IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-30296

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

WALTER P. REED; STEVEN P. REED,

Defendants - Appellants

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

ON PETITIONS FOR REHEARING EN BANC

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

Before HIGGINBOTHAM, SMITH, and CLEMENT, Circuit Judges.

PER CURIAM:

(✓) Treating the Petitions for Rehearing En Banc as Petitions for Panel Rehearing, the Petitions for Panel Rehearing are DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petitions for Rehearing En Banc are DENIED.

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

ENTERED FOR THE COURT:

Patrick Higginbotham

UNITED STATES CIRCUIT JUDGE

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

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FILED
November 5, 2018
Lyle W. Cayce
Clerk

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Before HIGGINBOTHAM, SMITH, and CLEMENT, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Walter Reed served as District Attorney for Louisiana's 22nd Judicial District from 1985 to 2015. Federal prosecutors charged him and his son, Steven Reed,[1] with conspiracy to commit wire fraud and money laundering and substantive counts of both wire fraud and money laundering. Walter Reed also drew additional counts of wire fraud, false statements on income tax returns, and mail fraud. The jury convicted on all but one count, and both defendants

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

appeal. We vacate and remand the district court's imposition of joint and several liability for monetary forfeiture, but otherwise affirm.

I

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

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

Count 1 alleged that the Reeds conspired to engage in wire fraud and money laundering by funneling campaign funds to Steven Reed. The indictment described 21 overt acts on behalf of the conspiracy, linked to three distinct events. First, Walter Reed paid Steven Reed about $14,000 in campaign funds for producing an anti-drug service announcement worth only $2,000. Second, Walter Reed paid Steven Reed's company, Globop, about $550 for bar services at a "housewarming party" unrelated to the campaign.[3] And third, Walter Reed paid Steven Reed's other company, Liquid Bread, to provide "Bar Services: Beverages and Liquor" at a campaign event featuring the band America, the "America Event." The prosecution presented evidence that Liquid Bread only provided bar services and did not provide alcohol at the event, but that Walter Reed nonetheless paid Steven Reed $12 per person for 2,450

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

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

people. The prosecution also alleged that Walter Reed suggested to two other companies providing services at the America Event that they each pay Steven Reed $5,000 out of the amount Walter Reed's campaign had paid them, but that he did not disclose either $5,000 payment on his campaign finance reports. After receiving payment from the America Event, Steven Reed paid down a loan for which Walter Reed was the guarantor and on which Steven Reed had begun to incur late charges. Counts 7, 9, and 10 alleged that both defendants committed wire fraud and money laundering related to the America Event.

Counts 2–6 and 8 dealt with Walter Reed's additional use of campaign funds for personal expenditures. The prosecution alleged that Reed spent campaign funds to purchase dinners, restaurant gift cards, and flowers—all for non-campaign purposes. It further alleged that he used campaign funds to pay for dinners with Pentecostal pastors and their families, then used those dinners to recruit referrals for the private legal practice he operated concurrently with his District Attorney service. As the prosecution explained, on one occasion, Walter Reed used campaign funds to host one of these dinners, requested that his firm reimburse him because he obtained a referral during the dinner, and then kept the reimbursement for himself until the investigation was underway.[4] It presented evidence at trial that the same pastor who gave Walter Reed the referral sought a "referral fee" in the form of a contribution to a church gymnasium, and after his firm declined to provide that fee, Walter Reed "donated" $25,000 of campaign funds for a church gymnasium.

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

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

The second broad category of counts, counts 11–14, alleged that Walter Reed underreported income on his tax returns, including for failing to report campaign funds he had converted to personal use. The prosecution contended that Reed owed the Internal Revenue Service about $40,000 in unpaid taxes. The jury convicted Walter Reed of all tax counts.

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

The district court sentenced Walter Reed to a below-guidelines term of imprisonment of 48 months, and Steven Reed to a below-guidelines term of probation. It ordered Walter Reed to pay a $15,000 fine and $605,244.75 in restitution. It also imposed forfeiture of $46,200 jointly and severally against both defendants, and of $609,217.08 solely against Walter Reed. In determining how much forfeiture to impose, the district court declined to

impose forfeiture for the "housewarming party" that the prosecution had identified as one of the 21 overt acts supporting the conspiracy count.[5] Because the court concluded that there was sufficient evidence of other overt acts to support the conspiracy charges, however, this affected the forfeiture amount but not the defendants' conspiracy convictions.

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

II

One of the principal arguments of the Reeds is that in prosecuting offenses drawn from misuse of Walter Reed's D.A. campaign funds,[6] the jury was asked to convict the Reeds of violation of campaign finance law, a denial of due process and "federalism."[7] We review here *de novo*,[8] and reject the contention.

The Reeds chiefly rely on the Supreme Court's decision in *McDonnell v. United States*,[9] which was issued after trial but before the district court denied the Reeds' post-trial motions for judgment of acquittal.[10] It called on the

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

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

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

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

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

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

Supreme Court to interpret "official act" in the federal bribery statute 18 U.S.C. § 201—"any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit."[11] The Court declined to read the definition broadly, determining that the phrase "official act" implicated only a limited set of decisions or actions "involv[ing] a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee."[12]

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

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

[12] *Id.* at 2371–72.

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

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

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

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

The argument fails: to the extent that the prosecution pointed to Louisiana campaign finance law, it did so only to prove non-honest-services wire fraud and related offenses, a different context from *McDonnell*. The jury was tasked with determining whether the defendants committed simple wire

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

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

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

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

fraud by defrauding Reed's donors.[20] The government was not required to prove that the defendants ran afoul of Louisiana campaign finance law, in contrast to *McDonnell*, where the troublesome concept of an "official act" was agreed to be an element of the honest services fraud and Hobbs Act charges.[21]

As a result, the Reeds' due process arguments are without merit. We agree with the district court that the conspiracy and wire fraud statutes at issue do not suffer the difficulties of "technical interpretation" of "official act," as in *McDonnell*; and so are unattended by its vagueness concerns.[22] Our recent decision in *United States v. Hoffman* is instructive. There, we reviewed convictions for wire and mail fraud related to filings and reports made in attempting to obtain state tax credits for film production.[23] We concluded that prosecution for those offenses did not raise vagueness concerns—"lying to cheat another party of money has been a crime since long before Congress passed the first mail fraud statute making it a federal offense in 1872."[24] In *Hoffman*, "[t]he government did not have to prove violations of state law," but

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

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

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

[23] *Hoffman*, 901 F.3d at 531–36.

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

instead, "[t]he elements the jury had to find included terms like misrepresentations and property that have deep roots in both criminal and civil law."[25] Here too, the jury was not called upon to interpret technical federal statutes or even elements of Louisiana's campaign finance law—it was asked to determine whether the Reeds had committed fraud.

We also conclude that the Reeds' prosecution did not impermissibly step on principles of federalism. *McDonnell* concerned a statute that, read broadly, might chill permissible official-constituent interactions.[26] While the Supreme Court's narrow reading was informed by a broader reading's challenge to principles of federalism,[27] it did not suggest that federal criminal law may never overlap with state regulation of governmental activity. We agree with the district court that "the federal government, in this case, enforced federal law—namely the federal fraud statute—and used state law only to prove *mens rea* and donor expectations."[28] While state governments certainly have "the prerogative to regulate the permissible scope of interactions between state officials and their constituents,"[29] those state officials simultaneously must

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[25] *Id.* at 540–41.

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

[27] *Id.* at 2372–73.

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

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

comply with federal fraud statutes.[30] In other words, if Reed's expenditures were legal under state law, the funding for the expenditures could nonetheless have been obtained fraudulently under federal law—and if Reed's expenditures were illegal under state law, the federal fraud prosecution did not substitute for any discipline under state campaign finance law.[31]

We pause to observe that our holding here is consistent with our fellow circuits' reluctance to extend *McDonnell* beyond the context of honest services fraud and the bribery statute, even where prosecutions involved local or state government officials.[32] This is not to say that the federalism or vagueness concerns raised in *McDonnell* could never have teeth beyond the specific

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

[31] This point is born out in this case. Prosecution witnesses who had donated to Walter Reed's campaign testified that they had expected their donations to be used for *campaign* activities. The defendants argue that some of the expenditures, while not used for campaigning purposes per se, were nonetheless permissible under Louisiana law because they were related to the "holding of public office." While the defense elicited testimony from the prosecution donor witnesses that they solely expected their donations to be spent in accordance with Louisiana campaign laws, those same donors had previously testified that they expected their donations to be used toward typical political campaign expenditures. One donor denied that she solely expected her donation to be spent in accordance with state law, instead stating that "if you ask for money for a campaign, it should be used that way," regardless of state law. The wire fraud counts did not hinge on state law; instead, they hinged on whether the jury could determine fraud had occurred.

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

statutes *McDonnell* interpreted, but rather that *McDonnell* should not be taken to prohibit prosecution for any federal crime that overlaps or intersects with state law or local governance.

III

The Reeds further raise a host of claimed errors in the district court's conducting of the trial. We will address the points of error, ultimately rejecting each of them.[33]

A

Steven Reed contends that the district court should have severed his case from Walter Reed's, and Walter Reed contends that the district court should have severed the Hospital counts from the other counts. Federal Rule of Criminal Procedure 8 provides for joinder of defendants and offenses. Federal Rule of Criminal Procedure 14(a) allows a court to sever a trial if joinder appears to prejudice a defendant. "We review the denial of a motion to sever a trial under the 'exceedingly deferential' abuse of discretion standard."[34] Giving

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

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

the district court the deference due, we find no abuse of discretion in its denial of both defendants' motions to sever.

1

"[T]he federal judicial system has a preference for joint trials of defendants who are indicted together,"[35] and "[a] defendant is not entitled to severance just because it would increase his chance of acquittal or because evidence is introduced that is admissible against certain defendants."[36] We have held that "[m]erely alleging a spillover effect—whereby the jury imputes the defendant's guilt based on evidence presented against his co-defendants—is an insufficient predicate for a motion to sever."[37] Instead, a defendant "must prove that: (1) the joint trial prejudiced him to such an extent that the district court could not provide adequate protection; and (2) the prejudice outweighed the government's interest in economy of judicial administration."[38] Severance is proper "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence."[39]

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

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

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

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

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

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

inadequate protection against the harms he identifies.[40] The court directed the jury to consider each defendant's case separately and to give separate consideration to the evidence as to each defendant.[41] Steven Reed only offers a conclusory assertion that despite this instruction, the jury could not separately consider the evidence as to each defendant. This is not a showing that the district court abused its discretion.[42]

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

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

Steven Reed points to our decision in *United States v. McRae*, 702 F.3d 806 (5th Cir. 2012), where we reversed a district court's refusal to sever one police officer's officer-involved shooting trial from the trial of a set of other police officers who separately attempted to cover up the shooting. Unlike in *McRae*, the evidence presented against Walter Reed on the counts only pertaining to him (the tax return, mail fraud, and certain wire fraud counts) was not so inflammatory that the jury would find it highly difficult to dissociate it from Steven Reed's conduct. *See id.* at 828. Further, the charge and evidence against Steven Reed was significantly related to the charge and evidence against Walter Reed on the campaign funds counts, whereas in *McRae*, two sets of defendants were effectively being tried for two completely different offenses and the only link was that one offense was the "catalyst" for the other. *See id.* at 821–23.

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

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

[42] We generally presume that juries follow trial court instructions. *See, e.g.*, *United States v. Posada-Rios*, 158 F.3d 832, 864 (5th Cir. 2009).

free and declined to raise certain defenses that would have aided Steven Reed but put his father in a negative light.[43] As Steven Reed did not adequately develop this argument before the trial court, we will not hold here that the district court abused its discretion in denying his motion to sever.[44] He also claims that his father's testimony was a core portion of his defense, but that once evidence emerged in the trial of the Hospital counts that Walter Reed had asked an assistant District Attorney to lie on his behalf, Walter Reed's credibility as a witness was effectively impeached.[45] Here too, Steven Reed has not presented specific reason to believe that if the jury had not been aware of Walter Reed's alleged dishonesty related to the Hospital counts, it would have credited his testimony differently or reached a different outcome—he simply asserts without further explanation that Walter Reed's testimony was central

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

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

[45] The crux of Steven Reed's argument here is effectively that the jury was exposed to extrinsic evidence of specific dishonest acts taken by Walter Reed, which otherwise would have been barred by Federal Rule of Evidence 608(b) if Walter Reed had simply been a testifying witness at Steven Reed's separate trial. This was not directly addressed by the limiting instruction; Steven Reed's argument on this point is not that the jury held his father's offenses against him, but rather that the most convincing evidence he had in his favor was his father's testimony, and the jury may separately have been compelled to conclude that his father was not credible.

to his defense, and that evidence emerging from the Hospital counts impeached that testimony. In sum, we cannot conclude that the district court abused its discretion in not severing Steven Reed's trial from all or part of Walter Reed's, especially given the strong preference for joint trials and the fact that joint trials have significant benefits that go beyond efficiency.[46]

2

Walter Reed, in turn, urges us to hold that the district court should have severed the Hospital counts from the other counts.[47] Joinder of counts is justified when there is "a series of acts unified by some substantial identity of facts or participants."[48] Because "[j]oinder of charges is the rule rather than the exception," in order to justify severance of counts a defendant must show "clear, specific and compelling prejudice that resulted in an unfair trial."[49] As with joinder of defendants, "the mere presence of a spillover effect does not ordinarily warrant severance."[50] The district court found that all of the counts in the indictment were properly joined because they were "part of a common series of transactions with a singular purpose—to exploit Walter Reed's influence as district attorney for personal financial betterment." It also found that "[t]o enrich himself, Defendant Walter Reed employed a singular means—fraud." Walter Reed alleges a general spillover effect whereby the prosecution conflated his alleged violation of the public trust in the Hospital counts with

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

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

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

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

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

his misuse of *non*public campaign funds in the campaign funding counts. But he has not adequately explained why, especially in light of the district court's limiting instructions to the jury to consider each count and the corresponding evidence on each count separately, he suffered "clear, specific, and compelling" prejudice resulting in an unfair trial. We conclude that the district court did not abuse its discretion in denying the motion to sever counts.

B

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

1

Both appellants contend that the district court improperly limited the expert testimony of Gray Sexton, a former Louisiana Board of Ethics general counsel.[52] The district court initially excluded Sexton's proffered testimony in its entirety, but later allowed Sexton to offer limited testimony in response to Kathleen Allen, a prosecution witness who testified to certain aspects of campaign finance law. The court observed that it had thought Allen would primarily explain aspects of Walter Reed's campaign finance reports, but because she ultimately testified to her opinions on what the campaign finance laws required, Sexton should be allowed to respond. The Reeds argue that further "custom and practice" testimony from Sexton was critical to demonstrate that Walter Reed had a good faith belief that he was in

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

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

compliance with Louisiana law involving "dual purpose" campaign expenditures, so limiting Sexton's testimony also impermissibly limited their ability to present a defense.

A district court has "wide latitude" and "broad discretion" to exclude expert testimony.[53] We will not disturb the court's exercise of its discretion to exclude such testimony unless the exclusion was "manifestly erroneous"—that is, unless it "amounts to a complete disregard of the controlling law."[54] The district court found that Sexton's proffered "custom and practice" evidence about the Ethics Board's treatment of campaign fund expenditures was not relevant to Walter Reed's state of mind or other issues in the case, since there was no suggestion that Walter Reed had been aware of the facts on which Sexton would testify, and that Sexton's testimony would not help the jury understand the core issue of fraud.[55] We see no manifest error in the exclusion, especially because, as we have explained, this was not a trial of campaign finance violations.[56]

2

Walter Reed further argues that the district court erred in admitting certain statements by Steven Reed discussing the America Event. In 2014, Steven Reed was approached over a social networking site by a news reporter, who asked him whether he had the proper license to provide catering services to Louisiana political campaigns between 2009 and 2012. They conversed

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

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

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

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

online, and Steven Reed told the reporter that he did not require a catering license because he did not provide food or purchase or transport alcohol, but rather only provided bar setup services—including at the America Event. These statements were admitted in trial, apparently against both defendants. Walter Reed contends that under the Sixth Amendment's Confrontation Clause and *Bruton v. United States*, these statements could only be admitted against him if Steven Reed testified at the trial. While he raised other challenges to the admission of Steven Reed's statements before the district court, including that they were inadmissible hearsay as offered against him and that they violated other elements of the Confrontation Clause, he does not present those arguments here, and has therefore waived them on appeal.[57] We review alleged Confrontation Clause violations *de novo*, but subject to a harmless error analysis.[58]

The *Bruton* doctrine "addresses the thorny Sixth Amendment problem where one defendant confesses out of court and incriminates a co-defendant without testifying at their joint trial."[59] The Supreme Court held that in such a case, the declarant's confession presents such a "powerfully incriminating

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

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

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

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

extrajudicial statement[ ]" that a limiting instruction alone cannot safeguard the co-defendant's Sixth Amendment rights.[60] But the Court has since clarified that *Bruton* applies only to facially inculpatory statements—and not to statements that only become inculpatory "when linked with evidence later introduced at trial."[61] It has explained that non-facially-inculpatory statements are less likely to inexorably steer a jury into disregarding limiting instructions, not to mention the practical impossibility of predicting in advance what statements might *become* inculpatory when coupled with other evidence presented at trial.[62]

We have some doubt about whether *Bruton* presents the appropriate lens for Walter Reed's objection,[63] but at a minimum, *Bruton* does not apply here because Steven Reed's statements did not facially inculpate Walter Reed. Steven Reed told the reporter that he had not provided alcohol at the America Event. For Steven Reed's statements to inculpate Walter Reed, the prosecution needed to link the statements to other evidence presented at trial: it had to prove that Walter Reed knew that his son did not provide the alcohol, and that a payment of $12 per person was not commensurate with the services that Steven Reed provided. Where there was this degree of attenuation between the

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

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

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

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

statement and its inculpatory value, introducing the statement did not violate *Bruton*.

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

3

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

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

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

The first question is whether Cordes's statements were hearsay, that is, an out-of-court statement offered to prove the truth of the matter asserted.[66] We review *de novo* the district court's legal conclusion about whether a statement is hearsay.[67] Ordinarily, a statement is not hearsay if it is offered to prove the statement's effect on the listener.[68] Reed contends that he did not offer Cordes's statements to prove that Cordes actually arranged for him to represent the Hospital personally, but rather as evidence supporting his belief that he had begun representing the Hospital personally. The line was fuzzy, however, as to whether Reed truly sought to admit Cordes's statements solely to prove their impact on him, the listener, or whether he in fact sought to admit them for their truth. For example, after the district court excluded testimony about Cordes's statements, Reed attempted to offer the following statement, which the court directed the jury to strike: "It was my state of mind [that I was representing the Hospital in my personal capacity], and it was Paul Cordes'[s] state of mind too, I can tell you, from discussions with him." In light of the dual purposes for which Cordes's statements could have been wielded, we do not believe that the district court erred in concluding that Cordes's out-of-court statements were hearsay.

The issue was therefore whether the statements fell under an exception to hearsay, which Reed had the burden to establish.[69] He urges us to conclude

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

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

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

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

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

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parties have not briefed it, we do not consider it further, as Reed did not carry his burden of proving this hearsay exception.

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

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

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

In any event, any error would have been harmless because the district court allowed Reed and his wife to testify extensively regarding Reed's reactions to the conversation. For example, Reed testified that "[a]fter a discussion with Mr. Cordes, [he] began attending the meetings in a personal capacity, and [he] began getting a check to Walter Reed." He further testified that he alerted the D.A. office manager that the D.A.'s office would no longer receive payment from the Hospital, and gave his office a memorandum to that effect. The district court also allowed Reed to introduce a letter, dated October 15, 1996, where he wrote to Cordes saying that while he had begun representing the Hospital two years prior, he had recently become aware that the board had never ratified his appointment as counsel. The letter attached a draft resolution for the Hospital Board to adopt; the defense also introduced a fax to Cordes's office dated October 21, 1996, also attaching a draft resolution. To the extent that Reed truly sought to introduce Cordes's statements to prove their impact on Reed as the listener, "the district court permitted [Reed] to elicit essentially the same (if not better) facts as those he originally proffered."[73] The jury's decision to nonetheless convict Reed on the Hospital counts is supported by the prosecution's contrary evidence that Reed was aware that the Hospital had never approved his appointment in a personal capacity, and that he sent members of the D.A.'s office to take his place at meetings without arranging for any additional compensation.

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

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

IV

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

In discussing the Hospital counts, the indictment stated that

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

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

Reed now argues that the government's case impermissibly diverged from the indictment. He appears to frame this as a constructive amendment issue, but it is more appropriately addressed under the framework of material variance, which occurs "when the proof at trial depicts a scenario that differs

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

materially from the scenario challenged in the indictment but does not modify an essential element of the charged offense."[75] The parties differ on what standard of review is appropriate, since Reed did not raise this argument until sentencing. We conclude that under any standard, Reed's claim fails.

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

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

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

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

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

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

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

V

Only Steven Reed directly challenges the sufficiency of the evidence for his conviction.[81] His argument partially hinges on claims Walter Reed advances, which we have already rejected. He also disputes, however, that the prosecution proved some of the 21 overt acts included in the indictment to establish the conspiracy count, and avers that the evidence did not sufficiently support that he committed wire fraud or money laundering connected to the America Event.

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reversal, he does not provide us with legal grounds to reach the predicate determination that the prosecution in his case engaged in misconduct.

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

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

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

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

We review the denial of a motion for acquittal based on the sufficiency of the evidence *de novo*, but will affirm "if a reasonable trier of fact could conclude from the evidence that the elements of the offense were established beyond a reasonable doubt, viewing the evidence in the light most favorable to the verdict and drawing all reasonable inferences from the evidence to support the verdict."[82] The jury, not we, evaluates the weight of the evidence and the credibility of witnesses.[83]

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

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

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

[84] *See United States v. Cessa*, 785 F.3d 165, 173 (5th Cir. 2015) (discussing conspiracy to commit money laundering); *United States v. Ingles*, 445 F.3d 830, 838 (5th Cir. 2008) (discussing conspiracy to commit wire fraud).

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

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

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

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

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

[89] While Steven Reed contests that the evidence showed that he personally intended to conceal the origin of the check, the prosecution did not need to prove that. *See Adair*, 436 F.3d at 524 ("To be guilty under [18 U.S.C. § 1956(a)(1)(B)(i)], a defendant need not have specifically intended to conceal or disguise the proceeds of the unlawful activity. It is sufficient for the defendant merely to be aware of the perpetrator's intent to conceal or disguise the nature or source of the funds.").

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

VI

We must separately consider the defendants' challenges to the district court's imposition of forfeiture. As we have described, the district court ordered forfeiture of $46,200 jointly and severally against both defendants for the conspiracy conviction under Count 1, and ordered forfeiture of $609,217.08 against Walter Reed for the wire and mail fraud counts.[90] We "review[ ] the district court's findings of fact under the clearly erroneous standard of review, and the question of whether those facts constitute legally proper forfeiture de novo."[91] The defendants raise three primary challenges to the fact and amount of forfeiture.[92]

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

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

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

A

First, Walter Reed argues that the district court should have only imposed forfeiture on the Hospital mail fraud counts related to offenses occurring within the five-year statute of limitations for mail fraud. We see no clear factual error in the district court's finding that Reed had engaged in a continuing scheme over 20 years, and no legal error in its conclusion that he could therefore be required to forfeit all of the proceeds from that scheme under 18 U.S.C. § 981 and 28 U.S.C. § 2461(c).[93]

Reed's reliance on the Supreme Court's decision in *Kokesh v. SEC*[94] is mistaken. *Kokesh* concerned the civil forfeiture statute 28 U.S.C. § 2462, and interpreted the language of that statute—which explicitly provides for a five-year limitations period on "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture."[95] By its terms, § 2462 governs *civil* forfeitures.[96] In contrast, here, forfeiture was imposed under 18 U.S.C. § 981

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applicable laws, and Reed was on notice of the intended forfeiture prior to the hearing, allowing him to argue against the forfeiture of twenty years of legal fees prior to the forfeiture hearing.

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

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

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

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

and 28 U.S.C. § 2461(c). Section 2461(c) allows for criminal forfeiture when civil or criminal forfeiture is authorized for an offense and the defendant is convicted.[97] Because no specific statutory provision authorized criminal forfeiture on the fraud counts, the government therefore sought criminal forfeiture under § 2461(c) based on the civil forfeiture authorized under § 981. Reed identifies no case where a court has applied § 2462 or *Kokesh* to forfeiture under the provisions at issue in this case, neither of which incorporates the limitations provision in 28 U.S.C. § 2462 or imposes its own limitations period.[98] We conclude that the five-year limitations period at issue in *Kokesh* did not apply, and the district court was entitled to impose forfeiture on all proceeds from Reed's continuous criminal scheme—including those that fell outside the five-year limitations period for mail fraud.

B

Second, Walter Reed also argues that the forfeiture amount violated the Eighth Amendment prohibition against excessive fines. The Supreme Court has explained that "[t]he touchstone of the constitutional inquiry under the Excessive Fines Clause [of the Eighth Amendment] is the principle of proportionality."[99] "If the amount of [a punitive] forfeiture is *grossly* disproportional to the gravity of the defendant's offense, it is

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

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

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

unconstitutional."[100] Here, the district court found that Walter Reed engaged in a twenty-year scheme to defraud by diverting payments meant for the D.A.'s office into his personal bank account. His offenses had identifiable victims—the Hospital, his constituents, and the D.A.'s office—and the money that he would forfeit came from those victims. The required forfeiture of $574,063.25 for the mail fraud offenses was not grossly disproportionate to the gravity of his offenses.[101]

C

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

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

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

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

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

VII

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

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

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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

ORDER & REASONS

Pending before the Court are Motions for Judgment of Acquittal and Arrest of Judgment (R. Doc. 261) and for New Trial (R. Doc. 263) filed by Defendant Walter Reed (W. Reed), and a Motion for Acquittal, New Trial, and Arrest of Judgment (R. Doc. 329) filed by Defendant Steven Reed (S. Reed). The Government opposes all of the motions in an Omnibus Response. (R. Doc. 337). Having read the parties' briefs, reviewed the applicable law, and heard the parties on oral argument, the Court now issues this Order & Reasons.

CONTENTS

I. BACKGROUND

From 1985 to January 12, 2015, W. Reed served as the District Attorney for Louisiana's 22nd Judicial District. S. Reed is his son. On April 23, 2015, the United States Government filed an eighteen-count indictment charging Defendants W. Reed and S. Reed with conspiracy to commit wire fraud and money laundering, as well as substantive counts of wire fraud, money laundering, false statements on income tax returns, and mail fraud. On October 22, 2015, the Government filed a superseding indictment (the "Indictment"), adding an additional wire fraud count (Count 8) against W. Reed.

The gravamen of the conspiracy and wire fraud counts (Counts 1-8) is Defendants' alleged improper personal use of campaign funds. The jury found that W. Reed solicited campaign funds from donors on the premise that the funds would be used to facilitate his reelection, and then used those funds for personal expenses unrelated to his campaign or the holding of public office. Specifically, the wire fraud counts alleged that, inter alia, W. Reed used campaign donations to (i) recruit potential clients for his private legal practice, (ii) pay off various expenses incurred by S. Reed, (iii) pay for private and personal dinners, (iv) purchase flowers for personal reasons, (v) overpay his son for work allegedly performed on behalf of the Campaign, and (vi) host a housewarming party for friends and family unrelated to the Campaign or the holding of public office. Further, W. Reed and S. Reed were charged with engaging in money laundering (Counts 9 and 10)[1] when they caused two service providers for a campaign-related event to make payments to entities controlled by S. Reed in a manner that would disguise the payments as legitimate expenses when, in fact, the payments were for the Defendants'

[1] The jury convicted both Defendants as to Count 9 but found them not guilty as to Count 10.

personal benefit. S. Reed was only charged with conspiracy to commit wire fraud, one count of wire fraud (Count 7) and money laundering.

In addition to the wire fraud and money laundering counts, the Indictment also alleged that W. Reed engaged in mail fraud when, in exchange for legal representation by the District Attorney's office, he deposited payments made by the St. Tammany Parish Hospital (the "Hospital") into his own personal bank accounts for private use. According to the Indictment, he arranged for checks to be sent to the District Attorney's office and then deposited them into his personal bank account when he knew these funds were actually intended for the Office of District Attorney. Finally, the Indictment alleges that W. Reed underreported his income on his tax returns for four years (Counts 11-14).

An eleven-day jury trial took place from April 19-May 2, 2016. After trial, the Jury found W. Reed guilty as to counts one-nine and eleven-nineteen, and S. Reed guilty as to counts one, seven, and nine. (R. Doc. 247). Both W. Reed and S. Reed were found not guilty as to count ten. *Id*. Upon leave of the Court for additional time to file, W. Reed filed Motions for Acquittal and Arrest of Judgment and for New Trial. (R. Docs. 261, 263). S. Reed obtained a new attorney post-trial. Accordingly he requested, and the Court granted, additional time to file his post-judgment motions. S. Reed timely filed a Motion for Acquittal, New Trial, and Arrest of Judgment. (R. Doc. 329). Because of the Supreme Court's recent decision in *United States v. McDonnell* 136 S. Ct. 2355 (2016), which may be relevant to the instant case, the Court granted W. Reed leave to file a supplemental memorandum to address *McDonnell*'s impact on this case. (R. Doc. 331). The Government opposed all of the motions in an Omnibus Opposition. (R. Doc. 337). With leave of the Court, both W. Reed and S. Reed filed Replies. (R. Docs. 341, 343). The

Court heard Oral Argument on the above Motions on October 5, 2016, specifically focusing on the import of *McDonnell*.

II. PRESENT MOTIONS

The post-trial motions filed by W. Reed and S. Reed are in some ways distinct. Accordingly, each Defendant's motion will be addressed in turn. However, because both Defendants seek the same relief, the Court will first address *in globo* the legal standards for each requested relief.

A. Legal Standards

1. Standard for Judgment of Acquittal

Rule 29 provides that "[a]fter the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). Further, "[a] defendant may move for a judgment of acquittal, or renew such a motion, within 14 days after a guilty verdict or after the court discharges the jury, whichever is later." Fed. R. Crim. P. 29(c)(1).

The Fifth Circuit has explained that in determining whether there is sufficient evidence to support a conviction, the court should "determine whether, viewing the evidence and the inferences that may be drawn from it in the light most favorable to the verdict, a rational jury could have found the essential elements of the offenses beyond a reasonable doubt." *United Sates v. Pruneda-Gonzalez*, 953 F.2d 190, 193 (5th Cir. 1992). "It is not necessary that the evidence exclude every rational hypothesis of innocence or be wholly inconsistent with every conclusion except guilty, provided a reasonable trier of fact could find the evidence establishes guilt beyond a reasonable doubt." *Id.* (citing *United States v. Chavez*, 947 F.2d 742, 744 (5th Cir. 1991)).

In making this determination, the Court must "accept all credibility choices that tend to support the jury's verdict," recognizing that the jury was "free to choose among all reasonable constructions of the evidence." *United States v. Sneed*, 63 F.3d 381, 385 (5th Cir. 1995) (quoting *United States v. Anderson*, 933 F.2d 1261, 1274 (5th Cir. 1991); *United States v. Chaney*, 964 F.2d 437, 448 (5th Cir. 1992)). The courts have explained that the jury has the "unique role" of judging the credibility of witnesses and deciding how much weight to give each witness' testimony. *See United States v. Layne*, 43 F.3d 127, 130 (5th Cir. 1995) (citing *United States v. Higdon*, 832 F.2d 312, 315 (5th Cir. 1987), *cert. denied*, 484 U.S. 1075 (1988)). Furthermore, the Court must keep in mind that "[g]enerally speaking, '[w]hat a jury is permitted to infer from the evidence in a particular case is governed by a rule of reason, and juries may properly 'use their common sense' in evaluating that evidence.'" *United States v. Villasenor*, 894 F.2d 1422, 1425 (5th Cir. 1990).

2. Standard for Arrest of Judgment

According to Federal Rule of Criminal Procedure 34, "the court on motion of a defendant, shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged." Fed. R. Crim. P. 34.

3. Standard for a New Trial

Federal Rule of Criminal Procedure 33 provides that "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice requires." This Rule also provides that "[a]ny motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 14 days after the verdict or finding of guilty." Fed. R. Crim. P. 33(b)(2). The Fifth Circuit has stated that a court "should not grant a motion for new trial unless there would be a miscarriage of justice or the weight of evidence preponderates against the verdict." *United States v. Wall*, 389 F.3d 457, 466 (5th Cir. 2004). The Fifth Circuit

has stated that "motions for new trial are not favored, and are granted only with great caution." *United States v. O'Keefe*, 128 F.3d 885, 898 (5th Cir. 1997) (citing *United States v. Hamilton*, 559 F.2d 1370, 1373 (5th Cir. 1977)). Unlike a motion for judgment of acquittal, when deciding whether to grant a new trial, the court may "weigh the evidence and may assess the credibility of the witnesses during its consideration." *United States v. Ramos-Cardenas*, 524 F.3d 600, 605 (5th Cir. 2008) (quoting *United States v. Robertson*, 110 F.3d 1113, 1116 (5th Cir. 1997)).

B. W. Reed's Motions for Judgment of Acquittal and Arrest of Judgment and for a New Trial

W. Reed argues that he merits a judgment of acquittal under FRCP 29 or, in the alternative, an arrest of judgment under FRCP 34 because (1) the United States Attorney's Office does not have jurisdiction over the issues in this case and they therefore violated principles of federalism; (2) the wire fraud charges regarding the Open House, church donations, Thanksgiving dinners, the gift cards, the donations to St. Paul's High School, and the flowers purchase for Christine Curtis were insufficiently proven, and the evidence weighed in W. Reed's favor; (4) no rational jury would have convicted W. Reed for intentionally, knowingly, and willfully making false statements on his tax returns; (5) no rational jury would have convicted W. Reed for mail fraud for the legal work performed for the Hospital, and (6) the wire fraud charges should not have been based on violations of state campaign finance law and the two were inappropriately merged. (R. Doc. 261-1). W. Reed claims an arrest of judgment is warranted because this Court does not have jurisdiction over the campaign finance reporting of state political candidates.

The Government opposes W. Reed's motion, saying it mischaracterizes and ignores the evidence, is premised on arguments the jury rejected at trial, is an attempt to re-litigate issues the court already rejected, and fails to apply the proper standard for post-trial relief. (R. Doc. 337).

In the alternative, W. Reed seeks a new trial under F.R.Cr.P. 33 because of federalism concerns pervading the trial, the exclusion of critical evidence, the admission of improper evidence, the improper denial of a motion for severance, the lack of materiality of the income taxes owed, and prosecutorial misconduct. (R. Doc. 263-1 at 1).

The Government contends that W. Reed's Motion for a New Trial should be denied because the errors he alleges either did not occur or were harmless. (R. Doc. 337). The Court will discuss these issues in turn.

1. Federalism (Counts 1-8 and 10)[2]

In the recent *McDonnell* decision, the Supreme Court unanimously overturned Virginia Governor Robert McDonnell's bribery conviction because of the federal government's over-expansive interpretation of the term "official act" in charging him with and convicting him of bribery codified at 18 U.S.C.S. § 201(a)(3). *McDonnell*, 136 S. Ct. 2355. The Court expressed concern that this overbroad interpretation would lead to sweeping federal prosecutorial power, and it could not "assum[e] that the government will use [that power] responsibly." *Id*. at 2373. In overturning Governor McDonnel's conviction, the Court stated that

> [t]he Government's position also raises significant federalism concerns. A State defines itself as a sovereign through 'the structure of its government, and the character of those who exercise government authority.' That includes the prerogative to regulate the permissible scope of interactions between state officials and their constituents. Here, where a more limited interpretation of 'official act is supported by both text and precedent, we decline to 'construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards' of 'good government for local and state officials.'

[2] S. Reed adopts and reiterates W. Reed's federalism arguments in his Motion for Judgment of Acquittal, Arrest of Judgment, and New Trial (R. Doc. 329-1 at 8-9) and deferred to Mr. Simmons' oral arguments on the issue. Accordingly, the Court extends its holding on this issue to S. Reed's motion as well and will not readdress it in the following section specific to S. Reed.

Id. at 2373 (internal citations omitted). Further, both public officials and the general public might be reticent to participate in the democratic process for fear of federal prosecution. *Id*. at 2372.

(a) W. Reed's Arguments

W. Reed seeks acquittal, arrest of judgment, or a new trial because the government breached the bounds of federalism when they prosecuted him for wire fraud.

W. Reed seeks to extend the unanimous *McDonnell* decision to this case, arguing that the same issues of federalism and prosecutorial overreach apply. He claims that the Government was overzealous in its prosecution and in prosecuting him, the Government is seeking a roundabout way to enforce the state campaign finance laws codified at La. R.S. 18:1505.2(I)(1). (R. Doc. 261-1 at 2). Accordingly, he argues this Court should follow the *McDonnell* court and rein in the Government's overzealous prosecution of state officials for fraud.

W. Reed claims that both *McDonnell* and this case raise similar vagueness concerns. Federal prosecution of state laws presents a vagueness problem because when two parties separately interpret the same law, "political figures will not know what they are supposed to do and what they are not supposed to do." *Id*. at 2 (citing Transcript of Oral Argument at 32, *McDonnell* 136 S. Ct. 2355). Like in *McDonnell*, the jury verdict in this case would leave Louisiana politicians "quaking in fear" because not only are they responsible for following state campaign finance law, they also must determine whether the *federal prosecutors* are sufficiently convinced that their spending is related to the campaign or to the holding of public office. If the federal prosecutors are unconvinced, state politicians may face federal fraud charges. This lack of guidance presents a classic vagueness problem.

There is also an issue of statutory interpretation in *McDonnell*. "A related concern is that, under the Government's interpretation, the term 'official act' is not defined 'with sufficient

definiteness that ordinary people can understand what conduct is prohibited,' or 'in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Id*. at 2373, quoting *Skilling v. United States*, 561 U.S. 358, 364 (2010). Similarly, W. Reed argues "there is no federal law which clearly proscribes the conduct with which the defendant is charged…and there is no federal law which sets out the parameters of appropriate campaign spending for state political candidates." (R. Doc. 331 at 4, citing (R. Doc. 58 at 2-3)). Louisiana politicians are left without notice of their potentially criminal behavior or guidance as to how to avoid prosecution. W. Reed maintains that he believed, and continues to believe, that he followed Louisiana law but is nevertheless subject to federal prosecution for fraud.

The *McDonnell* court was also concerned with the federalism implications if federal prosecutors were permitted to conduct these types of prosecutions: "A State defines itself as a sovereign through 'the structure of its government, and the character of those who exercise government authority.' That includes the prerogative to regulate the permissible scope of interactions between state officials and their constituents." *McDonnell* 136 S. Ct. at 2373 (internal citations omitted). W. Reed argues that the jury's verdict in the present case makes federal prosecutors the final arbiter of Louisiana state campaign finance law. "The Department of Justice, and the Executive Branch, become the ultimate arbitrator of how public officials are behaving in the United States, States, local, and national." (R. Doc. 331 at 4). This is untenable under the tenants of federalism and under the recent *McDonnell* decision.

W. Reed argues that the Government rested their entire fraud case on the correct interpretation of state campaign finance law. Specifically, in deciding whether W. Reed was guilty of fraud for misusing campaign funds, the jury had to decide whether his expenditures were "related to the campaign" or "related to the holding of public office." La. R.S. §

18:1505.2(I)(a). W. Reed avers that this state law should be interpreted by the state legislature or the Louisiana Board of Ethics, not the United States Attorney's Office.

Though the Government claims they were prosecuting fraud, not state law, W. Reed argues their conduct at trial proved otherwise. To be found guilty of fraud the Government must prove that a misrepresentation occurred. In this case, the Government did not argue or attempt to prove that W. Reed made any specific misrepresentation to voters. On cross examination, donors to W. Reed's campaign acknowledged that they expected W. Reed to follow the law when spending campaign funds, and no evidence was presented at trial suggesting W. Reed made any false representations or promises to his donors. Instead of proving misrepresentation, the Government introduced W. Reed's state campaign finance reports and argued the contents were inaccurate, and his expenditures were therefore fraudulent. W. Reed argues that this suggests that the Government was not prosecuting a traditional fraud case, but rather rested their case on W. Reed's compliance with state law.

Before trial, this Court eliminated charges for ethics violations because they were not relevant to wire fraud or money laundering and they alluded to an un-charged scheme to defraud the public and the Louisiana Board of Ethics. W. Reed argues that, despite this pre-trial elimination, the Government continued to improperly prosecute ethics violations and infused the case with honest services fraud. W. Reed objects to the testimony of the Government's witness, Kathleen Allen, the Ethics Administrator and General Counsel to the Louisiana Board of Ethics. Though they did not qualify Ms. Allen as an expert witness, the Government questioned her about the types of expenditures allowed under the Louisiana statute, the purpose of requiring candidates to file reports, and the state's ability to adequately enforce their campaign laws. W. Reed argues the Government elicited improper opinion testimony from this non-expert witness

and, in so doing, demonstrated their desire to enforce the state's campaign laws in part because of the state's inability to do so.

Additionally, W. Reed argues that the Government revealed their intent to treat this case as an honest services fraud case through their questioning of CPA Ron Garrity about Ethics Board brochures and the purpose and process of campaign reports, and through their cross-examination of W. Reed when they asked about the campaign finance reports he submitted and his truthfulness on those forms. All of these actions taken together, according to W. Reed, demonstrate a reliance on state law, and show that the Government was actually prosecuting a state ethics case rather than a straightforward fraud case. The Government seeks to make state campaign finance a federal concern, which is impermissible under the tenants of federalism. Accordingly, W. Reed seeks an acquittal or arrest of judgment.

(b) The Government's Response

The Government contests W. Reed's federalism argument, reasserting that the Government's fraud case does not rely wholly on state campaign finance law, nor is this case federal enforcement of state law. (R. Doc. 337). Instead, its theory at trial was that W. Reed "misled donors into thinking that their money would be used for one thing, and then he turned around and used it for other things. This is fraud." *Id*. at 26. While the Government agrees that state campaign finance law helps set a baseline for donor expectations, they argue that the case did not rely on W. Reed's compliance with those laws. At oral argument on these motions, the Government explained that a public official's compliance with state law is not the basis for guilt or innocence, but it may be a factor to consider when determining *mens rea*. That is, what W. Reed knew or believed about the legality of his expenditures.

Addressing *McDonnell*, the Government avers that W. Reed presents an overly-broad reading of the holding in that case. The Government argues that *McDonnell*'s holdings are limited to bribery charges and are inapplicable to the present fraud charges. *McDonnell*'s precedential value lies in its interpretation of the federal bribery statute, including what the government must allege and prove and what must be included in jury instructions when prosecuting a bribery case. In its holding, the Supreme Court focuses heavily on the definition of "official act" in the federal bribery statute. W. Reed's prosecutions were for fraud and money laundering, and the term "official act" is not included in either of those statutes. *See* 18 U.S.C. §§ 1341, 1343. Accordingly, the Government argues their prosecution was proper and does not implicate federalism.

(c) Analysis

Candidates and elected officials in Louisiana are bound by the provisions of the Campaign Finance Disclosure Act ("CFDA") codified under La. R. S. §§ 18:1481-1532. Specifically to this case, "funds shall not be used … for any personal use unrelated to a political campaign, the holding of a public office or party position, … except that excess campaign funds may be … given as a charitable contribution as provided in 26 USC 170(c), [or] given to a charitable organization as defined in 26 USC 501(c)(3)…" La. R.S. § 18:1505.2(I)(1).

Federal law criminalizes wire fraud. Anyone who, "having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire … in interstate or foreign commerce" is guilty of a crime. 18 U.S.C. § 1343. "To prove wire fraud under 18 U.S.C. § 1343, the government must prove: (1) a scheme to defraud and (2) the use of, or causing the use of, wire communications in furtherance of the scheme." *United*

States v. Dowl, 619 F.3d 494, 499 (5th Cir. 2010) (quotation omitted). The "scheme" referenced in the first element of 18 U.S.C. § 1341 must be one to deprive the alleged victim of money or property. *See Ratcliff*, 488 F.3d at 645.[3]

W. Reed does not dispute his use of wire communications, including through his use of the banks. Accordingly, the only remaining issue is the existence of a scheme to defraud.

> The definition of a scheme to defraud is quite broad. As a learned judge of this Circuit once remarked in regard to the mail fraud statute, '[t]he law does not define fraud; it needs no definition; it is as old as falsehood and as versatile as human ingenuity.' The language of the mail fraud statute is sufficiently flexible to encompass any conduct 'which fails to match the reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.'

United States v. Curry, 681 F.2d 406, 410 (5th Cir. 1982) (citing *Blackly v. U.S.*, 380 F.2d 665, 671 (5th Cir. 1967)). That description is equally applicable to wire fraud.

The Court addressed W. Reed's federalism arguments before trial, and maintains the position detailed in its prior order. (R. Doc. 63). For the sake of completeness, the Court will reiterate some of its earlier conclusions further supported by the facts revealed at trial.

Defendants argue that federal regulation and enforcement of state campaign law runs afoul of Supreme Court and Fifth Circuit precedent and violates Article X of the United States Constitution, which mandates that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." In support of this argument, Defendants point to the fact that while the State of Louisiana has criminalized the conduct with which they are charged and has set out a detailed procedure for enforcing the law by specifying allowable campaign expenditures, establishing a

[3] The exception to this rule is "honest services fraud" defined in 18 U.S.C. § 1346, which is not alleged in the Indictment.

procedure for investigating alleged violations, setting applicable civil and criminal penalties, and setting a statute of limitations, the state has not taken any action against either defendant. La. R.S. 18 § 1, et seq.

W. Reed avers that the Government's case depends on a finding that the expenses in the indictment were "unrelated" to W. Reed's campaign or his holding of public office. This determination, W. Reed argues, is, at its core, the interpretation of state law that does not implicate interstate commerce or individuals in other states and should not be interpreted by the United States Attorney's Office. A federal conviction for fraud, however, stands on its own; it is not predicated on an underlying state conviction. *See*, *United States v. Edwards*, 458 F.2d 875, 880 (5th Cir. 1972) (citing *Parr v. United States*, 363 U.S. 370, (1960) ("We likewise recognize, however, that the fact that a scheme may or may not violate State law does not determine whether it is within the proscriptions of the federal statute. Congress may forbid any mailing in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme itself or not."); *United States v. States*, 488 F.2d 761, 766–67 (8th Cir. 1973) (abrogated on other grounds) ("Nevertheless, the appellants argue that the application of the mail fraud statute to the facts of this case will result in a "policing" of state election procedure, and that Congress has never explicitly authorized such widespread intervention into state affairs. The appellants' argument misinterprets the purpose of the mail fraud legislation. The focus of the statute is upon the misuse of the Postal Service, not the regulation of state affairs, and Congress clearly has the authority to regulate such misuse of the mails.") (citations omitted); *United States v. Hanser*, 340 F.3d 1261, 1269 (11th Cir. 2003); *United States v. Keane*, 522 F.2d 534, 544–45 (7th Cir. 1975) ("A specific violation of state law, although covered by the statute . . . is not necessary to obtain a conviction for mail fraud."); *United States v. Smith*, 985 F. Supp. 2d 547,

606–07 (S.D.N.Y. 2014). Accordingly, the jury could convict W. Reed for fraud without contemplating any violation of state campaign finance law. As the Eleventh Circuit explained:

> Pursuant to traditional norms of federalism, a federal court may not instruct state officials on how to conform their conduct to state law, because this power is reserved to the states. [However, t]he claims against Walker were not predicated on any violation of state law. In fact, the jury instructions specifically cautioned jurors *not* to decide whether Walker violated any state law, but to consider those laws only to the extent that the evidence indicated an intent to commit fraud on Walker's part. Moreover, an honest services mail fraud or mail fraud conviction does not require proof of a state law violation. . . . Thus, the jury could have found that Walker violated the mail fraud statutes by failing to disclose his relationship with the Medical College without considering the state ethics requirement.

U.S. v. Walker, 490 F.3d 1282, 1299 (11th Cir. 2007).

In an earlier Motion to Dismiss, Defendants cited related federalism concerns raised in *Cleveland v. United States*, 531 U.S. 12 (2000) and *United States v. Ratcliff*, 488 F.3d 639 (5th Cir. 2007). In its order, the Court rejected Defendants' argument that these cases stood for the proposition that state officials could no longer be charged with federal criminal violations for fraud committed in conjunction with state elections, holding that the federalism concerns expressed in the *Ratcliff* and *Cleveland* cases were stated in dicta, were more narrowly focused, and were not the basis for the holdings in those cases.

In *Cleveland*, the Supreme Court held that the mail fraud statute does not contemplate false statements made in an application for a state lottery license. *Cleveland*, 531 U.S. at 15. "Equating issuances of licenses or permits with deprivation of property would subject to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities." *Id.* at 24. However, despite this language, the holding in *Cleveland* was predicated on the fact that the alleged fraud did not deprive the state of "property" under § 1341 because a

video poker license has no value to the state prior to its issuance. The federalism concern expressed in *Cleveland* related specifically to the expansion of the definition of property.

In *Ratcliff*, the defendant was charged with using the mails in a scheme to defraud Livingston Parish of the salary and employment benefits of elected office by securing his reelection as parish president by obtaining illegal funding and concealing his violations from the Board of Ethics. 488 F.3d at 643. The Fifth Circuit held that the alleged misconduct could not constitute mail fraud because "the financial benefits budgeted for the parish president go to the winning candidate regardless of who that person is." *Id.* at 645; *see also United States v. Turner,* 465 F.3d 667, 680 (6th Cir. 2006) (finding no deprivation of property "because the relevant salary would be paid to someone regardless of the fraud. In such a case, the citizens have simply lost the intangible right to elect the official who will receive the salary."). The parish would have had to pay the salary to whomever won the election and was therefore not deprived of any money or property by means of Ratcliff's misrepresentations. In other words, the scheme in *Ratcliff* was not "money or property fraud" cognizable under the mail fraud statute because the defendant's campaign finance misrepresentations "did not implicate the parish's property rights." *Ratcliff,* 488 F.3d at 645–46.

While *Ratcliff* warns that such an application "invites [the Court] to approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress," it does not establish a blanket prohibition against federal prosecution of fraud committed under the auspices of a campaign for state office. *Id.* at 649. The *Ratcliff* court discusses its federalism concerns only in the final two paragraphs of the opinion and those concerns do not govern the court's holding. *See id.* at 648-49. W. Reed's case is distinct from *Ratcliff* holing because donors to W. Reed's campaign could have chosen not to donate to Reed's campaign. *See also United*

States v. McMillan, 600 F.3d 434, 449 (5th Cir. 2010) (interpreting *Ratcliff* as requiring "that the scheme be to defraud the victim insofar as victims were left without money that they otherwise would have possessed"). Protecting individuals who were defrauded of money they would have otherwise retained because of misrepresentations made to them about the purpose to which their money would be put is consistent with the conduct the federal fraud statute was intended to proscribe. *See Ratcliff* 488 F.3d at 649 (quoting *Cleveland*, 531 U.S. at 24).

Notably, *Ratcliff* was not the first time the Fifth Circuit considered the federalism implications of prosecuting conduct which simultaneously violated Louisiana election law and the federal mail fraud statute. In *United States v. Curry*, the chairman of a political action committee converted political contributions for personal use and gave false reports on the financial disclosures required under CFDA. 681 F.2d 406, 409 (5th Cir. 1982).[4] The Fifth Circuit found that the evidence was sufficient to uphold the convictions for mail fraud[5] and discussed the relationship between the federal mail fraud indictments and the state election law violations:

> The same conduct [giving rise to the mail fraud indictment] could also give rise to charges of state law violations. Thus, [the defendant] faced the possibility of being indicted under Louisiana law, for, inter alia, embezzling, and for 'knowingly and willfully' filing a false campaign report in violation of the Election Act's criminal provisions. However, '(t)he fact that a scheme may violate state laws does not exclude it from the proscriptions of the federal mail fraud statute....' Thus even when a state is itself the victim of a fraudulent scheme, and makes the scheme illegal under state law, the perpetrators may still be prosecuted under the federal mail fraud statute.

[4] The Fifth Circuit's statement in *Curry* that "a scheme to defraud need not necessarily contemplate loss of money or property to the victims" was later limited by the Supreme Court's decision in *McNally v. United States,* 483 U.S. 350, 359 (1987). *See United States v. Herron*, 825 F.2d 50, 55n.6 (5th Cir. 1987) (recognizing that cases holding that defendants could be convicted of mail fraud for depriving citizens of intangible rights, such as the right to good government rather than only money or property, were limited by the *McNally* decision). However, *Curry* is still relevant for the proposition that violations of Louisiana campaign finance laws may also constitute fraud subject to federal prosecution without implicating federalism principles.

[5] The convictions were reversed on the grounds that the district court erred in refusing to provide the requested jury instruction. *Id*. at 408.

Id. at 411 n.11 (internal citations omitted) (quoting *Parr v. United States*, 363 U.S. 370, 389 (1960)).

Other circuits have also upheld federal fraud convictions for politicians who used campaign funds for personal purposes. For example, in *United States v. Henningsen*, the Seventh Circuit affirmed the mail fraud conviction of an alderman who failed to accurately account for campaign contributions and improperly used funds for personal expenses. 387 F.3d 585 (7th Cir. 2004). The defendant contended that he had never lied to campaign contributors, but only promised to seek re-election, and thus there could be no scheme to defraud. *Id.* at 589. The Seventh Circuit rejected this argument and instead found that a rational jury could have found, based upon the defendant's failure to accurately disclose revenue and expenditures in his campaign finance reporting, that the defendant's "solicitation of campaign funds for private use was dishonest, and that it influenced donors' decisions to contribute" so as to constitute a scheme to defraud. *Id.* at 589-90. The court concluded that "it makes no difference that [the defendant] may not have solicited each donor individually. Each person who gave to [his] re-election campaign and whose money was diverted for non-campaign expenses was a victim of his false representations." *Id.* at 590; *see also United States v. Walker*, 490 F.3d 1282, 1299 (11th Cir. 2007) (finding defendant's federalism claims had no merit and affirming mail fraud convictions of former state legislator for misusing campaign funds and other conduct which also violated state financial disclosure and ethics rules); *United States v. Delle Donna*, 552 F. Supp. 2d 475, 494 (D.N.J. 2008), *aff'd*, *United States v. Donna*, 366 F. App'x 441 (3d Cir. 2010) (denying motion to dismiss indictment for fraud when mayor's campaign contributions were expended for personal purposes).

While *Henningson* and *Delle Donna*, which involve the failure to report campaign contributions and expenditures entirely, concealing the fact that the candidate was receiving money at all, are factually distinct from the present case where W. Reed fully disclosed all campaign contributions and expenditures, these factual distinctions are inapposite to the question of whether the federal fraud statutes can criminalize conduct that is also penalized under state election laws. Criminal fraud cases are inherently factually pregnant. However, the fact remains that whether or not conduct violates state law, it may violate federal law. While Defendants are correct that the state could (and perhaps should) be the entity policing this alleged misconduct, this verity does not of itself preclude the federal government from doing the same.

The recent Supreme Court decision in *McDonnell v. United States* merits a second consideration of the issue of federalism in federal fraud prosecutions that also implicate state campaign or election laws. After careful consideration, this Court finds that neither *McDonnell* nor its progeny provide a sufficient basis to depart from the Court's earlier decision, and accordingly declines to grant W. Reed's motion for acquittal, arrest of judgment, or new trial following that opinion.

W. Reed rests his case on the federalism concerns raised in *McDonnell*. However, the crux of the Supreme Court's reasoning in that case is the definition of "official act" under the federal bribery statute, 18 U.S.C. §201(a)(3), which is not at issue in this case. 136 S. Ct. 2355. A review of *McDonnell*'s progeny also indicates that the precedential import of the case lies in that definition – many of the ensuing cases cite to the discussion of "official act," the requirement of quid pro quo, and statutory interpretation.[6]

[6] *See United States v. Madison*, No. 15-3456, 2016 U.S. App. LEXIS 19232, at *3 (2d Cir. Oct. 25, 2016); *United States v. Halloran*, Nos. 15-2351(L), 15-2433(Con), 2016 U.S. App. LEXIS 18847, at *10 (2d Cir. Oct. 20, 2016); *United States v. Jones*, No. 5:15-CR-324-F-1, 2016 U.S. Dist. LEXIS 127113, at *6 (E.D.N.C. Sep. 19, 2016) (foregoing a discussion of *McDonnell* because, though the instant case was a bribery case, it did not require an

Nevertheless, in dicta the *McDonnell* court does raise some of concerns about federalism and prosecutorial power that may be relevant to the instant case and should be addressed. Expressing its concern about prosecutorial overreach, the *McDonnell* court states: "[w]e cannot construe a criminal statute on the assumption that the Government will use it responsibly." *McDonnell*, 136 S. Ct. at 2372-73 (internal citation omitted); s*ee also United States v. Nosal*, 828 F.3d 865, 896 (9th Cir. 2016) (Reinhardt, J., dissenting); *United States v. Chin*, No. 14-10363-RGS, 2016 U.S. Dist. LEXIS 137776, at *15 (D. Mass. Oct. 4, 2016) (citing *McDonnell* to demonstrate the danger of "overly aggressive and unbounded readings of statutes [producing] distorted results"). The D.C. Circuit addressed the same issue in a case following *McDonnell*.

> The absurdity of the CFPB's position is illustrated by its response to a hypothetical question about the CFPB's bringing an administrative enforcement action 100 years after the allegedly unlawful conduct. Presented with that question, the CFPB referenced its prosecutorial discretion. But 'trust us' is ordinarily not good enough. Cf. McDonnell v. United States, 136 S. Ct. 2355, 2372-73, 195 L. Ed. 2d 639 (2016).

PHH Corp. v. Consumer Fin. Prot. Bureau, No. 15-1177, 2016 U.S. App. LEXIS 18332, at *139 (D.C. Cir. Oct. 11, 2016).

To further elucidate the import of *McDonnell*'s to the instant case, the Court asked both parties to focus their oral arguments on their interpretations of *McDonnell*'s significance to this case, and to bring that interpretation to its logical conclusion. For example, is the federal government prohibited from *ever* charging state officials with fraud if state campaign law is also

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interpretation of the term 'official act'); *United States v. Stevenson*, No. 14-1862-cr, 2016 U.S. App. LEXIS 15075, at *7 n.1 (2d Cir. Aug. 17, 2016); *United States v. Silver*, No. 15-CR-093 (VEC), 2016 U.S. Dist. LEXIS 114189, at *17 (S.D.N.Y. Aug. 25, 2016); *United States v. Fattah*, No. 15-346, 2016 U.S. Dist. LEXIS 145833, at *41-42 (E.D. Pa. Oct. 20, 2016); *United States v. Jones*, No. 5:15-CR-324-F-1, 2016 U.S. Dist. LEXIS 127113, at *6-12 (E.D.N.C. Sep. 19, 2016); *United States v. Pomrenke*, No. 1:15CR00033, 2016 U.S. Dist. LEXIS 100016, at *133 (W.D. Va. Aug. 1, 2016) ("The issue in the *McDonnell* decision was 'the proper interpretation of the term "official act"' as used in 18 U.S.C. § 201."); *United States v. Arnold*, No. 3:16-00117, 2016 U.S. Dist. LEXIS 136003, at *2 (M.D. Tenn. Sep. 30, 2016); *United States v. Bills*, No. 14 CR 135-1, 2016 U.S. Dist. LEXIS 119519 (N.D. Ill. Aug. 29, 2016); *State v. Holle*, 240 Ariz. 301, 379 P.3d 197, 207 (2016).

at issue? If the state official's actions were deemed legal by the state enforcement body, could the federal government still charge that official with fraud? Inversely, if the state enforcement body deemed a state official's actions illegal, is that a *per se* violation of the federal fraud statute? Further, if the state enforcement body determined the official's expenditures were not in violation of state law, who determines whether they are fraudulent under federal law? At oral argument, the Government clarified its position: the jury ultimately determines whether or not a defendant committed fraud. While state campaign finance law, interpretation of that law by the governing body, and a defendant's CFDA submissions may be admissible in a fraud case, the weight of that evidence goes to *mens rea*, not to whether or not defendant's actions were fraudulent. W. Reed, on the other hand, maintained the inappropriate intervention of the federal government in this matter, but indicated that an extreme case may exist wherein the federal government could prosecute a state official for fraud.

In this case, the jury heard a plethora of evidence, including evidence about Louisiana state campaign finance law, W. Reed's CFDA submissions, and testimony from donors and others who knew W. Reed. Ultimately, despite W. Reed's testimony and evidence suggesting his expenditures were, or he believed they were, legal and appropriate, the jury disagreed and found him guilty. *McDonnell* and its progeny suggest the U.S. Attorney's Office cannot be the final word on the interpretation of federal criminal statutes. However, those cases do not make the federal fraud statutes inapplicable in all instances to state office holders or those who campaign for state offices. The holdings in *McDonnell* and *Ratcliff* are limited to the facts in those cases.

In the present case, the jury heard W. Reed admit his guilt to a portion of Count 5 of the Indictment, which charged him with wire fraud for the campaign funds he spent sending flowers to Melissa Frasier. He testified as follows: "[y]ou know, I should have paid for those flowers. I

should have. They went on the flower fund. Ms. Jean wrote the check. I should have paid for those myself. She lives [outside of my district], and that [payment] wasn't justified." (R. Doc. 313 at 38). Later, on cross-examination, he states: "I shouldn't have sent the girl flowers. I shouldn't have paid for it with campaign funds." *Id*. at 153.

Regarding other instances where he purchased flowers, W. Reed testified that sending of flowers to his aunts, his girlfriend's mother, and ex-wife was appropriate because they were related to his campaign or the holding of public office. (R. Doc. 313). The jury apparently did not believe him.

Finally, with regard to a campaign gift from W. Reed to Reverend Jerry Cox for some $25,000, the jury apparently concluded that it was not a donation related to the holding of public office as urged by W. Reed, but was instead a kickback related to the referral of a civil case to W. Reed in his private capacity. These are only a few instances distinguishing the present case from *Ratcliff* and *McDonnell.*

In any event, this case does not present the same jury issue as did *McDonnell*. In *McDonnell*, the jury was forced to determine guilt despite jury instructions containing an overbroad definition of a term in the statue of conviction. 136 S.Ct. at 2358. The fraud statutes in the present case does not require that same degree of technical interpretation, like the definition of "official act," that the bribery statute required in *McDonnell*. There is no federal law setting out the parameters of appropriate campaign spending for state political candidates. And, as mentioned above, fraud "needs no definition" and is "sufficiently flexible to encompass any conduct which fails to match the reflection of more uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society." *Curry* 681 F.2d at

410 (internal quotations omitted). Accordingly, neither the jury instructions nor the jury's ability to make an informed decision based on the fraud statute are of concern here.

While the federal enforcement of state law can raise significant federalism concerns, the Court finds that the federal government, in this case, enforced federal law – namely the federal fraud statute – and used state law only to prove *mens rea* and donor expectations, that is, W. Reed's misrepresentation in the course of a fraudulent scheme. The essence of federal prosecution is, in part, its discrete ability to enforce federal laws regardless of what is criminalized under state law. This is especially salient given that criminal law may differ significantly from state to state, while the federal law remains applicable across the country. While the wisdom of federal prosecution of state officials for campaign-related activities is controversial and the defendants raise valid points, it is not within the purview of this Court, which is cabined to the facts of this case, to prohibit the enforcement of federal fraud statutes in all instances involving campaigning for or the holding of state offices. A strong argument can be made, as Defendants have done, for the proposition that allowing a federal prosecutor to pursue state officeholders on any campaign fund issue will have a chilling effect on those who seek state elective office in the future and should not be permitted. But a blanket exemption of all campaign contributions to state officeholders from the enforcement of the federal fraud statutes is not supported by the current state of the law. Instead, under the current law, each case is dependent on its own facts, and the facts in this case, as established by the evidence, support the jury's finding of a violation of the federal wire and mail fraud statutes. Perhaps the appellate court, in the future, may conclude that the federal fraud statutes have no place in any campaign activity of state officeholders, as urged by Defendants. This is a result, however, that is beyond the power and scope of a federal district court and is better determined by a more policy-based

court such as the Fifth Circuit Court of Appeals or the Supreme Court. Accordingly, Defendant's Motion for Acquittal, Arrest of Judgment, and New Trial on this ground must be denied.

2. Sufficiency of the Evidence – the Open House (Count 1), Thanksgiving Dinners (Count 4), church donations (Counts 2, 6, 8), Gift cards (Count 1, 11-14), St. Paul's High School (Counts 11-14), and Flowers to Christine Curtis (Count 5).

(a) W. Reed's Arguments

W. Reed avers that the Government had insufficient evidence to prove that his use of campaign funds was fraudulent when spent on the Open House event (Count 1), for church donations, on the Thanksgiving Dinner (Count 4), to purchase gift cards (Count 1 and 11-14), for donations to St. Paul's High School, and for flowers sent to Christine Curtis (Count 5). In order to convict W. Reed of wire fraud for these charges, the jury would have to find that none of these events were related to the campaign or the holding of public office, as is required under the CFDA. W. Reed argues the Government presented insufficient evidence to prove the expenditures were not related to the campaign or holding of public office, and that the Government accordingly misrepresented the evidence.

Open House

The Open House, W. Reed argues, was held to honor campaign contributors and volunteers. (R. Doc. 261-1 at 12-15). The party's guests included other politicians, volunteers, and his biggest supporters and contributors, including those in his "Breakfast Club," who met regularly to discuss both W. Reed's campaign and his work as a District Attorney. The guest list suggests the party was held in connection to W. Reed's campaign or his holding of public office.

Thanksgiving

W. Reed argues that in order to promote political good-will and positive relationships, .he hosted Thanksgiving dinner parties for his supporters and employees who had nowhere else to

spend the Thanksgiving holiday. (R. Doc. 261-1 at 15-16). Accordingly, W. Reed argues the event was clearly connected to the campaign or holding of public office, and he merits an acquittal.

Church Donations

W. Reed's avers that his donations to churches and for church events were charitable contributions and in furtherance of his campaign or holding of public office. (R. Doc. 261-1 at 24-25). He argues that the support of local churches is imperative for politicians in his area, and the CFDA specifically allows for charitable contributions. He alleges that, had the Court permitted Gray Sexton to testify about dual-purpose expenditures, he would have explained that any reciprocal benefit W. Reed received from these donations was irrelevant, provided the contributions had at least one campaign-related purpose. Further, W. Reed avers that because he donated the money to finance the gymnasium in Faith Tabernacle Church more than fifteen months after he received a referral case from Faith's Pastor, Cox, it is clear that the money was a donation and was not related to Cox's referral of a case to W. Reed's law firm. Cox's testimony at trial regarding W. Reed's purpose for donating the money was inappropriately speculative and should not have been admitted, especially given the Court's limitation of Mr. Sexton's testimony.

Regarding the preacher dinner in Count 6, W. Reed avers the dinner included various pastors from the parishes within his electoral district, and he paid for the dinner to support local religious organizations, not to drum up business for his private legal practice. Finally, W. Reed argues that because the expenditures in Count 2 were in error and were returned prior to Indictment, he should not have been convicted on this count.

Gift Cards

Because the Government could not or did not prove how he used the gift cards he purchased with campaign funds, W. Reed argues the Government failed to prove that it was a misuse of campaign funds to purchase those gift cards. (R. Doc. 261-1 at 16-18). Purchasing gift cards is not a *per se* violation of the CFDA. Accordingly, the Government should have proven that the gift cards purchased with campaign funds were also not used in connection with the campaign or holding public office. Because they did not, W. Reed argues the Government did not provide sufficient evidence to convict W. Reed on these counts, and W. Reed merits acquittal.

St. Paul's High School

W. Reed also argues that no rational jury could have convicted him of fraud for his donations to his St. Paul's High School. (R. Doc. 261-1 at 26-27). He alleges his donations to St. Paul's, including paying for dinners for the wrestling team, were charitable and were clearly unconnected to his son's attendance because the donations began before his son attended St. Paul's. At trial, Craig Ketelsen from St. Paul's testified that W. Reed was a devoted supporter who was not working an angle or looking for special treatment for his son. W. Reed argues that had Gray Sexton been permitted to testify about the Board of Ethics' advisory opinions on charitable giving, he would have said that donations similar to this one are considered related to the holding of public office. W. Reed's inability to put on a complete defense resulted in reversible error and merit his acquittal.

Flowers

Additionally, W. Reed claims the flowers he sent to Christine Curtis, a campaign supporter and well-known real estate agent, were related to the campaign. (R. Doc. 261-1 at 27-29). Witnesses testified at trial that Ms. Curtis and W. Reed together attended the Angola Rodeo,

a state function that supports the rehabilitation of prisoners, and then toured Angola and met with high-ranking prison officials. W. Reed sent Ms. Curtis flowers as a thank you for attending the event with him and in the hopes of her becoming a campaign supporter and contributor which she did. Accordingly, the flowers W. Reed sent from his campaign funds were clearly related to the campaign and a rational jury could not have found otherwise. Further, the sending of reasonably-priced flowers was sanctioned by the Louisiana Board of Ethics in their Advisory Opinion 98-232. Accordingly, W. Reed avers there is no doubt the flowers he sent to Ms. Curtis were appropriate expenditures and he merits acquittal on this count.

Evidence was elicited at trial that all of the above expenditures were part of W. Reed's campaigns or his holding of public office, and W. Reed argues he deserves acquittal on these counts.

(b) The Government's Arguments

The Government contends that W. Reed's arguments on the sufficiency of the evidence regarding the Open House, the Thanksgiving dinners, church donations, the gift cards, the donations to St. Paul's High School, and the flowers sent to Christine Curtis are objections to specific items of proof, not the sufficiency of the evidence in total, and therefore do not merit relief under Rule 29 or 34. (R. Doc. 337 at 23-25).

Even if the Court found W. Reed's arguments meritorious, the Government avers this finding would still not upset the guilty verdict. W. Reed does not contest *all* of the acts or the sum of the evidence regarding the conspiracy (Count 1)[7] or the purchase of flowers Count 5), just the quantum of proof for specific overt acts that comprise Counts 1 and 5. Therefore, his arguments do not undermine the verdict and are insufficient for relief under Rule 29.Further, the

[7] W. Reed's arguments about the Open House and gift cards fall under Count 1.

Government avers that W. Reed's arguments focus on the evidence *most favorable* to his case and fail to view the evidence in the light most favorable to the verdict, as required under Rule 29. (R. Doc. 337 at 31-41).

The Government highlights that in making its guilty finding, the jury was not required to tell the Court upon which evidence it based its determination. To find W. Reed guilty, the jury only needed to find he had committed *at least one* of the twenty-one overt acts at issue in the Open House charge, and it was not required to inform the court upon which overt act it relied. *See, e.g., Hoover v. Johnson*, 193 F.3d 366, 370-71 (5th Cir. 1999); *Jolley v. United States*, 232 F.2d 83, 88 (5th Cir. 1956). The same is true for W. Reed's arguments on the sufficiency of the evidence related to the purchase of gift cards, the donation to St. Paul's, and the flowers purchased for Ms. Curtis.

The Government also avers that W. Reed focused on the evidence most favorable to him when arguing that the Thanksgiving Dinners were campaign-related events, and failed to address the evidence presented at trial that the Thanksgiving dinner was a family affair. The Government points to various witness testimony that W. Reed did not address in his arguments. The jury weighed this evidence as well as the evidence upon which W. Reed now relies. W. Reed's arguments incorrectly apply the standard for a Rule 29 motion.

Regarding the money W. Reed gave to certain churches and church functions, the Government argues that W. Reed conflates donations with contributions, and that not all money given to a religious institution qualifies as a gift. Further, the Government contends that an act may be a violation of federal law even if it is permissible under state law. Accordingly, Gray Sexton's testimony would have irrelevant. After weighing all the evidence, including evidence that the money was given to the church for referrals made to W. Reed's private legal practice, the

jury determined that the money W. Reed gave to religious organizations were not donations and should not have been paid with his campaign funds.

In all, the Government argues that W. Reed rests his argument on the evidence most favorable to him and fails to address the weight of evidence against him at trial. He presents an alternate interpretation of the evidence that the jury ultimately rejected. Further, the arguments he makes, if true, do not undermine the verdict. Weighing the evidence and inferences in the light most favorable to the verdict, the Government argues that W. Reed's Motion for Acquittal should be denied.

(c) Analysis

Many of W. Reed's arguments rely on the sufficiency of the evidence presented at trial. Specifically, he argues that no rational jury could have convicted him on the charges related to the Open House, the Thanksgiving Dinners, the church donations, the donations to St. Paul's high school, the gift cards, and the flowers sent to Christine Curtis.

When determining whether there is sufficient evidence to support a conviction, the court should "determine whether, viewing the evidence and the inferences that may be drawn from it in the light most favorable to the verdict, a rational jury could have found the essential elements of the offenses beyond a reasonable doubt." *United Sates v. Pruneda-Gonzalez*, 953 F.2d 190, 193 (5th Cir. 1992). The jury has a unique role of judging the credibility of witnesses and determining how much weigh to give each witness; testimony. *See United States v. Layne*, 43 F.3d 127, 130 (5th Cir. 1995) (citing *United States v. Higdon*, 832 F.2d 312, 315 (5th Cir. 1987), *cert. denied*, 484 U.S. 1075 (1988)). Accordingly, the Court must "accept all credibility choices that tend to support the jury's verdict," recognizing that the jury was "free to choose among all reasonable constructions of the evidence." *United States v. Sneed*, 63 F.3d 381, 385 (5th Cir.

1995) (quoting *United States v. Anderson*, 933 F.2d 1261, 1274 (5th Cir. 1991); *United States v. Chaney*, 964 F.2d 437, 448 (5th Cir. 1992)).

In making the above arguments, W. Reed focuses primarily on the evidence most favorable to him. However, the jury heard this evidence at trial along with other evidence the Government introduced that was less favorable to W. Reed's case. For example, regarding the Thanksgiving dinner, W. Reed fails to take into account the testimonies of Melissa Skillingstad who testified as to an email sent to her by W. Reed concerning the Thanksgiving Dinner (R. Doc. 309 at 274-75), Gina Higgins (R. Doc. 308 at 165-66), Kenneth Lacour (R. Doc. 308 at 171-73), and Ronald Garrity (R. Doc. 309 at 221), whose testimonies all suggest the dinners were thrown for W. Reed's family and friends. The jury considered all of this testimony and found that W. Reed committed wire fraud by spending campaign money on personal Thanksgiving dinners. The jury also heard the testimony of Ms. Curtis, to whom W. Reed sent a bouquet of flowers after she attended the rodeo with him. She testified that the note accompanying the flowers – "To my rodeo girl from a secret admirer from Camp J" – made her uncomfortable. (R. Doc. 252 at 9-10). The Court does not presume to know upon what evidence the jury relied or how they interpreted the evidence. However, given the entirety of the evidence presented at trial, this Court finds that it was not unreasonable for a jury to find W. Reed guilty.

It merits noting that Count 5 charges the Defendant with wire fraud for the $614.49 he spent at "Flowers N. Fancies." While the flowers to Christine Curtis make up a portion of that amount, W. Reed also purchased flowers for other people that are included in this charge. He does not now contest those purchases, and even admitted to the impropriety of one of the purchases at trial: "You know, I should have paid for those flowers. I should have. They went on

the flower fund. . . . I should have paid for those myself. She lives somewhere else, and that wasn't justified." (R. Doc. 313 at 38).

Further, regarding W. Reed's argument that the Government did not meet its burden of proof as to the Open House and gift cards – included in the conspiracy charge (Count 1) – the Court instructed the jury that they need only find that the Defendants had committed at least one of the twenty-one alleged overt acts alleged in the indictment. (R. Doc. 241 at 17-23, 32-34). Only two of those overt acts concerned the Open House. Accordingly, even if W. Reed's argument that the evidence was insufficient to convict him for fraud concerning the Open House, there are still nineteen remaining overt acts upon which the jury could have rendered its verdict. *Jolley v. United States*, 232 F.2d 83, 88 (5th Cir. 1956) ("Nor was it necessary that the evidence establish the appellant's guilt of each and all of the overt acts charged, but only of the commission of any one or more thereof to effect the objects and purposes of the conspiracy."). The same is true for his arguments regarding the donations to St. Paul's, and purchase of flowers as they relate to the charges of tax fraud in Counts 11-14. Further, the total loss amount in those Counts was not an element of the crime, and arguments about that amount will be addressed at sentencing. Accordingly, W. Reed's arguments on Counts 1 and 11-14 are not sufficient to overturn the verdict.

W. Reed also argues that his payments to certain churches and for certain church functions were permissible donations, and therefore the evidence was insufficient to prove his guilt. As this Court held in a previous order denying motions to strike, dismiss, and for reconsideration, although Louisiana campaign finance laws allow for the charitable gift of campaign funds to non-profit religious entities,

> …not all payments to charities or religious organizations are gifts. *See United States v. Terrell*, 754 F.2d 1139, 1149 n.3 (5th Cir. 1985) (affirming conviction and upholding jury instruction on the

> definition of "gift" that stated, "[t]he characterization given to a certain payment…is not conclusive," and that payment is not a "gift" if, *inter alia*, it is made to compensate another or with the intent to receive anything in return for it). The fact that Walter Reed says the payment was a gift, that he listed the payment on his state campaign filings as a donation, or that the money went to a non-profit religious organization, does not necessarily make it so. After seeing the evidence, hearing the testimony, and assessing the credibility of the witnesses, the jury will decide Walter Reed's intention in making the payment.

(R. Doc. 93 at 24). In his Motion, W. Reed does not address certain evidence the jury considered in making its determination. Specifically, the testimony of Jerry Cox that he had referred numerous cases to W. Reed, that W. Reed was the only person to pay for dinners like the one held at Gerald's in Count 2, and that the dinner included people W. Reed sought to have as clients for his firm. (R. Doc. 309 at 170-72; Tr. Ex. 87). Cox also testified that, having referred a personal injury case to W. Reed and the firm with which W. Reed was affiliated, he sought a referral fee from the managing partner of W. Reed's law firm and was denied because such fees were "illegal" and "unethical." He then sought a referral fee from W. Reed, and W. Reed gave $25,000 of his campaign money to the church to build a gym (Count 8). Though W. Reed argues the payment was unrelated to the case referral, the jury clearly disagreed. Further, Pastor Joel Holmes provided damning testimony as to Count 6, testifying that W. Reed had run an advertisement in a Pentecostal magazine and that W. Reed had received numerous clients through referrals from Pentecostal ministers. (R. Doc. 310 at 29-34). Further, Holmes was not from Louisiana and was not eligible to vote for W. Reed, but he did refer legal work to him after that event. *Id*. The jury weighed the evidence presented at trial and found W. Reed guilty of fraud as it relates to the campaign money given to churches and for church events.

It is the jury's unique role to determine the credibility of witnesses and to weigh the sufficiency of the evidence, and the Court must accept those decisions and view the evidence in

the light most favorable to the verdict. Accordingly, while W. Reed puts forward a feasible interpretation of certain evidence – an interpretation he also presented at trial – the jury ultimately did not find it credible. Viewing the evidence in the light most favorable to the verdict, the Court finds the jury's verdict reasonable.

It would be inappropriate for this Court, post-trial, to re-weigh the evidence and overturn the verdict simply because another interpretation of the evidence is possible. The Court must view the evidence in the light most favorable to the verdict, and, having done so, the Court finds the jury's determination rational. The jury's determination on these counts is therefore upheld. Accordingly, W. Reed's Motion for Acquittal or Arrest of Judgment on this basis is denied.

3. The Tax Returns

(a) W. Reed's Arguments

W. Reed argues that he should be acquitted on Counts 11-14 which charge him with making materially false statements on his income tax returns from 2009-2012. (R. Doc. 261-1 at 18-23). Alternatively, he argues he merits a new trial on those charges. (R. Doc. 263). He argues that no rational jury could have convicted him of intentionally, knowingly, and willfully making materially false statements on his tax returns because the miscalculation was done in error. Further, underreporting his income was not material to the case at hand.

W. Reed argues that his failure to properly report his income in charges 12-14 was unintentional because he believed his campaign expenditures to be proper and legal. Accordingly, he did not consider the amount to be income and did not report it as such. W. Reed argues that because he lacks the requisite intent to convict he should be acquitted on these counts.

As to Count 11, the underreported income came from a $48,000 referral fee that W. Reed claims was mistakenly recorded as $18,000 due to illegible handwriting. Because the

underreported income was done in error, W. Reed avers it was not intentional, knowing, or willful, and he should be acquitted on that count. Further, the referral fee came from attorney, James Marchand, and had nothing to do with W. Reed's work for the hospital. Accordingly, it had nothing to do with the conspiracy or fraud charges in this case and was inappropriately included.[8]

Finally, W. Reed avers the tax charges lack materiality. Because the IRS has a permissible margin of error and because the IRS requires the underreporting of income to be material in order to be criminal, the tax charges should be dismissed. The amount alleged is, at most, under 5% of his income and under 10% of the amount of taxes paid from 2009-2012. *See* Trial Exhibits WR-117 and WR-119. W. Reed also maintains that he should not be liable for unpaid taxes on the $40,000 mistake in Count 11; the $26,000 spent on the Open House Party, which he avers was campaign-related; or the $9,000 of medical reimbursements that he claims the prosecution did not prove were taxable. W. Reed argues that because he did not have the requisite *mens rea*, Count 11 had nothing to do with the conspiracy, and the amount lacks materiality, he merits an acquittal or new trial on Counts 11-14.

(b) The Government's Arguments

The Government contests all of W. Reed's arguments. First, they argue that while W. Reed disputes the amount of tax deficiency in Counts 11-14, this is not an element of the crime and the jury was not determining a loss amount. (R. Doc. 337 at 25 (citing the Court's jury instructions at (R. Doc. 241 at 32-33)). Accordingly these arguments lend no support to overturning the guilty verdict and therefore fail. The Government argues that disputes over dollar

[8] The Government originally charged the $30,000 underreported income as money from St. Tammany Parish Hospital, but the charge was later amended to reflect that the money came from Marchand. There is no dispute that W. Reed paid taxes on the money he received from the Hospital, nor does the Government aver the money from Marchand was related to the campaign.

amounts, such as the amount of tax deficiency, are more appropriate for the sentencing and restitution rather than the guilt phase. At that time, this Court will consider the loss amount and its implication on W. Reed's sentence and restitution. Accordingly, W. Reed is not entitled to relief under Rule 29 for these arguments.

Further, the Government avers that W. Reed focuses on the evidence most favorable to the defense and fails to view the evidence in the light most favorable to the verdict, as required when determining whether a Motion for Acquittal should be granted. (R. Doc. 337 at 31-41). His argument is merely another interpretation of the evidence – one the jury rejected. The Government evidence produced at trial showed that W. Reed never gave his accountant either the $48,000 check or the 1099 from Marchand. (R. Doc. 309 at 249-51); Tr. Ex. 98.03, 98.04. Further, W. Reed's accountant testified that W. Reed told him the amount was $18,000. *Id*. The jury considered all of the evidence at trial and did not believe W. Reed's "miscalculation" was an innocent mistake on Count 11.

The Government also contests that W. Reed's failure to report tax income related to campaign expenditures (Counts 12-14) was inadvertent, unintentional, and immaterial. This argument, they aver, is again an alternate interpretation of the evidence with which the jury ultimately disagreed. The Government presented evidence demonstrating willfulness and intent, including testimony of W. Reed's accountant, Ronald Garrity, of Jerry Reed, and of W. Reed himself. (R. Docs. 309 at 245-46, 257-58 and 307 at 9-10); Tr. Ex. 130, 131. Through their testimonies, the Government demonstrated W. Reed's *mens rea*, specifically as it relates to underreporting his taxes using his campaign expenditures and health reimbursement. After weighing all the evidence presented, the jury found the requisite *mens rea* and chose to convict.

Further, while W. Reed argues the tax amounts are immaterial, there is no threshold for materiality in the Fifth Circuit, and W. Reed fails to legally support for his argument that the amount at issue was immaterial. (R. Doc. 337 at 34-35); s*ee*, *e.g.*, *United States v. Foster*, 229 F.3d 1196, 1197 (5th Cir. 2000). The Government cites to the Fifth Circuit Pattern Jury Instructions, which define materiality as having "a natural tendency to influence, or [be] capable of influencing, the Internal Revenue Service in investigating or auditing a tax return or in verifying or monitoring the reporting of income by a taxpayer." Fifth Circuit Pattern Jury Instruction 2.102A. The Government's evidence at trial demonstrated the amount W. Reed failed to report, and the jury found it material. (Tr. Ex. 142-46).

In all, the Government argues that W. Reed seeks to reintroduce issues already litigated at trial and rests his argument on the evidence most favorable to him. The jury, however, weighed that evidence along with other evidence introduced by the Government and found W. Reed guilty. Weighing the evidence and inferences in the light most favorable to the verdict, the Government argues that W. Reed's Motions for Acquittal and New Trial should be denied.

(c) Analysis

Many of W. Reed's arguments rely on the sufficiency of the evidence presented at trial. When determining whether there is sufficient evidence to support a conviction, the court should "determine whether, viewing the evidence and the inferences that may be drawn from it in the light most favorable to the verdict, a rational jury could have found the essential elements of the offenses beyond a reasonable doubt." *United Sates v. Pruneda-Gonzalez*, 953 F.2d 190, 193 (5th Cir. 1992). The jury has a unique role of judging the credibility of witnesses and determining how much weigh to give each witness; testimony. *See United States v. Layne*, 43 F.3d 127, 130 (5th Cir. 1995) (citing *United States v. Higdon*, 832 F.2d 312, 315 (5th Cir. 1987), *cert. denied*,

484 U.S. 1075 (1988)). Accordingly, the Court must "accept all credibility choices that tend to support the jury's verdict," recognizing that the jury was "free to choose among all reasonable constructions of the evidence." *United States v. Sneed*, 63 F.3d 381, 385 (5th Cir. 1995) (quoting *United States v. Anderson*, 933 F.2d 1261, 1274 (5th Cir. 1991); *United States v. Chaney*, 964 F.2d 437, 448 (5th Cir. 1992)).

In making his arguments, W. Reed again focuses primarily on the evidence most favorable to him. However the jury heard this evidence at trial, along with other evidence the Government introduced that was less favorable to W. Reed's case. As previously stated, it is the jury's unique role to determine the credibility of witnesses and weigh the sufficiency of the evidence, and the Court must accept those decisions and view the evidence in the light most favorable to the verdict. Accordingly, while W. Reed puts forward a feasible interpretation of the evidence – an interpretation he also presented at trial – the jury ultimately did not find it credible.[9] The Court cannot, post-trial, re-weigh the evidence and overturn the verdict simply because another interpretation of the evidence is possible. The Court must view the evidence in the light most favorable to the verdict, and, having done so, the Court finds the jury's determination rational. The jury's determination on these counts is therefore upheld. Accordingly, W. Reed's Motion for Acquittal, Arrest of Judgment, or new trial on this basis is denied.

[9] The Court instructed the Jury that "[w]illfully means that the act was committed voluntarily and purposefully, with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey, disregard or circumvent the law. If a person in good faith honestly believes that his income tax return truthfully reports his taxable income and allowable deductions, that person cannot be guilty of willfully filing a fraudulent return." Jury Instructions, Rec. Doc. No. 241.

4. The Hospital

(a) W. Reed's Arguments

W. Reed argues that because he never made any misrepresentation regarding the funds he received for his representation of the Hospital, there was insufficient evidence to convict him of mail fraud on Counts 15-19 and he merits a judgment of acquittal. (R. Doc. 261-1 at 29-32). Each year, W. Reed publicly disclosed his financial receipts to the Board of Ethics and paid taxes on the amount earned. He also argues that he could have and would have raised his salary if he were representing the Board in his official capacity. He chose not to, and his decision saved the office the 7% retirement benefits he would otherwise be owed. Instead, he represented the Board in his private capacity and received the funds to which he was entitled. Because there was no misrepresentation, W. Reed argues there was no fraud and no rational jury could have convicted him.

(b) The Government's Arguments

The Government opposes W. Reed's argument that the evidence was insufficient to convict him on the Hospital charges. (R. Doc. 337 at 38-41). The Government contends that the many pieces of evidence presented at trial convinced the jury that W. Reed was not representing the hospital in his personal capacity and should not have kept the money intended for the Office of the District Attorney. This evidence includes, among other things, contracts between the District Attorney and the Hospital and the fact that W. Reed would send his subordinates to Hospital board meetings yet did not pay them any more for their work and therefore must not have been doing contract work for W. Reed's private firm. *Id*. W. Reed argued all of his points at trial. The jury weighed the evidence and ultimately did not believe W. Reed's theory of the case. The Government argues that he should not be able to relitigate these issues now. Weighing the

evidence and inferences in the light most favorable to the verdict, the Government argues that W. Reed's Motion for Acquittal should be denied.

(c) Analysis

W. Reed again centers his argument on the sufficiency of the evidence presented at trial, specifically that the evidence was insufficient to support a finding of guilt for the mail fraud charge charges in Counts 11-14.

When determining whether there is sufficient evidence to support a conviction, the court should "determine whether, viewing the evidence and the inferences that may be drawn from it in the light most favorable to the verdict, a rational jury could have found the essential elements of the offenses beyond a reasonable doubt." *United Sates v. Pruneda-Gonzalez*, 953 F.2d 190, 193 (5th Cir. 1992). As the Court has recognized several times now, the jury has a unique role of judging the credibility of witnesses and determining how much weigh to give each witness; testimony. *See United States v. Layne*, 43 F.3d 127, 130 (5th Cir. 1995) (citing *United States v. Higdon*, 832 F.2d 312, 315 (5th Cir. 1987), *cert. denied*, 484 U.S. 1075 (1988)). Accordingly, the Court must "accept all credibility choices that tend to support the jury's verdict," recognizing that the jury was "free to choose among all reasonable constructions of the evidence." *United States v. Sneed*, 63 F.3d 381, 385 (5th Cir. 1995) (quoting *United States v. Anderson*, 933 F.2d 1261, 1274 (5th Cir. 1991); *United States v. Chaney*, 964 F.2d 437, 448 (5th Cir. 1992)).

In making his arguments, W. Reed again focuses primarily on the evidence most favorable to him. However the jury heard this evidence at trial, along with other evidence the Government introduced that was less favorable to W. Reed's case. *See* Tr. Ex. 47.13, 47.14, 47.15, 47.16, 76. Some of that evidence included various resolutions and contracts passed by the Hospital board that indicated the Hospital was retaining the District Attorney in his official

capacity. The Government also showed that W. Reed knew about these resolutions. Additionally, W. Reed knew that any resolution drafted to retain him in his personal capacity had to be reviewed, discussed, voted on, and passed by the Hospital Board. He also knew that none of this had occurred. Further, W. Reed would sometimes attend board meetings himself, but other times would send his subordinates in his stead. His subordinates were not compensated for this work outside of their salaries as Assistant District Attorneys (ADAs), and they understood themselves to be representatives of the Office of the District Attorney during those meetings.

It is the jury's unique role to determine the credibility of witnesses and weigh the sufficiency of the evidence, and the Court must accept those decisions and view the evidence in the light most favorable to the verdict. After weighing the evidence, the jury clearly did not find W. Reed credible, and found it was improper for him to keep the money designated for the Office of the District Attorney. The Court cannot, post-trial, re-weigh the evidence and overturn the verdict simply because another interpretation of the evidence is possible. The Court must view the evidence in the light most favorable to the verdict, and, having done so, the Court finds the jury's determination rational. The jury's determination on these counts must therefore be upheld. Accordingly, W. Reed's Motion for Acquittal or Arrest of Judgment on this basis is denied.

5. Inappropriate merger of money laundering and wire fraud

(a) W. Reed's Arguments

W. Reed argues that he merits an acquittal because money laundering charges cannot be based on violations of state campaign finance law. (R. Doc. 261-1 at 32-33). Charges for money laundering must be for an enumerated unlawful activities, and the misuse of campaign funds is not one of those enumerated offenses. Further, because the alleged wire fraud was not completed at the time of the alleged money laundering, the wire fraud and money laundering counts were

improperly merged. *United States v. Santos*, 553 U.S. 507 (2008); *United States v. Kennedy*, 707 F.3d 558 (5th Cir. 2013). Money laundering cannot rely on the "same or continuing conduct of the underlying predicate crime." *Kennedy*, 707 F.3d 558. A merger exists if the underlying conduct was not complete by the time of the alleged money laundering or if the money laundering transaction was a payment of gross receipts rather than profits of the underlying crime. *Id*. at 910. W. Reed argues that the payments made to S. Reed were not profits, but rather gross receipts of the wire fraud charges. W. Reed's act of sending money to S. Reed acts as *both* wire fraud and the money laundering, which is an improper merger of the two issues. W. Reed argues he should therefore be acquitted of money laundering (Count 9).

(b) The Government's Arguments

The Government rejects W. Reed's argument that money laundering was inappropriately merged with wire fraud, highlighting that the Court considered and rejected both arguments before trial. (R. Doc. 337 at 25-31). These claims are essentially pleas for the Court to reconsider its prior rulings, and the Government urges the Court to find that the argument has not changed and neither should the outcome.

(c) Analysis

W. Reed argues that he should not have been convicted of money laundering because a money laundering charge cannot be based on a violation of state campaign finance law. This Court has previously addressed this argument in its Order and Reasons denying Defendants' Motions to Dismiss on October 13, 2015. (R. Doc. 63 at 14-15). As this Court previously stated, the argument has not changed, and neither will the outcome. For the sake of completeness, the Court will reiterate its prior analysis and holding.

The money laundering statute provides in pertinent part:

> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity--
>
> > (A)(i) with the intent to promote the carrying on of specified unlawful activity ... [shall be guilty of money laundering]

18 U.S.C. § 1956. To prove money laundering, the government must prove that (1) the financial transaction in question involves the proceeds of unlawful activity, (2) the defendant had knowledge that the property involved in the financial transaction represented proceeds of an unlawful activity, and (3) the financial transaction was conducted with the intent to promote the carrying on of a specified unlawful activity. *United States v. Wilson,* 249 F.3d 366, 377 (5th Cir.2001).

W. Reed argues that the money laundering counts must be dismissed because 18 U.S.C. §1956 does not list violations of state campaign law as a predicate offense. Notably, however, the predicate offense charged in the Indictment is wire fraud. Although wire fraud is not listed as a "specified unlawful activity" in the money laundering statute, "specified unlawful activity" includes "any act or activity constituting an offense listed in section 1961(1)." 18 U.S.C. §1956(c)(7)(A). And, significantly, section 1961 does specifically include wire fraud. Thus, the alleged wire fraud represents the unlawful activity as required by the money laundering statute. *See United States v. Brown*, 186 F.3d 661, 667 n.10 (5th Cir. 1999) ("[T]he money laundering statute defines 'specified unlawful activity' to include mail and wire fraud."); *see also United States v. Valuck*, 286 F.3d 221, 225 (5th Cir. 2002) (finding that first element of the offense of money laundering was established where the defendant did not appeal the sufficiency of the government's evidence charging him with wire fraud). Thus, the allegation that Defendants engaged in financial transactions using the ill-gotten donations obtained from their fraudulent

misrepresentations to further defraud donors is sufficient to allege money laundering. W. Reed's Motion for Acquittal or Arrest of Judgment on this basis is denied.

6. Motion for Arrest of Judgment is Untimely and Unwarranted

(a) Government's Arguments

The Government argues that while W. Reed requested additional time to file Motions under F. R. Cr. P. 29 and 33, he did not request additional time to file under Rule 34. (R. Doc. 337 at 41-42). Because F. R. Cr. P. 34 states that relief must be sought within fourteen days of the verdict, W. Reed's Rule 34 Motion filed twenty-nine days after the verdict was untimely. Further, the Government argues that W. Reed's arguments rely on previously-rejected theories and upon evidentiary proof at trial. No new evidence or other legal analysis was given to support a finding of error on the "face of the record," and thus no justification for granting an Arrest of Judgment.

(b) Analysis

While there is an issue of timeliness as to relief under Rule 34, because the Court is not granting Defendant the relief he seeks under Rule 34, the issue of timeliness is moot. However, as is further discussed throughout this opinion, W. Reed presented no new evidence or other legal analysis to support a finding of error on the face of the record. Therefore, relief under Rule 34 is unwarranted.

7. Exclusion of Critical Evidence

(a) W. Reed's Arguments

In his Motion for a New Trial, W. Reed reiterates his arguments that the Court improperly limited witness testimony at trial and, in so doing, prevented him from putting on a full defense.

W. Reed argues that the Court unfairly limited Gray Sexton's testimony despite allowing Government witness Kathleen Allen to testify about the CFDA and the propriety of certain expenditures under state campaign finance law. (R. Doc. 263-1 at 2-8). W. Reed believes that because Ms. Allen was permitted to testify and present evidence about interpretations of certain laws, Mr. Sexton should have been permitted to do the same. Because this evidence was kept from the jury, they did not know the traditional interpretation of the campaign law, and they were without crucial evidence that showed W. Reed's lack of specific intent to defraud. This prevented the jury from hearing a viable defense. W. Reed avers that he believed his expenditures were legal, and Mr. Sexton could have testified in support of that argument. Because Mr. Sexton was not permitted to testify, W. Reed argues he was prevented from putting on a full defense.

Mr. Sexton also could have testified about "dual purpose expenditures," which support W. Reed's defense, specifically that the expenditures regarding church donations, the Open House event, and birthday dinners were appropriate. W. Reed also sought to use Mr. Sexton to introduce and explain certain Board of Ethics advisory opinions that support his defense. W. Reed cites advisory opinions factually similar to his own that he avers would have helped his defense had his witness been permitted to testify about them. Finally, W. Reed argues that Mr. Sexton should have been permitted to testify about the Board of Ethics' procedure for handling improper campaign expenditures. Because Mr. Sexton's testimony was limited, W. Reed avers he was unable to put forth a full defense as was his right under the Sixth Amendment, resulting in reversible error deserving of a new trial.

W. Reed also alleges that the Court improperly excluded evidence regarding statements made by Paul Cordes, the former chairman of the Hospital, specifically the testimonies of Shawn

and W. Reed. (R. Doc. 263 at 12-17). W. Reed says Mr. Cordes informed him that he would be representing the Hospital in his personal capacity. However, Mr. Cordes passed away in 2004 and is accordingly unable to personally verify that statement. Testimony about that conversation, he argues, is not hearsay because it was not offered for the truth of the matter, but rather to show W. Reed's understanding and intent. Even if it were hearsay, W. Reed argues the statement falls under F.R.E. 807 as an exception to hearsay. W. Reed avers that sufficient testimony and corroborating evidence, including a type-written note suggesting W. Reed would represent the hospital in his personal capacity, permits the statements to fall under Rule 807. Accordingly, W. Reed argues he merits a new trial.

(b) The Government's Arguments

The Government argues that allowing Mr. Sexton to testify on additional topics of state law would have been improper. (R. Doc. 337 at 42-47). First, Mr. Sexton's opinions on state law have no bearing on W. Reed's state of mind. Further, the Government argues that permitting Mr. Sexton to opine on the legality of dual-purpose expenditures would only be relevant if W. Reed had knowledge of their legality when he spent the campaign funds. W. Reed did not provide evidence of contemporaneous knowledge, nor did he aver that Mr. Sexton advised him of the legality of either generally-accepted or his specific campaign expenditures. Further, the Government argues that W. Reed made purchases for purely personal reasons; it does not argue that the purchases he made were per se illegal, but rather that the *personal purpose* for which W. Reed made the purchases was illegal. Additionally, W. Reed took the stand and testified that he believed his expenditures, particularly dual purpose expenditures, were legal under state law. W. Reed was the best witness to testify about his own intent, and he did. Accordingly, additional testimony by Mr. Sexton would have been improper.

The Government further argues that the Court properly excluded Mr. Sexton's legal conclusions because they are prohibited, irrelevant and would serve to confuse the jury. W. Reed sought to have Mr. Sexton give opinion testimony about state laws not charged in the indictment. Finally, the Government argues that Mr. Sexton's testimony was sufficient to counter Ms. Allen's testimony, pointing out that W. Reed does not identify any instances in which Mr. Sexton was prevented from addressing an issue raised by Ms. Allen's testimony.

The Government reiterates the Court's prior determination that the statements made by Paul Cordes are inadmissible hearsay under Fed. R. Evid. 801-807. While W. Reed argues that the statements made would not be introduced for the truth of the matter asserted but rather to demonstrate state of mind and are therefore not inadmissible hearsay, the Government disagrees, contending that W. Reed seeks to do more than merely prove the conversation took place, but rather introduce the substance of that conversation. The Court instructed W. Reed at trial that he could testify that a conversation occurred and that after the conversation, he took certain actions. The Government contends that W. Reed was not satisfied with this instruction and again seeks to introduce the substance of his conversation with Cordes. This would be hearsay.

Further, the Government avers that Cordes' statements do not fall under any hearsay exception. The Court already ruled that Cordes' statements do not fall under an exception for unavailable declarants. W. Reed argues that Rule 807 should apply in this case, but 807 is used in rare circumstances where there exists sufficient indicia of reliability. The Government argues that this is not the case here. The statements W. Reed seeks to admit are wholly self-serving and are only corroborated by a one-sentence 'memo,' the testimony of W. Reed and his ex-wife Shawn Reed, and a fax W. Reed himself wrote that was never passed or voted on by the Board. Further evidence was introduced showing the Board had voted on resolutions recognizing the

entire Office of the D.A. as its legal counsel, which further calls into question the reliability of Cordes' statements and cuts against an 807 exception.

Shawn Reed did testify at trial as to W. Reed's excluded conversation with Cordes. The Government argues that even though the Court had previously ruled that testimony was hearsay, it was introduced, and the Jury considered it. Even with Shawn Reed's testimony, the jury found W. Reed guilty of the hospital counts.

(c) Analysis

Before trial, this Court denied W. Reed's motion *in limine* to include Gray Sexton's testimony, in part because his opinions were irrelevant to prove W. Reed's state of mind. (R. Doc. 159 at 10). While the Court may "weigh the evidence and may assess the credibility of the witnesses during its consideration," it has done so and finds no reason to overturn its prior rulings. *United States v. Ramos-Cardenas*, 524 F.3d 600, 605 (5th Cir. 2008) (quoting *United States v. Robertson*, 110 F.3d 1113, 1116 (5th Cir. 1997)). The Court will not relitigate this issue, but includes its prior reasoning and findings for the sake of completeness.

The proponent of expert testimony bears the burden of establishing its admissibility, *see Moore v. Ashland Chem., Inc.,* 151 F.3d 269, 276 (5th Cir. 1998), and a district court has wide latitude and broad discretion to exclude expert evidence, *Watkins v. Telsmith, Inc.*, 121 F.3d 984, 988 (5th Cir. 1997). Courts consider several factors when assessing whether to admit testimony from a witness who has been qualified as an expert. Federal Rule of Evidence 702 provides that an expert witness may testify if the expert's specialized knowledge "will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. As with all evidence, expert testimony must be relevant under Federal Rule of Evidence 401 and must satisfy a balancing test under Federal Rule of Evidence 403. *See United States v. Posado*, 57 F.3d 428,

435 (5th Cir. 1995). Even if the expert testimony is relevant, a court may exclude it under Rule 403 "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403.

Here, W. Reed has not met his burden of establishing the admissibility of Mr. Sexton's expert testimony or other "custom and practice" evidence. At the core of the W. Reed's motion is his argument that the expert testimony of Mr. Sexton is crucial to establishing Defendant's state of mind i.e., his lack of criminal intent. However, Mr. Sexton's opinions regarding the CFDA are not relevant to the W. Reed's state of mind. There is no evidence that W. Reed ever spoke to Mr. Sexton about the expenditures in question. Mr. Sexton does not and cannot speak to W. Reed's understanding of the rules. Any purported lack of clarity regarding the CDFA is only relevant to the extent that the W. Reed himself was actually confused. *See United States v. Whittemore*, 944 F. Supp. 2d 1003, 1011-12 (D. Nev. 2013) *aff'd*, 776 F.3d 1074 (9th Cir. 2015) (denying defendant's motion *in limine* to admit expert testimony regarding ambiguity of campaign finance regulations because "the defendant does not allege that he relied on [the expert's] expertise in interpreting the regulation and [the expert] does not offer testimony relating to [defendant's own ability to understand the legal principles involved.").

In *United States v. Herzog*, the defendant wanted to offer an attorney-expert's opinion "that tax laws are complex and that even law students, law professors, and attorneys find the subject very difficult." 632 F.2d 469, 473 (5th Cir. 1980). The trial court excluded this testimony, because "[n]one of the questions concerning [the expert's] view of tax laws could be relevant to the willfulness issue…since [the expert's] opinion that the laws are complex could not shed any light on whether Herzog had been confused by any such complexity at the time he

submitted the withholding forms." *Id.* The trial court further reasoned that other individuals' "comprehension of the tax laws could not have any bearing on Herzog's intent." *Id.* Mr. Sexton, like the expert in *Herzog*, does not provide any information about W. Reed's understanding of the CFDA, so his testimony is not relevant to W. Reed's intent. *See Herzog*, 632 F.2d at 472; *United States v. Scholl*, 166 F.3d 964, 973 (9th Cir. 1999) (upholding exclusion of expert testimony that, because tax laws were complex, defendants beliefs about reporting gambling wins were "reasonable" on the grounds that experts could not explain defendant's actual beliefs or ability to understand legal principles); *Whittemore*, 944 F. Supp. 2d at 1012 (excluding expert testimony regarding purported ambiguity in campaign finance regulation, reasoning that it would be confusing because "only defendant's subjective belief is at issue." Mr. Sexton's opinions as to the construction, usage and application of the CFDA based on interpretation of the law by the Louisiana Board of Ethics do not speak to the issue of whether *W. Reed* believed his expenditures were reasonable under the law. Indeed, W. Reed may not have ever read or even been aware of the Board of Ethic's actions in interpreting and applying the law. W. Reed did testify regarding his understanding of the prohibitions on his campaign expenditures under the CFDA, but Mr. Sexton's testimony does not provide insight on W. Reed's subjective understanding of the law. Consequently, Mr. Sexton's testimony would not "help the trier of fact to understand the evidence or to determine a fact in issue." *See* Fed. R. Evid. 702.

The present circumstances are unlike the circumstances in *Simson* wherein an expert on standard practices in the surety business was critical to develop the defense that it was the standard practice in the surety business not to disclose indemnitors on bondability letters. *United States v. Simson*, No. 90-7368, 1991 U.S. App. LEXIS 17217 (4th Cir. Aug. 1, 1991) Here, although jurors may not be aware of the nuances of the CFDA, a detailed understanding of the

CFDA is not relevant and would not "help [the jurors] to understand the evidence or to determine a fact in issue." *See* Fed. R. Evid. 702. Defendant is not being charged with violating the CFDA. The gravamen of the charges against the Defendant are that he used campaign funds for personal use. A lay person (and presumably a potential campaign contributor) can appreciate that certain expenditures are unrelated to the holding of public office when they are purely personal expenditures. The concept of personal versus professional (unlike bondability letters in the surety business) is one that is well within the grasp of a reasonable juror.

The issue at present is also distinct from the facts in *Garber*. In *Garber*, the court held that the "combined effect of the trial court's evidentiary rulings excluding defendant's proffered expert testimony *and its requested jury charge* [that a misunderstanding as to defendant's liability for the tax is a valid defense] prejudicially deprived the defendant of a valid theory of her defense…. The Court erred by refusing to instruct the jury that a reasonable misconception of the tax law on her part would negate the necessary intent." 607 F.2d at 97, 99. Here, no one prevented W. Reed from arguing that he lacked the necessary intent to commit fraud because he believed that his campaign expenditures were related to the holding of public office and permissible under the CFDA. Moreover, the jury was instructed as to *mens rea.*

Additionally, Defendant seeks to introduce evidence that other candidates have reported expenditures for flowers and have donated money to faith-based organizations and educations. However, like the expert testimony, this evidence about the campaign expenditures of other candidates is also irrelevant. The Government is not arguing that spending money on flowers or donating money to churches or schools is *per se* illegal. Rather, for example, when the Defendant gave money to the Faith Tabernacle Church and its pastor, Reverend Jerry Cox, the Government argues this was not a donation. On the contrary, the Indictment alleges that this sum was

provided as a kickback in exchange for referring private legal work. It is of no consequence that other candidates under other circumstances properly (or improperly) gave money to churches. Similarly, the Government seeks to prove that W. Reed's expenditures were fraudulent when he purchased flowers for various individuals and made payments to Saint Paul's School for purely personal reasons. Evidence that others purchased flowers and donated money to schools is not relevant to whether W. Reed did the same for reasons unrelated to his campaign. Accordingly, excluding such evidence was not improper.

Additionally, Mr. Sexton's proffered testimony regarding that such expenditures are permissible under certain circumstances does not speak to W. Reed's intent in making such expenditures. Although the members of the jury may not have any knowledge or experience relating to campaign finance, a lay person can understand—without expert testimony—when an expenditure is personal and when it is not. Purchasing flowers for a constituent's funeral or in recognition of prior political support is different than purchasing flowers for your girlfriend, or for a person you met online and who resides in Caddo Parish, or for your own daughter, or to thank someone for a personal favor. Lay people can understand this distinction without expert testimony. Finally, evidence of legitimate purchases by others would shed no light on whether the Defendant in this case used his campaign funds for purely personal expenses or kickbacks.

At trial, the Government's fact witness, Kathleen Allen, testified about technical requirements and regulations and regarding W. Reed's campaign finance reports. After listening to Ms. Allen's testimony, the Court found she had opened the door to some rebuttal testimony and permitted Mr. Sexton to testify on various topics. However, the Court limited Mr. Sexton's testimony to the topics covered by Ms. Allen. For the reasons more fully developed above, the Court finds that limitation proper.

W. Reed avers he was unable to put on a full defense given Mr. Sexton's limitation. However, the Court finds that the excluded testimony W. Reed now seeks to include would have been inappropriate and irrelevant. As discussed above, W. Reed provided no evidence that he consulted with Mr. Sexton during the conspiracy. Accordingly, Mr. Sexton's personal opinion testimony regarding the legality of certain campaign expenditures has no bearing on W. Reed's *mens rea*. Mr. Sexton has no basis to testify as to W. Reed's beliefs either now or at the time he made the purchases. W. Reed is the most appropriate witness to testify to his own *mens rea*; and he did so. Further, because the Government did not allege that the purchases W. Reed made were *per se* illegal, Mr. Sexton's testimony that such purchases *could* be legal is not relevant to W. Reed's guilt. That fact was not contested.

W. Reed also argues that the Court inappropriately limited Shawn Reed's testimony and excluded a type-written note by W. Reed suggesting that Paul Cordes, former chairman of the board of the Hospital, told W. Reed that he would be representing the Hospital in his personal capacity. At trial, the Court rejected W. Reed's attempts to introduce this evidence, finding no basis for an 807 exception. (R. Doc. 311 at 187-191). The Court similarly finds no reason to overturn that holding now. Accordingly, W. Reed's Motion for a New Trial based on the exclusion of critical evidence is denied.

8. Introduction of Improper Evidence

(a) W. Reed's Arguments

W. Reed argues that the introduction of certain statements made by S. Reed violated his constitutional rights and he therefore deserves a new trial. (R. Doc. 263-1 at 8-12). At trial, the Government introduced statements made by S. Reed indicating that S. Reed did *not* provide liquor for the America Event despite being paid by W. Reed for doing so. Instead of introducing S. Reed as a witness, the Government introduced records of a conversation between S. Reed and

Heather Nolan, a reporter for nola.com. W. Reed argues that the introduction of this conversation violated the Confrontation Clause and *Bruton* because the statements were directly and facially incriminating and because W. Reed had no opportunity to confront the evidence since it was not introduced as a live witness. Additionally, S. Reed is a non-testifying co-defendant, so W. Reed was unable to call him to cross examine him on the statements. This, W. Reed argues, is specifically prohibited under *Bruton*.

W. Reed also argues that the manner in which the conversation was introduced was improper. The Government verified the evidence through an FBI financial analyst who did not participate in the conversation, speak to either party, or assist in preparing the records and therefore had no personal knowledge of the conversation or its authenticity. The Government should have introduced Ms. Nolan to avoid a clash with the Confrontation Clause. If the introduction of this statement stands, W. Reed avers that it will have serious policy implications. In theory, he argues, the Government could simply call one government analyst who has reviewed all the evidence, and submit the evidence through that witness.

Furthermore, W. Reed argues the conversation was hearsay. Though the Court instructed the jury to only pay attention to S. Reed's statements, the jury had already heard both sides of the conversation and was sent to deliberation with a full copy of the conversation.

Finally, W. Reed argues that the evidence was improperly admitted because it was fruit of the poisonous tree. This evidence was material obtained through hacking by a former romantic partner of W. Reed. W. Reed filed motions for an evidentiary hearing and for suppression, which were both denied. W. Reed argues that the evidence was illegally obtained and should not have been admitted.

(b) The Government's Arguments

The Government highlights that the Court already considered and rejected W. Reed's argument that the Court should not have admitted the comments S. Reed made on Facebook. (R. Doc. 337 at 47-49). The Government again avers that the Facebook statements do not fall within the narrow *Bruton* and *Crawford* exceptions because they were not facially inculpatory and testimonial. Whether S. Reed provided alcohol was only inculpatory when connected with other evidence at trial, and therefore not facially inculpatory. Further, the statements were not testimonial because they were made to a reporter, on a social media platform, and not in connection with any investigation.

The Government also rejects W. Reed's assertion that admitting the conversation through an FBI Financial Analyst was problematic. Additionally, the parties had previously stipulated to the correspondence's authenticity. Further, the Government avers there were methods other than "cross examin[ing] a piece of paper" through which W. Reed could contend with S. Reed's statements, such as calling other witnesses or questioning the FBI analyst's knowledge of the conversation, but they did not do so. Finally, the Government contests W. Reed's argument that the conversation constituted inadmissible hearsay because of the parties' prior stipulation and because it was not admitted for the truth of the matter asserted. Ms. Nolan's comments were admitted for background on S. Reed's comments, which W. Reed does not contend were hearsay. Finally, the Government avers that the Court gave the jury a limiting instruction, which sufficiently addressed W. Reed's concerns.

(c) Analysis

The Court has previously addressed W. Reed's concern about admitting the Facebook conversation that took place between S. Reed and a reporter, Heather Nolan, and finds no basis

to change its prior ruling. (R. Doc. 156; R Doc. 306). Further, the parties had previously stipulated to the authenticity of the conversation, and the Court provided a limiting instruction to the jury which sufficiently addressed W. Reed's concerns about hearsay. (R. Docs. 235 at 4, 11 and 306 at 64) While the Court declines to relitigate this previously-decided issue, for the sake of completeness, the Court will reiterate its holding.

THE SIXTH AMENDMENT AND CRAWFORD V. WASHINGTON

The Sixth Amendment guarantees that a criminal defendant will be afforded the opportunity to confront the witnesses against him. "[T]he right of cross-examination is included in the right of an accused in a criminal trial to confront the witnesses against him." *Pointer v. State of Texas*, 380 U.S. 400, 404, 406-407 (1968) (noting that "a major reason underlying the constitutional confrontation rule is to give a defendant charged with a crime an opportunity to cross-examine the witnesses against him"). Pursuant to *Crawford v. Washington*, the Confrontation Clause of the Sixth Amendment bars the admission of "testimonial" out-of-court statements by a non-testifying witness unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the declarant-witness. 541 U.S. 36, 53-54 (2004).

For a statement to be "testimonial" under Crawford, it must have been made "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310 (2009). Courts have regularly interpreted the word "trial" to mean a subsequent criminal prosecution, and the relevant point of view is of the declarant at the time he makes the statement. See, e.g., *United States v. Smalls*, 605 F.3d 765, 777 (10th Cir. 2010) (recognizing that a statement is testimonial "if a reasonable person in the position of declarant would objectively foresee that his statement might be used in the investigation or prosecution of a crime"). The

Crawford court provided a non-exhaustive list of testimonial statements that focused on statements made in court-like proceedings or to law enforcement, including affidavits, custodial examinations, depositions, prior testimony, and confessions. *See Crawford*, 541 U.S. at 51-52.

To determine whether a statement is "testimonial" under *Crawford*, the Fifth Circuit focuses on the "primary purpose of the interrogation." *United States v. Polidore*, 690 F.3d 705, 711 (5th Cir. 2012) (recognizing that "when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony, it does not fall within the scope of the Clause, and the admissibility of the statement is the concern of state and federal rules of evidence, not the Confrontation Clause") (internal quotations omitted). *Crawford* does not apply to statements "procured for the primary purpose of allowing police to assist in an ongoing emergency or … under other circumstances where the primary purpose is not to create an out-of-court substitute for trial testimony." *Brown v. Epps*, 686 F.3d 281, 287 (5th Cir. 2012).

Since *Crawford*, the Fifth Circuit and the Supreme Court have held that statement to 911 operators, *Polidore*, 690 F.3d 705, government informants (when the co-conspirator making the statement is unaware that the person to whom they were speaking was a government agent or informant), *Brown*, 686 F.3d 281, and jail cellmates, *United States v. Vasquez*, 766 F.3d 373, 378-79 (5th Cir. 2014) (collecting cases), are non-testimonial and, hence, admissible at trial against co-conspirator defendants.

S. Reed's statements are non-testimonial because of the circumstances in which he provided them and the nature of the individual to whom he provided them. S. Reed made the statement to a member of the news media via private social media. The "primary purpose" (and, likely, the only purpose) of Ms. Nolan's inquiry was to research and, ultimately, to publish, an accurate news story, not to create an out-of-court substitute for trial. W. Reed does not cite to any

case law suggesting that a court has been willing to enlarge the reach of *Crawford* to include extra-judicial events such as news articles, "media frenz[ies]," "media trial[s]," the "court of public opinion," and speculation regarding possible administrative action. Thus, to accept Defendant's argument that S. Reed's statements were testimonial because they "occurred in the context of a media frenzy" or "could be used against him in the court of public opinion" would represent an impermissible expansion of *Crawford*. The proceedings at issue pursuant to *Crawford* have been formal, court-based, and criminal.

At the time the statements were made, S. Reed could not objectively foresee that a statement he made to the news media via Facebook's private messaging feature might be used in the investigation and prosecution of the crime since he could not have known that a covert investigation was being conducted. *See Melendez-Diaz*, 557 U.S. at 310; *Smalls*, 605 F.3d at 777. Therefore, the statements cannot be deemed testimonial under Crawford.

THE SIXTH AMENDMENT AND BRUTON V. UNITED STATES

In certain circumstances, the Confrontation Clause of the Sixth Amendment bars the admission of a statement in a criminal trial by a co-defendant. In *Bruton v. United States*, the Supreme Court held that where a co-defendant's confession was admitted at a joint trial and the co-defendant-declarant did not take the stand, the defendant was denied his constitutional right of confrontation, even though the jury was instructed not to consider the confession by the co-defendant as evidence against the defendant. 391 U.S. 123, 127 (1968).

Bruton involved two defendants accused of participating in the same crime and tried jointly before the same jury. One of the defendants had confessed. His confession named and incriminated the other defendant. The trial judge issued a limiting instruction, telling the jury that it should consider the confession as evidence only against the codefendant who had confessed

and not against the defendant named in the confession. The Supreme Court held that, despite the limiting instruction, the Constitution forbids the use of such a confession in the joint trial. *Id.*

Bruton recognized that in many circumstances a limiting instruction will adequately protect one defendant from the prejudicial effects of the introduction at a joint trial of evidence intended for use only against a different defendant. *Id.* at 135. But it said that "[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Id*. Accordingly, the Supreme Court held that the co-defendant's confession—which stated that both he and the defendant together committed the crime—was such a "powerfully incriminating extrajudicial statemen[t]," that its introduction into evidence, insulated from cross-examination, violated Bruton's Sixth Amendment rights. *Id.* at 135.

Nonetheless, subsequent precedent has recognized the limited applicability of *Bruton*. *See, e.g., Richardson v. Marsh*, 481 U.S. 200 (1987). The Supreme Court and the Fifth Circuit have held that *Bruton* "applies only to statement that are facially inculpatory." *United States v. Stevens*, 778 F. Supp. 2d 683, 690 (W.D. La. 2011) (citing *Richardson*, 481 U.S. at 202-03); *see also United States v. Surtain*, 519 F. App'x 266, 288 (5th Cir. 2013) ("[W]e have consistently held that *Bruton* is not violated unless a co-defendant's statement directly alludes to the complaining defendant.") (internal quotations omitted). "Confessions that are only 'incriminating by connection' to other evidence are not excluded under *Bruton*." *Stevens*, 778 F.Supp. 2d at 690 (quoting *Richardson*, 481 U.S. at 209). In other words,

> Out-of-court statements of a non-testifying witness that only inferentially incriminate a defendant when linked to other evidence introduced at trial do not violate the Sixth Amendment because an instruction not to consider such a statement will be considered effective to remove it from the jury's consideration. But, statements that obviously incriminate a defendant, involve an inference that a

> jury could make immediately without hearing other evidence, and that a judge could easily predict prior to trial, before hearing any evidence, would be barred under the rational of *Bruton*, do violate the Confrontation clause.

United States v. Harper, 527 F.3d 396, 403 (5th Cir. 2008).

S. Reed is a co-defendant. *Bruton* specifically prohibits the admission of facially inculpatory statements of a non-testifying co-defendant as it denies the non-declarant defendant the opportunity to confront the witnesses against him. *See Stevens*, 778 F.Supp. 2d at 690. Thus, the question before the Court is whether S. Reed's statements to Ms. Nolan that he did not provide alcohol at the America Event only "inferentially incriminate [W. Reed] when linked to other evidence introduced at trial" *or* whether they "obviously incriminate [W. Reed]" because they "involve an inference that a jury could make immediately without hearing other evidence." *Harper*, 527 F.3d at 403 (5th Cir. 2008).

In deciding whether *Bruton*'s protective rule applies to S. Reed's statements to Ms. Nolan, three cases are instructive: (1) *Richardson v. Marsh*, which limited *Bruton's* scope; (2) *Gray v. Maryland*, which the Supreme Court distinguished from *Richardson*; and (3) *United States v. Harper*, which the Defendant relied upon in his brief. The Court briefly summarizes each of these three cases.

In *Richardson v. Marsh,* the Supreme Court considered a redacted confession. 481 U.S. 200 (1987). The case involved the joint murder trial of Marsh and Williams. The State had redacted the confession of one defendant, Williams, so as to "omit all reference" to his codefendant, Marsh—"indeed, to omit all indication that *anyone* other than ... Williams" and a third person had "participated in the crime." *Id.* at 203 (emphasis in original). The trial court also instructed the jury not to consider the confession against Marsh. *Id.* at 205. As redacted, the confession indicated that Williams and the third person had discussed the murder in the front seat

of a car while they traveled to the victim's house. *Id.* at 203–204, n. 1. The redacted confession contained no indication that Marsh—or any other person—was in the car. Later in the trial, however, Marsh testified that she was in the back seat of the car. *Id.* at 204. For that reason, in context, the confession still could have helped convince the jury that Marsh knew about the murder in advance and therefore had participated knowingly in the crime.

The Supreme Court held that this redacted confession fell outside *Bruton*'s scope and was admissible (with appropriate limiting instructions) at the joint trial. The Court distinguished the co-defendant's confession in *Bruton* as a confession that was "incriminating on its face," and which had "expressly implicat[ed]" Bruton. 481 U.S., at 208. By contrast, Williams' confession amounted to "evidence requiring linkage" in that it "became" incriminating in respect to Marsh "only when linked with evidence introduced later at trial," namely that she was in the back seat of the car. *Id.* The Supreme Court held "that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." *Id.,* at 211.

In *Gray v. Maryland,* a confession had been redacted to substitute the defendant's name with a blank space or the word "deleted." 523 U.S. 185 (1998). The Supreme Court held that the redacted confession fell within the class of statements to which *Bruton*'s protections apply because, unlike the redacted confession in *Richardson*, the confession in *Gray* referred directly to the "existence" of the nonconfessing defendant. *Id.* at 192. The Supreme Court reasoned that a jury would likely react similarly to an unredacted confession (like the confession in *Bruton*) and a confession redacted with a blank space or the word "deleted," because the jury would realize that the blank space in an obviously redacted confession points directly to the defendant. *Id.* at

194. The Supreme Court recognized that the statements in *Gray*, like those in *Richardson*, required the jury to make inferences; however, the Court found that the inferences at issue in *Gray*, unlike those in *Richardson*, "involve statements that, despite redaction, obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial." *Id.* at 196.

In *United States v. Harper*, the Fifth Circuit held that the admission of officers' accounts of non-testifying co-defendant's statements—that he sold crack, that the firearms and narcotics inside the residence were his, and that he was unaware of the cocaine found in the microwave and "it was probably his dinner"—did not violate the defendant's right of confrontation. 527 F.3d 396 (2008). The Fifth Circuit held that the co-defendant's statements were "well within the category of statements identified in *Richardson* that do not violate the Sixth Amendment" because they "did not directly or obviously implicate [the defendant] until other evidence, such as the fact that [the defendant] lived in the same house as [the co-defendant], was introduced." *Id.* at 406. The co-defendant's admission that he sold crack cocaine did not facially incriminate the defendant nor did it refer to the existence of the defendant or anyone else. *Id.* The statement that he was unaware of the cocaine found in the microwave and it was probably his dinner was a closer question for the Fifth Circuit because "it did obliquely refer to the existence of someone else since if [the defendant] was unaware the cocaine was in the microwave, either [the defendant] forgot he had put it there or someone had done, and in the latter case, a likely candidate would be [the defendant], who also lived in the house." *Id.* Nevertheless, the Fifth Circuit held that the statement was more analogous to the category of confessions that *Richardson* says do not constitute a Confrontation Clause violation than it was to the category of

redacted confessions more directly incriminating a defendant that *Gray* holds do violate the Confrontation Clause. *Id.* at 406-407.

Similarly, here, the statements made by S. Reed to Ms. Nolan are more analogous to the category of statements that *Richardson* held do not constitute a Confrontation Clause violation because they become incriminating "only when linked with evidence introduced later at trial." To begin, the statements by S. Reed *are not confessions* and therefore, on their face, indicate no wrong-doing on the part of either Defendant. Unlike the statements in *Bruton* (admitting to robbery), *Richardson* (discussing a murder), and *Gray* (referencing illegal narcotics), the statements at issue merely indicate that S. Reed did not provide alcohol at his father's campaign event, in contradiction with a statement made by a spokesman for his father. Contradictory statements regarding the sale of alcohol are not facially inculpatory. While Defendant W. Reed argues that the statements are inculpatory on their face because of the language of the Indictment, the Court notes that the Indictment is not evidence and the Court instructed the jury as to the same. (R. Doc. 241 at 3, 17).

For these statements to become inculpatory, the Government also had to prove that W. Reed knew that his son was not providing alcohol and, further, if he did know his son was not providing alcohol, that the figure of $12/person for 2,450 people, totaling in $29,400 was not commensurate with the "bar setups and other services" excluding alcohol that S. Reed did provide for the event. Indeed, for these statements to be incriminating, the Government would have to put forth evidence regarding the America Event, including conflicting statements and representations made by W. Reed and evidence demonstrating what exactly S. Reed and his company did provide for the event and the fair market value of those services.

Moreover, the statements at issue, while they may help to convince the jury that W. Reed overpaid his son are, like the statements in *Richardson* (despite the fact that it may have helped convince the jury that Marsh participated in the crime) not protected by *Bruton* because they require the jury to make inferences that they cannot make without other evidence. *See Richardson*, 481 U.S. at 203-204. The statements in the present matter are unlike those in *Gray*, which require inferences "that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial." *Gray*, 523 U.S. at 196. If the statements S. Reed made to Ms. Nolan were the very first item introduced at trail, the jury would be completely unaware as to any incriminating effect that they might have on W. Reed. With respect to these statements—that S. Reed didn't provide alcohol at the America Event—the limiting instruction adequately protected W. Reed from the prejudicial effects of the introduction at a joint trial of evidence intended for use against S. Reed. (R. Doc. 306 at 64); *see also Bruton*, 391 U.S. at 135. The statements at issue are not so "powerfully incriminating" that, as contemplated in *Bruton*, the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Id.,* at 135. Accordingly, *Bruton* does not apply and the introduction of the statements at issue does not violate W. Reed's Reed Sixth Amendment right of confrontation.

Considering the foregoing, the Court finds that admission of the statements made by S. Reed to Ms. Nolan at trial do not violate W. Reed's Sixth Amendment right to confront the witnesses against him under either *Bruton v. United States* or *Crawford v. Washington*. Accordingly, his Motion for a New Trial on this ground is denied.

9. Severance[10]

(a) W. Reed's Arguments

W. Reed argues that he is entitled to a new trial because the Court failed to sever his counts pre-trial. (R. Doc. 263-1 at 17-22). W. Reed believes the charges related to campaign finance fraud should have been severed from the charges related to his representation of the Hospital because the two charges were distinct and did not overlap at trial. Additionally, there was no nexus between the two, given that the tax reporting in Count 11 was ultimately not related to the Hospital. Because the trial was not severed, W. Reed argues the campaign counts served as character assassination and created an impermissible and prejudicial spillover effect.

W. Reed also argues that his trial should have been severed from S. Reed's trial. Severance would have avoided the *Bruton* issue discussed above. Additionally, none of the Hospital or tax charges were related to S. Reed. Trying the two parties together created an additional impermissible and prejudicial spillover effect.

(b) The Government's Arguments

The Government opposes both Defendants' contentions that the Court should have severed certain indictments and the two defendants. (R. Doc. 337 at 52-58). The Government argues that W. Reed fails to cite supporting case law, and simply reiterates previously-asserted arguments. The Government adopts the Court's pre-trial holding that the various counts on the indictment formed a common scheme with a singular purpose. Further, in arguing to sever the Defendants, both parties ignore existing precedent, the Court's limiting instruction, and the volume of incriminatory evidence presented against S. Reed. Severance is not warranted just

[10] S. Reed also argues that he merits a new trial because the court failed to sever his trial from W. Reed's. (R. Doc. 329-1 at 16-18). Because the arguments and results are substantially similar, the Court extends its findings and conclusions in this section to S. Reed's request for relief in his Motion, and will not reiterate the arguments and holdings in the section dedicated to S. Reed.

because it would increase a Defendant's chance of acquittal. The Government avers that S. Reed only suffered prejudice as a result of his own actions evidenced at trial, not as a result of the actions taken by his father, W. Reed.

(c) Analysis

This Court has already addressed W. Reed's arguments that the cases and indictments should have been severed in a pretrial order, and W. Reed presents no compelling reason for the Court to overturn its prior holding. While the Court will not relitigate this issue, it incorporates prior reasoning and holdings for completeness.

JOINDER

When reviewing a motion to sever, the preliminary inquiry is whether joinder was proper as a matter of law under Rule 8 of the Federal Rules of Criminal Procedure. *See United States v. Holloway*, 1 F.3d 307, 310 (5th Cir. 1993). Where, as here, an indictment charges multiple defendants and multiple counts, Rule 8(b) governs the propriety of joinder. *See United States v. Kaufman*, 858 F.2d 994, 1003 (5th Cir. 1998). This rule allows joinder of defendants in the same indictment if they are alleged to have participated "in the same series of acts or transactions ... constituting an offense or offenses." Fed. R. Crim. P. 8(b). Whether the counts charged fulfill this "same series" requirement is determined by the facts in the indictment, which are accepted as true absent arguments of prosecutorial misconduct.[11] *See United States v. McRae*, 702 F.3d 806, 820 (5th Cir. 2012); *United States v. Faulkner*, 17 F.3d 745, 758 (5th Cir. 1994). There is no requirement that each defendant have participated in the same act(s), or that each defendant be charged in the same count(s). Fed. R. Crim. P 8(b); *McRae*, 702 F.3d at 820.

[11] The Defendants have made no arguments regarding prosecutorial misconduct.

Rather, Rule 8 is "flexible" and broadly construed in favor of joinder. *United States v. Butler*, 429 F.3d 140, 146 (5th Cir. 2005); *see also United States v. Bullock*, 71 F.3d 171, 174 (5th Cir. 1995) ("Joinder of charges is the rule rather than the exception and Rule 8 is construed liberally in favor of initial joinder.") The dispositive inquiry is whether the indictment charges "a series of acts unified by some substantial identity of facts or participants." *See McRae*, 702 F.3d at 821 (quoting *United States v. Dennis*, 645 F.2d 517, 520 (5th Cir. 1981)); *see also United States v. Harrelson*, 754 F.2d 1153, 1176 (5th Cir. 1985) ("Whether the counts of an indictment fulfill the 'same series' requirement is determined by examining the relatedness of the facts underlying each offense.")).

W. Reed argues that campaign and tax counts are improperly joined with the Hospital counts.[12] W. Reed constructs his joinder analysis under Rule 8(a); however, Rule 8(b) provides the relevant standard. Nonetheless, because the two subsections overlap, the Court is able to evaluate W. Reed's arguments under the relevant standard. W. Reed argues that, other than the fact that the charges are levelled against the same individual, there is no logical connection between (1) the Hospital counts, which allege a scheme to deprive the St. Tammany District Attorney's Office of a salary for legal services and (2) the Campaign and related tax counts, which concern the misuse of campaign funds and allege a scheme to defraud campaign contributors of campaign donations. W. Reed characterizes these two sets of counts as two distinct schemes with different victims. The allegations in the two schemes involve funds originating from different sources that were deposited in distinct transactions. In the scheme to

[12] Defendant Steven Reed asserts that the Campaign counts, which include the charges against him, are improperly joined under Rule 8 with the tax and Hospital counts. However, he did not offer any support for this assertion. Moreover, this argument is without merit as the tax counts are closely related to the Campaign counts. The misuse of campaign funds constitute a portion of W. Reed's income that is the basis of the tax charges. Accordingly, the tax counts are properly joined with the Campaign counts under Rule 8.

defraud the Office of the District Attorney, the funds are payments made by the Hospital that were deposited into W. Reed's personal account. In the scheme to defraud campaign contributors, the funds are campaign donations that were improperly expended for personal use.

While the Court acknowledges the differences between the Hospital counts and the Campaign and tax counts, those differences are insufficient to overcome the liberal rule of joinder. *United States v. Bullock*, 71 F.3d 171, 174 (5th Cir. 1995) ("Joinder of charges is the rule rather than the exception and Rule 8 is construed liberally in favor of initial joinder."). The Campaign and tax counts are properly joined with the Hospital counts because they are part of a common series of transactions with a singular purpose—to exploit W. Reed's influence as district attorney for personal financial betterment. To enrich himself, Defendant W. Reed employed a singular means—fraud. In addition to the common means and ends, the conduct alleged in the Campaign counts and the Hospital counts occurred during the same time period and involved several of the same people (e.g., W. Reed's accountant and individuals with Office of the District Attorney). Thus, joinder of all charges in the Superseding Indictment is proper under Rule 8 because the facts and participants underlying all counts are substantially related.

SEVERANCE

It is the general rule "that persons who are indicted together should be tried together." *U.S. v. Michel,* 588 F.2d 986, 1001 (5th Cir.1979). "Joint trials play a vital role in the criminal justice system." *Zafiro v. U.S.,* 506 U.S. 534, 537 (1993) (internal quotation omitted). However, Federal Rule of Criminal Procedure 14 provides that "if the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." Fed. R. Crim. P. 14(a). The United States Supreme Court

has explained that "when defendants properly have been joined under Rule 8(b), a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro,* 506 U.S. at 539. The Fifth Circuit has explained that "[i]n ruling on a motion to sever, a trial court must balance potential prejudice to the defendant against the public interest in joint trials where the case against each defendant arises from the same general transaction." *U.S. v. Simmons,* 374 F.3d 313, 317 (5th Cir. 2004) (internal quotation omitted).

The Fifth Circuit has explained that "[a] defendant is not entitled to severance just because it would increase his chance of acquittal or because evidence is introduced that is admissible against certain defendants." *Burton v. U.S.,* 237 F.3d 490, 495 (5th Cir.2000) (citing *Zafiro,* 506 U.S. at 540). Furthermore, "even where defendants have markedly different degrees of culpability, severance is not always required if less drastic measures, such as limiting instructions will suffice to cure the prejudice." *Id.* (citing *United States v. Broussard,* 80 F.3d 1025, 1037 (5th Cir.1996)); *see also U.S. v. Bermea,* 30 F.3d 1539, 1572 (5th Cir.1994) ("Any prejudice created by a joint trial can generally be cured through careful jury instructions."). The Fifth Circuit has explained that "[i]f the jury can keep separate the evidence that is relevant to each defendant, even if the task is difficult, and render a fair and impartial verdict as to each defendant, a severance should not be granted." *U.S. v. Ramirez,* 145 F.3d 345, 355 (5th Cir.1998) (citing *United States v. Walters,* 87 F.3d 663, 670–71 (5th Cir.1996)).

Notwithstanding proper joinder under Rule 8, the Court may grant severance upon a proper showing of prejudice. S. Reed requests severance because of the potential spillover effect from evidence and allegations that do not pertain to him. He argues that the evidence that will be

presented against his father in the tax and Hospital counts, including evidence of his father's income, will create a prejudicial spillover effect that will preclude the jury from impartially assessing the evidence against him. However, neither the spillover effect nor the fact that the government might present more evidence against W. Reed than S. Reed justifies severance. *See U.S. v. Krout*, 66 F.3d at 1420, 1430 (5th Cir. 1995).

The law is clear that "[w]hile the district court must guard against undue prejudice, it need not protect conspirators from evidence of their confederates' acts in furtherance of their common illegal aims." *U.S. v. Manges*, 110 F.3d 1162 1174-75 (5th Cir. 1997). Accordingly, the prejudice alleged by S. Reed is not of the type Rule 14 was designed to protect against. *United States v. Jones*, 303 F.R.D. 279, 286 (E.D. La. 2014). And, even if it were, S. Reed has failed to demonstrate that any potential prejudice could not be cured with a limiting jury instruction. Finally, any potential prejudice that could not be cured by instructions to the jury is outweighed by the public interest in joint trials. *See U.S. v. Simmons,* 374 F.3d 313, 317 (5th Cir. 2004). Severance of the tax counts from the campaign counts would have required the Government to introduce the same evidence in two trials, resulting in inefficiency and unnecessary expenditure of judicial resources. It is clear which allegations relate to S. Reed, and the jury was able to sort out the evidence and view each Defendant separately with a curative jury instruction.

W. Reed argued that a trial including both the Campaign and Hospital counts prejudiced him because he may wish to testify in defense of some of the charges but not others, forcing him to choose between testifying as to both set of counts or testifying as to neither. He argued that his own testimony is critical to defending against the Hospital counts, whereas he has a strong interest in refraining from testifying on his own behalf with regards to the Campaign and tax counts.

In *United States v. Ballis*, the Fifth Circuit articulated the following two-part standard to address the type of prejudice claimed by W. Reed in the instant motion. "A defendant seeking severance of charges because he wishes to testify as to some counts but not as to others has the burden of demonstrating that he has both important testimony to give concerning one count and a strong need to refrain from testifying on the other." 28 F.3d 1399, 1408 (5th Cir. 1994) (internal citations and quotations omitted).

The limited case law on severance motions related to a defendant's decision to testify does not greatly illuminate the question just how "important" must be the defendant's proffered testimony or what kind of "strong" reasons explain the need not to testify on other counts. *United States v. Alosa*, 14 F.3d 693, 695 (1st Cir. 1994). Nonetheless, the defendant's burden of demonstrating that he has both important testimony to give concerning one count and a strong need to refrain from testifying on another is a "heavy" burden and requires a showing of "real" prejudice. *United States v. Holland*, 10 F.3d 696, 699 (10th Cir. 1993).

W. Reed fails to meet this burden. While he puts forth a plausible argument that he has important testimony to give regarding the Hospital counts, it is not clear how important this testimony is to his defense. *See Alosa*, 14 F.3d at 695 (finding that while testimony defendant would have offered "might have been of some help to him," it was not a strong enough reason for severance). More significantly, W. Reed has not demonstrated that he has any need, much less a "strong need," to refrain from testifying in the Campaign counts. His argument is entirely speculative. It turns on whether the government intends to call a past romantic partner as a witness. Moreover, even if called to the stand, neither the Court nor W. Reed can predict what this witness will say or how the jury will react. It is possible that the jury will not find her credible. It is equally possible that her testimony on cross-examination will have the effect of

bolstering W. Reed's defense. There is no showing of real prejudice with respect to such a speculative argument.

Furthermore, W. Reed's concerns regarding the testimony of a witness can be and were resolved with a curative jury instruction. The jury was instructed to view each count separately. Finally, obvious considerations of judicial economy, which support trying all related counts against the same defendant at one time outweigh W. Reed's interest in having a free choice with respect to testifying. *See United States v. Jardan*, 552 F.2d 216, 220 (8th Cir. 1977); *United States v. Alosa*, 14 F.3d 693, 695 (1st Cir. 1994). While the courts zealously guard a defendant's Fifth Amendment right not to testify at all, the case law is less protective of a defendant's right to testify selectively, addressing some issues while withholding testimony on others that are related. *See Brown v. United States,* 356 U.S. 148, 155–56, 78 S.Ct. 622, 627 (1958).

For the foregoing reasons, the Court finds that the counts in the Indictment are united by common facts and participants, and that any potential prejudice inherent in a joint trial is insufficient to justify severance under Rule 14.

Accordingly, the Court denies Defendant's motion for a new trial on the above grounds

10. Prosecutorial Misconduct

(a) W. Reed's Arguments

Finally, W. Reed alleges that he is entitled to a new trial due to prosecutorial misconduct. (R. Doc. 263-1 at 24-30). One week prior to trial, certain information that had been excluded as evidence was disseminated by the government to media outlets. W. Reed's resulting motion for change of venue or continuance was denied. Additionally, the Court denied a request for a continuance, despite the fact that the Government repeatedly produced untimely *Brady* material. Finally, the Government repeatedly changed the tax charge, up to a month before trial. Because of the moving target, W. Reed argues he was unable to adequately prepare a defense for the tax

charges. The Court's failure to grant brief continuances for all of these incidents requires a new trial.

Further, W. Reed argues the Government participated in improper argument and witness examination. W. Reed argues the Government's opening statement was character assassination and blurred the line between campaign funds related to wire fraud, and public funds related to mail fraud. W. Reed alleges the Government's opening statement suggests all of the charges dealt with public funds. During witness examination, the Government asked about his son's scholarship and about his income outside of his role as District Attorney. None of those questions, W. Reed argues, were relevant or proper. Additionally, they asked questions about events that took place before the time frame at issue in this case and about events for which they presented no evidentiary support. These *ad hominem* attacks, W. Reed argues, only served to incite the jury. Finally, W. Reed argues the Government made improper statements during its closing argument. Specifically, the Government misrepresented evidence that was not in the record.

(b) The Government's Arguments

The Government avers the Defendant's request for a continuance was unwarranted. *Id*. at 59-61). The Government argues that the unsealed filing of a motion to admit business records was proper after Defendants had refused to stipulate to their authenticity. Further, jurors were selected through *voir dire*, which accounted for exposure to media reports, and, accordingly, to the information in that motion. Exchange of further discovery the week before trial also did not warrant a continuance. Both parties provided evidence during that week, and the volume of material was a small percentage of the total discovery. Additionally, some of the discovery produced was due to parties' inability to locate or open certain documents that were sent or

believed to be sent earlier in the process. Finally, though the Government contends the evidence did not constitute *Jencks* material, it was all produced well in advance of the timeline required by the Jencks Act. 18 U.S.C. § 3500(a)-(b). The Court's denial of a continuance was proper.

Request to Strike

The Government argues that W. Reed's reiterated request to strike Paragraph 9 of Counts 15-19 in the Superseding Indictment is meritless and was properly denied before trial. *Id*. at 58-59. The Government avers there is no support for the argument that they attempted to mislead the court, and W. Reed does not explain how the evidence prejudiced him or caused the Jury to find him guilty on other charges. In his argument, W. Reed ignores the extensive evidence the Government produced at trial and merely alleges prejudice. This is not sufficient to overcome a verdict and merit a new trial.

SugarDaddie.com

W. Reed argues that the admission of evidence from SugarDaddie.com, including statements he made about the Thanksgiving Dinners he paid for with campaign funds, should have been excluded because they were 'fruit of the poisonous tree.' He argues the evidence was obtained through his ex-girlfriend's hacking that eventually led to a search warrant. The Government highlights that the Court, however, addressed these arguments pretrial and found no evidence that W. Reed's ex-girlfriend acted as government agent, and accordingly found suppression inappropriate because the Fourth Amendment was not implicated by this private search. The introduction of this evidence was limited – e.g. no reference was made to the name"SugarDaddie.com" – and W. Reed raises no arguments that were not addressed in previously-considered motions. (R. Doc. 61).

Government Statements and Cross-Examination of W. Reed

The Government contends that it did not err in its opening statements, closing statements, or cross-examination of W. Reed and, further, the Defendants did not make any of these objections during trial. (R. Doc. 337 at 62-65). The Government argues that W. Reed should have objected at trial, and his failure to do so makes the present arguments untimely. Further, he does not provide any legal justification for the arguments he now raises. W. Reed must show that the statements were improper and that they substantially affected his right to a fair trial. The Government avers that he failed to do so.

The purpose of opening statements is for each side to set the stage for the jury and to forecast what they intend to prove. The Government argues that in objecting to its opening statement, W. Reed does not point to any testimony the Government promised that they did not later deliver. Further, the Court reminded the jury that any statements or arguments made by the attorneys are not evidence. The Government also avers its cross-examination of W. Reed was proper, relevant, and supported by evidence it submitted or offered to submit on rebuttal. None of the statements or questions the Government presented at trial were unfairly prejudicial, nor did they implicate any substantial right or the fairness and integrity of the proceeding. Accordingly, a new trial is not warranted

(c) Analysis

W. Reed raises objections to certain questions and statements made by the Government during the trial, and argues that such prosecutorial misconduct warrants him a new trial. These objections should have been raised during the trial. *United States v. Torres-Colon*, 790 F.3d 26, 33 n.4 (1st Cir. 2015). W. Reed's failure to timely object at trial prevented the Court from considering the objection and taking corrective action, if appropriate. See, e.g., *Thomas v.*

Moore, 866 F.2d 803 (5th Cir.) (reversed on other grounds) (failure to timely object to the jury selection process voids relief). Permitting W. Reed to raise these objections now could encourage defendants to forego objecting during trial in the hopes that the Court would later grant a new trial.

Further, W. Reed fails to legally support his arguments that the Government's questions and statements substantially affected his right to a fair trial. *United States v. Diaz-Carreon*, 915 F.2d 951, 956 (5th Cir. 1990). Under Fifth Circuit precedent, the Court cannot grant a new trial on bare allegations that W. Reed was prejudiced. W. Reed does not provide sufficient proof, especially in the light of the evidence presented at trial, that the Government's opening statements, closing arguments, or questions on cross-examination were unfairly prejudicial, affected any substantial right, or seriously affected the fairness, integrity, or public reputation of the proceeding. *United States v. Gaudin*, 515 U.S. 506, 527 (1995). Even if the prosecution's comments were inappropriate, that would not, on its own, be enough to grant acquittal or a new trial. *See United States v. Young*, 470 U.S. 1, 11, 105 S. Ct. 1038, 1044 (1985) ("Inappropriate prosecutorial comments, standing alone, would not justify a reviewing court to reverse a criminal conviction obtained in an otherwise fair proceeding."). Further, this Court previously found no evidence indicating that Reed's former romantic partner acted as a Government agent and concluded that under existing precedent, suppression was inappropriate because the Fourth Amendment does not apply to private searches. *See* Doc. No. 206 at 4 (citing *United States v. Jacobsen*, 466 U.S. 109, 113 (1984), *United States v. Grimes*, 244 F.3d 375, 383 (5th Cir. 2001)). No new arguments supporting suppression based on 'fruit of the poisonous tree' have since been raised.

Accordingly, W. Reed's motion for a new trial on this ground is denied.

C. S. Reed's Motion for Judgment of Acquittal, Arrest of Judgment, or New Trial

S. Reed argues that he should be granted a new trial because of (1) ineffective assistance of counsel; (2) federalism concerns; (3) failure to prove a conspiracy; (4) failure to prove count 9; (5) failure to sever; and (6) failure to prove paternity. (R. Doc. 329-1).

The Government avers that all of S. Reed's arguments are meritless, specifically that his counsel was ineffective and conflicted, that the Court's Pinkerton instruction was incorrect, that the Government failed to prove the elements of the conspiracy, that the Government failed to prove the elements of Count 9, and that the Government failed to prove that W. Reed was S. Reed's father.

1. Ineffective Assistance of Counsel

(a) S. Reed's Arguments

S. Reed alleges ineffective assistance of counsel because his attorney had divided loyalties. The Sixth Amendment guarantees representation that is free from conflict. *United States v. Garcia-Janso*, 472 F.3d 239, 243 (5th Cir. 2009). Conflicts include divided loyalties, which may be indicated by a co-defendant paying attorney's fees. *Id.*; *United States v. Jackson*, 805 F.3d 775, 801 (5th Cir. 2000); *Woods v. Georgia*, 450 U.S. 261, 268-69 (1981). A conflict can also be shown by demonstrating that a plausible defense could have been raised but was not because of the attorney's conflict of interest. *United States v. Burns*, F.3d 239, 856-57 (5th Cir. 2008).

S. Reed argues that his father, W. Reed, was the main focus of this case and that S. Reed was just a bargaining chip to convince W. Reed to plead. The Government's evidence overwhelmingly focused on W. Reed, and S. Reed's role in the conspiracy was to receive the improper campaign funds. (R. Doc. 329-1 at 1). The defense put on by S. Reed's trial attorney

was a joint defense; a collaboration between the two defense attorneys. Although a joint-defense is not *per se* ineffective, S. Reed argues that there was evidence and arguments helpful to his defense that were not raised because they could have hurt W. Reed's defense.

S. Reed highlights two instances in which defenses were not raised to counter incriminating evidence. The first piece of evidence was the $14,300 invoice that failed to detail all of the relevant jobs for which S. Reed was billing. S. Reed argues that his attorney failed to introduce evidence or testimony explaining the joint-invoice and it therefore appeared that the invoice was at least partially illegitimate. *Id*. at 2-3. The second piece of evidence was S. Reed's Facebook conversation with Heather Nolan, a reporter from nola.com. In that conversation, S. Reed denied providing alcohol for one his father's events when, in fact, he had. S. Reed now explains that his father told him to answer the reporter in this way, and that he was suffering from Corexit poisoning, which causes memory loss. *Id*. Although S. Reed informed his attorney of his defenses, they were not raised at trial. S. Reed claims he was 'told' he was not going to testify and would have to rely on his father's testimony. *Id*. at 3-4.

S. Reed further argues that certain exculpatory evidence was never introduced. He alleges that he deferred to his father on business and legal matters, and as a result did not question the legality of his father's actions. These three pieces of evidence and their defenses could have proven that S. Reed did not have the requisite intent or *mens rea*. S. Reed argues his attorney chose not to introduce them, however, because they would have negatively impacted W. Reed's case.

Additionally, W. Reed selected and paid S. Reed's lawyer, W. Glenn Burns, who had known W. Reed for many years and who had worked closely with W. Reed's attorney, Mr. Simmons. S. Reed claims his counsel assumed the role of Mr. Simmons' co-counsel.

S. Reed avers that the above warrants a new trial under *Cuyler v. Sullivan*, or, alternatively, *Strickland v. Washington*. 466 U.S. 335 (1980); 466 U.S. 668 (1984). The first prong of *Strickland*, S. Reed argues, is satisfied because multiple representation suffices to prove prejudice, and multiple representation exists in this case given Mr. Burns' personal and professional ties to W. Reed and Mr. Simmons, and given the joint defense agreement. *Perillo v. Johnson*, 205 F. 3d 775, 797-800 (5th Cir. 2000). While W. Reed was not officially Mr. Burns' client, S. Reed argues, the ties and joint-defense agreement essentially created that relationship. Secondly, S. Reed argues Mr. Burns did not present an independent defense and thus meets the second *Strickland* prong.

(b) Government's Arguments

The Government opposes S. Reed's argument that his trial attorney had a conflict of interest given his relationship to W. Reed and W. Reed's attorney, characterizing it as an "undocumented and unsupported recreation of events at trial." (R. Doc. 337 at 66-70). While S. Reed analyzes his trial attorney's trial strategy and terms it unfavorable, he does not indicate under which rule of criminal procedure he seeks relief. To prove ineffective assistance of counsel in this case, S. Reed would have to prove an actual conflict of interest. *See*, *Cuyler v. Sullivan*, 446 U.S. 335, 345-350 (1980); *Perillo v. Johnson*, 205 F.3d 775, 781 (5th Cir. 2000). The conflict cannot be merely potential – the Defendant must prove his attorney made an actual choice between two options, and the option he chose was not in the Defendant's best interest. *See*, *United States v. Garcia-Jasso*, 472 F.3d 239, 243 (5th Cir. 2006). Then, the Defendant must prove the conflict adversely affected counsel's representation of Defendant.

The Government argues that S. Reed's allegations do not establish either a conflict or an adverse effect, as a third-party fee agreement is not an automatic conflict. In addition, the

Government avers that S. Reed could have raised the issue of the third-party fee agreement at or before trial, but he never did. Further, S. Reed does not provide any evidence of his contention that his attorney failed to pursue defenses that were helpful to him but would have hurt W. Reed. S. Reed does not fairly weigh the extent of the evidence against him, but simply asserts that his counsel's strategy was to blame for his conviction. The Government avers that S. Reed's claims are just bare allegations that are not supported by evidence, and therefore fail.

(c) Analysis

S. Reed claims his attorney had divided loyalties and failed to raise certain defenses, rendering his counsel ineffective. In order to prevail on a claim of ineffective assistance of counsel, a defendant must show both cause and prejudice:

> Under *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984), a habeas petitioner claiming ineffective assistance of counsel has the burden to demonstrate both deficient performance and prejudice. As to the former, judicial scrutiny of counsel's conduct 'must be highly deferential . . . the distorting effect of hindsight' is to be avoided, and courts must 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." "It is not enough to show that some, or even most, defense lawyers would have handled the case differently." *Green v. Lynaugh*, 868 F.2d 176, 178 (5th Cir. 1989). To establish prejudice, "it is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding," rather, he must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different . . . A reasonable probability is a probability sufficient to undermine confidence in the outcome."

Nichols v. Scott, 69 F.3d 1255, 1284 (5th Cir. 1995) (further citation omitted). A court reviewing an ineffectiveness claim need not address both prongs of the Strickland standard, but may dispose of the claim based on defendant's failure to meet either prong of the test. See *Motley v. Collins*, 18 F.3d 1223, 1226 (5th Cir. 1994). Furthermore, "the Constitution does not mandate error-free counsel." *Henry v. Wainwright*, 721 F.2d 990, 996 (5th Cir. 1983).

Review and study of the record shows no evidence that S. Reed's attorney provided incompetent or ineffective legal assistance during the pretrial or trial phases of this case. Further, while S. Reed makes bare allegations as to the ineffectiveness of his trial attorney's strategy at trial, he does not prove or attempt to prove any real prejudice. S. Reed fails to demonstrate a "reasonable probability" that he would have been found not guilty but for the actions of his trial attorney. To prove ineffective assistance of counsel in this case, S. Reed would have to prove an actual conflict of interest. *See*, *Cuyler v. Sullivan*, 446 U.S. 335, 345-350 (1980); *Perillo v. Johnson*, 205 F.3d 775, 781 (5th Cir. 2000). To obtain relief under *Strickland*, a petitioner must show both unreasonable performance by counsel and prejudice to the petitioner's case as a result of counsel's performance. While S. Reed alleges that certain evidence was not introduced in his defense because it would have hurt his father, he fails to prove any actual decision was made by his attorney with his father in mind. Though he submits an affidavit with his Motions, that affidavit merely puts forth another interpretation of the evidence submitted at trial. (R. Doc. 329-2). It does not prove any misconduct or conflict. Further, while S. Reed could have proven a conflict of interest had he shown that a "plausible alternative defense strategy that could have been pursued, but was not, because of" divided loyalties, he did not demonstrate that divided loyalties played any role in the decisions made by his trial attorney. *Burns*, 526 F.3d at 856-57. Bare allegations are insufficient to find ineffective assistance.

S. Reed fails to prove conflict of interest or ineffective assistance of counsel and his Motions are accordingly denied on this count.

2. Pinkerton

(a) S. Reed's Arguments

S. Reed argues that the Court gave an erroneous Pinkerton instruction to the jury. (R. Doc. 329-1 at 9-10). Specifically, S. Reed argues the Court should have instructed the jury that a

co-conspirator may be responsible for the *substantive* offenses committed by another co-conspirator. Rather, the Court instructed the jury that S. Reed could be guilty even if he did not participate in any of the acts that constitute the offense described in the conspiracy count. *Id*. at 9. Because of this error, S. Reed argues, he should not be held liable for Counts 7 and 9 and should be given a new trial on Count 1 because the jury could have interpreted the Court's words to mean S. Reed could be liable even without proof that he entered into an agreement.

(b) Government's Arguments

The Government first points out that no party objected to the Court's *Pinkerton* instructions at trial, and S. Reed is therefore not permitted to assign error now. Second, the Government argues any error was harmless because the evidence against S. Reed was so overwhelming. (R. Doc. 337 at 70-71).

(c) Analysis

S. Reed argues that the Court's *Pinkerton* instruction, an instruction to which he did not object during trial, suggested that the jury could convict S. Reed on Count One (conspiracy) under the *Pinkerton* principle. He suggests that this caused the jury to convict him on Counts 7 and 9 and may have confused the jury into convicting him for Count 1. At trial, the Court instructed the jury:

> Now, a conspirator is responsible for offenses committed by the other conspirator if the conspirator was a member of a conspiracy when the offense was committed and if the offense was committed in furtherance of or a foreseeable consequence of the conspiracy. Therefore, if you have found a defendant guilty of a conspiracy in Count 1, and if you find beyond a reasonable doubt that during the time the defendant was a member of that conspiracy the other conspirator committed the offense in Count 1 in furtherance of or as a foreseeable consequence of that conspiracy, then you may find the defendant guilty of Count 1 even though the defendant may not have participated in any of the acts which constitute the offense described in Count 1.

(R. Doc. 314 at 122). Under *Pinkerton*, a co-conspirator is criminally responsible for the acts of his co-conspirators when those actions where in furtherance of the conspiracy, whether or not he was aware of the actions. S. Reed argues that the jury may have understood the Court's instruction to mean that S. Reed could be convicted of conspiracy even if he did not participate in the conspiracy.

First, S. Reed did not object to the *Pinkerton* instruction at trial, despite the opportunity to do so. Fed. R. Cr. P. 30(d) states:

> A party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate. An opportunity must be given to object out of the jury's hearing and, on request, out of the jury's presence. Failure to object in accordance with this rule precludes appellate review, except as permitted under Rule 52(b).

"A party generally may not assign error to a jury instruction if he fails to object before the jury retires or to 'stat[e] distinctly the matter to which that party objects and the grounds of the objection.'" *Jones v. United States*, 527 U.S. 373, 387 (1999) (quoting Fed. R. Crim. P. 30). Accordingly, the Court was unaware of S. Reed's issue with its instruction and was unable to take corrective measures at trial, if appropriate. Accordingly, S. Reed's objection is untimely.

Further, "[a] district court's error in giving the jury instructions is subject to harmless error review." *United States v. Skilling*, 554 F.3d 529, 547-48 (5th Cir. 2009) (citations omitted); *see also Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). Looking to the jury instructions as a whole and the quantum of the evidence, it is apparent that the instruction, if unclear, was harmless. *Skilling*, 554 F.3d. at 551.

For example, the Court also included the following instruction: "Each count, and the evidence pertaining to it, should be considered separately. The case of each defendant should be considered separately and individually. The fact that you may find one of the accused guilty or

not guilty of any of the crimes charged should not control your verdict as to any other crime or any other defendant. You must give separate consideration to the evidence as to each defendant." (R. Doc. 241 at 12-13). The Court further instructed that to find the defendants guilty of conspiracy, the jury must find that "the defendants made an agreement to commit the crimes of wire fraud…and/or money laundering…" and that "one of the conspirators during the existence of the conspiracy knowingly committed at least one of the overt acts described in the superseding indictment." *Id*. at 18. Further, "A conspirator is responsible for offenses committed by the other conspirator if the conspirator was a member of the conspiracy when the offense was committed and if the offense was committed in furtherance of, or as a foreseeable consequence of, the conspiracy." *Id*. at 20.

As has been detailed throughout this opinion, the quantum of the evidence presented at trial was sufficient for a reasonable jury to convict both S. Reed and W. Reed of conspiracy and the related offenses of mail fraud, wire fraud, and money laundering. Accordingly, S. Reed's motion on this basis is denied.

3. Sufficiency of the Evidence

(a) S. Reed's Arguments

Conspiracy

S. Reed also argues that the Government failed to prove a conspiracy and he should be granted acquittal or, alternatively, a new trial. (R. Doc. 329-1 at 10-15). The fact that S. Reed and W. Reed are family is not sufficient to prove an agreement or plan. S. Reed avers that all of the transactions between himself and W. Reed were discreet transactions for services rendered, and no overarching plan or conspiracy existed. S. Reed cites various cases requiring a plan or agreement to commit further crimes in order to find a conspiracy. *See*, *e.g.*, *United States v. Gee*, 226 F.3d 885, 895 (7th Cir. 2000); *United States v. Maseratti*, 1 F.3d 330, 336 (5th Cir. 1993);

United States v. Townsend, 924 F.3d 1365, 1394 (7th Cir. 1991). S. Reed argues that there was no agreement or overarching plan, and the Government failed to prove one. *Id*. at 10-11.

On the sole conviction for money laundering, S. Reed argues he only received the check and deposited it. He had no further involvement, and therefore did not participate in a conspiracy. On the wire fraud counts, S. Reed avers the Government failed in various respects. First, the Government failed to prove interstate commerce on the Globop count, making the underlying wire fraud untenable. Secondly, the Government failed to prove conspiracy regarding the Open House. The evidence showed that most of the guests were contributors or politicians, making the party a valid dual-purpose under the state campaign finance laws. Furthermore, S. Reed performed the work for which he was paid for that event. (R. Doc. 392-1 at 13-14). Thirdly, S. Reed argues he was not involved in the payment to Liquid Bread, and the money came as a surprise. If all those charges are dismissed, only one count would remain, the payment for providing liquor, and one single transaction cannot prove a conspiracy. *Id*. at 14.

Finally, S. Reed argues that he had no stake in being paid from W. Reed's campaign fund, and thus had no stake in the alleged conspiracy. *Id*.

Count 9 – the $5,000 Payment to Cayman Sinclair

S. Reed avers that the Government did not produce any evidence that he intended to conceal the origin of the $5,000 check. W. Reed and Cayman Sinclair both testified at trial that they were involved in agreeing to cut the check. Further, S. Reed argues there was no evidence that S. Reed had the knowledge or background necessary to understand that a bank check would more easily conceal the source of the funds.

(b) Government's Arguments

Conspiracy

The Government avers that S. Reed's allegations that the Government failed to prove conspiracy because they did not prove he made any forward-looking agreement, they did not prove he had any stake in the outcome of the conspiracy, and because they failed to prove the objects themselves, fail to take into account the full weight of the Government's evidence at trial, and fail to understand the elements of conspiracy. *Id*. at 71-74.

An agreement does not have to be explicit, and the elements of a conspiracy can be inferred from circumstantial evidence. *See*, *United States v. Casilla*, 20 F.3d 600, 603 (5th Cir. 1994); *United States v Mann*, 161 F.3d 840, 847 (5th Cir. 1998). The Government argues that the jury heard sufficient evidence to conclude that W. Reed and S. Reed made an agreement, including inflated and fraudulent invoices, S. Reed's changing stories, and his cooperation with his father. Further, having a stake in the outcome is not essential to prove a conspiracy, and ample evidence exists to show S. Reed participated in the conspiracy. Finally, proof of a conspiracy does not require proof of all elements of the underlying substantive offenses. *See*, *United States v. Adair*, 436 F.3d 520, 525 (5th Cir. 2006). Accordingly, the Government argues that S. Reed's Motion should fail.

Count 9 – the $5,000 Payment to Cayman Sinclair

The Government highlights that to prove Count Nine, they had to prove that S. Reed knowingly conducted a financial transaction, that that transaction involved proceeds of wire fraud, that the S. Reed knew the property involved was the proceeds of wire fraud, and that S. Reed knew the transaction was designed in whole or in part to conceal or disguise the nature, location, source, ownership, or control of the proceeds of the wire fraud. (R. Doc. 337 at 74-75). S. Reed argues that the Government did not prove he intended the transaction to conceal the origin of the $5,000 at issue. However, the Government argues that it is sufficient for the

defendant to be aware of the co-defendant's intent to conceal, and that concealment does not need to be the primary purpose of the transaction. *See*, *Adair*, 436 F.3d at 324; *United States v. Powers*, 168 F.3d 741, 747 (5th Cir. 1999). The Government avers that it provided sufficient evidence at trial to conclude that concealing the nature of the funds was at least one purpose of the transaction, and, having heard that evidence, the jury chose to convict on that count.

(c) Analysis

In making the above arguments, S. Reed focuses primarily on the evidence most favorable to him. However, the jury heard this evidence at trial along with other evidence the Government introduced that was less favorable to S. Reed's case.

As was explained in the Court's response to W. Reed's Motions above, it is the jury's unique role to determine the credibility of witnesses and to weigh the sufficiency of the evidence, and the Court must accept those decisions and view the evidence in the light most favorable to the verdict. Accordingly, while S. Reed puts forward a feasible interpretation of certain evidence – an interpretation he also presented at trial – the jury ultimately did not find it credible. Viewing the evidence in the light most favorable to the verdict, the Court finds the jury's verdict reasonable.

Many of S. Reed's arguments rely on the sufficiency of the evidence presented at trial. Specifically, he argues the Government failed to prove conspiracy, and looks to its failure to prove certain overt acts upon which the jury's finding of guilt may or may not have relied.

When determining whether there is sufficient evidence to support a conviction, the court should "determine whether, viewing the evidence and the inferences that may be drawn from it in the light most favorable to the verdict, a rational jury could have found the essential elements of the offenses beyond a reasonable doubt." *United Sates v. Pruneda-Gonzalez*, 953 F.2d 190,

193 (5th Cir. 1992). The jury has a unique role of judging the credibility of witnesses and determining how much weigh to give each witness; testimony. *See United States v. Layne*, 43 F.3d 127, 130 (5th Cir. 1995) (citing *United States v. Higdon*, 832 F.2d 312, 315 (5th Cir. 1987), *cert. denied*, 484 U.S. 1075 (1988)). Accordingly, the Court must "accept all credibility choices that tend to support the jury's verdict," recognizing that the jury was "free to choose among all reasonable constructions of the evidence." *United States v. Sneed*, 63 F.3d 381, 385 (5th Cir. 1995) (quoting *United States v. Anderson*, 933 F.2d 1261, 1274 (5th Cir. 1991); *United States v. Chaney*, 964 F.2d 437, 448 (5th Cir. 1992)).

While S. Reed argues that he had no forward-looking involvement or intent to commit money laundering, or wire fraud, the Government introduced evidence at trial supporting its conspiracy charge. Further, the Court instructed the jury that they need only find that the Defendants had committed at least one of the twenty-one alleged overt acts alleged in the indictment. (R. Doc. 241 at 17-23, 32-34). Accordingly, there are twenty-one overt acts upon which the jury could have rendered its verdict, and arguments contesting only certain overt acts are therefore unavailing. *Jolley v. United States*, 232 F.2d 83, 88 (5th Cir. 1956) ("Nor was it necessary that the evidence establish the appellant's guilt of each and all of the overt acts charged, but only of the commission of any one or more thereof to effect the objects and purposes of the conspiracy."); *see also United States v. Adair*, 436 F.3d 520, 525 (5th Cir. 2006) ("The Government, in a conspiracy case, need not prove that a substantive crime was actually committed.").

Further, as was explained above, if the jury found S. Reed guilty of conspiracy, they did not need to find that he was guilty of the underlying crimes committed by W. Reed, and the Government presented evidence of a conspiracy at trial. For example, the Government presented

to the jury a series of inflated, fraudulent invoices S. Reed created and gave to W. Reed's Campaign Fund. See Tr. Ex. 16, 18, 19, 20, 35, 36. The Government also presented evidence that S. Reed was untruthful after the fact, arguing that he sought to cover up his illegal dealings. See Tr. Ex. 40.02, 40.05, 41.01, 42; Doc. No. 307 at 114-17 (Amy Bailey), 146-48 (Steven Johnson).

Finally, it is worth noting that to prove a conspiracy, the Government does not have to prove either a "stake in the outcome" or an overt agreement. *See*, *e.g.*, *United States v. Alvarez*, 610 F.2d 1250, 1256 (5th Cir. 1980); *United States v. Casilla*, 20 F.3d 600, 603 (5th Cir. 1994).

Regarding Count 9, the Government did not need to prove that *personally* intended to conceal the origin of the $5,000 check, only that S. Reed was aware of W. Reed's intent to conceal. Further, the concealment does not need to be the primary purpose of the transaction. *Adair*, 436 F.3d at 324; *United States v. Powers*, 168 F.3d 741, 747 (5th Cir. 1999). At trial, the Government produced evidence showing that concealing the nature of the funds was at least one purpose of the transaction. For example, the jury heard that W. Reed told Cayman Sinclair he would have to accept $5,000 less to cater the America Event, but later arranged for Mr. Sinclair to be paid the full amount, $5,000 of which he was instructed to pay to S. Reed's company, Liquid Bread. (R. Doc. No. 306 at 193-200); Tr. Ex. 8.54, 8.56; 37.01, 37.02. Further, the Government presented evidence that S. Reed lied about the nature of the checks after the fact. (R. Doc. No. 307 at 108, 114-16).

While this Court again does not presume to know how the jury interpreted various pieces of evidence, it does find that, given the totality of the evidence, a reasonable jury could have found S. Reed guilty of Conspiracy and money laundering. It would be inappropriate for this Court, post-trial, to re-weigh the evidence and overturn the verdict simply because another interpretation of the evidence is possible. The Court must view the evidence in the light most

favorable to the verdict, and, having done so, the Court finds the jury's determination rational. The jury's determination on these counts is therefore upheld. Accordingly, S. Reed's Motion for Acquittal or New Trial on this basis is denied.

4. Paternity

(a) S. Reed's Arguments

Finally, S. Reed argues that the Government failed to prove that W. Reed is his father. (R. Doc. 329-1 at 18-19). Without that proof, the state campaign law requiring pay "commensurate with the services provided" would be inapplicable and there would be no pay limitation. At trial, the only proof presented that S. Reed was W. Reed's son was the testimony of Kenneth Lacour, the owner of Dakota Restaurant, and the testimony of Connie Grantham, W. Reed's sister, who testified that S. Reed was her nephew. Neither of those testimonies are sufficient under Federal Rule of Evidence 804. S. Reed avers this failure to prove paternity entitles him to a Judgment of Acquittal.

(b) Government's Arguments

The Government contests S. Reed's argument that they failed to prove that W. Reed was S. Reed's father. (R. Doc. 337 at 75-76). Specifically, the Government avers that they were under no obligation to prove paternity, as paternity is not an element of federal wire fraud. S. Reed argues that it is necessary to prove a violation of state law, but the Government rebuts, saying this prosecution was not for violating state law. The Government did not seek to enforce state law. State law was only used to establish W. Reed's *mens rea*, as the law put him on notice of what are and are not appropriate expenditures of state campaign funds. Further, the jury had ample evidence to conclude S. Reed was W. Reed's son, including the testimonies of W. Reed and Shawn Reed.

(c) Analysis

While S. Reed argues that the Government was required to prove his paternity in order to convict him under the CFDA, neither W. Reed nor S. Reed were charged with violations of the CFDA, or any other state law. S. Reed's paternity had no bearing on his conviction for conspiracy, wire fraud, or money laundering, as paternity is not an element of any of those crimes. Further, under Rule 804, S. Reed's paternity *was* proven through the statement of his father, W. Reed. (R. Doc. 313 at 17) ("Q. Who was the person that put together the event, from the standpoint of catering, liquor, etc.? A. My son Steven."). Accordingly, S. Reed's arguments on this basis bear no weight and are denied.

III. CONCLUSION

Considering the foregoing and for the reasons detailed above,

IT IS ORDERED that W. Reed's Motion to for Arrest of Judgment or Acquittal is **DENIED**. **IT IS FURTHER ORDERED** that W. Reed's Motion for a New Trial **DENIED**. **IT IS FURTHER ORDERED** that S. Reed's Motion for Arrest of Judgment, Acquittal, or a New Trial **DENIED**.

New Orleans, Louisiana, this 28th day of November, 2016.

UNITED STATES DISTRICT JUDGE