not believe that any further instructions or admonitions would do any good. I think he's intent on, as he said, hanging this jury no matter what the law is, no matter what the evidence is.
>
> Therefore, he will be excused, and I will replace him with the next alternate . . . .

JA5994–95.

In response, defense counsel moved for a mistrial, which the judge promptly denied. He then informed the reconstituted jury that deliberations would need to start over, and reinstructed them on

certain points of law, including that the verdict slip does not constitute evidence.

Judge Bartle elaborated upon his decision to remove Juror 12 in two post-trial memorandum opinions. In the first, ruling on a media request for the sealed transcripts, he explained:

> Here, there is no doubt that Juror 12 intentionally refused to deliberate when he declared so early in the process that he would hang the jury no matter what. This finding was predicated on the admission of Juror 12 as reported by the court's deputy clerk. The facts became clear to the court after hearing the credible testimony of the deputy clerk and the less credible testimony of Juror 12. The demeanor of Juror 12 before the court confirmed the court's findings.

GSA23–24. The second opinion addressed motions for bail pending appeal from Nicholas and Brand. GSA25. There, Judge Bartle explained:

> The law is well-settled that the court has discretion to act as it did under these circumstances. *See United States v. Kemp*, 500 F.3d 257, 304 (3d Cir. 2007). The court, after taking testimony, specifically found that the juror, following only a few hours of deliberation, stated to the court's courtroom deputy clerk that he would hang this jury no matter what. He could not possibly have reviewed all of the law and evidence of this five-week trial at the time he made his remark. The court examined the deputy clerk and the juror under oath in the presence of counsel for all parties. The

> undersigned found the deputy clerk to be credible and the juror not to be credible. Based on the juror's demeanor, it was clear he would not change his attitude and that his intent had been and would continue to be to refuse to deliberate in good faith concerning the law and the evidence.

GSA32.

After deliberating for approximately 15 hours, the jury returned with its verdicts on June 21, 2016, finding the defendants guilty on most counts. Fattah, Vederman, and Brand were convicted on all counts. The jury acquitted Bowser on sixteen counts, but found her guilty of the bribery conspiracy and the associated charges of bank fraud, making false statements to a financial institution, falsifying records, and money laundering (Counts 16, 19, 20, 21 and 22). The jury also acquitted Nicholas of wire fraud (Count 24). *See* Nicholas Supp. App. (NSA) 36.

The following week, on June 27, the Supreme Court issued its opinion in *McDonnell v. United States*, 136 S. Ct. 2355 (2016). *McDonnell* provided new limitations on the definition of "official acts" as used in the honest services fraud and bribery statutes under which Fattah and Vederman had been convicted. *Id.* at 2369–72. Fattah and Vederman both moved to set aside their convictions. The District Court "acknowledge[d] that under *McDonnell* our instructions to the jury on the meaning of official act turned out to be incomplete and thus erroneous." JA103. But the Court held that "the incomplete and thus erroneous jury instruction on the meaning of official acts did not influence the

verdict on the bribery counts" and upheld the verdict on Counts 16–18 and 22–23. JA107, 121.

Fattah, Vederman, and Bowser had more success with their other post-verdict motions. The District Court, in a thoughtful opinion, granted relief under Federal Rule of Criminal Procedure 29, acquitting Vederman of the RICO conspiracy (Count 1) and Fattah, Vederman, and Bowser of bank fraud, making false statements to a financial institution, and falsifying records (Counts 19, 20, and 21). JA37–139.

This appeal followed.[8] The defendants raise a variety of challenges to their convictions. All defendants but Bowser challenge the District Court's decision to dismiss Juror 12. Fattah and Vederman argue that the District Court erred in upholding the jury's verdict on the bribery and honest services fraud counts in light of the Supreme Court's decision in *McDonnell*. Fattah, Brand and Nicholas challenge the sufficiency of the evidence underlying the RICO conviction. Several of the defendants contend the District Court erred in its instruction on intent and by sending the indictment out to the jury. There are also several evidentiary challenges.[9] The

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[8] Fattah, Brand, Vederman, and Nicholas each filed a timely notice of appeal, but Bowser did not challenge her convictions.

[9] Pursuant to Rule 28(i), "Fattah joins in the arguments of Herbert Vederman, Robert Brand, and Karen Nicholas to the extent their arguments on appeal apply to Mr. Fattah." Fattah Br. 19 n.69. Federal Rule of Appellate Procedure 28(i) provides that a defendant, "[i]n a case involving more than one appellant . . . may adopt by reference a part of another's brief." Here, Fattah's decision to join fails to specify which of the many issues of

Government cross-appeals from the District Court's judgment acquitting Fattah and Vederman on Counts 19 and 20, arguing that the District Court erred in interpreting the definition of a "mortgage lending business" under 18 U.S.C. § 27. We address these arguments in turn.

We hold that the District Court erred in upholding the jury verdict in light of *McDonnell*, and we will therefore reverse and remand for retrial on Counts 16, 17, 18, 22, and 23. We also hold that the District Court erred in acquitting Fattah and Vederman on Counts 19 and 20. Because the jury's verdict was supported by the evidence, we will reinstate the convictions as to those counts. In all other respects, we will affirm the judgment of the District Court.

III. Juror Misconduct and Dismissal of Juror 12[10]

Defendant Fattah challenges the District Court's decision to conduct an in camera inquiry into alleged juror misconduct and the ultimate dismissal

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his codefendants he believes worthy of our consideration. Rather, it appears that he presumes we will scour the record and make that determination for him. This type of blanket request fails to satisfy Rule 28(a)(5)'s directive requiring that the "appellant's brief must contain . . . a statement of the issues presented for review." Fed. R. App. P. 28(a)(5). We conclude that expecting the appellate court to identify the issues to be adopted simply results in the abandonment and waiver of the unspecified issues. *See Kost v. Kozakiewicz*, 1 F.3d 176, 182 (3d Cir. 1993).

[10] The District Court had jurisdiction under 18 U.S.C. § 3231. We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

of Juror 12.[11] We reject both challenges. The record reveals credible allegations of juror misconduct and a sufficient basis to support the finding that Juror 12 violated his oath.

A. Investigation of Alleged Juror Misconduct

We first consider whether the District Court erred in its handling of the two notes from jurors. A trial court's response to allegations of juror misconduct is reviewed under an abuse of discretion standard. *United States v. Boone*, 458 F.3d 321, 326 (3d Cir. 2006) (citing *United States v. Resko*, 3 F.3d 684, 690 (3d Cir. 1993)). We conclude that the District Court did not abuse its discretion in addressing the issues raised in the jurors' notes to the Court.

Trial courts are afforded discretion in responding to allegations of juror misconduct. This is so because "the trial court is in a superior position to observe the 'mood at trial and the predilections of the jury.'" *Resko*, 3 F.3d at 690 (quoting *United States v. Chiantese*, 582 F.2d 974, 980 (5th Cir. 1978)). But this discretion is not unlimited. Once the jury retires to deliberate, the confidentiality of its deliberations must be closely guarded. An accused is constitutionally entitled to be tried before a jury of his peers. As ordinary citizens, jurors are "expected to speak, debate, argue, and make decisions the way ordinary people do in their daily lives." *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 874 (2017) (Alito, J., dissenting). To protect against intrusion

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[11] Vederman, Nicholas, and Brand adopt Fattah's claim of reversible error concerning the dismissal of Juror 12.

into a defendant's right to be judged only by fellow citizens, "the door to the jury room [is] locked." *Id.* at 875.

In *Boone*, this Court considered the threshold for intervention by a trial judge who is presented with allegations of juror misconduct during the course of deliberations. 458 F.3d at 327. We recognized that "[i]t is beyond question that the secrecy of deliberations is critical to the success of the jury system." *Id.* at 329. But that secrecy abuts a competing interest—the jury's proper execution of its duties. That is, "a juror who refuses to deliberate or who commits jury nullification violates the sworn jury oath and prevents the jury from fulfilling its constitutional role." *Id.* Recognizing these competing interests, we declined in *Boone* to adopt a sweeping limitation on a trial court's ability to investigate allegations of misconduct during jury deliberations. *See id.* Consistent with the standard applied at other stages of criminal proceedings, *Boone* teaches that "where substantial evidence of jury misconduct—including credible allegations of jury nullification or of a refusal to deliberate—arises during deliberations, a district court may, within its sound discretion, investigate the allegations through juror questioning or other appropriate means." *Id.*

Fattah argues that the District Court had no basis to question any of the jurors. Fattah Br. 20. We disagree. In *Boone*, notes from the jury presented substantial credible evidence of misconduct. 458 F.3d at 330. Here, the initial note from the foreperson alleged that Juror 12 "refuse[d] to vote by the letter of the law," would "not listen or reason with anybody," and that he had "an agenda or ax to grind"

with the Government. JA5916. The note contained allegations of both a refusal to deliberate and a suggestion of nullification. A refusal to deliberate is a violation of a juror's oath. *Boone*, 458 F.3d at 329 (citing *United States v. Baker*, 262 F.3d 124, 130 (2d Cir. 2001) ("It is well-settled that jurors have a duty to deliberate.")). Moreover, nullification—a juror's refusal to follow the law—is a violation of the juror's sworn oath to render a verdict according to the law and evidence. *See United States v. Thomas*, 116 F.3d 606, 614–18 (2d Cir. 1997) (discussing both "benevolent" and "shameful" examples of juror nullification, but "categorically reject[ing] the idea that, in a society committed to the rule of law, jury nullification is desirable or that courts may permit it to occur when it is within their authority to prevent"). The second jury note, signed by nine jurors, supported the claim of misconduct by asserting that Juror 12 was "incapable of making decision[s]" and was "constantly scream[ing]" at the other jurors. JA5916–17. We conclude that the District Court did not abuse its discretion in deciding to initially question Juror 2, and subsequently, Jurors 12, 3, 6 and 1.

Fattah also challenges the scope of the District Court's questioning. He argues that the rights to an impartial jury and to a unanimous verdict "would be rendered toothless if trial courts had free rein to question jurors during deliberations." Fattah Br. 36. Indeed, we acknowledged the legitimacy of such a concern in *Boone*. Despite adopting a modest "credible allegations" standard for investigating misconduct, we "ke[pt] in mind the importance of maintaining deliberative secrecy." *Boone*, 458 F.3d at 329. Fattah asserts that the trial court's questions to

the five jurors were "intrusive and pointed" and "nothing like the questioning . . . approved in *Boone*." Fattah Br. 38. But Fattah does not elaborate on how, in his view, the questions posed by Judge Bartle specifically intruded into deliberative secrecy.

To be sure, Judge Bartle's questioning of each juror was more extemporaneous than the juror questioning in *Boone*. There, the district court asked a single juror four "concise and carefully-worded" questions. 458 F.3d at 330. Judge Bartle's *voir dire* of each of the five jurors took on a more conversational tone. We take no issue with that approach. The substance of the judge's questions was limited and mirrored that of questions we deemed appropriate in *Kemp*. There, the court conducted three rounds of questioning. In the first round, each juror was asked:

> (1) "Are you personally experiencing any problems with how the deliberations are proceeding without telling us anything about the votes as to guilt or innocence? If yes, describe the problem." (2) "Are all the jurors discussing the evidence or lack of evidence?" (3) "Are all the jurors following the court's instructions on the law?"

Kemp, 500 F.3d at 273. In the second and third rounds, each juror was asked:

> (1) "Is there any juror or jurors who are refusing to deliberate?" (2) "Is there any juror who is refusing to discuss the evidence or lack of evidence?" (3) "Is there any juror who is refusing to follow the Court's instructions?"

Id. at 274. Here, Judge Bartle began his *voir dire* of each juror by stating that he did not wish for the

juror to discuss the merits of the case or to reveal the content of the deliberations that had taken place. He asked the jurors whether screaming was occurring, whether the jurors were discussing the evidence, whether Juror 12 was placing his hands on other jurors, and whether Juror 12 was unwilling to follow his instructions.

Fattah points to no specific question posed or topic discussed that was inappropriate, and we see little to no substantive difference between the questions here and those asked by the trial judge in *Kemp*. As in *Kemp*, "the District Court took care to limit its questions to appropriate matters that did not touch on the merits of the jury's deliberation, and expressly informed each juror on multiple occasions that he or she should not reveal the substance of the deliberations." *Id.* at 302 (citing *United States v. Edwards*, 303 F.3d 606, 634 n.16 (5th Cir. 2002)).

Fattah also argues that once the remarks of Juror 2 and Juror 12 revealed no further evidence of misconduct, the court had no basis to question other jurors. Fattah Reply 19. Yet, our cases make clear that a trial court may, in its discretion, examine each juror. *Kemp*, 500 F.3d at 302 ("We have recognized that there are times in which individual questioning is the optimal way in which to root out misconduct."). Indeed, "the District Court must utilize procedures that will 'provide a reasonable assurance for the discovery of prejudice.'" *Id.* (quoting *Martin v.*

Warden, Huntingdon State Corr. Inst., 653 F.2d 799, 807 (3d Cir. 1981)).[12]

Judge Bartle, a very able and experienced district judge, was in the best position to determine what type of inquiry was warranted under the circumstances. We conclude that his questioning of the five jurors was not an abuse of discretion. *See id.* at 302.

B. Dismissal of Juror 12

Fattah, joined by Vederman, Brand, and Nicholas, strongly contends that the District Court committed reversible error by dismissing Juror 12. "We review the dismissal of a juror for cause for abuse of discretion." *Kemp*, 500 F.3d at 303. That deferential standard compels us to affirm.

Rule 23(b) of the Federal Rules of Criminal Procedure permits a trial court to excuse a deliberating juror for good cause. *See id.* (citing Fed. R. Crim. P. 23(b)). Good cause exists where a juror refuses to apply the law, refuses to follow the court's

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[12] Our cases do not suggest that a trial judge confronted with allegations that a jury's deliberations are being obstructed by one of its members should always resort to interviewing jurors. Reinstructing the jury on its duty to deliberate will often be the better course at the first sign of trouble. Mere disagreement among jurors—even spirited disagreement—is no ground for intervention. Furthermore, intrusive or leading questions about the deliberative process may work against the twin goals of protecting that process and ensuring that jurors remain faithful to their oaths. We share the Eleventh Circuit's preference of "err[ing] on the side of too little inquiry as opposed to too much." *United States v. Oscar*, 877 F.3d 1270, 1287 (11th Cir. 2017) (quoting *United States v. Augustin*, 661 F.3d 1105, 1133 (11th Cir. 2011)).

instructions, refuses to deliberate with his or her fellow jurors, or demonstrates bias. *See Kemp*, 500 F.3d at 305–06; *United States v. Oscar*, 877 F.3d 1270, 1287 (11th Cir. 2017); *Thomas*, 116 F.3d at 617. Good cause does not exist when there is reasonable but sustained disagreement about how a juror views the evidence. The courts of appeals are emphatic that trial courts "may not dismiss a juror during deliberations if the request for discharge stems from doubts the juror harbors about the sufficiency of the government's evidence." *Kemp*, 500 F.3d at 303 (quoting *United States v. Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987)); *see also Oscar*, 877 F.3d at 1287 (same); *United States v. Symington*, 195 F.3d 1080, 1087 (9th Cir. 1999); *Thomas*, 116 F.3d at 622.

To reinforce a defendant's right to a unanimous jury, we have adopted a high standard for juror dismissal. *Kemp*, 500 F.3d at 304 & n.26. "[D]istrict courts may discharge a juror for bias, failure to deliberate, failure to follow the district court's instructions, or jury nullification when there *is no reasonable possibility that the allegations of misconduct stem from the juror's view of the evidence*." *Id.* at 304 (emphasis added). This "no reasonable possibility" standard is "by no means lax." *Id.* Rather, "[i]t corresponds with the burden for establishing guilt in a criminal trial." *Id.*

We first applied this standard in *Kemp*, but have not had occasion to do so since. There, the evidence supporting the district court's removal decision was "overwhelming." 500 F.3d at 304. Ten jurors separately and consistently reported that a juror was improperly biased, and did so only after three rounds

of questioning and careful and correct instructions from the district court as to the distinction between appropriate skepticism and impermissible bias. *Id.* at 304–05; *see id.* at 275–76 (district court's instruction). The testimony also showed that the juror in question refused to deliberate or to discuss the evidence with her fellow jurors. *Id.* at 305.

Whether the evidence of misconduct in this case is as strong as that in *Kemp* is beside the point. After only four hours of deliberations, Juror 12 stated unequivocally to the courtroom deputy that he was "going to hang" the jury, and that it would be "11 to 1 *no matter what*." JA5981–82 (emphasis added). These statements, coupled with the District Court's finding that Juror 12 lacked credibility, provided a sufficient basis for Juror 12's dismissal.

As grounds for excusing Juror 12, the District Court found that he refused to deliberate in good faith, "delayed, disrupted, impeded, and obstructed the deliberative process and had the intent to do so," JA5995, and that he was "intent on . . . hanging this jury no matter what the law is, no matter what the evidence is." *Id.* The District Court determined from this that Juror 12 had violated his oath as a juror and that no further instructions or admonitions could rehabilitate the juror. *Id.* The District Court based these findings on personal observation, including Juror 12's words and demeanor, and making the specific finding that Juror 12 was not credible. That finding is amply supported by the record.

In *United States v. Abbell*, 271 F.3d 1286, 1303 (11th Cir. 2001), the Ninth Circuit recognized that "the demeanor of the pertinent juror is important to

juror misconduct determinations" because the "juror's motivations and intentions are at issue." That court emphasized, as we do, that a district judge is best situated to assess the demeanor of a juror. *Id.* Here, Juror 12 stated he could not recall putting his hand on another juror's shoulder, while his fellow jurors' testimony was consistent on this point. Juror 12 also failed, at first, to recall his troubling statements to the courtroom deputy despite having made those statements only the previous afternoon. When questioned a second time and asked directly about the statements, he admitted to saying that he would hang the jury but claimed he could not "really remember" saying "no matter what" the day before. JA5989–90. Juror 12's spotty recollection of the previous day's events further supports the District Court's finding that he was not credible.

Fattah argues that the credibility determination was not, by itself, a sufficient reason to dismiss the juror because the record demonstrates more than a reasonable possibility that the complaints about his conduct stemmed from Juror 12's own view of the Government's case. Fattah Reply Br. 11; Fattah Br. 25, 28. Fattah claims that the District Court abused its discretion by dismissing Juror 12 "on the basis of, in effect, six words the juror purportedly said to the court's deputy after he was verbally attacked by other jurors." Fattah Br. 24. According to Fattah, the questioning of the other jurors "confirmed that there were no legitimate grounds for removing juror 12." *Id.* at 26. We conclude otherwise.

"A district court's finding on the question whether a juror has impermissibly refused to participate in the deliberation process is a finding of

fact to which appropriate deference is due." *Baker*, 262 F.3d at 130. While district courts must apply a high standard for juror dismissal, their underlying findings are afforded considerable deference on appeal. *Kemp*, 500 F.3d at 304 (citing *Abbell*, 271 F.3d at 1302–03). We will reverse only if the decision to dismiss a juror was "without factual support, or for a legally irrelevant reason." *Abbell*, 271 F.3d at 1302 (citation omitted).

Here, the District Court had a legitimate reason for removing Juror 12. Refusal to deliberate constitutes good cause for dismissal. Although the judge did not expressly articulate the *Kemp* standard when he announced that he would dismiss Juror 12, he did acknowledge the "no reasonable possibility" standard in his discussion with counsel. The unmistakable import of the District Court's statement from the bench is that there was no reasonable possibility that Juror 12's intransigence was based on his view of the evidence. *See Oscar*, 877 F.3d at 1288 n.16.

Fattah contends that there is no record support for the finding that Juror 12 said "he was going to hang this jury no matter what." Fattah Br. 29. To be sure, the courtroom deputy's testimony is not that Juror 12 used the words "hang this jury" and "no matter what" in the same sentence. She testified that Juror 12 first stated "I am going to hang this jury," then *later* stated "it is going to be 11 to 1 no matter what." JA5981–82. This is a distinction without a difference. Likewise, Fattah challenges the District Court's finding that Juror 12 was determined to hang the jury "no matter what the law is" and "no matter what the evidence is." Fattah Br. 29.

Although there is no evidence that Juror 12 uttered the phrases "no matter what the law is" or "no matter what the evidence is," the District Court was describing the import of Juror 12's statements. This was not error.

Fattah expresses the concern that "[i]f jurors are asked the right questions or interrogated long enough, it would not be difficult for a trial court to elicit testimony from [a] majority [of] jurors that can be held up as evidence of a dissenting juror's bias or refusal to deliberate." Fattah Br. 22. He also worries that a group of jurors might have an incentive to rid themselves of a juror who holds a different view. *Id.* These are valid concerns—but no basis existed for such concerns in this case. Juror 12's own words provided most of the support for his eventual dismissal. Furthermore, his statements were made early in the deliberations, in a complex case, before any juror could reasonably be expected to have reached final verdicts on the twenty-nine counts before the jury.

The able District Judge did not err in finding that Juror 12 refused to deliberate and therefore violated his oath.

IV. The District Court's Instructions Under *McDonnell*

On appeal, Fattah and Vederman renew their challenge to the jury instructions given on Counts 3, 16, 17, 18, 22, and 23, concerning the meaning of the term "official act" as used in the bribery statute (pursuant to which both were convicted) and the honest services fraud statute (pursuant to which Fattah alone was convicted).

In light of the Supreme Court's opinion in *McDonnell v. United States*, 136 S. Ct. 2355 (2016), released the week after the jury verdict, the District Court conceded that its instructions were incomplete and erroneous, at least as to Counts 16–18. Nevertheless, the District Court held that the erroneous jury instructions had not influenced the verdict on the bribery counts, and declined to set aside Fattah and Vederman's convictions. As to Counts 16–18 and 22–23, we disagree, and will reverse the District Court's judgment. The District Court's judgment with respect to Count 3, which did not involve Vederman, will be affirmed. JA78–79.

A. The *McDonnell* Framework

In *McDonnell*, the Supreme Court interpreted the term "official act" as defined in 18 U.S.C. § 201(a)(3). 136 S. Ct. at 2368. The statute defines an "official act" as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." 18 U.S.C. § 201(a)(3). The *McDonnell* Court distilled this definition into two requirements:

> First, the Government must identify a "question, matter, cause, suit, proceeding or controversy" that "may at any time be pending" or "may by law be brought" before a public official. Second, the Government must prove that the public official made a decision or took an action "on" that question, matter, cause, suit, proceeding, or controversy, or agreed to do so.

136 S. Ct. at 2368. Applying this two-step test to Governor Robert McDonnell's convictions, the Supreme Court concluded that "the jury was not correctly instructed on the meaning of 'official act,'" and as a result, "may have convicted Governor McDonnell for conduct that is not unlawful." *Id.* at 2375. Given that uncertainty, the Court "[could not] conclude that the errors in the jury instructions were 'harmless beyond a reasonable doubt.'" *Id.* (quoting *Neder v. United States*, 527 U.S. 1, 16 (1999)). The Supreme Court, therefore, vacated Governor McDonnell's convictions. *Id.*

McDonnell lays out a clear path for the Government to follow in proving that an accused has performed an "official act." First, the Government must "identify a 'question, matter, cause, suit, proceeding or controversy' that 'may at any time be pending' or 'may by law be brought' before a public official." 136 S. Ct. at 2368 (quoting 18 U.S.C. § 201(a)(3)). This first step is divided into two sub-components. In Step 1(A), the Government must "identify a 'question, matter, cause, suit, proceeding or controversy.'" *Id.* Step 1(B) then clarifies that the identified "question, matter, cause, suit, proceeding or controversy" be one that "'may at any time be pending' or 'may by law be brought' before a public official." *Id.*

Under Step 1(A), a "question, matter, cause, suit, proceeding or controversy" must be "a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee." *Id.* at 2372. Importantly, "a typical meeting, telephone call, or event arranged by a public official"

does not qualify as such a formal exercise of governmental power. *Id.* at 2368.

Step 1(B) then requires us to ask whether the qualifying "question, matter, cause, suit, proceeding or controversy" was one that "'may at any time be pending' or 'may by law be brought' before a public official." *Id.* As the *McDonnell* Court clarified, "'[p]ending' and 'may by law be brought' suggest something that is relatively circumscribed—the kind of thing that can be put on an agenda, tracked for progress, and then checked off as complete." *Id.* at 2369; *accord United States v. Repak*, 852 F.3d 230, 252 (3d Cir. 2017) (quoting *McDonnell*, 136 S. Ct. at 2369). By contrast, matters described at a high level of generality—for example, "[e]conomic development," "justice," and "national security"—are not sufficiently "focused and concrete." *McDonnell*, 136 S. Ct. at 2369.

In *McDonnell*, the Court concluded that at least three questions or matters identified by the Fourth Circuit were sufficiently focused:

> (1) whether researchers at any of Virginia's state universities would initiate a study of [a drug];
>
> (2) whether the state-created Tobacco Indemnification and Community Revitalization Commission would allocate grant money for the study of [a chemical compound]; and
>
> (3) whether the health insurance plan for state employees in Virginia would include [a specific drug] as a covered drug.

Id. at 2370 (internal quotations omitted) (quoting *United States v. McDonnell*, 792 F.3d 478, 515–16

(4th Cir. 2015)). We provided guidance in the form of a fourth example in *Repak*, when we held that a redevelopment authority's awarding of contracts was "a concrete determination made by the [redevelopment authority's] Board of Directors." 852 F.3d at 253.

Step 2 requires the Government to prove that the public official made a "decision" or took "an action" on the identified "question, matter, cause, suit, proceeding or controversy." *McDonnell*, 136 S. Ct. at 2368. The *McDonnell* Court explained:

> Setting up a meeting, hosting an event, or calling an official (or agreeing to do so) merely to talk about a research study or to gather additional information . . . does not qualify as a decision or action on the pending question of whether to initiate the study. Simply expressing support for the research study at a meeting, event, or call—or sending a subordinate to such a meeting, event, or call—similarly does not qualify as a decision or action on the study, as long as the public official does not intend to exert pressure on another official or provide advice, knowing or intending such advice to form the basis for an "official act."

Id. at 2371. The Court further clarified:

> If an official sets up a meeting, hosts an event, or makes a phone call on a question or matter that is or could be pending before another official, that could serve as evidence of an agreement to take an official act. A jury could conclude, for example, that the official was attempting to pressure or advise another official

> on a pending matter. And if the official agreed to exert that pressure or give that advice in exchange for a thing of value, that would be illegal.

Id.

Here, Fattah was charged with engaging in three categories of official acts, which we analyze in accordance with the *McDonnell* framework. In Counts 16–18 and 22–23, Fattah is alleged to have set up a meeting between Vederman and the U.S. Trade Representative, attempted to secure Vederman an ambassadorship, and hired Vederman's girlfriend, all in return for a course of conduct wherein Vederman provided things of value to Fattah.

In this case, as in *McDonnell*, the jury instructions were erroneous. We conclude that the first category of the charged acts—setting up a meeting between Vederman and the U.S. Trade Representative—is not unlawful, and that the second category—attempting to secure Vederman an ambassadorship—requires reconsideration by a properly instructed jury. The third charged act—hiring Vederman's girlfriend—is clearly an official act. But because we cannot isolate the jury's consideration of the hiring from the first two categories of charged acts, we must reverse and remand the judgment of the District Court.

B. The Kirk Meeting

We turn first to Fattah's scheduling of a meeting between Vederman and the U.S. Trade Representative, Ron Kirk. Under *McDonnell*, "setting up a meeting . . . does not, standing alone,

qualify as an 'official act.'" 136 S. Ct. at 2368. Fattah's setting up the meeting between Vederman and Kirk was therefore not an official act, a concession implicit in the Government's opening brief. *See* Gov't Br. 32 (failing to mention the Kirk meeting as one of the "two categories" of allegedly "official acts"). But the jury was not properly instructed on this point. Without the benefit of the principles laid down in *McDonnell*, the jury was free to conclude that arranging the Kirk meeting was an official act—and it may have done so. The District Court's erroneous jury instructions, therefore, cannot survive harmless error review.

In a footnote in its brief to this Court, the Government argues that evidence about the Kirk meeting was offered only "because it established the strength of Vederman's desire to be an ambassador" and not because the Government was attempting to establish the meeting as an independent official act. *Id.* at79–80 n.6. But the record undercuts the Government's post hoc justification.

The indictment, provided to the jury in redacted form for use in its deliberations, lists Fattah's setting up the Kirk meeting as an official act under the heading "FATTAH's Official Acts for VEDERMAN." JA494. Under this heading are three distinct subheadings: (1) "The Pursuit of an Ambassadorship," (2) "The Pursuit of Another Executive Branch Position," and (3) "Hiring the Lobbyist's Girlfriend to the Congressional Staff." JA494–95. The second subheading, "The Pursuit of Another Executive Branch Position," describes the arrangement of the Kirk meeting. Quite clearly, then, this three-part structure demonstrates that

setting up the Kirk meeting was one of three distinct categories of official acts alleged by the Government.

Although there is some support for the Government's argument that evidence of the Kirk meeting was presented at trial only to establish the extent of Vederman's interest in becoming an ambassador, JA827, 852–53 (mentioning the Kirk meeting in close proximity to references to Fattah's attempts to secure Vederman an ambassadorship), it is undermined by language in the redacted indictment itself, and by the way in which the Government presented its case at trial as a "pattern" of connected acts.

The redacted indictment, for example, refers to the Kirk meeting as "The Pursuit of *Another* Executive Branch Position." JA495 (emphasis added). The use of the word "Another" strongly suggests that evidence about the Kirk meeting was not merely evidence of Fattah's attempt to secure Vederman an ambassadorship, but was also evidence of a separate and distinct attempt to secure Vederman a position on a federal trade-related commission. The redacted indictment also notes that "[i]n or around May 2011, with little progress made on securing an ambassadorship for VEDERMAN, FATTAH *turned towards* obtaining for VEDERMAN an appointment in the Executive Branch to a federal trade commission." *Id.* (emphasis added). The words "turned towards," taken literally, clearly convey that arranging the Kirk meeting was presented as distinct from Fattah's efforts to secure Vederman an ambassadorship.

The District Court denied Fattah and Vederman a new trial on Counts 17 and 18, referring to

evidence of the Kirk meeting as "de minimis" and noting that "Kirk's testimony during this lengthy trial lasted a mere sixteen minutes." JA97 n.14. In the District Court's view, evidence of the Kirk meeting "played no role in the outcome" of the case. *Id.* Considering the record in light of *McDonnell*, we are not so sure.

Although it is possible that evidence of the Kirk meeting played a minor role at trial when compared to the other acts on which the Government presented evidence, the redacted indictment suggests that the Kirk meeting was a significant part of the Government's case. The indictment dedicates five paragraphs to describing the Kirk meeting, but just three paragraphs to describing the hiring of Vederman's girlfriend—a hiring that, as we explain below, is clearly an official act. JA495–96. While neither the number of minutes used at trial nor the number of paragraphs contained in an indictment is a dispositive unit of measurement for determining the significance of evidence, we conclude that the District Court's erroneous jury instructions pertaining to the Kirk meeting were not harmless.

We conclude, in accordance with *McDonnell*, that Fattah's arranging a meeting between Vederman and the U.S. Trade Representative was not itself an official act. Because the jury may have convicted Fattah for conduct that is not unlawful, we cannot conclude that the error in the jury instruction was harmless beyond a reasonable doubt, and we must vacate and remand the convictions of Fattah and Vederman as to Counts 16, 17, 18, 22 and 23.

C. Fattah's Efforts to Secure Vederman an Ambassadorship

The nature of Fattah's efforts to secure Vederman an ambassadorship is less clear, and presents a closer question than the Kirk meeting. We ultimately conclude that the question warrants remand so that it may be answered by a properly instructed jury. On remand, the jury must decide whether Fattah's conduct constituted a "decision" or "action" under Step 2 of the *McDonnell* analysis.

At the outset, it is clear to us that, under Steps 1(A) and 1(B), a formal appointment of Vederman as an ambassador would qualify as a "matter" that "may at any time be pending" before a public official. The formal appointment of a particular person (Vederman), to a specific position (an ambassadorship), constitutes a matter that is sufficiently focused and concrete. The formal appointment of an ambassador is a matter that is "pending" before the President—the constitutional actor charged with nominating ambassadors—as well Senators, who are charged with confirming the President's ambassadorial nominations. U.S. Const. art. II § 2 ("[H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors . . . ."). It is beyond cavil that the formal appointment of an ambassador satisfies both sub-components of *McDonnell*'s Step 1.

Turning to Step 2, we consider whether Fattah's efforts to secure Vederman an ambassadorship qualify as making a "decision" or taking "an action" on the identified "matter" of appointment. *McDonnell*, 136 S. Ct. at 2368. Although those efforts—three emails, two letters, and one phone

call—do not *themselves* qualify as a "question, matter, cause, suit, proceeding, or controversy" under *McDonnell*'s Step 1, they may nonetheless qualify as the making of a "decision" or taking "an action" on the identified matter of appointment. *Id.*

McDonnell's Step 2 requires us to determine whether Fattah's efforts qualify as permissible attempts to "express[] support," or impermissible attempts "to pressure or advise another official on a pending matter." *Id.* at 2371. At trial, the jury was not instructed that they had to place Fattah's efforts on one side or the other of this divide. The jury might even have thought they were permitted to find Fattah's efforts—three emails, two letters, and one phone call—to *themselves* be official acts, rather than a "decision" or "action" on the properly identified matter of appointment. Such a determination would have been contrary to the dictates of *McDonnell*.

Faced with such uncertainty, we cannot assume the jury verdict was proper. Although the jury *might* not have concluded that Fattah's efforts were themselves official acts, and although the jury *might* not have concluded that those efforts crossed the line into impermissible attempts "to pressure or advise," we are unable to conclude that the jury *necessarily* did so. Nor can we, on the cold record before us, determine whether Fattah's efforts to secure Vederman an ambassadorship crossed the line. Determining, for example, just how forceful a strongly worded letter of recommendation must be before it becomes impermissible "pressure or advice" is a fact-intensive inquiry that falls within the domain of a properly instructed jury. Should the Government elect to retry these counts after remand,

the finder of fact will need to decide whether Fattah's efforts constituted permissible attempts to "express[] support," or impermissible attempts "to pressure or advise another official on a pending matter." *Id.*

D. The Zionts Hiring

The third group of acts charged in the Fattah–Vederman scheme involves Fattah's decision to hire Vederman's girlfriend, Alexandra Zionts, as a congressional staffer. We conclude that the hiring was an official act. A brief analysis of *McDonnell*'s two steps suffices to show why this is so.

Here, under *McDonnell*'s Step 1(A), the relevant "matter" is the decision to hire Zionts. Step 1(B) of the analysis is satisfied because the hiring decision was "pending" before Fattah himself. And that hiring was "focused and concrete," "within the specific duties of an official's position—the function conferred by the authority of his office." *Id.* at 2369. Finally, *McDonnell*'s Step 2 requires that the "Government . . . prove that the public official made a decision or took an action 'on' [the identified] question, matter, cause, suit, proceeding, or controversy, or agreed to do so." *Id.* at 2368. Fattah's decision to hire Zionts clearly satisfies that requirement. We therefore conclude that the hiring of Zionts was an official act under *McDonnell*.

Vederman concedes that the Zionts hiring was an official act. Oral Argument Transcript at 5–6. Fattah, for his part, maintains that "hiring someone for a routine, part-time, short-term position falls well outside [the] definition [of 'official act'] and is nothing like a lawsuit, agency determination, or committee

hearing, even if each shares the happenstance that federal funds will be used." Fattah Reply Br. 25.

Fattah's argument lacks traction. Official acts need not be momentous decisions—or even notable ones. Judges, for example, make "routine" evidentiary rulings every day, and yet it is beyond question that those rulings are official acts. In the realm of official acts, it is of no moment that Zionts provided only "part-time, short term" labor. When a public official hires an employee to work in his government office, he has engaged in an official act.

* * *

If we could conclude that the Zionts hiring was the *only* category of actions that the jury relied on when it found that Fattah performed an official act under Counts 16–18 and 22–23, remand would not be necessary. But, as we have explained, we cannot rule out that the jury erroneously convicted Fattah and Vederman based on other actions that were not official acts under *McDonnell*.[13]

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[13] More specifically, the incomplete, and therefore erroneous, instructions could have led the jury to commit at least one of three mistakes. First, the jury could have improperly convicted Vederman and Fattah based on the Kirk meeting alone, or misunderstood the Kirk meeting to be a necessary component of an impermissible "pattern" of official acts. Second, the jury might have concluded that Fattah's efforts to secure Vederman an ambassadorship were *themselves* official acts. Third, the jury might have concluded that Fattah's efforts to secure Vederman an ambassadorship were merely attempts to "express[] support," rather than to "exert pressure . . . or provide advice," but nonetheless erroneously concluded that those expressions of support were official acts. *McDonnell*, 136 S. Ct. at 2371.

The Government argues that because the Zionts hiring was an official act, the effect of the erroneous jury instructions could be no more than harmless. The jury's verdict, the Government contends, permits us to deduce that the jury necessarily concluded the Zionts hiring was an official act, and that this conclusion alone supported Fattah's and Vederman's convictions as to Counts 16–18 and 22–23—regardless of whether the jury erroneously found any unofficial acts to be official acts. We disagree.

Fattah and Vederman objected to the definition of "official act" at trial. We thus apply the harmless error standard of review. *McDonnell*, 136 S. Ct. at 2375. The Government argues that because the jury convicted Fattah and Vederman of illegally laundering the proceeds of a "scheme to commit bribery" under Count 23, the jury found that the scheme must have encompassed only the Zionts hiring. JA531. That would mean that the jury did not conclude that the "scheme to commit bribery" included any acts that *McDonnell* now makes clear were unofficial. Yet the redacted indictment, jury instructions, and the fact that the Government presented its case under a "pattern" theory at trial compel us to reject the Government's argument.

The very first sentence under Count 23 of the redacted indictment incorporates *all three* categories of "Overt Acts" contained within paragraphs "58 through 95 of Count One."[14] All three of these

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[14] JA531. Paragraphs 58 through 95 of Count 1 refer to the three categories of allegedly official acts discussed above: (1) "The Pursuit of an Ambassadorship," (2) "The Pursuit of Anoth-

categories fall under a general heading within the redacted indictment titled "The Bribery and Fraud Scheme [redacted]." JA494. The jury had before it instructions for Count 23 which referred to "the alleged bribery *scheme* involving an $18,000 payment," JA448 (emphasis added), and the redacted indictment which referred to "a *scheme* to commit bribery," JA531 (emphasis added). The parallel language could well lead a rational jury to conclude that the relevant "scheme" included all three categories of acts listed under the general heading: "The Bribery and Fraud *Scheme* [redacted]." JA494 (emphasis added).

Like the redacted indictment and jury instructions, the Government's trial arguments referred to patterns and a course of conduct, and stressed that the jury need not connect specific payments to particular official acts. In its closing argument to the jury, the Government stated that the alleged "scheme took place over a period of several years. Over and over again you're going to see the same *pattern*." JA5383 (emphasis added). Then, in its rebuttal argument, the Government went out of its way to explicitly distinguish its "pattern" theory from an alternative theory that would have directly connected individual payments to individual acts. As the prosecutor argued to the jury:

> Ms. Recker appears to argue that each thing of value must coincide with some specific official act, but that is not the law and that is not what

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er Executive Branch Position," and (3) the "Hiring of the Lobbyist's Girlfriend to the Congressional Staff." JA494–95.

> Judge Bartle is going to instruct you. Instead what he will tell you is that the government is not required to prove that Vederman intended to influence Fattah to perform a set number of official acts in return for things of value so long as the evidence shows a *course of conduct* of giving things of value, things of value to Fattah *in exchange for a pattern of official acts* favorable to Vederman. In other words a stream of benefits. *These for those, not this for that.*

JA5715–16 (emphases added). In closing to the jury, the Government made several other references to this "pattern" theory,[15] and the District Court referred to this "pattern" theory in its instructions to the jury. As Judge Bartle instructed:

> [I]t is not necessary for the government to prove that a defendant intended to induce a public official to perform a number of official acts in return for things of value.
>
> So as long as the evidence shows *a course of conduct* of giving things of value to a public official in exchange for a *pattern of official acts* favorable to the giver.

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[15] *See, e.g.*, JA5389 ("And the exchange of an official act for a thing of value is called a bribe. There's the pattern. Fattah needs money, Vederman gets an official act."); JA 5393 ("That's why you see the pattern over and over again. Fattah needs money, Vederman gets an official act."); JA5400 ("The same pattern we saw over and over again. Fattah needs money, Vederman gets an official act."); JA5409 ("[Y]ou know that these were bribes because of the pattern you saw over and over and over again. Fattah needs money, Vederman gets an official act, that makes these things a bribe.").

JA5833–34 (emphasis added). On appeal, the Government changes course, asking us to assume that the jury ignored these repeated references to a "pattern of official acts" and instead considered the Zionts hiring and Vederman's $18,000 payment to Fattah as an isolated quid pro quo. This is an invitation to speculate, and we decline to do so.[16] The jury began its deliberations accompanied by a copy of the redacted indictment which alleged a pattern of official acts, consisting of any combination of three categories of acts: pursuing an ambassadorship, arranging the Kirk meeting, and hiring Zionts. In light of the erroneous instructions, and because only one category clearly qualifies as an "official act," the jury's deliberations were fraught with the potential for *McDonnell* error. We will vacate the convictions of Fattah and Vederman as to Counts 16, 17, 18, 22, and 23, and remand to the District Court.

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[16] Providing some support to the Government's ultimately unconvincing argument that the jury considered the Zionts hiring and $18,000 payment in isolation, we note that the redacted indictment does mention those two events side-by-side in paragraph 78 of the indictment's Part V. JA497 ("On January 13, 2012, VEDERMAN wired $18,000 to FATTAH, and six days later, on January 19, 2012, BOWSER emailed VEDERMAN's girlfriend, A.Z., welcoming her as a new employee to FATTAH's Congressional Staff."). But although paragraph 78 mentions the $18,000 wire transfer and the Zionts hiring in the same breath, paragraph 78 does not instruct the jury to connect these two events apart from the rest of the evidence presented at trial. In light of the other instructions and arguments indicating that the jury should not consider the Zionts hiring in isolation, but instead should consider the hiring as one part of a three-part scheme, paragraph 78 is not sufficient to avoid a reversal and remand on the convictions of Fattah and Vederman as to Counts 16–18 and 22–23.

E. Vederman's Sufficiency Challenge to Counts 16–18 and 22–23

Vederman argues that there is insufficient evidence to support a conviction, even if a jury were properly instructed under *McDonnell*. Specifically, Vederman argues that there is insufficient evidence to convict him and Fattah, after remand, on Counts 16–18 and 22–23 because "[a]t least seven of the eight alleged 'official acts' were, as a matter of law, not official at all." Vederman Br. 35. As to the single act that Vederman implicitly concedes to be an official act—the Zionts hiring—Vederman argues that "[t]he only thing that even arguably associates" the Zionts hiring with Vederman was its timing in relation to Vederman's sham purchase of the Fattahs' Porsche. *Id.* According to Vederman, "the undisputed chronology precludes any inference that Vederman conferred this benefit on his friend as an illegal bribe." *Id.* (emphasis omitted). Vederman is wrong. Sufficient evidence was produced at trial to have allowed a properly-instructed jury to convict Fattah and Vederman of Counts 16–18 and 22–23.

To begin with, even if the Zionts hiring had been the sole official act to survive this Court's interpretation of *McDonnell*, there would still be sufficient evidence to convict Fattah and Vederman. Zionts did not receive written notice of her official hiring until six days after the sham Porsche purchase. Moreover, the jury would not be restricted to considering the chronology of the sham purchase alone. It would be free to consider Vederman's entire course of conduct. Under the general heading "VEDERMAN'S Payments and Things of Value to FATTAH," the redacted indictment not only refers to

the $18,000 wire transaction from Vederman to Fattah as part of the sham Porsche purchase, but also to Vederman's $3,000 payment for the college tuition of Simone Muller, Fattah's live-in au pair, as well as thousands of dollars in payments made by Vederman for Chip Fattah's college tuition. JA496–97.

And the Zionts hiring is not the only act to survive our application of *McDonnell*. As we explained, a jury could find that Fattah's efforts to secure Vederman an ambassadorship—three emails, two letters, and a phone call—were an impermissible attempt to "pressure or advise" President Obama, Senator Casey, or both men.[17] This means that a

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[17] Although Fattah's efforts to secure Vederman an ambassadorship present a jury question that is not for us to answer on appeal, we note that not one of these efforts alone could qualify as an official act *itself*. *See McDonnell*, 136 S. Ct. at 2372 ("Setting up a meeting, talking to another official, or organizing an event (or agreeing to do so)—without more—does not fit that definition of 'official act.'"). The relevant question for a jury to consider on remand, then, is whether these actions constituted "a 'decision or action' on a different question or matter"—to wit, the formal appointment of an ambassador. *Id.* at 2369 (emphasis omitted).

Even though the emails, letters, and phone call are not, individually, official acts, it will be for a jury to decide if Fattah's efforts to secure an ambassadorship for Vederman crossed the line from permissible "support" to impermissible "pressure or advice." While we express doubt that some of Fattah's efforts concerning the ambassadorship are, when considered in isolation, enough to cross that line, a properly instructed jury considering all of the facts in context might nonetheless conclude that other efforts—such as a hand-delivered letter to the President of the United States—indeed crossed that line. Further, a jury might find that in the aggregate, three emails, two letters,

properly instructed jury on remand, presented with evidence of Fattah's efforts to secure an ambassadorship for Vederman and evidence of the Zionts hiring, could find more than a single official act.

F. Blue Guardians

In addition to the charges arising from his dealings with Vederman, Fattah was charged in Count 3 with participating in a scheme with Lindenfeld to funnel money to a fraudulent nonprofit organization. In connection with this scheme, Fattah was convicted of conspiring to commit honest services fraud.

Fattah owed Lindenfeld nearly $100,000 for work performed on Fattah's 2007 mayoral campaign. In lieu of repayment, Fattah suggested that Lindenfeld create an entity, later named Blue Guardians, to which Fattah would direct $15,000,000 in public funds by using his position as a member of the House Committee on Appropriations. Nothing in *McDonnell* requires us to upset Fattah's conviction on Count 3.

Step 1(A) of our *McDonnell* analysis requires the Government to "identify a 'question, matter, cause, suit, proceeding or controversy.'" 136 S. Ct. at 2368. Here, the "matter" is the appropriation of millions of dollars in public funds. *See Repak*, 852 F.3d at 253–54 (holding the awarding of redevelopment funds to be an official act). In particular, it was Fattah's

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and a phone call crossed the line and therefore constituted a "decision or action" on the identified matter of appointment.

promise to perform this official act that was unlawful. As *McDonnell* makes clear:

> [A] public official is not required to actually make a decision or take an action on a "question, matter, cause, suit, proceeding or controversy"; it is enough that the official agree to do so. The agreement need not be explicit, and the public official need not specify the means that he will use to perform his end of the bargain.

136 S. Ct. at 2370–71 (internal citations omitted). That Fattah took steps to actually carry out his promise (*e.g.*, by drafting and sending a formal appropriations request on official congressional letterhead) is evidence of his illegal promise. *See id.* at 2371.

Step 1(B) requires the Government to establish that the "'question, matter, cause, suit, proceeding or controversy' . . . 'may at any time be pending' or 'may by law be brought' before a public official." *McDonnell*, 136 S. Ct. at 2368. Appropriating public funds was not only a matter that was pending before Fattah as a member of the Appropriations Committee, it was also a matter that was pending before the Chairman and Ranking Member of an Appropriations Subcommittee to whom Fattah ultimately sent a formal written request. *See id.* at 2369 ("[T]he matter may be pending either before the public official who is performing the official act, or before another public official."). Appropriating millions of dollars in response to the Blue Guardians request is "focused and concrete," and "the kind of thing that can be put on an agenda, tracked for progress, and then checked off as complete." *Id.*

Given Fattah's membership on the Appropriations Committee, this was "something within the specific duties of an official's position—the function conferred by the authority of his office." *Id.* Even if we were to assume, against all reason, that an appropriation is not "something within the specific duties" of either Fattah or the Chairman or Ranking Member of an Appropriations Subcommittee, Fattah's formal *request* for an appropriation was something that Fattah had the authority to do. Like the Executive Director in *Repak*, who lacked authority himself to award redevelopment funds but could request such funds from the Board, Fattah used his position as a Congressman to formally request appropriations for the Blue Guardians. 852 F.3d at 254 ("Repak had the power to, and indeed did, make recommendations to the [redevelopment authority])".

Step 2 of *McDonnell* requires the Government to "prove that the public official made a decision or took an action 'on' that question, matter, cause, suit, proceeding, or controversy, *or agreed to do so*." 136 S. Ct. at 2368 (emphasis added). Here, Fattah agreed to request an appropriation for a bogus purpose. Unlike Fattah's letters, emails, and phone call seeking an ambassadorship for Vederman, there is no potential for the jury to have made a mistake when it found Fattah's Blue Guardians promise unlawful.

Fattah argues that the Government presented "[n]o evidence . . . that would have allowed [the jury] to conclude that [he] made a decision or took an action, or could have done so, on the question whether Blue Guardians would receive a $15 million

federal grant." Fattah Br. 46. This argument misses the point. It was Fattah's *agreement* to engage in the official act of formally requesting the appropriation that was illegal. *See McDonnell*, 136 S. Ct. at 2371.

Lindenfeld's trial testimony provided sufficient evidence of Fattah's illegal agreement. JA1694–96, 1954. Fattah's letter provided additional evidence from which the jury could have concluded that Fattah illegally agreed to perform an official act.[18] In short, the agreement itself was illegal, and the Government provided sufficient evidence for the jury to conclude that the illegal agreement took place.

The Government's evidence in support of the Blue Guardians scheme meets the requirements of *McDonnell*, and the Count 3 verdict will stand.

V. Sufficiency of the Evidence for the RICO Conspiracy Conviction

The jury found Fattah, Vederman, Brand, and Nicholas guilty of the RICO conspiracy charged in Count 1 of the indictment, but acquitted Bowser. Vederman filed a post-verdict motion, and the District Court overturned his RICO conspiracy conviction.

On appeal, Fattah, Brand, and Nicholas challenge the sufficiency of the evidence supporting their RICO conspiracy convictions. We "review[] the

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[18] Despite Fattah's protestation to the contrary, there is evidence that Fattah took steps to carry out his official act. JA6432–33 (Letter from Congressman Fattah to House Appropriations Subcommittee members "request[ing] funding and support for the following projects and programs of critical importance," including $3,000,000 for "Blue Guardians").

sufficiency of the evidence in the light most favorable to the government and must credit all available inferences in favor of the government." *United States v. Riddick*, 156 F.3d 505, 509 (3d Cir. 1998). If a rational juror could have found the elements of the crime beyond a reasonable doubt, we must sustain the verdict. *United States v. Cartwright*, 359 F.3d 281, 286 (3d Cir. 2004), *abrogated on other grounds by United States v. Caraballo-Rodriguez*, 726 F.3d 418 (3d Cir. 2013) (en banc).

The indictment charged a RICO conspiracy in violation of 18 U.S.C. § 1962(d), which makes it "unlawful for any person to conspire to violate" § 1962(c). Section 1962(c) provides:

> It shall be unlawful for any person . . . associated with any enterprise engaged in, or the activities of which affect, interstate . . . commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . .

18 U.S.C. § 1962(c).

In *Salinas v. United States*, 522 U.S. 52 (1997), the defendant was convicted of a § 1962(d) RICO conspiracy, but a jury acquitted him of the substantive RICO offense under § 1962(c). *Id.* at 55. The Supreme Court rejected Salinas's contention that his conviction had to be set aside because he had neither committed nor agreed to commit the two predicate acts required for the § 1962(c) offense. *Id.* at 66. The Court declared that liability for a RICO conspiracy under § 1962(d), "unlike the general conspiracy provision applicable to federal crimes,"

does not require proof of an overt act. *Id.* at 63. A conspiracy may be found, the Court explained, "even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense. The partners in the criminal plan must agree to pursue the same criminal objective and may divide up the work, yet each is responsible for the acts of each other." *Id.* at 63–64 (citations omitted). This means that, if a plan "calls for some conspirators to perpetrate the crime and others to provide support, the supporters are as guilty as the perpetrators." *Id.* at 64. Thus, opting into and participating in a conspiracy may result in criminal liability for the acts of one's co-conspirators. *Smith v. Berg*, 247 F.3d 532, 537 (3d Cir. 2001).

Accordingly, liability for a RICO conspiracy may be found where the conspirator intended to "further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor." *Salinas*, 522 U.S. at 65. Because the substantive criminal offense here was conducting a § 1962(c) enterprise, the government had to prove:

> (1) that two or more persons agreed to conduct or to participate, directly or indirectly, in the conduct of an enterprise's affairs through a pattern of racketeering activity; (2) that the defendant was a party to or member of that agreement; and (3) that the defendant joined the agreement or conspiracy knowing of its objective to conduct or participate, directly or indirectly, in the conduct of an enterprise's affairs through a pattern of racketeering activity.

United States v. John-Baptiste, 747 F.3d 186, 207 (3d Cir. 2014).

In *United States v. Turkette*, 452 U.S. 576 (1981), the Supreme Court instructed that an enterprise is a "group of persons associated together for a common purpose of engaging in a course of conduct." *Id.* at 583. The government can prove an enterprise "by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *Id.* In *Boyle v. United States*, 556 U.S. 938 (2009), the Supreme Court established that an "association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." *Id.* at 946. The structure necessary for a § 1962(c) enterprise is not complex. *Boyle* explained that an enterprise

> need not have a hierarchical structure or a "chain of command"; decisions may be made on an ad hoc basis and by any number of methods—by majority vote, consensus, a show of strength, etc. Members of the group need not have fixed roles; different members may perform different roles at different times. The group need not have a name, regular meetings, dues, [or] established rules and regulations . . . . While the group must function as a continuing unit and remain in existence long enough to pursue a course of conduct, nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence.

Id. at 948.

Another element of a substantive § 1962(c) RICO enterprise is that the enterprise must conduct its affairs through a pattern of racketeering activity. Section 1961 defines racketeering activity to include various criminal offenses, including wire fraud, 18 U.S.C. § 1344, and obstruction of justice, 18 U.S.C. § 1511. *See* 18 U.S.C. § 1961(1). A pattern of such activity "requires at least two acts of racketeering activity." *Id.* § 1961(5). The racketeering predicates may establish a pattern if they "related and . . . amounted to, or threatened the likelihood of, continued criminal activity." *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 237 (1989).

Here, the District Court denied the post-trial sufficiency arguments raised by Fattah, Brand, and Nicholas. It reasoned:

> For a RICO conspiracy to exist, the conspirators must agree to participate in an enterprise with a unity of purpose as well as relationships among those involved. The evidence demonstrates that an agreement among Fattah, Brand, Nicholas, Lindenfeld, and Naylor existed for the overall purpose of maintaining and enhancing Fattah as a political figure and of preventing his standing from being weakened by the failure to be able to pay or write down his campaign debts. These five persons agreed to work together as a continuing unit, albeit with different roles.
>
> The Government established that Fattah, Brand, and Nicholas conspired along with Naylor and Lindenfeld to conceal and repay the 2007 illegal $1,000,000 loan to the Fattah for Mayor campaign.

JA128–29. The District Court further determined that

> [w]hile each member may not have been involved in every aspect of the enterprise, its activities were sufficiently structured and coordinated to achieve the purpose of maintaining and enhancing Fattah's political standing and of preventing him from being weakened politically because of his campaign debts.
>
> A RICO conspiracy also requires an agreement to participate in an enterprise with longevity sufficient to pursue its purpose. This was established. In May 2007 the illegal loan was obtained and continued through its repayment in January 2008 and into at least 2014 when the last campaign report reducing a fake campaign debt to Naylor's consulting firm was filed by Fattah.

JA131.

The defendants argue that the evidence is insufficient to show either an enterprise for purposes of § 1962(c) or an agreement as required for a § 1962(d) conspiracy. We disagree, and conclude that the District Court's analysis is on the mark.

We begin by considering whether there was an agreement. The evidence showed that Fattah knew each member involved in the scheme to conceal the unlawful campaign loan. When Lindenfeld learned of the $1 million loan, he informed Fattah that it exceeded campaign finance limits. In short, the transaction was unlawful, and the two knew it. The transaction nonetheless went forward, disguised as a

loan, with Lindenfeld executing the promissory note as Strategies' officer and obligating Strategies to repay Lord $1 million. The concealment efforts continued as Lindenfeld funneled a substantial portion of the loan proceeds to Naylor for get-out-the-vote efforts. After the losing campaign, Lindenfeld spoke with Fattah and Naylor about accounting for the funds that had been spent. They decided not to include the amounts in the FFM campaign reports. Fattah instructed Naylor to prepare a fictitious invoice, and Naylor complied. The FFM campaign reports filed from 2008 to 2014 disclosed nothing about the unlawful $1 million loan. Instead, they falsely showed that Naylor's consulting firm made yearly in-kind contributions of $20,000 in debt forgiveness, when in reality there was no debt to forgive.

As Lindenfeld fretted over repaying the $600,000 balance of the Lord loan, Naylor assured him that Fattah had promised to take care of the repayment. And the evidence supports an inference that Fattah recruited both Nicholas and Brand in doing so. As EAA's director, Nicholas could fund the repayment. Brand, through his company, Solutions, acted as the middleman: he received the payment from EAA pursuant to a fictitious contract, and then forwarded the balance due to Strategies pursuant to yet another fictitious contract. Nicholas and Brand continued in the spring and summer of 2008 to hide the fictitious agreement and the $600,000 payment to Lindenfeld to satisfy the Lord loan.

In short, this evidence shows that Fattah, Lindenfeld, Naylor, Brand, and Nicholas all agreed to participate in Fattah's plan to conceal the

unlawful campaign loan to maintain his political stature. Nicholas and Brand claim that they had no knowledge of the false campaign reporting aspect of the plan. But as *Salinas* instructs, conspirators need not "agree to commit or facilitate each and every part of the" conspiracy. 522 U.S. at 63. Rather, they "must agree to pursue the same criminal objective and may divide up the work, yet each [be] responsible for the acts of each other." *Id.* at 63–64. Thus, a conspirator may agree to "facilitate only some of the acts leading to the substantive offense" yet still be criminally liable. *Id.* at 65.

The evidence showed that a substantial amount of money was needed to repay Lord, and that the source of the repayment was EAA, a non-profit organization whose funds could be spent only for purposes consistent with the terms of the grants it received. It also showed that Nicholas was presented with a sham contract to legitimize the EAA–Solutions transaction. We conclude that the evidence is sufficient to support an inference that Nicholas knew at the start that the plan was unlawful. Yet she still agreed to provide the requisite funds and to play a role in concealing the illegal campaign loan so that Fattah could maintain his political stature.

As to Brand, even if he did not know that false campaign reports were being filed, the evidence is sufficient to show he played a key role in the enterprise. From the outset, Brand worked to disguise the repayment of the Lord loan as the consideration in a sham contract between EAA and Solutions. He then arranged for the transfer of funds to Strategies in satisfaction of a contractual term in another purported business agreement between

Solutions and Strategies. The evidence reveals that Brand was the point man in the effort to meet the January 31, 2008 deadline to repay the Lord loan, and it amply shows that Brand also agreed to participate in the plan to hide the illegal campaign loan and its repayment to benefit Fattah politically.

Fattah, Brand, and Nicholas attack their RICO conspiracy convictions on another front. They argue that those verdicts should be set aside because the evidence fails to show that the various schemes alleged in the indictment as part of the RICO conspiracy are connected. The RICO count, they assert, charges a hub-and-spoke conspiracy that is unconnected by a rim. In their view, Fattah is the hub, and the spokes consist of a series of independent schemes: the Vederman bribery scheme, the payment of the outstanding tuition debt of Fattah's son Chip, the Blue Guardians plan, and the repayment of the illegal Lord loan to maintain Fattah's political stature. They argue that, without a unifying rim, their actions cannot constitute an enterprise. Again, we disagree.

In *In re Insurance Brokerage Antitrust Litigation*, 618 F.3d 300 (3d Cir. 2010), we concluded, in analyzing one of plaintiffs' RICO claims, that the alleged hub-and-spoke enterprise—comprised of broker hubs and insurer spokes—could not withstand a motion to dismiss because it did not have a unifying rim. *Id.* at 374. We explained that the allegations did "not plausibly imply concerted action—as opposed to merely parallel conduct—by the insurers, and therefore cannot provide a 'rim' enclosing the 'spokes' of these alleged 'hub-and-spoke' enterprises." *Id.* Thus, the allegations did not

"adequately plead an association-in-fact enterprise" because the hub-and-spoke conspiracy failed to "function as a unit." *Id.*

That is not the case here. The evidence showed that Fattah, Brand, and Nicholas agreed to conceal the illegal Lord loan. Each acted for the common purpose of furthering Fattah's political interests. In short, they engaged in concerted activity and functioned as a unit. The jury convicted Fattah, Brand, and Nicholas of the RICO conspiracy based on the racketeering activity of wire fraud and obstruction of justice to conceal the unlawful transaction. Because the evidence shows that Fattah, Lindenfeld, Naylor, Brand, and Nicholas agreed to protect Fattah's political status by acting to maintain the secrecy of the unlawful Lord loan, the alleged lack of a unifying "rim" is not fatal to this RICO enterprise. What matters in analyzing the structure of this enterprise is that it functioned as a unit. *Boyle*, 556 U.S. at 945; *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 374. That "basic requirement" was met. *Id.*

We turn next to the contention that the evidence fails to establish other components of an enterprise. We conclude that much of the evidence supporting the existence of an agreement also shows that there was an association-in-fact enterprise.

Boyle made clear that an association-in-fact enterprise must have "a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." 556 U.S. at 946. The purpose, as we have repeatedly observed, was to maintain and preserve Fattah's political stature by

concealing the illegal loan and its repayment. Though informal, there were relationships among those associated with the enterprise. Fattah was at the center of this association and he directed its activity. He knew each of the association's members, and the members knew each other (except, perhaps, for Nicholas, who may not have known Lindenfeld).[19]

The Government also adduced sufficient proof of the longevity component required for an enterprise. The scheme began in mid-2007, when Lord made the campaign loan, directing the proceeds of the loan to Strategies. From the outset, Fattah, Lindenfeld, and Naylor all knew they needed to conceal this illegal transaction. They began by fabricating an explanation for the source of the funds they spent on election day. SLA created a fake invoice for the campaign, showing a fictitious debt that Naylor could later forgive by fictitious in-kind contributions existing only on Fattah's campaign finance reports.

The effort to disguise the Lord loan was not limited to filing false campaign reports. Nicholas and Brand, who joined the conspiracy a few months later than the other members, understood that they too had to make the fraudulent $600,000 payment by EAA to Solutions appear legitimate. Nicholas and

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[19] Nicholas's lack of familiarity with Lindenfeld does not undermine her membership in this association-in-fact enterprise. We have previously explained that "[i]t is well-established that one conspirator need not know the identities of all his co-conspirators, nor be aware of all the details of the conspiracy in order to be found to have agreed to participate in it." *United States v. Riccobene*, 709 F.2d 214, 225 (3d Cir. 1983), *abrogated on other grounds by Griffin v. United States*, 502 U.S. 46 (1991).

Brand tried to disguise the sham contract as an ordinary transaction (even though it called for a six-figure upfront payment simply to support Solutions' various projects), and they succeeded in keeping it out of the DOJ auditors' view until August 2008. The ruse continued as Solutions funneled the $600,000 payment to Strategies under the guise of another sham contract (which also required an upfront six-figure payment). The scheme then continued as Fattah submitted false FFM campaign reports from 2008 through 2014.

Finally, we consider whether the enterprise conducted its affairs through a pattern of racketeering activity, as required for a § 1962(c) enterprise. Wire fraud and obstruction of justice may constitute "racketeering activity" under § 1961(1). As the Supreme Court instructed in *H.J. Inc.*, the "multiple predicates within a single scheme" must be related and "amount[] to, or threaten[] the likelihood of, continued criminal activity." 492 U.S. at 237. Here, the amount of the illegal loan to be concealed was substantial. The enterprise needed to write off the fictitious debt to Naylor's consulting firm, and it was urgent that both the EAA–Solutions contract and the Solutions–Strategies contract be legitimized. We conclude the evidence was sufficient to establish that this enterprise conducted its affairs through a pattern of racketeering activity and that the predicate acts of wire fraud and obstruction of justice were related. The racketeering activity furthered the goals of maintaining the secrecy of this $1 million illicit campaign loan and of preserving Fattah's political stature.

Nicholas contends that the evidence fails to establish a pattern of racketeering activity because the actions to which she agreed did not "extend[] over a substantial period of time" as *H.J. Inc.* requires. 492 U.S. at 242. That case indeed instructs that the continuity requirement of a pattern is a "temporal concept," and that "[p]redicate acts extending over a few weeks or months" do not satisfy the continuity concept. *Id.* But the Supreme Court explained that continuity may also be established by showing that there is a "threat of continued racketeering activity." *Id.* Here, the course of fraudulent conduct undertaken to secure and to conceal the $1 million Lord loan consisted of the creation of sham debts, fictitious contracts, and false accounting entries over the course of about a year. But because Fattah needed to appear able to retire his campaign debt, the enterprise needed to continue filing false campaign reports for several years, allowing the annual $20,000 in-kind debt forgiveness contributions to appear to satisfy Naylor's fake $193,000 invoice. That evidence was sufficient to establish the requisite threat of continued criminal activity. *See H.J. Inc.*, 492 U.S. at 242–43.

We conclude that the Government met its burden in proving that Fattah, Brand, and Nicholas[20]

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[20] Nicholas also asserts, in passing, that that her conviction under § 1962(d) should be set aside because that statutory provision is unconstitutionally vague as applied to her. According to Nicholas, a person of ordinary intelligence would not know that her actions constituted an agreement to participate in a RICO enterprise. *See United States v. Pungitore*, 910 F.2d 1084, 1104–05 (3d Cir. 1990). To the contrary, a person of ordinary intelligence, who had been employed by a prominent politician

engaged in a RICO conspiracy in violation of § 1962(d).

VI. Variance from the Indictment and Sufficiency of the Evidence for Count 2

Brand and Nicholas challenge their convictions for conspiracy to commit wire fraud by arguing that the Government's evidence at trial impermissibly varied from the indictment. Nicholas also challenges the sufficiency of the evidence to support her conviction for conspiracy to commit wire fraud. We address these contentions together.[21]

Count 2 of the indictment alleged a single conspiracy. JA277–79. Brand and Nicholas assert that the Government's evidence at trial did not support the existence of a single conspiracy but instead showed two independent conspiracies, only one of which involved the two of them. According to Brand and Nicholas, the only conspiracy with which they were involved ended more than five years before the Government charged them. That would mean that all their conduct falls outside the five-year limitations period for wire fraud conspiracy under 18 U.S.C. § 3282.

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and then became the CEO of a nonprofit organization which that politician had founded (and, to some extent, continued to direct), would realize that agreeing to participate with others in hiding an unlawful campaign loan of $1 million could constitute an unlawful RICO conspiracy.

[21] In her briefing, Nicholas discusses variance in far less detail than Brand, so we refer primarily to Brand's arguments. *See* Nicholas Br. 54–56. Her variance arguments fail for the same reasons that Brand's fail.

"A conviction must be vacated when (1) there is a variance between the indictment and the proof presented at trial and (2) the variance prejudices a substantial right of the defendant." *Kemp*, 500 F.3d at 287 (quoting *United States v. Kelly*, 892 F.2d 255, 258 (3d Cir. 1989)). We see no variance, and will affirm the District Court.

A variance exists "if the indictment charges a single conspiracy while the evidence presented at trial proves only the existence of multiple conspiracies." *Id.* "We must determine 'whether there was sufficient evidence from which the jury could have concluded that the government proved the single conspiracy alleged in the indictment.'" *Id.* (quoting *Kelly*, 892 F.2d at 258). Viewing the record in the light most favorable to the Government, we consider three factors: (1) "whether there was a common goal among the conspirators"; (2) "whether the agreement contemplated bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators"; and (3) "the extent to which the participants overlap in the various dealings." *Id.* (quoting *Kelly*, 892 F.2d at 259).

Brand argues that the Government failed to establish a common goal among the conspirators. To determine whether the conspirators shared a common goal, "we look to the underlying purpose of the alleged criminal activity" in a fairly broad sense. *United States v. Rigas*, 605 F.3d 194, 214 (3d Cir. 2010) (en banc). In *Rigas*, we described the common goal of the defendants as "enriching [themselves] through the plunder of [their corporate employer]," *id.*, and we have similarly articulated the common

goal in fairly general terms elsewhere. *See United States v. Greenidge*, 495 F.3d 85, 93 (3d Cir. 2007) ("There was certainly evidence of a common goal among these co-conspirators: to make money by depositing stolen and altered corporate checks into business accounts."); *Kelly*, 892 F.2d at 259 ("[T]he common goal of all the participants was simply to make money selling 'speed.'"). Importantly, a common goal may exist even when "conspirators individually or in groups perform different tasks in pursuing the common goal," and a single conspiracy may "attract[] different members at different times" or "involve[] different sub-groups committing acts in furtherance of the overall plan." *United States v. Boyd*, 595 F.2d 120, 123 (3d Cir. 1978).

Here, the indictment described the purpose of the unified conspiracy in Count 2 at length:

> It was a purpose of the conspiracy to obtain an illegal campaign loan and to fraudulently repay that loan with hundreds of thousands of dollars of misappropriated charitable funds from Sallie Mae and federal grant funds from NASA which were intended for educational purposes.
>
> . . . . It was further a purpose of the conspiracy to present FATTAH to the public as a perennially viable candidate for public office who honored his obligations to his creditors and was able to retire his publicly reported campaign debts.
>
> . . . . It was further a purpose of the conspiracy to promote FATTAH's political and financial goals through deception by concealing and protecting the conspirators' activities from

> detection and prosecution by law enforcement officials and the federal judiciary, as well as from exposure by the news media, through means that included obstruction of justice and the falsification of documents, including Campaign Finance Reports, false invoices, contracts, and other documents and records.

JA277–78, ¶¶ 3–5.

Brand characterizes the evidence at trial as establishing two distinct conspiracies. The first he labels the "diversion of funds scheme," covering the misappropriation of funds by Nicholas, Brand, Lindenfeld, and Fattah to repay the Lord loan. Brand Br. 34. Brand calls the second conspiracy the "CFR scheme," in which Fattah and Naylor filed the false campaign finance reports showing Naylor gradually forgiving a nonexistent debt. *Id.*

Brand argues that the only goal of the CFR scheme was to cover up how the funds from the illegal campaign loan were spent, a goal he distinguishes from that of the diversion of funds scheme, which he characterizes as a plan to cover up the repayment of the loan with stolen funds. He also argues that the evidence does not establish he was involved in, or even aware of, the false campaign finance reports filed by Fattah. In Brand's view, that necessarily means the evidence showed two separate conspiracies.

In considering these arguments, we begin by noting that one conspiracy can involve multiple subsidiary schemes. *Rigas*, 605 F.3d at 214. It is true that the false campaign finance reports, in the narrowest sense, had the specific purpose of covering

up how the illegal loan funds were used during the election. But the false campaign finance reports were also filed in furtherance of a broader goal shared by the conspirators involved in repayment of the Lord loan. They sought to promote Fattah's political and financial goals by preserving his image as a viable candidate and making him appear able to repay or otherwise service his campaign debts without resorting to illegal means in doing so. The two subsidiary schemes worked in concert in furtherance of this overarching goal, and both were directed at covering up how the loan was truly repaid. The "diversion of funds scheme" hid the illegal (but real) loan repayment through the use of fake contracts; the "CFR scheme" showed the seemingly legal (but fake) loan forgiveness installments through the creation of fake invoices and campaign finance reports. The existence of two concealment schemes acting in concert does not undermine the unity of the conspiracy of which they were both a part. We have no difficulty concluding that the false campaign finance reports and the concealed use of stolen funds to repay the Lord loan operated together in furtherance of a common goal.

As for Brand's argument that he was unaware of the false campaign finance reports and therefore could not be a part of any conspiracy involving them, it is well-settled that "each member of the charged conspiracy is liable for the substantive crimes his coconspirators commit in furtherance of the conspiracy even if he neither participates in his coconspirators' crimes nor has any knowledge of them." *United States v. Bailey*, 840 F.3d 99, 112 (3d Cir. 2016) (citing *Pinkerton v. United States*, 328 U.S. 640 (1946)). The exceptions to that rule allow a

defendant to escape liability for a co-conspirator's crime if: (1) "the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy," (2) "the substantive offense committed by one of the conspirators 'did not fall within the scope of the unlawful project,'" or (3) "the substantive offense committed by one of the conspirators 'could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement.'" *Id.* (quoting *Pinkerton*, 328 U.S. at 647–48). There was, as we have concluded, a unity of purpose between the co-conspirators to further Fattah's political and financial goals by secretly obtaining and repaying an illegal campaign loan with stolen funds. The filing of false campaign reports does not fit within any of the recognized exceptions to co-conspirator liability, as it was in furtherance of the conspiracy's shared goal, within the scope of the agreement to conceal the loan, and foreseeable to Brand and Nicholas.

Neither Brand nor Nicholas briefed the other two factors we consider when determining whether the evidence impermissibly varied from the evidence, "whether the agreement contemplated bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators," and "the extent to which the participants overlap in the various dealings." *Kemp*, 500 F.3d at 287 (quoting *Kelly*, 892 F.2d at 258). The unified goal of promoting Fattah's political career and maintaining secrecy surrounding the illegal loan and the misappropriated funds used to repay it required the continuous cooperation of the conspirators. Indeed, the efforts of several of them overlapped in every aspect of the scheme. And

Lindenfeld and Fattah were, at a minimum, involved in some way in nearly every aspect of the origination of the loan, the false campaign finance reports, and the use of misappropriated funds to repay the loan. For his part, Naylor was involved in the use of the funds, the false campaign finance reports, and to a lesser extent, the repayment of the loan.

Brand (as part of his variance argument) and Nicholas (as part of her sufficiency argument) argue that the Government did not prove they agreed to conceal their actions, and thus the false campaign reports would not be sufficient to extend the duration of the conspiracy so that it fell within the statute of limitations. Acts of concealment, such as the false campaign reports, are not automatically "in furtherance" of a conspiracy. We must determine whether there was "an express original agreement among the conspirators to continue to act in concert in order to cover up, for their own self-protection, traces of the crime after its commission," as opposed to "a conspiracy to conceal . . . being implied from elements which will be present in virtually every conspiracy case, that is, secrecy plus overt acts of concealment." *Grunewald v. United States*, 353 U.S. 391, 404 (1957). If the indictment "specifically alleges a continuing conspiracy" to conceal the crime after the completion of the wire fraud, and such a conspiracy can be proven, the statute of limitations does not begin to run until the last overt act of concealment. *United States v. Moses*, 148 F.3d 277, 282 (3d Cir. 1998).

Here, the evidence shows that the conspirators expressly agreed to conceal the loan and its repayment. As an initial matter, Brand's only role in

the conspiracy was to cover up the use of stolen funds by (1) serving as an intermediary between Nicholas and Lindenfeld; and (2) agreeing to create false documentation (the contracts) with both EAA and Strategies for the sole purpose of disguising the payments and covering up the wire fraud conspiracy. Nicholas could simply have paid Lindenfeld herself (or paid Lord) if she and Brand had not agreed to conceal the crime from the start. Additionally, and as Brand acknowledges, the false campaign finance reports began before the loan was repaid, proving that concealment of the crime was contemplated and begun as a direct purpose of the conspiracy before Brand and Nicholas became involved in the repayment. Nicholas too agreed to conceal the repayment, as she implicitly acknowledged in her emails with Brand and Fattah. GSA2. Finally, when Lindenfeld briefly strayed from the conspiracy's commitment to secrecy by mentioning the repayment in front of others who did not know of the scheme, Brand became "angry," "took [Lindenfeld] out in the hallway," and chastised him, saying that "[Lindenfeld] couldn't say that sort of []thing" in front of other people. JA1670–71. We conclude that the evidence is consistent with the allegations in the indictment, which charge a single conspiracy consisting of an original agreement to conceal the illegal loan and its subsequent illegal repayment to further Fattah's political career.

Nicholas makes several arguments in passing. She suggests that the District Court upheld the conviction after trial "on a theory not submitted to the jury." Nicholas Br. 51. This argument is, essentially, that the indictment and the District Court's post-trial ruling described the conspiracy one

way, but that the jury charge described the conspiracy differently. Nicholas argues that the jury was presented with the theory that the sole purpose of the false campaign reports under Count 2 was to "conceal[] the alleged scheme to defraud," JA5849, rather than to support Fattah's political career, as the District Court described the purpose after trial, *see* JA74.

Nicholas ignores that part of the jury charge which instructed that Count 2 required a finding "[t]hat two or more persons agreed to commit wire fraud *as charged in the indictment*." JA5845 (emphasis added). The jury had access to the indictment, and as Nicholas points out, Nicholas Br. 45–46, the indictment outlines the offense in the same way the District Court later described it in its post-trial ruling. The District Court consistently described the count, and we see no reversible error.

Nicholas also argues that the conspiracy charged in Count 2 has an objective—"to 'present Fattah' as 'perennially viable'"—and that such an objective is not illegal. Nicholas Br. 53. But, of course, the jury was not instructed that it was illegal to be a Fattah supporter, or even to work on his campaign. The jury was charged specifically on the crime of wire fraud.

We conclude that there was no impermissible variance between the indictment and the Government's evidence at trial, and that there was sufficient evidence to support the convictions. We will affirm the convictions of Brand and Nicholas for conspiracy to commit wire fraud under Count 2.

VII. The District Court's Instruction to the Jury on the Meaning of Intent

Nicholas contends that the District Court improperly instructed the jury by using the disjunctive rather than the conjunctive at one point in its definition of intent. When providing its final charge to the jury, the District Court explained:

> Certain of the offenses charged in the indictment require that the government prove that the charged defendant acted intentionally or with intent. This means that the government must prove either that (1), it was the defendant's conscious desire or purpose to act in a certain way or to cause a certain result; or (2), the defendant knew that he or she was acting in that way *or* it would be practically certain to cause that result.

JA5787 (emphasis added). According to Nicholas, an accurate definition of intent required that the final "or" be an "and." Nicholas argues that this was an error so grievous as to "effectively eliminate[] the intent element from each offense of conviction."[22] Nicholas Br. 26.

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[22] The Comment to Third Circuit Model Criminal Jury Instruction 5.03 makes clear that the definition of intent encapsulates both "specific intent" (acting "purposely" or with "conscious object") and "general intent" (acting "knowingly" or "with awareness"). Although Nicholas describes the alleged error as "essentially eliminating" the element of intent, we think Nicholas's argument is better understood as a claim that the instruction given could have permitted a jury to conclude that she acted with only general intent (that she was aware of what she was doing), when her crimes require specific intent (that she had an illegal purpose). As her brief states, "[p]lainly she 'knowingly'

Our review of whether a jury instruction stated the proper legal standard is plenary. *United States v. Petersen*, 622 F.3d 196, 207 n.7 (3d Cir. 2010). At trial, Nicholas failed to object to this portion of the jury charge. Accordingly, our review must be for plain error. *See United States v. Flores-Mejia*, 759 F.3d 253, 258 (3d Cir. 2014) (en banc).

To prevail on plain error review, Nicholas must establish that there was an error, that it was plain (*i.e.*, clear under current law), and that it affected her substantial rights (*i.e.*, whether there is a reasonable likelihood that the jury applied the challenged instruction in an impermissible manner). *United States v. Olano*, 507 U.S. 725, 733–34 (1993); *United States v. Dobson*, 419 F.3d 231, 239–40 (3d Cir. 2005). If these requirements are met, we may then exercise our discretion to address the error, but only if we conclude that the error seriously affected the fairness, integrity, or public reputation of the judicial proceeding. *United States v. Andrews*, 681 F.3d 509, 517 (3d Cir. 2012) (quoting *Johnson v. United States*, 520 U.S. 461, 467 (1997)). A failure to instruct the jury on a necessary element of an offense ordinarily constitutes plain error, unless the instructions as a whole otherwise make clear to the jury all the necessary elements of the offense. *United States v. Stimler*, 864 F.3d 253, 270 (3d Cir. 2017).

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wrote checks from EAA to [Solutions] and made record entries about them; the question was whether she intended to defraud EAA and NASA, or to obstruct justice, by doing so." Nicholas Br. 24. We cannot agree with her characterization that the instruction resulted in the "effective omission" of the intent element from the jury instructions.

Nicholas acknowledges, as she must, that the instruction given was a verbatim recitation of Instruction 5.03 of the Third Circuit's Model Criminal Jury Instructions. She nonetheless contends that our Model Instruction is erroneous. Even if we were to accept Nicholas's contention that the instruction is incorrect, a proposition we consider as highly doubtful, *see Petersen*, 622 F.3d at 208 ("We have a hard time concluding that the use of our own model jury instruction can constitute error . . . ."), we conclude that, considering the instructions as a whole, the District Court clearly and specifically instructed the jury on the intent element as it applied to each of Nicholas's charged crimes.

The disputed intent instruction was given at the beginning of the final charge, explaining the general meaning of the intent applicable to "[c]ertain of the offenses charged."[23] JA5787. The District Court went

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[23] The introductory definition did not end with the language Nicholas cites. The District Court elaborated that acting in good faith is a complete defense to the charges:

> The offenses charged in the indictment require proof that the charged defendants acted with criminal intent. If you find that a defendant acted in good faith that would be a complete defense to such a charge, because *good faith on the part of the defendant would be inconsistent with his or her acting knowingly, willfully, corruptly, or with intent to defraud or intent to impede, obstruct, or wrongfully influence.*

JA5788–89 (emphasis added). This instruction undermines Nicholas's claim that the jury could have reasonably concluded that she "'knowingly' wrote checks" but did not "intend[] to defraud . . . or to obstruct justice[] by doing so," Nicholas Br. 24, as this instruction leaves little room for doubt that good faith is at odds with "criminal intent."

on to instruct the jury in specific detail on the elements of each of the crimes of which Nicholas was accused, explaining also the intent element of each.[24] *See* JA5791 (describing the third element of the RICO conspiracy charge as: "the particular defendant and at least one other alleged conspirator shared a unity of purpose and the intent to achieve the objective of conducting or participating in the conduct of an enterprise's affairs through a pattern of racketeering activity"); JA5823 (regarding wire fraud, instructing that the government must prove "[t]hat the defendant under consideration acted with the intent to defraud"); JA5838–39 (regarding obstruction of justice, instructing that the defendant must have acted "with the intent to impair the record, document, or object's integrity or availability for use in an official proceeding," and must have acted corruptly "with the purpose of wrongfully impeding the due administration of justice"); JA5860 (explaining that falsification of records requires that "the defendant under consideration acted with the intent to impede, obstruct or influence the investigation or proper administration of a matter"). These instructions are consistent with both our Model Jury Instructions and our case law concerning the elements of these crimes. *See* Third Circuit Model Criminal Jury Instruction 6.18.1962D (RICO), 6.18.1343 (wire fraud), 6.18.1512A2 (obstruction of justice); *United States v. Sussman*, 709 F.3d 155, 168 (3d Cir. 2013) (obstruction of justice); *United States*

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[24] Nicholas did not object to the knowledge and intent instructions when the District Court discussed each of the individual charges, and does not identify a disagreement with any specific instruction on any particular charge.

v. Moyer, 674 F.3d 192, 208–09 (3d Cir. 2012) (falsification of records); *United States v. Pelullo* (*Pelullo I*), 964 F.2d 193, 216 (3d Cir. 1992) (wire fraud).

The District Court also provided a separate definition of the knowledge element of each charge, illustrating the difference between knowledge and intent. See JA5793 (explaining that the evidence must show that a RICO defendant "knowingly agreed to facilitate or further a course of conduct, which if completed would include a pattern of racketeering activity"); JA5823 (wire fraud means that the defendant "knowingly devised a scheme to defraud a victim . . . by materially false or fraudulent pretenses"); JA5860 (falsification of records has as an element "[t]hat the defendant under consideration knowingly concealed, covered up, falsified or made false entries in a document or record"). These instructions made clear that knowledge and intent are separate considerations, undermining Nicholas's contention that the jury was led to believe that "knowledge is sufficient to prove intent." Nicholas Br. 24.

The District Court provided each member of the jury with more than 100 pages of instructions before deliberations began. Viewing those instructions as a whole, we are satisfied that the jury was apprised of the correct meaning of intent as an element of the crimes with which Nicholas was charged, as well as the distinction between knowledge and intent. We

perceive no error, much less error that is plain, in the District Court's instructions to the jury.[25]

VIII. Sending the Indictment to the Jury

At trial, Vederman, Nicholas, and Brand objected to the District Court's decision to give the jury a redacted copy of the indictment to use during its deliberations. Only Nicholas and Brand raise this issue on appeal. In Nicholas's view, sending the indictment to the jury unfairly prejudiced her because it contained unsupported allegations that she had obstructed federal agencies and referred to a nonexistent certification requirement for Sallie Mae funds. Brand argues that he was prejudiced by the indictment's references to "schemes" and "fake" contracts, and because it mentioned Brand's spouse and that she was a former member of Fattah's congressional staff. Nicholas and Brand together assert that the indictment included legal theories on which the jury was not instructed. They contend that the indictment's narrative of the Government's case set out a roadmap that omitted any averments relating to the defense theory and allowed the Government to yet again present its case. To buttress that argument, Nicholas and Brand cite the testimony of Juror 12, who described the jury's initial deliberations and alleged that the jurors viewed the indictment as evidence.

In *United States v. Todaro*, 448 F.2d 64, 66 (3d Cir. 1971), we held that the decision to allow "jurors

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[25] Accordingly, we need not consider the merits of Nicholas's argument that Model Criminal Jury Instruction 5.03 is erroneous.

to have a copy of the indictment with them during their deliberations . . . is a matter within the discretion of the District Judge, subject to a limiting instruction that the indictment does not constitute evidence, but is an accusation only." Subsequently, in *United States v. Pungitore*, 910 F.2d 1084, 1142 n.83 (3d Cir. 1990), we acknowledged that the District Court has the power to redact the indictment if doing so would be appropriate to avoid prejudice to the defendant. *See also United States v. Roy*, 473 F.3d 1232, 1237 n.2 (D.C. Cir. 2007) (noting that court may redact an indictment before submitting it to the jury).

While both Nicholas and Brand objected in general terms to the District Court's decision to provide the indictment to the jury, they have not directed us to any specific request to redact the information they now claim is prejudicial. And the District Court provided a limiting instruction on four occasions during its charge, repeatedly emphasizing that the indictment was not evidence. JA5765, 5767, 5782, 5880. The Court instructed the jury on its duty to base its verdict "solely upon the evidence in the case." JA5764. Just before the jury retired to deliberate, the Court reiterated that the purpose of the indictment is to set forth the charges, and that it is "merely an accusation." JA5909.

"[J]uries are presumed to follow their instructions . . . ." *Richardson v. Marsh*, 481 U.S. 200, 211 (1987). In our view, Juror 12's assertion that the indictment was being considered evidence does not, standing alone, establish that his fellow jurors actually did so. We reject the notion that the jury, after hearing weeks of testimony and having

viewed substantial documentary evidence, went on to ignore the Court's limiting instruction concerning the indictment.[26] Accordingly, we conclude that the District Court did not abuse its discretion in sending the indictment out to the jury.

IX. The District Court's Evidentiary Rulings

Vederman, Nicholas, and Brand each challenge evidentiary rulings by the District Court. We conclude that none of these contentions warrants setting aside their convictions.

A. The District Court's Application of Rule 404(b)

Vederman argues that the District Court misapplied Federal Rule of Evidence 404(b) when it excluded evidence of Vederman's prior gift-giving.[27]

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[26] We acknowledge that our case law provides minimal guidance to district courts concerning the practice of sending an indictment to the jury for their use during deliberations. We are also aware that some courts have disapproved the practice of sending the indictment out with the jury. *See United States v. Esso*, 684 F.3d 347, 352 n.5 (2d Cir. 2012); *Roy*, 473 F.3d at 1237 n.2. We emphasize that this practice is committed to the sound discretion of the district judge. *Todaro*, 448 F.2d at 66. In our view, such an exercise of a judge's discretion should be informed by considering the nature of the case, the number of defendants, the length of the indictment, the extent of the factual recitation supporting the criminal charges, and most importantly, whether the indictment (especially if lengthy and fact-laden) will be useful to the jury, in light of the judge's own carefully tailored jury instruction, as supplemented by a verdict slip. *See Esso*, 684 F.3d at 352 n.5.

[27] Although Rule 404(b) determinations are usually in response to attempts to introduce "bad" acts evidence, Vederman's attempt to introduce "good" acts of gift-giving is properly analyzed

This Court reviews a district court's application of Rule 404(b) for abuse of discretion. *United States v. Daraio*, 445 F.3d 253, 259 (3d Cir. 2006); *Ansell v. Green Acres Contracting Co.*, 347 F.3d 515, 519 (3d Cir. 2003). A trial court commits "[a]n abuse of discretion . . . when [the] district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact." *Pardini v. Allegheny Intermediate Unit*, 524 F.3d 419, 422 (3d Cir. 2008) (quoting *P.N. v. Clementon Bd. of Educ.*, 442 F.3d 848, 852 (3d Cir. 2006)).

Federal Rule of Evidence 404(b) provides in part:

> (b) Crimes, Wrongs, or Other Acts.
>
> (1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
>
> (2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation,

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under the same rule. *Ansell v. Green Acres Contracting Co.*, 347 F.3d 515, 520 (3d Cir. 2003) ("The evidence admitted in this case differs from garden variety Rule 404(b) matter because it is evidence, not of a prior bad act in a criminal case, but of a subsequent good act in a civil case. Nonetheless, this evidence is encompassed by the plain text of Rule 404(b) which addresses 'other . . . acts,' not just prior bad acts.").

> plan, knowledge, identity, absence of mistake, or lack of accident.

Fed. R. Evid. 404(b)(1)–(2).

At trial, Vederman sought to present a witness from American University who would have testified that "Vederman agreed, on more than fifty instances, to financially assist students [at American] who needed help with tuition, book money, or travel funds to visit their families." Vederman Br. 42 (emphasis omitted). According to Vederman, the testimony was relevant to refuting the Government's argument that he agreed to guarantee the tuition expenses of Fattah's *au pair* as a way of bribing the congressman. In excluding this evidence under Rule 404(b), the District Court stated at sidebar:

> I sustain the government's objection to calling a representative of American University to testify on behalf of Herbert Vederman.
>
> In my view the testimony runs afoul of Rule 404(b)(1) of the Federal Rules of Evidence. I find it to be propensity evidence. He or she would be testifying about Mr. Vederman's financial generosity with respect to students of American University.
>
> The issue here is payment of partial tuition of a student at the Philadelphia University. I see no connection between the generosity at American University and the situation with Philadelphia University.

JA4459–60. Vederman argues that because the proposed evidence related to Vederman's intent, and not solely his propensity to perform good acts, we should conclude that the District Court abused its

discretion. We see no error in the District Court's ruling.

Vederman challenges as arbitrary the District Court's "assertion that support for *American* University students is too remote from support for *Philadelphia* University students" such that it constitutes inadmissible evidence. Vederman Reply Br. 23. This distinction was far from arbitrary. Vederman may well have financially supported American University students because of connections he had to that school or to the D.C. community at large—connections Vederman did not have to Philadelphia University. And the excluded testimony appears to have described support for students Vederman did not previously know. By supporting Fattah's *au pair*, Vederman was helping an employee of a man whom he knew quite well. JA889 ("[Fattah and Vederman] spent a lot of time together traveling back and forth to Washington, in the case of a death in the family attending certain ceremonies that were important, and above all spending time with each other and their families together."). Vederman's decision to help Fattah's *au pair*, who wished to attend Philadelphia University, seems more like a departure from, rather than a continuation of, his pattern of support for American University students.

As the party seeking admission of evidence under Rule 404(b), Vederman bore "the burden of demonstrating its applicability" and "identifying a proper purpose." *United States v. Caldwell*, 760 F.3d 267, 276 (3d Cir. 2014). By failing to explain sufficiently why the factual distinctions discussed above were not material, Vederman failed to meet his burden. In particular, although Vederman argues

that he offered evidence of his prior gift-giving to prove intent—"a proper non-propensity purpose"—he failed to show why the proposed testimony was "relevant to that identified purpose." *Id.* at 277.[28] As we noted in *Ansell v. Green Acres Contracting*, an employment discrimination case on which Vederman heavily relies, "[t]here is . . . no bright line rule for determining when evidence is too remote to be relevant." 347 F.3d at 525. As such, a district court's determination under Rule 404(b) "will not be disturbed on appeal unless it amounts to an abuse of discretion." *Id.* The District Court did not abuse its discretion in excluding evidence of Vederman's support for students at American University.

B. Evidentiary Rulings Regarding Nicholas's Defense

Nicholas argues that the District Court rendered three erroneous evidentiary rulings that prejudiced her defense. We do not find any of her arguments convincing.

1. The EAA Board Minutes

In support of its theory that Nicholas defrauded EAA, the Government introduced minutes from EAA's Board. Minutes from 2005 revealed that the Board limited Nicholas's signing authority to

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[28] Under Rule 404(b), "prior act evidence is inadmissible unless the evidence is (1) offered for a proper non-propensity purpose that is at issue in the case; (2) relevant to that identified purpose; (3) sufficiently probative under Rule 403 such that its probative value is not outweighed by any inherent danger of unfair prejudice; and (4) accompanied by a limiting instruction, if requested." *United States v. Caldwell*, 760 F.3d 267, 277–78 (3d Cir. 2014).

$100,000. Minutes from December 2007, February 2008, and May 2008 failed to reference either the EAA–Solutions contract or the checks, drawn from EAA's account for $500,000 and $100,000, that were purportedly paid pursuant to the contract. Nicholas contends that the Board minutes were erroneously admitted because they constituted improper hearsay which failed to satisfy either the exception for business records under Federal Rule of Evidence 803(6) or the absence of records exception under Federal Rule of Evidence 803(7). "We review the District Court's evidentiary ruling[s] for abuse of discretion, but also 'exercise plenary review . . . to the extent [the rulings] are based on a legal interpretation of the Federal Rules of Evidence.'" *Repak*, 852 F.3d at 240 (citations omitted) (second alteration in original).

At trial, no defendant objected to the testimony of EAA's Board Chairman Raymond Jones about the 2005 EAA Board minutes, which indicated that the Board limited Nicholas's authority to spend funds without Board approval to $100,000. Nor was there objection to the admission of EAA's Board minutes from December 2007, February 2008, and May 2008 during Special Agent Rene Michael's testimony. Because Nicholas failed to preserve these evidentiary issues, we review for plain error. Fed. R. Crim. P. 52(b).

As to the 2005 minutes, the prosecution's direct examination of Jones failed to expressly track each of the prerequisites for admission of a business record under Rule 803(6). Still, Jones' testimony was sufficient for purposes of Rule 803(6) because he stated that he was Board Chairman at the relevant

time, the Board's practice was to keep accurate minutes of its meetings, the Board passed the motion to limit Nicholas's signing authority, and Jones recognized the document as the minutes of a Board meeting. We conclude that the District Court did not commit plain error by permitting this unobjected-to testimony to remain in the record.

Jones, who chaired the Board from 2004 to 2007, testified that Nicholas's authority to bind EAA to contracts was limited to $100,000, and that any contracts in excess of that amount were to be brought to the Board's attention. EAA's accountant, Janice Salter, testified that EAA maintained a procedure for disbursements which required the completion of a check request form to document the purpose of the check for approval of the payment by Nicholas. Yet Jones testified that he never saw a request form for either the $500,000 check or the $100,000 check to Solutions. We conclude that the Government laid an adequate foundation under Rule 803(7) for admitting the Board minutes from 2005, December 2007, February 2008, and May 2008, and for highlighting that none of them mentioned the EAA–Solutions contract requiring an upfront payment of well over $100,000.

Nicholas correctly points out that the minutes of some monthly meetings were not among the documents that were admitted. But this point simply makes plain that she could have objected on that basis and did not. Given the lack of an objection and the existence of a proper foundation, admission of EAA's Board minutes was not an abuse of discretion.

Nicholas also asserts that, even if Rules 803(6) and (7) permitted admission of the Board minutes,

they were of minimal relevance and unfairly prejudicial. We disagree. Not only is the evidence relevant, any possible prejudice was minimized by the fact that the Board minutes make no reference to either the EAA–Solutions contract or to any financial matters whatsoever. Indeed, given these lacunae in the Government's proof, a reasonable factfinder might well have concluded that the Board's intention to limit Nicholas's signing authority had not been implemented and that Nicholas had not concealed the contract from the Board.

2. Jones' Memory Regarding Other Contracts

Nicholas next asserts that the District Court erred during her cross-examination of Board Chairman Jones by sustaining the prosecution's objection to her inquiry into whether he remembered other contracts in excess of $100,000 being brought to the Board. *See* JA1386–87. The basis of the prosecution's objection seemed to be that Nicholas's line of inquiry was beyond the scope of the direct testimony. JA1387 ("I showed checks concerning what's going on, not other programs."); *see* Fed. R. Evid. 611(b). The District Court sustained the objection, declaring that "it has absolutely nothing to do with this case." JA1387. Nicholas contends that if Jones did not recall whether other large contracts had been presented to the Board, his inability to recall the EAA–Solutions contract would have been "unremarkable rather than evidence of fraud or concealment." Nicholas Br. 61.

We acknowledge that whether Jones remembered other large contracts requiring Board approval had some relevance under Rule 401. Yet

any error by the District Court in prohibiting Nicholas's counsel from pursuing this line of inquiry is harmless. Jones admitted that he did not know if the Board ever implemented the policy requiring its approval of contracts exceeding $100,000. He also conceded that the EAA Board focused less on the financial side of EAA than on its programs. JA1383–85. Nicholas could not have been prejudiced by the District Court's ruling.

3. Exclusion of NOAA Evidence

Nicholas defended against the criminal charges arising out of the non-existent October 2012 conference by asserting that she acted in "good faith in spending the NOAA funds on EAA expenses," Nicholas Br. 64, that the difference in the dates in the paperwork was not material, and that NOAA had received the benefits of the sponsorship because its logo was displayed on the signage used at the February conference. Nicholas succeeded in presenting testimony and introducing photographs that showed NOAA's logo on the February 2012 annual conference bags, padfolios, and name tags. The Court excluded a photograph of a NOAA intern at the February 2012 conference, other photographs of the February conference signage, and some checks that pertained to the February conference. Nicholas claims that her inability to introduce those exhibits frustrated her ability to present her good faith defense. We are not persuaded.

The photographs were excluded as cumulative, the sort of ruling to which we afford trial judges very broad discretion. *See* Fed. R. Evid. 403; *United States v. Dalfonso*, 707 F.2d 757, 762 (3d Cir. 1983). It was not error to exclude the student intern's photograph.

The conference brochure included photographs from previous conferences, and the witness from NOAA was unable to testify to the year the student served as an intern. Finally, the checks tendered for the travel expenses incurred for the February conference were excluded as irrelevant to whether Nicholas had a good faith belief that NOAA sponsored the October conference.

C. The Cooperating Witness's Mental Health Records

During discovery, Brand learned that a cooperating witness was diagnosed with bipolar II disorder and was taking medication to treat that condition. Brand subpoenaed mental health records kept by the witness's current and former psychiatrists in hopes of using those records to attack the witness's memory, truthfulness, and credibility. The witness and the Government both filed motions to quash the subpoena, arguing that the witness's mental health records were protected by the psychotherapist–patient privilege recognized by the Supreme Court in *Jaffee v. Redmond*, 518 U.S. 1 (1996). The Government also filed a motion in limine seeking to restrict the scope of cross-examination to prevent Brand from questioning the witness about his mental health.

Alongside his motion to quash, the witness voluntarily produced for the Court his mental health records. The Court concluded that the psychotherapist–patient privilege would ordinarily apply to the mental health records, but that the privilege was not absolute, especially when invoked in response to a criminal defendant's efforts to obtain through discovery evidence that is favorable to his

case. Following the procedure set forth in *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), the District Court conducted an in camera review of the mental health records to determine if they contained material evidence—that is, evidence that would "give[] rise to a reasonable probability that it [would] affect the outcome of the case." JA149. The District Court found "nothing in the mental health records of the [witness] . . . material for this criminal action," noting that "[t]he records reveal nothing that calls into question [the witness's] memory, perception, competence, or veracity." JA150. Accordingly, the Court entered an order granting the motions to quash the subpoena.

The District Court also granted the Government's motion in limine and restricted the scope of cross-examination, ruling that "no reference may be made to [the witness's] bipolar disorder or the medications he takes to manage it." JA142, 156. The Court reasoned that bipolar disorder varied in its effects from person to person, and concluded that Brand had not shown that the effects of the disorder had any bearing on the witness's credibility. The District Court ruled that cross-examination would not serve any valid impeachment purpose.

Brand claims that the District Court's order ran afoul of the Due Process Clause of the Fifth Amendment and the Confrontation Clause of the Sixth Amendment. We review a district court's rulings to quash a subpoena and to limit the scope of cross-examination for abuse of discretion. *United States v. Tykarsky*, 446 F.3d 458, 475 (3d Cir. 2006); *NLRB v. Frazier*, 966 F.2d 812, 815 (3d Cir. 1992).

Here, the District Court did not abuse that discretion.

1. The District Court's Denial of Access to the Mental Health Records

In claiming that the District Court's decision to review the mental health records in camera before ruling on their admissibility violated his rights under both the Fifth and Sixth Amendments, Brand specifically argues that his right to confront the witness was impeded because he was denied access to records he could have used to impeach the witness. This very argument was considered and rejected by a plurality of the Supreme Court in *Ritchie*, which noted that "the effect [of the argument] would be to transform the Confrontation Clause into a constitutionally compelled rule of pretrial discovery. . . . [T]he right to confrontation is a *trial* right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination." 480 U.S. at 52. We follow the *Ritchie* plurality, and conclude that the Confrontation Clause did not require the District Court to grant Brand access to the witness's mental health records.

Brand next challenges the District Court's decision to quash the subpoena as a violation of the Fifth Amendment's Due Process Clause. He concedes that *Ritchie*'s Due Process holding allowed the District Court to review the mental health records in camera without disclosing them to him. *See id.* at 59–60 ("A defendant's right to discover exculpatory evidence does not include the unsupervised authority to search through [the Government's] files. . . . We find that [the defendant's] interest . . . in ensuring a

fair trial can be protected fully by requiring that the [privileged] files be submitted only to the trial court for *in camera* review."). Brand instead argues that the District Court abused its discretion by focusing on "irrelevant facts and spurious symptoms. . . . such as 'hallucinations,'" and by "refus[ing] to consider evidence of cognitive impairment and memory issues." Brand Br. 30. The record reveals, however, that the District Court reviewed the mental health records and determined that they "reveal[ed] nothing that calls into question [the witness's] memory, perception, competence, or veracity." JA150. This hardly amounts to a refusal to consider evidence of cognitive impairment or memory issues.

Brand also challenges the legal standard applied by the District Court, arguing that the court "focused solely on whether disclosure would 'change the outcome' of Brand's trial," Brand Br. 29 (quoting JA148), rather than considering "whether the ultimate verdict is one 'worthy of confidence.'" *Id.* (quoting *United States v. Robinson*, 583 F.3d 1265, 1270 (10th Cir. 2009)). Brand misleadingly quotes from the District Court's opinion. The District Court considered, in accordance with *Ritchie*, "whether there is a *reasonable probability* that disclosure would change the outcome" of Brand's trial, JA148 (emphasis added), not whether disclosure would *necessarily* change the outcome. As articulated in *Ritchie*, a "'reasonable probability' is a probability sufficient to undermine confidence in the outcome." 480 U.S. at 57 (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985) (Blackmun, J.)). The District Court applied the correct standard.

2. The District Court's Grant of the Motion in Limine

In granting the Government's motion in limine, the District Court ruled that Brand could not "reference . . . [the witness's] bipolar disorder or the medications he takes to manage it." JA156. Yet that ruling placed no restriction on Brand's ability to cross-examine the witness with respect to "his memory, competence, or truthfulness." *Id.* Brand argues, nevertheless, that his Sixth Amendment right "to be confronted with the witnesses against him" was violated. U.S. Const. amend. VI.

The Confrontation Clause protects a defendant's right to cross-examine a witness with respect to any testimonial statements made by that witness. *United States v. Berrios*, 676 F.3d 118, 125–26 (3d Cir. 2012) (citing *Crawford v. Washington*, 541 U.S. 36, 51 (2004), and *Davis v. Washington*, 547 U.S. 813, 823–24 (2006)). But the scope of cross-examination is not unlimited, and "[a] district court retains 'wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about . . . harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" *John-Baptiste*, 747 F.3d at 211 (quoting *United States v. Mussare*, 405 F.3d 161, 169 (3d Cir. 2005)). We review limitations on cross-examination for abuse of discretion, and reverse "only when the restriction 'is so severe as to constitute a denial of the defendant's right to confront witnesses against him and . . . is prejudicial to [his] substantial rights.'" *Id.* (alternation in

original) (quoting *United States v. Conley*, 92 F.3d 157, 169 (3d Cir. 1996)).

In *United States v. Chandler*, 326 F.3d 210, 219 (3d Cir. 2003), we analyzed whether a district court's decision to limit cross-examination with respect to a witness's motivation for testifying violated the Confrontation Clause. *See also Mussare*, 405 F.3d at 169; *John-Baptiste*, 747 F.3d at 211–12. Consistent with *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), we first concluded that "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Chandler*, 326 F.3d at 219–20 (quoting *Van Arsdall*, 475 U.S. at 678–79). We also noted that the Confrontation Clause does not prevent a trial judge from imposing reasonable limits on cross-examination. *Id.* In reviewing a district judge's imposition of such limitations, we apply a two-part analysis. As we have since described, "we inquire into: '(1) whether the limitation significantly limited the defendant's right to inquire into a witness's motivation for testifying; and (2) whether the constraints imposed fell within the reasonable limits that a district court has the authority to impose.'" *John-Baptiste*, 747 F.3d at 211–12 (quoting *Mussare*, 405 F.3d at 169).

The same analytical framework is appropriate when determining whether a restriction on the cross-examination of a witness with respect to his memory and perception violates the Confrontation Clause. *See Davis v. Alaska*, 415 U.S. 308, 316 (1974); *Greene v. McElroy*, 360 U.S. 474, 496 (1959); *United States v. Segal*, 534 F.2d 578, 582 (3d Cir. 1976). Memory and perception, like motivation for testifying, are central

issues affecting the credibility of any witness, and unreasonable limitations on the right to cross-examine on those subjects cannot be countenanced. We therefore ask, paraphrasing *Chandler*: (1) whether the District Court's decision to put the witness's diagnosis and medications off limits significantly impaired Brand's right to inquire into the witness's memory and perception; and (2) whether the ruling fell within the reasonable limits that the District Court has the authority to impose.

We conclude that the District Court did not err. As an initial matter, the District Court permitted Brand to cross-examine the witness about his memory and perception, and limited cross-examination only with respect to the witness's bipolar disorder and the medications he was taking to treat that condition. Brand was free to question the witness about his memory and perception, and indeed did so. The restriction on asking the witness about his bipolar disorder was not a significant limitation of Brand's right to inquire into the witness's memory or perception. Moreover, as the District Court pointed out, Brand failed to show how inquiry into the witness's bipolar disorder would be useful for impeachment purposes. *See* JA154.

Given that failure, the District Court's limits on cross-examination were reasonable. The Court concluded, after reviewing the evidence submitted by Brand and the witness's mental health records, that any mention of the witness's bipolar disorder would "only be designed to confuse the jury or to stigmatize him unfairly because of a 'mental problem' without any countervailing probative value." JA155. The District Court did not abuse its discretion in limiting

Brand's cross-examination on a topic that would be far more prejudicial than probative. *See Tykarsky*, 446 F.3d at 476–77 ("[T]he District Court acted well within its discretion to restrict irrelevant and confusing testimony.").

All of this is not to suggest that a witness's mental health is always off limits. The appropriate course in any given case must be determined from the facts and circumstances surrounding that case and the witness's particular condition. *See United States v. George*, 532 F.3d 933, 937 (D.C. Cir. 2008) ("The days are long past when any mental illness was presumed to undermine a witness's competence to testify. . . . [M]ental illness [is] potentially relevant in a broad[] range of circumstances . . . . [But] some indication is needed that a particular witness's medical history throws some doubt on the witness's competence or credibility."). Here, Brand failed to show, through mental health records or otherwise, any particularized reason to doubt the credibility of the witness for medical reasons.

Brand states that the witness provided "the *only* evidence offered" on the intent element of his conspiracy conviction and that he should therefore be entitled to unrestricted cross-examination. Yet no matter the importance of a witness to any party, a district court may always place reasonable limits on cross-examination to avoid "harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *John-Baptiste*, 747 F.3d at 211 (citation omitted).

We conclude that the District Court did not abuse its discretion in restricting the scope of

Brand's cross-examination of the cooperating witness.

X. The Government's Cross-Appeal

The jury convicted Fattah, Vederman, and Bowser of bank fraud, 18 U.S.C. § 1344[29] (Count 19) and making false statements to a financial institution, 18 U.S.C. § 1014[30] (Count 20). In response to post-trial motions, the District Court granted a judgment of acquittal on both counts under Fed. R. Crim. P. 29, concluding that the evidence was insufficient to establish that the Credit Union Mortgage Association (CUMA), the entity to whom Fattah, Vederman, and Bowser made the false statements, is a "financial institution," or, more specifically, a "mortgage lending business" as defined in 18 U.S.C. § 27. The Government claims that, viewing the evidence in the light most favorable to it, the District Court erred and that CUMA is, indeed, a "mortgage lending business." We agree. Because the

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[29] "Whoever knowingly executes, or attempts to execute, a scheme or artifice . . . to defraud a financial institution . . . shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both." The definition of "financial institution" for purposes of § 1344 is set forth at 18 U.S.C. § 20, and includes "a credit union with accounts insured by the National Credit Union Share Insurance Fund" and "a mortgage lending business (as defined in section 27 of this Title)." 18 U.S.C. §§ 20(2), (10).

[30] "Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of . . . a Federal credit union . . . any institution the accounts of which are insured by . . . the National Credit Union Administration Board . . . or a mortgage lending business . . . shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both."

evidence is sufficient to support the jury's verdict, we will remand so Fattah and Vederman may be resentenced on these charges.[31]

A. CUMA is a Mortgage Lending Business

In reviewing the District Court's post-verdict judgment of acquittal under Rule 29 of the Federal Rules of Civil Procedure, we consider whether the evidence, when viewed in a light most favorable to the government, supports the jury's verdict. *United States v. Dixon*, 658 F.2d 181, 188 (3d Cir. 1981). Our standard of review is the same as that applied by the District Court, and we must uphold the jury's verdict unless no reasonable juror could accept the evidence as sufficient to support the defendant's guilt beyond a reasonable doubt. *United States v. Coleman*, 811 F.2d 804, 807 (3d Cir. 1987).

Initially, the grand jury's indictment alleged that CUMA is a financial institution because it is federally insured. JA302–03. At trial, however, the jury was instructed that CUMA could qualify as a financial institution either because it is federally insured or because it is a "mortgage lending business." *See* JA111, 401–02. A "mortgage lending business" is "an organization which finances or refinances any debt secured by an interest in real estate, including private mortgage companies and any subsidiaries of such organizations, and whose

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[31] Because the Government did not file an appeal as to Bowser, the cross-appeal is limited to Fattah and Vederman. The judgment of acquittal as to Bowser is therefore unaffected by our ruling today.

activities affect interstate or foreign commerce." 18 U.S.C. § 27.

At trial, CUMA's president and CEO, Eddie Scott Toler, testified that CUMA is not federally insured. JA4235. The Government therefore attempted to prove that CUMA is a "mortgage lending business" by presenting evidence that CUMA funds mortgages and then sells them in a secondary market.

Toler also testified that CUMA is a "credit union service organization"—a for-profit company owned by 48 credit unions, which serves small credit unions that do not have the infrastructure or in-house expertise to handle mortgage loans themselves. JA4235. According to Toler, "[CUMA] exclusively provide[s] First Trust Residential Mortgage loaning [*sic*] services, all the way from the origination of the mortgage loan through processing, underwriting, closing and access to the secondary market where—and we're selling the mortgage loan on the secondary market." JA4236–37. In jurisdictions in which CUMA is licensed,[32] CUMA holds the mortgage for a limited period, generally from two to thirty days, and then sells the mortgage either to a partner credit union or on the secondary market. JA4240.

The District Court concluded that CUMA is not a "mortgage lending business" because "[t]he record is devoid of any evidence that CUMA finances or refinances any debt." JA113. Concluding that CUMA "simply is a loan processor for various credit unions

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[32] CUMA is licensed in Maryland, Washington, D.C., and Virginia. JA4238.

which do the financing or refinancing," *id.*, the District Court ruled that CUMA's "activity does not constitute the financing or refinancing of any debt. CUMA is not the mortgagee. It is merely selling the debt instrument to a third party." JA114.

We cannot agree with the District Court's view of the evidence. Toler testified that in "Maryland, D.C., and Virginia . . . all of the loans are closed in the name of CUMA." JA4238–39. As Toler described it, CUMA borrows on a line of credit to fund the loan, and when the loan is sold, CUMA pays off its line of credit. JA4239–40. So contrary to the District Court's assessment, the evidence, viewed in a light most favorable to the Government, shows that CUMA is indeed the mortgagee—at least during the time from closing until the loan is sold to a partner credit union or on the secondary market. The fact that CUMA funds the closing and then holds the mortgage, even for a brief time, is sufficient to support a conclusion that CUMA is "an organization which finances or refinances any debt secured by an interest in real estate." 18 U.S.C. § 27.

Fattah and Vederman attempt to refute the argument that CUMA engages in financing mortgages by focusing on Toler's testimony that CUMA "doesn't actually have any money to fund these mortgage loans." JA4239; *see* Fattah Reply Br. 38, Vederman Reply Br. 36. But Toler testified that CUMA employs a credit line to borrow the funds necessary to close on mortgages. *See* JA4239. That CUMA incurs debt to finance mortgages hardly undermines a conclusion that CUMA finances mortgages. Indeed, it is the very nature of modern banking that financial institutions do not hold cash

reserves equal to the full amount of their liabilities. *See*, *e.g.*, Timothy C. Harker, *Bailment Ailment: An Analysis of the Legal Status of Ordinary Demand Deposits in the Shadow of the Financial Crisis of 2008*, 19 Fordham J. Corp. & Fin. L. 543, 561 (2014) ("[F]ractional reserve banking . . . is the *de facto* standard for all modern banks.").

Vederman also argues that, even if CUMA acts as a mortgage lending business in *some* transactions, it was not acting as a mortgage lending business in *this* transaction. Vederman points to Toler's testimony that, in a state in which CUMA is not licensed, the mortgage is closed in the name of a credit union. In such cases, the credit union, and not CUMA, owns the mortgage for the short period before the loan is sold on the secondary market. JA4241. CUMA is not licensed in the Commonwealth of Pennsylvania. *See id.* Thus, according to Vederman, CUMA was acting in its capacity as a mortgage servicing company for Fattah's vacation home purchase and did not—and could not—finance Fattah's mortgage. That would mean that CUMA could not have been a victim of a crime against a financial institution in this instance: "When an entity is not *functioning* as a mortgage lender, the 'pertinent federal interest' behind the statutes is not implicated." Vederman Reply Br. 38 (citation omitted).

The Government responds that neither of the statutes of conviction requires that the fraud or false statement occur in connection with the same transaction that places the entity within the definition of "financial institution." Gov't Fourth Step Br. 4. We agree with the Government.

Both § 1344 and § 1014 protect entities that fall within the definition of "financial institution" and are otherwise quite broad in their application. *See Loughrin v. United States*, 134 S. Ct. 2384, 2389 (2014) (interpreting § 1344 as not requiring specific intent to defraud a bank); *United States v. Boren*, 278 F.3d 911, 914 (9th Cir. 2002) ("[Section 1014's] reach is not limited to false statements made with regard to loans, but extends to *any* application, commitment or other specified transaction."). Neither statute is expressly limited in the manner that Vederman suggests. *Williams v. United States*, 458 U.S. 279, 284 (1982) ("To obtain a conviction under § 1014, the Government must establish two propositions: it must demonstrate (1) that the defendant made a 'false statement or report,' . . . and (2) that he did so 'for the purpose of influencing in any way the action of [a described financial institution] upon any application, advance, . . . commitment, or loan.'"); *United States v. Leahy*, 445 F.3d 634, 646 (3d Cir. 2006) ("The purpose of the bank fraud statute is to protect the 'financial integrity of [banking] institutions.'") (citing S. Rep. No. 98-225, at 377 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3517), *abrogated on other grounds by Loughrin*, 134 S. Ct. at 2389.

In support of his position, Vederman relies on *United States v. Devoll*, 39 F.3d 575 (5th Cir. 1994), in which the Fifth Circuit concluded that § 1014 (false statements to a financial institution) is not intended to capture fraud unrelated to an entity's lending activities, and therefore held that it "applies only to actions involving lending transactions." *Id.* at 580. The Fifth Circuit stated:

> [W]e are not persuaded that the statute imposes liability whenever a defendant's false statement was intended to interfere with *any activity* of a financial institution; such a broad interpretation of section 1014 presumably would encompass fraud or false representations having nothing to do with financial transactions, such as fraud in an employment contract or, for example, in a contract to provide goods or services for custodial care, premises repair, or renovation.

Id.

Yet a majority of circuits, including our own, have declined to follow *Devoll*'s suggestion that § 1014 is restricted to lending transactions. As the Ninth Circuit has held, "we join at least six of our sister circuits—the First, Third, Fourth, Sixth, Seventh, and Tenth—in holding that 18 U.S.C. § 1014 is not limited to lending transactions, and reject the minority rule to the contrary." *Boren*, 278 F.3d at 915. And even if we were to adopt *Devoll*'s narrow construction of § 1014 to lending transactions, that would not resolve the more specific question of whether the defrauded entity must be defined as a "mortgage lending business" by virtue of the specific transaction in which the false statements arose.

Recently, the Eighth Circuit addressed precisely this issue. In *United States v. Springer*, 866 F.3d 949 (8th Cir. 2017), that Court considered the defendant's appeal from the district court's denial of a Rule 29 motion on grounds that GMAC, the entity defrauded, was not a "financial institution." The Court upheld the district court's determination that the evidence was sufficient to establish that GMAC is in the mortgage lending business because there

was testimony that "it had made hundreds or thousands of loans secured by mortgages in 2010 and 2011 in states all across the country," which established that its activities affect interstate commerce. *Id.* at 953. It was not determinative that GMAC did not own the specific loan at issue in the case: "we discern no requirement in the definition of 'mortgage lending business' that the business own the particular loan in question; it need only finance or refinance any debt secured by an interest in real estate, or, in other words, be in the interstate mortgage lending business in general." *Id.*

In our view, the Eighth Circuit's analysis is correct. We therefore adopt that Court's reasoning in *Springer* and conclude that it is of no moment that CUMA did not finance the mortgage at issue in Fattah's case. CUMA is a "mortgage lending business," and that alone suffices to support the convictions under §§ 1014 and 1344.

B. Sufficiency of the Evidence

Finally, Vederman argues that, even if CUMA is a financial institution, the judgment of acquittal should stand because the Government did not put forth any evidence that he made a false representation to CUMA.[33] Specifically, Vederman argues that the title to the Porsche was actually changed to his name, making it a "true sale" as a

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[33] Although Vederman presented this argument in his Rule 29 motion, the District Court did not need to reach it in the context of Counts 19 and 20 because the Court granted the motion on the ground that CUMA is not a financial institution. The District Court rejected the argument as to Counts 16, 17, and 18. *See* JA100–02.

matter of law, without regard to whether Fattah's wife continued to retain possession. *See United States v. Castro*, 704 F.3d 125, 139 (3d Cir. 2013) (holding in another context that "the government must be able to show that [the defendant] made a statement to government agents that was untrue, and the government cannot satisfy that burden by showing that the defendant intended to deceive, if in fact he told the literal truth"); *see also* 75 Pa. Cons. Stat. § 102 (defining "owner" as "[a] person, other than a lienholder, having the property right in or title to a vehicle").

The Government responds that, regardless of whether it is legally possible for one person to hold a title while a different person possesses the vehicle, the jury was permitted to consider all the circumstances in deciding whether the Porsche sale was a sham. We agree.

First, as the District Court observed, it was unclear as to whether the title had been properly executed under Pennsylvania law. For instance, Fattah's wife never appeared before a notary.[34] JA101. In addition, title 75, section 1111(a) of the Pennsylvania Consolidated Statutes requires that, "[i]n the event of the sale or transfer of the ownership of a vehicle within this Commonwealth, the owner shall . . . deliver the certificate to the transferee at the time of the delivery of the vehicle." And, the transferee must, within twenty days of the

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[34] Vederman argues that it is of no significance that the parties did not appear before a notary as the statute requires, but he offers cases only from states other than Pennsylvania to support this proposition.

assignment of the vehicle, apply for a new title. *See* 75 Pa. Cons. Stat. § 1111(b). Neither of these requirements was fulfilled. Finally, Vederman never registered the Porsche in his name with the Department of Motor Vehicles. *See id.*; JA4254.

Second, and more importantly, even if the title had been properly transferred to Vederman, the title provisions of the Pennsylvania Motor Vehicle Code "were [not] designed to establish conclusively the ownership of an automobile." *Weigelt v. Factors Credit Corp.*, 101 A.2d 404, 404 (Pa. Super. Ct. 1953). Indeed, "[t]he purpose of a certificate of title is not to conclusively establish ownership in a motor vehicle, but rather to establish the person entitled to possession." *Speck Cadillac-Olds, Inc. v. Goodman*, 95 A.2d 191, 193 (Pa. 1953). Thus, a title provides *evidence* of ownership; it is not dispositive of the issue. *Wasilko v. Home Mut. Cas. Co.*, 232 A.2d 60, 61 (Pa. Super. Ct. 1967).

Vederman's argument that the title in his name constitutes conclusive evidence of ownership rests upon an erroneous conclusion that the jury was prohibited from considering all the circumstances of the transfer. As the District Court observed, though, Pennsylvania's Commonwealth Court has held that "[w]hether a transferor has transferred ownership of a motor vehicle to a transferee is a factual determination to be made by the court below." *Dep't. of Transp. v. Walker*, 584 A.2d 1080, 1082 (Pa. Commw. Ct. 1990). Thus, the signed certificate of title was appropriately treated as one piece of evidence for the jury to consider in assessing the validity of the vehicle transfer. Considered in the light most favorable to the Government, the totality

of the evidence is sufficient to support the jury's conclusion that the Porsche sale was a sham.

XI. Prejudicial Spillover

Finally, Fattah, Vederman, Nicholas, and Brand each contend that their convictions on various counts resulted from prejudicial spillover. We are not persuaded.

We exercise plenary review over a district court's denial of a claim of prejudicial spillover, *United States v. Lee*, 612 F.3d 170, 178–79 (3d Cir. 2010), and we apply a two-step test when reviewing such a claim. *United States v. Wright*, 665 F.3d 560, 575 (3d Cir. 2012). First, a court must consider "whether the jury heard evidence that would have been inadmissible at a trial limited to the remaining valid count[s]." *Id.* (quoting *United States v. Cross*, 308 F.3d 308, 317 (3d Cir. 2002)). The second step requires that we "ask whether that evidence (the 'spillover evidence') was prejudicial." *Id.* We consider four factors: "whether (1) the charges are intertwined with each other; (2) the evidence for the remaining counts is sufficiently distinct to support the verdict on these counts; (3) the elimination of the invalid count [will] significantly change[] the strategy of the trial; and (4) the prosecution used language of the sort to arouse a jury." *Id.* (quoting *United States v. Murphy*, 323 F.3d 102, 118 (3d Cir. 2003)); *see also United States v. Pelullo* (*Pellulo II*), 14 F.3d 881, 898–99 (3d. Cir. 1994). These four factors are considered in a light "somewhat favorable to the defendant." *Wright*, 665 F.3d at 575 (quoting *Murphy*, 323 F.3d at 122); *see also* Gov't Br. 198 (same).

A. Fattah's Claim of Prejudicial Spillover

Fattah argues that he suffered prejudicial spillover on the remaining counts of conviction in light of (1) evidence pertinent to the alleged Vederman bribery schemes that is now arguably inadmissible under *McDonnell*; and (2) "the government's flawed RICO conspiracy theory." Fattah Br. 50, 64. Fattah's argument is undercut substantially because of our determination that *McDonnell* requires a new trial for Counts 16, 17, 22, and 23 and our decision to affirm the RICO conspiracy conviction. The only possible spillover left to consider is the evidence pertaining to Fattah's arranging a meeting between Vederman and the U.S. Trade Representative, Ron Kirk, which in light of *McDonnell* is now arguably inadmissible.[35]

The evidence of the Kirk meeting admitted during this five-week trial was limited. Although this evidence was part of the Government's proof as to both the RICO and the bribery related charges, there is more than sufficient—and distinct — evidence to support Fattah's conviction on all the other counts. In our view, eliminating any evidence of the Kirk meeting would not have altered the strategy of the trial, nor should it significantly change the strategy for any new trial that may be held. Because Fattah has not pointed us to any argument by the prosecution relating to this meeting that could have inflamed the jury, we conclude that Fattah's prejudicial spillover claim fails. Like the District

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[35] Nothing in this opinion is intended to foreclose the possibility that evidence of the Kirk meeting may be admissible on retrial for some purpose other than as proof of an official act.

Court, we presume that the jury followed the Court's instructions to consider and weigh separately the evidence on each count as to each defendant and not to be swayed by evidence pertaining to other defendants.[36]

B. Vederman's Assertion of Prejudicial Spillover

Because the District Court acquitted Vederman of the RICO charge, Vederman argues that he was "severely prejudiced by the presentation to the jury of a legally flawed racketeering conspiracy charge," and as a consequence his bribery and money laundering convictions should be overturned. Vederman Br. 46. In response to the Government's appeal of the District Court's Rule 29 acquittal on Counts 19–20 involving CUMA, Vederman asserts that these two counts also were affected by spillover evidence because the Government's theory tied the bribery charges to the actions taken to defraud CUMA. In that we are vacating Vederman's convictions of Counts 16–18 and 22–23 based on *McDonnell* and remanding for further proceedings, we need address only Vederman's argument of prejudicial spillover as it relates to the charges involving CUMA in Counts 19–20, charges that we will reinstate.

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[36] We likewise reject Brand's prejudicial spillover arguments. *See* Brand Br. 6 ("Brand adopts the significant issue advanced by his co-appellant pursuant to Fed. R. App. P. 28(i) that improper jury instructions and the resulting spillover of related improperly admitted evidence and argument unfairly prejudiced Brand.").

The District Court's acquittal of Vederman on the RICO count establishes that step one of the *Wright* spillover test has been met. "[T]he jury heard evidence that would have been inadmissible at a trial limited" to the bribery and CUMA-related counts. *Wright*, 665 F.3d at 575 (quoting *Cross*, 308 F.3d at 317).

Wright's second step requires "ask[ing] whether that evidence (the 'spillover evidence') was prejudicial." *Id.* Vederman submits that the RICO, bribery, and CUMA-related charges were intertwined "in that the acts relating to the alleged bribery scheme were also charged as 'predicates' under RICO." Vederman Br. 49. We disagree.

To be sure, the RICO, bribery, and CUMA Counts are related to one another. But in this instance, mere relatedness is not enough to demonstrate the foundation necessary for spillover. This is so because the bribery charges were a predicate to the RICO charge. In other words, the jury had to determine if Vederman was guilty of bribery, and the jury then used that "predicate" to consider whether he was also guilty of the RICO conspiracy. Thus, the necessarily tiered structure of the questions presented to the jury refute Vederman's argument that the counts were intertwined.

That the bribery charges were predicates for the RICO conspiracy further demonstrates that the "evidence for the different counts was sufficiently distinct to support the verdict on other separate counts." *Pelullo II*, 14 F.3d at 898. Regardless of the evidence pertaining solely to the RICO conviction, the evidence supporting both the bribery charges and

the charges involving CUMA in Counts 19–20 would have remained the same.

The next factor we address is "whether the elimination of the count on which the defendant was invalidly convicted would have significantly changed the [defendant's] strategy of the trial." *Id.* As Vederman argues, "the RICO charge interfered with Vederman's central defense to the bribery charge—that his gestures toward Fattah 'were motivated purely by friendship.'" Vederman Reply Br. 28 (citing Gov't Br. 200). In other words, the "RICO count made it dangerous to unduly emphasize [Vederman's] close friendship" with Fattah. *Id.* From Vederman's perspective, "a bribery-only trial would have reduced this danger and allowed a freer presentation of the defense." *Id.*

It is quite likely that Vederman's claim of friendship would have been less risky as a litigation strategy if he had not been facing a RICO charge. But Vederman nevertheless chose to take that risk and fully presented his friendship argument to the jury. Moreover, while Vederman's reliance on friendship might have helped him defend against the bribery charges, that friendship would not have altered the evidence pertaining to Counts 19–20 involving CUMA. Whether done for friendship or some other reason, submitting fraudulent information to a financial institution is unlawful.

Finally, we "examine the charges, the language that the government used, and the evidence introduced during the trial to see whether they are 'of the sort to arouse a jury.'" *Pelullo II*, 14 F.3d at 899 (quoting *United States v. Ivic*, 700 F.2d 51, 65 (2d Cir. 1983)). Vederman points out that Fattah was

presented as "a backslapping, corrupt party boss," with "predictable spillover to his friend and associate, Vederman." Vederman Br. 50 (quoting *United States v. Murphy*, 323 F.3d 102, 118 (3d Cir. 2003)). But this description was of Fattah, not Vederman. Vederman cites other examples of prejudicial, pejorative language in the Government's closing arguments. At one point, the Government referred to "conspirators engaged in what can only be described as a white collar crime spree from Philadelphia all the way to Washington, D.C." and promised "to untangle the webs of lies and deception that these conspirators spun." Vederman Br. 51 (quoting JA5295, 5297). Whatever rhetorical flair these words contained, they did not obscure the evidence which independently supported the convictions for bank fraud at Count 19 and for making false statements to CUMA at Count 20. Accordingly, because we presume that the jury followed the District Court's instruction to consider and to weigh separately the evidence on each count and as to each defendant, and because the evidence supporting the CUMA-related charges in Counts 19–20 is sufficiently distinct from the RICO conspiracy, we conclude that Vederman's spillover argument is unavailing.[37]

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[37] Nicholas adopted "pertinent portions" of the prejudicial spillover arguments advanced by Vederman and Fattah. Nicholas Br. 65. Her spillover claim has no more merit than theirs. Nicholas's involvement in the RICO conspiracy was distinct from the bribery charges, which did not unfairly influence the other counts. As to Nicholas's assertion that the NOAA charges did not belong in the indictment and should have been tried separately, we fail to see how this relates to a claim of prejudicial

XII. Conclusion

We will vacate the convictions of Chaka Fattah, Sr. and Herbert Vederman as to Counts 16, 17, 18, 22, and 23. Fattah and Vederman may be retried on these counts before a properly instructed jury. We will also reverse the District Court's judgment of acquittal on Counts 19 and 20. The convictions of Chaka Fattah, Sr. and Herbert Vederman will be reinstated, and the case will be remanded for sentencing on those counts. In all other respects, the judgments of the District Court will be affirmed.

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spillover. To the extent it challenges the District Court's denial of Nicholas's motion for a severance, Nicholas has failed to provide legal support for such a contention. *See* Fed. R. App. P. 28(a)(8)(A); *United States v. Irizarry*, 341 F.3d 273, 305 (3d Cir. 2003).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
v.	:	
CHAKA FATTAH, SR., et al.	:	NO. 15-346

MEMORANDUM

Bartle J. October 20, 2016

This action is the story of political corruption involving five criminal schemes. Following their convictions by a jury after a lengthy trial, the defendants have filed motions for judgments of acquittal under Rule 29 of the Federal Rules of Criminal Procedure or in the alternative for a new trial under Rule 33.

Congressman Chaka Fattah, Sr., Herbert Vederman, Robert Brand, Karen Nicholas, and Bonnie Bowser were charged in a twenty-nine count indictment with conspiracy to commit racketeering (18 U.S.C. § 1962(d)) as well as an array of other

crimes.[1] The indictment, which was returned on July 29, 2015, also accused the defendants of one or more of the following offenses: conspiracy to commit wire fraud (18 U.S.C. §§ 1343 and 1349); conspiracy to commit honest services wire fraud (18 U.S.C. §§ 1343, 1346, and 1349); conspiracy to commit mail fraud (18 U.S.C. §§ 1341 and 1349); mail fraud (18 U.S.C. § 1341); falsification of records (18 U.S.C. §§ 1519 and 2); bribery conspiracy (18 U.S.C. § 371); bribery (18 U.S.C. § 201); bank fraud (18 U.S.C. §§ 1344 and 2); false statements to financial institutions (18 U.S.C. §§ 1014 and 2); money laundering (18 U.S.C. §§ 1957 and 2); money laundering conspiracy (18 U.S.C. § 1956(h)); and wire fraud (18 U.S.C. § 1343).

Fattah, at all times relevant, represented the Second Congressional District of Pennsylvania which currently encompasses parts of Philadelphia and Montgomery Counties. Prior to taking his seat in the United States House of Representatives in 1995, he served as a Representative and later as a Senator in the Pennsylvania General Assembly. Vederman, a former Deputy Mayor of Philadelphia and lobbyist, was close to Fattah and was a long-time Fattah supporter and contributor. Brand, whose wife was at one point a member of Fattah's congressional staff, was a Philadelphia businessman and also a long-time Fattah supporter. Nicholas was formerly employed as a member of Fattah's congressional staff

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[1] Prior to trial, the court granted the motion of Nicholas to dismiss Count Twenty-Seven charging her alone with money laundering. See Doc. No. 224. Thus, only twenty-eight counts remained thereafter.

and at the time of the events in question was the chief executive officer of Educational Advancement Alliance ("EAA"), a non-profit entity established by Fattah. Finally, Bowser held the position of chief of staff of Fattah's congressional office in Philadelphia for many years and served at times as the treasurer of the Fattah for Mayor campaign and the Fattah for Congress campaign. She had a close working relationship with Fattah and held a power of attorney for him personally.

The jury returned a verdict of guilty against Fattah on all twenty-two counts in which he was named. Specifically, it found against him on Count One (conspiracy to commit racketeering), Count Two (conspiracy to commit wire fraud), Count Three (conspiracy to commit honest services wire fraud), Count Four (conspiracy to commit mail fraud), Counts Five through Ten (mail fraud), Counts Eleven through Fifteen (falsification of records), Count Sixteen (bribery conspiracy), Count Seventeen (bribery), Count Nineteen (bank fraud), Count Twenty (false statements to a financial institution), Count Twenty-One (falsification of records), Count Twenty-Two (money laundering), and Count Twenty-Three (money laundering conspiracy).[2]

Vederman was found guilty on all eight counts against him. They were Count One (conspiracy to commit racketeering), Count Sixteen (bribery conspiracy), Count Eighteen (bribery), Count Nineteen (bank fraud), Count Twenty (false

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[2] Fattah resigned his seat in Congress on June 23, 2016, two days after the jury verdict.

statements to a financial institution), Count Twenty-One (falsification of records), Count Twenty-Two (money laundering), and Count Twenty-Three (money laundering conspiracy).

Brand was named in Count One (conspiracy to commit racketeering) and Count Two (conspiracy to commit wire fraud). The verdict was guilty on both counts.

As to Nicholas, the jury convicted her on Count One (conspiracy to commit racketeering), Count Two (conspiracy to commit wire fraud), Counts Twenty-Five and Twenty-Six (wire fraud), and Counts Twenty-Eight and Twenty-Nine (falsification of records) but acquitted her on Count Twenty-Four (wire fraud).

The jury found Bowser guilty on Count Sixteen (bribery conspiracy), Count Nineteen (bank fraud), Count Twenty (false statements to a financial institution), Count Twenty-One (falsification of records), and Count Twenty-Two (money laundering). She was found not guilty on Count One (conspiracy to commit racketeering), Count Two (conspiracy to commit wire fraud), Count Three (conspiracy to commit honest services wire fraud), Count Four (conspiracy to commit mail fraud), Counts Five through Ten (mail fraud), Counts Eleven through Fifteen (falsification of records), and Count Twenty-Three (money laundering conspiracy).

The defendants, as noted above, have pending motions under Rules 29 and 33. Under Rule 29, the court must "enter judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." The court must review the

evidence in the light most favorable to the Government to determine whether a rational jury could have found a defendant guilty beyond a reasonable doubt. See United States v. Wolfe, 245 F.3d 257, 261 (3d Cir. 2001). All reasonable inferences, of course, are drawn in favor of the jury's verdict. A defendant carries a heavy burden when challenging the sufficiency of the evidence. See United States v. Lore, 430 F.3d 190, 205 (3d. Cir. 2005).

Pursuant to Rule 33, the court may grant a new trial "if the interest of justice so requires." The standard of review under Rule 33 is different than under Rule 29. Here, the evidence is not evaluated in the light most favorable to the Government. Instead, a new trial may be granted if in the view of the court the verdict is against the weight of the evidence. See United States v. Johnson, 302 F.3d 139, 150 (3d Cir. 2002). The court must consider whether there is "a serious danger that a miscarriage of justice has occurred." See United States v. Silveus, 542 F.3d 993, 1004–05 (3d Cir. 2008).

I.

The first criminal scheme charged in the indictment centered on a $1,000,000 illegal loan to the unsuccessful campaign of Fattah to become Mayor of Philadelphia in 2007. The evidence, taken in the light most favorable to the Government, established the following facts.

In the spring of 2007, Fattah, a member of Congress, was in need of funds for his faltering primary campaign for Mayor of Philadelphia. To remedy the situation, Fattah arranged for an illegal

campaign loan of $1,000,000 from a wealthy donor. This sum far exceeded the amount allowed under the recently enacted City of Philadelphia ordinance which provided for a maximum individual campaign contribution of $2,500 for city-wide races for office. To conceal the loan, Fattah had the donor wire the $1,000,000 to LSG Strategies Services Corporation ("LSG"), the Washington, D.C. political consulting firm of Thomas Lindenfeld. At Fattah's direction, Lindenfeld signed a promissory note with the donor for the $1,000,000.[3] Fattah assured Lindenfeld that he, Fattah, would cover the debt.

Lindenfeld distributed some of the $1,000,000 to Gregory Naylor, a Lindenfeld friend and long-time Fattah confidant, who paid various Fattah campaign expenses through his political consulting firm Sidney Lei & Associates ("SLA").[4] Naylor had known Fattah for more than thirty years and had served for a period of time as the district director of Fattah's congressional office in Philadelphia. Naylor used $200,000 of this sum to pay "walking around money" in cash to a large group of campaign workers on the eve of the primary election on May 15, 2007. To

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[3] Lindenfeld pleaded guilty in a separate action to one count of conspiracy to commit wire fraud. See United States v. Lindenfeld, No. 14–598, 2014 WL 12546956 (E.D. Pa. 2014). He provided substantial assistance to the Government in this case and testified at the trial.

[4] Naylor pleaded guilty in a separate action to misprision of a felony, scheme to falsify, and false statements. See United States v. Naylor, No. 14–457 (E.D. Pa. 2014). He too provided substantial assistance to the Government in this case and testified at the trial.

camouflage that this widely known expenditure came from an illegal loan, Naylor submitted a false SLA invoice dated June 1, 2007 to the Fattah mayoral campaign for approximately $193,000. The invoice stated it was for election-day campaign expenses, although SLA itself never incurred any. Naylor sent the invoice at the instruction of Fattah.

After Fattah's defeat, Lindenfeld mailed back to the donor a check for $400,000 which represented the portion of the $1,000,000 loan that was never spent. The donor, however, also pressed for the return of the remaining $600,000. Lindenfeld reported this development to Fattah who told Lindenfeld that he would take care of it. Fattah arranged for the non-profit EAA to provide the money to pay the debt. EAA, which Fattah had established, was headed by Nicholas, his former staffer. She proceeded to misappropriate a $500,000 charitable grant from Sallie Mae and a $100,000 grant from the National Aeronautics and Space Administration ("NASA") for this purpose. Both grants to EAA were intended to support the nonprofit's educational work.

On January 24, 2008, Nicholas, using funds from Sallie Mae, transmitted a check for $500,000 from EAA to Solutions for Progress ("SFP"), a company in Philadelphia led by Brand. Several days later, Brand had $600,000 wired to Lindenfeld's firm. Lindenfeld then returned the money by wire to the donor the same day that he received it. The wired funds were sent from SFP's bank account in Pennsylvania through Rhode Island, Virginia, and Washington, D.C. to LSG's bank account and then from LSG's bank account through Vederman to the donor's bank account. Nicholas later defrauded

NASA of $100,000 and forwarded this sum to Brand in May 2008 to make him whole.

Nicholas and Brand attempted to disguise the purpose of the transfer of the $600,000 from EAA to SFP with a $600,000 sham contract for software to be provided by SFP to EAA. The contract, however, was not signed until August 2008, months after EAA had forwarded the $600,000 to SFP and only after a Department of Justice audit of EAA had begun and a subpoena had been served on SFP by the Office of the Inspector General of the Department of Justice. SFP never provided anything of value to EAA under their contract.

Brand and Lindenfeld likewise entered into a fake contract to cover up the real reason for the movement of the money from SFP to Lindenfeld's firm, LSG. Under the contract, LSG purportedly would provide SFP with services for $600,000. SFP paid LSG upfront the entire $600,000, but LSG never did anything of value for SFP in return. This subterfuge was concocted at the initiation of Brand. Throughout, Lindenfeld kept Fattah apprised about the transfer of money from Brand to the donor.

Steps were taken by the Fattah for Mayor campaign to address the June 1, 2007 invoice for $193,000 from SLA, Naylor's consulting firm. This invoice, as noted above, had been designed to conceal a portion of the illegal loan. As required by local law, this debt was included in the campaign's public filings. It was important for an elected official to pay off or write down his campaign debts in order to maintain his political standing. To wipe the debt from the campaign's books and to avoid the appearance that Fattah could not raise money and

satisfy his obligations, the Fattah for Mayor campaign began to write down the $193,000 bogus obligation in $20,000 annual increments. This was the limit of annual debt forgiveness allowed under local election law. These annual write-downs of the debt, recorded in public filings with local election officials, continued through 2014 even though there was in fact no actual debt to retire. In filing the campaign finance reports, Fattah swore or affirmed on the face of each filing "that to the best of my knowledge and belief this political committee has not violated any provisions of the Act of June 3, 1937 (P.L. 1333, No. 320) as amended."

II.

The Government has established the following facts as to the "Blue Guardians" scheme, which involved a promise by Fattah to obtain a federal appropriation for Lindenfeld in return for Lindenfeld's forgiveness of a campaign debt owed to his consulting firm.

After Fattah lost the primary election for Mayor of Philadelphia on May 15, 2007, he continued to serve in Congress. According to campaign filings, his mayoral campaign still owed Lindenfeld and LSG some $130,000 for their work on that failed effort. Lindenfeld met with Fattah in 2008 and pressed for payment. Fattah responded that his campaign did not have the funds to pay the debt. Fattah also explained that he needed to write down the obligation on his campaign finance reports. Because these reports are a matter of public record, ignoring the campaign debts or having a large unpaid balance affects the electoral strength of a candidate and makes it harder to raise funds for future campaigns.

Since his campaign could not pay what it owed LSG, Fattah promised to obtain a $15,000,000 federal appropriation for Lindenfeld's benefit in return for LSG's forgiveness of the debt. Fattah proposed that the appropriation be funneled through a nonprofit corporation called Blue Guardians to be created by Lindenfeld. The purpose of Blue Guardians would be to promote coastal environmental preservation along the southern Atlantic and Gulf coasts and the United States islands in the Caribbean Sea. Lindenfeld, a political consultant, had no experience or expertise in the environmental field.

In early 2010, Lindenfeld, following Fattah's instruction, created Blue Guardians as a nonprofit corporation. For political reasons, Fattah needed it to have a Philadelphia address. At Fattah's direction and with the concurrence of Brand, Lindenfeld used the South Broad Street address of Brand's company SFP in Philadelphia even though Lindenfeld was in Washington, D.C.

Lindenfeld took a number of additional steps to activate Blue Guardians. He sent via the internet an application for Blue Guardians for an Employer Identification Number from the Internal Revenue Service. The transmission went from Washington, D.C. to Cincinnati, Ohio. An LSG employee also sent an application on behalf of Blue Guardians for an identification number from the Data Universal Numbering System, which is required for all federal grant applications. The application was transmitted by the internet from Washington, D.C. to Berkeley Heights, New Jersey. In addition, Lindenfeld opened a bank account for Blue Guardians.

Lindenfeld and LSG, with the guidance of Fattah, submitted to the Appropriations Committee of the House of Representatives in 2009 a "FY 2010 Appropriations Project Questionnaire" seeking $15,000,000 for Blue Guardians. This was done even before Blue Guardians came into existence. In 2010, Lindenfeld on behalf of "Blue Guardians" submitted a completed questionnaire for a $3,000,000 appropriation for the fiscal year 2011. Fattah's staff helped formulate the answers on the questionnaires.

In the spring of 2010, an investigative reporter from The Philadelphia Inquirer got wind of Blue Guardians and asked Lindenfeld about it. Lindenfeld reported the inquiry to Fattah, and the project was abandoned. Blue Guardians never reached the operational stage.

In the meantime, beginning in 2010, as part of the bargain to eliminate the $130,000 debt owed by the Fattah for Mayor campaign to Lindenfeld, Fattah began to write down the debt in $20,000 increments in his annual campaign finance reports. This was the maximum yearly deduction allowed under local election law. These public filings continued through 2014 and in each instance Fattah certified them as not in violation of Pennsylvania law.

III.

The third scheme described Fattah's use of campaign funds to pay the student debts of his son and the contemporaneous deception of campaign creditors. The facts are outlined in the light most favorable to the Government.

Fattah directed that funds from the Fattah for Mayor campaign and the Fattah for Congress

campaign be diverted for the payment of some of the student debts that his son, Chaka Fattah, Jr., owed to Drexel University and to Sallie Mae. From January 2008 into November 2010, Fattah had Bowser, his Fattah for Mayor and Fattah for Congress treasurer, transmit to Naylor checks payable to SLA from the Fattah for Mayor campaign account. On occasion, those funds had first been moved from the Fattah for Congress account to the Fattah for Mayor account. At Fattah's instruction, Naylor then used these funds to satisfy the student debts of Chaka Fattah, Jr. Naylor, through SLA, mailed thirty-five payments totaling in excess of $20,000 to Drexel University and Sallie Mae on behalf of Fattah's son from the summer of 2007 into the spring of 2011.

To conceal the use of Fattah for Mayor and Fattah for Congress funds to pay off the student debts of Fattah's son, Fattah made false filings with state and local election officials. The filings falsely documented the payments as expenditures to SLA against the June 1, 2007 bogus invoice that Naylor had sent to the Fattah for Mayor campaign for approximately $193,000. Naylor improperly provided Chaka Fattah, Jr. with copies of Internal Revenue Service 1099 forms to cover the money used to pay the latter's debt.

While Naylor was paying the obligations of Fattah's son with campaign funds, the Fattah for Mayor campaign owed the law firm of Montgomery McCracken Walker & Rhoads, LLP $84,667.35 for legal services it had rendered in connection with the 2007 mayoral campaign. In 2008, Vederman, a close and active financial supporter of Fattah and the

Fattah for Mayor campaign, approached the firm to settle the debt. The firm agreed to do so by foregoing $40,000 over a two-year period. Vederman told the attorney of the firm with whom he met that it would be very difficult for Fattah to raise the funds needed to meet this entire obligation. The firm was never advised that Fattah for Mayor campaign funds were being used to pay Chaka Fattah, Jr.'s college debt. This information would have been material to the firm in deciding whether to compromise the campaign debt.

In 2009, the Fattah for Mayor campaign still owed $55,000 to a small printing company for campaign mailings it had created in 2007. Before the printing company performed the work in issue, Fattah had made personal contact with the owner and had signed a personal guarantee in early May 2007 to pay all the sums due. In 2010, Vederman met with the owner on behalf of Fattah and the Fattah for Mayor campaign about retiring the debt. Several subsequent meetings and other interactions occurred between the owner and Vederman. In December 2011, the owner finally settled the debt for a payment of $25,000. Again, no one ever told him that Fattah for Mayor campaign funds were being siphoned off to satisfy the college debt of Chaka Fattah, Jr. If he had known this, he never would have entered into the compromise.

There is no evidence that Vederman knew anything about the payment of Chaka Fattah, Jr.'s student debts by the Fattah for Mayor campaign.

IV.

The indictment also alleged a bribery scheme involving Fattah, Vederman, and Bowser. Accepting the evidence in the light most favorable to the Government, the record demonstrated that Fattah, as a Congressman, made a focused effort to secure an ambassadorship for Vederman from late 2008 through late 2010 and hired Vederman's girlfriend as a low-show employee on his staff in January 2012. In return, Vederman provided things of value to Fattah.

In November 2008, shortly after the election of Barack Obama, Fattah wrote the following letter on official letterhead to Senator Robert Casey of Pennsylvania in which he "strongly recommend[ed]" Vederman as an "unquestionably exceptional candidate" for an ambassadorship:

> Dear Bob:
>
> I am writing to strongly recommend Mr. Herb Vederman for an opportunity to represent our country through an ambassadorship.
>
> Mr. Vederman is willing to serve in any location that would be helpful to the Obama Administration. His resume is attached, however I felt it important to highlight his experience as a member of the Mayor of Philadelphia's cabinet for 8 years and the Governor's cabinet, as well. Mr. Vederman has traveled extensively throughout Europe and Asia on diplomatic missions, government related trade delegations and for personal business. This direct contact and experience has provided him with the diplomatic knowledge and tools necessary on cultural, governmental and

> business customs. On governmental travel alone, Mr. Vederman visited nearly 20 different countries representing the Commonwealth of Pennsylvania's interests, and worked with foreign trade and business officials. In addition to this wealth of experience, Mr. Vederman serves as an adjunct professor of government at Drexel University, an opportunity that came in recognition of his expertise in working with legislators and public policy formulators.
>
> Mr. Vederman has devoted most of his career to public service. He has worked tirelessly to make a difference and is so committed that in each position, he has requested an annual salary of $1.00. He now offers his services to our president-elect for this same sum.
>
> Mr. Vederman is an unquestionably exceptional candidate for an ambassadorship, particularly when considering the importance of diplomatic relations at this time. Based on my direct involvement both personally and professionally, he has proven himself to have both the initiative and the intellectual creativity necessary for this position. His communication skills are clear and concise, both essential elements as he ensures the interests of our nation while effectively representing our president.
>
> I look forward to hearing from you or a member of your staff after you have had an opportunity to review his resume.

The letter was accompanied by a copy of Vederman's resume. A professor of international relations at American University also sent a letter of

recommendation to Senator Casey. It turned out that the Senator was not prepared to recommend Vederman to be an ambassador and had no further contact with Fattah about the matter.

For several years before Fattah sent his letter to Senator Casey, Fattah and his wife had had an au pair from South Africa living with them. In August 2009, the au pair applied for a student visa to study at the Community College of Philadelphia. On the application, she had to provide information as to where she was staying and how she would finance her education while in the United States. She declared that the Fattahs would be her host family but that her financial sponsor would be Vederman.

In January 2010, Fattah signed a certification stating that he had the ability to satisfy the au pair's financial commitments when she sought a transfer to Philadelphia University. However, he did not submit the requested supporting bank statements or other documentation. Fattah explained that he did not provide the bank statements "for confidentiality reasons." Instead, he supplied a letter dated January 14, 2010 from Vederman's bank in New York "to back this pledge." Philadelphia University accepted this arrangement. Without Vederman's letter the au pair would not have been able to study at Philadelphia University or remain in the United States. When she did transfer, Vederman paid her tuition balance of $3,000.

In February 2010, the month Vederman paid the tuition for Fattah's au pair, Fattah obtained a teleconference with White House deputy chief of staff James Messina to press for the naming of Vederman to an ambassadorship. Fattah enlisted Edward

Rendell, the former Governor of Pennsylvania and former Mayor of Philadelphia, to join him on the call as an additional advocate for Vederman. Messina did not usually agree to a telephone conference of this kind with a congressman about a political appointment. It only happened because Fattah had a relationship with Rahm Emanuel, the White House chief of staff, who told Messina to do so.

Shortly thereafter, in March 2010, a member of Fattah's staff sent a follow-up email to the White House concerning the appointment of Vederman. Attached was a copy of the letter Fattah had sent to Senator Casey, the biography of Vederman, and the letter of recommendation from the American University professor. A few weeks later, Fattah's staff sent yet another email to the White House on the same subject.

In April 2010, Fattah found himself in need of funds to pay his wage taxes in the amount of $2,381 owed to the City of Philadelphia. Again, Vederman came to the rescue. On April 9, 2010, Vederman wrote a check for $3,500 payable to Fattah's son, Chaka Fattah, Jr. On April 15, the date the wage taxes were due, Chaka Fattah, Jr. made cash deposits totaling $2,310 into his father's bank account, and Fattah wrote a check that day to the City of Philadelphia in payment of his tax bill. Without the deposits by his son, Fattah did not have sufficient funds in his account to cover the check.

Fattah continued to press hard for the ambassadorship for Vederman. He took the unusual step of hand-delivering to the President of the United States a letter on his official stationery dated

October 30, 2010. Fattah urged the President to name Vederman as an ambassador. The letter read:

> Mr. President:
>
> Governor Rendell and I have written letters and made phone calls to recommend Mr. Herb Vederman for an opportunity to represent our country through an ambassadorship. I'm writing this note to follow-up on this matter.
>
> Mr. Vederman is willing to serve in any location that would be helpful to the Obama Administration. His resume was submitted to your staff, however I feel it important to highlight his experience as a member of the Mayor of Philadelphia's cabinet for 8 years and the Governor's cabinet, as well. Mr. Vederman has traveled extensively throughout Europe and Asia on diplomatic missions, government related trade delegations and for personal business. This direct contact and experience has provided him with the diplomatic knowledge and tools necessary on cultural, governmental and business customs. On governmental travel alone, Mr. Vederman visited nearly 20 different countries representing the Commonwealth of Pennsylvania's interests, and worked with foreign trade and business officials. In addition to this wealth of experience, Mr. Vederman serves as an adjunct professor of government at Drexel University, an opportunity that came in recognition of his expertise in working with legislators and public policy formulators.
>
> Mr. Vederman has devoted most of his career to public service. He has worked tirelessly to make

> a difference and is so committed that in each position, he has requested an annual salary of $1.00. He now offers his services to your administration for this same sum.
>
> Mr. Vederman is an unquestionably exceptional candidate for an ambassadorship. He has proven himself to have both the initiative and intellectual creativity necessary for this position.
>
> Governor Rendell and I look forward to hearing from a member of your staff soon.

On the same day as Fattah dated his letter to the President, Vederman opened his wallet once more. He sent a check to Chaka Fattah, Jr. for $2,800.

Several weeks later, on November 18, 2010, Fattah's chief of staff in Washington sent another email to the White House concerning Vederman. The email stated:

> Kristin,
>
> I hope all is well.
>
> Congressman Fattah was with the President a few weeks ago and gave him a note following up on Herb Vederman's interest in serving the nation. The note is attached.
>
> This note is a follow-up to a few calls with Mr. Messina, Congressman Fattah and Governor Rendell. It is our hope that Mr. Vederman will have an opportunity to discuss this opportunity with Mr. Messina. If I can be of any assistance, please let me know.

Despite Fattah's persistent efforts, Vederman was never named as an ambassador.[5]

At the end of 2011, Vederman's girlfriend lost her long-time job as a law clerk to a federal magistrate judge in Florida. At the time of her termination, she only needed ten months of federal service for her pension to vest. Vederman contacted Fattah about hiring her on his congressional staff in Philadelphia. She herself spoke to Fattah on the phone on Christmas Day, and during that conversation he told her that it should not be a problem for her to work for him. On December 26, 2011, at Fattah's suggestion, she sent Bowser, chief of staff of Fattah's Philadelphia office, an email addressed to Fattah describing her situation. She included a resume, a letter of recommendation, and several writing samples.

In December 2011, while Vederman's girlfriend was seeking employment on Fattah's staff, Fattah again found himself in need of money, and he and his wife, Renee Chenault–Fattah, turned again to Vederman. The Fattahs had decided to purchase a vacation home in the Pocono region of Pennsylvania and were short of funds to be able to close on the property. It so happened that Chenault–Fattah owned a 1989 Porsche. On January 12, 2012, she offered by email to sell it to Vederman for $18,000.

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[5] In June 2011, Fattah's staff arranged a short meeting between Vederman and Ronald Kirk, the United States Trade Representative, in the hope that Vederman might be named to an unpaid federal trade advisory committee. It turned out that Vederman was not particularly interested in such a position, and this short-lived digression was abandoned.

Several hours later, Vederman responded that he would "love to purchase" it.

On December 13, 2011, Bowser, at Fattah's request, had faxed the realty agreement for the Pocono home to Credit Union Mortgage Association ("CUMA"), the mortgage loan processing organization, and to the realtor. Bowser had a close working relationship with Fattah as the long-time chief of staff of his Philadelphia office and held a personal power of attorney for him. On January 13, 2012, the day after Vederman agreed to purchase the Porsche, Bowser emailed Vederman with instructions on how to wire the money to Fattah's Wright Patman Congressional Federal Credit Union account. Vederman wired the money that same day.

After Vederman wired the $18,000 into Fattah's Wright Patman account, thus making it available to help fund the purchase of the vacation home, Victoria Souza, the mortgage loan processor for CUMA, informed Fattah that she needed documentation of the source of the money. Fattah then rapidly began to generate that documentation. He responded to Souza on January 17, 2012 that the funds had resulted from the sale of a car and that the "paper work is in process." On January 17, 2012, Souza emailed Fattah that CUMA needed the bill of sale signed by the seller and purchaser and documentation as to the source of the wired funds.

Later that day, Bowser emailed the unsigned bill of sale for the Porsche to Vederman to sign. At that time, he was in Florida. She also emailed Fattah the link to instructions on selling a car and asked him for the title number and odometer reading for the Porsche. The next day, January 18, 2012,

Vederman returned to Bowser the bill of sale signed and undated. Thereafter, on the same day, Bowser obtained the signature of Chenault–Fattah on the bill of sale and signed the bill of sale herself as a witness even though she never saw Vederman affix his signature. The bill of sale was backdated to January 16, 2012, the day before CUMA had requested documentation about the car. The backdating occurred sometime after Vederman had signed and returned it to Bowser and before Fattah forwarded it to Souza. The record does not reveal who added the date.

On January 19, 2012, Bowser had the title with the signatures of Vederman and Chenault–Fattah notarized but without either signatory appearing before the notary. Fattah emailed the title and bill of sale to Souza that same day.

The jury had more than enough evidence to find that the sale of the Porsche was a sham. Vederman never picked up the car or took possession of it. Chenault–Fattah continued to hold herself out as the owner. The Porsche remained with the Fattahs at their home as before. In May 2012, Chenault–Fattah renewed the registration as owner of the Porsche with the Pennsylvania Department of Transportation. In June 2012, she had the car serviced at a Porsche dealership in Conshohocken, Pennsylvania for $1,575. She continued to pay the insurance on the car after the ostensible sale. In November 2012, in a recorded conversation with a representative of the insurance company, she stated: "We have the Porsche which we take off of insurance during the winter because we have it just in the

garage." She never mentioned any sale and continued to insure the car into 2015.

On January 19, 2012, less than a week after Vederman wired the $18,000 to Fattah and the same day that Fattah emailed the false title and bill of sale to CUMA, Vederman's girlfriend received a letter from Bowser welcoming her as an employee in Fattah's Philadelphia office. Bowser knew she was "Herb's [Vederman's] lady." Vederman's girlfriend remained employed for only two months and during this period spent half of her time in Florida. Although she was under the supervision of Bowser when she was at Fattah's Philadelphia office, no one there seemed to know what she did. She testified that she spent what time she was in the office largely on a project to archive Fattah's plaques and awards with Temple University. Nonetheless, her contact with Temple consisted of only one brief phone call and two emails. Nothing ever came of this project. She left her job in Fattah's office in late March 2012 when she took a position with a congressman in Florida. Fattah's hiring of Vederman's girlfriend had put Fattah over budget for his office staff and her departure was documented with a letter of termination citing budgetary considerations.

V.

The final scheme charged in the indictment involved the defrauding of and false statements to the National Oceanic and Atmospheric Administration ("NOAA") by Nicholas, the chief executive officer of EAA. The facts are narrated in the light most favorable to the Government.

In December 2011, EAA, a nonprofit entity which Fattah had founded, was experiencing financial difficulties. Accordingly, Nicholas requested a special grant of $409,000 from NOAA for the annual Fattah-founded National Conference on Higher Education, previously denominated the "Fattah Conference on Higher Education." Regardless of the good works EAA and its annual conference may have accomplished, one of EAA's purposes was to advance the political standing of Fattah. Fattah had served as the conference's keynote speaker and at that event t-shirts and other momentos with Fattah's name imprinted on them were handed out.

In her December 2011 email, Nicholas advised NOAA that the annual conference was to be held from February 17, 2012 through February 19, 2012 at the Sheraton Hotel in Philadelphia although Nicholas had missed the deadline for any application for the 2012 to 2013 fiscal year. NOAA responded in mid-January that it agreed in principle to provide $50,000 for the conference.

In May 2012, Nicholas wired a formal application to NOAA for a grant of $50,000. The application stated that the funds would be used between January 1, 2012 and June 30, 2012 although she did not state the actual dates of the Conference on Higher Education. NOAA then sought the exact dates of the conference because by that time it was too late to provide funds for an event which had already taken place. Nicholas stated that the conference was to take place from October 19, 2012 through October 21, 2012 at Philadelphia's Sheraton. Thereafter, she emailed to NOAA the

criteria for the student participants purportedly attending the October 2012 conference. Nicholas also certified her agreement to abide by the award conditions. Based on these representations, NOAA approved the grant for the purported October 2012 conference and sent the $50,000 to EAA.

In November 2013, Nicholas wired false documentation to NOAA that the funds had been used as intended for the October 2012 conference although no such conference ever took place. In January 2014, she submitted a final progress report describing the non-existent conference purportedly held in October 2012. In that report, she also falsely stated that Congressman Chaka Fattah had been the featured speaker.

Nicholas kept some of the $50,000 grant on herself and forwarded $20,000 to Naylor in March 2013 in partial payment of money EAA owed to Naylor's firm SLA for services it had performed more than a year before.

VI.

Fattah, Brand, and Nicholas have moved for judgments of acquittal or in the alternative for a new trial on Count Two of the indictment which charged them with conspiracy to commit wire fraud under 18 U.S.C. §§ 1343 and 1349. Count Two averred that they, as well as Bowser[6] and others, agreed to execute a scheme to defraud EAA and NASA. The scheme aimed to obtain money and property by fraud, and to use interstate wires in furtherance of

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[6] Bowser was found not guilty on this charge.

the conspiracy in connection with an illegal $1,000,000 loan to the Fattah mayoral campaign and its repayment.

Section 1343 provides in relevant part:

> Whoever, having devised or intended 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 . . . communication in interstate . . . 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.

See 18 U.S.C. § 1343.

Section 1349 reads:

> 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 conspiracy.

See 18 U.S.C. § 1349.

In support of his motion for judgment of acquittal, Brand argues that there was insufficient evidence that he participated in a conspiracy to defraud EAA and NASA, that he knew of the $1,000,000 illegal loan, or that he was aware of the campaign finance reports that contained the annual $20,000 write down of SLA's $193,000 phony invoice.

It is well established that a conspirator does not have to be aware of all aspects or details of the

conspiracy. See United States v. Bailey, ___ F.3d ___, 2016 WL 6081354, at (3d. Cir. Oct. 18, 2016). Moreover, "the very nature of the crime of conspiracy is such that it often may be established only by indirect and circumstantial evidence." See United States v. Brodie, 403 F.3d 123, 134 (3d Cir. 2005).

The evidence established that Nicholas, at Fattah's direction, provided Brand's company, SFP, with $600,000 of EAA's money without SFP ever performing any services to EAA. A bogus contract between SFP and EAA was not signed by Brand and Nicholas until many months thereafter and only then after Government investigators were zeroing in on EAA and SFP. As part of Fattah's plan, Brand also promptly wired $600,000 in interstate commerce to LSG, again without LSG ever doing any work for his company under their bogus contract. This money, as Brand knew, was then used to pay off the debt to the donor. The evidence is more than sufficient for the jury to have found him guilty of conspiracy to commit wire fraud.

Nicholas, like Brand, also asserts that there was insufficient evidence to convict her of wire fraud conspiracy. Her argument, like his, is totally without merit. As the chief executive officer of EAA, she misappropriated $600,000 received from Sallie Mae and NASA and transferred the money to Brand at Fattah's direction. She attempted to conceal the transfer as a legitimate payment on a contract with Brand's SFP. Again, no contract was signed until months after the transfer and then only when Government investigators were hot on her trail. We repeat that no work was ever done for EAA for the $600,000.

Fattah, Brand, and Nicholas further contend that no interstate wire was involved. They are incorrect. The parties stipulated at trial that a wire transfer of $600,000 was sent from SFP's bank account in Pennsylvania through Rhode Island and Virginia to LSG's bank account in Washington, D.C. It was further stipulated that LSG wired the money from Washington, D.C. through Virginia to the bank account of the donor to repay him for the illegal loan to the Fattah for Mayor campaign. These wires to repay the illegal loan all took place in early 2008. Brand was responsible for sending the wire from SFP to Lindenfeld at LSG, and Lindenfeld was responsible for sending the wire to the donor.

The defendants also maintain that the proof with respect to Count Two fails because it is time barred. The applicable statute of limitations is five years. See 18 U.S.C. § 3282(a). Conspiracy to commit wire fraud is a continuing offense, and the limitation period does not begin to run until the completion of the last act overt that is part of the offense. See United States v. Amirnazmi, 645 F.3d 564, 592 (3d Cir. 2011); United States v. Jake, 281 F.3d 123, 129 n.6 (3d Cir. 2002). The indictment was filed on July 29, 2015. Thus, an overt act must have occurred on or after July 29, 2010 for the count to be timely. See United States v. Bornman, 559 F.3d 150, 153 (3d Cir. 2009).

The Supreme Court ruled in Grunewald v. United States, 353 U.S. 391 (1957), that "the crucial question in determining whether the statute of limitations has run is the scope of the conspiratorial agreement, for it is that which determines both the duration of the conspiracy, and whether the act

relied on as an overt act may properly be regarded as in furtherance of the conspiracy." See id. at 397. An act of concealment brings the conspiracy within the statute of limitations when "done in furtherance of the main objectives of the conspiracy." See id. at 405. Concealment activities after the purpose of the conspiracy has been attained "for the purpose only of covering up after the crime" do not extend the time to file an indictment. See id. In compliance with Grunewald, this court instructed the jury:

> The Government charges that the filing of Fattah for Mayor campaign finance reports on or after July 29, 2010 brings Count Two within the five-year period because the reports concealed the alleged scheme to defraud charged as the object of the conspiracy. However, in order to bring an alleged fraud within the five-year period, you must find that when the alleged conspiracy was formed, the defendants expressly agreed to conceal the alleged fraud, and that their acts on or after July 29, 2010 furthered that purpose.
>
> It is not enough for the Government to offer circumstantial evidence permitting an inference of an agreement to conceal, and it is not enough for the Government to offer direct evidence that the defendants implicitly agreed to conceal. The Government must prove by direct evidence that the conspirators originally expressly agreed to conceal the conspiracy.

The indictment alleged and the Government proved that the central objective of the conspiracy was to maintain and enhance the stature of Fattah as a political figure. Integral to this objective was the

need to demonstrate that he could meet his financial obligations to his vendors and retire his campaign debts. The record contains evidence that it was a sign of weakness for a candidate or holder of public office to be unable to raise funds or to eliminate campaign obligations. Fattah obtained the $1,000,000 loan from the donor to help finance his run for Mayor. When the primary campaign ended in defeat in May 2007, it was necessary to pay off or appear to pay off or reduce his debts to maintain Fattah's political strength.

In June 2007, long before the repayment of the $1,000,000 loan in January 2008, Fattah had Naylor prepare a $193,000 invoice to the Fattah for Mayor campaign to conceal most of the $200,000 that Naylor had distributed as "walking around money" using a portion of the illegal loan funds. Naylor had handed out this money in cash to dozens of election workers on the eve of the May 15, 2007 primary. It was well known in the community that these payments had been made and clearly questions would be asked as to the source of the funds. Thus, those expenditures were described in the fake invoice and included in the public Fattah for Mayor campaign filings. These steps made it appear that SLA, not the donor, was the source of the money.

Fattah, Lindenfeld, and Naylor, all experienced political operatives, knew from the outset that this non-existent debt to SLA would then need to be written off for Fattah to avoid appearing financially vulnerable, which would politically undermine Fattah. They also knew from the outset, as experienced political operatives, that the law only permitted a maximum of $20,000 to be written off

each year and thus that it would take almost ten years of annual campaign filings to erase the debt. The campaign filings through 2014 concealing the fraudulent nature of the invoice and a part of the illegal $1,000,000 loan were clearly a central aim of this conspiracy to maintain the position of Fattah, a Congressman, as a viable political figure. Consequently, Count Two is not barred by the statute of limitations because overt acts, that is campaign filings, occurred as part of the plan of the conspiracy within five years of the filing of the indictment on July 29, 2015.

The defendants next argue that Count Two improperly alleged two conspiracies, one involving Fattah, Bowser, Lindenfeld, and Naylor in obtaining and spending the $1,000,000 loan and the other involving Fattah, Lindenfeld, Brand, and Nicholas in misappropriating Sallie Mae and NASA funds to repay the loan. A duplicitous indictment violates a defendant's constitutional right to notice of charges against him or her and undermines the right to assert a double jeopardy defense in a subsequent action. See United States v. Moloney, 287 F.3d 236, 239 (2d Cir. 2002); United States v. Crisci, 273 F.3d 235, 238 (2d. Cir. 2001). Our Court of Appeals has cautioned against formalism in resolving issues of duplicity. It explained: "a single count of an indictment should not be found impermissibly duplicitous whenever it contains several allegations that could have been stated as separate offenses, but only when the failure to do so risks unfairness to the defendant." United States v. Root, 585 F.3d 145, 155 (3d Cir. 2009).

Here, the jury could and did reasonably find that there was one conspiracy involving the obtaining, repayment, and concealment of the illegal loan with the aim of maintaining and enhancing Fattah's political stature in the community. The SLA invoice and the public campaign filings were all part of this objective. Simply because Brand or Nicholas may not have known or been involved in all the details of the conspiracy is of no consequence. See Bailey, ___ F.3d ___, 2016 WL 6081354, at *3. The indictment gave all defendants proper notice of the conspiracy allegation, and they experienced no unfairness in the way Count Two was framed.

Finally, defendants contend a new trial is required on Count Two because they were unfairly prejudiced by the introduction of evidence on other counts where guilty verdicts must be reversed. This spillover argument is without merit as we explain in Section XVI of this Memorandum.

The evidence was overwhelming that Fattah, Brand, and Nicholas were guilty of the timely charge of conspiracy to commit wire fraud. Their motions for judgments of acquittal or for a new trial on Count Two will be denied.

VII.

Count Three charged Fattah and Bowser[7] with conspiracy to commit honest services wire fraud in violation of 18 U.S.C. §§ 1343, 1346, and 1349. Specifically, it alleged that the Blue Guardians scheme deprived the citizens of the Second

[7] Bowser was found not guilty on this count.

Congressional District of Pennsylvania of their right to the honest services of Congressman Fattah through bribery and that in furtherance of the scheme interstate wires were used. Fattah seeks a judgment of acquittal or in the alternative a new trial on this count.

Section 1346 provides that "a scheme or artifice to defraud," as used in § 1343, the wire fraud statute, "includes a scheme or artifice to deprive another of the intangible right of honest services." See 18 U.S.C. § 1346. The Supreme Court held in Skilling v. United States, 561 U.S. 358 (2010), that "§ 1346 covers only bribery and kickback schemes." Id. at 367. Under the bribery statute, 18 U.S.C. § 201, it is unlawful for a public official to accept anything of value in return for being influenced in the performance of an official act. A promise to perform an official act is sufficient to constitute a bribery offense if done in exchange for a thing of value, whether or not the official act ever occurs. See McDonnell v. United States, 136 S. Ct. 2355, 2371 (2016). The Supreme Court in McDonnell reiterated: "Under this Court's precedents, a public official is not required to actually make a decision or take an action on a 'question, matter, cause, suit, proceeding or controversy'; it is enough that the official agreed to do so." Id. An act to be official "must involve a formal exercise of governmental power" and be something specific and focused. See id. at 2372; United States v. Birdsall, 233 U.S. 223, 234 (1914).

Fattah argues that any promise to obtain an appropriation was not an official act as a matter of law. This argument is without merit. The evidence proved overwhelmingly that Fattah promised Lindenfeld a federal appropriation for Blue

Guardians, a corporation to be set up by Lindenfeld, in return for Lindenfeld's forgiveness of the $130,000 debt that the Fattah for Mayor campaign owed him and his consulting firm. The conspiracy continued into 2014 while Fattah was writing down the debt in his annual campaign filings.

It is hard to imagine a more quintessential official act than that which occurred here. Fattah, as a member of the House Appropriations Committee, agreed to obtain an appropriation for Lindenfeld's benefit. He promised a formal exercise of specific and focused governmental power. See McDonnell, 136 S. Ct. at 2371.

The facts here are quite similar to those charged in United States v. Brewster, 408 U.S. 501 (1972). There the Supreme Court upheld the indictment of a former United States Senator for bribery under § 201. It charged him with accepting money while in office in return for promising to be influenced with respect to postage rate legislation pending in Congress. The Court stated:

> The illegal conduct is taking or agreeing to take money for a promise to act in a certain way. There is no need for the Government to show that appellee [the Senator] fulfilled the alleged illegal bargain; acceptance of the bribe is the violation of the statute, not performance of the illegal promise.
>
> . . . .
>
> Nor does it matter if the Member defaults on his illegal bargain. . . . If, for example, there were undisputed evidence that a Member took a bribe in exchange for an agreement to vote for a given

> bill and if there were also undisputed evidence that he, in fact, voted against the bill, can it be thought that this alters the nature of the bribery or removes it from the area of wrongdoing the Congress sought to make a crime?

See id. at 526–27.

Fattah also argues that the Government failed to prove beyond a reasonable doubt that the conspiracy involved any wires across state lines. This is incorrect. The Government established that Lindenfeld did indeed use the internet across state lines in organizing and readying Blue Guardians to do business. Specifically, he sent an email to obtain an IRS identification number. The wire was transmitted from Washington, D.C. to Cincinnati, Ohio. He also sought a special identification number for federal grant applications by sending a wire from Washington, D.C. to Berkeley Heights, New Jersey.

Consistent with McDonnell, this court instructed the jury that one of the elements of honest services wire fraud to be proven for a conviction was a "scheme to exchange an agreement to forgive a Fattah for Mayor campaign debt owed to Thomas Lindenfeld for a promise to secure an earmark for a nonprofit entity called Blue Guardians." The court directed the jury to the specific conduct of Fattah in issue and the thing of value alleged to be provided by Lindenfeld. See United States v. Kemp, 500 F.3d 257, 281 (3d Cir. 2007). As more fully outlined in Section X of this Memorandum, the narrowing of the definition of official act in McDonnell does not require a new trial on Count Three since the only official act involved in the Blue Guardians scheme squarely meets that narrowed definition. Charging

the jury in strict compliance with McDonnell would have made absolutely no difference in the outcome of the jury's verdict on this Count. Any error was harmless. See Fed. R. Crim. P. 52(a).

The motion of Fattah for judgment of acquittal or a new trial on Count Three will be denied.

VIII.

The jury found Fattah guilty of conspiracy to commit mail fraud under 18 U.S.C. §§ 1341 and 1349 in Count Four of the indictment and of mail fraud under § 1341 in Counts Five through Ten, all in connection with Fattah's causing the use of Fattah for Mayor and Fattah for Congress campaign funds to pay the student debts of his son, Chaka Fattah, Jr.[8] He seeks judgments of acquittal or a new trial on these counts.

Section 1341 provides:

> 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 . . . for the purposes 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 takes or receives therefrom, any such matter or thing . . . shall be fined under this title or imprisoned not more than 20 years, or both.

See 18 U.S.C. § 1341.

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[8] Bowser was found not guilty on these counts.

The evidence is overwhelming that Fattah orchestrated the use of these campaign funds to pay his son's college debts. He directed Bowser, his campaign treasurer, to send the campaign funds to Naylor, and he had Naylor pay the debts through Naylor's consulting firm's bank account. The transmissions to SLA were disguised as payments due for work on the Fattah for Mayor campaign. The scheme involved at the very least fraud on the Fattah for Mayor campaign and the Fattah for Congress campaign. Two of the Fattah for Mayor campaign creditors—one a Philadelphia law firm and the other a small printing company—were also misled by omission. The creditors agreed to compromise their debts without being told that campaign funds were being used to help Chaka Fattah, Jr. Both creditors considered the omission to be material.

Counts Five, Six, Seven, Nine, and Ten charged Fattah with mail fraud with respect to the following checks mailed at Fattah's instigation by Naylor from SLA's bank account to Sallie Mae to pay off Chaka Fattah, Jr.'s student debt:

Count	Mailing	Date
Five	Check to Sallie Mae for $1,051.03 drawn on SLA's bank account at PNC Bank and signed and mailed by Gregory Naylor	September 20, 2010
Six	Check to Sallie Mae for $525.52 drawn on SLA's bank account at PNC Bank	November 8, 2010

	and signed and mailed by Gregory Naylor	
Seven	Check to Sallie Mae for $525.52 drawn on SLA's bank account at PNC Bank and signed and mailed by Gregory Naylor	November 18, 2010
Nine	Check to Sallie Mae for $525.52 drawn on SLA's bank account at PNC Bank and signed and mailed by Gregory Naylor	December 17, 2010
Ten	Check to Sallie Mae for $2,102.08 drawn on SLA's bank account at PNC Bank and signed and mailed by Gregory Naylor	April 6, 2011

Fattah contends that the statements made to the campaign creditors charged in Counts Four through Ten to induce them to compromise the amount owed by the Fattah for Mayor campaign were not false or fraudulent. Even if he is correct, these counts, as noted previously, specifically charged as part of the scheme that Fattah defrauded the Fattah for Mayor campaign and the Fattah for Congress campaign by directing Naylor to use these funds to pay the student debts of Fattah's son. Naylor in turn paid Sallie Mae and Drexel University by sending checks through the mail. Fattah does not challenge the sufficiency of the evidence that he directed Bowser to mail these campaign funds to Naylor and that Naylor mailed

checks backed by those funds to Sallie Mae and Drexel as part of a conspiracy in which he was involved with Fattah. That evidence more than suffices for convictions for mail fraud and for conspiracy to commit mail fraud.

Fattah further asserts that he is entitled to a new trial on these counts because there was a prejudicial spillover effect from the evidence on other counts where the convictions must be reversed. As explained in Section XVI of this Memorandum, we reject this argument on prejudicial spillover.

Fattah does contend that the Government has not proven all the elements required in Count Eight. He maintains that the Government has not established beyond a reasonable doubt that Bowser mailed the check in issue to Naylor. The Count Eight check, unlike the others which are the subject of Counts Five, Six, Seven, Nine, and Ten, was drawn on the bank account of the Fattah for Mayor campaign. Naylor was the recipient, not the sender. The check was signed by Bowser, payable to SLA in the amount of $5,000, and dated November 22, 2010.

The use of the mails in furtherance of the scheme to defraud is an essential element of the offense under § 1341. See United States v. Hannigan, 27 F.3d 890, 892 (3d Cir. 1994). Naylor received five Fattah for Mayor campaign checks which were involved in the scheme, including the one charged in Count Eight. The others, which were outside the statute of limitations, were not charged in the indictment. Naylor testified that Bowser usually called him to let him know the check was coming. Naylor recalled that he "received most of them by mail, one or two may have been dropped off at the

office." He further stated that he was "not exactly sure as to which ones [of the checks received from Bowser] were mailed and which ones [he] picked up personally."

We start with the principle, stated in Hannigan and cited by the Government, that "[i]t is well-established that evidence of business practice or office custom supports a finding of the mailing element of § 1341." See Hannigan, 27 F.3d at 892. Naylor, however, did not testify about the business practice or office custom of the sender, that is Bowser, the treasurer of the Fattah for Mayor campaign. Indeed, he would have been in no position to do so. All he could possibly know is how he received the five checks from Bowser. While he remembered that most were received by mail, he also testified that one or two may have been hand-delivered or picked up. We need not delve into the propriety of statistics or probabilities in proving an element of a criminal offense, particularly where the sample was so small. In our view, Naylor's testimony that there was a 60% to 80% probability that the November 22, 2010 check was mailed to him is not enough to find Fattah guilty of mail fraud on Count Eight beyond a reasonable doubt.

Accordingly, we will deny the motion of Fattah for judgments of acquittal or new trial on Counts Four, Five, Six, Seven, Nine, and Ten and will grant his motion for judgment of acquittal on Count Eight.[9]

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[9] Pursuant to Rule 29(d) of the Federal Rules of Criminal Procedure, we find no new trial is warranted on Count Eight to the extent that the Court of Appeals disagrees with our decision to grant the judgment of acquittal.

IX.

The jury returned a verdict of guilty against Fattah on Counts Eleven through Fifteen charging him with falsification of records under 18 U.S.C. §§ 1519 and 2.[10] He seeks judgments of acquittal or a new trial on these counts.[11]

Section 1519 provides:

> Whoever knowingly . . . conceals . . . falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States . . . or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

See 18 U.S.C. § 1519.

Counts Eleven through Fourteen alleged, in essence, that the Fattah for Mayor Committee falsified the Pennsylvania campaign finance report

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[10] Section 2 provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsel, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

See 18 U.S.C. § 2.

[11] The jury found Bowser not guilty on all of these counts.

filings for each of the years 2010, 2011, 2012, and 2013 with the intent to impede investigations by the Department of Justice and the Federal Bureau of Investigation. Each report was signed by Fattah under oath that he had not violated the Pennsylvania election law.

Count Fifteen alleged a false "FEC FORM 3" styled "Report of Receipts and Disbursements" filed with the Federal Election Commission in December 2010, by Bowser, the treasurer of the Fattah for Congress Committee, again with the intent to impede a federal investigation. That form stated that the Fattah for Congress Committee disbursed $5,000 to the Fattah for Mayor Committee on November 19, 2010. These funds were not used for legitimate expenditures of the Fattah for Mayor campaign but to satisfy some of the personal financial obligations of Chaka Fattah, Jr.

Although Fattah states that the jury lacked sufficient evidence to convict him on all counts, he offers no specific supporting argument with respect to Counts Eleven through Fifteen. Instead, he argues that he is entitled to a new trial on these counts because he suffered from prejudicial spillover of evidence introduced on other counts where the verdict must be overturned. We reject this prejudicial spillover argument for the reasons stated in Section XVI of this Memorandum.

The motion of Fattah for judgments of acquittal or for a new trial on Counts Eleven through Fifteen will be denied.

X.

The jury found Fattah, Vederman, and Bowser guilty of bribery conspiracy on Count Sixteen. Fattah was also convicted of bribery on Count Seventeen and Vederman on Count Eighteen. The defendants now seek judgments of acquittal or, alternatively, a new trial on these counts in light of the Supreme Court's recent decision in McDonnell v. United States, 136 S. Ct. 2355 (2016). McDonnell was decided on June 27, 2016, six days after the jury reached its verdict in this case.

Count Sixteen charged Fattah, Vederman, and Bowser with conspiracy, in violation of 18 U.S.C. § 371, to commit bribery of a public official in violation of 18 U.S.C. § 201(b)(1)–(2) and to defraud the United States of the honest services of Fattah in violation of 18 U.S.C. §§ 1343 and 1346.

In Count Seventeen, Fattah was accused of bribery in accepting things of value from Vederman in exchange for being influenced in the performance of official acts as a public official. Section 201(b)(2) makes it unlawful for a public official to:

> directly or indirectly, corruptly demand[], seek[], receive[], accept[], or agree[] to receive or accept anything of value personally or for any other person or entity, in return for:
>
> (A) being influenced in the performance of any official act.

See 18 U.S.C. § 201(b)(2).

Count Eighteen charged Vederman with bribery of Fattah by supplying or promising to provide him things of value in order "to influence any official act" in violation of § 201(b)(1). Section 201(b)(1) makes it unlawful for an individual to:

> directly or indirectly, corruptly give[], offer[] or promise[] anything of value to any public official or person who has been selected to be a public official, or offer[] or promise[] any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—
>
> (A) to influence any official act.

See 18 U.S.C. § 201(b)(1).

Section 201 defines "official act" as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." See § 201(a)(3).

Our instruction to the jury on the meaning of official act mirrored the statutory language quoted above. We further explained that "it is not necessary for the Government to prove that a defendant intended to induce a public official to perform a number of official acts in return for things of value so long as the evidence shows a course of conduct of giving things of value to a public official in exchange for a pattern of official acts favorable to the giver."

Counsel for the defendants objected to this instruction on the meaning of official act and requested that the court model the instructions after the defendants' proposed jury instruction.[12] Counsel

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[12] In addition to requesting an instruction on the statutory definition of "official act," the defendants' proposed jury instruction stated:

for defendants referenced the McDonnell case awaiting decision in the Supreme Court although no one, of course, knew at that time what or how the Court might rule.

In McDonnell, the former Virginia Governor Robert McDonnell was convicted of honest services fraud, in violation of 18 U.S.C. §§ 1343 and 1349, and of Hobbs Act extortion, in violation of 18 U.S.C. § 1951(a), for accepting loans, gifts, and other bribes from Star Scientific chief executive officer Jonnie Williams in exchange for official acts relating to Star Scientific's nutritional supplement, Anatabloc. See McDonnell, 136 S. Ct. at 2366–67. The official acts alleged at trial were: (1) arranging meetings for Williams with Virginia officials to discuss Star Scientific's product; (2) hosting and attending events for Star Scientific at the Governor's mansion to encourage researchers to study Anatabloc; (3) contacting other government officials concerning studies of Anatabloc; (4) promoting Star Scientific's products and facilitating its relationships with

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> The term "official act" includes the decisions or actions generally expected of the public official. The term "official act" does not include every action taken in one's official capacity. For example, not every act an official performs as a matter of custom or courtesy constitutes an "official act." An act done out of friendship, or for political reasons, may or may not be an "official act." An official can perform an official act by exercising influence over a government decision, when it is a settled practice as part of the official's position for him to do so.

The defendants cited the Third Circuit Model Criminal Jury Instructions and United States v. McDonnell, 792 F.3d 478, 506 (4th Cir. 2015), cert. granted, 136 S. Ct. 891 (2016), as the sources of this proposed instruction.

government officials; and (5) recommending that senior government officials meet with Star Scientific executives. See id. at 2365–66.

In instructing the jury, the District Court described these five official acts and then quoted the statutory definition of official act. It also explained to the jury that "the term encompassed 'acts that a public official customarily performs,' including acts 'in furtherance of longer-term goals' or 'in a series of steps to exercise influence or achieve an end.'" See id.

Applying the harmless error standard, the Supreme Court vacated Governor McDonnell's convictions and remanded for further proceedings "[b]ecause the jury was not correctly instructed on the meaning of 'official act'" and "may have convicted Governor McDonnell for conduct that is not unlawful." See id. at 2375 (citing Neder v. United States, 527 U.S. 1, 16 (1999)).

McDonnell ruled that the District Court must do more than quote to the jury the statutory definition of official act. First, the jury must identify a "question, matter, cause, suit, proceeding or controversy" that "involve[s] a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee." See id. at 2372, 2374. Merely setting up a meeting, hosting an event, or contacting, calling, or speaking with another public official, without more, does not qualify as an official act. See id. at 2372. However, setting up a meeting, hosting an event, or making a phone call can serve as evidence of an agreement to take an official act. See id. at 2371.

Second, the jury must be told that to be an official act "the pertinent 'question, matter, cause, suit, proceeding or controversy' must be something specific and focused that is 'pending' or 'may by law be brought before any public official,' such as the question whether to initiate the research studies." See id. at 2374.

Third, the jury, to convict, must find that the public official "made a decision or took an action" on the "question, matter, cause, suit, proceeding or controversy." See id. The Supreme Court explained that a public official's mere expression of support to another public official for an action to be taken by that other public official is not an official act. Nonetheless, the jury may find that the public official undertook an official act if the official "us[es] his official position to exert pressure on another official to perform an 'official act' or if a public official uses his official position to provide advice to another official, knowing or intending that such advice will form the basis for an 'official' act by another official." See id. at 2372. Thus, the Court drew a line between support expressed to another official and pressure on or advice to that other official.

Fattah, Vederman, and Bowser, as noted above, were convicted of conspiracy to commit bribery in Count Sixteen, while Fattah and Vederman were also convicted of bribery in Counts Seventeen and Eighteen, respectively. The Government proved at the trial that Fattah used his position as a public official to pursue two objectives on Vederman's behalf in exchange for a "stream of benefits" from him. See Kemp, 500 F.3d at 282.

The evidence here established overwhelmingly that Fattah was engaged in official acts as defined in McDonnell in his persistent quest for an ambassadorship for Vederman. The appointment of an ambassador is a specific and focused exercise of governmental power. Fattah's aim was to obtain a high government post for a particular person, that is Vederman. It is hard to be more specific and focused than this.

Furthermore, unlike much of Governor McDonnell's activity, Fattah clearly crossed the line beyond mere expression of support for Vederman for an ambassadorship. He did not simply sign routine or pro forma letters of support to Senator Casey and to President Obama and then let the matter rest. Fattah first wrote to Senator Casey that he "strongly recommend[ed]" Vederman and attached a resume of Vederman. Through his contacts with Rahm Emanuel, he then set up a difficult-to-obtain telephone conference for himself and Governor Rendell to press Vederman's case with James Messina, the President's deputy chief of staff.

Fattah thereafter escalated matters to the highest level. He took the extraordinary step of hand-delivering a glowing letter of recommendation for Vederman to the President of the United States. In that letter, Fattah detailed Vederman's extensive array of qualifications to be an ambassador. He described Vederman to the President as someone who "has worked tirelessly to make a difference" and as "an unquestionably exceptional candidate [who] . . . has proven himself to have both initiative and intellectual creativity necessary for the position."

Even after Fattah delivered this letter, his office followed up with emails to the White House.

Fattah, a long-time member of the House of Representatives and its powerful Appropriation Committee, was without question exerting pressure on and if not pressure certainly seeking to providing advice to the President and Senator Casey with the intent that they would act on that advice. See McDonnell, 136 S. Ct. at 2371. Fattah was not merely expressing support for Vederman's appointment and then letting the matter rest.

Fattah makes the meritless argument that he did not engage in official acts because as a Congressman he had no role in the naming of ambassadors. We recognize that under the Constitution it is the President who nominates and who with the advice and consent of the Senate appoints ambassadors. See U.S. Const. art. II, § 2. The fact that the House of Representatives has no constitutional responsibility in this regard does not immunize Fattah when he accepts a thing of value to pressure or advise the President or a Senator who both have that responsibility when it is Fattah's intent that the advice will form the basis of an official act. See McDonnell, 136 S. Ct. at 2371. This is exactly what happened here.

In addition to the matter of an ambassadorship for Vederman, the Government presented overwhelming evidence that Fattah's hiring of Vederman's girlfriend was an official act. Fattah's decision to employ her was clearly a formal and focused exercise of governmental power in that he spent the taxpayers' money to employ a specific person in his congressional office, albeit for a make-

work job. Fattah told her in December 2011 that hiring her would not be a problem. She actually began her job on his staff in mid-January 2012. In contrast to his official acts to secure Vederman an ambassadorship by pressuring or advising the President and Senator Casey, Fattah's official act in hiring Vederman's girlfriend solely involved his own exercise of governmental power. These facts squarely fit the definition of an official act under McDonnell and other Supreme Court decisions.[13] See id. at 2371–72; see also Brewster, 408 U.S. at 526–27.

To convict on a bribery charge, the jury of course must find more than the existence of an official act. It must also find that there was a thing of value in exchange for the official act. In other words, there must be a quid pro quo. McDonnell it must be emphasized did not change existing law with respect to this offense element and did not discuss it except in passing.

The evidence before the jury was overwhelming concerning the things of value or stream of benefits which Vederman showered on Fattah for Fattah's official acts in pursuing the ambassadorship for Vederman and in the hiring of Vederman's girlfriend. As earlier explained in greater detail, Vederman provided financial guarantees and tuition for Fattah's au pair in 2009 and early 2010, paid Fattah's Philadelphia wage taxes in April 2010, and

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[13] We note that counsel for Governor McDonnell, who was also Vederman's counsel for his post-trial motion, argued to the Supreme Court that in contrast to the actions of the Governor, the hiring of a government employee would be an official act. See McDonnell, 136 S. Ct. at 2367.

wrote a check to Fattah's son in October 2010. Every time that Vederman provided a benefit to Fattah or on Fattah's behalf, Fattah engaged in some official action to obtain an ambassadorship for Vederman. Indeed, on the very day Vederman wrote the October 2010 check to Chaka Fattah, Jr., Fattah penned his strong letter of recommendation to the President of the United States.

On January 13, 2012, Vederman deposited $18,000 into Fattah's Wright Patman Credit Union account to enable the Fattahs to have sufficient funds to buy a vacation home. The $18,000 came as a continuation of the stream of benefits from the largess of Vederman. A short time before, on Christmas day 2011, Fattah had told Vederman's girlfriend that it would not be a problem to hire her, and six days after he received the $18,000 she began her low-show job on his staff. The evidence, as shown above, was overwhelming that Vederman's purported purchase of Chenault–Fattah's Porsche in consideration of the $18,000 payment was a sham.

In sum, there was compelling evidence that Fattah and Vederman were guilty of bribery as charged in Counts Seventeen and Eighteen, respectively.[14] It follows that they were also guilty

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[14] There was also evidence that, in June 2011, Fattah arranged a meeting between Vederman and United States Trade Representative Ronald Kirk so that Vederman could attempt to secure an unpaid position on an advisory trade committee. Vederman, it turned out, had no interest in the position and any effort by Fattah in this regard was thus abandoned. Kirk's testimony during this lengthy trial lasted a mere sixteen minutes. Although the Government referred to this meeting in its opening statement, it made no reference to it in its summa-

with respect to Count Sixteen which charged them under 18 U.S.C. § 371 with conspiracy to commit bribery in violation of § 201(b).

Bowser for her part asserts that there was insufficient evidence to convict her of bribery conspiracy in Count Sixteen, regardless of what the evidence may be against Fattah and Vederman.

Bowser, as previously noted, was Fattah's long-time chief of staff in his Philadelphia congressional office. They had a close working relationship such that he had given her his personal power of attorney. In December 2011, Bowser was aware that Fattah and his wife were in the process of purchasing a home in the Poconos. On December 26, 2011, Vederman's girlfriend sent an email to Bowser seeking a position in Fattah's Philadelphia congressional office. Bowser forwarded the email to Fattah. In mid-January, Bowser welcomed Vederman's girlfriend to her low-work and low-show job. She described Vederman's girlfriend as "Herb's lady."

Bowser knew that the Fattahs were purchasing a vacation home at the same time that Fattah was hiring Vederman's girlfriend for a bogus job and that she would be her supervisor. Bowser also knew that at that very same time Fattah was accepting money from Vederman. Indeed, she sent Vederman instructions as to where and how he should wire the money into Fattah's Wright Patman Credit Union account. CUMA then sought documentation as to the source of the money. It was only then that

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tion to the jury. The episode was de minimis and in our view played no role in the outcome.

documentation of the sham sale of the Porsche came into being. Bowser emailed to Fattah instructions on selling a car and helped procure the documentation. At Fattah's direction, she secured the signatures of Vederman and Chenault–Fattah on a bill of sale for the Porsche and proceeded to cut corners with respect to the transaction. She signed the bill of sale herself as a witness even though she never saw Vederman execute it. She obtained notarization on the title even though she knew that the signatories, Chenault–Fattah and Vederman, would not be present before the notary.

Bowser maintains that the Government has not proven her intent to join the bribery conspiracy. We are not persuaded. Intent most often can only be established by circumstantial evidence. See, e.g., United States v. Carr, 25 F.3d 1194, 1201 (3d. Cir. 1994). It also goes without saying that a conspirator need not know all the details of or participate in all aspects of the conspiracy to be found guilty. See United States v. Bailey, ___ F.3d ___, 2016 WL 6081354, at *3 (3d. Cir. Oct. 18, 2016). A jury could reasonably and without difficulty infer that Bowser, a confidant of Fattah, was so deeply involved and worked so closely with him and Vederman that she knew the nature of the bribery conspiracy and agreed to participate in it. See United States v. Boria, 592 F.3d 476, 481 (3d Cir. 2010).

Fattah, Vederman, and Bowser offer another reason in support of their motions for judgments of acquittal on Counts Sixteen, Seventeen, and Eighteen. They assert that the sale of the Porsche was not a sham because ownership passed to Vederman under Pennsylvania law when the title

was signed by Chenault–Fattah as seller and Vederman as buyer.

They cite to Cicconi Auto Body v. Nationwide Ins. Co., 904 A.2d 933 (Pa. Super. Ct. 2006). That case is inapposite. There, it was undisputed that Nationwide Insurance Company had acquired a properly executed title for the vehicle from its insured. Nationwide argued among other points that it was not the owner of the vehicle because the vehicle was not delivered into its possession. Notably, the vehicle was not in the possession of the insured, was located in a body shop following a collision, was not drivable, and was available to be picked up by Nationwide. The court quoted in part the Pennsylvania statute on motor vehicle title transfer, which reads:

> (a) Duty of transferor.—In the event of the sale or transfer of the ownership of a vehicle within this Commonwealth, the owner shall execute an assignment and warranty of title to the transferee in the space provided on the certificate . . . and deliver the certificate to the transferee at the time of the delivery of the vehicle.

See 75 Pa. Cons. Stat. § 1111(a).

While Cicconi contained a statement that a titleholder is an owner of the vehicle, the question presented in our case was: Who was the titleholder? The Government maintained that Vederman never acquired a properly executed title. Section 1111(a) also requires the owner to "execute an assignment and warranty of title to the transferee . . . sworn to before a notary public or other officer empowered to

administer oaths." See id. (emphasis added). Chenault–Fattah, it is undisputed, never appeared before the notary. Moreover, unlike the situation in Cicconi, there was evidence that Chenault–Fattah not only continued to possess the Porsche but also held herself out as the owner. Finally, Vederman never took delivery or registered the Porsche with the Pennsylvania Department of Transportation. See 75 Pa. Cons. Stat. § 1305.

The defendants also cite Department of Transportation v. Walker, 584 A.2d 1080 (Pa. Commwlth. Ct. 1990). This decision of the Commonwealth Court is not helpful to them. In that case, a husband had executed and delivered to his estranged wife all necessary documentation to transfer title of a motor vehicle to her. The wife, however, had not forwarded the documentation to the Department of Transportation or applied for a new title. The trial court found, based on the evidence, that she was the owner. In affirming, the Commonwealth Court emphasized that whether title had been transferred is "a factual determination." See id. at 1082. It made clear that "the certificate of title constitutes no more than some evidence of ownership." See id. We predict that the Pennsylvania Supreme Court would adopt the reasoning in Walker. See Wolfe v. Allstate Prop. & Cas. Ins. Co., 790 F.3d 487, 492 (3d Cir. 2015).

All of the surrounding circumstances must be considered in determining whether Vederman became the owner of the Porsche simply by the signing of the transfer of title to him by Chenaut–Fattah. The jury had before it overwhelming evidence to find that Chenault–Fattah maintained

ownership of the Porsche and that the sale to Vederman was a sham.

Alternatively, the defendants argue that even if there was sufficient evidence to support convictions for bribery and bribery conspiracy, they are entitled to a new trial because the court's jury instructions were erroneous in light of the subsequently announced McDonnell decision. They assert that because they objected to the jury instructions on the meaning of official act, they are entitled to harmless error review. Under the harmless error standard of review, a new trial is warranted unless "it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" See Neder, 527 U.S. at 15, (quoting Chapman v. California, 386 U.S. 18, 24 (1967)); McDonnell, 136 S. Ct. at 2375; Fed. R. Crim. P. 52(a).

The Government does not dispute and this court acknowledges that under McDonnell our instructions to the jury on the meaning of official act turned out to be incomplete and thus erroneous with respect to Counts Sixteen, Seventeen, and Eighteen. The Government also concedes that the defendants objected to the relevant portions of the jury instructions. Yet, the Government urges that plain error review, not harmless error review, is appropriate because the defendants did not suggest the exact language subsequently announced by the Supreme Court in McDonnell. We disagree. Since the defendants objected to the charge on the meaning of official act, the precise language of the federal bribery statute that was at issue in McDonnell, harmless error review is appropriate. See McDonnell, 136 S. Ct. at 2375 (citing Neder, 527 U.S.

at 16); United States v. Wright, 665 F.3d 560, 570–71 (3d Cir. 2012). Although the defendants' proposed jury instruction did not predict what the Supreme Court subsequently announced in McDonnell, harmless error review does not require such clairvoyance. See Wright, 665 F.3d at 571.

In Wright, our Court of Appeals addressed an error in the jury instructions in light of a change in the honest services fraud law announced by the Supreme Court in Skilling v. United States, 561 U.S. 358 (2010). The District Court in Wright had charged the jury that it could convict the defendants for honest services fraud based on either a "conflict-of-interest" theory or a "bribery" theory. See Wright, 665 F.3d at 567. In Skilling, the Supreme Court held that the "conflict-of-interest" theory was an impermissible basis for conviction. On appeal, the defendants in Wright argued that there was insufficient evidence to uphold their convictions on the bribery theory and that the erroneous jury instruction was not harmless error.

Our Court of Appeals vacated the defendants' honest services fraud convictions and remanded for a new trial because "the evidence supporting the bribery theory, while sufficient, [was] less than the 'overwhelming' evidence needed to hold that an error is 'harmless beyond a reasonable doubt.'" See Wright, 665 F.3d at 571 (quoting United States v. Balter, 91 F.3d 427, 440 (3d Cir. 1996)). The Court reasoned that a new trial was necessary because there were "plausible alternate inferences about [the defendants'] intent" such that a reasonable juror could have found for the defendant and because it could not "say that the erroneous instruction did not

contribute to the verdict."[15] See id., at 572. In contrast to Wright,the evidence here, as noted above, of the official acts exchanged for things of value was overwhelming.

The evidence of official acts in this case was far more compelling than in McDonnell. The testimony there described how Governor McDonnell set up meetings, contacted officials, and hosted events concerning Anatabloc, the nutritional supplement that Williams was seeking to develop and market. Significantly, the Supreme Court stressed that there was evidence that the Governor's alleged official acts were not specific and focused exercises of governmental power but dealt with Virginia business and economic development. The Court cited evidence that the Governor did not ask or expect any action to be taken by state officials. The Court also referenced evidence that he did not accede to Williams' request for funding for Virginia's universities to conduct research on Anatabloc, and it was never covered under Virginia's health plan for state employees. The Supreme Court was concerned that the jury may have convicted merely based on the Governor's expression of support for certain matters. Those concerns do not exist here.

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[15] The defendants now argue that a new trial is warranted because, as in Wright, a jury could plausibly infer that their friendship was the motive of Vederman's generosity and Fattah's efforts on his behalf. That theory was argued to and rejected by the jury. It has nothing to do with the change in the law by McDonnell, which affected only the official act prong of § 201.

In sum, Fattah's acts related to his pursuit of an ambassadorship for Vederman and his hiring of Vederman's girlfriend without any doubt met all the requirements of McDonnell for official acts. Unlike McDonnell, a rational jury could not have otherwise viewed the evidence. The official acts of Fattah were specific and focused exercises of governmental power to obtain an ambassadorship for Vederman by at the very least advising the President and Senator Casey with the intent that his advice would form the basis for Vederman's appointment. There was no way that a jury could have rationally considered Fattah's acts as mere expressions of support without more. His conduct on behalf of Vederman was unrelenting. Fattah likewise engaged in a specific and focused exercise of governmental power while he hired Vederman's girlfriend. The Government without question established a quid pro quo, that is, the stream of benefits provided by Vederman in exchange for the official acts. When Fattah undertook these official acts there was a benefit emanating from Vederman. The Government has met its heavy burden to prove beyond a reasonable doubt that the incomplete and thus erroneous jury instruction on the meaning of official acts did not influence the verdict on the bribery counts. See Neder, 527 U.S. at 15; McDonnell, 136 S. Ct. at 2375; Fed. R. Crim. P. 52(a).

There is no danger that a miscarriage of justice has occurred. See United States v. Silveus, 542 F.3d 993, 1004–05 (3d Cir. 2008). Under Rule 33, the interest of justice does not require a new trial. Consequently, we will deny the motions of Fattah and Vederman for judgments of acquittal or for a new trial on Counts Sixteen, Seventeen, and

Eighteen and will deny the motion of Bowser for judgments of acquittal or new trial on Count Sixteen.

XI.

Fattah, Vederman, and Bowser argue that they are entitled to judgments of acquittal or alternatively a new trial with respect to Counts Nineteen and Twenty because the Government failed to prove that the Credit Union Mortgage Association ("CUMA"), the victim named in those counts, was a "financial institution."

On Count Nineteen, the defendants were convicted of bank fraud in violation of 18 U.S.C. §§ 1344 and 2. Specifically, the indictment alleged that they "aided and abetted by one another and others, knowingly executed, and attempted to execute, a scheme to defraud CUMA, a federally insured financial institution, and to obtain monies owned by and under the care, custody, and control of that financial institution by means of false and fraudulent pretenses, representations, and promises." (Emphasis added).

Section 1344 provides that a defendant commits bank fraud where he or she:

> knowingly executes, or attempts to execute, a scheme or artifice—
>
> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises.

See 18 U.S.C. § 1344 (emphasis added).

In Count Twenty, Fattah, Vederman, and Bowser were found guilty of making false statements to a financial institution in violation of 18 U.S.C. §§ 1014 and 2. The indictment charged that the defendants "aided and abetted by one another and others, knowingly made and caused to be made to CUMA false statements for the purpose of influencing the actions of CUMA, a federally insured financial institution, upon a $320,000 mortgage for defendant FATTAH and . . . [his wife] as part of the purchase of a Poconos vacation home." (Emphasis added).

Section 1014 reads in relevant part:

> Whoever knowingly makes any false statement or report . . . [to a financial institution] upon any application . . . shall be fined not more than $1,000,000 or imprisoned not more than 30 years or both.

See 18 U.S.C. § 1014.

The parties agree that the relevant definition of a "financial institution" under §§ 1344 and 1014 is:

> (2) a credit union with accounts insured by the National Credit Union Share Insurance Fund; [or] . . .
>
> (10) a mortgage lending business (as defined in section 27 of this title).

See 18 U.S.C. § 20.

At trial, the Government proved that Fattah and his wife had completed an application for a mortgage for the Pocono vacation house with the Wright Patman Federal Credit Union. That application was subsequently sent to CUMA for processing. In

response to CUMA's inquiry, Fattah told it that the $18,000 that Vederman had wired to him in January 2012 represented the money obtained from the sale of Chenault–Fattah's Porsche even though no bona fide sale had taken place.

Eddie Scott Toler, the president and chief executive officer of CUMA, testified that CUMA is a for-profit corporation organized under the laws of Delaware and is a credit union service organization owned by forty-eight non-profit credit unions. The credit unions that own CUMA are each federally insured by the National Credit Union Share Insurance Fund. According to Toler, CUMA is not a federally insured institution.

CUMA is organized to serve credit unions and their members. Its services consist "exclusively" of "provid[ing] first trust residential mortgage loaning services, all the way from the origination of the mortgage loan through processing, underwriting, closing, and access to the secondary market where—and we're selling the mortgage loan on the secondary market." This includes "processing and evaluating mortgage applications" as well as "closing on the mortgage" and "handling the sale and the secondary mortgage market." CUMA provides these services to approximately sixty-five credit unions, including its forty-eight owners.

CUMA is licensed to do business in the District of Columbia, Maryland, and Virginia and can therefore close on mortgages in its own name in those jurisdictions. Because CUMA does not actually have any money to fund these mortgage loans, it drafts from the accounts of the credit union on whose behalf it is acting to fund the closing. CUMA then

sells the mortgage to an investor on the secondary market or returns it to credit union client which has advanced funds to pay the seller. While technically CUMA holds mortgages for a limited period of time, it does not hold mortgages long-term.

The Fattahs' closing took place in Pennsylvania where CUMA is not licensed. In this state, CUMA conducts the closing in the name of its credit union client, which is exempt from licensing requirements. Thus, the credit union, not CUMA, owned the Fattah loan during the time period between the closing and any sale to the investor. CUMA is otherwise involved in all other aspects of the mortgage application to the same extent it is in the District of Columbia, Maryland, and Virginia.

We instructed the jury in relevant part in connection with both Counts Nineteen and Twenty:

> The second element of bank fraud is that the entity being defrauded must be a financial institution. For purposes of this case, this means the government must prove that the entity, in this case CUMA, was either: (a) a credit union with accounts insured by the National Credit Union Share Insurance Fund; or (b) a mortgage lending business, that is an organization which finances or refinances any debt secured by an interest in real estate, including private mortgage companies and any subsidiaries of such organizations and the activities of which affect interstate commerce.

The defendants did not object to this jury instruction.

For CUMA to be a financial institution under §§ 1344 and 1014, it must be federally insured or a

mortgage lending business. There was no evidence that CUMA itself is federally insured. It is merely a loan processing corporation which in this case acted on behalf of a federally insured institution, the Wright Patman Credit Union. The latter provided the funds for the Fattahs' mortgage for the Pocono vacation home.

The Government responds that CUMA can be deemed a federally insured institution because it is owned by forty-eight federally insured credit unions. We do not see how CUMA, a Delaware corporation, which is not a federally insured financial institution, suddenly metamorphosed into one because it happens to be owned by a number of federally insured financial institutions. See United States v. Bouchard, 828 F.3d 116, 126–27 (2d Cir. 2016). The Government introduced no evidence to pierce the corporate veil between CUMA and the Wright Patman Credit Union or the other credit unions which own it. To the extent that cases from the Court of Appeals for the First Circuit are to the contrary, we do not find them persuasive. See United States v. Edelkind, 467 F.3d 791, 801 (1st Cir. 2006); United States v. Walsh, 75 F.3d 1, 8–9 (1st Cir. 1996).

If any federally insured financial institution was the victim under §§ 1344 and 1014, it was the Wright Patman Credit Union. However, the Government never identified it in the indictment and, thus, never gave the defendants proper notice to defend against Counts Nineteen and Twenty.

It is the Government's fallback position that if CUMA is not federally insured, it is a mortgage lending business which meets the definition of a financial institution under §§ 1344 and 1014. A

mortgage lending business for present purposes is defined as follows:

> the term "mortgage lending business" means an organization which finances or refinances any debt secured by an interest in real estate, including private mortgage companies and any subsidiaries of such organizations, and whose activities affect interstate or foreign commerce.

See 18 U.S.C. § 27 (emphasis added).

The record is devoid of any evidence that CUMA finances or refinances any debt. It did not finance or refinance the debt of Fattah and his wife in connection with their vacation home purchase. It was the Wright Patman Credit Union which did so. Nor, as far as the record reveals, does CUMA do so for any other buyer of real estate. CUMA simply is a loan processor for various credit unions which do the financing or refinancing.

The Government focuses on the fact that CUMA may hold mortgages for a short period of time while it is selling them in the secondary market. This activity does not constitute the financing or refinancing of debt. CUMA is not the mortgagee. It is merely selling the debt instrument to a third party. This transaction has no effect whatsoever on the mortgagor. He or she is still subject to the same pre-existing debt at the same pre-existing interest rate.[16]

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[16] We note that Toler testified that the "mortgages either get sold back to the partner credit unions or get sold directly on the secondary market." (Emphasis added). But Toler also testified that the credit union, not CUMA, pays the seller at closing. In light of this, it does not appear that CUMA actually "sells"

The Government has not established what it alleged in the indictment, that is that CUMA is a federally insured financial institution. Nor has it shown in the alternative that CUMA is a mortgage lending business. Furthermore, the language of §§ 1344 and 1014 cannot be stretched to encompass CUMA. The Supreme Court has cautioned courts to apply "the canon of strict construction of criminal statutes, or rule of lenity, [which] ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." See United States v. Lanier, 520 U.S. 259, 266 (1997). Any fraud against or a false statement to CUMA is not clearly covered by §§ 1344 and 1014.

The Government has not proven one of the elements of the offenses necessary to convict under §§ 1344 and 1014. Thus the court will grant the motions of Fattah, Vederman, and Bowser for judgments of acquittal on Counts Nineteen and Twenty.[17]

XII.

Fattah, Vederman, and Bowser were charged in Count Twenty-One with falsification of records in violation of 18 U.S.C. §§ 1519 and 2. They were found guilty and now seek acquittals because of insufficient evidence or in the alternative a new trial. Section 1519, as previously noted, provides:

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mortgages to the credit union given that it is the credit union that funded the mortgages in the first place.

[17] Pursuant to Rule 29(d) of the Federal Rules of Criminal Procedure, we find no new trial is warranted on Counts Nineteen and Twenty to the extent that the Court of Appeals disagrees with our decision to grant judgments of acquittal.

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

See 18 U.S.C. § 1519.

> The indictment averred that these defendants:
>
> aided and abetted by one another and others, knowingly concealed, covered up, falsified and made false entries in documents, specifically, a "MOTOR VEHICLE BILL OF SALE" with the intent to impede, obstruct, and influence the investigation and proper administration of a matter, and in relation to and contemplation of such matter, which was within the jurisdiction of a department or agency of the United States, specifically, the U.S. Department of Justice ("DOJ") and the Federal Bureau of Investigation ("FBI").

Under § 1519, the Government must first prove that the document in issue was false or contained false entries. It must also demonstrate that: (1) the defendant intended to impede an investigation into any matter and or in relation to or in contemplation of any matter; and (2) the matter at issue was within the federal government's jurisdiction. See United States v. Moyer, 674 F.3d 192, 210 (3d Cir. 2012).

While the Government must establish that the defendant intended to impede an investigation, it does not have to establish that the defendant intended to obstruct a federal investigation. It is sufficient for the Government to prove simply that the matter which is the subject of an investigation was within the jurisdiction of a department or agency of the United States, regardless of the defendant's knowledge or intent in this regard. See id.

The Government presented evidence that the motor vehicle bill of sale for Chenault–Fattah's Porsche was signed by Vederman on January 17 or 18, 2012 and signed by Renee Chenault–Fattah on January 18. Bowser signed as a witness on January 18. Fattah emailed the signed motor vehicle bill of sale to CUMA on January 19. Sometime on January 18 or 19, the document was backdated with the date of January 16. The Government presented evidence that the bill of sale was a sham. The Government demonstrated that Vederman never took possession or delivery of the vehicle and that Chenault–Fattah engaged in a number of acts and made statements signifying that she still owned it.

The defendants argue that even if the bill of sale was false the Government did not prove that defendants intended to impede an investigation or in relation to or in contemplation of an investigation into any matter. The Government simply counters by relying on Moyer and United States v. Gray, 642 F.3d 371 (2d Cir. 2011). These cases are not helpful to the Government because unlike in this action the Government established in each that there was an

impending investigation which happened to be within the jurisdiction of a federal agency.

In Moyer, a police chief was indicted and convicted under § 1519 for falsifying a police report about a racial incident which resulted in the death of a Latino man. The police chief prepared his false report knowing that the investigation by the district attorney was under way. The Court of Appeals, in sustaining the conviction, held that the jury had ample evidence to find that the report was false and that the defendant had prepared a false report after the district attorney, as part of his investigation of a police cover-up, had directed the police chief to prepare a report of the police investigation. See Moyer, 674 F.3d at 208. It was irrelevant that the police chief did not know of any federal investigation. The Government, as required, proved that the Federal Bureau of Investigation had jurisdiction over racially motivated killings.

In Gray, a guard at a privately owned prison who beat up a federal prisoner was indicted under § 1519 for falsifying a report of the incident. He prepared his report on that incident only after being directed to do so by an administrative lieutenant at the correctional facility. The guard obviously wrote the report to impede an investigation. See Gray, 642 F.3d at 379. Again, the federal government had jurisdiction over the matter.

We acknowledge that § 1519 does not require the existence of an investigation at the time that the document is falsified. Nonetheless, the statute demands that the Government prove that a defendant acted to impede an investigation or did so in relation to or in contemplation of an investigation.

In contrast to the circumstances in Moyer and Gray, the Government presented no evidence from which the jury could infer that Fattah, Vederman, or Bowser knew of or even contemplated any investigation whatsoever, be it federal or otherwise. At most, the Government has simply demonstrated that defendants were involved in presenting a false document to CUMA, a private entity.

The Government did not argue to the contrary in its closing to the jury. The part of its summation related to the false bill of sale never referenced any intent by defendants to prepare or use the false bill of sale in contemplation of any investigation. Indeed, the focus was only on the preparation and use of that false document to deceive CUMA in connection with the purchase of the Fattahs' vacation home. Counsel for the Government simply stated in his closing:

> [W]hen Vederman wrote back "Love to purchase the car," nobody even bothered with a bill of sale . . . They don't even start with the documentation until after the financial institution asks for it . . . [T]hey ginned up these documents only after CUMA asked for them. They don't want the bank to know that this is a fake car sale.

(Emphasis added). The motions of defendants Fattah, Vederman, and Bowser for judgments of acquittal on Count Twenty-One will be granted.[18]

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[18] Pursuant to Rule 29(d) of the Federal Rules of Criminal Procedure, we find no new trial is warranted on Count Twenty-One to the extent that the Court of Appeals disagrees with our decision to grant judgments of acquittal.

XIII.

Count Twenty-Two charged Fattah, Vederman, and Bowser with money laundering with regard to the $25,000 transfer of funds from Fattah's Wright Patman Credit Union account to an escrow account for the purchase of the Pocono home, in violation of 18 U.S.C. §§ 1957 and 2. According to the Government, that $25,000 transfer included the $18,000 bribe paid by Vederman to Fattah in exchange for the official act of hiring Vederman's girlfriend. The Government showed that the credit union account of Fattah did not have sufficient funds for the transfer of the $25,000 without the $18,000 derived from the unlawful criminal activity. All three were found guilty on Count Twenty-Two.

Count Twenty-Three charged Fattah, Vederman, and Bowser with money laundering conspiracy in violation of 18 U.S.C. § 1956(h). As in Count Twenty-Two, it concerned the alleged $18,000 bribe paid by Vederman to Fattah in exchange for the official act of hiring Vederman's girlfriend. The jury returned a verdict of guilty against Fattah and Vederman but not guilty as to Bowser.

The defendants first assert that judgments of acquittal or a new trial are necessary on the ground that their convictions on Counts Sixteen, Seventeen, and Eighteen, the bribery related charges, must be reversed. We agree that these three counts are closely related to Counts Twenty-Two and Twenty-Three. However, because the court has sustained the verdicts on these bribery charges against Fattah, Vederman, and Bowser, this argument fails.

The defendants also argue that the verdicts were against the weight of the evidence. This position too is without merit. To the extent the defendants are claiming prejudicial spillover of evidence, we find this argument likewise lacks merit as set forth in greater detail in Section XVI of this Memorandum.

Accordingly, the motion of Fattah and Vederman for judgment of acquittal or a new trial on Counts Twenty-Two and Twenty-Three will be denied and the motion of Bowser for a judgment of acquittal or a new trial on Count Twenty-Two will be denied.

XIV.

Nicholas, the chief executive officer of EAA, was found guilty on Counts Twenty-Five and Twenty-Six of wire fraud in violation of 18 U.S.C. § 1343 in connection with two false emails she sent to NOAA in July and August 2012. These emails concerned a grant that EAA was seeking from NOAA for a conference on higher education sponsored by EAA.

In Counts Twenty-Eight and Twenty-Nine, the jury convicted her of falsification of records to impede a federal investigation in violation of 18 U.S.C. § 1519. Count Twenty-Eight referenced a November 2013 financial report transmitted by Nicholas to NOAA which falsely certified that a $50,000 grant from NOAA to EAA was used for a conference on higher education in October 2012, even though the conference was never held. Count Twenty-Nine accused her of submitting a final performance progress report to NOAA that falsely described the non-existent October 2012 National Conference on

Higher Education and falsely stated that Congressman Chaka Fattah was the featured speaker.

Nicholas does not challenge the sufficiency of the evidence against her on these four counts. Instead, she seeks a by new trial because of the alleged prejudicial spillover effect caused by the bribery and bribery-related evidence introduced against defendants Fattah, Vederman, and Bowser. Nicholas was not charged with such offenses. The spillover argument is without merit for the reasons stated in Section XVI of this Memorandum.

The motion of Nicholas for a new trial on Counts Twenty-Five, Twenty-Six, Twenty-Eight, and Twenty-Nine will be denied.

XV.

Fattah, Vederman, Brand, and Nicholas seek judgments of acquittal or a new trial on Count One, which charged them with participating in a conspiracy to commit racketeering in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(d).[19] The defendants assert that there was insufficient evidence to support a rational jury's determination that they had agreed to participate in the affairs of a RICO enterprise.

In answer to special interrogatories with respect to RICO conspiracy in Count One, the jury found that Fattah agreed that a conspirator would commit the following types of racketeering activity: mail fraud, wire fraud, bank fraud, bribery, obstruction of

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[19] Bowser was acquitted on Count One.

justice, and money laundering. The jury determined that Vederman had agreed that a conspirator would commit racketeering activities consisting of wire fraud, bank fraud, bribery, and money laundering. As for Brand and Nicholas, the jury found that each had agreed that a conspirator would commit wire fraud and obstruction of justice as racketeering activities.

Section 1962(d) makes it "unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." See § 1962(d). As relevant here, § 1962(c) provides that "[i]t shall be unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." See § 1962(c).

Our Court of Appeals has explained:

> [t]o establish a § 1962(c) RICO violation, the government must prove the following four elements: "(1) the existence of an enterprise affecting interstate commerce; (2) that the defendant was employed by or associated with the enterprise; (3) that the defendant participated . . ., either directly or indirectly, in the conduct or the affairs of the enterprise; and (4) that he or she participated through a pattern of racketeering activity."

United States v. Bergrin, 650 F.3d 257, 265 (3d Cir. 2011) (quoting United States v. Irizarry, 341 F.3d 273, 285 (3d Cir. 2003)). To prove a RICO conspiracy, the Government must show that the defendant knowingly agreed to participate in the enterprise's

affairs through a pattern of racketeering activity. See United States v. Console, 13 F.3d 641, 653 (3d. Cir. 1993); United States v. Riccobene, 709 F.2d 214, 220–21 (3d Cir. 1983), abrogated on other grounds by Bergrin, 650 F.3d at 266 n.5.

Under the RICO statute, an "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." See § 1961(4). The Supreme Court has explained that this definition is "obviously broad" because "[t]he term 'any' ensures that the definition has a wide reach . . . and the very concept of an association in fact is expansive." See Boyle v. United States, 556 U.S. 938, 944 (2009). The Government described the enterprise in this case as an association-in-fact.

An association-in-fact RICO enterprise is "a group of persons associated together for a common purpose of engaging in a course of conduct." See United States v. Turkette, 452 U.S. 576, 583 (1981). "[A]n association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." Boyle, 556 U.S. at 946. Its existence is "proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit . . .. separate and apart from the pattern of activity in which it engages." See Turkette, 452 U.S. at 583.

A RICO conspiracy must also involve an agreement to commit a "pattern of racketeering

activity" which "requires at least two acts of racketeering activity." See § 1961(5). "[T]he existence of an enterprise is an element distinct from the pattern of racketeering activity and 'proof of one does not necessarily establish the other.'" Boyle, 556 U.S. at 947 (quoting Turkette, 452 U.S. at 583). For example, if "several individuals, independently and without coordination, engaged in a pattern of crimes listed as RICO predicates[,] . . . [p]roof of these patterns would not be enough to show that the individuals were members of an enterprise." See In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 367 (3d Cir. 2010) (quoting Boyle, 556 U.S. at 947 n.4). However, "the evidence used to prove the pattern of racketeering activity and the evidence establishing an enterprise 'may in particular cases coalesce.'" See Boyle, 556 U.S. at 947 (quoting Turkette, 452 U.S. at 583). "The existence vel non of a RICO enterprise is a question of fact for the jury." Console, 13 F.3d at 650. The indictment alleged that defendants Fattah, Vederman, Brand, Nicholas, and Bowser[20] participated in one or more of the five criminal schemes along with Lindenfeld and Naylor as part of a RICO conspiracy to "[f]urther[] and support[] the political and financial interests of FATTAH and his coconspirators through fraudulent and corrupt means" and "[p]romot[e] FATTAH's political and financial goals through deception by concealing and protecting the activities of the Enterprise." Fattah, Brand, and Nicholas now claim that the evidence was insufficient to prove that they conspired to

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[20] The jury acquitted Bowser of conspiracy to commit racketeering.

participate in a RICO enterprise because the underlying schemes were distinct and not part of a single "continuing unit."

As stated in Boyle, a RICO enterprise must have at least three structural features: (1) a common purpose; (2) relationships among associates; and (3) sufficient longevity to pursue the purpose. See Boyle, 556 U.S. at 946. We start with the relationships among the enterprise associates. The relationships between Fattah and each of the other individuals were certainly long-standing. Fattah had represented the Second Congressional District of Pennsylvania in the United States House of Representatives since 1995 and had served in the Pennsylvania General Assembly before that time. He knew all the codefendants for years in politics. Brand was a long-time Fattah supporter, and Brand's wife had previously been employed by Fattah on his congressional staff. Nicholas was also a former employee on Fattah's congressional staff and was the chief executive officer of EAA, a non-profit established by Fattah. Naylor and Fattah had known each other for over thirty years. Naylor worked for Fattah while Fattah was a Pennsylvania State Senator and later on his congressional staff. Lindenfeld had known and worked with Fattah since 1999 on his campaigns.

In addition, Brand, Nicholas, Lindenfeld, and Naylor all had long-standing relationships with one another. Nicholas and Naylor had known each other for approximately twenty years and had worked together on Fattah's congressional staff. Naylor also knew Brand as a result of Brand's business SFP. Brand and Nicholas also had a long-term business

relationship through SFP and EAA. Lindenfeld and Naylor had both participated in Fattah's mayoral campaign in 2007 and were friends. Similarly, Lindenfeld and Brand knew one another through Fattah. At trial, the Government proved that Fattah, Brand, Nicholas, Naylor, and Lindenfeld had longstanding relationships and associations with one another.[21]

For a RICO conspiracy to exist, the conspirators must agree to participate in an enterprise with a unity of purpose as well as relationships among those involved. The evidence demonstrates that an agreement among Fattah, Brand, Nicholas, Lindenfeld, and Naylor existed for the overall purpose of maintaining and enhancing Fattah as a political figure and of preventing his standing from being weakened by the failure to be able to pay or write down his campaign debts. These five persons agreed to work together as a continuing unit, albeit with different roles.

The Government established that Fattah, Brand, and Nicholas conspired along with Naylor and Lindenfeld to conceal and repay the 2007 illegal $1,000,000 loan to the Fattah for Mayor campaign. Pursuant to Fattah's efforts, Lindenfeld received the $1,000,000 loan from the donor and at Fattah's instruction Lindenfeld signed a promissory note to conceal the loan. Lindenfeld forwarded a portion of the illegal loan to Naylor who then used it to pay

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[21] Again, although the Government alleged that Bowser was involved in the RICO conspiracy, she was acquitted on Count One. We will discuss the evidence relating to Vederman's involvement in the RICO conspiracy below.

Fattah's campaign expenses, including $200,000 for election day "walking around money." Although Lindenfeld was able to return $400,000 in unused funds to the donor, Fattah needed to find $600,000 to repay the remainder of the loan. Lindenfeld, as signer of the promissory note for the loan, pressed Fattah to have it repaid. Fattah told Lindenfeld that he would make sure that the donor was made whole.

In order to do so, Fattah directed Nicholas, the chief executive officer of EAA, to provide the funds to pay back the illegal loan. EAA had received that money as Sallie Mae and NASA grants to perform charitable work. Nicholas transferred $500,000 to Brand and his company SFP in January 2008, and, that same month, Brand wired $600,000 to Lindenfeld's firm, LSG. Lindenfeld then wired the $600,000 to the original donor. To compensate Brand for the additional $100,000 that he had contributed, Nicholas later provided him with $100,000 from a NASA grant that had been intended for use by EAA. Lindenfeld in turn kept Fattah apprised of what was happening, and Fattah told Naylor about his efforts to obtain the funds to repay the loan.

As part of the RICO conspiracy, Fattah directed Naylor to submit a bogus invoice for $193,000 from his firm, SLA, to the Fattah for Mayor campaign to conceal portions of the illegal campaign loan. Nicholas and Brand engaged in obstruction of justice in concealing the illegal campaign loan by belatedly executing a sham contract between their companies, SFP and EAA, months after the $600,000 had been transferred to SFP and only after a Department of Justice audit of EAA had begun and a subpoena from the Office of Inspector General of the Department of

Justice had been served on SFP. Lindenfeld and Brand also entered into a sham contract to conceal the movement of money. Fattah thereafter obstructed justice by annually writing down in $20,000 increments the bogus debt to Naylor's firm in the public Fattah for Mayor campaign filings into 2014. While each member may not have been involved in every aspect of the enterprise, its activities were sufficiently structured and coordinated to achieve the purpose of maintaining and enhancing Fattah's political standing and of preventing him from being weakened politically because of his campaign debts.

A RICO conspiracy also requires an agreement to participate in an enterprise with longevity sufficient to pursue its purpose. This was established. In May 2007 the illegal loan was obtained and continued through its repayment in January 2008 and into at least 2014 when the last campaign report reducing a fake campaign debt to Naylor's consulting firm was filed by Fattah.

There was more than sufficient evidence with respect to the illegal loan scheme for the jury to find that Fattah, Brand, and Nicholas knowingly and intentionally conspired to be a part of an association-in-fact enterprise with Lindenfeld and Naylor through a pattern of at least two racketeering activities involving wire fraud and obstruction of justice. See 18 U.S.C. §§ 1343, 1346, and 1512. Consequently, as to these defendants, we need not decide whether there was an agreement with respect to the other proven criminal schemes such as to constitute a part of the RICO conspiracy.

The motions of Fattah, Brand, and Nicholas for judgments of acquittal on Count One will be denied.

The Government also alleged that Vederman participated in the RICO conspiracy in Count One. The Government claims that Vederman agreed to participate in the affairs of the enterprise by participating in a bribery scheme between 2008 and 2012. As discussed in detail in Section X of this Memorandum, the Government proved that Vederman was guilty of bribery and bribery conspiracy by providing things of value to Fattah in exchange for Fattah's official acts in support of Vederman's quest for an ambassadorship and in hiring of Vederman's girlfriend to his staff. Nonetheless, there is insufficient evidence that Vederman was part of any RICO enterprise

The purpose of the bribery scheme was quite different from the purpose of the RICO enterprise described above. The objective of the latter was to maintain and enhance Fattah's standing as a political figure and to prevent it from being weakened by his failure to be able to pay or write down his campaign debts. With the bribery scheme the objective was simply personal financial benefits for Fattah in return for personal favors in the form of official acts for Vederman. Despite his congressional salary and his wife's generous income, Fattah was not always able to make ends meet. Vederman filled the breach. He provided guarantees and money for Fattah's au pair, paid his Philadelphia wage taxes, gave money to his son, and wired the $18,000 so that Fattah and his wife could buy a vacation home. In exchange, Fattah sought to obtain an ambassadorship for Vederman and gave Vederman's

girlfriend a bogus job on his congressional staff. These were exchanges of personal quid pro quo things of value that had nothing to do with Fattah's campaigns for office or his stature as a political figure.

Furthermore, the relationship component of a RICO enterprise was missing. Nothing tied the bribery scheme to Brand, Nicholas, Lindenfeld or Naylor. See In re Ins. Brokerage Antitrust Litig., 618 F.3d at 374. The record contains no evidence that Vederman agreed to play a role or even knew about the events surrounding the illegal $1,000,000 loan or any other criminal scheme in which other defendants were involved except for the bribery scheme.

The bribery scheme is precisely the type of bare hub-and-spoke relationship which our Court of Appeals has instructed is insufficient to connect a defendant to a RICO enterprise. See id. This scheme involved only Fattah, Vederman, and Bowser. Of those participants, only Fattah, the so-called hub of the enterprise, agreed to participate in the RICO enterprise involving the $1,000,000 loan. Bowser of course was acquitted on Count One charging RICO conspiracy and on Count Two charging conspiracy concerning the illegal loan. Vederman was not even named in Count Two.

Because there is no "unifying rim" connecting Vederman to the RICO conspiracy, the Government "fail[s] the basic requirement that the components function as a unit, that they be 'put together to form a whole.'" See id.; see also Turkette, 452 U.S. at 583. Absent any evidence connecting Vederman to the RICO conspiracy, a jury could not reasonably find that he agreed to participate in the affairs of the

association-in-fact enterprise with Fattah, Brand, Nicholas, Lindenfeld and Naylor.

The Government has not met its burden to prove that Vederman conspired to be a part of the RICO enterprise, and we will grant his motion for judgment of acquittal as to Count One.[22]

XVI.

Finally, Fattah, Vederman, Brand, Nicholas, and Bowser all raise an additional argument that they are entitled to a new trial on the counts where the court has not otherwise overturned the jury verdict. They maintain that they have suffered unfair prejudice due to the spillover effect of evidence introduced on the reversed counts.

Specifically, Fattah seeks a new trial on this ground on: Count One (conspiracy to commit racketeering); Count Two (conspiracy to commit wire fraud); Count Three (conspiracy to commit honest services wire fraud); Count Four (conspiracy to commit mail fraud); Counts Five through Seven, Nine and Ten (mail fraud); Counts Eleven through Fifteen (falsification of records); Count Sixteen (bribery conspiracy); Count Seventeen (bribery); Count Twenty-Two (money laundering); and Count Twenty-Three (money laundering conspiracy). These counts concerned all the criminal schemes described in the indictment except for the scheme involving

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[22] Pursuant to Rule 29(d) of the Federal Rules of Criminal Procedure, we find no new trial is warranted on Count One as to Vederman to the extent that the Court of Appeals disagrees with our decision to grant the judgment of acquittal.

Nicholas' fraud against and false statements to NOAA.

The convictions remaining as to Vederman are on Counts Sixteen (bribery conspiracy), Eighteen (bribery), Twenty-Two (money laundering), and Twenty-Three (money laundering conspiracy). These all are related to the bribery scheme.

Brand seeks a new trial on Count One (conspiracy to commit racketeering) and Count Two (conspiracy to commit wire fraud). The counts as to him involved the $1,000,000 illegal loan scheme.

Nicholas moves for a new trial on Count One (conspiracy to commit racketeering), Count Two (conspiracy to commit wire fraud), Counts Twenty-Five and Twenty-Six (wire fraud), and Counts Twenty-Eight and Twenty-Nine (falsification of records). Counts One and Two as related to her concerned the $1,000,000 illegal loan scheme while the remaining counts accused her of fraud against and false statements to NOAA concerning the $50,000 grant to EAA.

Bowser seeks a new trial on Counts Sixteen (bribery conspiracy) and Twenty-Two (falsification of records). These counts dealt with the bribery scheme.

As noted, we are granting judgments of acquittal in favor of Fattah on Count Eight and in favor of Fattah, Vederman, and Bowser on Counts Nineteen, Twenty, and Twenty-One. Count Eight charged Fattah with mail fraud in connection with the scheme to use campaign funds to pay the student debts of Chaka Fattah, Jr. The Government did not present evidence sufficient to prove that Bowser had mailed the check in issue to Naylor. Counts Nineteen

and Twenty charged Fattah, Vederman, and Bowser with bank fraud and false statements to financial institutions, respectively, in connection with the financing and purchase of Fattah's vacation home. The Government failed to meet its burden to establish that CUMA was a financial institution as defined under the relevant statue. Finally, Count Twenty-One charged Fattah, Vederman, and Bowser with falsification of records. Here, the Government did not introduce any evidence that the false bill of sale for the Porsche submitted to CUMA was created with the intent to impede an investigation.

The court is also granting a judgment of acquittal to Vederman on Count One. The Government did not establish that he was part of any RICO enterprise.

Thus, we must decide whether evidence introduced on the counts where the court is entering judgments of acquittal under Rule 29 had a prejudicial "spillover effect" on the counts that remain. Our Court of Appeals has instructed us to consider:

> (1) whether the jury heard evidence that would have been inadmissible at a trial limited to the remaining valid count (i.e., "spillover" evidence); and (2) if there was any spillover evidence, whether it was prejudicial (i.e., whether it affected adversely the verdict on the remaining count). Considered conversely, we have the shorthand label "prejudicial spillover."
>
> . . .
>
> When a defendant is convicted on two counts involving different offenses at a single trial and

> an appellate court reverses his conviction on one of them, prejudicial spillover can occur only if the evidence introduced to support the reversed count would have been inadmissible at a trial on the remaining count.

See United States v. Cross, 308 F.3d 308, 317 (3d Cir. 2002).

If the evidence on a reversed count was also admissible to prove one of the remaining counts, there is no prejudice and the inquiry ends. If the evidence would not have been admissible as to a remaining count, we must determine whether there is a high probability that it prejudiced the outcome. See id. at 318.

The evidence on the acquitted counts was relevant to some of the remaining counts and was not relevant or admissible as to other counts. This is not uncommon in multi-count criminal cases of this complexity.

The court, to avoid any spillover issue, charged the jury that it must consider and weigh separately the evidence against each defendant on each count and not be swayed by the evidence introduced against other defendants on the same or different counts. The court did so both in its preliminary instructions at the beginning of the trial and again in its final instructions before the jury retired to deliberate. It is well established that the jury is presumed to follow the court's instructions. See Zafiro v. United States, 506 U.S. 534, 540–41 (1993). That the jury did so is supported by the fact that it returned seventeen not guilty verdicts—one as to Nicholas and sixteen as to Bowser. We observed the

jury in the courtroom and heard the evidence. The evidence against the defendants on the counts where the court has upheld the guilty verdicts was overwhelming. In our view, it is highly probable that the jury was not influenced by any spillover testimony or exhibits. See id.

The following motions based on prejudicial spillover of evidence will be denied: the motion of Fattah for a new trial on Counts One through Seven, Nine through Seventeen, Twenty-Two and Twenty-Three; the motion of Vederman for a new trial on Counts Sixteen, Eighteen, Twenty-Two and Twenty-Three; the motion of Brand for a new trial on Counts One and Two; the motion of Nicholas for a new trial on Counts One, Two, Twenty-Five, Twenty-Six, Twenty-Eight and Twenty-Nine; and the motion of Bowser for a new trial on Counts Sixteen and Twenty-Two.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
v.	:	
CHAKA FATTAH, SR., et al.	:	NO. 15-346

ORDER

AND NOW, this 20th day of October, 2016, for the reasons set forth in the foregoing Memorandum, it is hereby ORDERED that:

(1) the motion of defendant Chaka Fattah, Sr. for judgments of acquittal or for a new trial on Counts One, Two, Three, Four, Five, Six, Seven, Nine, Ten, Eleven, Twelve, Thirteen, Fourteen, Fifteen, Sixteen, Seventeen, Twenty-Two and Twenty-Three of the Indictment is DENIED;

(2) the motion of defendant Chaka Fattah, Sr. for judgments of acquittal on Counts Eight, Nineteen, Twenty, and Twenty-One of the Indictment is GRANTED;

(3) the motion of defendant Herbert Vederman for judgments of acquittal or for a new trial on

Counts Sixteen, Eighteen, Twenty-Two, and Twenty-Three of the Indictment is DENIED;

(4) the motion of defendant Herbert Vederman for judgments of acquittal on Counts One, Nineteen, Twenty, and Twenty-One of the Indictment is GRANTED;

(5) the motion of defendant Robert Brand for judgments of acquittal or a new trial on Counts One and Two of the Indictment is DENIED;

(6) the motion of defendant Karen Nicholas for judgments of acquittal or for a new trial on Counts One and Two of the Indictment is DENIED;

(7) the motion of defendant Karen Nicholas for a new trial on Counts Twenty-Five, Twenty-Six, Twenty-Eight, and Twenty-Nine of the Indictment is DENIED;

(8) the motion of defendant Bonnie Bowser for judgments of acquittal or for a new trial on Counts Sixteen and Twenty-Two of the Indictment is DENIED;

(9) the motion of defendant Bonnie Bowser for judgments of acquittal on Counts Nineteen, Twenty, and Twenty-One of the Indictment is GRANTED.

BY THE COURT:

/s/ Harvey Bartle III
J.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
v.	:	
CHAKA FATTAH, SR., et al.	:	NO. 15-346

MEMORANDUM

Bartle, J. December 16, 2016

On December 12, 2016, Philadelphia Media Network, PBC, publisher of The Philadelphia Inquirer and Philadelphia Daily News, filed a motion to intervene to seek access to records and information related to the dismissal of Juror 12 on June 17, 2016 in the political corruption trial of now former United States Congressman Chaka Fattah, Sr. and his four co-defendants. The court held a prompt hearing at which counsel for all parties in this action as well as the putative intervenor appeared. Defense counsel did not oppose the motion, and the Government took no position.

On June 15, 2016, after approximately five weeks of trial, the court gave the jury its instructions after all parties had rested. The jury deliberated for approximately one hour before the court recessed for

the evening. The following morning, the jury returned to continue with its responsibilities. Early in the afternoon of that second day of deliberations, the jury foreperson delivered a note to the court reporting that one of the jurors was not deliberating in good faith. A short time later, the court received a second note, which had been signed by nine of the jurors and read:

> We feel that [Juror 12] is argumentative [and] incapable of making decisions. He constantly scream [sic] at all of us.[1]

The court halted deliberations and conducted an in camera hearing of five jurors, including the foreperson and Juror 12, in the presence of all counsel.[2] The court then recessed for the day without resolving the issue. The following morning, the court conducted a second in camera hearing in the presence of all counsel as a result of information it had received after the recess from the court's courtroom deputy clerk. She advised the court about statements Juror 12 had made to her at the end of the day. At the second hearing, the court took the testimony of the deputy clerk and Juror 12 under oath. At the conclusion, the undersigned made the following findings on the record:

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[1] This June 16, 2016 note was erroneously dated June 15, 2016.

[2] At times, the transcripts erroneously misidentify Juror 12 as Juror 2. The transcripts also misidentify the foreperson, who was Juror 2, as Juror 12.

> I find my deputy clerk [] to be credible. I find the juror number 12 [] not to be credible.[3] I find that he did tell [the deputy clerk] that he was going to hang this jury no matter what. There have been only approximately four hours of deliberation. There's no way in the world he could have reviewed and considered all of the evidence in the case and my instructions on the law.
>
> I instructed the jury to deliberate, meaning to discuss the evidence; obviously, to hold onto your honestly held beliefs, but at least you have to be willing to discuss the evidence and participate in the discussion with other jurors.
>
> Juror number 12 has delayed, disrupted, impeded, and obstructed the deliberative process and had the intent to do so. I base that having observed him, based on his words and his demeanor before me. He wants only to have his own voice heard. He has preconceived notions about the case. He has violated his oath as a

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[3] In response to a question from the court, Juror 12 admitted that he told the deputy clerk that he intended to hang the jury. Thereafter, he attempted to backtrack:

> THE COURT: Did you say to [the deputy clerk] that you're going to hang this jury?
>
> JUROR 12: I said I would.
>
> THE COURT: You did?
>
> JUROR 12: I did. I said—I told her—I said, we don't agree; I'm not just going to say guilty because everybody wants me to, and if that hangs this jury, so be it.

We found this attempt to backtrack not to be credible.

> juror. And I do not believe that any further instructions or admonitions would do any good. I think he's intent on, as he said, hanging this jury no matter what the law is, no matter what the evidence is.
>
> Therefore, he will be excused, and I will replace him with the next alternate, who is [].[4]

(Emphasis added).

After the alternate was substituted for Juror 12, the court reminded the jury of the obligation of all members to participate in the deliberations and instructed it to start deliberations over again from the beginning. By the time of the verdict on June 21, 2016, the jury had deliberated for a total of 15.75 hours: 6.25 hours on Friday, June 17, 2016; 7 hours on Monday, June 20, 2016; and 2.5 hours on Tuesday, June 21, 2016.

The court may, in its discretion, discharge a juror during deliberations for cause based on "bias, failure to deliberate, failure to follow the district court's instructions, or jury nullification when there is no reasonable possibility that the allegations of misconduct stem from the juror's view of the evidence." See United States v. Kemp, 500 F.3d 257, 304 (3d Cir. 2007). In particular, "a juror who refuses to deliberate . . . violates the sworn jury oath and prevents the jury from fulfilling its constitutional role." See id. at 303 (quoting United States v. Boone, 458 F.3d 321, 329 (3d Cir. 2006)). Here, there is no doubt that Juror 12 intentionally refused to

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[4] The names of the deputy clerk, Juror 12, and the alternate juror have been omitted from this Memorandum.

deliberate when he declared so early in the process that he would hang the jury no matter what. This finding was predicated on the admission of Juror 12 as reported by the court's deputy clerk. The facts became clear to the court after hearing the credible testimony of the deputy clerk and the less than credible testimony of Juror 12. The demeanor of Juror 12 before the court confirmed the court's findings.

The transcripts and related documents at issue were placed under seal while the jury was deliberating to protect it and the deliberative process. However, the court specifically granted the parties immediate access to the transcripts.[5] The reasons for confidentiality must be balanced against the right of public access to judicial proceedings and records. See United States v. Wecht, 484 F.3d 194, 207–08 (3d Cir. 2007). It is now nearly six months after the jury reached a verdict in this case, and there is no longer any reason why those transcripts and related documents should not be unsealed and made part of the public record.

Accordingly, the motion of Philadelphia Media Network, PBC to intervene to seek access to records and information related to the dismissal of Juror 12 will be granted. The relevant records will be unsealed.

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[5] The motion of Philadelphia Media Network, PBC makes reference to an order of the court barring the parties or their counsel from discussing the circumstances of the dismissal of Juror 12. No such order has been put into effect.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
v.	:	
CHAKA FATTAH, SR., et al.	:	NO. 15-346

ORDER

AND NOW, this 16th day of December, 2016, for the reasons stated in the foregoing memorandum, it is hereby ORDERED that:

(1) the motion of intervenor Philadelphia Media Network, PBC to intervene to seek access to records and information related to dismissal of juror (Doc. # 582) is GRANTED; and

(2) the transcripts dated June 16, 2016 (Doc. # 487) and June 17, 2016 (Doc. # 508); the minute sheets and accompanying exhibits dated June 16, 2016 (Doc. # 470) and June 17, 2016 (Doc. # 474); and the Order dated July 6, 2016 (Doc. # 502) are unsealed.

BY THE COURT:

/s/ Harvey Bartle III
J.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
v.	:	
CHAKA FATTAH, SR., et al.	:	NO. 15-346

MEMORANDUM

Bartle, J. December 20, 2016

Before the court are the motions of defendants Robert Brand and Karen Nicholas, pursuant to the Bail Reform Act of 1984, 18 U.S.C. § 3143, for bail pending appeal. The facts of this case are set forth in detail in the court's Memorandum in support of its Order addressing post-trial motions. See generally United States v. Fattah, 2016 U.S. Dist. LEXIS 145833 (E.D. Pa. Oct. 20, 2016).

Defendants Robert Brand and Karen Nicholas were each found guilty by a jury of conspiracy to commit racketeering and conspiracy to commit wire fraud, along with co-defendant then-Congressman Chaka Fattah, Sr. The facts underlying these convictions are described in detail in the court's Memorandum in support of its Order addressing the defendants' post-trial motions. See id. at *6–11. The

charged offenses concerned illegal actions taken by Brand and Nicholas in conspiracy with Fattah to conceal and repay an illegal campaign loan from a wealthy donor to the unsuccessful primary campaign of Fattah in 2007 to become Mayor of Philadelphia. When the donor sought repayment of $600,000 of that loan, Nicholas misappropriated $500,000 from a charitable grant that Sallie Mae had provided to the non- profit, Educational Advancement Alliance ("EAA"), where she served as the chief executive officer. She sent that money to Brand's company, Solutions for Progress ("SFP"). Brand then sent $600,000 to co-conspirator Thomas Lindenfeld so that he could pay back the wealthy donor. Nicholas also defrauded the National Aeronautics and Space Administration of $100,000 so that she could make Brand whole. Nicholas and Brand thereafter drafted a sham contract between EAA and SFP to conceal their illegal activity. That contract was not executed until after the Department of Justice had begun to audit EAA and the Office of the Inspector General of the Department of Justice had served a subpoena on SFP.

Nicholas was also found guilty of two counts of wire fraud and two counts of falsification of records to impede a federal investigation. These counts related to her theft of $50,000 in funds received by EAA from the National Oceanic and Atmospheric Administration. See Fattah, 2016 U.S. Dist. LEXIS 145833, at *29–31, 88–90. In her post-trial motion, she did not challenge the sufficiency of the evidence against her on these four counts.

The evidence of the guilt of Nicholas and Brand as to all of the counts in issue was overwhelming.

On December 13, 2016, the court sentenced Brand to two concurrent 30-month terms of imprisonment. Nicholas was sentenced to six concurrent 24-month terms of imprisonment. Both defendants are scheduled to self-surrender on January 26, 2017.[1]

The Bail Reform Act provides that the court must detain pending appeal a defendant who has been found guilty and sentenced unless that defendant proves: (1) "by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released" and (2) that his or her "appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in—(i) reversal, (ii) an order for a new trial, (iii) a sentence that does not include a term of imprisonment, or (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process." See § 3143(b).

Our Court of Appeals has explained that under § 3143(b) there is a presumption against bail pending appeal. To overcome the presumption, the defendant must establish:

> (1) that the defendant is not likely to flee or pose a danger to the safety of any other person or the community if released;
>
> (2) that the appeal is not for purpose of delay;

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[1] The court signed the judgments on December 20, 2016.

> (3) that the appeal raises a substantial question of law or fact; and
>
> (4) that if that substantial question is determined favorably to defendant on appeal, that decision is likely to result in reversal or an order for a new trial of all counts on which imprisonment has been imposed.[2]

United States v. Miller, 753 F.2d 19, 24 (3d Cir. 1985). The Court recognized that "[o]nce a person has been convicted and sentenced to jail, there is absolutely no reason for the law to favor release pending appeal or even permit it in the absence of exceptional circumstances." See id. at 22 (quoting H.R. Rep. No. 91–907, at 186–87 (1970)).

We find that both Nicholas and Brand have established by clear and convincing evidence that they are not likely to flee or pose a danger to any person or the community. Further, we do not view their appeals as being filed for purposes of delay.

Section 3143(b) also requires the court to determine whether any questions to be raised on appeal are substantial. To be substantial, our Court of Appeals "requires that the issue on appeal be significant in addition to being novel, not governed by controlling precedent or fairly doubtful." See United States v. Smith, 793 F.2d 85, 88 (3d Cir. 1986). The absence of controlling precedent is not

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[2] In addition, with regard to the fourth inquiry, the court considers whether the defendant has proven that a substantial question determined favorably to him would likely result in a sentence that does not involve imprisonment or a reduced sentence less than the duration of the appeal.

itself enough to meet this test. See id. A question is substantial if the defendant can demonstrate that it is "fairly debatable" or is "debatable among jurists of reason." See id. at 89 (quoting Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983)); United States v. Handy, 761 F.2d 1279, 1281–82 (9th Cir. 1985). A substantial question is "one of more substance than would be necessary to a finding that it was not frivolous." See Smith, 793 F.2d at 89 (quoting Handy, 761 F.2d at 1282 n.2). Whether a question is substantial should be made on a case-by-case basis. Id. (quoting Handy, 761 F.2d at 1281–82).

Brand describes what he deems to be four substantial questions under § 3143(b) as follows:

> (1) whether the preclusion of any mention of the longstanding and serious mental illness of the key cooperating witness (rapid cycling bipolar disorder) which was undiagnosed and untreated but manifesting severe symptoms at the relevant time period—as well as his current medication regime that includes lithium, a drug widely known to impair memory and perception—was improper;
>
> (2) whether fundamentally flawed instructions to the jury regarding the alleged acts of Mr. Brand's co-defendants unduly prejudiced Mr. Brand;
>
> (3) whether the compelled dismissal of a juror who vigorously disagreed with the ultimate verdict and sought acquittal of Mr. Brand and other defendants was improper; and
>
> (4) whether the individualized voir dire of multiple jurors as to the dismissed juror's

> conduct disrupted and/or tainted the deliberation process and severely prejudiced Mr. Brand.

Nicholas also asserts that the dismissal of the juror during deliberations raises a substantial question on appeal. In addition, she lists without any discussion the following bases for appeal:

> whether the RICO conspiracy statute can reach conduct comprised of a single wire fraud scheme; whether the erroneous instruction as to a RICO predicate infected the verdict on Count One as to Ms. Nicholas; whether the evidence was sufficient to establish the "pattern" and "enterprise" elements of RICO conspiracy; whether Count Two was within the statute of limitations or was prejudicially duplicitous; and various rulings on the admissibility or exclusion of evidence.

We will address each of the defendants' contentions in turn.

First, Brand faults the court's decision to deny the defendants' access to the medical records of a government witness and to preclude mention of his medical condition during trial. The court reached its decision after in camera review of the medical records and explained its reasoning in a detailed Memorandum. See Doc. ## 340, 341. In denying access to the witness' medical records, we found that the witness' medical condition did not adversely affect his memory, perception, competence, or veracity with respect to the events or times in question. The probative value of such evidence was substantially outweighed by the danger of unfair

prejudice. This unremarkable evidentiary determination is based on settled law and does not raise a significant or fairly debatable question.

Next, both Brand and Nicholas claim that errors in instructions related to counts in which they were not charged unduly prejudiced them. We cannot see how any errors related to other defendants could possibly have prejudiced either of these defendants, particularly when the evidence related to the counts against them was overwhelming. The court instructed the jury in both its preliminary instructions at the beginning of the trial and in its final instructions to consider and weigh separately the evidence against each defendant on each count and not to be swayed by the evidence introduced against other defendants on the same or different counts. The jury is presumed to have followed the court's instructions. See Zafiro v. United States, 506 U.S. 534, 540–41 (1993). The jury clearly adhered to these instructions since it found Nicholas and another co-defendant not guilty on certain charges. This question is not substantial.

Brand's remaining questions and the focus of Nicholas's memorandum in support of her motion concern the dismissal of a juror who refused to deliberate. The law is well-settled that the court has discretion to act as it did under these circumstances. See United States v. Kemp, 500 F.3d 257, 304 (3d. Cir. 2007). The court, after taking testimony, specifically found that the juror, following only a few hours of deliberation, stated to the court's courtroom deputy clerk that he would hang this jury no matter what. He could not possibly have reviewed all of the law and evidence of this five-week trial at the time

he made his remark. The court examined the deputy clerk and the juror under oath in the presence of counsel for all parties. The undersigned found the deputy clerk to be credible and the juror not to be credible. Based on the juror's demeanor, it was clear he would not change his attitude and that his intent had been and would continue to be to refuse to deliberate in good faith concerning the law and the evidence. Again, the court has filed a Memorandum on this issue. See Doc. # 603. In essence, Brand and Nicholas are challenging the credibility determinations made by the court. Such a challenge cannot be deemed substantial.

Lastly, Nicholas makes a passing reference to additional questions that she intends to raise on appeal concerning the RICO conspiracy verdict with regard to a single wire fraud scheme and the sufficiency of the evidence on that count. She also points to an appellate issue as to whether the conspiracy to commit wire fraud charged in Count Two was within the statute of limitations or was duplicitous. She further asserts her intent to appeal "various rulings on the admissibility or exclusion of evidence." The court has filed memoranda on many of these questions. Her shot-gun references to these appellate issues, without more, fail to meet her burden to establish that there is a substantial question for appeal.

It must be remembered that the major reason for the Bail Reform Act was to create a presumption against bail pending appeal. Brand and Nicholas would turn the presumption on its head. Based on their reasoning, any time a defendant raises an issue which is not patently frivolous he or she would be

entitled to bail. If defendants convicted of white collar crimes are released as a matter of course pending appeal, the deterrent effect of expeditious sentencing is undermined.

Accordingly, the motions of Brand and Nicholas for bail pending appeal will be denied.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
v.	:	
CHAKA FATTAH, SR., et al.	:	NO. 15-346

ORDER

AND NOW, this 20th day of December, 2016, for the reasons set forth in the accompanying memorandum, it is hereby ORDERED that:

(1) the motion of defendant Robert Brand for bail pending appeal (Doc. # 589) is DENIED; and

(2) the motion of defendant Karen Nicholas for bail pending appeal (Doc. # 598) is DENIED.

BY THE COURT:

/s/ Harvey Bartle III
J.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 16-4397, 17-1346

UNITED STATES OF AMERICA
Appellant in 17-1346

v.

CHAKA FATTAH, SR.,
Appellant in 16-4397

(D.C. Civ./Crim. No. 2-15-cr-00346-001)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, RESTREPO, and BIBAS, Circuit Judges

The petition for rehearing filed by Chaka Fattah, Sr., in the above-entitled cases having been submitted to the judges who participated in the decision of this Court and to all the other available

circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/D. Brooks Smith
Chief Circuit Judge

Dated: September 13, 2018
CLW/cc: ALL COUNSEL OF RECORD

APPENDIX I

PROCEEDINGS

THE COURT: The Court is currently sitting in chambers with counsel for the government and counsel for the defendants. At approximately 1 p.m. my deputy clerk handed me a note signed by the foreperson. The note reads as follows:

> "Juror Number 12 refuses to vote by the letter of the law. He will not, after proof, still change his vote. His answer will not change. He has the 11 of us a total wreck knowing that we are not getting anywhere in the hour of deliberation yesterday and the three hours today. We have zero verdicts at this time all due to Juror Number 12. He will not listen or reason with anybody. He is killing every other juror's experience. We showed him all the proof. He doesn't care. Juror Number 12 has an agenda or ax to grind w/govt. Sincerely, Juror Number 2, Billy Cassidy."

Sometime thereafter the Court received a second note which reads as follows:

> "We feel that Tim is argumentative, incapable of making decision. He constantly scream at all of us."

And it's signed by Juror Number 7, Number 9, Number, Number 1, Number 10, Number 2, Number 8, Number 11, and also signed by Juror

Number 14 who was an alternate. The 14 -- and she is Juror Number 5.

I had told counsel that it is my intention to at least initially to voir dire the foreperson with respect to the note, to inquire as to whether or not Juror Number 12 is deliberating as required under his oath. We're going to stay away from the merits of the case.

I also intend to at this point voir dire Timothy Miller, who is Juror Number 12 about whom the foreperson is speaking. Whether the Court will voir dire other jurors at this time remains to be seen.

I've discussed this proposal with counsel and before I do voir dire the foreperson I will give counsel an opportunity to put their comments and objections on the record. Who will go first?

Mr. Welsh.

MR. WELSH: Yes, Your Honor.

THE COURT: You can turn that, I think, that microphone. Oh, maybe it doesn't --

MR. WELSH: It's probably not necessary.

THE COURT: Yeah.

MR. WELSH: Yes, Your Honor. You've accurately described the procedural posture where we are. On behalf of the defendants we oppose the Court's plan to voir dire the foreperson and Juror Number 12. We urge rather that the Court admonish the jurors in the manner in which it directed -- instructed them yesterday to -- of their duty to deliberate.

We would offer that the less intrusive way is the best way to proceed here because, number one, I think that the case law has certainly given you wide discretion in this regard. But we think that it is far less intrusive to at least try to calm down whatever contretemps may be going on in the jury room. So we think that a step by step way is the best way to go.

Also, upon hearing again the Court's reading of the note it is our view that while the note could be construed to be a flat refusal to deliberate, we think it rather sounds more in the manner of a disagreement over the evidence, and the note speaks for itself, of course. But we suggest that in light of the fact that we haven't taken any steps of a less intrusive nature, and in light of the -- what I think is the ambiguous nature of the complaint, that the Court should proceed as we suggest.

THE COURT: Thank you.

Ms. Flannery.

MS. FLANNERY: Thank you, Your Honor. On behalf of Ms. Nicholas I adopt what Mr. Welsh said and also wanted to articulate a few further comments.

We object to the Allen charge not being given before personal judicial intervention. That is what was done in the Kemp case which is the precedential opinion, one of the opinions we've looked at today.

The brief version that was given last night was not in response to a juror's -- to the juror's articulation of a concern. And if all were given this instruction in response to their concerns, it might

inform all of them to listen to one another. It's only been five hours of deliberation on a very long, complex case. To voir dire so quickly sends a message that if there's a block of jurors with one opinion they can immediately get personal court intervention by complaining to the Court.

We note that only eight jurors signed the second note, so that is an indication that there be a block of jurors that feel one way, and as Mr. Welsh said the focus seems to be on the juror not agreeing with the majority of the jurors' view of the evidence.

THE COURT: I think you'll find that there were nine that signed.

MS. FLANNERY: I'm sorry.

THE COURT: And --

MS. FLANNERY: They also seem from reading the note to think there is a time limit on deliberations and I would submit they should be informed there's not before the Court goes to personal intervention.

THE COURT: Okay.

MS. FLANNERY: Thank you.

MR. WELSH: Your Honor, I -- and I think we are all joining in --

THE COURT: Everybody joins in.

MR. WELSH: -- in the objection.

THE COURT: All right. That's fine.

MR. WELSH: We all join in.

THE COURT: That's fine.

All right. Does the government wish to make a comment at this point? Mr. Gibson?

MR. GIBSON: Judge, I would just reiterate that the Court had already given them an appropriate instruction yesterday afternoon and these notes came after that instruction.

I would also note in light of the bias suggested in the note that came back that if, in fact, that bias exists then Juror Number 12, in fact, lied through the voir dire process and his refusal to deliberate would be further evidence of that and his unsuitability as a juror.

THE COURT: Thank you.

All right. Let's -- we will -- I am going to first voir dire the foreperson and Ms. Makely (ph) will escort him into chambers and we'll put him under oath.

Thank you.

UNIDENTIFIED SPEAKER: Your Honor, may I see the second note very briefly? Thank you.

(Pause)

THE COURT: Is there any issue before --

UNIDENTIFIED SPEAKER: Oh, that's what you -- that's what happened. Yeah. No.

THE COURT: Okay.

UNIDENTIFIED SPEAKER: We're trying to figure out the --

MS. FLANNERY: We misread the number so we wanted to --

THE COURT: Any --

UNIDENTIFIED SPEAKER: Sorry. No --

THE COURT: Anything further --

UNIDENTIFIED SPEAKER: -- no issue, Your Honor. Thank you.

THE COURT: All right. Let's bring him in.

UNIDENTIFIED SPEAKER: And she -- I didn't realize she had the juror right there.

THE COURT: No, she doesn't. She's going to go --

UNIDENTIFIED SPEAKER: Oh. Oh, no. No issue. Go ahead. Thank you, Your Honor.

(Pause)

MS. FLANNERY: I apologize, Your Honor. Now we see how we made a mistake in counting the number of names.

THE COURT: Okay.

(Pause)

UNIDENTIFIED SPEAKER: You want to go off the record?

UNIDENTIFIED SPEAKER: No. I was just -- I was wondering if we were off the record.

UNIDENTIFIED SPEAKER: No. We're still on. I mean, we're quiet, but I can shut it off.

THE COURT: Yeah. Why don't you shut it off until he comes in?

(Off the record at 2:48 p.m.; on the record at 2:49 p.m.)

(Juror Number 2, Foreperson, present in chambers)

THE COURT: These are all familiar faces to you.

THE FOREPERSON: Yes, they are.

THE COURT: Thank you very much for coming in.

THE FOREPERSON: Thank you.

THE COURT: You may be seated here. First of all I want to swear you in. Would you raise your right hand?

JUROR NUMBER 2, FOREPERSON, SWORN

THE COURT: All right. We're just going to wait a second because we're having your note copied.

THE FOREPERSON: Okay.

THE COURT: So you can have a copy. I'll have a copy. I've already read your note into the record and I've shared it with the attorneys so they're familiar with, and the second note which came in which I believe you also signed.

THE FOREPERSON: Okay.

THE COURT: Okay. Just a second here. Everything that's obviously being said is being taken down on the record.

(Pause)

THE COURT: Before we get your note, the procedure is going to be for me to ask you a series of questions, and one of the things we do not want to

get into is the merits of the case. You understand? In other words --

THE FOREPERSON: Uh-huh.

THE COURT: -- whether somebody's voting for guilty or not guilty, that's not the issue here, what somebody's views about the evidence may be but -- in terms of guilt. But we're going to ask you about the deliberative process, how the deliberations are going, what's been happening without getting into saying, who wants to do what on question one, who wants to do what on question two and so forth. All right. You sort of get the message. And we'll try to --

THE FOREPERSON: I do.

THE COURT: -- we'll try to keep it directed in that fashion.

Sorry about the delay here, but I think it will be helpful if you had it in front of you.

(Pause)

THE COURT: Mr. Cassidy, before we get into your note, I want to ask you are you the foreperson of the jury in the case of the United States versus Fattah, et al?

THE FOREPERSON: I am.

THE COURT: Yeah. I'm placing before you a note. Did you write this note?

THE FOREPERSON: I did.

THE COURT: And approximately what time did you write this, if you can recall?

THE FOREPERSON: Lunchtime, a little after 12 or so.

THE COURT: A little after 12 or so on June 16th; is that right?

THE FOREPERSON: Correct.

THE COURT: And approximately how long had the jury been deliberating when you wrote the note?

THE FOREPERSON: We put an hour in or so yesterday and then another -- started at 9 -- started actually at 9:20 this morning.

THE COURT: Everybody was there at 9:20?

THE FOREPERSON: Everybody was there well before that.

THE COURT: All right. And you wrote the note after --

THE FOREPERSON: I wrote the note at lunch.

THE COURT: Okay. Now let's get into some of the details about your concerns of Juror Number 12. You say he refuses to vote by the letter of the law. Can you describe in a general way how the -- how he has been acting, how he's been deliberating or not deliberating during the process without getting into what --

THE FOREPERSON: The specifics.

THE COURT: -- side he's on? Yeah.

THE FOREPERSON: Yes.

THE COURT: Just generally how it's been going.

THE FOREPERSON: We're -- we have the evidence there.

THE COURT: You mean in the binders you mean?

THE FOREPERSON: Yeah. We have the law.

THE COURT: From the charge?

THE FOREPERSON: Yes. And he wants to add onto -- he'll admit the proof, but then he wants to add on that maybe somebody didn't mean to do that. It's got nothing -- we're just trying to tell him to answer the question that is asked and he will not do that. When we do get him to answer the question, he answers it, but then he has to add more to it and then that puts doubt into his mind.

THE COURT: Well, is he willing to follow the law?

THE FOREPERSON: No.

THE COURT: Can you explain what you mean by that without getting into --

THE FOREPERSON: Yeah. It's tough without getting into specifics. But can I tell you how I really feel?

THE COURT: Well, without getting into the merits of --

THE FOREPERSON: Right.

THE COURT: -- of the case. Yeah.

THE FOREPERSON: I think he thinks we're here for him. He wants to read every detail not once, but twice, three times when we laid everything out. And then when we ask him why he voted what he did it goes against the law. It goes against everything against the law. We all understand that we may have to vote for something that maybe personally we don't agree with, but that's the law. He doesn't understand that. He has everybody in that room a wreck and totally frustrated where it is ruining our experience of this whole trial.

THE COURT: Now you say you show him the proof, but he doesn't care. What did you mean by that?

THE FOREPERSON: He doesn't care. He -- the letter of the law. We're telling him this is the only question that they're asking. It's yes or no. He'll say what we want to hear, but then he'll say, but because I have doubt with that --

THE COURT: Doubt with the law or with the fact?

THE FOREPERSON: With the law and then he wants to add his own piece of the law to it which has nothing to do it.

THE COURT: Okay. Now --

THE FOREPERSON: He got to a point today where he said to me, why don't you just go to the judge and tell him you don't want me on this trial, and I said -- I told him, I already did. I already did.

THE COURT: Now what about -- there's some comments about -- you say everybody's a wreck.

What about this screaming that's referenced in the note? What's happening with regard to that?

THE FOREPERSON: Well, we're past that point now.

THE COURT: What do you mean?

THE FOREPERSON: We're -- he's very argumentative. I personally ended up telling him to sit down and shut up yesterday. I started the meeting off today by apologizing for my conduct. Nobody should ever be told to shut up. And --

THE COURT: What was -- what precipitated that yesterday?

THE FOREPERSON: Because he was standing up screaming about what I'm just telling you about. It's hard to explain without getting into specifics.

THE COURT: Right. So how long was the screaming going on? Was it just one instance or were there more than one?

THE FOREPERSON: No. There was more than one. And not just -- not me. I mean, everybody. I mean, it was mayhem. It was everybody pretty much against this guy.

THE COURT: And what about --

THE FOREPERSON: He's -- he has his own agenda and I don't know what it is.

THE COURT: This note you signed also --

THE FOREPERSON: I did.

THE COURT: -- said incapable –

THE FOREPERSON: This -- yeah.

THE COURT: -- of making decision and he's constantly screaming at all of us. What -- can you elaborate on that in terms of --

THE FOREPERSON: Yeah. He rambles. He raises his voice. He stands up. He put his hand on another juror. You know, I had to tell him, get your hands off of him. I'm going to tell you right now he's a time bomb in that room and he's got everybody on edge.

THE COURT: Okay. All right. I'm just going to ask you just to step out just for a second so I can --

THE FOREPERSON: Yeah.

THE COURT: -- confer with the lawyers about additional questions. Thank you.

(Juror Number 2, Foreperson, leaves chambers)

THE COURT: Any other questions you wish me to ask him?

MR. GRAY: Your Honor, I thought one of the notes said he's got an ax to grind against the government.

THE COURT: Right. That's true. I just want to be careful we don't get into the merits.

MR. GIBSON: Yeah. And he did say he has his own agenda but I don't know what that is.

UNIDENTIFIED SPEAKER: Yeah.

THE COURT: Okay.

MR. WELSH: Yeah. I think we should try to avoid that.

THE COURT: Yeah.

MR. GRAY: Judge, I think you could ask him without -- if it has to do with the merits of the charges don't answer, but you indicated that there was an ax to grind against the government. Can you answer -- can you describe what that was about?

MR. WELSH: Judge, I'm -- I suggest that there's a lot of ambiguity about whether this is a refusal to deliberate combined with a refusal to follow the law. He's -- he has -- this gentleman here, Mr. --

THE COURT: Cassidy.

MR. WELSH: -- Cassidy has said several

different things. He'll admit the proof is there, but then he'll add on something like somebody didn't mean to do that. Well, that's consistent with the good faith defense.

THE COURT: I understand.

MR. WELSH: And so I suggest that this is an insufficient basis to go further and that I think the Court should instruct the jury again and see where we go.

Now the personal conduct is concerning.

THE COURT: Absolutely.

MR. WELSH: It sounded to me like -- he said, we're past that. But I think that would be a proper subject for an admonition and --

THE COURT: Well, let's see.

MR. WELSH: -- see what -- here's my point, though. So here we have a witness or a juror who has, according to the foreman, expressed "doubt"

about whether somebody meant to do something and for the Court to bring him in here and to question him about that seems to us to be inherently coercive, but more importantly unnecessarily coercive at this point since we have other remedies.

THE COURT: Well, I wouldn't ask him about that. I would ask him about following the law and that kind of thing.

MR. SILVER: I just want to concur with Mr. Welsh on that.

THE COURT: Okay.

UNIDENTIFIED SPEAKER: I think that's --

THE COURT: Let me -- why don't we -- yes.

MR. GIBSON: I would just note I've never ever in my career heard of a juror laying hands on another juror.

THE COURT: That's very, very troubling.

MR. GIBSON: Yeah.

MR. WELSH: Put his hand -- we don't know the details.

THE COURT: Well, we'll ask him.

UNIDENTIFIED SPEAKER: And we very rarely intrude into the process in this way so we rarely hear about --

UNIDENTIFIED SPEAKER: The deliberative process isn't supposed to include physical contact.

UNIDENTIFIED SPEAKER: He said we're past that.

THE COURT: Let me ask -- just bring him in. I want to ask him about that.

(Juror Number 2, Foreperson, present in chambers)

THE COURT: Thank you, Mr. Cassidy. Have a seat again.

I just want to follow up a little bit more about his personal conduct in the jury room.

THE FOREPERSON: Yes.

THE COURT: Could you elaborate on that and whether it's continued into today from yesterday and so forth?

THE FOREPERSON: He's calmed down pretty much today since maybe the first hour. But he has his own agenda in the juror's room where he wants to -- like we have one person just pleasing him and listening to him and listening to him. We've gone over this. We've gone over this one count since yesterday morning. We're still going over it.

THE COURT: Well, of course, you understand you can take as much time as you need.

THE FOREPERSON: I understand that. I -- we all understand it. But we feel that he's just -- he's got another agenda. He just wants to continue and continue and prolong and prolong and, listen, I'm getting paid at my job. I enjoy doing this. All right. I'm getting paid. I even get to keep my juror's money.

THE COURT: Right.

THE FOREPERSON: All right. I enjoyed this entire experience.

THE COURT: Right.

THE FOREPERSON: He is ruining it, not just for me. You could call ten other jurors in here and they would tell you the same thing.

THE COURT: What about the hands? Tell me about that situation. When was -- when did he put the hands on the --

THE FOREPERSON: He put his hands on another juror, just, you know, nobody should be touching anybody. He put his hand on another juror's shoulder as they were sitting there as he was getting more and more mad because we're at a point now where he wants all the attention and he -- we decided we can't go over this with him anymore so he's going over it with another juror and we're having our own conversation. And he's --

THE COURT: So is he participating in the process now or not?

THE FOREPERSON: He's on his own because now we're not because we've gone over this over and over and over and a monkey would know what we're talking about at this point. And he's just playing dumb and he's playing this woman like a fiddle. I would never have the patience to do what she's doing. Never. It's an absolute disgrace.

THE COURT: When did he put the hand on the shoulder?

THE FOREPERSON: That was probably before lunch. It was before lunch.

THE COURT: Well, any -- all right. Thank you very much, Mr. Cassidy. You may return to the jury room.

THE FOREPERSON: Thank you, Your Honor.

(Juror Number 12, Foreperson, leaves chambers)

UNIDENTIFIED SPEAKER: Off the record, Judge? Off the record?

THE COURT: Yeah. We can go off until --

(Off the record at 3:05 p.m.; on the record at 3:06 p.m.)

THE COURT: Go ahead.

UNIDENTIFIED SPEAKER: And, Your Honor, of course I think Mr. Levine said this so we all don't have to join in all the objections.

THE COURT: I understand.

UNIDENTIFIED SPEAKER: Absolutely. Okay. With that we would --

THE COURT: Well --

UNIDENTIFIED SPEAKER: -- join in all the objections.

UNIDENTIFIED SPEAKER: Thank you.

THE COURT: Well, we'll see what Mr. Miller has to say, but this is a very serious situation that we have here.

MR. SILVER: Your Honor --

THE COURT: I hope counsel understand that.

MR. SILVER: -- I don't think this was on the record at the time, so --

THE COURT: Go ahead.

MR. SILVER: -- just to put it on the record on behalf of defendants we object to interviewing Mr. Miller I believe his name is at this time.

THE COURT: Okay.

MR. SILVER: So the record is –

THE COURT: Well, your objection –

MR. SILVER: -- (indiscernible).

THE COURT: -- your objection is overruled. We want to get to the bottom of this and the only way to do it is to interview Juror Number 12. Otherwise, it's speculation. I'll have a make a determination as to what he said versus what Mr. Cassidy said and maybe another juror.

MS. BAYLSON: Yes, Your Honor. At this time I would just renew the request to interview another juror as well in addition to the two.

THE COURT: But not Mr. Miller?

MS. BAYLSON: No. In -- Your Honor has made a decision about Number 12. So in --

THE COURT: Okay.

MS. BAYLSON: -- addition to Number 2 and Number 12.

(Pause)

THE COURT: Come in.

(Juror Number 2 present in chambers)

THE COURT: Hi, Mr. Miller. You know everybody.

JUROR NUMBER 2: Yes, I do.

THE COURT: Have a seat. Have a seat. Thank you.

I want to ask you a few questions about the jury deliberations. I don't want to get into the merits of the case. Do you understand --

JUROR NUMBER 2: I understand.

THE COURT: -- the difference? All right. I'm going to swear you in. Please raise your right hand.

JUROR NUMBER 2 SWORN

THE COURT: Okay. There's concern that you've been screaming in the jury room and raising your voice; is that accurate?

JUROR NUMBER 2: A lot of people have been raising their voice and screaming.

THE COURT: I'm asking about you.

JUROR NUMBER 2: I have. If they've yelled at me I've yelled back.

THE COURT: All right. There's concern that you're not deliberating, not allowing other people to speak, not deliberating. Tell us about that.

JUROR NUMBER 2: I am the only one deliberating.

THE COURT: Tell me about that.

JUROR NUMBER 2: I -- when the case was over we all went to the jury room. Okay. We elected

a head guy democratically and then we started talking about the case. And I believe it was 3:15, 4:00 when we got out of there. So within the first half hour they wanted to take a vote. So they all voted. My vote was different than everybody else's.

THE COURT: All right.

JUROR NUMBER 2: They asked me why. I explained to them why. I brang (sic) up evidence. They said, that doesn't mean anything. They pointed to the indictment. I said, the indictment is not evidence. We have no evidence in front of us at this present moment. And then I brang (sic) up NOAA this, KN this, this, this, this. They argued with me and then they threatened to have me thrown off. And I said if you feel that way, you can do it. At the end of the day we got nothing accomplished.

I came in today they said they were sorry. We went all over it again. Once again we're in the jury room. Not 45 minutes into deliberation they want to take a vote. My vote's different. They ask me why. I tell them. So we go over it and we go over it and they point to the indictment again. The indictment is not evidence. Read the charge. We read the charge. They said this. I said that.

So finally they are like all sitting around waiting for me to finish reading. And I'm reading this and I'm reading that. Some of them are talking about the football game, the baseball game, their grandkids, this and that. I'm sitting there with three other ones. I'm showing them my point. They can follow again. They have the same thing in front of them that I do. I read it aloud to her. She did

this. I pointed out this. She pointed out that. They can all follow along, but they're not. They're not even doing that. They have no idea. They're just waiting for me to finish up so they can take another vote. And that's fine.

And I told them, if you don't want me to be here, I don't want to be here. So if you want to take me off this jury, that's fine. I'm okay with it. I really am.

THE COURT: Well, a lot of the other jurors say you were screaming. You say you weren't or you were or --

JUROR NUMBER 2: They asked me why I feel that way. I said because of this and he goes, well, that's not good enough. And then another one says, we're all supposed to be taking a turn saying it.

THE COURT: Right.

JUROR NUMBER 2: Everybody take a turn. Why do I have three people screaming at me. So he says that's not true. I said it is. She goes, that's not true. Then he's yelling and he's yelling. Now I can't even hear me. So naturally I have to raise my voice.

THE COURT: Right.

JUROR NUMBER 2: But I do not want to yell at anybody. And today there was very little yelling, hardly any at all, hardly any at all.

THE COURT: Okay. Anything further in questions?

Okay. Thank you.

JUROR NUMBER 2: That's -- I can go?

THE COURT: Just stand right out in the jury --

JUROR NUMBER 2: Okay.

THE COURT: -- in the waiting room here.

(Juror Number 2 leaves chambers)

THE COURT: Any other questions?

Mr. Gibson.

MR. GIBSON: Judge, we still haven't inquired into the bias issue, which I think was squarely put before the Court in the notes. And if, in fact, that bias or prejudice exists that is clearly a violation of the juror's duty --

THE COURT: I understand.

MR. GIBSON: -- to answer truthfully in the voir dire process.

MR. WELSH: Judge, it's -- I suggest that the record is clear at this point that we have a disagreement over evidence and that he is the one who is deliberating and that many of the others are not willing to go through in a --

THE COURT: Okay.

MR. WELSH: -- conscientious fashion. He is the conscientious guy who says, let's look at NOAA this, KN that. And so I repeat our position that an admonition from the Court or the further re-instruction on the duty to deliberate, particularly after things seems to have -- seem to have calmed down now would be the appropriate step. They can always come back tomorrow.

THE COURT: Okay.

MR. LEVINE: I would add –

MR. GIBSON: To --

MR. LEVINE: I would add, Your Honor, excuse me, Eric. I would add, you know, what Juror 12 just said; that perhaps a reinstruction that the indictment is not evidence is appropriate.

MR. SILVER: I agree with that.

THE COURT: All right.

MR. SILVER: That's very disturbing.

MR. GIBSON: Judge, I would contrast the demeanor between Juror Number 2, the foreperson, and Juror Number 12 that just appeared before the Court. I would also stress that this juror indicated he doesn't want to be here, which is also problematic. And what you were told by Juror Number 2 is that he doesn't want to follow the law; that there's an inability to follow the law, which is also a violation. And jury nullification is not something that we tolerate.

MS. FLANNERY: And I want to make a record that I did not observe anything untoward or irrational or overly agitated by this individual who just sat before us. He has been brought in to be asked if he was disruptive and he was very articulate in explaining what the situation was. I take exception to Mr. Gibson's description of the difference in demeanor between the two.

And I note also that the first juror, the foreperson, did describe the situation in a way that is consistent with others screaming at the second juror as well as this juror yelling.

MR. SILVER: And if I may, Your Honor, I don't necessarily take exception to Mr. Gibson. We have observed different things. But in my view what we saw in this juror is somebody who is being shamed out of the room for expressing his viewpoint, which is exactly what we don't want from the jurors. And to dismiss him would be a very, very disturbing thing because it would suggest that somebody who is dissenting and trying to explain his position does not have a seat at the table.

THE COURT: Well, let me -- I'm going to ask one more -- let's get -- just to pick it, Juror Number 3, Ms. Lehman (ph), and see what she has to say. She didn't sign.

UNIDENTIFIED SPEAKER: She did not sign.

THE COURT: Okay.

UNIDENTIFIED SPEAKER: Your Honor, I just -- did you want to address the physical issue? If that's going to be the basis for a ruling shouldn't we get the chance to --

THE COURT: All right. Well, bring him -- ask her to bring him back in. I'm going to --

(Pause)

(Juror Number 12 present in chambers)

THE COURT: Mr. Miller, I just had one other question. Did you touch any of the jurors?

JUROR NUMBER 2: Hurt them? No. I didn't --

THE COURT: I didn't say hurt. I said touch. Did you put your hand on any of the jurors?

JUROR NUMBER 2: Well, we're sharing the books. I may have.

THE COURT: No. I mean, on -- did you stand up and put your hand on anybody's shoulder?

JUROR NUMBER 2: Not intentionally, no.

THE COURT: Did you do it?

JUROR NUMBER 2: I couldn't remember to be honest with you.

THE COURT: All right. Thank you.

(Juror Number 12 leaves chambers)

THE COURT: All right. Ms. Lehman.

(Off the record at 3:17 p.m.; on the record at 3:21 p.m.)

(Juror Number 3 present in courtroom)

THE COURT: You know everybody. Have a seat, please.

JUROR NUMBER 3: Okay.

THE COURT: What I would like to do is ask you a few questions about the deliberations. I don't want to get into the merits of the case, who is for what side and how people are voting, but just to talk about what's been going on in terms of deliberations.

JUROR NUMBER 3: Okay.

THE COURT: Let me swear you in. Would you raise your right hand?

JUROR NUMBER 3 SWORN

THE COURT: You're Juror Number 3; is that correct?

JUROR NUMBER 3: Correct. Uh-huh.

THE COURT: And we have received several notes concerning what has been going on in the jury room in terms of deliberations, and maybe you can kind of give us in your own words what has been happening. People have been calmly deliberating? Has there been screaming? What's been happening without getting into who is voting how?

JUROR NUMBER 3: Well, let's see. On the very first day there was kind of a screaming match between a couple of the jurors. And then the following day -- because we just had a short period of time. It was like from three to -- three to 4:45, whatever the time period was.

THE COURT: Right.

JUROR NUMBER 3: And then the next day apologies were made, amends -- let's all do a fresh start. And all of the jurors kind of discussed what count --

THE COURT: Well, don't -- just say a count.

JUROR NUMBER 3: Well, just -- so on -- okay. On a count all the jurors except for one decided.

THE COURT: Right. Right.

JUROR NUMBER 3: Okay.

THE COURT: Without telling us --

JUROR NUMBER 3: And there was a descending (sic) opinion. And in the -- and the juror -- in my opinion, the rest of the jurors pounced on the gentleman with the descending upon -- dissenting opinion. And so I think he got very defensive and just a little bit of impatient -- the other jurors were very impatient with him. And, you know, just roll their eyes, just like, ugh. It's not about you, you know, just comments like that, you know, that would make him -- so I think he got very defensive.

THE COURT: Was there any screaming today?

JUROR NUMBER 3: No, not as -- no. I wouldn't say screaming.

THE COURT: How --

JUROR NUMBER 3: It's loud voices, but not really screaming.

THE COURT: How about a juror putting a hand on somebody else's shoulder? Did you see that?

JUROR NUMBER 3: No. I did not see that.

THE COURT: Okay. All right. Anything? Why don't we just ask you to stand out in the anteroom for a moment --

JUROR NUMBER 3: Okay.

THE COURT: -- while I confer with the lawyers?

JUROR NUMBER 3: All right.

(Juror Number 3 leaves chambers)

THE COURT: Any further questions you wish me to ask of her?

(A chorus of no)

THE COURT: Okay. Is there anything else we need to do today on this issue?

MR. GIBSON: I would ask that you voir dire another juror, Judge.

THE COURT: Another juror?

MR. GIBSON: Yes, sir.

MR. LEVINE: Well, we would vehemently object to that, Your Honor.

THE COURT: Well, we'll do one more. Let's have --

MR. SILVER: I think this threatens the --

THE COURT: Ms. --

MR. SILVER: -- entire deliberative process of a jury, Your Honor. We're examining the jurors. We're having testimony --

THE COURT: Courts have said I can examine every one of them.

MR. SILVER: But the conduct --

THE COURT: All right. Let me have -- just have Ms. Rivers. She's Number 6.

MR. WELSH: But the predication for the process is being diminished moment by moment.

THE COURT: The what?

MR. WELSH: The predication for this entire process --

THE COURT: Well, we'll just have one -- then we'll -- then we're not going to do anymore. Let's just see what happens.

MR. WELSH: Understood, Judge.

THE COURT: Just be patient.

MR. SILVER: Okay.

UNIDENTIFIED SPEAKER: You say Ms. Rivers?

THE COURT: Yeah. I just picked one.

(Off the record at 3:25 p.m.; on the record at 3:28 p.m.)

(Juror Number 6 present in chambers)

THE COURT: Right over here, Ms. Rivers. Thank you.

You may be seated. Thank you.

What I want to do is ask you just a few questions about the deliberative process without getting into who is voting how.

JUROR NUMBER 6: Okay.

THE COURT: That's not -- the merits of the case is not the issue before us this afternoon.

Would you please raise your right hand?

JUROR NUMBER 6 SWORN

THE COURT: We've heard some concerns about the way the deliberative process has been going in the jury room and I wanted to get your assessment of it, what's been going on, if people have been discussing the case and deliberating or -- particularly with respect to Juror Number 12.

JUROR NUMBER 6: Yes. People have been discussing and -- discussing the case, reviewing the evidence.

Regarding Juror 12, he takes a stance where he -- in my opinion it looks like, you know, he wants to be seen. So he takes, I don't want to say a longer time. He just -- how do I describe it? He just doesn't necessarily -- it's like he's being obstinate. He's being different. He's -- we reviewed the evidence and we all have a conclusion and, you know, he may not agree, but he doesn't give valid reasons as to why he may disagree with the charge.

THE COURT: You say he disagrees with the charge?

JUROR NUMBER 6: Yes.

THE COURT: Now how about screaming? Is there any screaming going on?

JUROR NUMBER 6: He does raise his voice. He raises his voice quite a bit to be seen, to view his point about a particular matter.

THE COURT: Are other people screaming or --

JUROR NUMBER 6: Other people may raise their voice to tell him to calm down some. But I think the initial response and elevation of voice may come from him.

THE COURT: Was there any -- did you ever observe him touching any juror on the shoulder or anything of that kind?

JUROR NUMBER 6: He has been the juror next to me when we were in the ceremonial room.

He always kind of struck up a conversation with me and I -- how do I want to say -- he struck up a conversation with me. I've talked to him. But I think I've also kind of kept him calm and told him, you know, this is what we have to do. This is how we need to go about doing it just to calm him down.

THE COURT: So you didn't see him put his hand on anybody's shoulder or --

JUROR NUMBER 6: He might have put his arm around my shoulder or hand on my shoulder. He also did it maybe with another juror, too, because maybe we've been working with him to keep him calm so we can move on and go over the issues so we can move onto the next issue.

THE COURT: All right. Let me -- nothing further at the moment. Will you just remain out in the anteroom for the moment, Ms. Rivers, while I confer with the attorneys?

(Juror Number 6 leaves chambers)

THE COURT: Anything further you wish me to ask of this juror?

MR. WELSH: I just hope the Court doesn't construe her statement that he disagrees with the charge to be that he's not following the Court's jury instruction. We call it the charge. She didn't say -- she didn't -- certainly didn't intend to say as far as I can see that he's refusing to follow your jury instructions.

THE COURT: Well, let's ask her.

UNIDENTIFIED SPEAKER: Okay.

UNIDENTIFIED SPEAKER: I thought she meant the count.

MS. FLANNERY: I did, too.

THE COURT: Well, bring her in.

UNIDENTIFIED SPEAKER: The criminal charge.

MR. KRAVIS: Your Honor, may I --

THE COURT: Sure. Yeah.

MR. KRAVIS: -- as a possible additional question. I thought there was some ambiguity in the juror's testimony or description when she was talking about trying to calm the juror down. It seemed to me that -- it wasn't at least clear to me whether what she meant was that she was calming him down and he was continuing to participate in the process or --

THE COURT: All right.

MR. KRAVIS: -- just calming down -- I think the Court can make clear that taking time to deliberate is not a problem. The question is whether the process is happening --

THE COURT: Okay.

MR. KRAVIS: -- or whether the juror is not --

THE COURT: Let's bring her in. I want to ask her -- get her. Yeah.

(Juror Number 6 present in chambers)

THE COURT: Sorry.

JUROR NUMBER 6: It's okay.

THE COURT: Just a couple of clarifying questions, Ms. Rivers. Were you saying that he was not following the jury instructions when you say the charge?

JUROR NUMBER 6: I don't know if I would say he's not following it. He's just reading maybe too deeply into it and putting his own emotions into it instead of just looking at what it says, what the facts are. He's -- he just continues to read past that into his own mind of what he feels it should be.

THE COURT: Okay. All right. Now in terms of calming him down, can you elaborate a little bit on that? Is he participating in the process when you say --

JUROR NUMBER 6: Yeah. Yeah. Actually, before we started -- before we presented the -- you know, the request to you, we actually got him to review, this is the evidence, this is the facts, this is what it's saying, what do you agree. And he finally, you know, agreed or came to his conclusion as to what he felt his response should be.

THE COURT: Well, just so -- it's very important to know whether he's following the Court's instruction or putting his own gloss on them.

JUROR NUMBER 6: He's putting his own gloss, but after, you know, some time we were able to get him to look at, you know, the information. But if this is the (indiscernible) for 28 counts it's going to take -- takes it takes.

THE COURT: Well, whatever time it

JUROR NUMBER 6: I understand that.

THE COURT: Yeah.

JUROR NUMBER 6: I understand that. But it seems like, you know, the majority of us, we can look at it. We can review the evidence and we can come to a conclusion. That's 11 of us. And then you have one person, it's like wait a minute, and he just kind of holds out to be seen for whatever reason and just takes a little longer, and it's very frustrating to everybody the matter in which he is -- even his justification for some of his responses don't seem to relate to what the matter is before us.

THE COURT: Right. All right. Thank you very much.

JUROR NUMBER 6: Uh-huh.

(Juror Number 6 leaves chambers)

THE COURT: I'm going to call one more juror who is on this list. Why don't we call Number 1, Mr. --

UNIDENTIFIED SPEAKER: Blimline (ph).

THE COURT: Blimline, yeah, and see what he has to -- he's on --

(Off the record at 3:37 p.m.; on the record at 3:39 p.m.)

(Juror Number 1 present in chambers)

THE COURT: Come on in, Mr. Blimline.

JUROR NUMBER 1: Good morning.

THE COURT: Right in here. You know everybody. Please have a seat.

JUROR NUMBER 1: Sure. Hi.

THE COURT: Hi. I'm going to ask you a few questions about the deliberative process, what's been happening in the jury room.

JUROR NUMBER 1: Sure.

THE COURT: I don't want to get into the merits, who's voting which way, who's in favor of the government, the defendants, whatever, or on each count.

JUROR NUMBER 1: Sure.

THE COURT: Now let me first swear you in. You ready?

JUROR NUMBER 1: Sure.

JUROR NUMBER 1 SWORN

THE COURT: Thank you. We've had some notes, one of which you've signed --

JUROR NUMBER 1: Yes.

THE COURT: -- concerning Juror Number 12. The comment was that he was argumentative, incapable of making decisions and there's been a lot of screaming.

JUROR NUMBER 1: Yes.

THE COURT: Maybe -- let's start with the screaming.

JUROR NUMBER 1: Okay.

THE COURT: Tell us about that situation.

JUROR NUMBER 1: Yeah. He's -- as far as the deliberation process we really haven't been able to even start the deliberation process. You know, we're trying to -- I take this very serious, you know.

I've been down here for five weeks, you know, like this is important to me. That's why I when I'm out there I'm listening to everything that's going on because I want to make the right decision.

But when we're in there this one particular individual, it's -- he's very opinionated. He comes into the process with his view already established, refusing to even listen to any of the evidence, you know, and he's been very forceful, you know, standing up, yelling, pointing his finger, you know, like who -- for example, like you said about the snow.

THE COURT: Right.

JUROR NUMBER 1: You know, you would say you went to bed it didn't snow. You woke up. There was snow on the ground. Did it snow, you know. Well, 11 of us would say, well, yeah. It snowed during the night. He would say, well, I'm not sure. You know, during the night trucks could have come with shovels and shoveled -- you know, like it's just way over the top just stuff that is not even making sense. He contradicts himself back and forth.

I can understand people having different opinions. We all do in the room. Everyone has different opinions. We're all coming at it from a different -- and that's what makes the process work and that's what makes it really fascinating.

But he'll say one thing and then say, no, I didn't say that, go -- and we're just going back and forth. And basically we spent since yesterday at 3:00 till now just basically listening to him trying to even explain -- trying to get him to even listen to what he's saying and it's just not working, you know. And

I feel bad because we haven't accomplished much of anything in the eight hours or six hours that we've been in there. And it's -- you know, it's frustrating for all of us.

THE COURT: So are you saying he hasn't been deliberating? He has -- is he listening --

JUROR NUMBER 1: Not with us.

THE COURT: -- to other --

JUROR NUMBER 1: Not with us. Like he will not listen to anything we're saying, you know. He has his own -- he has his own path he's going and, you know, that's --

THE COURT: What about the Court's instructions, that 120 page document?

JUROR NUMBER 1: Yes. Yeah.

THE COURT: Is he willing to follow the instructions?

JUROR NUMBER 1: He -- well, that's the thing. He is -- he pours over them. He pours over the documents very well, you know, very well. But in the jury -- the papers that we sign, guilty or not guilty.

THE COURT: The verdict sheet.

JUROR NUMBER 1: Yeah. The verdict sheet.

THE COURT: Yeah. Don't tell me how it's been signed.

JUROR NUMBER 1: No, I'm not. I'm not. I'm saying the questions on there are very specific. They're not hard questions. And we all look at the

questions and all can determine what the question says. The problem with this person is he's going way beyond the questions like, well, what did this person or what did this person feel or why did this person -- and it's like, no. No. That's not even -- that's not part of the question.

THE COURT: Well, of course intent is part of it.

JUROR NUMBER 1: Yes. Yeah. But it's going way -- I mean, he's going -- he's trying to investigate. I feel like he's more like investigating the whole process trying to figure out why everything happened and like going way beyond the scope of what -- the information that we even have, you know. And that's the thing.

THE COURT: And how about the screaming?

JUROR NUMBER 1: Yes.

THE COURT: You say -- has anybody else been screaming? How -- what's been happening?

JUROR NUMBER 1: No. He's very vocal. He's very vocal. Like the -- when he feels like he's not getting -- being heard -- basically what I feel is what's happening is he has an opinion and that opinion is established. And he's not willing to listen to any sort of reason or any sort of what everyone else is saying and he's trying to force everyone else to get to his point of view. And if he feels like he's not getting there, he gets louder and louder and points and puts his hand on your shoulder and, you know, and that -- that gets --

THE COURT: Was he doing that to you?

JUROR NUMBER 1: Yes, he has. Yes. Yeah. He's put his hand on my shoulder at least once. you know. And it's like what's happening then is like a lot of the other jurors, there's 12 of us, and I raised this yesterday. I stood up and said, listen, we are a team of 12 who have all -- we deserve to be here. We've put our time in. We deserve to be in the jury room. We deserve to be -- have our voice heard. But there are people in there who haven't had a chance to get their voice heard because they're being bulldozed or drowned out by this one individual who seems to be steamrolling the whole process.

THE COURT: Any further -- all right. Mr. Blimline, will you just mind standing out --

JUROR NUMBER 1: No. Absolutely.

THE COURT: -- in the anteroom for a minute while I confer with the lawyers.

JUROR NUMBER 1: Absolutely. Sure.

THE COURT: We may ask you to come back for just a second.

JUROR NUMBER 1: Sure. No problem. Thank you.

(Juror Number 1 leaves chambers)

THE COURT: Any other questions you wish me to ask him?

UNIDENTIFIED SPEAKER: No, Judge.

THE COURT: All right. Well, we can excuse him. I mean, to go back to the jury room.

(Laughter)

THE COURT: That's an ambiguous word.

All right. I think I've heard a pretty good cross-section of the jurors. You want to make your comments and arguments about it?

All right. Mr. Gibson.

MR. GIBSON: Well, Judge, we didn't explore the bias issue in the degree to which the government had requested.

THE COURT: Right.

MR. GIBSON: But I think it's fairly clear what's happening here, and I also think that the Court has a clear credibility determination to make. Juror Number 12 sat here and said he didn't recall touching anyone. You have two jurors saying that he definitely did and even the juror who didn't sign the note said that he put his hand on her shoulder and that she had to try and calm him down.

And, again, I would go back to the demeanor that I believe he displayed for the Court during this voir dire process and I would suggest to the Court that there's ample evidence from which to conclude he's disrupting the process and should be removed from the jury.

MR. WELSH: Your Honor, I think the picture that is portrayed here is quite the opposite. This man is deliberating and he's in the face of 11 people who will pounce on him. So who's to say who is not deliberating. I think that --

THE COURT: I guess I'm the one to say whether he is or isn't.

MR. WELSH: You are. You are indeed.

But -- so as a rhetorical question. He's got his opinion. He seems very conscientious. He wants to get into the evidence. I thought there was some initial concern about him putting his own gloss on the jury instructions, but Ms. Rivers, Juror Number 6, said we talked it through. We went through it with him. I would suggest that it's entirely premature at this point. I think a supplemental instruction will do it. They know they can have recourse to you again.

I think what we have is people who just can't convince him of their view and he's deliberating against 11 people. So we urge that you give the instruction and see what tomorrow brings.

MR. LEVINE: Your Honor, I would add to Mr. Welsh --

THE COURT: Turn the microphone.

MR. LEVINE: I would add, I think it's also clear and we heard it from more than one of the witness -- juror witnesses that, you know, the issue of intent is being considered and that he is raising that issue. And, of course, that is at the heart of this case. And that seems to be the focus of some disagreement.

So, again, I join in Mr. Welsh, and I know I speak for the other defendants. This seems to me a juror who actually is being conscientious.

MR. SILVER: And I would add, Your Honor, if I may, that at least one of the jurors who just came in described for us how he is, in fact, deliberating and how he has changed his posture and has come around to the point where she believes he is deliberating.

And I would respectfully submit that at this point it is for none of us to say that there's a breakdown in the deliberation. It's far -- I think it's way premature, particularly given what we just heard about the jurors and how their various postures and their various approaches are evolving.

THE COURT: Mr. -- anybody else before we hear from Mr. Gibson?

MR. GIBSON: Judge, I believe you heard from the foreperson that he was unwilling to follow the charge. And I believe what Juror Number 6 told you was he was putting his own gloss on the jury charge that Your Honor gave to the jury, which is exactly what he's not allowed to do.

In fact, I believe it was the second paragraph in the jury charge that the Court read to him that he has to follow the instructions as given by the Court, whether he agrees with them or not and not at his own personal biases or prejudices to what he thinks the law should be.

MS. FLANNERY: To me it sounded like there was a disagreement in interpretation of instructions rather than an unwillingness to abide by the instructions.

THE COURT: Okay. I will make a decision, not right this moment, but I'll let you know in the morning what we're going to do. I think it probably wise at this point to excuse the jurors for the day. I mean, I just think we've had -- everybody needs a rest.

UNIDENTIFIED SPEAKER: Indeed.

THE COURT: All right. Thank you very much.

(A chorus of thank you)

THE COURT: In chambers will be sealed, but copies will be available to defense counsel with the admonition that the transcript should not be circulated beyond yourselves and those who work closely with you in the law firms. All right.

(A chorus of thank you)

UNIDENTIFIED SPEAKER: May I inquire? Jimmy, for those of us who have been getting dailies, we'll just get it as we were before; is that right?

UNIDENTIFIED SPEAKER: I'm sorry. What was that?

UNIDENTIFIED SPEAKER: For those of us who have been getting daily transcripts we'll just get this --

UNIDENTIFIED SPEAKER: Right. I'm going to --

UNIDENTIFIED SPEAKER: -- as we've gotten it before --

UNIDENTIFIED SPEAKER: I'm going to

take it down right away --

UNIDENTIFIED SPEAKER: Okay.

UNIDENTIFIED SPEAKER: -- and I'll let them know.

UNIDENTIFIED SPEAKER: Okay.

MS. FLANNERY: There is an -- okay. There is an instruction that has been given appropriately that everyone should listen to one another, deliberate, but one should not surrender one's honestly held viewpoint. And there is certainly indication in what we've heard that that may well be what he's doing which is following that instruction.

THE COURT: Well, like life itself it's not totally simple. There was some conflicting testimony that was given before the Court and I will have to decide who to believe, who not to believe and what action to take.

(A chorus of thank you)

(Whereupon, the chambers conference concluded at 3:51 p.m.)

* * * * * *

(This portion previously transcribed)

(At 3:58 p.m.)

THE CLERK: All rise. Court is now in session.

THE COURT: You may be seated.

Members of the jury, it has been a long day and we're going to adjourn for the evening and ask you to return in the morning at the usual time of 9:30. Please do not discuss the case among yourselves or with anyone else over the evening recess. See you tomorrow.

I ask everyone else to remain in the courtroom for about five minutes

MS. FLANNERY: Your Honor --

THE COURT: -- until the jury has retired.

MS. FLANNERY: May we see you at sidebar?

THE CLERK: All rise.

THE COURT: Yes. You may.

(At sidebar)

THE COURT: Yes.

MS. FLANNERY: Your Honor, one -- in reflecting in the few minutes we've had to reflect, one troubling thing was the last -- I believe it was the last juror's reference to the verdict sheet asking a simple sheet. I would ask that the jury be instructed that the charge not the verdict form controls the elements that they are to be determining. So I would that to the defense request that an Allen charge be given, that an instruction that the indictment is not

evidence be given, and that an instruction that the charge controls not the --

THE COURT: Of course the Allen charge is disfavored in this circuit I believe.

MR. WELSH: They call it a (indiscernible) charge in this --

MS. FLANNERY: I'm sorry.

THE COURT: So I don't think we --

MS. FLANNERY: I -- this is why I should defer to Mr. Welsh to make the legal argument.

THE COURT: I don't think we want to make the Allen charge. I don't think you would want that.

MS. FLANNERY: No. I'm sorry, Your Honor. I will -- I appreciate the correction from my colleague.

MR. WELSH: (Indiscernible - away from microphone).

THE COURT: I know. I'm well aware of that.

MS. FLANNERY: An instruction that they should continue to deliberate and to listen to one another.

THE COURT: Of course that deals with deadlock. So the question is are we at the point where there's a deadlock as opposed to whether somebody isn't deliberating. That's the issue, so I'm not sure the Allen charge or its successor is relevant at this point.

All right. Anything further at this time?

MR. WELSH: Let me just add, Judge, that I think that we've come up to the standard, which is from Kemp, which that says that -- which is cited with approval in Kemp that if the record evidence is closed there's the possibility that the request to discharge stems from the jurors in view of the evidence that the Court must deny the request.

THE COURT: Well, of course. So I don't disagree with that conclusion of law at all. So that's the issue whether that's -- whether it's doing that or whether it's something else I guess. I'm not --

MR. WELSH: Yes.

THE COURT: -- so let me know. So I think we probably ought to come a little bit early tomorrow. Maybe whatever I decide obviously I have to put on the record. Now, we can -- maybe we ought to do that in chambers. So --

MS. FLANNERY: What time, Your Honor?

THE COURT: -- probably want to come back nine o'clock.

MS. FLANNERY: Sure.

MR. WELSH: Okay.

THE COURT: So that way we can -- all right. See you at nine.

MS. FLANNERY: Thank you.

MR. WELSH: Thank you, Your Honor.

(Conclusion of sidebar)

* * * * *

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MULTIPLE SPEAKERS: Good morning, Your Honor.

THE COURT: Since we recessed last night, some additional significant evidence has come to light.

I'm going to ask Ms. Makely to take the stand.

– – –

(KRISTIN MAKELY, SWORN.)

– – –

KRISTIN MAKELY,

having been first duly sworn, was examined and testified as follows:

– – –

EXAMINATION

– – –

BY THE COURT:

Q. Please state your name.

A. Kristin Makely.

Q. And what is your position in the court?

A. Courtroom deputy clerk to you, Judge Bartle.

Q. Thank you.

Yesterday afternoon, before I interrogated juror number 12, did you escort him from the jury room to my chambers?

A. Yes.

Q. And after he was questioned, did you escort him back to the jury room?

A. Yes.

Q. Please tell us what occurred when you escorted him from chambers back to the jury room.

A. Okay. I was walking with him out -- right here, this still private hallway, going towards the judges' elevators, and he stopped me by just sort of -- not in a threatening way at all, just stopping me with his hand on my shoulder. And he just looked me straight in the eye, and he said, I'm going to hang this jury.

And then, at that point, actually, Ms. Baylson and Ms. Christianson (ph) came out into the hallway to call us back because you had additional questions for him.

Q. And then what occurred?

A. So he came in here, and you asked him further questions. And then you excused him again, and I walked him back out. And at that point, he walked ahead of me, paces ahead of me, because he was, you know, just sort of frustrated from what had gone on here, and we didn't talk. We went -- I took him back into the jury room and got the next juror to come back for questioning.

Then, after you went through the other jurors -- there was a -- a couple of the other jurors that you questioned. At the end of all of that, he came out of the jury room, and he said, I really need to talk to you.

And he said more about how they're treating him and what he's saying to them and then, it's going to be 11 to 1 no matter what.

THE COURT: All right. Anything further you want me to ask Ms. Makely about the conversation?

– – –

(No response.)

– – –

THE COURT: Thank you.

– – –

(Witness excused.)

– – –

THE COURT: Does anyone want me to voir dire juror number 12 about what occurred after he was excused? I'll go around the room.

Mr. Welsh?

MR. WELSH: May I have a moment to just think about that, Your Honor?

THE COURT: Yeah.

MS. FLANNERY: May we confer?

MR. WELSH: I think we -- I think we -- I think you should voir dire him again.

THE COURT: All right.

Will you bring him in, Ms. Makely?

COURTROOM DEPUTY: He actually wasn't yet here when we (indiscernible) --

THE COURT: Well, as soon as -- maybe he's here by now. Let's see.

MR. WELSH: May I comment on –

THE COURT: You may.

MR. WELSH: -- on that, Your Honor?

Are we on the record?

ESR OPERATOR: On the record?

MR. WELSH: Yes, please.

Obviously, this is, in fact, of some significance, and I don't want the court to feel that somehow we're wasting time here, but it seems to me that some inquiry is appropriate into whether or not he's saying, I'm going to hang the jury because the evidence isn't there, or I'm going to hang the jury because I'm just going to hang the jury because I won't deliberate. And so --

THE COURT: Well, how can he have known that if he hasn't discussed it with the other jurors?

MR. WELSH: Well, if --

MR. GIBSON: And beyond that, Judge, that seems to be getting into the merits of --

THE COURT: I understand.

MR. GIBSON: -- (indiscernible).

MR. WELSH: Well --

THE COURT: I want to ask him what his conversation was.

MR. SILVER: Perhaps basis for him saying --

THE COURT: No. I'm just going to ask him what he said. Let's just see -- let's just see how it goes, all right, before --

MR. SILVER: Some of the jurors emphasized yesterday how long they deliberated with him. We all know how long they have (indiscernible) --

THE COURT: Well, let's just see what he -- I want to hear what he has to say. I'm going to ask him an open-ended question about it.

– – –

(Pause)

– – –

(Whereupon, a recess was had between 9:03 a.m. and 9:28 a.m.)

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THE COURT: Back on the record, (indiscernible).

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TIMOTHY MILLER,

having been previously sworn, was examined and testified as follows:

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EXAMINATION

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BY THE COURT:

Q. Thank you for coming back.

Some questions have arisen, Mr. Miller, about what occurred after you left the questioning here yesterday afternoon and went back to the jury room, being escorted by Ms. Makely.

Did you have any conversations with her?

A. With Ms. Makely? Yes, I did.

Q. And what did you -- what happened? What occurred?

A. Basically, I said that there was a lot of name calling going on.

Q. Right.

A. There's people that are aware of some of the things I've done in my life, and they made a comment that maybe I hit my head a few -- hard a few times. Bill called me stupid the first day. He apologized.

Q. This is what you told Ms. Makely now?

A. No, I didn't tell her that.

Q. No. I'm asking you what you told -- your conversation with Ms. Makely after you left the questioning in my chambers and went back to the jury room yesterday afternoon.

A. The conversation I had with Ms. Makely is that somebody in that jury room made a comment -- I served six years in the 82nd Airborne --

Q. You were telling this to Ms. Makely now?

A. Yes.

-- (indiscernible) parachute infantry regiment, where I jumped out of airplanes. People on

the jury know that. Somebody made a comment that I may have hit my head --

Q. And you were telling this to Ms. Makely now?

A. Yes.

Q. Okay.

A. -- I may have hit my head a couple times too hard on the ground when I landed.

I didn't appreciate the comment. I can't prove that they said it. I don't know who all heard it. It doesn't matter. I found it offensive.

Q. Um-hmm. Did you say anything else to Ms. Makely?

A. I may have. I really can't recall.

Q. Can't recall whatever else you said?

A. No. To me, that was the most important thing.

Q. But you didn't say anything else to her that you can recall?

A. I said, I'm taking it seriously; I'm deliberating; I feel like I'm doing the best that I can; there's people in there calling me names, stupid --

Q. You were telling her this?

A. -- piece of work.

Yes.

Q. Okay. All right. All right. Anything -- that's it that you can remember? That's all you can --

A. That's it.

THE COURT: All right. Thank you.

THE WITNESS: Thank you.

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(Witness excused.)

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THE COURT: Just have him wait just a second.

All right. I don't think I need to ask him anything else.

MR. SILVER: Should we have a couple minutes (indiscernible)?

MR. WELSH: Yeah.

If we can just have a moment, Your Honor?

THE COURT: Well --

MR. WELSH: It should be very quick.

THE COURT: All right.

MR. WELSH: Thank you.

THE COURT: (Indiscernible.)

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(Whereupon, a recess was had between 9:31 a.m. and 9:33 a.m.)

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MR. WELSH: Your Honor, we've conferred on the defense side, and we ask the court to ask him directly if he said to Ms. Makely, I'm going to hang this jury. That's our request.

THE COURT: All right.

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(Pause)

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TIMOTHY MILLER,

having been previously sworn, was
examined and testified as follows:

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EXAMINATION

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BY THE COURT:

Q. You may be seated.

And, of course, Mr. Miller, you know you're under oath here from yesterday?

A. Yes, sir.

Q. Yeah. Did you say to Ms. Makely that you're going to hang this jury?

A. I said I would.

Q. You did?

A. I did. I said -- I told her -- I said, we don't agree; I'm not just going to say guilty because everybody wants me to, and if that hangs this jury, so be it.

THE COURT: Anything further?

INDISCERNIBLE SPEAKER: Nothing from us, Your Honor.

INDISCERNIBLE SPEAKER: No.

THE COURT: All right.

THE WITNESS: I did say that, sir.

BY THE COURT:

Q. You didn't remember that before?

A. I'm more concerned about people spitting on my military record.

Q. Did you say that you'd hang the jury no matter what?

A. If they do -- if we cannot come to --

Q. No. The question is what you said to her. Did you say to her you would hang the jury no matter

what?

A. I can't really remember that. I did say that if we didn't -- a person -- no matter what, I can't recall that exactly.

THE COURT: All right. Thank you very much. You can wait just out there in the anteroom.

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(Witness excused.)

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THE COURT: All right. I'll hear any comments anybody has to make, any argument. We'll start with Mr. Welsh, and then we'll go to -- hear the --

MR. WELSH: Your Honor, we still oppose dismissing this juror. We think it's still about the evidence. I'm not going to vote guilty just because everybody else wants to vote guilty was what I thought I heard. That's my only comment (indiscernible).

THE COURT: Mr. Gross?

MR. GROSS: I agree with Mr. Welsh.

And I think we should put on the record, of course, that if any of us object -- if one person objects, we all join into it; I mean, we all (indiscernible) --

THE COURT: All right.

MR. GROSS: -- join in the argument, so that would be on the record.

But I agree with Mr. Welsh by that comment, yes.

THE COURT: Ms. Flannery?

MS. FLANNERY: I concur. I think what he communicated is that what he meant by saying, I'll hang this jury is that he's not going to agree just because others want him to agree, which is the instruction Your Honor gave the jury.

THE COURT: That's what you think "no matter what" means?

MS. FLANNERY: What I heard him say, he -- his recollection, meaning what's sticking in his mind about what he said, was that he was not going to agree just because the others --

THE COURT: How about the fact that he didn't remember that until I asked him about it?

MS. FLANNERY: As he articulated, the thing that stuck most in his mind was --

THE COURT: Right.

MS. FLANNERY: -- the name calling.

THE COURT: All right.

Mr. Silver?

MR. SILVER: (Indiscernible) to add to that, Your Honor.

THE COURT: Speak -- speak into --

MR. SILVER: Usually people don't ask me to speak up. The -- (indiscernible) point to the microphone.

The part that he did not initially either remember or say, that didn't surprise me in the least. We see that out of witnesses every day. And I don't think it's indicative of anything because he said -- he explained why it was that he told us the part that he did say, and it wasn't as if he knew what we were fishing for.

And it would have been indicative had -- when you asked him about it, had he denied it, that would have been indicative, I think, perhaps. But he didn't, and I -- he said, in fact, that he said it, and he explained it, and I think he explained it in a way that we would expect of jurors who are participating in the process.

THE COURT: Mr. Levine?

MR. LEVINE: Your Honor, I concur in the defense position. I would add that given this early stage of deliberations, giving it another day with appropriate instructions from the court about people, obviously, acting in an appropriate manner toward each other, giving each other fair consideration of each other's arguments, et cetera, that would be my suggestion to the court. But I do concur that there's not a sufficient basis warranting removal at this point.

THE COURT: Mr. Gibson?

MR. GIBSON: Judge, this juror should absolutely be removed. Once again, his demeanor has demonstrated a hostility, I think, both to the other jurors and to the court, in particular.

He had to be confronted directly before he even acknowledged making the comment to Ms. Makely. Ms. Makely did not relay the explanatory comments that he made here today when he was confronted directly with the comment that he made.

And the comment that he made, according to Ms. Makely, was, I will hang this jury no matter what. That suggests he's not participating in the deliberations, as the other jurors suggested yesterday. That suggests he's ignoring the evidence and the law, as we had suggested to the court yesterday and the other jurors suggested as well.

I think the court has no alternative but to remove him at this point.

THE COURT: Thank you.

Anything further?

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(No response.)

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THE COURT: I find my deputy clerk, Kristin Makely, to be credible. I find the -- juror number 12, Timothy Miller, not to be credible. I find that he did tell Ms. Makely that he was going to hang this jury no matter what.

There have been only approximately four hours of deliberation. There's no way in the world he could have reviewed and considered all of the evidence in the case and my instructions on the law.

I instructed the jury to deliberate, meaning to discuss the evidence; obviously, to hold onto your honestly held beliefs, but at least you have to be willing to discuss the evidence and participate in the discussion with other jurors.

Juror number 12 has delayed, disrupted, impeded, and obstructed the deliberative process and had the intent to do so. I base that having observed him, based on his words and his demeanor before me.

He wants only to have his own voice heard. He has preconceived notions about the case. He has violated his oath as a juror.

And I do not believe that any further instructions or admonitions would do any good. I think he's intent on, as he said, hanging this jury no matter what the law is, no matter what the evidence is.

Therefore, he will be excused, and I will replace him with the next alternate, who is Ms. Devari (ph).

MR. WELSH: I think, Your Honor, if I may follow up on that, the -- we're going to ask the court for some supplemental instructions on --

THE COURT: All right. Go ahead.

MR. WELSH: Let me lay the groundwork for this.

First, we understand your ruling. I'm not asking you to re-examine that. But we ask the court to mis-try the case on the basis that we've lost a juror.

THE COURT: To do what?

MR. WELSH: Mis-try the case.

And we also believe that -- in the very real sense that this juror, having gotten, if you will, sideways with one or more other jurors and, therefore, having been dismissed, does send a message about yielding to the majority.

So having said that, while we don't agree that a set of cautionary instructions will be sufficient, we do ask the court to give some cautionary instructions that, I think, in responsibility, we ought to talk about.

And that is that several points have come up that -- in the court's interrogation of these witnesses -- of these jurors --

THE COURT: I think before we do that, so that we don't delay Mr. Miller, I'm going to ask Ms. Makely to bring him in. I'm going to tell him he's excused --

MR. WELSH: Understood.

THE COURT: -- from further service and that he can go on his way.

Is he out there, Ms. Makely?

MR. KRAVIS: Your Honor –

THE COURT: Just a minute.

MR. KRAVIS: -- may I just suggest that the court also provide some guidance to the other jurors, that they'll be receiving further instructions or (indiscernible) --

THE COURT: Well, what we're going to do is -- I'm going to excuse him, tell juror number 12 not to talk about the case until the case is over, until the trial is over. He will be excused. He can -- he'll be leaving.

And then we're going to have a discussion here, and then we'll bring the alternate up. And I will, obviously, tell them -- just give them some further instructions. I don't want to instruct them now.

You mean instruct --

MR. KRAVIS: No. I meant advising the other jurors now that they will be receiving further instructions just in case --

THE COURT: They'll just sit and enjoy their coffee a moment.

INDISCERNIBLE SPEAKER: They get coffee?

THE COURT: Yes.

All right. Just have him --

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(Pause)

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THE COURT: Mr. Miller, you're excused from further service. Thank you very much for coming.