

APPENDIX A

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION**

UNITED STATES OF AMERICA

v.

CRIMINAL ACTION NO. 2:16-CR-7-KS-MTP

**CHARLES BOLTON and
LINDA BOLTON**

MEMORANDUM OPINION AND ORDER

This matter is before the Court on the “Motion for New Trial Due to Defense Counsel for Defendant Charles Bolton Commenced the Representation With an Actual Conflict of Interest” (“Charles’s First Motion for New Trial”) [175], “Motion to Vacate Conviction and Sentence and in the Alterative, for New Trial Under Federal Rule of Criminal Procedure Rule 33 and Request for Garcia Hearing” (“Charles’s Second Motion for New Trial”) [177], “Motion to Vacate Conviction and Sentence and in the Alternative, for New Trial Under Federal Rule of Criminal Procedure Rule 33 and Request for Garcia Hearing” (“Charles’s Third Motion for New Trial”) [181], and “Expedited Motion by Charles Bolton to Vacate Conviction and Sentence, or in the Alternative for New Trial, Based on Newly Discovered Evidence and Prosecutorial Misconduct” (“Charles’s Fourth Motion for New Trial”) [226] filed by Defendant Charles Bolton, and the “Motion to Vacate Conviction and Illegal Sentence or in the Alternative, for New Trial Under Federal Rule of Criminal Procedure Rule 33 Based on New Evidence” (“Linda’s First Motion for New Trial”) [178] and “Limited Supplemental Motion to Vacate and/or for New Trial” (“Linda’s Second Motion for New Trial”) [231] filed by Defendant Linda Bolton. After considering the submissions of the parties, the record, and the applicable law, the Court finds that these motions are not well taken and should be denied.

I. BACKGROUND

On March 22, 2016, a federal grand jury indicted Defendants Charles Bolton (“Charles”) and Linda Bolton (“Linda”) (collectively “Defendants”) on five counts of attempted tax evasion for the years 2009-2013 (Counts 1-5) under 26 U.S.C. § 7201 and five counts of filing false tax returns for those same years (Counts 6-10) under 26 U.S.C. § 7206(1). Attorney Joe Sam Owen (“Owen”) filed his initial appearance on behalf of Charles on March 28, 2016. Attorney Paul Holmes (“Holmes”) initially appeared in this case on behalf of Linda at her initial appearance before the magistrate judge on March 31, 2016. Parties are husband and wife, and represented to the Court that there was a joint defense agreement between them. It was discussed on the record that Owen was taking the lead in the defense.¹ He hired experts to review the records and provided help in the defense of both Defendants.

Trial was initially set for May 23, 2016. Defendants filed a joint Unopposed Motion to Continue [17] on April 25, 2016. The Court granted this motion on April 29, 2016, and the trial date was then set for July 18, 2016.

Attorney James K. Dukes (“Dukes”) filed his appearance in the case on behalf of Linda on June 22, 2016, less than four weeks before trial. It was represented to the Court by both Dukes and Owen on the record in multiple hearings that Dukes was retained by Linda because Holmes needed some help understanding the case and had not practiced in federal court in a number of years. Despite the circumstances and the short time her new attorney had to prepare for the impending trial, Linda did not file for a continuance.

¹ This discussion took place during the disqualification hearing held before the Court on July 28, 2016.

Due to courtroom unavailability² and after conferring with the parties to ascertain any objections, the Court *sua sponte* continued the case until August 22, 2016.

Because they were potential witnesses in the case,³ Holmes and Dukes were disqualified from the case in a hearing held on July 28, 2016,⁴ and the Court gave Linda ten days to find new representation. On August 8, 2016, the deadline the Court originally gave Linda to find a new attorney, Attorney Lisa Ross (“Ross”) entered her appearance on behalf of Linda. Attorney Carlos Tanner (“Tanner”) attempted to enter his appearance as well, but it was not properly filed. Tanner did not properly enter his appearance in the case until August 12, 2016. Nevertheless, both Ross and Tanner appeared on behalf of Linda on August 10, 2016, at a telephonic hearing pertaining to the possibility of obtaining a continuance in this case. The Court advised parties that a motion to continue had to be filed before it could grant a continuance. The Court further informed the parties that the only trial dates available to continue the case until would be either August 29, 2016, or September 12, 2016, due to the scheduling constraints caused by the Court’s own docket as well as Owen’s and AUSA Fred Harper’s conflicts,⁵ which had long been brought to the attention of the Court. When Ross asked about dates in December, the Court advised her that it did not feel such a long continuance would be appropriate given the nature of the case, but that it would consider any arguments she may make if she filed a motion.

On August 12, 2016, the Court held a telephonic conference with the parties to remind them that, because a motion for continuance had yet to be filed and the trial date was still set for August 22, proposed jury instructions and the parties’ exhibit and witness lists were due the

² Both courtrooms in Hattiesburg were undergoing renovations and were not serviceable for most of the month of July.

³ Checks from both attorneys were included as evidence of Defendants’ undisclosed income.

⁴ This disqualification hearing occurred after the Government filed its Motion to Disqualify [26] on July 15, 2016.

⁵ Owen informed the Court much earlier in the case that he would be unavailable for the entire month of October. AUSA Harper was equally upfront with the Court about his unavailability during November.

following Monday on August 15, 2016. Ross informed the Court that she intended to file a motion for continuance that day on behalf of Linda, and Owen confirmed that he would join in whatever motion she filed on behalf of Charles. Ross contacted the Court later that date seeking information regarding the ordering of transcripts of previous proceedings. She then filed the Motion to Continue [42][43]⁶ on behalf of Linda late that evening, after business hours. Because it was a Friday, the Court did not receive the motion until the morning of August 15, 2016. Nevertheless, on August 16, 2016, the Court granted the Motion to Continue [42][43] and continued the trial date to September 12, 2016.

Attorney Robert McDuff (“McDuff”) entered his appearance in this case on August 26, 2016, eighteen days before the trial date. Less than a week later, on September 1, 2016, McDuff filed a second Motion to Continue [69] on behalf of Linda, less than two weeks before trial. On September 2, 2016, Ross filed her Motion to Withdraw as Attorney [72].

The Court issued its rulings on these motions on September 8, 2016.⁷ In its Order [81] denying the Motion to Withdraw as Attorney [72], the Court found that Ross had not shown good cause as to why she should be allowed to withdraw from the case. (See Order [81] at pp. 3-4.) In its Order [82] denying the Motion to Continue [69], the Court found, in light of the multiple continuances already granted in the case, that Linda’s purported reasons for a continuance did not warrant such an action.⁸

⁶ Charles filed his Notice of Joinder [43] that same day.

⁷ On that same date, the Court also issued rulings on the multiple motions *in limine* [47][48][49][50] filed on behalf of the Government and Charles.

⁸ Linda gave two reasons: (1) an official review of the investigation by DOJ and (2) the need for her attorney to prepare. The Court did not find these reasons persuasive because (1) there was no proof of an official review by DOJ and (2) McDuff entered the case with full knowledge of the impending trial date and when Linda was already represented by two other attorneys.

On September 9, 2016, counsel for John Lee filed a Motion to Quash Trial Subpoena and Rule 17 Subpoena [84] on his behalf. Because this motion pertained to documents⁹ subpoenaed for the trial, the Court continued the trial by one day and heard arguments pertaining to this motion on September 12, 2016. The Court ultimately denied the motion.

Trial began on September 13, 2016. Due to the high local interest in the case, the Court took the precaution of calling for a district-wide venire instead of a division-wide one, in order to ensure the Defendants would be tried before an unbiased panel.

The government rested its case on September 15, 2016, after presenting several witnesses and exhibits. Defense called one witness and rested that same day. After deliberations, the jury returned a verdict of guilty for Charles on Counts 2-10 and for Linda on Counts 6-10. Both Defendants were found not guilty as to Count 1. The jury was unable to reach a verdict as to Counts 2-5 with respect to Linda Bolton, and the Court declared a mistrial as to those counts.

On September 28, 2016, Charles filed his Motion for a Judgment of Acquittal and the Conditional Grant of a New Trial or, Alternatively, Motion for a New Trial [118], and Linda filed her Motion for a Judgment of Acquittal or, in the Alternative, for a New Trial [119] a day later on September 29, 2016. Both motions were fully briefed, and the Court entered its Order [127] denying them both on November 4, 2016.

Sentencing was originally set for December 19, 2016. On that date, Attorney Owen, counsel for Charles, and counsel for the Government requested an in camera meeting with the Court and made a joint request for a continuance, citing Charles's willingness to cooperate with the Government in connection with ongoing investigations. Linda made no objection to this

⁹ The motion also pertained to a subpoena to testify, which the Government agreed not to enforce owing to the fact that it knew John Lee would only invoke the Fifth Amendment if called to the witness stand and owing to John Lee's health issues.

continuance. The sentencing was then continued to January 18, 2017. Owen and counsel for the Government contacted the Court again on January 13, 2017, requesting the Court to continue the sentencing once more to allow Charles more time to speak with agents of the Government. Sentencing was then continued to February 3, 2017, again with no objection from Linda.

On January 20, 2017, during the time Charles was supposedly actively cooperating with the Government and being represented by Owen, an affidavit was signed by Carl Nicholson (“Nicholson”) with a heading bearing the style of this case, detailing John Lee’s purported involvement with Owen. (*See* Nicholson Affidavit [177-3].)

On January 24, 2017, because of internal scheduling conflicts of the Court,¹⁰ sentencing was continued once again, with the consent of the parties, and set for March 17, 2017.

On March 15, 2017, Owen filed his Motion to Deem Attorney-Client Privilege Waived [151], stating that Charles had terminated his representation and was now attempting to allege Owen had conducted himself unethically during his representation of Charles. At the time, Charles was also represented by Robert Nathan Udashen (“Udashen”), who represented that he would not be present for the sentencing hearing as his representation was for the appeal phase only, and Samuel S. McHard (“McHard”), who served as local sponsoring counsel for the *pro hac vice* admission of Udashen and who also did not intend to attend the sentencing hearing. The Court learned through the filings connected with Owen’s motion that Charles had apparently hired Alabama Attorney Willie J. Huntley (“Huntley”) some time during the prior week and that Huntley intended to represent Charles at the sentencing hearing. Despite these intentions, Huntley had not

¹⁰ The undersigned was the presiding judge over a case pending in the Northern District of Texas, which was set for a three-week trial in February.

entered an appearance in the Court and had not filed a motion for *pro hac vice* admission, as required by an out-of-state lawyer not licensed to practice in Mississippi.¹¹

On March 17, 2017, prior to the sentencing hearing, the Court heard in camera arguments as to the Motion to Deem the Attorney-Client Privilege Waived [151].¹² During these arguments, the Government represented to the Court that Charles, despite his promises to cooperate, had given its agents no useful information despite the continuances of sentencing granted by the Court and that, as a result, it was ready to move forward with the sentencing with no further delay. Despite his previous termination of Owen's representation, Charles allowed Owen to represent him at the sentencing hearing as he had no other counsel present¹³ and did not wish to utilize the Federal Public Defender.¹⁴

After the in camera arguments, the sentencing hearing was held in open court. Over the objections of the Defendants, the Court adopted the Pre-Sentence Reports' calculated sentencing guideline range of 27 to 33 months for both Charles and Linda. The Court then sentenced Linda to 30 months confinement per count with the Federal Bureau of Prisons ("BOP"), to be served concurrently. Charles was sentenced to 33 months confinement as to Counts 2 through 5, to run concurrently, and 12 months confinement for Counts 6 through 10, to run concurrently with each other but consecutively with the 33-month sentence under Counts 2 through 5, for a total of 45 months confinement in the custody of the BOP.¹⁵ Fines and restitution were also levied against

¹¹ In fact, despite the Court allowing him to appear unofficially on behalf of Charles at the sentencing hearing, Huntley did not move to appear *pro hac vice* until March 29, 2017.

¹² These arguments were heard on the record.

¹³ As previously stated, Huntley was allowed to unofficially appear on behalf of Charles despite not being properly admitted as *pro hac vice* counsel.

¹⁴ As a precautionary measure, the Court had requested the presence of an attorney from the Federal Public Defender's Office be present at the sentencing hearing and in the in camera hearing, to allow Charles an additional option for the sentencing hearing.

¹⁵ This was an upward variance from the sentencing guideline range, which the Court imposed because of Charles's position as a public official and for other reasons stated in open court.

both Defendants. Judgment was entered in the case on March 28, 2017. (See Judgments [165][166].) Defendants were allowed to self-surrender to the custody of the BOP as notified by the U.S. Marshal, but no later than 60 days from the date of sentencing.

Huntley and his associate, Attorney Dennis James Knizley (“Knizley”) were admitted *pro hac vice* on March 29, 2017. On March 30, 2017, Margaret W. Holmes (“Margaret”)¹⁶ entered an appearance on behalf of both Defendants. On March 31, 2017, Knizley filed a Notice of Appeal [172] on behalf of Charles. Subsequently, on April 3, 2017, Huntley requested that Notice of Appeal be dismissed without prejudice, as it was filed in error. The Court granted this request that same day. (See Order [174].)

On April 11, 2017, Huntley filed Charles’s First Motion for New Trial [175] and Charles’s Second Motion for New Trial [177]. That same day, Huntley filed a Notice of Appeal [180] on Charles’s behalf, despite knowledge that, under Federal Rule of Criminal Procedure 33, a pending appeal took away the Court’s authority to grant any motion for a new trial based on new evidence.

Also on April 11, 2017, Attorney Ursula K. Mitchell (“Mitchell”) entered an appearance on behalf of Linda, and Attorney Sharon Denotra Henderson (“Henderson”) entered an appearance on behalf of Charles. Mitchell then filed Linda’s First Motion for New Trial [178], while Henderson filed Charles’s Third Motion for New Trial [181]. That same day, Attorney McDuff filed a Notice of Appeal [182] on behalf of Linda, again despite knowledge that an appeal divested the Court of authority to grant the motions for a new trial previously filed on behalf of his client.

The Court issued an Order [183] on April 12, 2017, terminating all pending Motions for New Trial [175][177][178][181], finding that it did not have jurisdiction over the matters they involved. *See United States v. Hitchmon*, 602 F.2d 689, 692 (5th Cir. 1979) *superceded by statute*

¹⁶ Margaret is the daughter of the previously disqualified Holmes, and works at the Holmes Law Firm.

on other grounds as stated in United States v. Martinez, 763 F.2d 1297, 1308 (11th Cir. 1985) (citations omitted); *see also* Fed. R. Crim. 33(b)(1) (“If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case.”)

On April 21, 2017, Defendants filed their Motions to Seal [189][190],¹⁷ asking for leave to file certain confidential medical information under seal for purposes of forthcoming motions to stay the Defendants’ self-report dates. The Court entered its Order [191] granting these motions on April 24, 2017.¹⁸ Defendants’ Motions to Stay [198][199] were subsequently filed on April 26, 2017.

The Court learned on April 26, 2017, that Defendants had filed motions for bail pending appeal in the Fifth Circuit.¹⁹ These motions were procedurally incorrect, as motions for bail pending appeal must first be filed with the district court before they are brought to the appellate court, and no such motions were filed with this Court. *See* Fed. R. App. P. 9(b); *see also* *Jago v. U.S. Dist. Court, N. Dist. of Ohio*, 570 F.2d 618, 623 (6th Cir. 1978) (“Release pending an appeal must be first sought in the district court even after an appeal has been noted from the judgment of conviction.”). Because of the confusing motion practice of Defendants and because it was uncertain how to proceed on the Motions to Stay [198][199] given the motions for bail, the Court consulted with staff attorneys at the Fifth Circuit.

¹⁷ These motions were entitled “Motion to Stay Self-Report Date,” but the event chosen when filing these documents was “Motion to Seal.” The Court interpreted them, not as motions to seal, but as motions for leave to file under seal, as that was the relief asked for in the motions.

¹⁸ The Motions to Seal [189][190] were filed on a Friday, and the Court was unable to address them until the following Monday.

¹⁹ Also on April 26, 2017, adding to the confusion of the case, yet another attorney, William Walter (“Walter”), made an appearance on behalf of both Defendants. Three days later, on April 28, 2017, Mary Lee Holmes made an appearance on behalf of both Defendants as well.

It was ultimately decided that the best course of action was for the Court to request a remand pursuant to Federal Rule of Appellate Procedure 12.1(b),²⁰ in order to streamline the proceedings and to allow for factual findings to be made on the issues in all of the motions filed by Defendants. The Fifth Circuit panel issued a per curiam order remanding the case on April 27, 2017, divesting itself of jurisdiction and denying all pending motions before it as moot. (See Order of USCA [205].) The Court issued an Order [206] on April 27, 2017, reviving the Motions for New Trial [175][177][178][181] and setting briefing deadlines. Because of the remand, no appeal is currently pending in this case.

The Court denied the Motions to Stay [198][199] on May 1, 2017. That same day, Defendants filed their Motions for Bond [214][218]²¹ and asked for expedited consideration of these motions, which the Court denied. Linda surrendered to the custody of the BOP on May 2, 2017, and Charles surrendered on May 3, 2017.

Charles's Fourth Motion for New Trial [226] was filed on May 3, 2017, and Linda's Second Motion for New Trial [231] was filed on May 6, 2017.

The Court denied Defendants' Motions for Bond [214][218] on June 28, 2017. All of the Motions for New Trial [175][177][178][181][226][231] have been fully briefed and the Court is now ready to rule.

II. STANDARD OF REVIEW

All but one of the Motions for New Trial [175][177][178][181][226][231] are styled as motions to vacate or, in the alternative, for a new trial under Federal Rule of Criminal Procedure

²⁰ Federal Rule of Appellate Procedure 12.1(b) allows a district court to request remand in order to consider a motion that "raises a substantial issue."

²¹ Charles's Motion for Bond [218] was incorrectly filed as a motion for new trial, but it was styled as a motion for bond and that is how the Court analyzed it.

33(b) based on new evidence.²² The only avenue for a motion to vacate for a prisoner in federal custody is through a motion under 28 U.S.C. § 2255. Motions under § 2255 are collateral attacks on a federal conviction which may not be heard “until [the conviction] has been affirmed on direct appeal.” *Fassler v. United States*, 858 F.2d 1016, 1019 (5th Cir. 1988) (citing *Jones v. United States*, 453 F.2d 351, 352 (5th Cir. 1972)). Because Defendants’ convictions have not been affirmed on direct appeal, the only relief the Court can consider is under Rule 33(b) for a new trial based on new evidence.

“Motions for new trial based on newly discovered evidence are disfavored and reviewed with great caution.” *United States v. Wall*, 389 F.3d 457, 467 (5th Cir. 2004) (quoting *United States v. Erwin*, 277 F.3d 727, 731 (5th Cir. 2001)) (internal quotations omitted). There are five prerequisites, referred to as the “*Berry* rule,” that must be met for a new trial to be granted based on new evidence:

(1) the evidence is newly discovered and was unknown to the defendant at the time of trial; (2) the failure to detect the evidence was not due to a lack of diligence by the defendant; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence if introduced at a new trial would probably produce an acquittal.

Id.

As a preliminary matter, the Court would state that Defendants have failed to introduce any new evidence that satisfies the *Berry* rule, nor do they even attempt to argue that this standard is met.²³ Furthermore, many of Defendants’ arguments are duplicative of each other, and most contain flagrant misrepresentations of the record. Some of the allegations in Defendants’ motions

²² Charles’s First Motion for New Trial [175] is simply styled as a motion for new trial, without reference to the applicable rule of procedure.

²³ Though Defendants refer often to “new evidence” in their motions, they display an utter disregard to Fifth Circuit precedent as to what actually qualifies as “new evidence” under Rule 33(b).

even cross the thin line between flagrant misrepresentation and blatant lie.²⁴ At least three of these motions [175][178][181] should rightfully be stricken under Local Criminal Uniform Rule 47(E) for exceeding the page limit of such motions without obtaining leave from this Court. The only reason the Court has not done so is because it finds it necessary to address the misrepresentations contained in those motions in order to give clarity to any reviewing court, whether on direct appeal or collateral review.

III. CHARLES'S FIRST MOTION FOR NEW TRIAL [175]

Charles's First Motion for New Trial [175] raises only two issues: Owen's alleged conflict and Owen's deficiency as counsel for failure to call certain witnesses to the stand. These issues are addressed in more detail below, *see infra* IV. For the same reasons, this motion will be **denied**.

IV. CHARLES'S SECOND MOTION FOR NEW TRIAL [177]

A. Owen Conflict of Interest

Most of Charles's arguments stem from what he contends is a conflict of interest his attorney Owen had in his representation of Charles. Charles contends that this conflict arose because Owen's attorney fees were paid by John Lee, who he calls a "key Government witness." (See Charles's Second Motion for New Trial [177] at pp. 5-6.)

Before the Court addresses this alleged conflict, it must first point out this first lie by Defendants that is featured prominently throughout all the motions currently pending before the Court. Not only was John Lee *not* a "key Government witness," John Lee was never even a witness at trial and no subpoena to testify was ever enforced against him, as all parties were aware that he would only invoke the Fifth Amendment if called to the witness stand.²⁵ No testimonial

²⁴ The Court has not ruled out sanctions under its inherent powers for these falsehoods against the attorneys involved.

²⁵ Defendants were allowed and did in fact comment on John Lee's invocation of the Fifth Amendment.

statements²⁶ from John Lee were introduced at trial,²⁷ and the Court specifically ruled that any such statements would be inadmissible as hearsay in violation of both the Federal Rules of Evidence and the Sixth Amendment Confrontation Clause. (See Trial Transcript Vol. II [149] at 332:12-333:13.) With that point addressed, the Court moves to Owen's representation of Charles, beginning in August 2014.

Owen was first contacted regarding possibly representing Charles Bolton in August 2014, when Charles's brother, Terrell Bolton, called his office. (See Call List [276-2] at p. 1.) Owen met with Charles at his law office on September 3, 2014, to discuss Owen representing Charles, who was under investigation at the time for the theft of food from the Forrest County Sheriff's Office (the "FCSO") and the Adult and Youth Detention Center (the "Detention Center"). (See Owen Memo. in Response [277] at pp. 10-11.) Owen agreed to represent Charles in the food theft case and stated that he would further advise him on his fee structure. (See *id.* at p. 11.) Owen sent an email to Charles with the fee structure on October 24, 2014, stating that the fixed retainer fee for his representation was an initial \$75,000, and if an indictment were returned, an additional \$50,000 would be owed four weeks prior to trial or an additional \$10,000 would be owed if, four weeks before the trial date, it was apparent that there would be no trial.²⁸ (See Oct. 24 Email [276-5]; *see also* Owen Memo. in Response [277] at p. 12.)

On October 22, 2014, Charles informed Owen about a scheduled meeting with the U.S. Attorney's Office of the Southern District of Mississippi (the "Mississippi USAO") and directed

²⁶ John Lee's business records, which are non-testimonial in nature, were admitted into evidence by stipulation of parties.

²⁷ Including any statements John Lee made to investigators, which were included in the PSR and considered by the Court only at sentencing, as the hearsay rules and Confrontation Clause do not apply at sentencing.

²⁸ Owen's email represented that this was "significantly less" than what he typically charged. (See Oct. 24 Email [276-5].)

him to consult Dukes²⁹ about the meeting, which Owen did. (See Emails [276-4]; Owen Memo. in Response [277] at p. 11.) Owen and an associate with his office, along with Dukes, Holmes,³⁰ John Colette,³¹ and an associate from Dukes's office, attended this meeting with the Mississippi USAO on October 27, 2014. (See Owen Memo. in Response [277] at pp. 12-13.) During this meeting, the Mississippi USAO "presented an abbreviated, but fairly detailed version of the facts supporting the Government's claim" against the Defendants in the food theft case, which had "zero connection to John Lee." (*Id.* at p. 13; *see also* Ballard Affidavit [276-16] at ¶ 5.) Charles has not claimed at any time that John Lee had an interest in the food theft case.

The Mississippi USAO contacted all attorneys after this meeting seeking clarification on the representation of Charles, as Dukes could not represent Charles because of conflicts with his representation of the FCSO and the Detention Center. (See Oct. 27 Letter [276-6].) On October 19, 2014, the Mississippi USAO transmitted a plea offer to Owen, which was communicated to Charles and ultimately turned down. (See Plea Email [276-14]; Jan. 9 Email [276-15].)

On November 3, 2014, Charles called Owen and advised that he had made arrangements to pay his retainer fee. (See Owen Memo. in Response [277] at p. 14; Nov. 3 Call List [276-7].) On November 5, 2014, Charles, accompanied by no other person, met with Owen at his law office and presented him with three checks totaling \$60,000. (See Owen Memo. in Response [277] at pp. 14-15; Nov. 5 Calendar [276-8]; Ballard Affidavit [276-16] at ¶ 3.) One of these checks was from Nicholson³² in the amount of \$25,000 and dated November 3, 2014, one was from John Lee

²⁹ Dukes is the disqualifying counsel for Linda in this case, and Owen was uncertain as to Dukes's connection to the food theft case at the time.

³⁰ Holmes is also a disqualifying counsel for Linda in this case, and his involvement with the food theft case remains unclear.

³¹ John Colette is a criminal defense attorney well-known to the Court, and was previously involved in this case on behalf of Holmes and Dukes after the Government moved to disqualify them.

³² Nicholson states in his Affidavit [177-3] that this money was given to him by John Lee because "he did not want his office manager to know all of his personal activities." (Nicholson Affidavit [177-3] at p. 2.)

in the amount of \$25,000 and dated November 5, 2014, and one was from Southern Neurologic & Spinal Institute for \$10,000 and dated October 31, 2014. (*See Checks [276-9]; see also Checks [177-3][181-3].*) Charles told Owen “that he obtained loans from friends and had the checks made payable to Owen” and that “he would make arrangements to obtain the additional \$15,000.00 payment in due course.”³³ (Owen Memo. in Response [277] at p. 15.) At no point before or after November 5, 2014, did Owen or any member of his firm “meet with, converse with or have any contact with John Lee concerning the money Charles Bolton borrowed from John Lee or about the food theft case.” (*Id.* at p. 16; *see also* Ballard Affidavit [276-16] at ¶ 4.) Charles has not alleged any specific contact between John Lee and Owen. Rather he relies on statements that “John Lee made payments to Attorney Owen for attorney fees with funds controlled by Lee” without mentioning that these payments were made *through* Charles himself,³⁴ who personally delivered the checks to Owen’s law office and who represented that they were “loans from friends.” (Charles’s Second Motion for New Trial [177] at p. 6; Owen Memo. in Response [277] at p. 15.)

Owen transmitted Charles’s denial of the plea offer on January 9, 2015. (*See* Jan. 9 Email [276-16].) To the Court’s knowledge, no further activity has occurred in the food theft case and no indictment was ever filed against Charles or Linda.

Owen was first given notice of the Indictment [1][2] in this case on March 23, 2016,³⁵ the day after it was filed. (*See* Owen Memo. in Response [277] at p. 17.) Neither Charles nor Owen knew about the tax investigation or indictment until this time. (*See id.* at p. 18.) The tax indictment was filed by the U.S. Attorney’s Office for the Eastern District of Louisiana (the “Louisiana

³³ The remaining portion of the retainer fee was never paid to Owen. (*See* Owen Memo. in Response [277] at p. 18.)

³⁴ Charles does not dispute that he gave the checks to Owen himself.

³⁵ At the time, Charles was involved in a civil trial before this Court, of which Owen had no knowledge and in which Owen was not involved.

USAO") and was unrelated to the potential charges in the food theft case. (See Owen Memo. in Response [277] at p. 19; *see also* Indictment [1][2].)

Owen took up the representation of Charles in this case under the same fee structure as he previously detailed and, because no indictment was filed in the food theft case and as a gesture of good will, gave Charles credit for the fees already paid in the previous case and only charged a fee of \$65,000 for his representation in the tax case, plus expenses.³⁶ (See Owen Memo. in Response [277] at p. 19; *see also* Ballard Affidavit [276-16] at ¶ 3.) Of this \$65,000 fee, only \$35,000 was paid: \$2,500 from Charles Bolton on April 21, 2016, \$2,500 from C. T. Finnegan/Bolton on April 21, 2016, \$5,000 from Frazier Bolton on June 14, 2016, and \$25,000 from Linda Bolton on August 29, 2016. (See Client Settlement Trust Report [276-10].) With litigation expenses totaling \$38,000 in relation to the tax case, Charles still owes Owen and his firm approximately \$58,000 in fees and expenses. (See Owen Memo. in Response [277] at p. 19; Ballard Affidavit [276-16] at ¶ 3.)

With this history of Owen's representation of Charles and his fee arrangement before it, and with no allegation of any actual contact between Owen and John Lee, the Court can find with certainty that Owen had no conflict of interest in this case based on any payment made by John Lee for Charles's legal fees.

Even assuming *arguendo* that such a conflict did exist, the Court is at a loss as to how this could possibly be new evidence to qualify for a new trial under Rule 33(b). Although he never raised the issue with the Court until he filed his First Motion for New Trial [175],³⁷ Charles knew

³⁶ Owen stresses that he was in no way obligated to give Charles this credit and that it was a "gratuitous benefit." (See Owen Memo. in Response [277] at p. 19.)

³⁷ Owen himself brought the allegations of a conflict to the Court's attention in his Motion to Deem the Attorney-Client Privilege Waived [151]. Charles has *never* raised the issue of his own initiative until the subject motions were filed.

that he borrowed money from John Lee to pay his legal fees in 2014 for the food theft case *when he gave the check from John Lee to Owen in 2014*. So the evidence was not unknown to him as required by the first prong of the *Berry* rule, and cannot be the basis for a new trial under Rule 33(b). *See Wall*, 389 F.3d 467. The Court will **deny** his motion under his conflict argument.

B. Ineffective Assistance of Counsel

Charles argues that, because Owen had a conflict of interest due to John Lee's payment of his legal fees, he provided ineffective assistance of counsel. This argument unravels with the Court's determination that Owen had no such conflict of interest. The Court would also be remiss if it did not comment on the irony of this claim, as Owen's representation was so effective that he was able to negotiate a plea bargain with the Government on Charles's behalf, which would have significantly reduced his sentencing guideline range and put probation potentially within his reach. (*See* Galloway Affidavit [276-1] at ¶ 7.) Because Owen could not guarantee probation, however, Charles turned this offer down, as was his right. (*See id.*)

Furthermore, the Fifth Circuit has held that "a Rule 33 motion . . . premised on 'newly discovered evidence,' is an improper vehicle for raising a claim of ineffective assistance of counsel." *United States v. Medina*, 118 F.3d 371 (5th Cir. 1997) (per curiam) (citing *United States v. Ugalde*, 861 F.2d 802, 807-09 (5th Cir. 1988)). In *Ugalde*, the Fifth Circuit reasoned that allowing such claims under Rule 33 would "greatly expand the opportunities to make a late request for a new trial" and noted that "defendants prejudiced by ineffective assistance of counsel" already have a "ready remedy" in 28 U.S.C. § 2255. 861 F.2d at 809. Therefore, the Court must **deny** his motion under this argument.

Even if Charles *could* bring an ineffective assistance of counsel claim under a Rule 33(b) motion for new trial based on new evidence, he has woefully failed to bring a meritorious claim.

All of Charles's arguments are based on misrepresentations of the record, an almost willful misunderstanding of the law, or a combination of both.

The standard for ineffective assistance of counsel claims is found in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). The *Strickland* test requires that two prongs be met before assistance of counsel is found to be deficient. *Id.* at 687. First, counsel's performance must be shown to be deficient. *Id.* “To establish deficient performance, a petitioner must demonstrate that counsel's representation ‘fell below an objective standard of reasonableness’” as established by “prevailing professional norms.” *Wiggins v. Smith*, 538 U.S. 510, 521, 123 S. Ct. 2527, 156 L.Ed.2d 471 (2003) (quoting *Strickland*, 466 U.S. at 688, 104 S. Ct. 2052). Such scrutiny of counsel's performance is “highly deferential.” *Strickland*, 466 U.S. at 689, 104 S. Ct. 2052. Second, counsel's performance must have prejudiced the defendant. *Id.* at 687. To establish prejudice, a “defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694, 104 S. Ct. 2052.

1. Failure to Request a *Garcia* Hearing

A *Garcia* hearing is typically held when “a defendant chooses to proceed with representation by counsel who has a conflict of interest” in order for the district court “to ensure a valid waiver by the defendant of his Sixth Amendment right.” *United States v. Garcia-Jasso*, 472 F.3d 239, 243 (5th Cir. 2006) (citations omitted). A *Garcia* hearing is only necessary “if there is an actual conflict of interest.” *Id.* (quoting *United States v. Carpenter*, 769 F.2d 258, 263 (5th Cir. 1985)).

The Court only became aware of a potential conflict of interest when Owen filed his Motion to Deem the Attorney-Client Privilege Waived [151], in which Owen represented that he only a

few days prior had any notification that Charles was alleging that he, Owen, had a conflict of interest in this case. After the in camera hearing held on March 17, 2017, the Court was not convinced that an actual conflict existed, and after the extensive briefing on the current motions, it is still not convinced that any actual conflict exists. *See supra*, IV.A. The Court does not find Owen's performance here deficient as there was no actual conflict mandating a *Garcia* hearing and, even if there were, Owen brought it to the Court's attention as soon as he learned about the allegation of a conflict.

2. Failure to Call Nicholson

Charles claims Owen's performance was deficient in failing to call Nicholson as a witness in his defense. To establish Owen was ineffective based on his failure to call a witness, Charles "must name the witness, demonstrate that the witness was available to testify and would have done so, set out the content of the witness's proposed testimony, and show that the testimony would have been favorable to a particular defense." *Day v. Quartermann*, 566 F.3d 527, 538 (5th Cir. 2009) (citing *Bray v. Quartermann*, 265 F.App'x 296, 298 (5th Cir. 2008)). Charles has failed to set out what Nicholson would have testified to at trial³⁸ or that such testimony would have been favorable to him. Furthermore, "the initial defense strategy of Owen, Galloway and OGM was to aggressively challenge Nicholson & Co., particularly Carl Nicholson" and to "lay the blame for the indictment at the feet of Nicholson," a strategy to which Charles objected. (Owen Memo. in Response [277] at p. 10.) Moreover, Owen was of the opinion that Nicholson "may be considered by the Government as a possible co-conspirator" and "would be subjected to grueling cross examination" if called. (*Id.* at p. 22.) Owen also states that "[t]here were other secondary factors

³⁸ Though Nicholson states in his affidavit that he would have testified at trial, despite having pleaded the Fifth Amendment when he testified before the Grand Jury in connection with John Lee, he at no point details what his testimony would have been. (*See* Nicholson Affidavit [177-3].)

that play[ed] into a decision to call Carl Nicholson, such as credibility, reputation in the community and any prior arrest/convictions,”³⁹ and that it “would have been imprudent to call Nicholson as a witness” even “[a]side from the very important fact Nicholson would have invoked protection from self-incrimination under the Fifth Amendment,” as he “would have encountered damaging cross examination on several issues.” (*Id.* at p. 23.) As such, the Court does not find that Owen was deficient in his performance for failing to call Nicholson as a witness.

3. Failure to Object to Lee’s Attorney’s Participation at Trial

Charles claims that Owen’s representation was deficient for not objecting to the participation of John Lee’s attorney at trial. This argument is based on the assertion that John Lee’s attorney participated at trial, an assertion which is patently false. The only proceeding in which John Lee’s attorney participated was John Lee’s own third-party Motion to Quash Trial Subpoena and Rule 17 Subpoena [84], which the Court heard before trial began and to which Owen could not have raised any meritorious objection. Therefore, Owen’s representation was not ineffective under this argument.

4. Failure to Refute Lee’s Checks as Income

Charles argues that Owen’s performance was deficient because he failed to call witnesses and offer testimony to refute the claim that John Lee’s checks were income to the Defendants. Charles also claims that sales records from a different liquor store, 27th Avenue Liquor Store, should have been introduced at trial to show John Lee’s alcohol purchases were not from the Defendants’ liquor store, Hall’s Avenue Package Store. Because Charles’s second argument is

³⁹ Though Owen does not elaborate on Nicholson’s prior arrests and convictions, the Court is well-aware of Nicholson’s criminal history, including his arrests for disorderly conduct, public drunkenness, and public profanity, as well as his plea of guilty on the disorderly conduct charge. The Court is also aware that these arrests were highly publicized in the Hattiesburg area. *See Nicholson v. Garmon, et al.*, Civ. Action No. 2:16-CV-152-KS-MTP, Docket No. 21 (S.D. Miss. Oct. 7, 2016).

contrary to actual fact, as the records of 27th Avenue Liquor Store *were* entered into evidence at trial, (*see* Exhibit DC-76 [184-76]), the Court analyzes only his first argument as to witnesses not called.

As previously stated, to succeed on such a claim, Charles “must name the witness, demonstrate that the witness was available to testify and would have done so, set out the content of the witness’s proposed testimony, and show that the testimony would have been favorable to a particular defense.” *Day*, 566 F.3d at 538 (citing *Bray*, 265 F.App’x at 298). The only witness named by Charles is Maggie Hancock, who was an employee of Defendants’ restaurant and who in her affidavit states that she was available to testify and would have testified that, during her employment, she “never catered a party or event whatsoever for John Lee, P.A. at his office or his residence.”⁴⁰ (Hancock Affidavit [177-10] at ¶ 6.) The Court assumes Charles’s argument is that this testimony would have been favorable to his defense that the John Lee checks were not income.⁴¹

Owen, on Charles’s behalf, has three times argued that the John Lee checks were not proven to be income to the Defendants at trial—first at trial, (*see* Trial Transcript [150] at 405:18-413:24, 506:16-510:15.), second in his Motion for New Trial [118] and third in his Joinder [140] to Linda’s Renewed Motion for New Trial Based on New Information [128]. The Court has three times rejected this argument, finding that the Government had presented sufficient evidence that these checks were income to Defendants, and has twice ruled that even if Defendants had

⁴⁰ Ms. Hancock does not purport to have any knowledge as to whether John Lee purchased alcohol from Hall Avenue Package Store.

⁴¹ The Court does not understand the insistence of Defendants in continually advancing this defense as, under their arguments, they contend that the John Lee checks were not income to them but rather part of a scheme in which they aided John Lee in evading taxes by cashing checks made out to their businesses and returning the money to him. Such a scheme, however, would also be criminal in nature, meaning Defendants are attempting to defend one crime by arguing that they committed a different crime.

completely succeeded in showing that the John Lee checks were not income, there was still sufficient evidence of unreported income to support their convictions. (*See* Trial Transcript [150] at 416:5-421:8; Order [127] at p. 3; Order [145] at pp. 3-4.) To reiterate the argument here in his Second Motion for New Trial [177] is yet another futile attempt by Charles to misrepresent the evidence which was brought against him at trial. Besides the fact that the Government produced sufficient evidence at trial to show that the John Lee checks were income, (*see* Trial Transcript [150] at 416:5-421:8), the Government has also produced checks, claimed as loans by Defendants, written to either Sports 22 Restaurant or Hall Avenue Package Store by Manheim Mississippi Auto Action, the Mississippi Air National Guard, Forrest General Hospital, Linda's former attorneys, Holmes and Dukes, and, incredibly, a Sports 22 customer, who wrote a check for \$8.75 to pay for a fish dinner, which were undoubtedly shown to be income. (*See* Trial Transcript [148] at 106:12-107:23; Exhibit G-75 [188-75]; Exhibit G-78 [188-78]; Exhibit G-80 [188-80]; Exhibit G-82 [188-80]; Exhibit G-84 [188-84].)

Because Owen did in fact argue and present evidence that John Lee's checks were not income and because, even if he had failed to do so, this defense would have proven ultimately ineffective, the Court cannot find that his performance was deficient under this argument.

5. Failure to Present Alternate Theories

Charles argues that Owen should have presented alternate defense theories. In addition to the already-discussed theory that John Lee's checks were not income, Charles contends that Owen should have advanced a theory that "loaning capital back to the business as loans (as was the case with Charles and Linda Bolton) is not a crime under the income tax evasion and filing a false tax return statutes," citing *Boulware v. United States*, 552 U.S. 421, 128 S. Ct. 1168, 170 L.Ed.2d 34 (2008), in support of this defense.

First of all, this argument is in no way supported by the Supreme Court's decision in *Boulware*. That case dealt with allegedly unreported income to the defendant from a corporation to which he was a shareholder, and the defendant argued that the alleged income was actually a return of capital, and not a dividend as the government contended. *Boulware*, 552 U.S. at 426-28, 128 S. Ct. 1168. *Boulware* does not in any way make any comment on the tax treatment or criminal tax liability of capital contributions, as the Defendants contend the checks marked as loans in this case were. Rather, *Boulware* dispenses with the rule that "a criminal defendant may not treat a distribution as a return of capital without evidence of a corresponding contemporaneous intent" on the part of the corporation. 552 U.S. at 430-31, 128 S. Ct. 1168. This has no impact on Defendants' case, however, as they do not claim that any of the unreported income is a return of capital.

Defendants do, however, argue that the checks marked as loans were "capital contributions" that were exempt from taxation. This is yet another misunderstanding of the law on Defendants' part. Contributions of capital are exempt from income of a *corporation* under 26 U.S.C. § 118. Neither Sports 22 Restaurant nor Hall Avenue Package Store is a corporation, however, but rather both are Schedule C businesses claimed on Defendants' joint individual tax returns. Defendants have pointed to no section of the tax code to exempt capital contributions from the income of Schedule C businesses.⁴²

Furthermore, even if Schedule C businesses could exempt capital contributions from their income, there are certain requirements of capital contributions given by non-owners, which would be the case here as the checks marked as "loans" were written, not by either Charles or Linda, but by third-parties. To be a capital contribution by a non-owner:

⁴² The equivalent to capital contributions to Schedule C businesses would be loans from either the owners of the business or from third parties, which would not generally be considered taxable income.

[1] It certainly must become a permanent part of the transferee's working capital structure. [2] It may not be compensation, such as a direct payment for a specific, quantifiable service provided for the transferor by the transferee. [3] It must be bargained for. [4] The asset transferred foreseeably must result in benefit to the transferee in an amount commensurate with its value. [5] And the asset ordinarily, if not always, will be employed in or contribute to the production of additional income and its value assured in that respect.

AT&T, Inc. v. United States, 629 F.3d 505, 513 (5th Cir. 2011) (quoting *United States v. Chicago, B. & Q. R. Co.*, 412 U.S. 401, 413, 93 S. Ct. 2169, 37 L.Ed.2d 30 (1973)). The unreported income in this case fails to meet the second requirement to be a capital contribution, as these checks marked as loans were shown to be compensation for goods and services of Sports 22 Restaurant and Hall Avenue Package Store.

Finally, despite all the legal reasons why Defendants' claim that these checks were capital contributions fail, the Court must point out that Owen did in fact put forward the argument that these checks were capital contributions. (See, e.g., Trial Transcript [150] at 529:9-530:5; 510:22-511:8.) Owen fully admits that this defense was not presented fully because "the testimony of Linda Bolton was crucial" to it because "Charles claimed he had no knowledge of the deposits marked as loan and was not aware that Linda marked deposits as a loan until after the tax indictment." (Owen Memo. in Response [277] at p. 39.) Linda, who was not Owen's client, exercised her Fifth Amendment right not to testify at trial, despite Owen "implor[ing] Charles Bolton to intervene," which he refused to do. (*Id.*) Since the beginning of this case, Owen had been "emphatic in [his] position that only four people had specific knowledge of these events and only four people could provide the jury with the guidance the jury would need: (1) Charles Bolton; (2) Linda Bolton; (3) John Lee; (4) Nicholson & Co." (Sept. 20 Letter [276-20] at p. 3.) John Lee invoked the Fifth Amendment, and Owen believed that testimony from Nicholson would be damaging to Charles's case. (See Memo. in Response [277] pp. 22-23.) The only remaining

witnesses would have been Charles and Linda themselves, who both opted to not testify over Owen's advice, as was their right under the Fifth Amendment.⁴³

The Court can find no fault with Owen's representation on this theory, as it was advanced despite being hindered by Defendants' decisions to not testify, decisions which went against Owen's counsel.⁴⁴

6. Failure to Object to Sixth Amendment Violation

Charles claims that Owen was deficient for not objecting to the violation of his rights under the Confrontation Clause of the Sixth Amendment by the admission of John Lee's out-of-court statements at trial.

This argument is based on testimony concerning out-of-court statements made by John Lee to Agent Luker, to which Owen did, in fact, object. (See Trial Transcript Vol. II [149] at 329:8-330:12.) Furthermore, the Court ruled specifically and in detail that the hearsay rules barred such testimony from Agent Luker. (See *id.* at 332:12-333:13.) On cross-examination, Agent Luker stated that the John Lee checks were written for food and liquor and were claimed on John Lee PA's tax return as business supplies. (See *id.* at 348:12-349:6.) At trial, all parties agreed that this information was available in John Lee's ledger and check registers, which were admitted by parties' stipulation and, insofar as they may have contained hearsay, were subject to the business records exception of Federal Rule of Evidence 803(6). (See *id.* at 345:17-348:6.) As a general

⁴³ Defendants may have had a remote possibility of succeeding on this defense if Linda or Charles would have testified that they relied in good faith on what they mistakenly believed to be the law. *See generally Cheek v. United States*, 498 U.S. 192, 111 S. Ct. 604, 112 L.Ed.2d 617 (holding that whether an objectively unreasonable belief that a taxpayer had no legal duty under the tax law negated the willfulness element of tax evasion was a question for the jury).

⁴⁴ Owen counseled that both Defendants should testify, but when Linda refused, he advised Charles on "the implications of testifying and not testifying" and "conducted several direct and cross-examination simulations before and during trial," during which it was apparent that Charles could not give "a clear explanation regarding Mr. John Lee's cashed checks" and that he "would equivocate regarding the reasons for the cashed checks" if put on the stand. (Galloway Affidavit [276-11] at ¶ 5-6; *see also* Ballard Affidavit [276-16] at ¶ 14-15; Blum Affidavit [276-22] at ¶ 3; Rhodes Affidavit [276-21] at ¶ 4.)

rule, “business records are not testimonial in nature and their admission at trial is not a violation of the Confrontation Clause.” *United States v. Jackson*, 636 F.3d 687, 692 (5th Cir. 2011) (quoting *United States v. Morgan*, 505 F.3d 332, 339 (5th Cir. 2007)). Owen’s representation was not deficient under this argument.

7. Failure to Object to *Brady* Violations

Charles contends that Owen provided ineffective assistance of counsel for his failure to object to certain *Brady* violations by the Government. Specifically, Charles argues that the Government violated *Brady* by not disclosing the statements of John Lee from an interview investigators had with him and the alleged late disclosure of the Government’s summary charts and photographs.

The Court has already ruled in detail that the non-disclosure of John Lee’s statements from his interview with investigators was not a *Brady* violation, as those statements were not favorable to the Defendants as required by *Brady*. (See Order [145] at pp. 2-4.) The Court cannot find Owen’s performance as counsel deficient in some way for failing to object to a non-violation, particularly when he did, in fact, object by joining Linda’s Renewed Motion for New Trial [128], which argued unconvincingly that this was a violation of *Brady*.

As for Charles contention that the late disclosure of certain summary charts and photographs introduced by the Government was a *Brady* violation, this argument has absolutely no merit. The summary charts were produced by the Government in April 2016 and supplemented before trial, and the photographs were stipulated to by all parties. A *Brady* violation “occurs when the [Government] fails to disclose evidence materially favorable to the accused.” *Banks v. Thaler*, 583 F.3d 295, 310 (5th Cir. 2009) (quoting *Youngblood v. West Virginia*, 547 U.S. 867, 869, 126 S. Ct. 2188, 165 L.Ed.2d 269 (2006)). Even if the summary charts and photographs were untimely

disclosed, a contention for which the Court finds no evidence, they were still undoubtedly disclosed and cannot be the basis for a *Brady* violation, particularly when they are not materially favorable to Defendants. The Court therefore does not find Charles's argument against Owen persuasive here.

8. Failure to Object to Government's "False Tax Deficient [sic]"

Charles argues that Owen was ineffective because he failed to object to the Government's "false tax deficient [sic]," but he gives absolutely no support to his allegation that the Government presented "false tax deficient [sic] calculations that the Prosecution Knew [sic] were False [sic]." (Second Motion for New Trial [177] at p. 26) (emphasis omitted). There is nothing in the record but Charles's baseless allegation that the Government's tax deficiency calculations were erroneous, and the Court will not find Owen deficient on such an argument.

9. Failure to Research Tax Law

Charles offers two arguments here. First, he states that all the claims against him were barred because the six-year statute of limitations for criminal tax evasion only applies when the gross income omitted exceeded 25 percent of the gross income claimed and because they submitted their records along with their returns documenting their "loans." This is a false statement of the law. The provision cited by Charles, 26 U.S.C. § 6501, deals only with assessment and collection of taxes owed, *not* criminal prosecutions for attempted tax evasion. Additionally, the statute explicitly allows for the collection of past due taxes "at any time" in a case of a "willful attempt to evade tax," as Charles was convicted of here. 26 U.S.C. § 6501(c)(2). The Court cannot say that Owen was deficient in his performance because he failed to willfully misinterpret the law as Charles does in his motion.

Next, Charles argues that Owen was ineffective because he failed to argue against the inclusion of tax year 2009. This argument is premised on the lie that Agent Luker testified that there was no tax deficiency in 2009 and all income tax was properly paid. Agent Luker never offered such testimony. Agent Luker testified that, although he did not include the loans in calculating Defendants' income in 2009 because they were properly reported, he did find that, while Defendants had claimed \$31,179 in Schedule C income on their 2009 tax return, the correct amount was \$99,379, and that their total income, reported as \$79,620, should have been \$143,135.10, giving them a tax deficiency of \$25,430.13. (*See* Trial Transcript [149] at 279:2-280:5.) The Court will not find Owen ineffective for not making the baseless argument that Agent Luker testified that there was no tax deficiency for 2009 when Agent Luker specifically testified that there *was* a tax deficiency for 2009.

10. Failure to Raise 2010 Audit

Charles contends that Owen's representation was ineffective because he did not argue that the charges dealing with the 2010 tax year were barred because Defendants had been audited that year. This audit was based on gambling winnings that were unreported by Charles in 2010 and was explained in detail by Agent Luker at trial, who also explained the divide between the civil and criminal divisions of the IRS. (*See* Trial Transcript [149] at 309:1-23.) Even had Owen offered the argument Charles proposes, the Court would not have found it meritorious, as nothing in the law states that an audit forecloses a later criminal tax investigation.

11. Failure to Offer Expert Witness

Charles claims Owen was ineffective because he failed to offer an expert witness to testify. As for any failure to call a witness claim for ineffective assistance of counsel, Charles "must name the witness, demonstrate that the witness was available to testify and would have done so, set out

the content of the witness's proposed testimony, and show that the testimony would have been favorable to a particular defense." *Day*, 566 F.3d at 538 (citing *Bray*, 265 F.App'x at 298). The only expert witness Charles identifies that he claims Owen could have called is Phil Hull. However, the only proposed testimony of Hull is his expert opinion as to the legal sufficiency of the Government's case. (See Hull Affidavit [177-8].) These opinions would have been inadmissible legal conclusions at trial. *See United States v. Izydore*, 167 F.3d 213, 218 (5th Cir. 1999) (citing *Owen v. Kerr-McGee Corp.*, 698 F.2d 236, 240 (5th Cir. 1983)) (finding that Federal Rule of Evidence 704(a) "does not allow a witness to give legal conclusions"). The Court will not find Owen to have been ineffective for failing to offer inadmissible testimony.

12. Failure to Challenge Blind Jury Strikes

Charles argues that Owen's assistance was ineffective because he did not object to what Charles calls an "unconventional juror selection process." (Second Motion for New Trial [177] at p. 71.) Charles further alleges that the Court's method of utilizing blind strikes in jury selection "did not meet the provisions under the law to allow sufficient basis to overcome *Bastson* challenges." (*Id.*) The Court assumes Charles is referring to *Batson* challenges, which allows defendants to object to the exclusion of jurors based solely on their race. This argument is based on a fundamental misunderstanding of the jury selection process utilized by this Court and, as none of the attorneys who filed the current motions were actually present during the jury selection process, is likely premised on Attorney Ross's initial misunderstanding of the process.⁴⁵

Far from being "unconventional," the undersigned implemented the same method of jury selection as he does in any jury trial. The strikes made by both parties were not "blind" in that the

⁴⁵ Ross was the attorney of record for Linda when the Court relayed the jury selection process to all parties during the pre-trial conference.

identities of the jurors stricken by each side were not made known to all parties once they were made. They were “blind” in the sense that all parties presented their strikes simultaneously, without knowing who the other side was striking. Defendants knew who the Government struck and were given the opportunity to pursue any *Batson* challenge. “The method employed to select juries is committed to the sound discretion of the trial judge.” *United States v. Durham*, 587 F.2d 799, 801 (5th Cir. 1979). Owen was not ineffective in his performance for failing to object to this method the Court chose to employ as any objection would have been meritless.

13. Failure to Object to Duplicative Charges

Charles argues that Owen should have moved to dismiss the indictment because it impermissibly charged him with duplicative charges. Specifically, Charles claims that Counts 6-10 for violations of 26 U.S.C. § 7206(1) are lesser included charges of Counts 1-5 for violations of 26 U.S.C. § 7201. In support of this, Charles cites case law from multiple courts dealing with § 7201 and § 7203, which is not one of the statutes at issue in this case. Case law involving the correct statutes, § 7201 and § 7206(1), explicitly allows for charges to be brought under both.

A defendant can be guilty of violating section 7201 without violating section 7206(1) and vice versa because the elements of the offenses are not identical. However, in any particular case, section 7206(1) may not be a lesser included offense within section 7201 because, on the proof offered, the factual elements may be identical.

United States v. Bender, 606 F.2d 897, 898 (9th Cir. 1979), *cited with approval by United States v. Barrilleaux*, 746 F.2d 254, 255 (5th Cir. 1984). Because Charles is wrong in his belief that § 7206(1) is a lesser included charge of § 7201, the Court does not find Owen’s performance defective under this argument.

C. Sentencing

Charles raises numerous arguments dealing with his sentencing hearing, none of which could fairly be classified as based on “new evidence” under the *Berry* rule. The Court will address each of them in turn.

1. Counsel of Choice

Charles argues that the Court denied him his counsel of choice when it forced him to go forward with the sentencing with Owen as his attorney. This is a gross misrepresentation on Charles’s part. The truth of the matter is that Charles, on the date of his sentencing and without giving any notice to the Court that Owen had a potential conflict,⁴⁶ appeared before this Court with no attorney present and duly admitted to practice before this Court, in a blatant attempt to force the Court to continue the sentencing hearing. His attorney of choice, Huntley, had been hired a week prior to the sentencing, (*see* Owen Memo. in Response [277] at p. 8; Galloway Affidavit [276-11] at ¶ 9), but had failed to enter a motion to appear *pro hoc vice*, in what the Court can only assume was a calculated tactic aimed at a continuance. The Court cannot and will not allow a convicted defendant to force a continuance of his sentencing hearing because he willfully appears without an attorney. If it did, every convicted defendant would attempt to delay sentencing with the same type of tactic.

Faced with this situation, the Court offered Charles the choice of going forward with the sentencing with Owen as his attorney or utilizing the Federal Public Defender’s Office, who, thanks solely to Owen’s notification to the Court, had been advised of the situation and was present, willing, and ready to represent Charles if he so chose. Additionally, in an abundance of

⁴⁶ The only notice the Court had was from Owen himself when he filed his Motion to Deem the Attorney-Client Privilege Waived [151].

caution, the Court allowed Huntley to unofficially represent Charles at the sentencing. The Court did everything within its power to ensure that Charles was fairly represented at his sentencing hearing, despite his deceitful delay tactics.

2. Owen's Failure to Respond to PSR and Addendum

Charles contends that Owen failed to submit a sentencing memorandum in response to the PSR. However, Owen did in fact submit objections to the PSR, and argued them before the Court during the sentencing hearing. The Court is unsure what other “sentencing memorandum” Charles believes Owen should have submitted.

Charles also argues that Owen should have objected to the Addendum, but does not state what the objection should have been. The Addendum to the PSR only included penalties and interest, which Owen advised Charles at the time the original PSR was submitted that he could face. (*See* Owen Memo. in Response [277] at p. 34.) Nothing about Owen’s performance was deficient here.

3. Owen’s “Derogatory Statements with Connotations of Violence”

Charles claims that Owen made “derogatory statements with connotations of violence to Chief Deputy Bolton” during the in camera hearing held prior to the sentencing hearing. (*See* Second Motion for New Trial [177] at p. 36.) The Court addresses this allegation specifically, not because it has any merit, but because it shows the absurd inaccuracy apparent throughout his motions. The “derogatory statements” referred to by Charles are Owen’s colloquial statements that Charles “shot himself in the foot” by manufacturing a conflict of interest in Owen’s representation because Owen was doing everything in his power to assist Charles in reducing his sentence. (In Camera Transcript Excerpt [177-24] at 35:23-24.) To further illustrate his point, Owen continued his analogy by saying that Charles went a step further than the common idiom

because he “blew off both legs” instead of merely shooting himself in the foot. (*Id.*) To charge Owen with making “derogatory statements with connotations of violence” through the use of these banal rhetorical phrases is a gross mischaracterization of the actual events.

4. Owen’s Failure to Call McGee as Character Witness

Charles argues that Owen was ineffective at sentencing because he failed to call Sheriff Billy McGee as a character witness at the sentencing. The testimony McGee says he would have given if called as a witness at sentencing is substantially the same as the statements contained in his letter to the Court on behalf of Defendants prior to sentencing, which was duly considered by the Court. (*See McGee Affidavit [177-32].*) To introduce him as a character witness at the hearing would have been redundant and would have not impacted the sentence imposed by the Court.

5. Owen’s Failure to Object to *Booker* Violations

Charles argues that his sentence, which was an upward variance from the sentencing guidelines, violated *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L.Ed.2d 621 (2005), and Owen was ineffective at sentencing for not making an objection under *Booker*. This argument once again is premised on Charles’s incorrect reading of the law.

Booker held that the federal sentencing guidelines were advisory, requiring “a sentencing court to consider Guidelines ranges” but permitting it “to tailor the sentence in light of other statutory concerns as well.” 543 U.S. at 245, 125 S. Ct. 738. In *Booker*, the sentencing guideline range was greater than the sentence “authorized by the jury verdict alone.” *Id.* at 230. The Court quoted its previous ruling in *Apprendi v. New Jersey*, which set aside an enhanced sentence reasoning that, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury.” *Id.* at 231 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000)).

In this case, each conviction under 26 U.S.C. § 7201 allowed for a sentence of up to five years under the statutory provisions, and each conviction under § 7206(1) allowed for a sentence of up to three years. There is no statutory requirement under either § 7201 or § 7206(1) for these sentences to run concurrently. Charles was sentenced to 33 months, or 2.75 years, for his convictions under § 7201, and 12 months, or one year, for his convictions under § 7206(1), both of which are well within the statutory limits. (See Judgment [165] at p. 2.) As such, this argument is meritless, and Owen cannot be deficient for failing to make a meritless argument.

D. “Attorney-to-attorney Conflict”

An “attorney-to-attorney conflict” is, to the Court’s best knowledge,⁴⁷ a fictitious legal concept presented by Charles in the current motion and in his Third Motion for New Trial [181], and by Linda in her First Motion for New Trial [178]. (See, e.g., Charles’s Second Motion for New Trial [177] at p. 71.) Under this fabricated issue, Charles and Linda claim that they were both prejudiced by the disagreement of their attorneys and are therefore entitled to a new trial.

First and foremost, this is not new evidence under the *Berry* rule, as the disagreement between their attorneys was known or should have been known to Defendants, evidence of this disagreement is not material because it would not have made it to a jury, and it would not have probably resulted in an acquittal if presented at trial. *See Wall*, 389 F.3d at 467. Second, if an “attorney-to-attorney conflict” rule were to exist, such a conflict would exist in every case involving multiple co-defendants with adverse interests where lawyers advocated for their clients’ respective interests over their co-defendants. Because such advocacy is *encouraged*, there is a strong policy rationale behind the rejection of a so-call “attorney-to-attorney conflict of interest.”

⁴⁷ Defendants cite no legal authority in support of such a concept, and the Court can locate no court, state or federal, from any jurisdiction within the United States, which even mentions the phrase “attorney-to-attorney conflict.”

Because Charles's arguments under this issue fail to meet the requirements for a new trial under Rule 33(b), his motion will be **denied** here as well.

V. CHARLES'S THIRD MOTION FOR NEW TRIAL [181]

Charles's Third Motion for New Trial [181] is word-for-word identical to his Second Motion for New Trial [177], with only some minor formatting changes. It will, of course, be **denied** for the same reasons. Attorney Henderson, the attorney who filed this motion on Charles's behalf, is warned that the Court is considering sanctions against her for such a frivolous filing of a 73-page document.

VI. CHARLES'S FOURTH MOTION FOR NEW TRIAL [226]

A. Court "Erroneously" Terminated Motions for New Trial

Charles argues that the Court "erroneously" terminated his previous motions for new trial after he filed his Notice of Appeal [180]. (Charles's Fourth Motion for New Trial [226] at p. 1.) In fact, it was Charles who was in error here, as his Notice of Appeal [180] divested the Court of jurisdiction to hear his motions. *See United States v. Hitchmon*, 602 F.2d 689, 692 (5th Cir. 1979) *superceded by statute on other grounds as stated in United States v. Martinez*, 763 F.2d 1297, 1308 (11th Cir. 1985) (citations omitted); *see also* Fed. R. Crim. 33(b)(1) ("If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case.")

B. Denial of Motion to Stay was Denial of Bond

Charles also erroneously argues that the Court's denial of his Motion to Stay [198] his report date was a denial of bond pending appeal. (*See* Charles's Fourth Motion for New Trial [226] at p. 2.) Charles's Motion for Stay [198], however, did not argue for bond pending appeal but rather for a stay of his report date and cited no legal authority for such a stay. In fact, Charles did not move for bond pending appeal with this Court until the day the Court's Order [217] denying

his Motion for Stay [198] was filed.⁴⁸ Charles's Motion for Bond [218] was not denied until the Court issued its Order [294] on June 28, 2017, and provided detailed reasoning as to why Charles was not entitled to bond pending appeal.

C. Recusal of U.S. Attorney for the Southern District of Mississippi

Charles's Fourth Motion for New Trial [226] centers on what he calls "new evidence . . . that links this case to the selective targeting of Charles Bolton for prosecution by Office [sic] of the Assistant [sic] United States Attorney for the Southern District of Mississippi and federal investigators within the Southern District of Mississippi." (Charles's Fourth Motion for New Trial [226] at pp. 2-3.) This "new evidence" is an internal Department of Justice memorandum dated July 29, 2015, "approv[ing] the recusal of the entire United States Attorney's Office for the Southern District of Mississippi from the investigation and potential prosecution of Charles Bolton . . . based upon existing conflicts of interests or the appearance of conflicts of interest." (DOJ Memo. [226-1].) Despite Charles's allegation that this was an "involuntarily" recusal, the language of this memorandum reads as if the Mississippi USAO requested recusal.⁴⁹ (Charles's Fourth Motion for New Trial [226] at p. 3.) Furthermore, though Charles claims that this memorandum mandated that Agent Luker recuse himself from the tax investigation, the memorandum actually only relates to the Mississippi USAO, which is under the authority of the Department of Justice and which was not in any way involved in the tax case. Agent Luker is an agent with the Internal Revenue Service, which is not under the authority of the Department of

⁴⁸ Charles did incorrectly file a motion for bond pending appeal with the Fifth Circuit, which has no authority to grant such a motion unless it is first considered by the district court.

⁴⁹ Though the Court does not know the reason behind this recusal, it suspects that it involves the Mississippi USAO's previous involvement in the food theft case against Defendants.

Justice,⁵⁰ and the Department of Justice would have had no authority to order his recusal even if this memorandum did call for it, which it does not.

D. Prosecution’s Failure to Follow Internal DOJ Regulations

Charles makes multiple arguments in his Fourth Motion for New Trial [226] that the Louisiana USAO did not follow internal Department of Justice Regulations, as described in the United States Attorneys Manual (the “USAM”), in bringing this case against him. Even if Charles were correct in these allegations, which the Court does not find, the Fifth Circuit has found that the USAM does not create any substantive or procedural rights for a criminal defendant. *United States v. Cooks*, 589 F.3d 173, 184 (5th Cir. 2009) (citations omitted). As such, all Charles’s arguments to the contrary are meritless.

Because it does not provide any meritorious argument that Charles is entitled to a new trial under Rule 33(b), Charles’s Fourth Motion for New Trial [226] will be **denied**.

VII. LINDA’S FIRST MOTION FOR NEW TRIAL [178]

At the onset of its analysis of Linda’s First Motion for New Trial [178], the Court would note that it appears to be in large part a copy of Charles’s Second Motion for New Trial [177],⁵¹ with large swaths of Charles’s motion copied verbatim, changing only “he” to “she” and “Owen” to “McDuff,” and in many places forgetting to make these required changes. Because of this duplication of the issues, the Court adopts its reasoning for denying Charles’s motion to **deny** Linda’s motion as to those issues, and addresses only those issues that are unique to her motion.

⁵⁰ The IRS is actually a bureau of the Department of the Treasury.

⁵¹ This includes copying many of the lies and misrepresentations made in Charles’s motion.

A. Conflict of Interest

1. Conflict Caused by Court's Disqualification

Linda argues that the Court caused an “attorney-to-attorney conflict of interest” by disqualifying Holmes and Dukes. (Linda’s First Motion for New Trial [178] at p. 4) (emphasis omitted). The disqualification of Holmes and Dukes is not new evidence that entitles Linda to a new trial under Rule 33(b). Also, the Court has already found that an “attorney-to-attorney conflict of interest” is not a recognized legal concept.⁵² *See supra* IV.D. Furthermore, the Court was correct in disqualifying Holmes and Dukes.

“[T]he Sixth Amendment simply does not provide an inexorable right to representation by a criminal defendant’s preferred lawyer.” *United States v. Hughey*, 147 F.3d 423, 428 (5th Cir. 1998) (citing *Wheat v. United States*, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L.Ed.2d 140 (1988)). “The Sixth Amendment right to counsel of choice is limited, and protects only a paying defendant’s fair or reasonable opportunity to obtain counsel of the defendant’s choice.” *Id.* (citations omitted). Furthermore, although “there is a presumption in favor of a defendant’s counsel of choice, . . . that presumption may be overcome by an actual conflict of interest, or by showing a serious potential for conflict.” *United States v. Gharbi*, 510 F.3d 550, 553 (5th Cir. 2007) (citing *Wheat*, 486 U.S. at 164, 108 S. Ct. 1692). The Court can think of no clearer example of “a serious potential conflict” than where a retained attorney is a potential witness against a criminal defendant. *See id.*

2. Continuance After Disqualification

Linda also accuses the Court of wrongfully denying her a continuance after Holmes and Dukes were disqualified. Again this is not new evidence. This is not even a correct statement of

⁵² The Court would also note that there was absolutely nothing preventing Defendants from agreeing to be represented by the same attorney, which would have alleviated any potential for disagreement among counsel.

the record. The Court did in fact grant Linda a 21-day continuance to allow her new attorney more time to prepare after Holmes and Dukes were disqualified. (*See Order [45]* at pp. 9-10.)

Because her arguments under this issue are completely baseless, the Court will **deny** Linda's First Motion for New Trial [178] on this issue.

B. Ineffective Assistance of McDuff

The only unique allegation of ineffective assistance of counsel Linda makes that is not a copy of Charles's motion is her contention that McDuff should have objected to the disqualification of Holmes and Dukes. As Holmes and Dukes were disqualified on July 28, 2016, and McDuff did not enter his appearance until August 26, 2016, the Court is puzzled over how Linda proposes he should have objected when he had not even been hired by her at the time of disqualification.

For all the reasons stated in denying Charles's ineffective assistance of counsel claim, *see supra* IV.B, and because Linda's unique arguments have no merit, the Court will **deny** Linda's First Motion for New Trial [178] under this issue.

C. McDuff at Sentencing

The only unique claim against McDuff at sentencing that Linda claims entitles her to a new trial is the fact that he fainted during the sentencing hearing and resumed oral arguments after a recess, alleging that he was unconscious "for several minutes" and "medically unfit to continue." (Linda's First Motion for New Trial [178] at pp. 61-62.) McDuff strenuously objects to this characterization of the incident. He states that he "fainted at the podium" but "came to fairly quickly" and "ultimately made all of the arguments regarding the sentencing that [he] had intended to make." (McDuff Response [279] at p. 20.) McDuff's recitation of the incident comports with the Court's memory of the events, and the Court therefore does not find that Linda was in any way

impacted by McDuff's fainting at sentencing. Her First Motion for New Trial [178] will be **denied** here as well.

VIII. LINDA'S SECOND MOTION FOR NEW TRIAL [231]

This motion of Linda's is based on the same arguments as Charles's Fourth Motion for New Trial [226] and is hereby **denied** for the same reasons.

IX. CHARLES'S REPLY TO OWEN'S RESPONSE [292]

In his Reply to Owen's Response [292], Charles makes various accusations concerning Owen's actions in connection with the Motions for New Trial [175][177][178][181][226][231] and asks for his response to be stricken. Specifically, Charles claims that Owen went outside the scope of the waiver of the attorney-client privilege and made impermissible arguments against issues in Charles's motions which did not pertain to him. The Court specifically ruled that there were no limits to the waiver of the attorney-client privilege and does not find any of the formerly-privileged information revealed by Owen to be irrelevant to the motions at issue. (*See* Order [273] at p. 6.) The Court expresses no opinion as to whether Owen had the right to make arguments as to any issue besides those dealing with ineffective assistance of counsel, except to note that Charles's motions are written in a confusing way that makes it difficult to tell which arguments are addressing ineffective assistance of counsel and to point out that none of Owen's actions in connection with these motions have any bearing on Charles's or Linda's rights to a new trial. Furthermore, because the factual information in Owen's Response [276][277] is needed to fully address Charles's motions, the Court will not strike it.

X. CONCLUSION

IT IS THEREFORE ORDERED AND ADJUDGED that Charles's First Motion for New Trial [175] is **denied**.

IT IS FURTHER ORDERED AND ADJUDGED that Charles's Second Motion for New Trial [177] is **denied**.

IT IS FURTHER ORDERED AND ADJUDGED that Charles's Third Motion for New Trial [181] is **denied**.

IT IS FURTHER ORDERED AND ADJUDGED that Charles's Fourth Motion for New Trial [226] is **denied**.

IT IS FURTHER ORDERED AND ADJUDGED that Linda's First Motion for New Trial [178] is **denied**.

IT IS FURTHER ORDERED AND ADJUDGED that Linda's Second Motion for New Trial [231] is **denied**.

SO ORDERED AND ADJUDGED this the 3rd day of July, 2017.

s/Keith Starrett
UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-60576
D.C. Docket No. 2:16-CR-7-1

United States Court of Appeals
Fifth Circuit
FILED
October 18, 2018
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

CHARLES BOLTON,

Defendant - Appellant

Appeals from the United States District Court for the
Southern District of Mississippi

Before STEWART, Chief Judge, and WIENER and HIGGINSON, Circuit
Judges.

JUDGMENT

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

It is ordered and adjudged that the judgment of the District Court is
affirmed as modified.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-60502

D.C. Docket No. 2:16-CR-7-2

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

LINDA BOLTON,

Defendant - Appellant

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

Before STEWART, Chief Judge, and WIENER and HIGGINSON, Circuit
Judges.

JUDGMENT

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

It is ordered and adjudged that the judgment of the District Court is
affirmed as modified.

United States Court of Appeals
Fifth Circuit

FILED

October 18, 2018

Lyle W. Cayce
Clerk

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 17-60502

United States Court of Appeals
Fifth Circuit

FILED

October 18, 2018

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

CHARLES BOLTON; LINDA BOLTON,

Defendants - Appellants

Consolidated with 17-60576

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

CHARLES BOLTON,

Defendant - Appellant

Appeals from the United States District Court
Southern District of Mississippi

Before STEWART, Chief Judge, and WIENER and HIGGINSON, Circuit
Judges.

CARL E. STEWART, Chief Judge:

No. 17-60502
c/w No. 17-60576

A grand jury indicted Plaintiffs-Appellants Charles Bolton (“Charles”) and his wife, Linda Bolton (“Linda”), on five counts of attempted tax evasion and five counts of filing false tax returns. The jury convicted Charles on four of the attempted tax evasion counts and all five counts of filing false tax returns. The jury acquitted both Boltons on one of the attempted tax evasion counts, failed to reach a verdict as to Linda on the remaining attempted tax evasion counts, and convicted Linda on all five counts of filing false tax returns.

The district court sentenced Charles to 45 months of imprisonment, imposed three years of supervised release with a special condition requiring payment of \$145,849.78 in restitution and a \$10,000 fine. The district court sentenced Linda to 30 months of imprisonment, with a one-year term of supervised release, a \$6,000 fine, and restitution of \$145,849.78, owed jointly and severally with Charles. Both Charles and Linda appeal their convictions and sentences. We affirm the Boltons’ convictions and sentences in all respects except that we modify the district court’s judgment to reflect that the restitution owed by the Boltons is not due until their terms of supervised release commence.

I. Facts & Procedural History

In 1992, Charles became chief deputy sheriff of the Forrest County Sheriff’s Office (“FCSO”) in Hattiesburg, Mississippi. He was terminated from the FCSO in 2016 after he was convicted in this case. As chief deputy, he oversaw the Forrest County Juvenile and Adult Detention Center. At that time, he and his wife Linda also owned and operated two businesses,¹ Hall Avenue Package Store and Sports 22 Café and Lounge.

¹ The Boltons’ businesses were Schedule C businesses which are considered sole proprietorships. Taxes for Schedule C businesses are reported on the owner’s personal income tax return.

No. 17-60502
c/w No. 17-60576

In March 2014, the Federal Bureau of Investigation (“FBI”) and the Mississippi State Auditor’s Office began an investigation into whether the Boltons and others were stealing food from the FCSO’s Detention Center.² In July 2015, the U.S. Attorney’s Office for the Southern District of Mississippi received approval to recuse itself from the investigation and prosecution of Charles, and the matter was re-assigned to the U.S. Attorney’s Office for the Eastern District of Louisiana. Around that time, the FBI referred several suspicious checks related to the Boltons’ businesses to Internal Revenue Service (“IRS”) Special Agent Bradley Luker who began a criminal tax investigation to determine whether the Boltons were guilty of violating any tax laws. Agent Luker provided information about the criminal tax investigation to Assistant United States Attorney Fred Harper of the Eastern District of Louisiana who had been assigned to Charles’s case.

A federal grand jury returned a ten-count indictment in March 2016 charging the Boltons with attempted tax evasion and aiding and abetting in attempted tax evasion for the tax years 2009 through 2013, in violation of 26 U.S.C. § 7201 and 18 U.S.C. § 2 (Counts 1–5), as well as filing false tax returns and aiding and abetting in the filing of false tax returns for tax years 2009 through 2013, in violation of 26 U.S.C. § 7206(1) and 18 U.S.C. § 2 (Counts 6–10). After the Boltons were indicted, attorney Joe Sam Owen (“Owen”) enlisted as counsel of record on behalf of Charles. Linda was represented by several different attorneys before trial, and by attorney Robert McDuff at trial and sentencing.

² The 2014 food theft investigation did not result in charges against the Boltons in the underlying proceedings but the district court determined the incident to be relevant conduct for purposes of sentencing and its calculation of the loss and restitution amounts. *See* U.S.S.G. § 1B1.3.

No. 17-60502
c/w No. 17-60576

Prior to trial, the government stated its intent to introduce business records, checks, check registers, and tax returns of an individual named John Lee (“Lee”), who, through his law practice, Lee P.A., was involved with the Boltons, as business or public records. The government also subpoenaed Lee to testify at trial, and Charles subpoenaed a large number of checks from Lee’s law practice as well as Lee’s casino gambling records.

Before trial, Lee hired attorney Rick Simmons who moved to quash a subpoena by the government to testify at trial on grounds that Lee would be invoking his Fifth Amendment privilege against self-incrimination. The district court denied the motion, but the parties stipulated at the outset of trial that Lee would not actually testify even if called.³ The parties also stipulated that records or summaries of records were admissible as business records, and the Boltons stipulated to the authenticity of their handwriting on various exhibits. The parties further stipulated that Lee had invoked his Fifth Amendment privilege, and the jury was instructed that Lee would not be called as a witness.

The Boltons’ three-day jury trial began in September 2016. At trial, the government presented evidence that the Boltons treated money received by their two businesses as “loans” rather than “income” when reporting their business income on their personal income tax returns, prepared by Renee Moore (“Moore”) of Nicholson and Company, thus falsely reducing their tax liability. The deposits in question included checks from various entities and individuals, including Lee and Manheim Mississippi Auto Auction.

³ The district court ruled that the Boltons could comment at trial on Lee’s invocation of his Fifth Amendment privilege.

No. 17-60502
c/w No. 17-60576

The jury ultimately convicted Charles on four counts of attempted tax evasion and all five counts of filing false tax returns. The jury acquitted each Bolton on one count of attempted tax evasion, failed to reach a verdict as to Linda on the remaining attempted tax evasion counts, and convicted Linda on all five counts of filing false tax returns.

The presentence reports (“PSRs”) for Charles and Linda described an interview (referred to as an “FBI 302”) of Lee by federal agents regarding checks he had given to Charles. Linda moved for a new trial based on an alleged discrepancy between the information in the FBI 302 and the testimony of Agent Luker. Linda also argued that the failure to disclose the substance of the interview violated the government’s discovery obligations and constituted a *Brady* violation. Charles joined the motion. The district court denied the new trial motion, finding no discrepancy between Agent Luker’s trial testimony and the information in the FBI 302.

Three days before sentencing, Charles’s attorney, Owen, advised the court that Charles had obtained new counsel and that Charles would be complaining about his (Owen’s) handling of the case. On the day of sentencing, Charles sought to be represented by new counsel, Willie J. Huntley—an out-of-state attorney who said he would need more time to review the case before being ready to proceed. The district court declined to grant a continuance and offered Charles the choice of being represented at sentencing by Owen or by an attorney from the Federal Public Defender’s Office. Ultimately, Charles was represented at sentencing by Owen, and Huntley was allowed to assist.

In sentencing Charles, the district court upwardly varied from the guidelines range of 27 to 33 months, imposing a 45-month term of imprisonment. The variance was based on the district court’s finding that he had stolen food inventory from the FCSO Detention Center and used the food

No. 17-60502
c/w No. 17-60576

at his Sports 22 restaurant and catering business. The district court also imposed three years of supervised release with a special condition requiring payment of \$145,849.78 in restitution and a \$10,000 fine. Charles reported to federal prison on May 3, 2017. He then moved the district court for release pending appeal, which the district court denied.⁴

After sentencing, Owen sought and received permission to withdraw as counsel of record for Charles. Three days after entry of the judgment, Charles filed a notice of appeal, and also filed three motions seeking a new trial or vacatur of his conviction and sentence. Among numerous other arguments, Charles argued that his representation by Owen was paid for by Lee and was therefore tainted by a conflict of interest. This court remanded the case pursuant to Federal Rule of Appellate Procedure 12.1(b) so that the district court could rule on the motions, expressly declining to retain jurisdiction.

Following remand, the district court issued an order reviving the pending motions, setting briefing deadlines, and ordering former counsel Owen and McDuff to respond to various allegations of ineffective assistance of counsel. The government filed a consolidated response to all of the Boltons' pending motions, as did Owen and McDuff. On July 3, 2017, the district court denied the new trial motions. Charles noticed his appeal on July 12 (entered July 13), citing the district court's July 3 new trial order. Linda noticed her appeal on July 13, also citing the district court's July 3 new trial order.

Owen asked the district court to deem the attorney-client privilege and the work-product doctrine waived so that he could respond to the Boltons' allegations of conflict and ineffective assistance of counsel. Charles objected and Owen noted that, in multiple motions, he and his firm were accused of

⁴ This court denied Charles's motion for release pending appeal on August 7, 2017.

No. 17-60502
c/w No. 17-60576

harboring a conflict-of-interest and a litany of instances of ineffective assistance. The government supported the waiver. Charles then sought a protective order, which Owen opposed, precluding the availability of the documents to the prosecution, law enforcement, or the public. Owen identified the claims against him as involving an alleged conflict about Lee, trial preparation and use of an expert, jury selection, trial strategy, exhibits, witnesses, Linda's decision not to testify, Charles's decision not to testify, Charles's conviction, the PSR and objections, the in-camera sentencing conference, the sentencing hearing, and the post-sentencing submissions under seal.

The district court acknowledged that Charles had waived his attorney-client privilege and work-product doctrine but determined that the documents should be filed under seal and not served on the government. The government moved for reconsideration on grounds that it would need the materials to respond to any appeal filed by Charles and to defend against allegations of ineffective assistance of counsel under 28 U.S.C. § 2255. The district court granted the government's motion and placed Owen's response to Charles's new trial motions on the public docket, finding that Charles "did not point to a single piece of formerly privileged evidence which would prejudice him either on appeal or in the event of a new trial." Charles noticed his appeal of that order (appeal No. 17-60576). Charles's second appeal, No. 17-60576, was consolidated with the existing appeal of the Boltons' convictions and sentences, No. 17-60502.

II. Discussion

The Boltons each raise a host of arguments on appeal including but not limited to: (1) whether the indictment was sufficient; (2) whether the evidence was sufficient to support the Boltons' convictions; (3) whether one or more

No. 17-60502
c/w No. 17-60576

Brady violations took place in the proceedings below; (4) whether the Boltons' Confrontation Clause rights were violated; (5) whether the government engaged in prosecutorial misconduct during trial; (6) whether the district court erred in its issuance of jury instructions; (7) whether the district court erred in imposing the Boltons' sentences; (8) whether Charles was denied his right to conflict-free choice of counsel or received ineffective assistance of counsel; and (9) whether the district court erred in holding that Charles waived his attorney-client privilege. We address each issue in turn.

Indictment

Charles argues that his indictment was insufficient. Because Charles failed to preserve his objection to the alleged defective indictment, plain error review applies. *United States v. Robinson*, 367 F.3d 278, 285 (5th Cir. 2004). "Plain error exists if (1) there is an error, (2) the error is plain, . . . (3) the error affect[s] substantial rights and (4) the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *United States v. Garcia-Carrillo*, 749 F.3d 376, 378 (5th Cir. 2014) (per curiam) (internal quotation marks and citation omitted).

"An indictment is legally sufficient if (1) 'each count contains the essential elements of the offense charged,' (2) 'the elements are described with particularity,' and (3) 'the charge is specific enough to protect the defendant against a subsequent prosecution for the same offense.'" *United States v. Fairley*, 880 F.3d 198, 206 (5th Cir. 2018) ("[T]he validity of an indictment is governed by practical, not technical considerations,' and '[t]he basic purpose behind an indictment is to inform a defendant of the charge against him[.]'").

The government charged five counts of attempted tax evasion and aiding and abetting in attempted tax evasion for the tax years 2009 through 2013 in violation of 26 U.S.C. § 7201 and 18 U.S.C. § 2 (Counts 1-5), and five counts of

No. 17-60502
c/w No. 17-60576

filings false tax returns and aiding and abetting in the filing of false tax returns for the tax years 2009 through 2013 in violation of 26 U.S.C. § 7206(1) and 18 U.S.C. § 2 (Counts 6-10).

A. Tax Evasion

“The elements of [§7201 tax evasion are]: (1) willfulness, (2) existence of a tax deficiency; and (3) an affirmative act constituting an evasion or attempted evasion of the tax.” *United States v. Nolen*, 472 F.3d 362, 377 (5th Cir. 2006). The indictment charged that, for the tax evasion counts, the Boltons “did willfully attempt to evade and defeat a large part of the income tax due and owing by defendants to the United States of America by, among other things, preparing and causing to be prepared, and by signing and causing to be signed, a false and fraudulent joint U.S. Individual Income Tax Return, Form 1040, on behalf of defendants, which was filed with the Internal Revenue Service.” The indictment further alleged that the Boltons attempted to evade and evaded the assessment of their income taxes by cashing tens of thousands of dollars in checks purportedly issued in payment for liquor, wine, and catering services to prevent those payments from being recorded on their business bank statements; providing deceptive records to their tax return preparer; and making false statements to their tax return preparer that some payments for goods and services were loans. When compared to the elements required to prove tax evasion under § 7201, the indictment was sufficient in that it alleged with specificity the affirmative acts willfully taken by the Boltons to evade the tax they knew they owed, provided the Boltons notice of the alleged crime, and protected them from subsequent prosecution for the same crime. *Fairley*, 880 F.3d at 206.

No. 17-60502
c/w No. 17-60576

B. Filing False Tax Returns

“A person commits the felony of filing a false tax return in violation of 26 U.S.C. § 7206(1) when he ‘willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter.’” *United States v. Bishop*, 264 F.3d 535, 546 (5th Cir. 2001) (quoting 26 U.S.C. § 7206(1)).

The indictment alleged that the Boltons “did willfully make and subscribe to a joint United States Income Tax Return, Form 1040, which was verified by a written declaration that it was made under penalty of perjury and was filed with the Internal Revenue Service [which] defendants herein did not believe to be true and correct as to every material matter for each calendar tax year noted [2009–2013]” in that they knew and believed they had failed to report a substantial amount of income on Line 22 of the Form.

Viewing the language of the indictment against the elements required to prove the crime of filing a false tax return, the indictment was sufficient in that it alleged with specificity the Boltons’ falsification of the tax returns, provided the Boltons notice of the alleged crime, and protected the Boltons from subsequent prosecution for the same crime. *Fairley*, 880 F.3d at 206. Accordingly, Charles failed to show plain error with respect to the sufficiency of the indictments for tax evasion and filing false tax returns. *Garcia-Carrillo*, 749 F.3d at 378. In light of this holding, we do not reach Charles’s alternative arguments as to the alleged insufficiency or defectiveness of the indictment.

Sufficiency of the Evidence

Both Charles and Linda argue that the evidence was insufficient to support the jury’s verdicts of guilt against them as to the crimes of tax evasion (Charles) and filing false tax returns (Charles and Linda). The Boltons

No. 17-60502
c/w No. 17-60576

preserved their challenges to the sufficiency of the evidence by moving for and renewing their motions for a judgment of acquittal. Accordingly, “[w]e review preserved challenges to the sufficiency of the evidence *de novo*, but we are ‘highly deferential to the verdict.’” *United States v. Scott*, 892 F.3d 791, 796 (5th Cir. 2018).

“When reviewing the sufficiency of the evidence, we view all evidence, whether circumstantial or direct, in the light most favorable to the government, with all reasonable inferences and credibility choices to be made in support of the jury’s verdict.” *Id.* It is the province of the jury to “weigh any conflicting evidence and to evaluate the credibility of witnesses.” *Id.* at 796–97. We consider the evidence “sufficient to support a conviction if ‘any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” *Id.* at 797. Our question is whether “the jury’s verdict was reasonable, not whether we believe it to be correct.” *Id.*

The jury convicted Charles on four of the five counts of tax evasion. Linda was not convicted of tax evasion. 26 U.S.C. § 7201 provides that “[a]ny person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony[.]” “The elements of [§ 7201 tax evasion are]: (1) willfulness, (2) existence of a tax deficiency; and (3) an affirmative act constituting an evasion or attempted evasion of the tax.” *Nolen*, 472 F.3d at 377. “Affirmative acts that satisfy the [third] element may include keeping double sets of books, concealment of assets, or ‘any conduct, the likely effect of which would be to mislead or to conceal.’” *United States v. Miller*, 588 F.3d 897, 907 (5th Cir. 2009). To prove willfulness “the government must show that: (1) the law imposed a duty on the defendant; (2) the defendant knew of that duty; and (3) the defendant voluntarily and intentionally violated that duty.” *Id.* “Such evidence is

No. 17-60502
c/w No. 17-60576

ordinarily circumstantial, since direct proof is often unavailable.” *United States v. Kim*, 884 F.2d 189, 192 (5th Cir. 1989). To prove a tax deficiency the government must establish that the taxpayer had unreported taxable income. *United States v. Conaway*, 11 F.3d 40, 43 (5th Cir. 1993).

The jury convicted both Charles and Linda of five counts of filing false tax returns, or aiding and abetting in filing false tax returns, for the years of 2009 through 2013. A person commits the felony of filing a false tax return in violation of 26 U.S.C. § 7206(1) when he “[w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter[.]”

At the Boltons’ trial, the government presented sufficient evidence that Charles evaded taxes for the years 2010 through 2013 and that the Boltons filed false tax returns in which they consistently underreported their income from 2009 through 2013. The government’s evidence included numerous instances when the Boltons (1) cashed a significant number of checks before they were recorded in the Boltons’ financial books, and (2) designated significant amounts of income as non-taxable loans. Agent Luker testified at trial that he had traced the income derived from the cashed checks and the checks marked as loans in the Boltons’ records and concluded that they had a tax deficiency resulting from underreporting their income from their two businesses. Agent Luker used a multitude of specific examples of the checks marked as loans and the checks that were cashed before they “hit the books” to illuminate the discrepancy between the Boltons’ actual income and their reported income. The government also presented a number of charts at trial which featured year-by-year summary computations of the Boltons’ “reported”

No. 17-60502
c/w No. 17-60576

versus their “corrected” taxable income resulting from cashed checks and checks marked as loans.

Consequently, given this court’s high level of deference to the jury’s verdict and the mountain of evidence presented at trial in support of the jury’s verdict, specifically proving the elements of tax evasion as to Charles and filing false returns as to both Charles and Linda, we hold that the evidence was sufficient to support the Boltons’ convictions. *Scott*, 892 F.3d at 796–97. In light of this holding, we do not reach either Charles’s or Linda’s alternative arguments as to the alleged insufficiency of the evidence.

Alleged Brady Violations

The Boltons contend that the *Brady* material suppressed by the government includes: (1) a Department of Justice memorandum dated July 29, 2015, (2) an FBI 302 interview report documenting Lee’s statements to law enforcement that allegedly contradict the trial testimony of Agent Luker, (3) a subpoena issued by the government to Carl Nicholson (“Nicholson”), and (4) Lee’s plea agreement. “We review a district court’s determination on a *Brady* claim de novo, though we defer to factual findings underlying the district court’s decision.” *United States v. Swenson*, 894 F.3d 677, 683 (5th Cir. 2018) (citing *United States v. Cessa*, 861 F.3d 121, 128 (5th Cir. 2017)).

Under *Brady*, “the government violates a defendant’s due process rights if it withholds evidence that is favorable to the accused and material to the defendant’s guilt or punishment.” *Swenson*, 894 F.3d at 683 (citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). The rule is applied regardless “of the good faith or bad faith of the prosecution . . . [and] extends to impeachment evidence as well as exculpatory evidence.” *Id.* (citing *Youngblood v. West Virginia*, 547 U.S. 867, 869 (2006); *Brady*, 373 U.S. at 87). For a defendant to prevail on a *Brady* claim, he “must show: (1) the evidence at issue was favorable to the

No. 17-60502
c/w No. 17-60576

accused, either because it was exculpatory or impeaching; (2) the evidence was suppressed by the prosecution; and (3) the evidence was material.” *Id.* The usual remedy for a *Brady* violation is a new trial. *Swenson*, 894 F.3d at 684.

The Boltons fail to make a successful argument on any of their purported *Brady* claims. With respect to Charles’s argument regarding the DOJ memorandum dated July 29, 2015, that memo simply addressed conflicts within the US Attorney’s Office, Mississippi division, and authorized transfer to the US Attorney’s Office, Louisiana division. This subject matter has no bearing on Agent Luker’s status as an IRS agent within the Department of Treasury. Moreover, the recusal information of the Mississippi division of the US Attorney’s Office is immaterial to Charles’s ability to “prepare a proper defense against the indictment” for his own crimes of tax evasion and filing false tax returns. Accordingly, the memorandum does not qualify as *Brady* material. *Swenson*, 894 F.3d at 683.

Both Charles and Linda argue that the FBI 302 interview report, which documents Lee’s statements to law enforcement that allegedly contradict Agent Luker’s trial testimony, was improperly suppressed *Brady* material. They claim that they would have used Lee’s statements in the interview that he could not remember what each and every check he wrote to the Boltons’ businesses was for to contradict Agent Luker’s testimony that Lee told him that the checks were written for food and liquor. As the district court properly observed, Lee’s statements did not go to the truth of Agent Luker’s testimony or to his own credibility because they were intended to highlight the suspicious nature of all the money going from Lee’s firm to the Boltons’ restaurant under the auspices of purchasing “business supplies”; they were not solicited to disprove Agent Luker’s testimony that Lee had told him that the checks were written for food and liquor. *United States v. St. Junius*, 739 F.3d 193, 202 (5th

No. 17-60502
c/w No. 17-60576

Cir. 2013) (“Under Federal Rule of Evidence 801(c), hearsay is a statement, other than one made by the declarant while testifying at trial or a hearing, offered in evidence to prove the truth of the matter asserted . . . The rule against hearsay does not apply when an out-of-court statement is offered for some purpose other than to prove the truth of the matter asserted.”). Moreover, Lee’s statement to Agent Luker that the checks were written for food and liquor does not contradict or undermine his statement in the FBI 302 interview that he could not remember what each individual check was for when he was shown a spreadsheet of payments at a later date. It is certainly conceivable that Lee stood by his story that all of the checks were written either for food or liquor without claiming to remember what each specific check was written for. Further, the government did not withhold the report from the Boltons; it was turned over as required *Jencks*⁵ material. Accordingly, the FBI 302 interview report does not qualify as *Brady* material. *Swenson*, 894 F.3d at 683.

Charles argues that the subpoena issued by the government to Nicholson was improperly suppressed *Brady* material because it “addressed the nature of certain checks that were written from John Lee to Joe Sam Owen and provided written acknowledgement of those checks.” As the government observes, however, Charles’s argument on this issue goes to the purported conflict of interest that he believed his attorney had—not to his own defense of the charges against him for tax evasion and filing false tax returns. Accordingly, the subpoena was immaterial and neither exculpatory nor impeaching. Thus, it did not qualify as *Brady* material. *Swenson*, 894 F.3d at 683.

⁵ 18 U.S.C. § 3500.

No. 17-60502
c/w No. 17-60576

Finally, Charles fails to brief his argument that Lee's plea agreement was improperly suppressed *Brady* material and thus has waived the issue. *See Procter & Gamble Co. v. Amway Corp.*, 376 F.3d 496, 499 n.1 (5th Cir. 2004) ("Failure [to] adequately [] brief an issue on appeal constitutes waiver of that argument."). In any event, the plea agreement was signed after the Boltons were tried and convicted and thus could not have conceivably qualified as *Brady* material. *Swenson*, 894 F.3d at 683.

Confrontation Clause Rights

Both Charles and Linda argue that their Confrontation Clause rights were violated when Agent Luker was permitted to testify as to out-of-court statements that Lee had made to him since Lee was not available for cross-examination at trial given his invocation of the Fifth Amendment right against self-incrimination. "Alleged Confrontation Clause violations are reviewed *de novo* and subject to harmless error analysis." *United States v. Garcia*, 887 F.3d 205, 209 (5th Cir. 2018). However, "[a] defendant may not complain on appeal of errors that he himself invited or provoked the [district] court . . . to commit." *United States v. Salazar*, 751 F.3d 326, 332 (5th Cir. 2014) (citing *United States v. Wells*, 519 U.S. 482, 487–88 (1997)). Only errors attributed to the actions of the defense will be considered invited errors. *Id.* The standard of review for invited error is higher than that of plain error review. *Id.* "We will not reverse on the basis of invited error, absent manifest injustice." *Id.*

"The Confrontation Clause guarantees a defendant the opportunity for effective cross-examination." *United States v. Lockhart*, 844 F.3d 501, 510 (5th Cir. 2016) (citing *Delaware v. Fensterer*, 474 U.S. 15, 19–20 (1985)). The Supreme Court has held "that the prosecution violates this clause when it introduces 'testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior

No. 17-60502
c/w No. 17-60576

opportunity for cross-examination.” *Garcia*, 887 F.3d at 212 (quoting *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004)).

During the trial, the district court ruled that the government could not elicit testimony concerning Lee’s out-of-court statements on grounds that Lee was unavailable to be cross-examined because he had asserted his Fifth Amendment privilege against self-incrimination and would not testify at trial. The district court ruled that any out-of-court statement by Lee would be considered hearsay without an applicable exception. The record reflects that the government did not question Agent Luker or anyone else about the content of any out-of-court statement by Lee. However, during Owen’s cross-examination of Agent Luker, he asked Luker to “[t]ell the jury, please, what business supply John Lee purchased from Sports 22.” The district court interrupted and suggested that the solicited testimony would be inadmissible hearsay and a bench conference was held with all counsel. Outside of the presence of the jury, both defense counsel urged the court to allow the line of questioning and acknowledged that Agent Luker’s answers would involve statements that Lee had made to him. The bench conference ended and Owen stated to Agent Luker: “So if I understand your testimony, what John Lee has told you with reference to the cashed checks is that he bought \$273,520 worth of food and liquor from Sports 22 and Hall’s Package.” Agent Luker responded, “Over the five years, that’s correct.” Owen commented “You will agree that’s a lot of ribs, isn’t it?” and Agent Luker answered affirmatively.

Given the above record evidence, we conclude that the Boltons, through their counsel, invited the error of soliciting Agent Luker to testify as to statements that Lee made, resulting in the admission of hearsay. *Salazar*, 751 F.3d at 332. Considering, however, the substantial amount of evidence presented at trial against the Boltons that did not include the checks written

No. 17-60502
c/w No. 17-60576

by Lee, admission of the hearsay statements did not result in a “manifest injustice.” *Id.*

Charles claims he dissented from Owen’s decision to solicit the hearsay statements but he misinterprets the law on this issue. As the government points out, the right to confrontation is susceptible to waiver by counsel but when a defendant does not object to his attorney’s decision at trial or present an argument as to why his counsel’s actions could not have been a legitimate trial tactic, he waives that right. *United States v. Ceballos*, 789 F.3d 607, 616 (5th Cir. 2015) (quoting *United States v. Reveles*, 190 F.3d 678, 683 (5th Cir. 1999) (“When a defendant has waived a right, the district court cannot be said to have erred by failing to override *the intentions of the defendant’s counsel* by asserting the right *sua sponte*.” (emphasis in original))); *see also United States v. Stephens*, 609 F.2d 230, 232–33 (5th Cir. 1980) (holding “that counsel in a criminal case may waive his client’s Sixth Amendment right of confrontation by stipulating to the admission of evidence, so long as the defendant does not dissent from his attorney’s decision, and so long as it can be said that the attorney’s decision was a legitimate trial tactic or part of a prudent trial strategy”). Here, the Boltons have failed in both respects since they did not object to their respective counsels’ decisions to solicit the hearsay statements at trial, and they have failed to present any type of argument on appeal as to why admission of the statements could not have been a legitimate trial tactic. *Ceballos*, 789 F.3d at 616.

Based on a close review of the trial record, we hold that the district court’s admission of the hearsay statements was invited error, solicited by both sets of defense counsel. *Salazar*, 751 F.3d at 332. The invited error did not rise to the level of manifest injustice given the substantial evidence presented at trial to support the Boltons’ convictions, aside from the evidence involving

No. 17-60502
c/w No. 17-60576

the checks written by Lee. *Id.* Further, to the extent they attempt to argue otherwise, the Boltons have failed to show that they have not waived their Confrontation Clause rights under *Ceballos*. 789 F.3d at 616.

Prosecutorial Misconduct

According to Charles, “his Fifth and Fourteenth Amendments rights to due process of law [were] violated where the Government engaged in (1) improper vouching for the credibility of its witnesses, (2) making false statements to the jury, (3) engaging in derogatory name calling, and (4) making improper personal impressions.” He urges *de novo* review.

This court conducts a two-part analysis of prosecutorial misconduct. *United States v. Meza*, 701 F.3d 411, 429 (5th Cir. 2012). First, we consider whether the prosecutor made an improper remark and if so, we look next to see if the remark affected the substantial rights of the defendant. *Id.* Usually, we review the first question *de novo* and the second for abuse of discretion. *Id.* We will conclude that “a defendant’s substantial rights are affected only where the error in question affected the outcome of the district court proceedings.” *Id.* To determine whether the error affected the outcome of the proceedings, we must “assess (1) the magnitude of the statement’s prejudice, (2) the effect of any cautionary instructions given, and (3) the strength of the evidence of the defendant’s guilt.” *Id.* However, when a defendant fails to object contemporaneously to the prosecutor’s allegedly improper statements, we review his prosecutorial misconduct claims for plain error. *United States v. Bennett*, 874 F.3d 236, 247 (5th Cir. 2017). Under this standard, a defendant must show an error that is plain and affects his substantial rights. *Id.* at 247–48. “If these conditions are present, we may exercise our discretion to correct the error if it ‘seriously affects the fairness, integrity, or public reputation of judicial proceedings.’” *Id.* at 248.

No. 17-60502
c/w No. 17-60576

“In attempting to establish that a prosecutor’s improper comments constitute reversible error, the criminal defendant bears a substantial burden.” *Id.* at 247. This court does “not lightly make the decision to overturn a criminal conviction on the basis of a prosecutor’s remarks alone.” *Id.* “We also 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.’” *Id.* Our ultimate question is “whether the prosecutor’s remarks cast serious doubt on the correctness of the jury’s verdict.” *Id.*

Despite the fervor of Charles’s claims of prosecutorial misconduct, the trial record does not support them. Moreover, the district court instructed the jury at the start of trial that attorney statements are not evidence, rendering any potential prejudice harmless.⁶ *Meza*, 701 F.3d at 429. Additionally, given the strength of the evidence presented against the Boltons at trial, it is unlikely that the verdict would have been different absent the prosecutor’s remarks. *Id.* The prosecutor’s alleged misconduct, even if proven, did not amount to error, plain or otherwise. *Bennett*, 874 F.3d at 247–48.

Jury Instructions

According to Charles, “[t]he cumulative errors in the indictment, jury instructions, jury verdict form and response to jury notes violated [his] Fifth

⁶ The district court stated:

The first step in the trial will be the opening statements. The government in its opening statement will tell you about the evidence which it intends to put before you so that you will have an idea or a roadmap as to what the government's case is going to be. Just as the indictment is not evidence, neither is the opening statement evidence. Its purpose is only to help you understand what the evidence will be and what the government will try to prove.

No. 17-60502
c/w No. 17-60576

and Fourteenth Amendment rights to due process and a fair trial and resulted in faulty guilty verdicts and sentences.” We disagree. A review of Charles’s seven arguments on this issue in the context of the record reveals that he has failed to show plain error with respect to the indictment (for reasons previously explained), the jury instructions, or the jury verdict form. *See Fairley*, 880 F.3d at 208. We first note that any instances when the district court misstated an oral instruction were subsequently cured by the correct written instructions that were provided to the jury. Thus, he has failed to show plain error on any of his arguments to this effect. *Id.* We reject all of Charles’s additional claims about the jury instructions as meritless.

Sentencing

In sentencing Charles, the district court upwardly varied from the guidelines range of 27 to 33 months, adding an additional 12 months for the unpaid taxes on the FCSO food theft, and sentenced him to 45 months of imprisonment. The district court also imposed three years of supervised release with a special condition requiring payment of \$145,849.78 in restitution and a \$10,000 fine. The district court sentenced Linda to 30 months of imprisonment, along with one year’s supervised release, a \$6,000 fine, and restitution of \$145,849.78, owed jointly and severally with Charles.

A. Loss Amount

Charles and Linda both argue that the district court improperly calculated the loss amount. We disagree. A district court’s loss calculation is a factual finding that this court reviews for clear error. *See Fairley*, 880 F.3d at 215. The district court’s method of calculation is an application of the guidelines that this court reviews *de novo*. *Id.* “[T]he guidelines emphasize the deference that must be shown to the sentencing judge, who is in a unique position to assess the applicable loss, so this court need only determine

No. 17-60502
c/w No. 17-60576

whether the district court made ‘a reasonable estimate of the loss.’” *Id.* “Under the Sentencing Guidelines, the base offense level for a tax fraud offense derives from the amount of loss that is the object of the offense.” *United States v. Johnson*, 841 F.3d 299, 303 (5th Cir. 2016). If the tax loss is uncertain, the district court is permitted to “make a reasonable estimate based on the available facts.” *Id.* “To prevail on an argument that the district court’s calculation of tax loss was clearly erroneous, a defendant must introduce evidence to contradict or rebut the alleged improper computation of the loss.” *Id.*

The district court may include tax losses in the total loss computation that qualify as relevant conduct under U.S.S.G. § 1B1.3, whether charged or not. *See United States v. Powell*, 124 F.3d 655, 666 (5th Cir. 1997) (“[T]he facts of [the defendant’s] conduct make clear that the district court did not clearly err in deciding that the state tax evasion was part of [the defendant’s] relevant conduct. It was therefore proper for the district court, in calculating [the defendant’s] sentence, to include the amount of state fuel excise taxes evaded in the total ‘tax loss’ used to determine [the defendant’s] base offense level.”).

“It is well established . . . that a ‘jury’s verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.’” *United States v. Andradi*, 309 F. App’x 891, 893 (5th Cir. 2009) (quoting *United States v. Watts*, 519 U.S. 148, 157 (1997)).

Here, the district court’s total loss amount of \$145,849.78 (as reflected in the PSR) was based on the tax owed as a result of the charged offenses (\$117,369.84) and the estimated amount of tax that the Boltons failed to pay (\$28,479.94) on the food stolen from the FCSO Detention Center that was used at their businesses. Testimony was presented at trial that the Boltons received

No. 17-60502
c/w No. 17-60576

approximately \$273,000 worth of checks from Lee as income. Charles incorrectly argues that using the tax loss amounts from the Lee checks was error because “[t]he John Lee cashed checks were proven to be false based on the ‘inadmissible hearsay’ testimony of IRS Agent Luker.” As we have stated, Agent Luker’s testimony that Lee told him that the checks were for “food and liquor” does not negate Lee’s statements in the FBI 302 interview that he could not remember what each individual check was for. Additionally, these statements do nothing to undermine the information in the PSR or show that it “was inaccurate or materially untrue.” *United States v. Scher*, 601 F.3d 408, 414 (5th Cir. 2010) (“[The defendant] simply failed to produce reliable evidence supporting an alternate number or demonstrating that the information in the PSR was inaccurate or materially untrue.”).

Further, the district court properly included the uncharged tax loss of \$28,479.94 on grounds that the tax loss from the stolen food qualified as relevant conduct. This conclusion was supported by witness statements and detailed information in the PSR. *Powell*, 124 F.3d at 664 (observing that relevant conduct includes “all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction” (quoting U.S.S.G. § 1B1.3(a)(2))).

Additionally, the district court’s inclusion of the loss amount from Count 1 was proper. Charles’s acquittal on Count 1 did not prevent the district court from considering the conduct underlying the acquitted charge as long as it was proven by a preponderance of the evidence, which it was in this case. *Watts*, 519 U.S. at 157; *Andradi*, 309 F. App’x at 893. There was sufficient evidence presented at trial to prove that the Boltons committed tax fraud in 2009 and they were both convicted of filing false returns that year.

No. 17-60502
c/w No. 17-60576

In sum, because the Boltons have failed to produce sufficient rebuttal evidence as to the loss amount, the district court did not clearly err in adopting the PSR's loss amount of \$145,849.78. *Scher*, 601 F.3d at 414.

B. Sentences

Charles and Linda both argue that their sentences were substantively unreasonable or otherwise defective. Neither Charles nor Linda objected to their sentences in the proceedings below so their claims on appeal are reviewed for plain error. *See United States v. Ruiz*, 621 F.3d 390, 398 (5th Cir. 2010).

“A sentence within the Guidelines range is presumptively reasonable, and this presumption is rebutted only if the appellant demonstrates that the sentence does not account for a factor that should receive significant weight, gives significant weight to an irrelevant or improper factor, or represents a clear error of judgment in balancing sentencing factors.” *United States v. Hernandez*, 876 F.3d 161, 166 (5th Cir. 2017). On the other hand, “[a] non-Guidelines sentence unreasonably fails to reflect the statutory sentencing factors set forth in § 3553(a) where it (1) does not account for a factor that should have received significant weight, (2) gives significant weight to an irrelevant or improper factor, or (3) represents a clear error of judgment in balancing the sentencing factors.” *United States v. Nguyen*, 854 F.3d 276, 283 (5th Cir. 2017). When “reviewing a challenge to the length of a non-Guidelines sentence, this court ‘may take the degree of variance into account and consider the extent of a deviation from the Guidelines.’” *Id.* We give “due deference to the district court’s decision that the § 3553(a) factors, on a whole, justify the extent of the variance.” *Id.* (quoting *Gall v. United States*, 552 U.S. 38, 51 (2007)).

Charles argues that his sentence was substantively unreasonable or otherwise defective and that the district court’s upward variance was not

No. 17-60502
c/w No. 17-60576

warranted. This argument fails. The district court based the upward variance on relevant § 3553(a) factors, including Charles's history and characteristics (specifically his theft of food from the FCSO detention center) and the need to deter future criminal conduct. *See* 18 U.S.C. § 3553(a)(1)–(2). The district court was within its discretion to use the food theft as a basis for an upward variance because it was admitted as relevant conduct in the PSR and was not established to be materially untrue, inaccurate or unreliable. *See* U.S.S.G. § 1B1.3(a)(2); *United States v. Zuniga*, 720 F.3d 587, 591 (5th Cir. 2013). As the government further points out, the district court was permitted to consider the food theft in the context of the upward variance even it was determined not to be relevant conduct. *United States v. Rhine*, 637 F.3d 525, 528–29 (5th Cir. 2011). Moreover, contrary to Charles's assertion, the record reveals that the district court explained that it was imposing the upward variance because, among other reasons, “[t]here was a culture of corruption in the Forrest County Jail, and [Charles] knew it and . . . allowed it to go on.” For these reasons, Charles has failed to show that the district court plainly erred in imposing his sentence or in applying the sentencing factors under § 3553(a). *Nguyen*, 854 F.3d at 283. His remaining contentions on this issue are denied as meritless.

Linda claims that her sentence was substantively unreasonable because the loss amount was an inadequate measure of culpability and the district court failed to consider other relevant sentencing factors such as her age and the fact that she had “nearly zero chance of recidivism.” Her argument is misplaced. This court has acknowledged that “[a] sentence within the Guidelines range is presumptively reasonable, and this presumption is rebutted only if the appellant demonstrates that the sentence does not account for a factor that should receive significant weight, gives significant weight to

No. 17-60502
c/w No. 17-60576

an irrelevant or improper factor, or represents a clear error of judgment in balancing sentencing factors.” *See Hernandez*, 876 F.3d at 166. Although Linda attempts to argue that the total loss amount was an inadequate measure of her culpability, she was convicted by a jury on five counts of filing false tax returns and she was unable to present evidence to rebut the loss amount as shown in the PSR or to prove that it “was inaccurate or materially untrue” in general or as it related specifically to her. *Scher*, 601 F.3d at 414. While Linda’s age and allegedly low chances of recidivism might be relevant considerations, the district court was free to give other § 3553(a) factors more significant weight in imposing her sentence. 18 U.S.C. § 3553(a). Accordingly, Linda has failed to rebut the presumption of reasonableness afforded to her within-guidelines sentence. *United States v. Gomez-Herrera*, 523 F.3d 554, 565–66 (5th Cir. 2008) (“As [the defendant] was sentenced within a properly calculated Guidelines range, his sentence is entitled to a presumption of reasonableness that we see no reason to disturb.”). Consequently, we hold that the district court did not plainly err in imposing Linda’s sentence. *See Ruiz*, 621 F.3d at 398.

C. Restitution

Charles argues that the district court erred in imposing restitution. We review Charles’s claim that the district court lacked the authority to impose restitution de novo. *See United States v. Westbrooks*, 858 F.3d 317, 327 (5th Cir. 2017). We review the restitution amount imposed by the district court for abuse of discretion. *United States v. Benns*, 810 F.3d 327, 329 (5th Cir. 2016).

“Restitution to the IRS may be imposed as a condition of supervised release under § 3583[.]” *Nolen*, 472 F.3d at 382. To calculate the restitution amount, the district court is granted wide latitude and “may simply make a reasonable estimate based on the available facts.” *Westbrooks*, 858 F.3d at 329.

No. 17-60502
c/w No. 17-60576

Nevertheless, “a restitution award due prior to the commencement of a term of supervised release is a component of the sentence, not a condition of supervised release,” and is therefore unauthorized. *Id.* at 328.

Charles’s general challenge to the district court’s authority to impose restitution fails as it is well-established that “[r]estitution to the IRS may be imposed as a condition of supervised release under § 3583[.]” *Nolen*, 472 F.3d at 382. However, he does correctly argue and the government concedes that “a restitution award due prior to the commencement of a term of supervised release is a component of the sentence, not a condition of supervised release,” and is therefore unauthorized. *Westbrooks*, 858 F.3d at 328. Here, the district court’s condition that the restitution amount was due “immediately”⁷ was unauthorized under this court’s precedent in *Westbrooks*. *Id.* at 328 (“We thus conclude that the judgment contains an error in ordering that [the defendant] begin making payments while in prison—a timeline that exceeds the court’s statutory authority. But that error does not overcome the other indications that the court intended to impose restitution under the statute permitting it as part of supervised release.”). Accordingly, we modify the judgment to reflect that the Boltons do not owe restitution until their terms of supervised release begin. *Id.* (“The most efficient remedy in this situation is to modify the judgment so that [the defendant] does not owe restitution until she begins her term of supervised release.” (citing 28 U.S.C. § 2106)).

Finally, as to the amount of restitution, this court gives the district court “wide latitude” to determine the amount of loss based on the available facts.

⁷ The district court stated at sentencing: “It’s ordered that the defendant pay a thousand dollars a month toward the restitution beginning immediately. Payment begins and shall continue while he is in prison.”

No. 17-60502
c/w No. 17-60576

Westbrooks, 858 F.3d at 329. Because the district court used the same figures to calculate the restitution amount that it used to calculate the damages amount, Charles has failed to show that the restitution award was an abuse of discretion. *See Scher*, 601 F.3d at 414. All of his remaining arguments on this issue are meritless.

Conflict-Free Choice of Counsel or Ineffective Assistance of Counsel

Charles claims that his trial counsel (Owen) “labored under an actual conflict of interest and provided unconstitutional representation before trial, during trial, and at sentencing because of a direct conflict of interest concerning Owen’s relationship to attorney John Lee.” Charles presented his allegations of conflict of counsel and ineffective assistance of counsel in three separate post-trial motions, all three of which moved for a new trial.

A district court’s denial of a motion for a new trial is reviewed for abuse of discretion. *Olibas v. Barclay*, 838 F.3d 442, 448 (5th Cir. 2016). “This standard is necessarily deferential to the trial court because we have only read the record, and have not seen the impact of the witnesses on the jury or observed the demeanor of the witnesses ourselves, as has the trial judge.” *United States v. Stanford*, 823 F.3d 814, 838 (5th Cir. 2016). Questions of law are reviewed de novo. *United States v. Anderson*, 755 F.3d 782, 800 (5th Cir. 2014). When there are mixed questions of law and fact, this court reviews “the underlying facts for abuse of discretion, but the conclusions to be drawn from those facts de novo.” *Stanford*, 823 F.3d at 838.

Whether a defendant’s counsel labored under a conflict of interest is a mixed question of law and fact that this court reviews de novo. *United States v. Hernandez*, 690 F.3d 613, 619 (5th Cir. 2012). We also conduct a de novo review of the district court’s determinations concerning ineffective assistance of counsel claims. *See United States v. Shepherd*, 880 F.3d 734, 740 (5th Cir.

No. 17-60502
c/w No. 17-60576

2018). A district court's decision to disallow substitution of counsel is reviewed for abuse of discretion. *United States v. Jones*, 733 F.3d 574, 587 (5th Cir. 2013).

Although generally disfavored, a new trial may be granted on the basis of newly discovered evidence when "(1) the evidence is newly discovered and was unknown to the defendant at the time of trial; (2) the failure to detect the evidence was not due to a lack of diligence by the defendant; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence if introduced at a new trial would probably produce an acquittal." *Anderson*, 755 F.3d at 800; Fed. R. Crim. P. 33.

"The Sixth Amendment right to counsel includes the 'right to representation that is free from any conflict of interest.'" *Hernandez*, 690 F.3d at 618. Generally, this court will determine that "a conflict exists when defense counsel allows a situation to arise that tempts a division in counsel's loyalties." *Id.* "If a defendant chooses to proceed with representation by counsel who has a conflict of interest, a district court must conduct what is commonly known as a 'Garcia hearing'⁸ to ensure a valid waiver by the defendant of his Sixth Amendment right." *Id.* A district court's requirement to conduct a *Garcia* hearing only exists if there is an actual conflict of interest and not just a "speculative or potential conflict." *Id.* at 618–19.

Ineffective assistance of counsel claims are evaluated under the legal standard articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a defendant must prove both deficient performance and prejudice. 466 U.S. at 700. To prove deficient performance, the defendant must show that

⁸ *United States v. Garcia*, 517 F.2d 272, 278 (5th Cir. 1975).

No. 17-60502
c/w No. 17-60576

his counsel's performance "fell below an objective standard of reasonableness." *Id.* at 688. To show prejudice, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Charles's claim that Owen labored under an actual conflict of interest when he represented Charles is meritless. In its memorandum opinion denying Charles's motions for post-trial relief, the district court carefully described the payment arrangements between Charles and Owen and the parties that paid Owen's retainer on Charles's behalf and Charles's knowledge of those payments. The district court clarified that Lee was not a government witness, he was never called to testify at trial, and the parties understood that if he were called, he would invoke his Fifth Amendment privilege against self-incrimination and not testify. Additionally, the record reflects that Charles gave Owen a check written by Lee to represent him in the food theft case back in 2014, but the tax fraud investigation against Lee did not commence until 2016. Consequently, Owen's acceptance of Lee's payment could not have created a conflict in Owen's representation of Charles. Moreover, as the district court noted, Charles not only knew of Lee's payments to Owen, he hand-delivered the checks. He has failed to meet the requirements for a new trial in that the evidence he attempts to use to support his motion was known and available to him several years prior to the commencement of his trial. *Anderson*, 755 F.3d at 800; Fed. R. Crim. P. 33.

Charles has also failed to show that he was denied his "counsel of choice" at sentencing. As the government points out, neither the district court nor Owen knew that Charles had retained new counsel to represent him at sentencing until shortly before the hearing. The district court was within its

No. 17-60502
c/w No. 17-60576

sound discretion to deny Charles's motion to continue as it was his fourth motion. At that point, Huntley had neither sought pro hac vice admission nor made an appearance to represent Charles. Nevertheless, the district court "allowed the Boltons to confer privately with [Huntley], along with a representative of the local Federal Public Defender's Office invited by the district court, to determine who should represent [Charles]. Owen appeared at sentencing on behalf of [Charles], but the district court allowed Huntley to unofficially appear on [Charles]'s behalf as well." The district court went above and beyond to accommodate Charles's "choice of counsel" at sentencing and his choice to instruct Owen to continue to represent Charles alongside Huntley at sentencing was not an abuse of discretion. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006) (observing that trial courts have "wide latitude in balancing the right to counsel of choice against the needs of fairness and against the demands of its calendar"). Likewise, the district court's decision to deny Charles a *Garcia* hearing was proper given that the district court conducted extensive fact-finding and concluded that no actual conflict existed. *Hernandez*, 690 F.3d at 618–19 (noting that a district court's requirement to conduct a *Garcia* hearing only exists if there is an actual conflict of interest and not just a "speculative or potential conflict"). His remaining arguments on this issue are denied as meritless.

Attorney-Client Privilege Waiver

Charles argues that his communications with Owen should be protected by the attorney-client privilege, that he did not waive that privilege, and that the district court erred in granting the government's motion for reconsideration and unsealing the record. He also complains that the district court did not have jurisdiction over his case when it issued an order on July 24, 2017 for him to file a response to the government's motion for

No. 17-60502
c/w No. 17-60576

reconsideration. He argues that this is because he filed an appeal on July 13, 2017 and this court had accepted jurisdiction which effectively divested the district court of jurisdiction over the proceedings at the time it ordered him to respond to the government's motion.

“In evaluating a claim of attorney-client privilege, we review factual findings for clear error and ‘the application of the controlling law de novo.’” *In re Itron, Inc.*, 883 F.3d 553, 557 (5th Cir. 2018). The controlling law to be applied here is that of Mississippi, which governs . . . any assertion of attorney-client privilege or putative waiver thereof. *Id.* “Our task is to apply the law as would the Mississippi Supreme Court.” *Id.* (citing *Guilbeau v. Hess Corp.*, 854 F.3d 310, 311 & n.4 (5th Cir. 2017)). Mississippi law allows clients the “privilege to refuse to disclose . . . any confidential communication[s] made to facilitate professional legal services, if those communications were made between the client . . . and [his] lawyer or among lawyers . . . representing the same client.” *Id.* (citing Miss. R. Evid. 502(b) (internal quotation marks omitted)).

“By definition, the attorney-client privilege protects only confidential communications.” *Id.* at 558 (citing Miss. R. Evid. 502(b) (emphasis omitted)). A client waives the privilege “[b]y disclosing such communications to third parties—such as by revealing them in open court[.]” *Id.* The waiver extends to related subject matter. *Id.* A client also “waives the privilege by affirmatively relying on attorney-client communications to support an element of a legal claim or defense—thereby putting those communications ‘at issue’ in the case.” *Id.* That is to say, “when a party entitled to claim the attorney-client privilege uses confidential information against his adversary (the sword), he implicitly waives its use protectively (the shield) under that privilege.” *Id.*

No. 17-60502
c/w No. 17-60576

The issue of whether Charles waived the attorney-client privilege arose out of Owen's filing a motion to deem the privilege and the work-product doctrine waived so that his responses to Charles's allegations could be filed in the public record. In June 2017, the district court found that Charles had waived the attorney-client privilege but ordered that Owen's responses to Charles's allegations against him be filed under seal until the conclusion of the Boltons' convictions and sentences. However, in its order placing Owen's responses under seal, the district court acknowledged "that Charles has repeated[ly] used both this Court and the media in an attempt to [publicly] vilify both Owen and the Government." The government filed a motion to reconsider requesting that the responses be unsealed. Charles was ordered to respond and the district court ultimately granted the government's motion for reconsideration stating that "[t]he Court is concerned only with previously privileged information which could prejudice Bolton on appeal or in the event of a new trial. Because Bolton makes no specific arguments towards any of the previously privileged information, the Court finds that the Motion for Reconsideration should be granted." Charles then filed a second notice of appeal, No. 17-60576, of the district court's order granting the motion for reconsideration and unsealing Owen's responses to Charles's allegations against him.

Charles's argument is unconvincing that the district court was divested of jurisdiction when it ordered him to file a response to the government's motion for reconsideration. The Supreme Court has held and this court has recently recognized that "[a]n appeal divests the district court of its jurisdiction 'over those aspects of the case involved in the appeal.'" *United States v. Pena*, 713 F. App'x 271, 272 (5th Cir. 2017) (per curiam) (unpublished) (quoting *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 379 (1985)). As

No. 17-60502
c/w No. 17-60576

Charles acknowledges, he has filed two appeals: (1) No. 17-60502, filed on July 13, 2017, pertaining to his convictions and sentences and (2) No. 17-60576, filed August 2017, pertaining to the district court's grant of the motion for reconsideration and the unsealing of Owen's responses. The only appeal pending at the time the district court issued its order to him to respond to the government's motion for reconsideration was No. 17-60502, the appeal pertaining to his convictions and sentences. The district court had not been divested of jurisdiction with respect to the issues involved in Charles's second appeal pertaining to his allegations against Owen, waiver of the attorney-client privilege, release of the work-product doctrine information, and unsealing the record. *Marrese*, 470 U.S. at 379; *Pena*, 713 F. App'x at 272.

Next, under controlling Mississippi law, Charles waived the attorney-client privilege when he charged Owen with providing him with ineffective assistance and further when he made public statements to third parties via the media, social media, the court, and the press, to publicly criticize and make derogatory comments about Owen and his firm's representation of him. *See In re Itron, Inc.*, 883 F.3d at 558 (noting that a client waives the privilege “[b]y disclosing such communications to third parties—such as by revealing them in open court” and “by affirmatively relying on attorney-client communications to support an element of a legal claim or defense—thereby putting those communications ‘at issue’ in the case”). The district court properly granted the government's motion for reconsideration to modify the protective order and unseal Owen's responses to Charles's allegations. *See United States v. Morales*, 807 F.3d 717, 723 (5th Cir. 2015). His remaining arguments on this issue are denied as meritless.

No. 17-60502
c/w No. 17-60576

III. Conclusion

For the foregoing reasons, we AFFIRM the convictions and sentences of Charles and Linda Bolton and MODIFY the district court's judgment to show that the restitution owed by the Boltons does not become due until they begin their terms of supervised release.

APPENDIX C

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

NO. 17-60502

**UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus**

**CHARLES BOLTON; LINDA BOLTON,
Defendants-Appellants.**

Consolidated with 17-60576

**UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus**

**CHARLES BOLTON,
Defendant-Appellant.**

**Appeal From The United States District Court
For The Southern District of Mississippi**

**Honorable Keith Starrett, District Judge
Criminal Docket No. 16-CR-00007**

MOTION TO CORRECT STATEMENT

The government respectfully requests that this Court correct one statement in its opinion regarding allegations of a *Brady* violation arising from an FBI 302 report of an interview with John Lee. In particular, the opinion states that the FBI

302 was turned over as required *Jencks* material. Slip op. at 15. However, the author of the report, an FBI agent, did not testify, and the FBI 302 thus was not turned over as required *Jencks* material.

Rather, IRS Agent Luker testified, and Agent Luker's investigative report was turned over under *Jencks*. As the government stated in its brief, "the Boltons received Agent Luker's report as *Jencks* material." Gov. Br. at 60 (citing district court order at ROA.17-60502.372); *see* ROA.17-60502.6687-95 (Luker report). Further, as the record reflects, the district court, in its order denying a renewed motion for new trial and for discovery, stated, "The Government turned over Agent Luker's report of the interview as required *Jencks* material. The FBI report was not turned over because it was not required to be turned over, as it was not exculpatory or impeaching, nor was it a statement of a testifying witness." ROA.17-60502.372. The government thus respectfully requests that the opinion be corrected in this regard.

Jeffrey M. Brandt, counsel for defendant-appellant Linda Bolton, stated that Linda Bolton concurs in the government's request that the Court correct the statement that the FBI 302 was turned over as required *Jencks* material. However, a representative from the office of Ivan Bates, counsel for defendant-appellant Charles Bolton, stated, "Charles Bolton does not concur. The court's opinion was

based in part on this erroneous fact, and it may have led to the court's ultimate conclusion."

CONCLUSION

For the foregoing reasons, the government respectfully requests that the Court correct the statement at page 15 of its opinion to reflect that the FBI 302 was not turned over as required *Jencks* material.

Respectfully submitted,

PETER G. STRASSER
UNITED STATES ATTORNEY

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CERTIFICATE OF SERVICE AND ECF COMPLIANCE

I hereby certify that on this 22nd day of October, 2018, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system, which will send a notice of electronic filing to ECF-registered counsel of record.

I further certify the foregoing document meets the required privacy redactions; that it is an exact copy of the paper document; and the document has been scanned with the most recent version of a commercial virus scanning program and is virus-free.

/s/Diane Hollenshead Copes

DIANE HOLLENSHEAD COPES
Assistant U.S. Attorney

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/s/ Diane Hollenshead Copes
DIANE HOLLENSHEAD COPES
Assistant U.S. Attorney
October 22, 2018

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-60502

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

CHARLES BOLTON; LINDA BOLTON,

Defendants - Appellants

Consolidated with 17-60576

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

CHARLES BOLTON,

Defendant - Appellant

Appeals from the United States District Court
for the Southern District of Mississippi

Before STEWART, Chief Judge, and WIENER and HIGGINSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that appellee's opposed motion to correct this court's opinion is GRANTED.

APPENDIX E

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

NO. 17-60502

**UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus**

**CHARLES BOLTON; LINDA BOLTON,
Defendants-Appellants.**

Consolidated with 17-60576

**UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus**

**CHARLES BOLTON,
Defendant-Appellant.**

**Appeal From The United States District Court
For The Southern District of Mississippi**

**Honorable Keith Starrett, District Judge
Criminal Docket No. 16-CR-00007**

MOTION TO CORRECT SUBSTITUTED STATEMENT

The government respectfully requests that this Court amend its substituted opinion and apologizes for failing to sufficiently communicate the problematic

language in the first instance. As discussed below, the government respectfully suggests that the Court simply delete the sentence.

In its original opinion, on page 15, this Court stated:

Further, the government did not withhold the report from the Boltons; it was turned over as required *Jencks*⁵ material.

⁵18 U.S.C. § 3500.

The government understood this reference to the “report” to mean the FBI 302, which was not turned over to the Boltons. *See* ROA.17-60203.372 (district court opinion stating, “The FBI report was not turned over because it was not required to be turned over, as it was not exculpatory or impeaching, nor was it a statement of a testifying witness.”).

Yesterday, the government moved to correct the reference in the Court’s opinion but apologizes for failing to explain the problem sufficiently as, on page 15, the Court substituted the following language:

Further, the government did not withhold the report from the Boltons; it voluntarily turned over the report under *Jencks*.⁵

⁵18 U.S.C. § 3500.

To be clear, the FBI 302 was not turned over either voluntarily or as *Jencks* material.¹ Rather, the district court ruled that the FBI 302 was not *Brady* material and denied discovery of the FBI 302.²

For simplicity's sake, the government respectfully suggests that the Court consider simply deleting the sentence and footnote. Jeffrey M. Brandt, counsel for defendant-appellant Linda Bolton, concurs in this request for relief. Charles Bolton's counsel did not respond to the government's email requesting his position, although a representative from the office of Ivan Bates stated yesterday that Charles Bolton did not concur with the government's initial motion to correct the statement: "Charles Bolton does not concur. The court's opinion was based in part on this erroneous fact, and it may have led to the court's ultimate conclusion." Presumably, Mr. Bolton also would oppose the relief sought herein.

¹ A description of *Jencks* materials given over pretrial is at ROA.17-60502.6675-76. As the government stated in its brief, IRS Agent Bradley Luker testified, and his report was turned over as *Jencks*. Gov. Br. at 60 (citing district court order at ROA.17-60502.372); *see also* ROA.17-60502.6687-95 (Luker report).

² *See* Gov. Br. at 11 (citing ROA.17-60502.368-74); Gov. Br. at 55-63 & n.57 (citing ROA.17-60502.369-73, 2133).

CONCLUSION

For the foregoing reasons, the government respectfully requests that the Court delete the statement at page 15 of its opinion regarding the government's having turned over the FBI 302 voluntarily or under *Jencks*.

Respectfully submitted,

PETER G. STRASSER
UNITED STATES ATTORNEY

/s/ Diane Hollenshead Copes
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CERTIFICATE OF SERVICE AND ECF COMPLIANCE

I hereby certify that on this 24th day of October, 2018, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system, which will send a notice of electronic filing to ECF-registered counsel of record.

I further certify the foregoing document meets the required privacy redactions; that it is an exact copy of the paper document; and the document has been scanned with the most recent version of a commercial virus scanning program and is virus-free.

/s/Diane Hollenshead Copes

DIANE HOLLENSHEAD COPES
Assistant U.S. Attorney

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/s/ Diane Hollenshead Copes
DIANE HOLLENSHEAD COPES
Assistant U.S. Attorney
October 24, 2018

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-60502

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

CHARLES BOLTON; LINDA BOLTON,

Defendants - Appellants

Consolidated with 17-60576

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

CHARLES BOLTON,

Defendant – Appellant

Appeals from the United States District Court
for the Southern District of Mississippi

Before STEWART, Chief Judge, and WIENER and HIGGINSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that appellee's opposed motion to correct this court's opinion issued October 23, 2018 is GRANTED.

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-60502
D.C. Docket No. 2:16-CR-7-1

United States Court of Appeals
Fifth Circuit
FILED
October 26, 2018
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

CHARLES BOLTON

Defendant - Appellant

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

Before STEWART, Chief Judge, and WIENER and HIGGINSON, Circuit
Judges.

J U D G M E N T

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

It is ordered and adjudged that the judgment of the District Court is
affirmed as modified.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-60502

D.C. Docket No. 2:16-CR-7-2

United States Court of Appeals
Fifth Circuit

FILED

October 26, 2018

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

LINDA BOLTON,

Defendant - Appellant

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

Before STEWART, Chief Judge, and WIENER and HIGGINSON, Circuit
Judges.

JUDGMENT

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

It is ordered and adjudged that the judgment of the District Court is
affirmed as modified.

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

October 26, 2018

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

CHARLES BOLTON; LINDA BOLTON,

Defendants - Appellants

Consolidated with 17-60576

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

CHARLES BOLTON,

Defendant - Appellant

Appeals from the United States District Court
Southern District of Mississippi

Before STEWART, Chief Judge, and WIENER and HIGGINSON, Circuit
Judges.

CARL E. STEWART, Chief Judge:

IT IS ORDERED that our prior panel opinion, *United States v. Bolton*,

No. 17-60502
c/w No. 17-60576

No. 17-60502 c/w 17-60576, 2018 WL 5303661 (5th Cir. Oct. 23, 2018), is WITHDRAWN and the following opinion is SUBSTITUTED therefor.

A grand jury indicted Plaintiffs-Appellants Charles Bolton (“Charles”) and his wife, Linda Bolton (“Linda”), on five counts of attempted tax evasion and five counts of filing false tax returns. The jury convicted Charles on four of the attempted tax evasion counts and all five counts of filing false tax returns. The jury acquitted both Boltons on one of the attempted tax evasion counts, failed to reach a verdict as to Linda on the remaining attempted tax evasion counts, and convicted Linda on all five counts of filing false tax returns.

The district court sentenced Charles to 45 months of imprisonment, imposed three years of supervised release with a special condition requiring payment of \$145,849.78 in restitution and a \$10,000 fine. The district court sentenced Linda to 30 months of imprisonment, with a one-year term of supervised release, a \$6,000 fine, and restitution of \$145,849.78, owed jointly and severally with Charles. Both Charles and Linda appeal their convictions and sentences. We affirm the Boltons’ convictions and sentences in all respects except that we modify the district court’s judgment to reflect that the restitution owed by the Boltons is not due until their terms of supervised release commence.

I. Facts & Procedural History

In 1992, Charles became chief deputy sheriff of the Forrest County Sheriff’s Office (“FCSO”) in Hattiesburg, Mississippi. He was terminated from the FCSO in 2016 after he was convicted in this case. As chief deputy, he oversaw the Forrest County Juvenile and Adult Detention Center. At that

No. 17-60502
c/w No. 17-60576

time, he and his wife Linda also owned and operated two businesses,¹ Hall Avenue Package Store and Sports 22 Café and Lounge.

In March 2014, the Federal Bureau of Investigation (“FBI”) and the Mississippi State Auditor’s Office began an investigation into whether the Boltons and others were stealing food from the FCSO’s Detention Center.² In July 2015, the U.S. Attorney’s Office for the Southern District of Mississippi received approval to recuse itself from the investigation and prosecution of Charles, and the matter was re-assigned to the U.S. Attorney’s Office for the Eastern District of Louisiana. Around that time, the FBI referred several suspicious checks related to the Boltons’ businesses to Internal Revenue Service (“IRS”) Special Agent Bradley Luker who began a criminal tax investigation to determine whether the Boltons were guilty of violating any tax laws. Agent Luker provided information about the criminal tax investigation to Assistant United States Attorney Fred Harper of the Eastern District of Louisiana who had been assigned to Charles’s case.

A federal grand jury returned a ten-count indictment in March 2016 charging the Boltons with attempted tax evasion and aiding and abetting in attempted tax evasion for the tax years 2009 through 2013, in violation of 26 U.S.C. § 7201 and 18 U.S.C. § 2 (Counts 1–5), as well as filing false tax returns and aiding and abetting in the filing of false tax returns for tax years 2009 through 2013, in violation of 26 U.S.C. § 7206(1) and 18 U.S.C. § 2 (Counts 6–

¹ The Boltons’ businesses were Schedule C businesses which are considered sole proprietorships. Taxes for Schedule C businesses are reported on the owner’s personal income tax return.

² The 2014 food theft investigation did not result in charges against the Boltons in the underlying proceedings but the district court determined the incident to be relevant conduct for purposes of sentencing and its calculation of the loss and restitution amounts. *See* U.S.S.G. § 1B1.3.

No. 17-60502
c/w No. 17-60576

10). After the Boltons were indicted, attorney Joe Sam Owen (“Owen”) enlisted as counsel of record on behalf of Charles. Linda was represented by several different attorneys before trial, and by attorney Robert McDuff at trial and sentencing.

Prior to trial, the government stated its intent to introduce business records, checks, check registers, and tax returns of an individual named John Lee (“Lee”), who, through his law practice, Lee P.A., was involved with the Boltons, as business or public records. The government also subpoenaed Lee to testify at trial, and Charles subpoenaed a large number of checks from Lee’s law practice as well as Lee’s casino gambling records.

Before trial, Lee hired attorney Rick Simmons who moved to quash a subpoena by the government to testify at trial on grounds that Lee would be invoking his Fifth Amendment privilege against self-incrimination. The district court denied the motion, but the parties stipulated at the outset of trial that Lee would not actually testify even if called.³ The parties also stipulated that records or summaries of records were admissible as business records, and the Boltons stipulated to the authenticity of their handwriting on various exhibits. The parties further stipulated that Lee had invoked his Fifth Amendment privilege, and the jury was instructed that Lee would not be called as a witness.

The Boltons’ three-day jury trial began in September 2016. At trial, the government presented evidence that the Boltons treated money received by their two businesses as “loans” rather than “income” when reporting their business income on their personal income tax returns, prepared by Renee

³ The district court ruled that the Boltons could comment at trial on Lee’s invocation of his Fifth Amendment privilege.

No. 17-60502
c/w No. 17-60576

Moore (“Moore”) of Nicholson and Company, thus falsely reducing their tax liability. The deposits in question included checks from various entities and individuals, including Lee and Manheim Mississippi Auto Auction.

The jury ultimately convicted Charles on four counts of attempted tax evasion and all five counts of filing false tax returns. The jury acquitted each Bolton on one count of attempted tax evasion, failed to reach a verdict as to Linda on the remaining attempted tax evasion counts, and convicted Linda on all five counts of filing false tax returns.

The presentence reports (“PSRs”) for Charles and Linda described an interview (referred to as an “FBI 302”) of Lee by federal agents regarding checks he had given to Charles. Linda moved for a new trial based on an alleged discrepancy between the information in the FBI 302 and the testimony of Agent Luker. Linda also argued that the failure to disclose the substance of the interview violated the government’s discovery obligations and constituted a *Brady* violation. Charles joined the motion. The district court denied the new trial motion, finding no discrepancy between Agent Luker’s trial testimony and the information in the FBI 302.

Three days before sentencing, Charles’s attorney, Owen, advised the court that Charles had obtained new counsel and that Charles would be complaining about his (Owen’s) handling of the case. On the day of sentencing, Charles sought to be represented by new counsel, Willie J. Huntley—an out-of-state attorney who said he would need more time to review the case before being ready to proceed. The district court declined to grant a continuance and offered Charles the choice of being represented at sentencing by Owen or by an attorney from the Federal Public Defender’s Office. Ultimately, Charles was represented at sentencing by Owen, and Huntley was allowed to assist.

No. 17-60502
c/w No. 17-60576

In sentencing Charles, the district court upwardly varied from the guidelines range of 27 to 33 months, imposing a 45-month term of imprisonment. The variance was based on the district court's finding that he had stolen food inventory from the FCSO Detention Center and used the food at his Sports 22 restaurant and catering business. The district court also imposed three years of supervised release with a special condition requiring payment of \$145,849.78 in restitution and a \$10,000 fine. Charles reported to federal prison on May 3, 2017. He then moved the district court for release pending appeal, which the district court denied.⁴

After sentencing, Owen sought and received permission to withdraw as counsel of record for Charles. Three days after entry of the judgment, Charles filed a notice of appeal, and also filed three motions seeking a new trial or vacatur of his conviction and sentence. Among numerous other arguments, Charles argued that his representation by Owen was paid for by Lee and was therefore tainted by a conflict of interest. This court remanded the case pursuant to Federal Rule of Appellate Procedure 12.1(b) so that the district court could rule on the motions, expressly declining to retain jurisdiction.

Following remand, the district court issued an order reviving the pending motions, setting briefing deadlines, and ordering former counsel Owen and McDuff to respond to various allegations of ineffective assistance of counsel. The government filed a consolidated response to all of the Boltons' pending motions, as did Owen and McDuff. On July 3, 2017, the district court denied the new trial motions. Charles noticed his appeal on July 12 (entered July 13), citing the district court's July 3 new trial order. Linda noticed her appeal on July 13, also citing the district court's July 3 new trial order.

⁴ This court denied Charles's motion for release pending appeal on August 7, 2017.

No. 17-60502
c/w No. 17-60576

Owen asked the district court to deem the attorney-client privilege and the work-product doctrine waived so that he could respond to the Boltons' allegations of conflict and ineffective assistance of counsel. Charles objected and Owen noted that, in multiple motions, he and his firm were accused of harboring a conflict-of-interest and a litany of instances of ineffective assistance. The government supported the waiver. Charles then sought a protective order, which Owen opposed, precluding the availability of the documents to the prosecution, law enforcement, or the public. Owen identified the claims against him as involving an alleged conflict about Lee, trial preparation and use of an expert, jury selection, trial strategy, exhibits, witnesses, Linda's decision not to testify, Charles's decision not to testify, Charles's conviction, the PSR and objections, the in-camera sentencing conference, the sentencing hearing, and the post-sentencing submissions under seal.

The district court acknowledged that Charles had waived his attorney-client privilege and work-product doctrine but determined that the documents should be filed under seal and not served on the government. The government moved for reconsideration on grounds that it would need the materials to respond to any appeal filed by Charles and to defend against allegations of ineffective assistance of counsel under 28 U.S.C. § 2255. The district court granted the government's motion and placed Owen's response to Charles's new trial motions on the public docket, finding that Charles "did not point to a single piece of formerly privileged evidence which would prejudice him either on appeal or in the event of a new trial." Charles noticed his appeal of that order (appeal No. 17-60576). Charles's second appeal, No. 17-60576, was consolidated with the existing appeal of the Boltons' convictions and sentences, No. 17-60502.

No. 17-60502
c/w No. 17-60576

II. Discussion

The Boltons each raise a host of arguments on appeal including but not limited to: (1) whether the indictment was sufficient; (2) whether the evidence was sufficient to support the Boltons' convictions; (3) whether one or more *Brady* violations took place in the proceedings below; (4) whether the Boltons' Confrontation Clause rights were violated; (5) whether the government engaged in prosecutorial misconduct during trial; (6) whether the district court erred in its issuance of jury instructions; (7) whether the district court erred in imposing the Boltons' sentences; (8) whether Charles was denied his right to conflict-free choice of counsel or received ineffective assistance of counsel; and (9) whether the district court erred in holding that Charles waived his attorney-client privilege. We address each issue in turn.

Indictment

Charles argues that his indictment was insufficient. Because Charles failed to preserve his objection to the alleged defective indictment, plain error review applies. *United States v. Robinson*, 367 F.3d 278, 285 (5th Cir. 2004). “Plain error exists if (1) there is an error, (2) the error is plain, . . . (3) the error affect[s] substantial rights and (4) the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” *United States v. Garcia-Carrillo*, 749 F.3d 376, 378 (5th Cir. 2014) (per curiam) (internal quotation marks and citation omitted).

“An indictment is legally sufficient if (1) ‘each count contains the essential elements of the offense charged,’ (2) ‘the elements are described with particularity,’ and (3) ‘the charge is specific enough to protect the defendant against a subsequent prosecution for the same offense.’” *United States v. Fairley*, 880 F.3d 198, 206 (5th Cir. 2018) (“[T]he validity of an indictment is

No. 17-60502
c/w No. 17-60576

governed by practical, not technical considerations,’ and ‘[t]he basic purpose behind an indictment is to inform a defendant of the charge against him[.]’”).

The government charged five counts of attempted tax evasion and aiding and abetting in attempted tax evasion for the tax years 2009 through 2013 in violation of 26 U.S.C. § 7201 and 18 U.S.C. § 2 (Counts 1-5), and five counts of filing false tax returns and aiding and abetting in the filing of false tax returns for the tax years 2009 through 2013 in violation of 26 U.S.C. § 7206(1) and 18 U.S.C. § 2 (Counts 6-10).

A. Tax Evasion

“The elements of [§7201 tax evasion are]: (1) willfulness, (2) existence of a tax deficiency; and (3) an affirmative act constituting an evasion or attempted evasion of the tax.” *United States v. Nolen*, 472 F.3d 362, 377 (5th Cir. 2006). The indictment charged that, for the tax evasion counts, the Boltons “did willfully attempt to evade and defeat a large part of the income tax due and owing by defendants to the United States of America by, among other things, preparing and causing to be prepared, and by signing and causing to be signed, a false and fraudulent joint U.S. Individual Income Tax Return, Form 1040, on behalf of defendants, which was filed with the Internal Revenue Service.” The indictment further alleged that the Boltons attempted to evade and evaded the assessment of their income taxes by cashing tens of thousands of dollars in checks purportedly issued in payment for liquor, wine, and catering services to prevent those payments from being recorded on their business bank statements; providing deceptive records to their tax return preparer; and making false statements to their tax return preparer that some payments for goods and services were loans. When compared to the elements required to prove tax evasion under § 7201, the indictment was sufficient in that it alleged with specificity the affirmative acts willfully taken by the

No. 17-60502
c/w No. 17-60576

Boltons to evade the tax they knew they owed, provided the Boltons notice of the alleged crime, and protected them from subsequent prosecution for the same crime. *Fairley*, 880 F.3d at 206.

B. Filing False Tax Returns

“A person commits the felony of filing a false tax return in violation of 26 U.S.C. § 7206(1) when he ‘willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter.’” *United States v. Bishop*, 264 F.3d 535, 546 (5th Cir. 2001) (quoting 26 U.S.C. § 7206(1)).

The indictment alleged that the Boltons “did willfully make and subscribe to a joint United States Income Tax Return, Form 1040, which was verified by a written declaration that it was made under penalty of perjury and was filed with the Internal Revenue Service [which] defendants herein did not believe to be true and correct as to every material matter for each calendar tax year noted [2009–2013]” in that they knew and believed they had failed to report a substantial amount of income on Line 22 of the Form.

Viewing the language of the indictment against the elements required to prove the crime of filing a false tax return, the indictment was sufficient in that it alleged with specificity the Boltons’ falsification of the tax returns, provided the Boltons notice of the alleged crime, and protected the Boltons from subsequent prosecution for the same crime. *Fairley*, 880 F.3d at 206. Accordingly, Charles failed to show plain error with respect to the sufficiency of the indictments for tax evasion and filing false tax returns. *Garcia-Carrillo*, 749 F.3d at 378. In light of this holding, we do not reach Charles’s alternative arguments as to the alleged insufficiency or defectiveness of the indictment.

No. 17-60502
c/w No. 17-60576

Sufficiency of the Evidence

Both Charles and Linda argue that the evidence was insufficient to support the jury's verdicts of guilt against them as to the crimes of tax evasion (Charles) and filing false tax returns (Charles and Linda). The Boltons preserved their challenges to the sufficiency of the evidence by moving for and renewing their motions for a judgment of acquittal. Accordingly, “[w]e review preserved challenges to the sufficiency of the evidence *de novo*, but we are ‘highly deferential to the verdict.’” *United States v. Scott*, 892 F.3d 791, 796 (5th Cir. 2018).

“When reviewing the sufficiency of the evidence, we view all evidence, whether circumstantial or direct, in the light most favorable to the government, with all reasonable inferences and credibility choices to be made in support of the jury’s verdict.” *Id.* It is the province of the jury to “weigh any conflicting evidence and to evaluate the credibility of witnesses.” *Id.* at 796–97. We consider the evidence “sufficient to support a conviction if ‘any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” *Id.* at 797. Our question is whether “the jury’s verdict was reasonable, not whether we believe it to be correct.” *Id.*

The jury convicted Charles on four of the five counts of tax evasion. Linda was not convicted of tax evasion. 26 U.S.C. § 7201 provides that “[a]ny person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony[.]” “The elements of [§ 7201 tax evasion are]: (1) willfulness, (2) existence of a tax deficiency; and (3) an affirmative act constituting an evasion or attempted evasion of the tax.” *Nolen*, 472 F.3d at 377. “Affirmative acts that satisfy the [third] element may include keeping double sets of books, concealment of assets, or ‘any conduct, the likely effect of which would be to mislead or to

No. 17-60502
c/w No. 17-60576

conceal.” *United States v. Miller*, 588 F.3d 897, 907 (5th Cir. 2009). To prove willfulness “the government must show that: (1) the law imposed a duty on the defendant; (2) the defendant knew of that duty; and (3) the defendant voluntarily and intentionally violated that duty.” *Id.* “Such evidence is ordinarily circumstantial, since direct proof is often unavailable.” *United States v. Kim*, 884 F.2d 189, 192 (5th Cir. 1989). To prove a tax deficiency the government must establish that the taxpayer had unreported taxable income. *United States v. Conaway*, 11 F.3d 40, 43 (5th Cir. 1993).

The jury convicted both Charles and Linda of five counts of filing false tax returns, or aiding and abetting in filing false tax returns, for the years of 2009 through 2013. A person commits the felony of filing a false tax return in violation of 26 U.S.C. § 7206(1) when he “[w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter[.]”

At the Boltons’ trial, the government presented sufficient evidence that Charles evaded taxes for the years 2010 through 2013 and that the Boltons filed false tax returns in which they consistently underreported their income from 2009 through 2013. The government’s evidence included numerous instances when the Boltons (1) cashed a significant number of checks before they were recorded in the Boltons’ financial books, and (2) designated significant amounts of income as non-taxable loans. Agent Luker testified at trial that he had traced the income derived from the cashed checks and the checks marked as loans in the Boltons’ records and concluded that they had a tax deficiency resulting from underreporting their income from their two businesses. Agent Luker used a multitude of specific examples of the checks marked as loans and the checks that were cashed before they “hit the books”

No. 17-60502
c/w No. 17-60576

to illuminate the discrepancy between the Boltons' actual income and their reported income. The government also presented a number of charts at trial which featured year-by-year summary computations of the Boltons' "reported" versus their "corrected" taxable income resulting from cashed checks and checks marked as loans.

Consequently, given this court's high level of deference to the jury's verdict and the mountain of evidence presented at trial in support of the jury's verdict, specifically proving the elements of tax evasion as to Charles and filing false returns as to both Charles and Linda, we hold that the evidence was sufficient to support the Boltons' convictions. *Scott*, 892 F.3d at 796–97. In light of this holding, we do not reach either Charles's or Linda's alternative arguments as to the alleged insufficiency of the evidence.

Alleged Brady Violations

The Boltons contend that the *Brady* material suppressed by the government includes: (1) a Department of Justice memorandum dated July 29, 2015, (2) an FBI 302 interview report documenting Lee's statements to law enforcement that allegedly contradict the trial testimony of Agent Luker, (3) a subpoena issued by the government to Carl Nicholson ("Nicholson"), and (4) Lee's plea agreement. "We review a district court's determination on a *Brady* claim de novo, though we defer to factual findings underlying the district court's decision." *United States v. Swenson*, 894 F.3d 677, 683 (5th Cir. 2018) (citing *United States v. Cessa*, 861 F.3d 121, 128 (5th Cir. 2017)).

Under *Brady*, "the government violates a defendant's due process rights if it withholds evidence that is favorable to the accused and material to the defendant's guilt or punishment." *Swenson*, 894 F.3d at 683 (citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). The rule is applied regardless "of the good faith or bad faith of the prosecution . . . [and] extends to impeachment evidence

No. 17-60502
c/w No. 17-60576

as well as exculpatory evidence.” *Id.* (citing *Youngblood v. West Virginia*, 547 U.S. 867, 869 (2006); *Brady*, 373 U.S. at 87). For a defendant to prevail on a *Brady* claim, he “must show: (1) the evidence at issue was favorable to the accused, either because it was exculpatory or impeaching; (2) the evidence was suppressed by the prosecution; and (3) the evidence was material.” *Id.* The usual remedy for a *Brady* violation is a new trial. *Swenson*, 894 F.3d at 684.

The Boltons fail to make a successful argument on any of their purported *Brady* claims. With respect to Charles’s argument regarding the DOJ memorandum dated July 29, 2015, that memo simply addressed conflicts within the US Attorney’s Office, Mississippi division, and authorized transfer to the US Attorney’s Office, Louisiana division. This subject matter has no bearing on Agent Luker’s status as an IRS agent within the Department of Treasury. Moreover, the recusal information of the Mississippi division of the US Attorney’s Office is immaterial to Charles’s ability to “prepare a proper defense against the indictment” for his own crimes of tax evasion and filing false tax returns. Accordingly, the memorandum does not qualify as *Brady* material. *Swenson*, 894 F.3d at 683.

Both Charles and Linda argue that the FBI 302 interview report, which documents Lee’s statements to law enforcement that allegedly contradict Agent Luker’s trial testimony, was improperly suppressed *Brady* material. They claim that they would have used Lee’s statements in the interview that he could not remember what each and every check he wrote to the Boltons’ businesses was for to contradict Agent Luker’s testimony that Lee told him that the checks were written for food and liquor. As the district court properly observed, Lee’s statements did not go to the truth of Agent Luker’s testimony or to his own credibility because they were intended to highlight the suspicious nature of all the money going from Lee’s firm to the Boltons’ restaurant under

No. 17-60502
c/w No. 17-60576

the auspices of purchasing “business supplies”; they were not solicited to disprove Agent Luker’s testimony that Lee had told him that the checks were written for food and liquor. *United States v. St. Junius*, 739 F.3d 193, 202 (5th Cir. 2013) (“Under Federal Rule of Evidence 801(c), hearsay is a statement, other than one made by the declarant while testifying at trial or a hearing, offered in evidence to prove the truth of the matter asserted . . . The rule against hearsay does not apply when an out-of-court statement is offered for some purpose other than to prove the truth of the matter asserted.”). Moreover, Lee’s statement to Agent Luker that the checks were written for food and liquor does not contradict or undermine his statement in the FBI 302 interview that he could not remember what each individual check was for when he was shown a spreadsheet of payments at a later date. It is certainly conceivable that Lee stood by his story that all of the checks were written either for food or liquor without claiming to remember what each specific check was written for. Accordingly, the FBI 302 interview report does not qualify as *Brady* material. *Swenson*, 894 F.3d at 683.

Charles argues that the subpoena issued by the government to Nicholson was improperly suppressed *Brady* material because it “addressed the nature of certain checks that were written from John Lee to Joe Sam Owen and provided written acknowledgement of those checks.” As the government observes, however, Charles’s argument on this issue goes to the purported conflict of interest that he believed his attorney had—not to his own defense of the charges against him for tax evasion and filing false tax returns. Accordingly, the subpoena was immaterial and neither exculpatory nor impeaching. Thus, it did not qualify as *Brady* material. *Swenson*, 894 F.3d at 683.

No. 17-60502
c/w No. 17-60576

Finally, Charles fails to brief his argument that Lee's plea agreement was improperly suppressed *Brady* material and thus has waived the issue. *See Procter & Gamble Co. v. Amway Corp.*, 376 F.3d 496, 499 n.1 (5th Cir. 2004) ("Failure [to] adequately [] brief an issue on appeal constitutes waiver of that argument."). In any event, the plea agreement was signed after the Boltons were tried and convicted and thus could not have conceivably qualified as *Brady* material. *Swenson*, 894 F.3d at 683.

Confrontation Clause Rights

Both Charles and Linda argue that their Confrontation Clause rights were violated when Agent Luker was permitted to testify as to out-of-court statements that Lee had made to him since Lee was not available for cross-examination at trial given his invocation of the Fifth Amendment right against self-incrimination. "Alleged Confrontation Clause violations are reviewed *de novo* and subject to harmless error analysis." *United States v. Garcia*, 887 F.3d 205, 209 (5th Cir. 2018). However, "[a] defendant may not complain on appeal of errors that he himself invited or provoked the [district] court . . . to commit." *United States v. Salazar*, 751 F.3d 326, 332 (5th Cir. 2014) (citing *United States v. Wells*, 519 U.S. 482, 487–88 (1997)). Only errors attributed to the actions of the defense will be considered invited errors. *Id.* The standard of review for invited error is higher than that of plain error review. *Id.* "We will not reverse on the basis of invited error, absent manifest injustice." *Id.*

"The Confrontation Clause guarantees a defendant the opportunity for effective cross-examination." *United States v. Lockhart*, 844 F.3d 501, 510 (5th Cir. 2016) (citing *Delaware v. Fensterer*, 474 U.S. 15, 19–20 (1985)). The Supreme Court has held "that the prosecution violates this clause when it introduces 'testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior

No. 17-60502
c/w No. 17-60576

opportunity for cross-examination.” *Garcia*, 887 F.3d at 212 (quoting *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004)).

During the trial, the district court ruled that the government could not elicit testimony concerning Lee’s out-of-court statements on grounds that Lee was unavailable to be cross-examined because he had asserted his Fifth Amendment privilege against self-incrimination and would not testify at trial. The district court ruled that any out-of-court statement by Lee would be considered hearsay without an applicable exception. The record reflects that the government did not question Agent Luker or anyone else about the content of any out-of-court statement by Lee. However, during Owen’s cross-examination of Agent Luker, he asked Luker to “[t]ell the jury, please, what business supply John Lee purchased from Sports 22.” The district court interrupted and suggested that the solicited testimony would be inadmissible hearsay and a bench conference was held with all counsel. Outside of the presence of the jury, both defense counsel urged the court to allow the line of questioning and acknowledged that Agent Luker’s answers would involve statements that Lee had made to him. The bench conference ended and Owen stated to Agent Luker: “So if I understand your testimony, what John Lee has told you with reference to the cashed checks is that he bought \$273,520 worth of food and liquor from Sports 22 and Hall’s Package.” Agent Luker responded, “Over the five years, that’s correct.” Owen commented “You will agree that’s a lot of ribs, isn’t it?” and Agent Luker answered affirmatively.

Given the above record evidence, we conclude that the Boltons, through their counsel, invited the error of soliciting Agent Luker to testify as to statements that Lee made, resulting in the admission of hearsay. *Salazar*, 751 F.3d at 332. Considering, however, the substantial amount of evidence presented at trial against the Boltons that did not include the checks written

No. 17-60502
c/w No. 17-60576

by Lee, admission of the hearsay statements did not result in a “manifest injustice.” *Id.*

Charles claims he dissented from Owen’s decision to solicit the hearsay statements but he misinterprets the law on this issue. As the government points out, the right to confrontation is susceptible to waiver by counsel but when a defendant does not object to his attorney’s decision at trial or present an argument as to why his counsel’s actions could not have been a legitimate trial tactic, he waives that right. *United States v. Ceballos*, 789 F.3d 607, 616 (5th Cir. 2015) (quoting *United States v. Reveles*, 190 F.3d 678, 683 (5th Cir. 1999) (“When a defendant has waived a right, the district court cannot be said to have erred by failing to override *the intentions of the defendant’s counsel* by asserting the right *sua sponte*.” (emphasis in original))); *see also United States v. Stephens*, 609 F.2d 230, 232–33 (5th Cir. 1980) (holding “that counsel in a criminal case may waive his client’s Sixth Amendment right of confrontation by stipulating to the admission of evidence, so long as the defendant does not dissent from his attorney’s decision, and so long as it can be said that the attorney’s decision was a legitimate trial tactic or part of a prudent trial strategy”). Here, the Boltons have failed in both respects since they did not object to their respective counsels’ decisions to solicit the hearsay statements at trial, and they have failed to present any type of argument on appeal as to why admission of the statements could not have been a legitimate trial tactic. *Ceballos*, 789 F.3d at 616.

Based on a close review of the trial record, we hold that the district court’s admission of the hearsay statements was invited error, solicited by both sets of defense counsel. *Salazar*, 751 F.3d at 332. The invited error did not rise to the level of manifest injustice given the substantial evidence presented at trial to support the Boltons’ convictions, aside from the evidence involving

No. 17-60502
c/w No. 17-60576

the checks written by Lee. *Id.* Further, to the extent they attempt to argue otherwise, the Boltons have failed to show that they have not waived their Confrontation Clause rights under *Ceballos*. 789 F.3d at 616.

Prosecutorial Misconduct

According to Charles, “his Fifth and Fourteenth Amendments rights to due process of law [were] violated where the Government engaged in (1) improper vouching for the credibility of its witnesses, (2) making false statements to the jury, (3) engaging in derogatory name calling, and (4) making improper personal impressions.” He urges *de novo* review.

This court conducts a two-part analysis of prosecutorial misconduct. *United States v. Meza*, 701 F.3d 411, 429 (5th Cir. 2012). First, we consider whether the prosecutor made an improper remark and if so, we look next to see if the remark affected the substantial rights of the defendant. *Id.* Usually, we review the first question *de novo* and the second for abuse of discretion. *Id.* We will conclude that “a defendant’s substantial rights are affected only where the error in question affected the outcome of the district court proceedings.” *Id.* To determine whether the error affected the outcome of the proceedings, we must “assess (1) the magnitude of the statement’s prejudice, (2) the effect of any cautionary instructions given, and (3) the strength of the evidence of the defendant’s guilt.” *Id.* However, when a defendant fails to object contemporaneously to the prosecutor’s allegedly improper statements, we review his prosecutorial misconduct claims for plain error. *United States v. Bennett*, 874 F.3d 236, 247 (5th Cir. 2017). Under this standard, a defendant must show an error that is plain and affects his substantial rights. *Id.* at 247–48. “If these conditions are present, we may exercise our discretion to correct the error if it ‘seriously affects the fairness, integrity, or public reputation of judicial proceedings.’” *Id.* at 248.

No. 17-60502
c/w No. 17-60576

“In attempting to establish that a prosecutor’s improper comments constitute reversible error, the criminal defendant bears a substantial burden.” *Id.* at 247. This court does “not lightly make the decision to overturn a criminal conviction on the basis of a prosecutor’s remarks alone.” *Id.* “We also 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.’” *Id.* Our ultimate question is “whether the prosecutor’s remarks cast serious doubt on the correctness of the jury’s verdict.” *Id.*

Despite the fervor of Charles’s claims of prosecutorial misconduct, the trial record does not support them. Moreover, the district court instructed the jury at the start of trial that attorney statements are not evidence, rendering any potential prejudice harmless.⁵ *Meza*, 701 F.3d at 429. Additionally, given the strength of the evidence presented against the Boltons at trial, it is unlikely that the verdict would have been different absent the prosecutor’s remarks. *Id.* The prosecutor’s alleged misconduct, even if proven, did not amount to error, plain or otherwise. *Bennett*, 874 F.3d at 247–48.

Jury Instructions

According to Charles, “[t]he cumulative errors in the indictment, jury instructions, jury verdict form and response to jury notes violated [his] Fifth

⁵ The district court stated:

The first step in the trial will be the opening statements. The government in its opening statement will tell you about the evidence which it intends to put before you so that you will have an idea or a roadmap as to what the government's case is going to be. Just as the indictment is not evidence, neither is the opening statement evidence. Its purpose is only to help you understand what the evidence will be and what the government will try to prove.

No. 17-60502
c/w No. 17-60576

and Fourteenth Amendment rights to due process and a fair trial and resulted in faulty guilty verdicts and sentences.” We disagree. A review of Charles’s seven arguments on this issue in the context of the record reveals that he has failed to show plain error with respect to the indictment (for reasons previously explained), the jury instructions, or the jury verdict form. *See Fairley*, 880 F.3d at 208. We first note that any instances when the district court misstated an oral instruction were subsequently cured by the correct written instructions that were provided to the jury. Thus, he has failed to show plain error on any of his arguments to this effect. *Id.* We reject all of Charles’s additional claims about the jury instructions as meritless.

Sentencing

In sentencing Charles, the district court upwardly varied from the guidelines range of 27 to 33 months, adding an additional 12 months for the unpaid taxes on the FCSO food theft, and sentenced him to 45 months of imprisonment. The district court also imposed three years of supervised release with a special condition requiring payment of \$145,849.78 in restitution and a \$10,000 fine. The district court sentenced Linda to 30 months of imprisonment, along with one year’s supervised release, a \$6,000 fine, and restitution of \$145,849.78, owed jointly and severally with Charles.

A. Loss Amount

Charles and Linda both argue that the district court improperly calculated the loss amount. We disagree. A district court’s loss calculation is a factual finding that this court reviews for clear error. *See Fairley*, 880 F.3d at 215. The district court’s method of calculation is an application of the guidelines that this court reviews *de novo*. *Id.* “[T]he guidelines emphasize the deference that must be shown to the sentencing judge, who is in a unique position to assess the applicable loss, so this court need only determine

No. 17-60502
c/w No. 17-60576

whether the district court made ‘a reasonable estimate of the loss.’” *Id.* “Under the Sentencing Guidelines, the base offense level for a tax fraud offense derives from the amount of loss that is the object of the offense.” *United States v. Johnson*, 841 F.3d 299, 303 (5th Cir. 2016). If the tax loss is uncertain, the district court is permitted to “make a reasonable estimate based on the available facts.” *Id.* “To prevail on an argument that the district court’s calculation of tax loss was clearly erroneous, a defendant must introduce evidence to contradict or rebut the alleged improper computation of the loss.” *Id.*

The district court may include tax losses in the total loss computation that qualify as relevant conduct under U.S.S.G. § 1B1.3, whether charged or not. *See United States v. Powell*, 124 F.3d 655, 666 (5th Cir. 1997) (“[T]he facts of [the defendant’s] conduct make clear that the district court did not clearly err in deciding that the state tax evasion was part of [the defendant’s] relevant conduct. It was therefore proper for the district court, in calculating [the defendant’s] sentence, to include the amount of state fuel excise taxes evaded in the total ‘tax loss’ used to determine [the defendant’s] base offense level.”).

“It is well established . . . that a ‘jury’s verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.’” *United States v. Andradi*, 309 F. App’x 891, 893 (5th Cir. 2009) (quoting *United States v. Watts*, 519 U.S. 148, 157 (1997)).

Here, the district court’s total loss amount of \$145,849.78 (as reflected in the PSR) was based on the tax owed as a result of the charged offenses (\$117,369.84) and the estimated amount of tax that the Boltons failed to pay (\$28,479.94) on the food stolen from the FCSO Detention Center that was used at their businesses. Testimony was presented at trial that the Boltons received

No. 17-60502
c/w No. 17-60576

approximately \$273,000 worth of checks from Lee as income. Charles incorrectly argues that using the tax loss amounts from the Lee checks was error because “[t]he John Lee cashed checks were proven to be false based on the ‘inadmissible hearsay’ testimony of IRS Agent Luker.” As we have stated, Agent Luker’s testimony that Lee told him that the checks were for “food and liquor” does not negate Lee’s statements in the FBI 302 interview that he could not remember what each individual check was for. Additionally, these statements do nothing to undermine the information in the PSR or show that it “was inaccurate or materially untrue.” *United States v. Scher*, 601 F.3d 408, 414 (5th Cir. 2010) (“[The defendant] simply failed to produce reliable evidence supporting an alternate number or demonstrating that the information in the PSR was inaccurate or materially untrue.”).

Further, the district court properly included the uncharged tax loss of \$28,479.94 on grounds that the tax loss from the stolen food qualified as relevant conduct. This conclusion was supported by witness statements and detailed information in the PSR. *Powell*, 124 F.3d at 664 (observing that relevant conduct includes “all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction” (quoting U.S.S.G. § 1B1.3(a)(2))).

Additionally, the district court’s inclusion of the loss amount from Count 1 was proper. Charles’s acquittal on Count 1 did not prevent the district court from considering the conduct underlying the acquitted charge as long as it was proven by a preponderance of the evidence, which it was in this case. *Watts*, 519 U.S. at 157; *Andradi*, 309 F. App’x at 893. There was sufficient evidence presented at trial to prove that the Boltons committed tax fraud in 2009 and they were both convicted of filing false returns that year.

No. 17-60502
c/w No. 17-60576

In sum, because the Boltons have failed to produce sufficient rebuttal evidence as to the loss amount, the district court did not clearly err in adopting the PSR's loss amount of \$145,849.78. *Scher*, 601 F.3d at 414.

B. Sentences

Charles and Linda both argue that their sentences were substantively unreasonable or otherwise defective. Neither Charles nor Linda objected to their sentences in the proceedings below so their claims on appeal are reviewed for plain error. *See United States v. Ruiz*, 621 F.3d 390, 398 (5th Cir. 2010).

“A sentence within the Guidelines range is presumptively reasonable, and this presumption is rebutted only if the appellant demonstrates that the sentence does not account for a factor that should receive significant weight, gives significant weight to an irrelevant or improper factor, or represents a clear error of judgment in balancing sentencing factors.” *United States v. Hernandez*, 876 F.3d 161, 166 (5th Cir. 2017). On the other hand, “[a] non-Guidelines sentence unreasonably fails to reflect the statutory sentencing factors set forth in § 3553(a) where it (1) does not account for a factor that should have received significant weight, (2) gives significant weight to an irrelevant or improper factor, or (3) represents a clear error of judgment in balancing the sentencing factors.” *United States v. Nguyen*, 854 F.3d 276, 283 (5th Cir. 2017). When “reviewing a challenge to the length of a non-Guidelines sentence, this court ‘may take the degree of variance into account and consider the extent of a deviation from the Guidelines.’” *Id.* We give “due deference to the district court’s decision that the § 3553(a) factors, on a whole, justify the extent of the variance.” *Id.* (quoting *Gall v. United States*, 552 U.S. 38, 51 (2007)).

Charles argues that his sentence was substantively unreasonable or otherwise defective and that the district court’s upward variance was not

No. 17-60502
c/w No. 17-60576

warranted. This argument fails. The district court based the upward variance on relevant § 3553(a) factors, including Charles's history and characteristics (specifically his theft of food from the FCSO detention center) and the need to deter future criminal conduct. *See* 18 U.S.C. § 3553(a)(1)–(2). The district court was within its discretion to use the food theft as a basis for an upward variance because it was admitted as relevant conduct in the PSR and was not established to be materially untrue, inaccurate or unreliable. *See* U.S.S.G. § 1B1.3(a)(2); *United States v. Zuniga*, 720 F.3d 587, 591 (5th Cir. 2013). As the government further points out, the district court was permitted to consider the food theft in the context of the upward variance even it was determined not to be relevant conduct. *United States v. Rhine*, 637 F.3d 525, 528–29 (5th Cir. 2011). Moreover, contrary to Charles's assertion, the record reveals that the district court explained that it was imposing the upward variance because, among other reasons, “[t]here was a culture of corruption in the Forrest County Jail, and [Charles] knew it and . . . allowed it to go on.” For these reasons, Charles has failed to show that the district court plainly erred in imposing his sentence or in applying the sentencing factors under § 3553(a). *Nguyen*, 854 F.3d at 283. His remaining contentions on this issue are denied as meritless.

Linda claims that her sentence was substantively unreasonable because the loss amount was an inadequate measure of culpability and the district court failed to consider other relevant sentencing factors such as her age and the fact that she had “nearly zero chance of recidivism.” Her argument is misplaced. This court has acknowledged that “[a] sentence within the Guidelines range is presumptively reasonable, and this presumption is rebutted only if the appellant demonstrates that the sentence does not account for a factor that should receive significant weight, gives significant weight to

No. 17-60502
c/w No. 17-60576

an irrelevant or improper factor, or represents a clear error of judgment in balancing sentencing factors.” *See Hernandez*, 876 F.3d at 166. Although Linda attempts to argue that the total loss amount was an inadequate measure of her culpability, she was convicted by a jury on five counts of filing false tax returns and she was unable to present evidence to rebut the loss amount as shown in the PSR or to prove that it “was inaccurate or materially untrue” in general or as it related specifically to her. *Scher*, 601 F.3d at 414. While Linda’s age and allegedly low chances of recidivism might be relevant considerations, the district court was free to give other § 3553(a) factors more significant weight in imposing her sentence. 18 U.S.C. § 3553(a). Accordingly, Linda has failed to rebut the presumption of reasonableness afforded to her within-guidelines sentence. *United States v. Gomez-Herrera*, 523 F.3d 554, 565–66 (5th Cir. 2008) (“As [the defendant] was sentenced within a properly calculated Guidelines range, his sentence is entitled to a presumption of reasonableness that we see no reason to disturb.”). Consequently, we hold that the district court did not plainly err in imposing Linda’s sentence. *See Ruiz*, 621 F.3d at 398.

C. Restitution

Charles argues that the district court erred in imposing restitution. We review Charles’s claim that the district court lacked the authority to impose restitution de novo. *See United States v. Westbrooks*, 858 F.3d 317, 327 (5th Cir. 2017). We review the restitution amount imposed by the district court for abuse of discretion. *United States v. Benns*, 810 F.3d 327, 329 (5th Cir. 2016).

“Restitution to the IRS may be imposed as a condition of supervised release under § 3583[.]” *Nolen*, 472 F.3d at 382. To calculate the restitution amount, the district court is granted wide latitude and “may simply make a reasonable estimate based on the available facts.” *Westbrooks*, 858 F.3d at 329.

No. 17-60502
c/w No. 17-60576

Nevertheless, “a restitution award due prior to the commencement of a term of supervised release is a component of the sentence, not a condition of supervised release,” and is therefore unauthorized. *Id.* at 328.

Charles’s general challenge to the district court’s authority to impose restitution fails as it is well-established that “[r]estitution to the IRS may be imposed as a condition of supervised release under § 3583[.]” *Nolen*, 472 F.3d at 382. However, he does correctly argue and the government concedes that “a restitution award due prior to the commencement of a term of supervised release is a component of the sentence, not a condition of supervised release,” and is therefore unauthorized. *Westbrooks*, 858 F.3d at 328. Here, the district court’s condition that the restitution amount was due “immediately”⁶ was unauthorized under this court’s precedent in *Westbrooks*. *Id.* at 328 (“We thus conclude that the judgment contains an error in ordering that [the defendant] begin making payments while in prison—a timeline that exceeds the court’s statutory authority. But that error does not overcome the other indications that the court intended to impose restitution under the statute permitting it as part of supervised release.”). Accordingly, we modify the judgment to reflect that the Boltons do not owe restitution until their terms of supervised release begin. *Id.* (“The most efficient remedy in this situation is to modify the judgment so that [the defendant] does not owe restitution until she begins her term of supervised release.” (citing 28 U.S.C. § 2106)).

Finally, as to the amount of restitution, this court gives the district court “wide latitude” to determine the amount of loss based on the available facts.

⁶ The district court stated at sentencing: “It’s ordered that the defendant pay a thousand dollars a month toward the restitution beginning immediately. Payment begins and shall continue while he is in prison.”

No. 17-60502
c/w No. 17-60576

Westbrooks, 858 F.3d at 329. Because the district court used the same figures to calculate the restitution amount that it used to calculate the damages amount, Charles has failed to show that the restitution award was an abuse of discretion. *See Scher*, 601 F.3d at 414. All of his remaining arguments on this issue are meritless.

Conflict-Free Choice of Counsel or Ineffective Assistance of Counsel

Charles claims that his trial counsel (Owen) “labored under an actual conflict of interest and provided unconstitutional representation before trial, during trial, and at sentencing because of a direct conflict of interest concerning Owen’s relationship to attorney John Lee.” Charles presented his allegations of conflict of counsel and ineffective assistance of counsel in three separate post-trial motions, all three of which moved for a new trial.

A district court’s denial of a motion for a new trial is reviewed for abuse of discretion. *Olibas v. Barclay*, 838 F.3d 442, 448 (5th Cir. 2016). “This standard is necessarily deferential to the trial court because we have only read the record, and have not seen the impact of the witnesses on the jury or observed the demeanor of the witnesses ourselves, as has the trial judge.” *United States v. Stanford*, 823 F.3d 814, 838 (5th Cir. 2016). Questions of law are reviewed de novo. *United States v. Anderson*, 755 F.3d 782, 800 (5th Cir. 2014). When there are mixed questions of law and fact, this court reviews “the underlying facts for abuse of discretion, but the conclusions to be drawn from those facts de novo.” *Stanford*, 823 F.3d at 838.

Whether a defendant’s counsel labored under a conflict of interest is a mixed question of law and fact that this court reviews de novo. *United States v. Hernandez*, 690 F.3d 613, 619 (5th Cir. 2012). We also conduct a de novo review of the district court’s determinations concerning ineffective assistance of counsel claims. *See United States v. Shepherd*, 880 F.3d 734, 740 (5th Cir.

No. 17-60502
c/w No. 17-60576

2018). A district court's decision to disallow substitution of counsel is reviewed for abuse of discretion. *United States v. Jones*, 733 F.3d 574, 587 (5th Cir. 2013).

Although generally disfavored, a new trial may be granted on the basis of newly discovered evidence when "(1) the evidence is newly discovered and was unknown to the defendant at the time of trial; (2) the failure to detect the evidence was not due to a lack of diligence by the defendant; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence if introduced at a new trial would probably produce an acquittal." *Anderson*, 755 F.3d at 800; Fed. R. Crim. P. 33.

"The Sixth Amendment right to counsel includes the 'right to representation that is free from any conflict of interest.'" *Hernandez*, 690 F.3d at 618. Generally, this court will determine that "a conflict exists when defense counsel allows a situation to arise that tempts a division in counsel's loyalties." *Id.* "If a defendant chooses to proceed with representation by counsel who has a conflict of interest, a district court must conduct what is commonly known as a 'Garcia hearing'⁷ to ensure a valid waiver by the defendant of his Sixth Amendment right." *Id.* A district court's requirement to conduct a *Garcia* hearing only exists if there is an actual conflict of interest and not just a "speculative or potential conflict." *Id.* at 618–19.

Ineffective assistance of counsel claims are evaluated under the legal standard articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a defendant must prove both deficient performance and prejudice. 466 U.S. at 700. To prove deficient performance, the defendant must show that

⁷ *United States v. Garcia*, 517 F.2d 272, 278 (5th Cir. 1975).

No. 17-60502
c/w No. 17-60576

his counsel's performance "fell below an objective standard of reasonableness." *Id.* at 688. To show prejudice, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Charles's claim that Owen labored under an actual conflict of interest when he represented Charles is meritless. In its memorandum opinion denying Charles's motions for post-trial relief, the district court carefully described the payment arrangements between Charles and Owen and the parties that paid Owen's retainer on Charles's behalf and Charles's knowledge of those payments. The district court clarified that Lee was not a government witness, he was never called to testify at trial, and the parties understood that if he were called, he would invoke his Fifth Amendment privilege against self-incrimination and not testify. Additionally, the record reflects that Charles gave Owen a check written by Lee to represent him in the food theft case back in 2014, but the tax fraud investigation against Lee did not commence until 2016. Consequently, Owen's acceptance of Lee's payment could not have created a conflict in Owen's representation of Charles. Moreover, as the district court noted, Charles not only knew of Lee's payments to Owen, he hand-delivered the checks. He has failed to meet the requirements for a new trial in that the evidence he attempts to use to support his motion was known and available to him several years prior to the commencement of his trial. *Anderson*, 755 F.3d at 800; Fed. R. Crim. P. 33.

Charles has also failed to show that he was denied his "counsel of choice" at sentencing. As the government points out, neither the district court nor Owen knew that Charles had retained new counsel to represent him at sentencing until shortly before the hearing. The district court was within its

No. 17-60502
c/w No. 17-60576

sound discretion to deny Charles's motion to continue as it was his fourth motion. At that point, Huntley had neither sought pro hac vice admission nor made an appearance to represent Charles. Nevertheless, the district court "allowed the Boltons to confer privately with [Huntley], along with a representative of the local Federal Public Defender's Office invited by the district court, to determine who should represent [Charles]. Owen appeared at sentencing on behalf of [Charles], but the district court allowed Huntley to unofficially appear on [Charles]'s behalf as well." The district court went above and beyond to accommodate Charles's "choice of counsel" at sentencing and his choice to instruct Owen to continue to represent Charles alongside Huntley at sentencing was not an abuse of discretion. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006) (observing that trial courts have "wide latitude in balancing the right to counsel of choice against the needs of fairness and against the demands of its calendar"). Likewise, the district court's decision to deny Charles a *Garcia* hearing was proper given that the district court conducted extensive fact-finding and concluded that no actual conflict existed. *Hernandez*, 690 F.3d at 618–19 (noting that a district court's requirement to conduct a *Garcia* hearing only exists if there is an actual conflict of interest and not just a "speculative or potential conflict"). His remaining arguments on this issue are denied as meritless.

Attorney-Client Privilege Waiver

Charles argues that his communications with Owen should be protected by the attorney-client privilege, that he did not waive that privilege, and that the district court erred in granting the government's motion for reconsideration and unsealing the record. He also complains that the district court did not have jurisdiction over his case when it issued an order on July 24, 2017 for him to file a response to the government's motion for

No. 17-60502
c/w No. 17-60576

reconsideration. He argues that this is because he filed an appeal on July 13, 2017 and this court had accepted jurisdiction which effectively divested the district court of jurisdiction over the proceedings at the time it ordered him to respond to the government's motion.

“In evaluating a claim of attorney-client privilege, we review factual findings for clear error and ‘the application of the controlling law de novo.’” *In re Itron, Inc.*, 883 F.3d 553, 557 (5th Cir. 2018). The controlling law to be applied here is that of Mississippi, which governs . . . any assertion of attorney-client privilege or putative waiver thereof. *Id.* “Our task is to apply the law as would the Mississippi Supreme Court.” *Id.* (citing *Guilbeau v. Hess Corp.*, 854 F.3d 310, 311 & n.4 (5th Cir. 2017)). Mississippi law allows clients the “privilege to refuse to disclose . . . any confidential communication[s] made to facilitate professional legal services, if those communications were made between the client . . . and [his] lawyer or among lawyers . . . representing the same client.” *Id.* (citing Miss. R. Evid. 502(b) (internal quotation marks omitted)).

“By definition, the attorney-client privilege protects only confidential communications.” *Id.* at 558 (citing Miss. R. Evid. 502(b) (emphasis omitted)). A client waives the privilege “[b]y disclosing such communications to third parties—such as by revealing them in open court[.]” *Id.* The waiver extends to related subject matter. *Id.* A client also “waives the privilege by affirmatively relying on attorney-client communications to support an element of a legal claim or defense—thereby putting those communications ‘at issue’ in the case.” *Id.* That is to say, “when a party entitled to claim the attorney-client privilege uses confidential information against his adversary (the sword), he implicitly waives its use protectively (the shield) under that privilege.” *Id.*

No. 17-60502
c/w No. 17-60576

The issue of whether Charles waived the attorney-client privilege arose out of Owen's filing a motion to deem the privilege and the work-product doctrine waived so that his responses to Charles's allegations could be filed in the public record. In June 2017, the district court found that Charles had waived the attorney-client privilege but ordered that Owen's responses to Charles's allegations against him be filed under seal until the conclusion of the Boltons' convictions and sentences. However, in its order placing Owen's responses under seal, the district court acknowledged "that Charles has repeated[ly] used both this Court and the media in an attempt to [publicly] vilify both Owen and the Government." The government filed a motion to reconsider requesting that the responses be unsealed. Charles was ordered to respond and the district court ultimately granted the government's motion for reconsideration stating that "[t]he Court is concerned only with previously privileged information which could prejudice Bolton on appeal or in the event of a new trial. Because Bolton makes no specific arguments towards any of the previously privileged information, the Court finds that the Motion for Reconsideration should be granted." Charles then filed a second notice of appeal, No. 17-60576, of the district court's order granting the motion for reconsideration and unsealing Owen's responses to Charles's allegations against him.

Charles's argument is unconvincing that the district court was divested of jurisdiction when it ordered him to file a response to the government's motion for reconsideration. The Supreme Court has held and this court has recently recognized that "[a]n appeal divests the district court of its jurisdiction 'over those aspects of the case involved in the appeal.'" *United States v. Pena*, 713 F. App'x 271, 272 (5th Cir. 2017) (per curiam) (unpublished) (quoting *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 379 (1985)). As

No. 17-60502
c/w No. 17-60576

Charles acknowledges, he has filed two appeals: (1) No. 17-60502, filed on July 13, 2017, pertaining to his convictions and sentences and (2) No. 17-60576, filed August 2017, pertaining to the district court's grant of the motion for reconsideration and the unsealing of Owen's responses. The only appeal pending at the time the district court issued its order to him to respond to the government's motion for reconsideration was No. 17-60502, the appeal pertaining to his convictions and sentences. The district court had not been divested of jurisdiction with respect to the issues involved in Charles's second appeal pertaining to his allegations against Owen, waiver of the attorney-client privilege, release of the work-product doctrine information, and unsealing the record. *Marrese*, 470 U.S. at 379; *Pena*, 713 F. App'x at 272.

Next, under controlling Mississippi law, Charles waived the attorney-client privilege when he charged Owen with providing him with ineffective assistance and further when he made public statements to third parties via the media, social media, the court, and the press, to publicly criticize and make derogatory comments about Owen and his firm's representation of him. *See In re Itron, Inc.*, 883 F.3d at 558 (noting that a client waives the privilege “[b]y disclosing such communications to third parties—such as by revealing them in open court” and “by affirmatively relying on attorney-client communications to support an element of a legal claim or defense—thereby putting those communications ‘at issue’ in the case”). The district court properly granted the government's motion for reconsideration to modify the protective order and unseal Owen's responses to Charles's allegations. *See United States v. Morales*, 807 F.3d 717, 723 (5th Cir. 2015). His remaining arguments on this issue are denied as meritless.

No. 17-60502
c/w No. 17-60576

III. Conclusion

For the foregoing reasons, we AFFIRM the convictions and sentences of Charles and Linda Bolton and MODIFY the district court's judgment to show that the restitution owed by the Boltons does not become due until they begin their terms of supervised release.

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-60502

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

CHARLES BOLTON; LINDA BOLTON,

Defendants - Appellants

Consolidated with 17-60576

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

CHARLES BOLTON,

Defendant - Appellant

Appeals from the United States District Court
for the Southern District of Mississippi

ON PETITION FOR REHEARING

Before STEWART, Chief Judge, and WIENER, and HIGGINSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ Carl E. Stewart
UNITED STATES CIRCUIT JUDGE